CEU CENTRAL EUROPEAN UNIVERSITY

INDIA'S CONFORMITY WITH INTERNATIONAL HUMAN RIGHTS STANDARDS TO COMBAT RAPE

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EXECUTIVE SUMMARY

The increase in the incidents of rape and other forms of gender-based violence across the world has placed this issue as one of the top concerns in the international agenda. However at the domestic level, especially in a country like India, the state response to combat rape is highly inadequate. Although previous research has been carried out in order to address this issue, there still exist several gaps in this research. Firstly, such research is restricted to finding the solutions to combat rape within the realm of domestic criminal law which is quite narrow and not victim-centric as it does not remedy the problem of structural gender inequality which causes rape. Secondly, existing research focus in the criminal justice system in India emphasizes on criminalization of offences without looking at other critical elements such as lack of access to justice, ineffective investigation by the enforcement machinery and gender stereotypes in relation to rape which equally contribute to the problem of rape. Thirdly, the sparse research that is available in the area of a rights-based approach to rape focuses more on women's rights and their violations. In furtherance of such violations, there is hardly any research on follow-up measures relating to the corresponding duty of the state to remedy such violations.

At the international level, human rights bodies widely accept that rape is a form of gender discrimination. In furtherance of this, these bodies have developed the due diligence standard for fixing responsibility on states to prevent, protect and punish in cases of rape. Recognizing the advantages of addressing the problem of rape from a human rights approach, this thesis highlights the exact nature and scope of these standards of state responsibility. The objective of this thesis is to use these standards as a yardstick to highlight the extent of state action in India in relation to criminalization, investigation and adjudication of cases of rape. The thesis undertakes this comparative exercise by using the standards that are laid down by the United Nations Human Rights Committee, the Committee overviewing the implementation of

Convention on Elimination of All Forms of Discrimination against Women and the European Court of Human Rights.

In doing so, it will be shown that although the criminal laws relating to rape in India conform to these standards to some extent (not fully as there are inconsistencies with respect to state's treatment of marital rape), the execution of these laws at the investigation stage and the interpretation of these laws at the trial stage are highly ineffective and inconsistent with international standards. Hence, this thesis uses these standards as an instrument to remedy these inadequacies by fixing a duty on the state and providing definitive guidelines to combat rape at different stages of the Indian criminal justice system.

ACKNOWLEDGEMENTS

First and foremost, I want to extend my deepest thanks and sincerest gratitude to Professor Mathias Möschel who has been an exceptional supervisor right from the beginning up to the completion of this project. This thesis would not have been possible without his unwavering patience, constant guidance, constructive suggestions and encouragement throughout the research and writing period. I also thank Professor Csilla Kollonay-Lehoczky for her invaluable suggestions and constant encouragement. I am also thankful to all my professors, classmates and staff at the Department of Legal Studies in CEU for helping me stay true and focused to the cause of human rights which was indispensable for this thesis.

I am deeply grateful to my family, especially my parents, Mr. Dillip Kumar Dwivedy and Dr. Kasturi Panda who are the source of my strength and perseverance. I also thank my sister Sukanya, my brother-in-law Mahesh and my niece Maanya, without whose unfailing support this thesis would not have seen the light of the day. My special thanks to my mentor, Professor Byasa Moharana whose initial guidance in the early stages of my academic life helped unleash the feminist in me and led me to pursue research in the field of gender rights.

Last but not the least, I am particularly grateful to my friends, Aklile, Ezgi, Kwame, Emir, Navneet, Preeti, Sarita, Valentine and Anudari for their invaluable suggestions and insightful comments which helped shape the final thesis as it stands today. Needless to say, any errors and inadequacies in this thesis are mine alone.

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LIST OF ABBREVIATIONS

CEDAW Convention on Elimination of All Forms of Discrimination against Women

CrPC Code of Criminal Procedure

DEVAW Declaration on the Elimination of Violence against Women

ECHR European Convention for the Protection of Human Rights and Fundamental Freedoms

ECOSOC Economic and Social Council

ECtHR European Court of Human Rights

IACHR Inter-American Commission on Human Rights

IACtHR Inter-American Court of Human Rights

ICC International Criminal Court

ICCPR International Covenant on Civil and Political Rights

ICTR International Criminal Tribunal for Rwanda

ICTY International Criminal Tribunal for the Former Yugoslavia

IEA Indian Evidence Act

IPC Indian Penal Code

NCRB National Crime Record Bureau

NGO Non-governmental organizations

PWDVA Protection of Women from Domestic Violence Act

UN United Nations

UNGA United Nations General Assembly

UNHRC United Nations Human Rights Committee

INTRODUCTION

Rape and other such forms of gender-based violence are one of the major problems that are plaguing the world today.[1] With the rapid increase in gender-based violence in the form of mental, physical, psychological as well as sexual abuse, it is important to look for safeguards to prevent such violence.[2] In this regard, sexual violence such as rape is treated as an issue which warrants urgent action by the international community.[3]

At the international level, existing research illustrates that human rights bodies treat rape and other such forms of gender-based violence as different from other kinds of violence, as women are targets of such violence not on an individual basis but because they belong to a particular group on the basis of their gender, thus proving that rape is a form of gender discrimination.[4] However, in the case of India, existing literature relating to the problem of rape is restricted to finding solutions to the problem of rape within the realm of domestic criminal law. In absence of treatment of rape from a human rights perspective, the measures taken are severely limited as they focus on the physical act of rape (usually from a male-centric approach) and fail to take into account the victim's experience of rape overall, which is a result of the systemic gender inequalities and power hierarchies. Hence, there exists a research gap relating to combating the problem of rape at the domestic level from a rights-based approach.

In addition to this, the public-private dichotomy in cases of rape and its effect on state responsibility is also an area which is less explored in the Indian context. The 'private' sphere is traditionally considered to be assigned as it relates to matters of family whereas the 'public'

[1] UNGA 'Report of the Secretary-General-Eliminating rape and other forms of sexual violence in all their manifestations, including in conflict and related situations' (2008) U.N. Doc A/63/216 para 3.
[2] UNGA 'UN Declaration on the Elimination of Violence against women' (20 December 1993) U.N. Doc. A/RES/48/104 Article 2.
[3] UNGA 'Report of the Secretary-General-Eliminating rape and other forms of sexual violence in all their manifestations, including in conflict and related situations' (2008) U.N. Doc A/63/ 216 para 3.
[4] Catharine A. MacKinnon, 'Reflections on Sex Equality under Law' (1991) 100 (5) Yale Law Journal 1281, 1301-1302.

sphere is regarded as the domain of men as it relates to matters of business and politics.[5] As the state usually operates in the public sphere, it hesitates to interfere in the private sphere because it relates to acts by private actors and is not perpetrated by state actors.[6] Moreover, the state also does not take action in matters relating to the private sphere as it considers it as an aspect of family autonomy which does not warrant state intervention.[7]

As a consequence of this, gender-based violence occurring in the private sphere is trivialized by the state by treating it as a private family matter and not as a political matter. A good example to showcase the separation between the public and private sphere as it relates to state intervention is the act of marital rape which is not treated as a crime in many countries.[8] For instance, in India, marital rape is considered as an exception to rape in the Indian Penal Code as the law considers marriage as a sacrament which should not be interfered by the State.[9] In this regard, existing literature focuses more on criminalization of marital rape but there is sparse research on the ways and modes of how the state can be held responsible.

This existing research focus on criminalization of the offence of rape often overlooks other critical factors such as lack of access to justice, ineffective investigation by the enforcement machinery and gender stereotypes that come into play at the level of adjudication which equally contribute to the problem of rape.[10] These angles have been the object of past research in isolation from each other, which falls short of addressing the problem of rape holistically. Thus,

[5] Elizabeth M. Schneider, 'The violence of privacy' (1990-1991) 23 Conn. L. Rev. 973, 976.
[6] Megan Alexandra Dersnah & Paulina Garcia-Del Moral, 'A feminist challenge to the gendered politics of the public/private divide: on due diligence, domestic violence, and citizenship' (2014) 18(6-7) Citizenship Studies 661, 663.
[7] ibid.
[8] ibid.
[9] Adam Taylor, 'Why won't India criminalize marital rape? Because marriage is sacrament the government says' *The Washington Post* (30 April 2015)
< https://www.washingtonpost.com/news/worldviews/wp/2015/04/30/why-wont-india-criminalize-marital-rape-because-marriage-is-sacrament-the-government-says/?utm_term=.e5e719ca2bf8> accessed 30 September 2017.
[10] CEDAW Committee 'Concluding observations on the combined fourth and fifth periodic reports of India' (2014) U.N. Doc. CEDAW/C/IND/CO/4-5. See also UNGA 'Report of the Secretary-General-Eliminating rape and other forms of sexual violence in all their manifestations, including in conflict and related situations' (2008) U.N. Doc A/63/ 216 para 13.

the limited amount of scholarly work in this regard piqued my interest to look for alternative mechanisms through a rights-based approach which would simultaneously address all these factors for effectively combating the problem of rape.

The benefit of the rights-based approach to rape is that in addition to the right, it also casts a corresponding obligation on the state for protection of such right.[11] In international human rights law, one of the ways of such holistic application of standards of state duty is the standard of 'due diligence' which holds the state accountable if it fails to protect, prevent and punish acts of violence, especially, gender-based violence by private actors both in the public and private sphere.[12] This standard has been laid down by human rights bodies and encompasses the positive obligations of a state to deal with the problem of rape by means of effective criminalization of rape, proper investigation procedures and addressing stereotypes of rape, especially by the judiciary which is further elaborated in this thesis.

In the Indian context, the right-based approach has been applied earlier by virtue of its membership to international human rights treaties such as Convention on Elimination of All Forms of Discrimination against Women ('CEDAW') and International Convention on Civil and Political Rights ('ICCPR'). For example, the Supreme Court of India has earlier treated certain issues such as sexual harassment of women at workplace as human right violations which subsequently led to framing of a domestic civil laws in this area.[13] However, with respect to offences in criminal law such as rape, it is observed that the courts do not usually look at the

[11] Julie Goldscheid & Debra J. Liebowitz, 'Due Diligence and Gender Violence: Parsing its Power and its Perils' (2015) 48 Cornell Int'l L.J. 301, 319. See also Savitri Goonesekere, 'A rights-based approach to realizing gender equality', Division for advancement of women (DAW), United Nations Entity for Gender Equality and the Empowerment of Women (UN Women).

[12] UNGA 'UN Declaration on the Elimination of Violence against women' (20 December 1993) U.N. Doc. A/RES/48/104 Article 4(c). See also Megan Alexandra Dersnah & Paulina Garcia-Del Moral, 'A feminist challenge to the gendered politics of the public/private divide: on due diligence, domestic violence, and citizenship' (2014) 18(6-7) Citizenship Studies 661, 666.

[13] *Vishaka v State of Rajasthan* (1997) 6 SCC 241. In this case the Supreme Court relied on CEDAW to frame guidelines in case of sexual harassment of women at the workplace pursuant to which the Indian Parliament framed The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013.

offence of rape from the perspective of human rights. The sparse research that is available in the area of rights-based approach to rape focus more on women's rights and their violations. In furtherance of such violations, there is scarce research relating to the corresponding duty to remedy such violations by fixing responsibility on the state. Hence, the main research question of this thesis is to examine the scope of these international human rights standards of state responsibility with respect to rape and to examine to what extent the Indian criminal justice system conforms to these standards in order to combat the problem of rape.

The thesis will evaluate the international and regional human rights standards to address the problem of rape in the public and private sphere. It will focus specifically on the standards of state responsibility relating to criminalization, investigation and adjudication of cases as laid down by the United Nations Human Rights Committee ('UNHRC'), the Committee overviewing the implementation of Convention on Elimination of All Forms of Discrimination against Women ('CEDAW Committee') and the European Court of Human Rights ('ECtHR'). It will not only unpack the contents of these standards of state responsibility but will also examine the existing criminal justice framework in India in the light of these standards to check the extent of conformity.

Overall, the significance of this thesis is its focus on the issue of rape from the lens of international human rights law not only in outlining the nature and causes of rape but also its contribution to setting standards of state responsibility to combat rape at different stages of the Indian criminal justice system. These standard-setting measures will act as definitive guidelines for lawmakers, police, lawyers as well as judges regarding their responsibility for protection of and effective redress for rape victims in the Indian criminal justice system.

The main purpose of this research is to use these human rights standards as a yardstick to highlight the extent of state action in the Indian criminal justice system at all stages - at the

legislation stage, the investigation stage and the trial stage. In doing so, it will be shown that although the laws relating to rape in India conform to these standards to some extent (not fully as there are inconsistencies with respect to state treatment of marital rape), the execution of these laws at the investigation stage and the interpretation of these laws at the trial stage are highly ineffective and inconsistent with international standards. Furthermore, these standards can also be serve as guidelines to remedy these inadequacies of the Indian criminal justice system.

This thesis uses the decisions, general comments, communications, declarations and recommendations by the UNHRC, the CEDAW Committee and the ECtHR in relation to rape for the purposes of comparison with India. These human rights bodies are chosen as comparators in this thesis in light of the increasingly detailed human rights standards developed by them in relation to rape. India, by virtue of its membership to these international Conventions such as ICCPR and CEDAW, has an obligation to align its domestic legal system in line with these international standards. Although India is not a party to the European Convention for the Protection of Human Rights and Fundamental Freedoms ('ECHR'), the ECtHR has a developed jurisprudence in terms of scope and extent of state responsibility in cases of rape, especially in the private sphere which makes it a useful comparator for the purposes of checking the extent of state action in the Indian context. The thesis has made the use of primary sources such as case-laws, communications, recommendations, declarations, legislations as well as secondary resources such as books, articles, newspaper reports, United Nations ('UN') reports and reports of governmental, non-governmental and international organizations as sources for this thesis.

At this point, some terminological clarifications are essential to understand the usage of certain terms in this thesis. First and foremost, this thesis uses the term 'victim' to refer to the person who is raped. This term has a specific connotation. For instance, some theorists opine that the

term 'victim' denies agency to the woman who is raped.[14] However, this term is still used by researchers as it denotes the severity of rape and stresses on the unequal power relations between the perpetrator and the subject of rape which is one of the main causes of rape. In the alternative, the term 'survivor' is sometimes used to denote agency to the woman. However, the 'rape survivor' is sometimes misleading when the rape results in the death of the woman who is raped. Furthermore, the term 'survivor' also stresses on the victim's action to prevent such rape which might lead to victim-blaming.[15] In order to have a balanced approach between these two terms, some researchers use the term 'victim-survivor'. However, for ease of convenience, this thesis uses the term 'victim' (while being fully aware of its shortcomings) which should be understood as the victim-survivor.

Secondly, in this thesis, the term 'victim' denotes a woman who is a victim of rape and the term 'perpetrator' denotes a man who commits the act of rape. In this background, the thesis recognizes that rapes are not restricted to the men as perpetrators and women as victims but also include cases of male rapes by men or women. However, due to the higher percentage of occurrence of the former and due to less availability of data regarding the latter, the thesis limits its scope to cases where the victims are women and the perpetrators are men.

Thirdly, the overall theoretical framework of the thesis examines the criminal justice system of states through a human rights approach. In furtherance of this theoretical framework, the comparison of the standards set by the human rights bodies (by cases and communications) is also restricted to cases relating to rape in the Indian criminal justice system and does not delve into the application of human rights standards in different fields such as civil laws, media, healthcare, socio-economic policies and other related areas.

[14] Sylvia Walby *et al*, *Stopping Rape: Towards a Comprehensive Policy* (Bristol Policy Press 2015) 13.
[15] ibid.

Fourthly, the analysis of rape and its legal safeguards in this thesis solely pertains to cases of rape of women and girls in times of peace and not in war situations or situations of armed conflict. The latter is an element of International Humanitarian Law and is subject to jurisdiction by the International Criminal Court (ICC)[16] and specific tribunals such as the International Criminal Tribunal for the Former Yugoslavia (ICTY)[17] and the International Criminal Tribunal for Rwanda (ICTR)[18] which falls outside the scope of this thesis. The thesis also does not address rape in asylum and refugee cases, which is subject to other international standards such as "country of residence", "well-founded fear of persecution" and "non-refoulement" which are not examined in this thesis.[19]

This thesis has three substantive chapters. The first chapter outlines the theoretical framework that traces the path of the concept of rape as a crime to a human rights violation. In doing so, it scrutinizes the nature of rape and dissects different international human rights instruments to show how rape is a form of gender-based discrimination. It further outlines the different elements of rape such as 'penetration/sexual violation', 'use of force' and 'absence of consent' and examines them from a victim-centric perspective through a human rights lens. Lastly, it delves into the public-private dichotomy in cases of rape and how the application of international human rights assists in bringing to an end this public and private divide by ensuring state responsibility equally in both the spheres.

The second chapter of the thesis highlights the (due diligence) standards that are developed by international and regional human rights bodies such as the UNHRC, the CEDAW Committee

[16] Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90 (Rome Statute) article 7 (1) (g) (Crime against humanity of rape), article 8 (2) (b) (xxii) (War crime of rape), article 8 (2) (e) (vi) (War crime of rape).
[17] See e.g. *Prosecutor v Delacic, Mucic, Delic and Landzo* (Judgement) ICTY- IT-96-21-T (16 November 1998) para 475-76.
[18] See e.g. *Prosecutor v. Jean-Paul Akayesu* (Trial Judgement) ICTR–96-4-T (2 September 1998) para 598.
[19] UN Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention).

and the ECtHR by means of cases, communications and recommendations. These cases direct states to make suitable changes in the national legal framework in cases of rape as they amount to substantive human rights violations. Such standards are aimed at each organ of the state, that is, the legislature, executive as well as the judiciary in order to ensure that there is a holistic model for application of these human rights standards in the national context. In the context of legislature, the thesis focuses on the effective criminalization of offences of specific types of rape as a starting step to ensure the rights of the rape victims are protected. With regard to the executive, these human rights bodies lay down strict standards in order to ensure quick and effective investigation of rape cases without giving undue hardship to the victim. With respect to the judiciary, these bodies interpret gender stereotypes as human rights violations and thus, direct the domestic adjudicating bodies to remove all such stereotypes.

The third chapter draws from the international and regional human rights standards that are identified in the second chapter and compares the present criminal justice situation in India with respect to rape. It executes this comparative exercise not just to check the extent of conformity to these international standards but also to hold the state responsible to carry out specific measures in line with the due diligence framework in areas where it falls short of such standards.

CHAPTER 1: THEORETICAL ASPECTS OF RAPE: FROM CRIMINAL LAW TO A HUMAN RIGHTS VIOLATION

Introduction

This chapter outlines the theoretical framework that traces the path of the concept of rape as a crime to a human rights violation. In doing so, the first section scrutinizes the nature of rape and identifies how it is a human rights violation by treating it as a form of discrimination based on gender. The second section examines the criminal definitions in different countries by extracting the different elements of rape such as 'penetration/sexual violation', 'use of force' and 'absence of consent' and interprets them from a human rights perspective. The third section of this chapter examines the public-private dichotomy in the case of rape and how the application of international human rights may bring an end to such public and private divide by ensuring state responsibility equally in both the spheres.

1.1 Understanding nature and causes of Rape

Gender-based violence differs from other forms of violence as women are targets of such violence not on an individual basis but because they belong to a particular group on the basis of their gender.[20] Echoing this narrative, very recently, on 26 July 2017, the CEDAW Committee, in its General Recommendation No.35 has stated that the term "violence against women" should be categorically recognized as "gender-based violence against women".[21] It further clarifies that such an expression is employed to expressly recognize the contribution of the systemic gender hierarchy to such violence instead of the individual circumstances of the victim or the perpetrator.[22]

[20] Catharine A. MacKinnon, 'Reflections on Sex Equality under Law' (1991) 100 Yale Law Journal 1281, 1301.
[21] CEDAW Committee 'General Recommendation No.35 on gender-based violence against women, updating general recommendation No. 19' (2017) U.N. Doc. CEDAW/C/GC/35 para 9.
[22] ibid.

In this regard, theorist Catharine MacKinnon argues that such targeting of women because of their belongingness to a particular sex, constitutes sex-discrimination per se.[23] She clarifies that such discrimination is because of men dominating women due to the subordinate position of the latter in the patriarchal society.[24]

The acknowledgement of such gender-based violence as a form of discrimination is only recently recognized by international and regional human rights bodies. For example, though CEDAW was adopted in 1979, the substantive text did not include gender-based violence as a form of discrimination. Such gender-based violence against women as a manifestation of women's subordinate status was first recognized in 1991 by the Economic and Social Council ('ECOSOC') of UN.[25] In its resolution 1991/18, the ECOSOC urged states to urgently formulate an international framework to effectively combat such violence. This resolution later was referred to as the Declaration on Elimination of Violence against Women ('DEVAW').[26] This was followed by the General Recommendation No.19 in 1992 by the CEDAW Committee which acknowledged that such violence is a form of discrimination as it not only targets disproportionately against one gender but also perpetuates inequality by preventing women to realise their freedoms, thus impairing their right to be on an equal footing with men in all spheres.[27] In its General Comment No. 28 regarding equality between men and women, the UNHRC has also acknowledged such violence as discrimination and directed the states to frame effective national laws and report it regularly in order to combat such sex-based discrimination.[28]

[23] Catharine A. MacKinnon, 'Reflections on Sex Equality under Law' (1991) 100 Yale Law Journal 1281, 1302.
[24] ibid.
[25] ECOSOC 'Recommendations and conclusions arising from the first review and appraisal of the implementation of the Nairobi Forward-looking Strategies for the Advancement of Women to the year 2000' (24 May 1990) U.N. Doc. E/RES/1990/15.
[26] ECOSOC 'Violence against women in all its forms' (30 May 1991) U.N. Doc. E/RES/1991/18.
[27] CEDAW Committee 'General Recommendation No. 19 on Violence against Women' (1992) U.N. Doc. A/47/38.
[28] UNHRC, 'General Comment No. 28 – Equality of rights between men and women (Article 3)' (2000) U.N.Doc. CCPR/C/21/Rev.1/Add.10.

Not only international human rights bodies, but regional human rights bodies such as the Council of Europe also state that the continuing power imbalance between men and women is the main cause of gender-based violence.[29] Thus, by recognizing that rape is a result of unequal power relations in society and is as an act of discrimination, it is established that rape is an international human rights violation. The treatment of rape as a violation of international human rights law has many advantages. For instance, the language of human rights law has a morally and legally authoritative value that commands respect by states and individuals alike and also provides an alternative forum for redress of grievances of individuals.[30] Moreover, such rights-based approach also creates an obligation on the state for enforcement of such rights which is explored in detail in the succeeding chapters.[31]

1.2 VIEWING THE CRIMINAL DEFINITION OF RAPE THROUGH A HUMAN RIGHTS LENS

The recognition of rape as a human rights violation is useful as it takes into account the holistic experience of the rape victim instead of solely focusing on the physical act of rape. This is evidenced by the definitions that are set down by human rights bodies and instruments. For instance, Recommendation No. 19 by the CEDAW Committee states that gender-based violence also includes mental or psychological harm, threats and other forms of deprivation of liberty.[32] Similarly, the United Nations also treats sexual violence (including rape) as a violation of human rights as well as a form of discrimination based on gender.[33] Such a broad definition is also observed in the case of the Council of Europe Convention on Preventing and

[29] Council of Europe 'Committee of ministers on Protection of women against violence' Rec (2002) 5 (30 April 2002).
[30] Savitri Goonesekere, 'A rights-based approach to realizing gender equality', Division for advancement of women (DAW), United Nations Entity for Gender Equality and the Empowerment of Women (UN Women).
[31] Partners for Law in Development, 'South Asia training of Trainers on CEDAW Convention on the Elimination of All forms of Discrimination against Women: A Report' (2006) 8 <http://pldindia.org/wp-content/uploads/2013/03/South_Asia_Training_of_Trainers-PDF2.pdf> accessed 26 October 2017.
[32] CEDAW Committee 'General Recommendation No. 19 on Violence against Women' (1992) U.N. Doc. A/47/38.
[33] UN Women, 'Handbook for Legislation on Violence against Women' (2012) 24 <http://www.unwomen.org/~/media/headquarters/attachments/sections/library/publications/2012/12/unw_legislation-handbook%20pdf.pdf?v=1&d=20141013T121502> accessed 24 April 2017. See also Sylvia Walby *et al*, *Stopping Rape: Towards a Comprehensive Policy* (Bristol Policy Press 2015) 11.

Combating Violence against Women and Domestic Violence (popularly known as 'The Istanbul Convention') which expands the definition of violence against women to include economic and psychological suffering in addition to physical violence, even those committed in the private sphere.[34] On an evaluation of these human rights definitions of rape, it is concluded that rape is much more than a single episodic physical assault in a violent form which is emphasized in most criminal law definitions.

Although criminal law definitions of rape vary across different countries, broadly however, rape is usually treated as "coerced violation or penetration of the body" where coercion is usually characterized by force or non-consent.[35] Thus, the definitions usually constitute three elements, namely, 'penetration/sexual violation', 'use of force' and 'absence of consent'.[36] It is observed that jurisdictions which consider rape primarily as an act of violence, employ the element of 'use of force' as a central focus of their definitions.[37] In contrast, jurisdictions which treat rape as a violation of sexual autonomy and bodily integrity focus more on the absence of consent of the victim.[38]

It is already shown in the previous section that the human rights perspective views rape in a broader and victim-centric manner by establishing rape as a result of structural inequality between genders. Hence, it is useful to interpret the aforementioned elements of rape in criminal law using the language of human rights in order to understand the actual 'harm' of

[34] Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention) (2011) Article 3(a) where "violence against women" is "understood as a violation of human rights and a form of discrimination against women and shall mean 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".
[35] Sylvia Walby *et al, Stopping Rape: Towards a Comprehensive Policy* (Bristol Policy Press 2015) 12.
[36] Maria Eriksson, *Defining rape: Emerging obligations for States under International Law* (Martinus Nijhoff Publishers 2011) 90.
[37] ibid at 92.
[38] ibid.

rape - whether it is the violence or the forced sexual nature of the act.[39] This would further assist in the framing of human rights sensitive criminal law definitions of rape by states.

1.2.1 Penetration/sexual violation

Proponents who believe in rape as sexual intercourse and not as a form of violence, view the act of rape solely as a form of fulfilment of the sexual desire of the perpetrator. This is problematic as it ignores the gender inequality between the perpetrator and the victim which is the driving factor behind the act of rape as already highlighted in the previous section of this chapter.[40] In the criminal law definitions, such sexual act is usually gauged by the term 'penetration'. The definition of penetration is sometimes restricted to the penis or may include other objects and the point of penetration is the vagina, the mouth or the anus depending on the legal regime of a particular country.[41] Although the latter is a slightly broader construction, restricting the sexual nature of rape merely to different forms of penetration does not take into account the other ways in which a woman's sexual autonomy is violated.[42]

Moreover, focus on penetration also removes the focus from the main issue of consent and makes the act of rape seem to be less serious as it is seen as a slight aberration to sexual intercourse which is otherwise considered as a pleasurable act.[43] This trivialization is especially observed in cases where the victim and the perpetrator are related (such as husband and wife) where issues of consent are not examined in detail as consent is inherently presumed in the relationship.[44] This is one of the main reasons why in certain countries such as India, marital rape is not treated as a criminal offence and is an exception to rape.

[39] Maria Eriksson, *Defining rape: Emerging obligations for States under International Law* (Martinus Nijhoff Publishers 2011) 54.
[40] ibid at 58.
[41] ibid at 110, 112.
[42] ibid.
[43] ibid at 61.
[44] Catharine A. MacKinnon, 'Rape: On Coercion and Consent' in *Toward a Feminist Theory of the State* (Harvard University Press 1989) 175.

The aforementioned treatment of rape as sexual intercourse or penetration for fulfilment of sexual desire does not take into account the actual experience of rape that is faced by a victim which is the violation of her right to sexual autonomy.[45] As stated in the Beijing Platform for Action, sexuality is a core human right which concerns the most intimate aspect of an individual and greatly influences the self-determination of an individual.[46] Thus, sexual autonomy is a foundational element of a person's dignity and is of prime importance.[47] Hence, viewing the act as a violation of sexual autonomy places more focus on consent of the woman to such act and makes the definition more victim-centric. It thus reflects the woman's experiences rather than focusing on the male-centric description of penetration/sexual intercourse.

A good example of this is the Canadian Criminal Code which reformed its law to treat rape as 'sexual assault' and not 'penetration'. Moreover, it differentiated 'sexual assault' into different gradation levels on the basis of violence, starting from non-violent rapes up to extremely violent forms of rape.[48] In this regard, the Supreme Court of Canada has also interpreted the 'sexual' nature of this provision broadly through a human rights perspective. It has held that the sexual nature of the act should be seen from the eyes of a "reasonable observer" taking into account relevant circumstances such as the nature of touch, the place where the act occurred, the part of the body which is touched, the communication between the accused and the victim, accused's intent, threats, accused's intention and other such surrounding conditions.[49]

[45] Maria Eriksson, *Defining rape: Emerging obligations for States under International Law* (Martinus Nijhoff Publishers 2011) 67.
[46] 'Report of the Fourth World Conference on Women' (4-15 September 1995) U.N. Doc A/CONF.177/20/Rev.1 para 93.
[47] Maria Eriksson, *Defining rape: Emerging obligations for States under International Law* (Martinus Nijhoff Publishers 2011) 261.
[48] Law Reform Commission of Canada, Report No.10, Sexual Offences (1978) 8. See also Maria Eriksson, *Defining rape: Emerging obligations for States under International Law* (Martinus Nijhoff Publishers 2011) 62.
[49] *R v Chase* [1989] 2 SCR 293 para 11. See also Government of India, (Justice J. S. Verma Committee) Report of the Committee on Amendments to Criminal Law (New Delhi 2013) 110.

Thus, the consideration of 'rape as sex' should not be restricted to the sexual act of penetration but should also extend to acts of sexual nature which equally affects the sexual autonomy of individual.

1.2.2 Violence / Use of Force

In contrast to the aforementioned focus of the sexual act in rape, some theories view rape as a violent act and focus less on the aspect of sexuality.[50] This theory takes into account the power relations wherein the expression of violence is a result of abuse of power and the act of dominance of the perpetrator instead of mere gratification of sexual desire.[51] However the problem of treating rape as violence is that, in the legal scenario, it would mean that the victim has to show violence or use of force to prove that she was raped, thus putting a greater legal burden on the victim to prove rape.[52] Moreover, it would not take into account non-violent rapes.

Such interpretation of rape that focuses on violence is seen in the definition of rape in criminal laws in different countries. For instance, in some cases, lack of physical resistance by the victim in response to such use of force is taken as an important determinant for proving consent in cases of rape.[53] In such cases, it is construed that as there are no signs of physical force such as bruising or tearing of clothes it proves that the victim did not struggle during the sexual act which is an indicator of consent.[54] However, according to international human rights standards, the interpretation of the scope of use of force should not be limited to physical force, but should

[50] Catharine A. MacKinnon, 'Rape: On Coercion and Consent' in *Toward a Feminist Theory of the State* (Harvard University Press 1989) 173.
[51] Maria Eriksson, *Defining rape: Emerging obligations for States under International Law* (Martinus Nijhoff Publishers 2011) 58.
[52] ibid at 110.
[53] *M.C. v Bulgaria* App. No. 39272/98 (ECtHR, 4 December 2003) para 156.
[54] ibid at para 64.

also include threats, fear, psychological force and power abuse which is usually not reflected in the criminal law definitions of rape in different countries.[55]

Hence, the focus on such physical violence views the act of rape from a very narrow lens by disregarding the other harms of rape which is experienced by the victim. The sexual aspect of the violence causes greater harm to the victim. According to Andrea Dworkin, one's dignity is deeply rooted in the "control over physical access to one's own body."[56] Hence, non-consensual access to one's intimate parts of the body causes emotional and psychological damage in addition to physical damage.[57] Therefore, the thesis recommends that even if the criminal law definition mentions violence, it should be interpreted as an act of violence not because of the physical violence but due to non-consensual sexual violence where physical violence may or may not be present.[58]

1.2.3 Absence of Consent

As consent to access the body forms a core element of one's sexual autonomy, when viewed from a human rights perspective, it assumes the primary factor to determine whether the act of rape was committed or not.[59] Such special focus on the sexual autonomy of the woman fights the stereotype that a little bit of aggression on the part of men (who are presumed to be possessors of sexual desire) during a sexual act is 'normal' and does not constitute rape of a

[55] Amnesty International, 'Rape and sexual violence: Human rights law and standards in the International Criminal Court' (2011) 19 <https://www.amnesty.org/en/documents/IOR53/001/2011/en/> accessed 15 September 2017.
[56] Andrea Dworkin, *Pornography: Men possessing women* (Dutton 1989) 243.
[57] Maria Eriksson, *Defining rape: Emerging obligations for States under International Law* (Martinus Nijhoff Publishers 2011) 59. It is however stressed that such emotional and psychological damage is a result of loss of sexual autonomy and bodily integrity. States usually construct such damage in the language of loss of honour and sense of shame for the victim. This approach shifts the focus away from the violation of the victim's human rights and leads to less access of victims to the criminal justice system due to fear of public shaming and stigma.
[58] ibid. See also Catharine A. MacKinnon, 'Rape: On Coercion and Consent' in *Toward a Feminist Theory of the State* (Harvard University Press 1989) 174.
[59] Maria Eriksson, *Defining rape: Emerging obligations for States under International Law* (Martinus Nijhoff Publishers 2011) 67.

woman (where women's bodies are perceived to be the passive objects of men's sexual desire).[60]

Hence, such sexualized violence constitutes rape when it is non-consensual in nature. Here, the consent of the woman in the sexual act is an essential element to decide whether a particular case constitutes rape or not. In traditional criminal law, the construction of consent is presumed to be the free consent of the woman under equal conditions of both sexes.[61] However, this presumption is contested especially in cases where there is a relationship between the man and the woman and there is an existing power hierarchy between the two genders.[62] In such situations, the consent is usually due to no available alternative or to prevent aggravated use of force in case of non-consent.[63] Thus, the determination of rape by such a narrow interpretation of 'consent' poses a problem as it is difficult to ascertain whether such consent is free or not.

The consent of the woman is also presumed to be dependent on the extent of her relationship with the man.[64] For instance, wives are presumed to give a permanent sexual consent to the husband after marriage.[65] This is one of the reasons why marital rape is still not criminalized in some countries. Moreover, consent is also presumed by placing a woman into a particular category. For instance, sex workers are always presumed to give consent because they are engaged in sex work as part of their profession.[66] The victim's conduct before the act of rape

[60] Catharine A. MacKinnon, 'Rape: On Coercion and Consent' in *Toward a Feminist Theory of the State* (Harvard University Press 1989) 177. See also Nicola Gavey, *Just Sex? The Cultural Scaffolding of Rape (Women and Psychology)* (1st edn, Routledge 2005) 216.
[61] Catharine A. MacKinnon, 'Rape: On Coercion and Consent' in *Toward a Feminist Theory of the State* (Harvard University Press 1989) 174.
[62] ibid at 182.
[63] ibid at 177.
[64] ibid at 175.
[65] Morrison Torrey, 'Feminist legal scholarship on rape: A maturing look at one form of violence against women' (1995) 2 Wm. & Mary J. of Women & L. 35, 42.
[66] ibid.

such as drinking, wearing 'revealing' clothing or going with a ride with the perpetrator is also sometimes taken into account by the court to determine consent.[67]

The proof of consent varies across different legal regimes. In some jurisdictions, in a criminal trial, the burden is on the women to prove that she did not consent to the sexual act and the victim has to prove the absence of consent "beyond reasonable doubt" which is a very high standard of proof and is difficult to prove.[68] It leads to re-victimization of the victim and puts the rape victim at a further disadvantage as the evidentiary burden of the victim rises considerably.

In order to prevent such re-victimization, a focus on the voluntary consent of the victim from a rights perspective may solve the issue. For instance, in Canada, the Criminal Code defines consent of the victim by her voluntary agreement to the act of sex.[69] In such a case, it is the perpetrator (and not the victim) who has the burden to prove beyond reasonable doubt that there was consent from the victim, thus improving access of justice for the victim.

Hence, on assessment of all these elements of rape through a human rights lens, it is found that rape takes into account both the theories of 'rape as violence' and 'rape as sex' cumulatively with the absence of consent being the defining factor to establish such sexualized violence. This synergy of these two theories regarding the nature of rape is also supported by theorist Catharine MacKinnon who argues that the sex and violence elements in rape should be defined in relation to each other and should not be examined in isolation in order to understand rape.[70] However, as stated earlier, the 'violence' should be broadly interpreted to include psychological harm, emotional suffering and not just the physical aspect. Similarly, the 'sex'

[67] Deborah L. Rhode, 'Sex and Violence' in *Justice and Gender* (Harvard University Press 1989) 248.
[68] UN Women, 'Handbook for Legislation on Violence against Women' (2012) 25 <http://www.unwomen.org/~/media/headquarters/attachments/sections/library/publications/2012/12/unw_legislation-handbook%20pdf.pdf?v=1&d=20141013T121502> accessed 26 March 2017.
[69] ibid.
[70] Catharine A. MacKinnon, 'Rape: On Coercion and Consent' in *Toward a Feminist Theory of the State* (Harvard University Press 1989) 174.

in rape should not be restricted to sexual intercourse or penetration but should include all such actions of a sexual nature which violate the sexual autonomy of the victim. Moreover, it should be ensured that the consent is free (not given under coercive circumstances) and the proximity of relationship between the victim and the accused or the previous sexual experience of the victim should not be a factor to presume consent.

1.3 EXTENT OF STATE RESPONSIBILITY IN CASE OF RAPE IN PRIVATE SPHERE

As already highlighted, rape and other forms of gender-based violence are not just forms of violence but are manifestations of structural inequalities and existing power hierarchies between men and women.[71] This hierarchy between the genders is reinforced by the public-private dichotomy.[72]

In order to understand this dichotomy, it is important to explore the nature of the public-private divide as perceived by the society in the context of gender. The private (family) sphere is traditionally considered to be assigned to women, thus restricting the activities of women in the private sphere.[73] In contrast, the public sphere is regarded as the domain of men as it relates to matters of business, economy and politics.[74] This public sphere of men is considered to be more important and is treated hierarchically superior to the perceived private realm of women.[75] One of the reasons for this hierarchy in the public and private domain is the treatment of women as property rights of their husbands in the earlier times which aggravated the power inequality between the two genders.[76] This attitude continues even today which further widens

[71] Charlotte Bunch, 'Women's Rights as Human Rights: Toward a Re-Vision of Human Rights' (1990) 12 Human Rights Quarterly 486, 491.
[72] Megan Alexandra Dersnah & Paulina Garcia-Del Moral, 'A feminist challenge to the gendered politics of the public/private divide: on due diligence, domestic violence, and citizenship' (2014) 18(6-7) Citizenship Studies 661, 662.
[73] Christine Chinkin, Hilary Charlesworth and Shelley Wright, 'Feminist Approaches to International Law' (1991) 85(4) The American Journal of International Law 613, 626.
[74] Elizabeth M. Schneider, 'The violence of privacy' (1990-1991) 23 Conn. L. Rev. 973, 976.
[75] Christine Chinkin, Hilary Charlesworth and Shelley Wright, 'Feminist Approaches to International Law' (1991) 85(4) The American Journal of International Law 613, 626.
[76] Joanna Bourke, 'Violent Institutions: The Home' in *Rape – Sex, Violence History* (Virago Press 2007) 328. See also Maria Eriksson, *Defining rape: Emerging obligations for States under International Law* (Martinus Nijhoff Publishers 2011) 38.

the structural gap of inequality of powers between the two genders. Moreover, the public-private dichotomy also determines the extent of state responsibility in these two spheres as the state hesitates to interfere in matters relating to private sphere which it considers as an aspect of private life and family autonomy.[77]

Thus, the public and private divide is a major factor contributing to the unequal power distribution between the two sexes and male domination which is the main reason of gender-based violence.[78] The non-interference of the state also contributes to the subordination of women in the private sphere as it protects the impunity of the perpetrators responsible for such intimate sexual violence such as marital rape.[79] In this scenario, it is useful to compare and contrast rape as a criminal offence and rape as a human right violation in the private sphere to determine the extent of state responsibility.

When rape is treated as a crime, it focuses on the one-time occurrence of the event and if the victim fails to prove such occurrence, she does not get justice. Moreover, the legal definition of rape in criminal statutes usually ignores the structural inequality surrounding the act of rape and does not take into account the woman's experience of rape.[80] Rather, it mostly focuses on use of force, proof of penetration, physical injury and the notion that the offender is a stranger.[81] These aspects become especially difficult when rapes are committed by acquaintances in the private sphere which may be non-violent and thus provides immunity to perpetrators of rape. However, if such violence in the private sphere is viewed as a way of coercive control by the husband, the justice system will address not just the episodic violence but also the systemic

[77] Paulina García-Del Moral & Megan Alexandra Dersnah, 'A feminist challenge to the gendered politics of the public/private divide: on due diligence, domestic violence, and citizenship' (2014) 18(6-7) Citizenship Studies 661, 663.
[78] ibid at 662.
[79] Elizabeth M. Schneider, 'The violence of privacy' (1990-1991) 23 Conn. L. Rev. 973, 984.
[80] Wendy Larcombe, 'Falling Rape Conviction Rates: (Some) Feminist Aims and Measures for Rape Law' (2011) 19 Feminist Legal Studies 27, 35.
[81] ibid.

power inequality which leads to such rape in the first place.[82] This would also result in greater focus on the victim's personal experiences over a long time which is usually ignored when rape is treated as a crime.[83]

Treating rape as a manifestation of coercive control in form of threat, control, intimidation and violence corresponds with human rights violations such as violation of liberty, dignity and autonomy.[84] Thus, rape as a violation of human rights is based on a systemic gendered bias and has a wider political implication as it not only leads to discrimination of women by treating them as unequal citizens at home but also while working outside the home and in all public spheres.[85] Hence, treating such acts in the private sphere as human rights violations results in a public implication which puts a greater responsibility on states to intervene in such private acts and put a stop to them.[86]

The public-private dichotomy was also present in international human rights law earlier wherein gender-based violence by non-state actors in the private sphere was not considered to be a human rights violation as the state was not the perpetrator in such cases.[87] Hence, a feminist understanding of the public-private dichotomy became necessary to frame rape and other gender-based violence as a human rights violation by ensuring state responsibility for violations by non-state actors in the private sphere.[88] The first step in ensuring state responsibility in the private realm was to incorporate positive or affirmative action of the state to prevent such rights violation in addition to its traditional role of non-interference of people's

[82] Evan Stark, 'Rethinking Coercive Control Violence Against Women' (2009) 15 (12) Violence against Women 1509, 1518.
[83] ibid.
[84] ibid at 1520.
[85] ibid at 1521.
[86] Charlotte Bunch, 'Women's Rights as Human Rights: Toward a Re-Vision of Human Rights' (1990) 12 Human Rights Quarterly 486, 491
[87] Christine Chinkin, Hilary Charlesworth and Shelley Wright, 'Feminist Approaches to International Law' (1991) 85(4) The American Journal of International Law 613, 629.
[88] Megan Alexandra Dersnah & Paulina Garcia-Del Moral, 'A feminist challenge to the gendered politics of the public/private divide: on due diligence, domestic violence, and citizenship' (2014) 18(6-7) Citizenship Studies 661, 663.

rights. Such positive obligation of the state was set down by the ECtHR in a number of cases and was also applicable horizontally, that is, to private actors in cases of rape.[89]

The positive obligation of the state is intricately linked to the 'due diligence standard' which also acts as an important tool to fasten state responsibility in cases of violence by private actors including those that occur in the private sphere.[90] The due diligence standard mandates that states are responsible for preventing, protecting women and punishing perpetrators in case of violence in the private sphere committed by non-state actors, including those in the private sphere.[91] Thus, in cases of rape in the private sphere such as marital rape, the state has to take measures to criminalize the offence as well as provide redress to the victims and punish the perpetrators irrespective of the relationship between the victim and the perpetrator. The thesis further elaborates the origin, scope and application of these standards by international human rights bodies in the next chapter.

Conclusion:

It is important to consider such rape and other forms of gender-based violence as a human rights violation as it occurs on a large scale as a manifestation of denial of liberty of women in all spheres across all nationalities, classes and religions.[92]

It is observed that criminal law has a narrow interpretation of the elements of rape whereas rape as a human rights violation takes into account the broader factors related to rape and not the act of rape itself. Unlike the emphasis of degree of force and the act of penetration for

[89] Ganna Khrystova, 'State Positive Obligations and Due Diligence in Human Rights and Domestic Violence Perspective' (2014) 1(5) European Political and Law Discourse 109, 111-112. See also Jean-François Akandji-Kombe, 'Positive obligations under the European Convention on Human Rights - A guide to the implementation of the European Convention on Human Rights' (Human Rights Handbooks No.7, Council of Europe, 2007) 7 <https://rm.coe.int/168007ff4d> accessed 24 March 2017. See also *Hokkanen v. Finland* App. No. 19823/92 (ECtHR, 24 August 1994); *López-Ostra v. Spain* App. No. 16798/90 (ECtHR, 9 December 1994); *Marckx v Belgium* App. No. 6833/74 (ECtHR, 13 June 1979).

[90] Ganna Khrystova, 'State Positive Obligations and Due Diligence in Human Rights and Domestic Violence Perspective' (2014) 1 (5) European Political and Law Discourse 109, 118-119.

[91] Julie Goldscheid & Debra J. Liebowitz, 'Due Diligence and Gender Violence: Parsing its Power and its Perils' (2015) 48 Cornell Int'l L.J. 301, 304.

[92] Charlotte Bunch, 'Women's Rights as Human Rights: Toward a Re-Vision of Human Rights' (1990) 12 Human Rights Quarterly 486, 489.

proving the crime of rape, importation of human rights standards views rape as a violation of bodily integrity and sexual autonomy irrespective of the extent of use of force.[93] It also addresses rape as an assault on dignity and personhood which occurs as a result of gender inequalities and is a manifestation of such gender discrimination.[94] Thus, the human rights framework addresses the causes of rape instead of just focusing on particular events thus addressing the needs of the victims better.

Proponents of criminal law may state that criminal law at times is broader in scope when it takes into account the previous sexual conduct of the women to determine consent in case of rape. They might equate it to the broader human rights approach which takes into consideration systemic inequality between the genders. However, both these approaches cannot be equated as the latter identifies the root cause of rape and provides an explanation of rape whereas the former destroys the equality of arms between the two parties by putting unduly high standards on the victim. Thus, the 'broad' nature of rape as a crime is harmful in contrast to the 'broad' nature of rape as a human rights violation which is beneficial as it helps to construct an explanation for rape.

In addition to this, locating rape within the human rights framework is also useful in cases of rape in the private sphere where state intervention is limited and there is trivialization of such cases as they are treated as family issues to be solved privately. In this regard, the human rights bodies have laid down standards and ensured positive action of the state, even in the private sphere in order to combat rape by the use of the due diligence standard.[95]

Hence, it is concluded that approaching rape from the perspective of human rights not only explores the systemic causes of rape but also helps in combating rape by invoking state

[93] Monica McWilliams and Fionnuala Ní Aoláin, 'Human Rights meets intimate partner sexual violence' in Kersti Yllö and M. Gabriela Torres(eds.), *Marital Rape- Consent, Marriage and Social Change in Global Context* (OUP, 2016) 188.
[94] ibid.
[95] Charlotte Bunch, 'Women's Rights as Human Rights: Toward a Re-Vision of Human Rights' (1990) 12 Human Rights Quarterly 486, 488.

responsibility to address these causes. These standards set up a normative framework and impose positive obligations on the state to address rape. In addition to this, they also guide states how to exercise this positive obligation and take concrete steps to combat rape.

CHAPTER 2: INTERNATIONAL HUMAN RIGHTS STANDARDS FOR STATE RESPONSIBILITY IN CASES OF RAPE

Introduction

The discussion in the previous chapter focused on the infringement of rights as a result of rape. Taking this argument forward, this chapter outlines corresponding obligations of the state for protection and prevention of violation of such rights. The rationale for such state responsibility is the treatment of rape from the perspective of rights wherein every right has a corresponding duty.

Historically, human rights and gender-based violence were treated as two separate entities. Since human rights covered acts committed by states and since gender-based violence was usually done by private actors, the latter was seen as a separate entity and not a human rights violation.[96] However, later, international human rights bodies set down the standard of 'due diligence' wherein states have a responsibility to prevent and punish perpetrators of such gender-based violence even in the private sphere.[97] For instance, the UNHRC in its General Comment No.31 lays down the states' duty to abide by the due diligence standard by means of protection, prevention, investigation and punishment in relation to human rights violation caused by private actors.[98] Similarly, General Recommendation 19 of CEDAW also imposes state responsibility for acts by private persons in case of the former's failure to meet the due diligence standard for protecting victims, carrying out effective investigation and punishing the perpetrators.[99] In addition to this, in various reports, the UN Special Rapporteur on Violence

[96] Sally Engle Merry, 'Gender Violation as a Human Rights' in *Gender violence: a cultural perspective* (Wiley-Blackwell 2009) 85.
[97] UNGA, 'UN Declaration on the Elimination of Violence against women' (20 December 1993) U.N. Doc. A/RES/48/104 article 4(c). See also Megan Alexandra Dersnah & Paulina Garcia-Del Moral, 'A feminist challenge to the gendered politics of the public/private divide: on due diligence, domestic violence, and citizenship' (2014) 18(6-7) Citizenship Studies 661, 667.
[98] UNHRC 'General Comment No. 31 - The Nature of the General Legal Obligation Imposed on States Parties to the Covenant' (2004) U.N. Doc. CCPR/C/21/Rev.1/Add. 13.
[99] CEDAW Committee, 'General Recommendation No. 19 on Violence against Women' (1992) U.N. Doc. A/47/38 para 9.

against Women has also evoked the due diligence standard to establish state responsibility in cases of rape and other gender-based violence by treating the standard as a duty under customary international law[100] and to check whether the state's actions to prevent and punish in case of such gender-based violence are adequate.[101]

The due diligence standard is also applied as a standard-setting measure of state responsibility in regional human rights systems. An example of this is the Inter-American Commission on Human Rights ('IACHR') and the Inter-American Court of Human Rights ('IACtHR')[102] and the 1994 Inter-American Convention on the Prevention, Punishment and Eradication of Violence against women (popularly known as the 'Belém do Para Convention') which developed jurisprudence regarding the duty on states to protect women from such violence both in the public and private spheres.[103] Thus, the due diligence standard has evolved as a normative basis which acts as a benchmark to check the extent of state responsibility in case of gender-based violence by private actors.[104]

Another standard of state responsibility which is developed by the ECtHR is known as 'positive obligation' where the court has ruled that in addition to the generally accepted negative right

[100] UNGA 'Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo' (2015) UN Doc. A/HRC/29/27. See also ECOSOC 'Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, submitted in accordance with Commission on Human Rights resolution 1995/85' (1996) U.N. Doc. E/CN.4/1996/53. See also ECOSOC 'The Due Diligence Standard as a tool for the Elimination Of Violence Against Women - Report of the Special Rapporteur on violence against women, its causes and consequences, Yakin Ertürk' (2006) U.N. Doc. E/CN.4//2006/61 para 29.

[101] ECOSOC 'Violence against women in the family - Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, submitted in accordance with Commission on Human Rights resolution 1995/85' (1999) U.N. Doc. E/CN.4/1999/68.

[102] *Velásquez Rodríguez Case v. Honduras* Series C, No.4 (IACtHR, 29 July 1988). Although this was a case of disappearance and not related to gender-based violence, it was the first time when the IACtHR laid down the due diligence standard of state responsibility to prevent, protect and punish even when the perpetrators were non-state actors. See also *Maria da Penha Fernandes v Brazil* Case 12.051, Report No.54/01, OEA/Ser. L./III.111 (IACHR, 16 April 2001).

[103] Megan Alexandra Dersnah & Paulina Garcia-Del Moral, 'A feminist challenge to the gendered politics of the public/private divide: on due diligence, domestic violence, and citizenship' (2014) 18(6-7) Citizenship Studies 661, 668. See also Michele E. Beasley and Dorothy Q. Thomas, 'Domestic violence as a human rights issue' in Martha A. Fineman and Roxanne Mykitiuk (eds.), *Public Nature of Private Violence – The Discovery of Domestic Abuse* (Routledge 1994) 326.

[104] Ganna Khrystova, 'State Positive Obligations and Due Diligence in Human Rights and Domestic Violence Perspective' (2014) 1(5) European Political and Law Discourse 109, 119.

of the state (prevention of arbitrary state interference), positive steps also need to be taken by the state to safeguard the rights enshrined in the Convention.[105]

The ECtHR interprets the nature of these positive obligation as either substantive or procedural in nature.[106] The substantive nature of these obligations is directly interpreted from the Articles of the Convention. For example, Article 2 of the Convention which states that "Everyone's right to life shall be protected by law" is interpreted by the ECtHR as the state responsibility to protect the lives of its citizens by affirmative measures.[107] The procedural aspects of positive obligations are interpreted by the ECtHR as arising from Article 2 (right to life), Article 3 (prohibition of ill-treatment) or Article 4 (prohibition of slavery). These procedural positive obligations are read with the general positive obligation mentioned in Article 1 of the Convention where states are given a mandate to secure and protect the rights of its citizens.[108]

The purpose of the positive obligations is to ensure that the rights enshrined in the Convention are "practical and effective"[109] and that there are effective remedies in case of breach of the Convention.[110] The ECtHR elucidates the scope of these positive obligations as including the duty of state to formulate an effective legislative framework,[111] prevention of violation of rights,[112] effective investigation[113] and protections against private individuals (horizontal effect

[105]Jean-François Akandji-Kombe, 'Positive obligations under the European Convention on Human Rights - A guide to the implementation of the European Convention on Human Rights' (Human Rights Handbooks No.7, Council of Europe, 2007)7 <https://rm.coe.int/168007ff4d> accessed 24 March 2017. See also *Hokkanen v. Finland* App. No. 19823/92 (ECtHR, 24 August 1994); *López-Ostra v. Spain* App. No. 16798/90 (ECtHR, 9 December 1994); *Marckx v Belgium* App. No. 6833/74 (ECtHR, 13 June 1979).
[106] Ganna Khrystova, 'State Positive Obligations and Due Diligence in Human Rights and Domestic Violence Perspective' (2014) 1 (5) European Political and Law Discourse 109, 112.
[107] Jean-François Akandji-Kombe, 'Positive obligations under the European Convention on Human Rights - A guide to the implementation of the European Convention on Human Rights' (Human Rights Handbooks No.7, Council of Europe, 2007) 8 <https://rm.coe.int/168007ff4d> accessed 24 March 2017.
[108] For example, with regard to Article 3, see *Assenov v. Bulgaria* App. No. 90/1997/874/1086 (ECtHR, 28 October 1998).
[109] *Airey v Ireland* App. No. 6289/73 (ECtHR, 9 October 1979).
[110] ECHR art 13.
[111] *X and Y v Netherlands* App. No. 89978/80 (ECtHR, 26 March 1985).
[112] *Airey v Ireland* App. No. 6289/73 (ECtHR, 9 October 1979).
[113] *Aydin v Turkey* App. No. 57/1996/676/866 (ECtHR, 25 September 1997).

and application).[114] In this background, by means of various judicial pronouncements, the ECtHR has invoked the positive obligations of the state in cases of rape where such acts are usually committed by individuals. Thus, these positive obligations which protect individuals from violations of human rights share a common nexus with the due diligence standard which are applied by international human rights bodies like UNHRC and CEDAW Committee to evoke state responsibility in case of gender-based violence by individuals.[115]

These human rights bodies not only establish the due diligence principle to address rape but also provided concrete recommendations[116] to states in relation to such responsibility. Hence, this chapter examines this principle by highlighting its contents relating to effective prevention and protection, efficient investigation and punishment and removal of gender stereotypes[117] in cases of rape. Although these means require the state to have an overall effective legal, administrative and policy framework, the major thrust of this thesis is on an elaborate evaluation of the legal framework, especially criminal law, which this thesis uses as a tool to enforce the human rights standards.

2.1 Prevention and Protection

In order to ensure that the state has exercised due diligence, the first step to assess this is to prevent the occurrence of rape and protection of victims of rape. The prevention strategy involves identification of the structural causes which contribute to such gender-based violence as well as socio-economic support to women such as education in order to empower them.[118] In addition to this, it also includes formulation of laws in response to gender-based violence

[114] *Marckx v Belgium* App. No. 6833/74 (ECtHR, 13 June 1979).
[115] Ganna Khrystova, 'State Positive Obligations and Due Diligence in Human Rights and Domestic Violence Perspective' (2014) 1 (5) European Political and Law Discourse 109, 119.
[116] Due Diligence Project, 'Due Diligence Framework: State Accountability Framework for eliminating Violence against Women' (IHRI, 2014) 5 <http://www.duediligenceproject.org/> accessed 16 September 2017.
[117] Ganna Khrystova, 'State Positive Obligations and Due Diligence in Human Rights and Domestic Violence Perspective' (2014) 1 (5) European Political and Law Discourse 109, 120.
[118] Due Diligence Project, 'Due Diligence Framework: State Accountability Framework for eliminating Violence against Women' (IHRI, 2014) 13 <http://www.duediligenceproject.org/> accessed 16 September 2017.

and the stereotypes associated with it.[119] In keeping with the focus of the thesis of the application of international human rights standards on the criminal justice system, this section of the thesis examines the instances where these standards are applied to protect victims of rape by means of formulation of effective laws.

It is observed that in many countries there is a lacuna in the law regarding the issue of rape. Such lacuna is usually in form of procedural irregularities in the law or due to non-recognition of offences in special cases of rape which results in lack of access of justice for the victims of rape. One of the ways by which the state can comply with the prevention and protection standard in this regard is by adopting substantive and procedural safeguards in criminal law with respect to such gaps in the law.[120] This ensures justice to the victim by means of effective penalties that are applicable on the perpetrator.

In this context, the ECtHR has laid down in various cases that the state has positive obligations to protect women and other vulnerable individuals from such violence as it amounts to discrimination and is a form of inhuman or degrading treatment.[121] It has further held that states should adopt effective deterrence measures and a sound legal framework for prevention of such violence, especially rape, by criminalization of the offence as a first step followed by investigation and prosecution without delay.[122] An example of such a case is that of *X and Y v Netherlands*[123] which involved the rape of a sixteen year old girl with a mental disability. She was raped by a relative of the person who ran an institution for mentally disabled children.[124] Due to her mental incapacity, her father lodged a criminal complaint of rape on her behalf.[125]

[119] Due Diligence Project, 'Due Diligence Framework: State Accountability Framework for eliminating Violence against Women' (IHRI, 2014) 13 <http://www.duediligenceproject.org/> accessed 16 September 2017.
[120] UNGA 'Ending Violence against Women: from words to action, Study of the Secretary-General (2006) U.N. Doc A/61/122/Add.1) 75.
[121] *Opuz v Turkey* App. No. 33401/02 (ECtHR, 9 June 2009) paras 159, 200.
[122] *M.C. v Bulgaria* App. No. 39272/98 (ECtHR, 4 December 2003) para 153.
[123] *X and Y v Netherlands* App. No. 89978/80 (ECtHR, 26 March 1985).
[124] *X and Y v Netherlands* App. No. 89978/80 (ECtHR, 26 March 1985) para 8.
[125] ibid at para 9.

However, the national courts rejected the claim, stating that the domestic law provided for redress only when the victim herself initiated the complaint.[126] This decision disregarded the victim's mental condition and thus was a glaring procedural loophole in the law.[127] The ECtHR held that the fact that there was no law regarding rape in case of mentally disabled victims amounted to infringement of Article 8 of the Convention as it violated the core elements of her private life.[128] Hence, the court asked the state to remedy this error in the law and provide effective justice to the victim. Moreover, the court also held that the state had a duty to protect her private life which was not restricted to her private self but also governed her relations with other individuals in the private sphere.[129]

Hence, in this case, the court not only held the state liable for violation of her private life but also went further and established state responsibility to protect and prevent rape in similar cases which may arise in the future. Therefore, the effective criminalization of rape is important to ensure protection against rape. This is an important human rights standard which goes a long way in providing redress to victims of rape as it kick-starts the justice delivery process.

Another example of the ECtHR's decision on state responsibility relating to rape in the private sphere is the case of *C.R. v United Kingdom*.[130] In this case, the applicant was convicted by the United Kingdom House of Lords for attempting to rape his wife.[131] He contended before the ECtHR that such conviction was a violation of his right under Article 7 of the ECHR as this act of marital rape was not a criminal offence at the time it was committed.[132] However, the ECtHR held that there was no violation of Article 7 and upheld his conviction. The court

[126] *X and Y v Netherlands* App. No. 89978/80 (ECtHR, 26 March 1985) at para 12.
[127] ibid. See also Council of Europe, 'European Court of Human Rights Factsheet – Violence against women' (2016).
[128] ibid at para 30.
[129] ibid at para 23.
[130] *C.R. v United Kingdom* App. No. 20190/92 (ECtHR, 22 November 1995).
[131] ibid at para 15.
[132] ibid at para 26.

reasoned that though the domestic law treated marital rape as an exclusion to the offence of rape, the fact that the rape was so debasing, it amounted to an attack on the personal freedom and dignity of the individual whose protection was the essence of the Convention.[133] The court further held that that the criminalization of the act of marital rape was foreseeable due to the general trend of cases and public opinion which denounced the immunity of rape in marital relations.[134] It is interesting to observe the active role played by the ECtHR in recognizing marital rape and imposing state responsibility even though there was no law specifically criminalizing marital rape at that time. Hence, the prevention and protection strategy includes effective law-making or judicial interpretation in case the legal system lacks the effective mechanism to combat the act of rape.

2.2 Investigation, Prosecution and Punishment

In addition to prevention and protection against rape by enacting legislation, the international human rights bodies have laid down that the state also has the responsibility to ensure effective investigation, prosecution and punishment of the offender in accordance with the due diligence standard.

In this regard, the UNHRC has laid down strict standards with respect to quick and effective investigation in cases relating to rape. For instance, in the case of *LNP v Argentine Republic*,[135] a 15 year old girl of the Qom ethnic group was sexually assaulted by three men by forcible anal penetration and forced oral sex.[136] She had to wait for several hours at the police station (for filing the complaint) as well as the medical centre (for the medical report).[137] At the medical

[133] *C.R. v United Kingdom* App. No. 20190/92 (ECtHR, 22 November 1995) para 42.
[134] ibid at para 38.
[135] *LNP v Argentine Republic* Human Rights Committee Communication No. 1610/2007, U.N. Doc. CCPR/C/102/D/1610/2007(16 August 2011).
[136] ibid at para 2.1.
[137] ibid at para 2.2.

centre, the examination caused her intense pain and instead of checking for anal injuries, she was checked to see whether she was a virgin or not.[138]

The UNHRC held that the attitude of the police and the medical authorities in questioning her reputation and morality while determining her legal rights was an undue interference of her right to privacy under Article 17 of the Covenant.[139] In addition to treatment of such ineffective investigation as a violation of the victim's private life, the UNHRC also stated that such acts amounted to discriminatory treatment under Article 26 of the Covenant on the basis of her gender and ethnicity.[140] Moreover, the UNHRC also took into account the minor age of the victim in its reasoning. It held that the attitude of the medical and police personnel during investigation resulted in the failure of the state's duties of protection, especially in such cases where the victim is a minor, thus violating Article 24 of the Covenant.[141] On an analysis of this case, it is observed that this case is adjudicated in a nuanced manner and has set high standards for state responsibility for swift investigation and medical examination as it not only takes into account the gender, but also the age and the ethnicity into account which highlights its intersectional approach.

In this regard, the ECtHR has also laid down that the failure of investigation authorities to conduct speedy and effective investigation is a violation of the right to private life of the victim under Article 8 of the Convention. This is observed in the case of *Y v Slovenia*[142] which involved multiple sexual assaults of a 14 year old girl.[143] After receiving the complaint, there was an undue delay wherein the investigation report was not submitted to the state prosecutor

[138] *LNP v Argentine Republic* Human Rights Committee Communication No. 1610/2007, U.N. Doc. CCPR/C/102/D/1610/2007(16 August 2011) para 3.2.
[139] ibid at para 13.7.
[140] ibid at para 13.3.
[141] ibid at para 13.4.
[142] *Y v Slovenia* App. No. 41107/10 (ECtHR, 28 May 2015).
[143] ibid at para 6.

by the police almost for a year.[144] There was also further delay in the judicial investigation as well as the trial proceedings.[145] Moreover, the applicant was also re-victimized during the course of the trial by humiliating questions.[146] In light of these circumstances, the ECtHR held that such ineffective investigation, humiliation of the victim during the trial and undue delay affects the victim's private life and is a violation of Article 8 of the Convention.[147] It further held that Article 8 not only protects the victim from undue interference by the state but also imposes positive obligations on the state to protect such right and hence, in this case, the state had a duty to ensure the personal integrity of the victim and to prevent re-victimization during the criminal proceedings.[148]

When both the aforementioned cases are compared with respect to investigation and prosecution, it is observed that unlike the ECtHR, the UNHRC did not stop after establishing that there was a violation of one of the articles of ICCPR (right to private life). The interpretation of the UNHRC was similar to the ECtHR's approach in the *Slovenia* case by pointing out the ineffective investigation as a human rights violation. However, the UNHRC went a step further and also identified the surrounding circumstances which contribute to the lackadaisical attitude of the state authorities during investigation. This sets a more holistic standard for investigation as it identifies and names the causes of such ineffective investigation which can be applied in future cases in order to establish broader standards of protection at the stage of investigation and trial. This approach is also observed in the case of future cases adjudicated by the UNHRC.

In case of rapes by state actors, the UNHRC has held that such rapes are even more serious in nature and amount to grave violation of human rights of women. For instance, in the case of

[144] *Y v Slovenia* App. No. 41107/10 (ECtHR, 28 May 2015) para 99.
[145] ibid.
[146] ibid at paras 88, 108.
[147] ibid at para 115.
[148] ibid at paras 101, 104.

M.T v Uzbekistan,[149] the applicant belonged to a human rights group and was arrested on charges of being a member of an illegal organization. She was gang-raped by the detention authorities and was also subjected to other forms of abuse such as being forced to stand in the cold, being hung from a hook, removal of her uterus without her consent and other forms of ill-treatment.[150] In this case, the UNHRC stated that sexual violence is a serious form of gender-based violence.[151] It held that the rape was a violation of Article 26 of the Covenant as it amounted to sex-based discrimination wherein the detention authorities perpetrated this form of abuse especially because she was a woman.[152] It held that when such acts are committed by state actors, it is necessary for the state to show the evidence negating the applicant's claims of torture.[153] In this case, since the state could not prove this, the Committee held that such abuse, especially the sexual violence amounted to violation of Article 7 of the Covenant which prohibits torture and inhuman and degrading treatment.[154]

Hence, the Committee followed the precedent of the *LNP* case by establishing rape as a violation of Articles 7 and 26. As the present case involved the act of rape by state actors, it went a step further and developed stricter standards for the state. It held that the state was liable for violation of Article 2 (3) of the Covenant read with Article 7 of the Covenant as it had failed to provide effective remedies and ensure a fair and impartial investigation and had a duty to prevent such cases from happening in the future.[155]

Thus, the court held that not only did such rape amount to violation of the Covenant, but also the inaction of the state to enquire into the victim's allegations into torture, carry out effective

[149] *M.T. v Uzbekistan* Human Rights Committee Communication No. 2234/2013, U.N. Doc. CCPR/C/114/D/2234/2013 (21 October 2015).
[150] ibid at paras 4.11, 2.10, 2.12, 7.2.
[151] ibid at para 7.4.
[152] ibid at para 7.6.
[153] ibid at para 7.4.
[154] ibid.
[155] ibid at para 9.

investigation and punish the perpetrators, led to separate violations of ICCPR.[156] Moreover, the state was also party to the Optional Protocol of CEDAW which meant that the state had vowed to provide even stronger protections to individuals against breaches of the Covenant.[157] In this regard, the UNHRC gave the state 180 days to report the information about steps taken by the state to introduce reforms and to disseminate them in public for the purposes of awareness.[158]

The ECtHR also takes serious cognizance of cases which involve rapes by state actors. For example, in the case of *Aydin v Turkey*,[159] the court held that rape of a woman while in custody by the security forces amounted to torture under Article 3 of the Convention.[160] Article 3 prohibits torture and inhuman and degrading treatment or punishment. In the ECtHR jurisprudence, it is usually observed that cases of rape are considered as acts of inhuman or degrading treatment and are not treated as acts of torture as they do not reach that level of severity.

However, in the *Aydin* case, the court held that in addition to the fact that the victim suffered psychologically due to the rape, the fact that such a rape occurred during detention made it more grave and serious as the victim was especially vulnerable which raised the severity of the act to that of torture and not mere ill-treatment.[161] Although this is a welcome change from the earlier decisions, such recognition of the severity of rape is usually observed when perpetrators are state agents. This is so as the ECtHR views state-oriented abuse as causing severe harm psychologically as well as physically and thus qualifies such rape as torture.[162] In order to for

[156] *M.T. v Uzbekistan* Human Rights Committee Communication No. 2234/2013, U.N. Doc. CCPR/C/114/D/2234/2013 (21 October 2015) para 7.5.
[157] ibid at para 10.
[158] ibid.
[159] *Aydin v Turkey* App. No. 57/1996/676/866 (ECtHR, 25 September 1997).
[160] ibid at paras 86, 87.
[161] ibid at para 83.
[162] Clare McGlynn, 'Rape, Torture and the European Convention on Human Rights' (2009) 58 (3) The International and Comparative Law Quarterly 565, 569.

such rape to reach the severity of torture, aggravating factors such as details of the circumstances of rape such as time, age and youth of victim, place and the perpetrator's status need to be examined.[163]

The reasoning of the state regarding the status of the perpetrator is that, such an act was committed by a state official on whom citizens place utmost trust for protection of their interests.[164] On a closer reading, this might mean that the abuse of trust by the perpetrator (of which, state actor is one example) contributes to the severity of harm of rape. By this analogy, rape in the private sphere is also an example of abuse of trust as it is usually perpetrated by acquaintances upon whom a victim has utmost faith.[165] Similarly, with regard to the place of occurrence of rape, just as the victim is vulnerable in detention, she is similarly vulnerable within her home.[166] As rightly stated by Deborah Blatt, "A woman's home can become her torture chamber"[167] as she may be physically and psychologically harmed, has a constant fear of rape and yet may not leave the house even after such acts due to reasons of stigma or economic reasons.[168] This view also finds support in the text of the CEDAW General Recommendation No. 35, which states that while assessing whether an act of rape comes under the category of 'torture' or 'inhuman and degrading treatment', a gender-sensitive approach should be adopted which takes into account the real suffering of the victim.[169] Hence, it is proposed that severity of harm in rape in the private sphere is equally grave and should also be

[163] Clare McGlynn, 'Rape, Torture and the European Convention on Human Rights' (2009) 58 (3) The International and Comparative Law Quarterly 565, 579; *Aydin v Turkey* App. No. 57/1996/676/866 (ECtHR, 25 September 1997) paras 84, 86.
[164] McGlynn, ibid at 576.
[165] ibid at 577.
[166] ibid.
[167] Deborah Blatt, 'Recognizing Rape as a Method of Torture' (1991-1992) 19 New York University Review of Law and Social Change 821, 851.
[168] Clare McGlynn, 'Rape, Torture and the European Convention on Human Rights' (2009) 58 (3) The International and Comparative Law Quarterly 565, 577-578.
[169] CEDAW Committee 'General Recommendation No.35 on gender-based violence against women, updating general recommendation No. 19' (2017) U.N. Doc. CEDAW/C/GC/35 para 17.

treated as torture similar to rapes by state officials.[170] This will help in enhancing the seriousness of rape in the private sphere and put a higher responsibility on the state to prevent such rapes.

On a combined critical evaluation of all these cases, it is inferred that these human rights bodies not only treat the actual act of rape as gender-based discrimination, violation of private life and inhuman or degrading treatment, but also establish that the investigation, prosecution and punishment process need to reach the threshold of human rights standards and in case this is not done, the absence of such measures constitutes a human rights violation. This puts even greater pressure on the states to ensure high standards of protection at the stage of investigation and prosecution by enhancement of the scope of state responsibility.

2.3 Removal of Gender Stereotypes

The interpretation of the act of rape is always accompanied by gender stereotypes at every stage of the criminal process. Such existing gender stereotypes, which are based on the societal construction of gender-based norms result in harassment not only by the investigation authorities but also at the stage of trial by lawyers and sometimes by the judges themselves. In this regard, this section highlights and examines the instances of such cases of harassment and the corresponding standards of state responsibility as laid down by the UNHRC, the CEDAW Committee and the ECtHR.

In criminal trials, it is observed that the victim is usually subjected to intimate form of questioning to assess her previous sexual conduct in order to show that since she had sexual relationships in the past, she also consented to the sexual act in question. An example of this is the *LNP* case (discussed above) where the judge in the domestic court adopted a discriminatory criterion of "long-standing defloration" of the applicant indicating that she had sexual

[170] Deborah Blatt, 'Recognizing Rape as a Method of Torture' (1991-1992) 19 New York University Review of Law and Social Change 821, 851.

experience in the past and had thus consented to the sexual act.[171] The UNHRC held that such criterion amounted to discrimination on the basis of gender and ethnicity and violated Article 26 of the Covenant.[172] In this context, the UNHRC, in its General Comment No. 28 (relating to Article 3 of the Covenant) has also stated that where the character of a victim with regard to her sexual life is considered to determine her rights and obligations, it amounts to violation of equal rights of men and women under Article 3 of ICCPR.[173]

In cases of rape, the judicial stereotypes come into play not only in form of determination of previous sexual life of the victim, but sometimes the judges also look at the victim's conduct at the time of rape to check whether there was consent or not. In this context, the CEDAW Committee has a strong jurisprudence for elimination of such gender stereotypes. For instance, with respect to Article 4 of the Convention, the CEDAW Committee has adopted the General Recommendation No. 25 in 2004, which mentions that states have a positive duty to undertake special measures for removal of such gender stereotypes.[174] Such stereotypes enforce rigid gender roles and perpetuate the patriarchal domination of men over women. The CEDAW Committee has also repeatedly emphasized the huge contribution of gender stereotypes to gender violence and the need to eliminate it.[175] Thus, these stereotypes not only discriminate against women but also perpetuate gender-based violence and acts as hurdles to access of justice by the victim.

[171] *LNP v Argentine Republic* Human Rights Committee Communication No. 1610/2007, U.N. Doc. CCPR/C/102/D/1610/2007(16 August 2011) para 13.3.
[172] ibid.
[173] UNHRC, 'General Comment No. 28 – Equality of rights between men and women (Article 3)' (2000) U.N.Doc. CCPR/C/21/Rev.1/Add.10 para 20.
[174] CEDAW Committee 'General Recommendation No. 25 on article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measure' (2004) para 7.
[175] CEDAW Committee 'General Recommendation No. 19 on Violence against Women' (1992) U.N. Doc. A/47/38 para 11. See also *Isatou Jallow v Bulgaria*, CEDAW Committee Communication No. 32/2011, U.N. Doc. CEDAW/C/52/D/32/2011(2012) para 8.6. See also OHCHR Commissioned Report, 'Gender Stereotyping as a Human Rights violation' (2013) 27.

Such stereotypes by the judiciary is observed in the case of *Karen Tayag Vertido v Philippines*[176] as decided by the CEDAW Committee. In this case, the applicant, an employee of Davao City Chamber of Commerce, was raped by her employer who was the Chamber President when he offered to drop her home after one of the meetings in the Chamber.[177] The domestic level judges held that the fact that the applicant did not try to escape or shout for help when she was raped clearly showed that there was no rape.[178] The domestic court also took into consideration the victim's conduct before the act of rape (going on a ride with her perpetrator) to hold that the act did not amount to rape.[179] This case is similar to a lot of rape trials where similar observations of the victim's conduct before the act of rape such as drinking, wearing 'revealing' clothing or going with a ride with the perpetrator are treated as indicators to determine consent.[180]

In the *Vertido* case, the CEDAW Committee held that such interpretation of consent by the court amounted to discrimination under Article 2(c) and (f) of the Convention as it perpetuated gender-rigid standards of how an ideal rape victim should behave.[181] The Committee further held that such gender stereotypes which do not look at the victim's consent but rather focus on her lack of resistance to rape is discriminatory and should not be adopted by the judiciary for adjudication of rape cases.[182] Thus, it directed that the state had to exercise due diligence to eradicate such practices and customs which contribute to the gender hierarchy under Article 5(a) of the Convention.[183]

[176] *Karen Tayag Vertido v Philippines* CEDAW Committee Communication No.18/2008, U.N. Doc. CEDAW/C/46/D/18/2008 (22 September 2010).
[177] ibid at paras 2.1, 2.2.
[178] ibid at para 2.9.
[179] ibid at para 8.5.
[180] Deborah L. Rhode, 'Sex and Violence' in *Justice and Gender* (Harvard University Press 1989) 248.
[181] *Karen Tayag Vertido v Philippines* CEDAW Committee Communication No.18/2008, U.N. Doc. CEDAW/C/46/D/18/2008 (22 September 2010) para 8.4.
[182] ibid.
[183] ibid.

The CEDAW Committee also applied this standard in the case of *RPB v Philippines* wherein it treated the adjudication of rape cases on the basis of gender stereotypes as a manifestation of gender-based discrimination.[184] In this case, the complainant, who had a speaking and hearing disability, was raped when she was 17 years old.[185] In the trial, she was not given proper assistance in terms of sign language interpreters which affected her full participation in the criminal proceedings.[186]

In this regard, the CEDAW Committee stated that this amounted to discrimination under Article 2(c) and 2(d) of the Convention.[187] Furthermore, the Committee also placed a special emphasis on the harmful effects of gender stereotyping on the victim's right to an impartial and fair trial. Hence, it held that such stereotypes violated Article 2(f) of the Convention wherein the state had a responsibility to remedy all laws and customs (including stereotypes) which discriminated against women.[188] The Committee also relied on the *Vertido* case and stated that such stereotypes put a greater evidentiary burden on the woman during the trial which is a form of discrimination.[189] Thus, these stereotypes can be abolished by naming them explicitly by the court and by giving clear instructions to the state with respect to their obligations in the removal of such stereotypes in all levels.[190]

The ECtHR also has a strong jurisprudence with respect to enforcing responsibility on states for removal of gender stereotypes. For instance, in the *Slovenia* case, the victim was continuously asked questions of a personal nature during cross-examination which were not only humiliating for her psychologically but also amounted to an attack on her character.[191] In

[184] *RPB v Philippines* CEDAW Committee Communication No.34/2011, U.N. Doc. CEDAW/C/57/D/34/2011 (12 March 2014).
[185] ibid at para 2.1.
[186] ibid.
[187] ibid at para 8.7.
[188] ibid at para 8.8.
[189] ibid at para 3.3.
[190] Eva Brems and Alexandra Timmer (eds.), *Stereotypes and Human Rights Law* (Intersentia Publishing 2016) 4.
[191] *Y v Slovenia* App. No. 41107/10 (ECtHR, 28 May 2015) para 108.

this case, the ECtHR held that the Presiding judge should have completely disallowed such form and content of questioning as it violates her privacy rights under the Convention.[192]

Moreover, in the case of *M.C. v Bulgaria*, the ECtHR has held that the domestic court's construction of consent which presupposed an 'ideal victim' who will definitely struggle and show signs of physical resistance at the time of rape was highly problematic.[193] In this case, a fourteen year old girl was raped. The domestic courts had held that there was no rape as there was no evidence of threat or usage of force and there was no physical resistance from the victim.[194] The ECtHR stated that there is no physical resistance from victims (especially minors) due to fear of violence and other psychological factors and thus, the absence of physical resistance cannot negate the existence of rape.[195] The court also considered the opinion of experts who stated the 'ideal victim' presupposition does not take into account the "frozen fright syndrome", a psychological behaviour where the victim does not resist but remains passive during such an act to disassociate herself from the event.[196] This is mostly seen in case of inexperienced persons or minors as observed in this case.[197] In furtherance of this reasoning, the ECtHR held that the state had a positive obligation under Article 3 (Prohibition of inhuman and degrading treatment) and Article 8 (Right to respect for private life) of the ECHR to provide effective legal protection against rape, enforce effective investigation procedures and punish the perpetrators of rape.[198]

On a comparison of the responses by the human rights bodies to the problem of gender stereotypes in cases of rape, it is noticed that the CEDAW Committee assesses such stereotypes in a more direct and effective manner when compared with the approaches of the UNHRC and

[192] *Y v Slovenia* App. No. 41107/10 (ECtHR, 28 May 2015) paras 108, 115.
[193] *M.C. v Bulgaria* App. No. 39272/98 (ECtHR, 4 December 2003) para 166.
[194] ibid at para 64.
[195] ibid at para 164.
[196] ibid at paras 69-71.
[197] ibid.
[198] ibid at para 153.

the ECtHR. In the latter cases, though the courts recognized the problem of examining previous sexual conduct of the victim (*LNP* case by the UNHRC) and lack of physical resistance (*Bulgaria* case by the ECtHR) as core elements to establish rape, they did not specifically name these elements as gender stereotypes.

For instance, in the *LNP* case, though the court held that such an act of examining sexual conduct of the victim is a form of discrimination under the ICCPR, it did not acknowledge explicitly that this act is a gender stereotype[199] and that usage of such stereotypes itself is inconsistent with the UNHRC's General Comment No. 28, which mentions that the state has a positive obligation to keep stereotypes in rape trials in check as they adversely impact the victim's rights.[200] Moreover, the absence of naming of such stereotypes expressly by the judiciary leads to an unfavourable situation wherein future victims of rape are still vulnerable as these stereotypes are not explicitly called out as acts of discrimination which amount to violation of the provisions of the Covenant.[201] In contrast, in both the cases by the CEDAW Committee discussed above,[202] it was explicitly stated in the judgement that victim-blaming in cases of rape is a gender stereotype and must be avoided in judicial reasoning as it amounts to discrimination against women.[203]

Hence, the international human rights standards (due diligence and positive obligations) dictate that the judiciary should not look at the lack of physical resistance, previous sexual conduct by the victim or indulge in victim-blaming to establish consent as such a notion is based on gender stereotypes. Rather, it should also take into account the facts, the law and the victim's

[199] OHCHR Commissioned Report, 'Gender Stereotyping as a Human Rights violation' (2013) 68, 69.
[200] UNHRC, 'General Comment 28-Equality of rights between men and women (article 3)' (2000) U.N. Doc. CCPR/C/21/Rev.1/Add.10 para 20.
[201] Simone Cusack, 'Eliminating judicial stereotyping - Equal access to justice for women in gender-based violence cases' OHCHR (2014) 35.
[202] *Karen Tayag Vertido v Philippines* CEDAW Committee Communication No.18/2008, U.N. Doc. CEDAW/C/46/D/18/2008 (22 September 2010); *RPB v Philippines* CEDAW Committee Communication No.34/2011, U.N. Doc. CEDAW/C/57/D/34/2011 (12 March 2014).
[203] *Vertido* ibid at para 8.4.

experiences (whether she had given voluntary consent or not) in order to adjudicate cases of rape.

Conclusion

On a detailed analysis of the aforementioned cases, the chapter finds that the language of human rights not only establishes the cause of rape but also has a major contribution to impose state responsibility as a result of such rights violations. Such standards of state responsibility are applicable holistically both to state as well as private actors. In addition to establishing positive obligations of the state by means of the due diligence standard, this chapter also breaks down the standard into specific measures which need to be undertaken by the state to reach the threshold of this standard by making suitable changes in the domestic framework. Such standards are directed to each organ of the state, that is, the legislature, executive as well as the judiciary in order to ensure that there is a holistic model for application of these human rights standards in the national context.

In the context of legislature, the thesis focuses on the effective criminalization of offences of specific types of rape as a starting point to ensure the rights of rape victims are protected. With regard to the executive, these human rights bodies lay down strict standards in order to ensure quick and effective investigation of rape cases without giving undue hardship to the victim and to provide adequate redress to the victims. With respect to the judiciary, these bodies interpret gender stereotypes as human rights violations and direct the judiciary to remove all such stereotypes when it comes to adjudication of cases relating to rape.

CHAPTER 3: INDIA'S COMPLIANCE WITH INTERNATIONAL HUMAN RIGHTS STANDARDS

Introduction:

The previous chapters concluded that the international and regional human rights bodies explicitly recognize rape as a human rights violation. These bodies also establish state responsibility in cases of rape (in both public and private sphere) by state as well as non-state actors. In this context, this chapter will examine the Indian criminal justice system with respect to rape by evaluating the extent of conformity of these substantive and procedural safeguards with the international human rights standards which are highlighted in the previous chapter.

At this juncture, it is important to answer why this thesis explores the state response to rape in India against the backdrop of international human rights standards. India neither has an effective domestic human rights framework nor is there a regional human rights body for Asia. The national legislation relating to human rights, that is, the 1993 Protection of Human Rights Act is a procedural legislation which establishes National and State Human Rights Commissions in India[204] but does not specify the substantive human rights of citizens that are subject to protection in detail. Rather, it defines human rights as "life, liberty, equality and dignity" and makes a reference to the definitions mention in the Indian Constitution and international conventions.[205] Moreover, the Commission does not have the power of enforcement of its decisions. It only has the power to issue recommendation which further dilutes the effectiveness of the Commission.[206] Hence, in the absence of an efficacious domestic or regional human rights regime, this thesis looks at 'international' human rights standards to combat rape in the Indian context.

[204] The Protection of Human Rights Act 1993, articles 3, 21.
[205] ibid at article 2(d).
[206] Vijayashri Sripati, 'India's National Human Rights Commission: A shackled Commission?' (2000) 18 (1) Boston University International Law Journal 1, 5.

India has the obligation to interpret its domestic law in accordance with the international treaties by virtue of its membership to such treaties (in this case, the ICCPR and CEDAW). Such international obligations have been applied earlier in the Indian context (through judicial or legislative incorporations) in a number of cases.[207] In case of judicial incorporation, there are three modes by which Indian courts rely on international obligations to interpret domestic cases. Firstly, in cases where the domestic law reflects the provision of an international convention to which it is a party, but has vague or ambiguous terms, the Supreme Court has interpreted these terms in accordance to the international conventions.[208] Secondly, in cases where there is no domestic law framed in pursuance to an international Convention to which India is a party, the courts still put them into effect in the Indian context by relying on the international principle in the case at hand.[209] Thirdly, when the circumstances are same as the aforementioned second mode, in addition to putting the international obligation into effect, the courts have gone a step further and framed guidelines as in the case of *Vishaka v State of Rajasthan*[210] where the Supreme Court relied on CEDAW to frame guidelines in case of sexual harassment of women at the workplace.[211]

In addition to judicial incorporation, another example of incorporation of international human rights law in the India in the past is legislative incorporation wherein the laws in India explicitly rely on international standards in their text. An example of this is the reliance on CEDAW and other international human rights instruments to interpret the state's obligations for prevention of gender-based violence which is expressly mentioned in the Protection of Women from

[207] Lavanya Rajamani, 'International law and the Constitution' in Pratap B. Mehta, Madhav Khosla & Sujit Choudhry (eds.), *The Oxford Handbook of Indian constitution* (Oxford University Press 2016) 146-147.
[208] ibid. See also *Kuldip Nayar v Union of India* (2006) 7 SCC 1(167); *Salil Bali v Union of India* (2013) 7 SCC 705; *M/s Mackinnon Mackenzie and Co. Ltd. v Audrey D' Costa* (1987) 2 SCC 469; *Pratap Singh v Union of India* (2005) 3 SCC 551.
[209] *People's Union for Civil Liberties v Union of India* (1997) 3 SCC 433.
[210] *Vishaka v State of Rajasthan* (1997) 6 SCC 241.
[211] ibid. In this case the Supreme Court relied on CEDAW to come to the conclusion that sexual harassment of women at the workplace adversely affected their dignity.

Domestic Violence Act, 2005 ('PWDVA').[212] Hence, these past practices show the importance of international human rights law in the Indian context. Therefore, this thesis takes this aspect further and builds on this connection between the international law and domestic law by examining the legal safeguards with respect to rape in India and checking the extent of their conformity to the standards set down by these international human rights bodies.

With respect to the ECHR, the Indian position is a little different. As India is not a party to ECHR, it does not have to interpret its domestic laws in line with the Convention. However, as stated by former UN Special Rapporteur on Violence against Women, Dr. Yakin Ertürk, the decisions and recommendations and *opinio iuris* of the international human rights bodies regarding state obligation to protect and punish perpetrators of gender-based violence have assumed the status of customary international law.[213] This effectively means that even if India is not privy to a particular treaty (such as ECHR), by virtue of such custom, it still has the obligation to act positively to prevent rape and other forms of such gender-based violence.[214] Moreover, it is highly useful to study the Indian laws and use the ECtHR cases as a comparator due to the established standards of the ECtHR with respect to positive obligations of the state in cases of rape (especially in the private sphere).

Hence, this thesis undertakes a comparative exercise in order to check whether the Indian legal practices to combat rape are in conformity with the aforementioned international human rights standards as set down by the UNHRC, the CEDAW Committee and the ECtHR. As a starting point, this chapter explores the substantive law in the Indian system with regard to rape and the

[212] The 'Statement of Object and Reasons' of the PWDVA recognizes domestic violence as a human rights violation by relying on the Vienna Accord, 1994 and the Beijing Platform for Action, 1995. It also expressly states that it also relies on CEDAW General Recommendation No. 12 (1989) which mentions that state should take measures to ensure women are free from violence occurring within their homes.

[213] ECOSOC 'The Due Diligence Standard as a tool for the Elimination Of Violence Against Women-Report of the Special Rapporteur on violence against women, its causes and consequences, Yakin Ertürk' (2006) U.N. Doc. E/CN.4//2006/61 para 29.

[214] Maria Eriksson, *Defining rape: Emerging obligations for States under International Law* (Martinus Nijhoff Publishers 2011) 202.

scope of state responsibility in the light of these standards. The next section compares the procedural safeguards that exist in the pre-trial and trial stage of rape cases and compares them with international standards of reporting, investigation and punishment in cases of rape. The last section of this chapter identifies the gender stereotypes of the judiciary with respect to rape in India and compares it with the standards set by these international human rights bodies in relation to such stereotypes.

3.1 Addressing Rape through Substantive Law

The problem of rape is increasingly serious in India. Records from the National Crime Record Bureau ('NCRB')[215] indicate that 2.84 rape cases were reported every hour in the year 2012.[216] Recognizing the gravity of such an offence, there are several laws (both substantive and procedural) in India which are put in place in order to combat rape. Out of these laws, the substantive laws form the first step of protection in a case of rape by criminalizing rape and setting down the penalties. Therefore, this section critically examines such substantive laws in the light of international human rights standards in order to check their effectiveness in cases of rape.

3.1.1 Section 375 Indian Penal Code

Section 375 of the Indian Penal Code defines rape as penetration by the penis or insertion of any other object or application of mouth by a man into the vagina/mouth/anus/urethra of a woman without her will and voluntary consent where such consent is immaterial in case the victim is a minor.[217] Such a definition of rape was broadened after the December 23, 2012 brutal gang-rape and murder of a woman in Delhi. This case shocked the conscience of the

[215] National Crime Records Bureau (NCRB) is a Central Government agency that maps, collects and analyses data relating to crimes in India.
[216] UNGA 'Report of the Special Rapporteur on violence against women, its causes and consequences (Addendum), Mission to India' (2014) 5 UN Doc. A/HRC/26/38/Add.1.
[217] Indian Penal Code 1860, section 375.

nation and led to collective outrage and protest.[218] In response, the Government of India convened a three-membered committee of retired justices headed by Justice J. S. Verma who were tasked with the production of a report suggesting changes in the criminal justice framework for enhanced punishment of offenders and quick access to criminal justice for sexual violence victims.[219] The committee, in its report ('Verma Committee Report'), suggested monumental changes in criminal law from which the current wide definition of rape and other sexual offences emerged. It also prescribed procedural safeguards in cases of rape.[220] Most of these suggestions were incorporated in the Criminal Law Amendment Bill, 2013 ('2013 Amendment') which introduced amendments in the substantive criminal law, that is, the Indian Penal Code, 1860 ('IPC') as well as the procedural criminal laws, namely, the Code of Criminal Procedure, 1973 ('CrPC') and the Indian Evidence Act, 1872 ('IEA').[221]

One of the major reforms was the broadening of the traditional penile-vaginal definition of rape where penetration was not restricted to penis but could also include mouth or any other object and such insertion was not restricted to the vagina but also included the mouth, anus or urethra.[222] Although the new construction of 'penetration' is slightly broader in construction, restricting the sexual nature of rape merely to different forms of penetration does not take into account the other ways in which a woman's sexual autonomy is violated[223] and the coercive circumstances which accompany the rape and thus this definition is narrow when compared to international human rights standards.[224] In addition to this, there are also provisions in the IPC relating to aggravated rapes such as rape by a policeman, medical personnel and armed

[218] Saptarshi Mandal, 'The Impossibility of Marital Rape - Contestations around Marriage, Sex, Violence and the Law in Contemporary India' (2014) Australian Feminist Studies 29 (81) 255, 256.
[219] Saptarshi Mandal, 'The Impossibility of Marital Rape-Contestations around Marriage, Sex, Violence and the Law in Contemporary India' (2014) Australian Feminist Studies 29 (81) 255, 256.
[220] Government of India, (Justice J.S. Verma Committee) *Report of the Committee on Amendments to Criminal Law* (New Delhi 2013).
[221] Government of India, Criminal Law Amendment Act 2013.
[222] Indian Penal Code 1860, section 375.
[223] Maria Eriksson, *Defining rape: Emerging obligations for States under International Law* (Martinus Nijhoff Publishers 2011) 113.
[224] ibid at 112.

forces,[225] rape causing death or leading to vegetative state of the victim,[226] rape by husband during separation,[227] rape by other public officials and other persons in authority,[228] gang-rapes,[229] and rape by repeat offenders.[230] Most of these examples showcase rape by a person in power and position of dominance or are examples of abuse of trust and hence conform to the international human rights standards which recognize that the hierarchy of power between the victim and the perpetrator is a cause of rape.[231]

The second major change in the definition of rape was with regard to the issue of consent, wherein consent is to be read as positive affirmation to be proved by the accused and not the erstwhile procedure where the burden of proof was on the woman to show that she did not consent. Such consent may be given verbally or even through gestures and other non-verbal modes for a particular sexual act only and such consent must be voluntary in nature.[232] Moreover, it prevents secondary victimization of the victim which is caused due to the high standard of burden of proof on her to prove the lack of consent beyond reasonable doubt.[233] This is in conformity with the international and regional human rights standards which also focus on affirmative consent of the victim as such a focus is in consonance with the woman's right to bodily integrity and sexual autonomy.[234]

Although the change in the definition of consent in the IPC conforms to the international standards, the interpretation of consent by the Indian judiciary is highly problematic. This is

[225] Indian Penal Code 1860, section 376 (2).
[226] ibid at section 376A.
[227] Indian Penal Code 1860, section 376B.
[228] ibid at section 376C.
[229] ibid at section 376D.
[230] ibid at section 376E.
[231] CEDAW Committee 'General Recommendation No.35 on gender-based violence against women, updating general recommendation No. 19' (2017) U.N. Doc. CEDAW/C/GC/35 para 9.
[232] Indian Penal Code 1860, section 375 explanation 2.
[233] UN Women, 'Handbook for Legislation on Violence against Women' (2012) 25 <http://www.unwomen.org/~/media/headquarters/attachments/sections/library/publications/2012/12/unw_legislation-handbook%20pdf.pdf?v=1&d=20141013T121502> accessed 26 March 2017.
[234] ibid. See also Amnesty International, 'Rape and sexual violence: Human rights law and standards in the International Criminal Court' (2011) 13 <https://www.amnesty.org/en/documents/IOR53/001/2011/en/> accessed 15 September 2017.

observed in the case of *Mahmood Farooqui v State (Government of NCT of Delhi)* which was recently decided on 25 September 2017, where the Delhi High Court held that a feeble 'no' to the sexual act may mean a 'yes' to the man and thus was not sufficient to negate consent and therefore, the act did not amount to rape.[235]

This judgement effectively nullifies the victim-centric standard of consent as "unequivocal and voluntary agreement" which is stated in the law[236] by shifting this standard of consent from positive affirmation to what the man understood as a negation of consent.[237] The court thus judicially formulated a new test of consent where the strength of the 'no' as understood by the perpetrator plays a dominant role in proving non-consent.[238] In applying this new standard of consent, the court further held that this standard was especially applicable in the present case where the parties were acquaintances, were academic intellectuals and had physical contact in the past which made it impossible to gauge whether a feeble 'no' in such a case was an actual 'no' to the sexual act.[239] Hence, by taking into account extraneous factors and stereotypes, the court has created a new class for deciphering consent from the perpetrator's perspective which is not in conformity with the international standards of focus on the victim's experience of rape as a violation of her sexual autonomy.

3.1.2 Rape in the private sphere

It is observed that the incidents of rape in the private sphere, especially marital rape are very high. In this regard, since India's laws treat marital rape as an exception to the offence of rape, there is no documentation of the exact number of cases of marital rape. However, under the

[235] *Mahmood Farooqui v State (Government of NCT of Delhi)* Criminal Law Appeal No. 944/2016 (25 September 2017) paras 46-47, 78.
[236] Indian Penal Code 1860, section 375 explanation 2.
[237] Jhuma Sen, 'Dastan-E-Judiciary versus Consent: Through Farooqi case, court creates a separate class of survivors—Educated Women' *Outlook* (5 October 2017) <https://www.outlookindia.com/website/story/dastan-e-judiciary-versus-consent-through-farooqi-case-court-creates-a-separate-/302636> accessed 30 October 2017.
[238] ibid.
[239] *Mahmood Farooqui v State (Government of NCT of Delhi)* Criminal Law Appeal No. 944/2016 (25 September 2017) para 78.

broad umbrella of intimate partner violence, it is observed that the percentage of married women facing intimate partner violence in form of physical or sexual violence at least once in their life is at a high 37%.[240]

Although the definition of rape in Section 375 of the IPC appears to be broadened by the 2013 Amendment, the Parliament failed to consider a significant recommendation of the Verma Committee Report which was the removal of the marital rape provision as an exception to the offence of rape.[241] This exception reads as, "Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape."[242] This leads to a dangerous situation in which a man is legally allowed to rape his wife with impunity if she is above the age of fifteen years.

In a recent judgement by the Supreme Court, namely, *Independent Thought v Union of India*[243] decided on 11 October 2017, the court has struck down the second part of the exception of 'fifteen years' and raised it to 'eighteen years'. Although this case *prima facie* appears as a first step to the enactment of the law on marital rape, a closer examination of the judgement reveals that it is not so. The judgement is decided solely in order to bring the age of the married girl child to eighteen years so that it is in consonance with the specific laws relating to child marriage and protection of children from sexual offences which define the age of eighteen years as the age of majority.[244] The fact that this judgement should not be approached from the issue regarding complete removal of the exception of marital rape is also expressly stated in the judgement.[245] In the best scenario, even if this judgement is considered as a stepping stone to the removal of the marital rape exception by protecting girls in the age bracket of fifteen to

[240] International Institute for Population Sciences (IIPS) and Macro International, *National Family Health Survey (NFHS-3), 2005–06: India* (IIPS, Mumbai 2007) 507.
[241] Government of India, (Justice J.S. Verma Committee) *Report of the Committee on Amendments to Criminal Law* (New Delhi 2013) 117.
[242] Indian Penal Code 1860, section 375 exception 2.
[243] *Independent Thought v Union of India* W.P. (Civil) No.382/ 2013 (11 October 2017)
[244] ibid at para 105.
[245] ibid at para 2.

eighteen years, the fact remains that marital rape is still not considered an offence in case the wife is above eighteen years of age. Considering the high figures with respect to intimate partner violence, this is highly dangerous as it provides immunity to perpetrators of marital rape. The CEDAW Committee in its Concluding Observations to the India's Reports in 2014 has also recognized the gravity of this problem and has directed the government to expand the definition of rape in the IPC in order to include marital rape as a form of gross human rights violation.[246]

In absence of an effective domestic legislation to specifically address the problem of marital rape as stated above, the thesis evaluates how this situation matches up to the international human rights standards in this regard. The absence of domestic law to deal with rape is recognized as a human rights violation by international and regional human rights bodies. Such absence of law is a violation of the right to private life of a woman as has been stated in the case of *X and Y v Netherlands* as it affects the core elements of the victim's privacy.[247] In addition to the establishment of rape in private sphere as a violation of personal privacy, the standard laid down by the *X and Y v Netherlands* judgement also established state responsibility to prevent and protect victims of gender-based violence in the private sphere.[248] The importance of such right to privacy is observed in a recent landmark judgement, namely, *Justice K.S. Puttaswamy (Retd.) v Union of India*, where the Supreme Court of India has laid down that the right to privacy holds utmost importance and is protected against public as well as private persons and was a fundamental right.[249] In the light of this judgement, the protection of rape as a violation of the fundamental right of the woman assumes great significance. Hence, in pursuance of recognition of the right to privacy, it becomes imperative that the state should

[246] CEDAW Committee 'Concluding observations on the combined fourth and fifth periodic reports of India' (2014) U.N. Doc. CEDAW/C/IND/CO/4-5 para 11.
[247] *X and Y v Netherlands* App. No. 89978/80 (ECtHR, 26 March 1985) para 27.
[248] ibid at para 40.
[249] *Justice K.S. Puttaswamy (Retd.) v Union of India* W.P. (Civil) 494/2012 (24 August 2017).

take immediate steps for effective criminalization of marital rape at the earliest in order to ensure protection of women in the private sphere.

The Indian lawmakers have given various reasons for the marital rape exception in the IPC. For instance, Ms. Sumitra Mahajan, a former lawmaker and current Speaker of the Lok Sabha (Lower House of the Indian Parliament) in one of the parliament debates regarding marital rape stated that the Indian family system is peculiar and different from other countries.[250] She further asserted that such problems should be confined within the home by internal counselling and criminal law should not interfere in this regard.[251]

The government further substantiates its stance by stating that India has a declaration with respect to Article 5 of the Convention which directs state parties to changes cultural practices which perpetuate gender discrimination and thus it shall follow this obligation only to the extent that it does not conflict with the community standards of personal relations.[252] However, such reasons run contrary to the 'due diligence' standard set by international human rights bodies which states that it is the state's responsibility to bring reforms in the law in order to address sexual violence against women in the private sphere by non-state actors.[253] For instance, in the case of *C.R. v United Kingdom*, the ECtHR has held that since marital rape is a violation of personal dignity, even if there is no express criminal prohibition on the act, the fact that it is so debasing, does not give an immunity to the perpetrator of rape in marital relations.[254]

[250] Government of India, Debate of the Lok Sabha, Lok Sabha Secretariat (New Delhi 19 March 2013).
[251] ibid.
[252] United Nations Entity for Gender Equality and the Empowerment of Women (UN Women), 'Declarations, Reservations and Objections to CEDAW' <http://www.un.org/womenwatch/daw/cedaw/reservations-country.htm> accessed 9 December 2016.
[253] *Karen Tayag Vertido v Philippines* CEDAW Committee Communication No.18/2008, U.N. Doc. CEDAW/C/46/D/18/2008 (22 September 2010) para 3.17.
[254] *C.R .v United Kingdom* App. No. 20190/92 (ECtHR, 22 November 1995) para 42.

Another oft-cited reason by the Indian government for non-criminalization of marital rape is that, there are adequate forums for redress of marital rape in other laws such as Protection of Women against Domestic Violence Act, 2005 ('PWDVA') and other provisions of IPC such as Cruelty (Section 498 A IPC) and thus a separate offence for marital rape need not be carved out in the IPC.[255] However, on further examination of these laws, it will be shown that these laws are inadequate to address marital rape and do not conform to the international human rights standards.

a. The Protection of Women from Domestic Violence Act, 2005

In order to prevent domestic violence, the Indian Parliament has enacted The Protection of Women from Domestic Violence Act, 2005. This Act prohibits violence against women in the private realm and covers abuses ranging from physical as well as emotional and sexual abuse.[256] Hence, marital rape complaints can be filed under this Act and the victims can claim remedies such as protection orders and compensation.[257] However, this Act suffers from a lot of implementation problems such as lack of appointment of protection officers and service providers, lack of training and awareness, less allocation of budget, all of which lead to a lot of delay and procedural irregularities.[258] This is a violation of international human rights standards which state that such ineffective investigation and delay amounts to inhuman and degrading treatment of the victim and leads to denial to access of justice to the victim.[259]

Since this Act is civil in nature, the offenders of marital rape go unpunished, which is a form of discrimination as it creates an unfair distinction between a perpetrator of rape outside marriage and a perpetrator of rape within marriage, wherein the former is subject to strict

[255] Saptarshi Mandal, 'The Impossibility of Marital Rape-Contestations around Marriage, Sex, Violence and the Law in Contemporary India' (2014) Australian Feminist Studies 29 (81) 255, 257.
[256] The Protection of Women from Domestic Violence Act 2005, section 4.
[257] ibid at sections 18, 19, 20.
[258] Oxfam India, 'The Protection of Women from Domestic Violence Act, 2005: Handbook for Parliamentarians' (CLRA, New Delhi 2014) 16.
[259] *Y v Slovenia* App. No. 41107/10 (ECtHR, 28 May 2015) paras 99, 100.

criminal sanctions but the latter goes unpunished as it is a civil offence and does not face criminal sanction.[260] The insufficient protection to victims by treating such rapes in the private sphere as a civil wrong is also highlighted by international human rights bodies. For instance, in the case of *X and Y v Netherlands*, the ECtHR held that the rape of a woman in the private sphere was grave as it affected the core essence of her private life and thus, in order to ensure deterrence, criminal law was the adequate and preferred form of state response.[261]

As stated earlier, when questioned about non-criminalization of marital rape, lawmakers reply that there are adequate remedies under the PWDVA. However, these problems show that PWDVA is not an alternative efficacious remedy. Moreover, making this grave offence as a civil wrong legally concretizes the notion that marital rape is a private dispute between the parties and thus, limits the state responsibility even further.[262]

b. Section 498A Indian Penal Code

Another provision that women resort to in order to seek redress from the violence of marital rape is Section 498A IPC which criminalizes physical and mental cruelty (by causing a "danger to her life, limb or health") to a woman by her husband and provides for imprisonment up to three years and a fine.[263] Though physical cruelty is punishable, the provision does not mention 'sexual' cruelty which is an essential part of marital rape and thus the gravity of this offence is not reflected in this section. Even if it does qualify under 'cruelty', the problem is that it is only punishable with a fine and maximum imprisonment for up to three years which is strikingly low when compared to the punishment of rape as mentioned in Section 376 of the IPC (which

[260] Saptarshi Mandal, 'The Impossibility of Marital Rape-Contestations around Marriage, Sex, Violence and the Law in Contemporary India' (2014) Australian Feminist Studies 29 (81) 255, 258. See also Lawyers Collective, 'Resource Tool on Monitoring and Evaluating Implementation of the Protection of Women from Domestic Violence Act, 2005' (2013) <http://www.lawyerscollective.org/wp-content/uploads/2012/07/Resource-Tool-for-Monitoring-Evaluation-of-PWDVA.pdf> accessed 26 August 2017.
[261] *X and Y v Netherlands* App. No. 89978/80 (ECtHR, 26 March 1985) para 27.
[262] Saptarshi Mandal, 'The Impossibility of Marital Rape-Contestations around Marriage, Sex, Violence and the Law in Contemporary India' (2014) Australian Feminist Studies 29 (81) 255, 258.
[263] Indian Penal Code 1860, section 498A.

specifies the punishment from a minimum of seven years which may extend to imprisonment for life to death in some cases).[264] Although the death penalty is not advocated here, yet it is observed that such minimal measure of punishment under Section 498A is inadequate for the offence of marital rape and does not provide effective deterrence as per international human rights standards.

Moreover, the access to justice by using this provision is highly limited due to the narrow interpretation of this provision by the Supreme Court. This narrow interpretation is the product of general mistrust of the law enforcement agencies, public as well as judiciary who subscribe to the discourse that this section and other similar provisions related to gender-based violence is misused by scheming women to file false cases against their husbands to harass them.[265] Falling prey to this public narrative, the Supreme Court in the recent case of *Rajesh Sharma v State of Uttar Pradesh*, stated that in order to combat the misuse of Section 498A IPC, a welfare committee shall be constituted to scrutinize the complaint and submit a report before it is taken into cognizance by the police.[266] This judgement adds an additional legal barrier for victims' access to justice in cases of rape in the private sphere as it puts an undue burden on the victim at the first stage itself in addition to the high standards of proving beyond reasonable doubt at the trial stage. This constitutes inhuman and degrading treatment as per international standards.[267] Moreover, the husband is not arrested until the report is submitted and is entitled to bail within a day which further adds to the re-victimization of the victim as she is made to

[264] Indian Penal Code 1860, section 376.

[265] Pratiksha Bakshi, 'Medicalization of Consent and Falsity-The figure of the Habitué in Rape Law' in *Public Secrets of Law: Rape Trials in India* (Oxford University Press 2014) 67. See also Indira Jaising, 'Victim in the dock', *The Indian Express* (2 August 2017) <http://indianexpress.com/article/opinion/columns/victim-in-the-dock-law-of-cruelty-against-women-supreme-court-judgment-rajesh-sharma-and-ors-v-state-of-up-and-anr-4777931/> accessed 31 August 2017. See also Kirti Singh and Akhila Singh, 'Marital Cruelty and 498A: A Study on Legal Redressal for Victims in Two States' *National Commission for Women* (2014) <http://ncw.nic.in/pdfReports/Marital_Cruelty_and_498A_A_Study_on_Legal_Redressal_for_Victims_in_Two_States.pdf> accessed 24 October 2017.

[266] *Rajesh Sharma v State of Uttar Pradesh* Criminal Appeal No. 1265 of 2017 (27 July 2013) para 19.

[267] CEDAW Committee 'Concluding observations on the combined fourth and fifth periodic reports of India' (2014) U.N. Doc. CEDAW/C/IND/CO/4-5.

live with her perpetrator without any legal redress even after she files a complaint under this section.[268] It is therefore concluded that these laws do not meet the international human rights of 'due diligence' as they fail to prevent and protect victims in case of rape in the private sphere. In absence of an effective domestic framework, the available option to combat marital rape is to use the international human rights standards as a guidance to push for legal reforms. Moreover, India has not signed the Optional Protocol to the CEDAW, 2000 [269] due to which victims of marital rape cannot directly access the CEDAW Committee for redress. Thus, it is imperative that India ratifies the Optional Protocol at the earliest in order to provide a forum for individuals when their human rights are violated, especially in cases of rape.[270]

3.2 Procedural Safeguards in relation to Rape

In contrast to the substantive laws which codify the definition of offences and their punishment, the procedural criminal laws in India, namely, the CrPC and the IEA, lay down directions to access the criminal justice system, procedures for investigation and manner of conducting criminal proceedings. This part of the thesis compares these procedural safeguards with the international standards of rape as discrimination, violation of right to private life and a form of inhuman or degrading treatment and finally evaluate the extent of conformity to these standards.

After the 2013 Amendment Act, there have been a lot of changes to the procedural requirements in a rape trial in order to provide victims with better access to justice. Section 164(5) of CrPC has been amended wherein in case of victims who are mentally or physically disabled, the statement by a Magistrate is taken as an examination-in-chief and the victim is only cross-

[268] Indira Jaising, 'Victim in the dock', *The Indian Express* (2 August 2017) <http://indianexpress.com/article/opinion/columns/victim-in-the-dock-law-of-cruelty-against-women-supreme-court-judgment-rajesh-sharma-and-ors-v-state-of-up-and-anr-4777931/> accessed 31 August 2017.

[269] United Nations Human Rights Office of the High Commissioner, Status of Ratification <http://indicators.ohchr.org/> accessed 9 December 2016.

[270] CEDAW Committee 'Concluding observations on the combined fourth and fifth periodic reports of India' (2014) U.N. Doc. CEDAW/C/IND/CO/4-5.

examined at the trial stage in order to prevent re-victimization of the victim.[271] Such a procedure prevents discrimination and thus meets the standard set by the CEDAW Committee in the *RPB v Philippines* case wherein the Committee held that victims (especially with physical abilities) should be provided proper assistance by the state for her full participation in the criminal trial and to protect the victim against discrimination.[272]

The 2013 Amendment Act has also made changes in the law in order to prevent re-traumatization at the time of giving evidence such as in-video proceedings for minor victims of rape,[273] removal of prior sanction of Government for cognizance of a case by public servants who are accused of rape,[274] special procedures for mentally/physically disabled victims at the time of reporting FIR[275] and at the time of identification parade of accused.[276]

The amended Code also provides for fast-tracking of rape cases wherein the maximum time for a completion of trial is two months from the date of filing the charge sheet.[277] However, on a practical application of law, it is observed that this law on prevention of undue delay is rarely followed. Moreover, the framing of rape as a loss of family honour and the constant discrediting of victim by the justice system leads to non-reporting or delayed registration and investigation of complaint even before reaching the charge sheet stage (when the law on delay becomes applicable).[278] Such a delay is especially observed in high-profile cases where the accused is an influential person as in the *Asaram Bapu* case.[279] Hence, it is concluded that though such

[271] Code of Criminal Procedure 1973, section 164(5).
[272] *RPB v Philippines* CEDAW Committee Communication No.34/2011, U.N. Doc. CEDAW/C/57/D/34/2011 (12 March 2014) para 8.7.
[273] Code of Criminal Procedure 1973, section 273. See also *State of Punjab v Gurmit Singh* (1996) 2 SCC 384; *Virender v State of NCT OF Delhi* Criminal Appeal No.121/2008 (September 29, 2009).
[274] Code of Criminal Procedure 1973, section 197.
[275] ibid at section 154.
[276] ibid at section 54A.
[277] ibid at section 309.
[278] Neha Tara Mehta, 'The slow road to justice for India's rape victims' *Al Jazeera* (18 August 2016) <http://www.aljazeera.com/indepth/features/2016/08/slow-road-justice-india-rape-victims-160817095526223.html> accessed 29 August 2017.
[279] Jiby J. Kattakayam, 'Who is responsible for delayed trials in rape' *The Times of India* (29 August 2017) <http://blogs.timesofindia.indiatimes.com/jibber-jabber/who-is-responsible-for-delayed-trials-in-rape-cases/> accessed 30 August 2017.

procedural laws appear to be in consonance with international human rights standards, in practice they are not very effective.

In relation to evidence, Section 146 CrPC states that in rape cases, questions or statements about the victim's previous sexual history or to show her "general immoral character" are not admissible as evidence for determining consent.[280] Similarly, Section 53A IEA also states that relevant evidence shall not include evidence relating to past sexual experience or character of the victim.[281] These provisions thus bring the focus on whether the consent was given for that particular act irrespective of her previous sexual conduct.[282] This is in conformity with the UNHRC standard wherein it held in the *LNP* case that the fact that the domestic court looked into the previous sexual conduct of a woman and interpreted consent on the basis of whether she was a virgin or not, was a clear violation of her right to private life and was a form of discrimination and inhuman and degrading treatment as it adversely affected her dignity.[283]

Although the practice of looking at the previous sexual conduct is formally disallowed in law, such practice still continues in other forms. For example, at the time of medical examination of a victim post-rape, a two-finger test is done and the state of the hymen is assessed.[284] The two-finger test is essentially done to ascertain that a woman has had regular sexual relationships.[285] This is certified by the doctor if he discovers that the vagina can admit two fingers.[286] This test was done earlier to check the virginity of the woman and discredit her

[280] Code of Criminal Procedure 1973, section 146.
[281] Indian Evidence Act 1872, section 53A. This is a huge change from the erstwhile Section 155(4) of IEA where the defence questioned the creditworthiness of a victim by showing that she had past sexual experiences and thus, was of 'general immoral character.' See also Mrinal Satish, 'Laws relating to Sexual Violence in India: Constitution and Human Rights' (2016) 15 National Human Rights Commission Journal 225, 245.
[282] Mrinal Satish, ibid at 243.
[283] *LNP v Argentine Republic* Human Rights Committee Communication No. 1610/2007, U.N. Doc. CCPR/C/102/D/1610/2007(16 August 2011) para 13.7.
[284] Durba Mitra and Mrinal Satish, 'Testing Chastity, Evidencing Rape-Impact of Medical Jurisprudence on Rape Adjudication in India' (2014) XLIX (41) Economic and Political Weekly 51, 53.
[285] Pratiksha Bakshi, 'Medicalization of Consent and Falsity-The figure of the Habitué in Rape Law' in *Public Secrets of Law: Rape Trials in India* (Oxford University Press 2014) 77.
[286] ibid at 74.

character in rape trials.[287] However, surprisingly, this practice continues even today, despite the introduction of the law preventing the lawyers from questioning the woman's previous sexual conduct, which puts into doubt the earlier claim of success of the new evidence laws with respect to rape. Moreover, it is a violation of bodily integrity and private life as observed by the UNHRC in the *LNP* case.[288] This also has an effect at the stage of sentencing where it is observed that after performing such two-finger test, lighter sentences were imposed on the accused when the victim was sexually active and unmarried.[289] This shows that gender stereotypes regarding the victim is still a contributing factor in spite of the change in law. This thesis elaborates the role of such stereotypes in the following section. Thus, these procedural safeguards have improved a lot after the 2013 Amendment Act but a lot needs to be done regarding their implementation in order to bring them in conformity with international standards.

3.3 Addressing Stereotypes in relation to rape

The high levels of suspicion and mistrust towards women victims of gender violence is unlike any other victim of crime. Such mistrust is usually a product of gender stereotypes which result in the shaming of rape victims by different players in a society.[290] In addition to this, it also lowers the trust of rape victims towards the effectiveness of the justice system[291] which explains the high levels of under-reporting of rape cases by women.

As observed in the *Vertido* case, gender stereotypes relating to the rape victim play a significant role in distorting a judge's vision of the victim which leads to unfavourable decisions against

[287] Pratiksha Bakshi, 'Medicalization of Consent and Falsity-The figure of the Habitué in Rape Law' in *Public Secrets of Law: Rape Trials in India* (Oxford University Press 2014) 74.
[288] *LNP v Argentine Republic* Human Rights Committee Communication No. 1610/2007, U.N. Doc. CCPR/C/102/D/1610/2007(16 August 2011) para 13.7.
[289] Ila Ananya, 'Is rape sentencing in India a joke? Judgments based on stereotypes have played pathetically important part' *Firstpost* (17 December 2016) http://www.firstpost.com/living/is-rape-sentencing-in-india-a-joke-judgments-based-on-stereotypes-have-played-pathetically-important-part-3161060.html> accessed 25 August 2017.
[290] Council of Europe, 'Factsheet on Guaranteeing equal access of women to justice' (2016) 4.
[291] ibid.

the victim as the whole case is seen through a patriarchal lens.[292] The problem in India is not restricted only to the judiciary during a trial but is also perpetrated in the pre-trial and post-trial stage by politicians, legislature, police, investigative bodies and the media.

This is in gross violation of Article 5(a) of CEDAW which mandates state parties to bring their socio-cultural patterns of conduct in relation to men and women in conformity with the idea that no gender is inferior or superior to the other and to rescind all such practices which are based on such gender stereotypes.[293] As stated in the *Vertido* case, such gender stereotyping is a form of discrimination.[294] Thus, it is the responsibility of the state to modify all such practices which constitute gender-based discrimination as stated under Article 2(f) of CEDAW. Moreover, the UNHRC, in its General Comment No. 32, also states that judges can ensure that there is no partiality by not being influenced by personal bias or prejudice and by having no prior preconception regarding the case or the victim which leads to the party being disadvantaged.[295] On an application of these international standards, it is stated that such gender stereotypes affect the impartiality of the case which adversely affects the final judgement and sentencing thus preventing efficient administration of justice in rape cases.

In light of the international human rights standards of treating gender-stereotyping as discrimination, the following sections examine the stereotypes prevalent in the Indian justice system at every stage (legislative stage, investigation stage and adjudication stage) in a case of rape. In furtherance of this exercise, it also checks the extent of the conformity of India's criminal justice system with the international human rights standards by means of a comparative analysis.

[292] *Karen Tayag Vertido v Philippines* CEDAW Committee Communication No.18/2008, U.N. Doc. CEDAW/C/46/D/18/2008 (22 September 2010) para 8.4.
[293] Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 (CEDAW Convention) article 5(a).
[294] *Karen Tayag Vertido v Philippines* CEDAW Committee Communication No.18/2008, U.N. Doc. CEDAW/C/46/D/18/2008 (22 September 2010) para 8.4.
[295] UNHRC 'General Comment No.32-Right to equality before courts and tribunals and to fair trial (Article 14)' (2007) U.N. Doc. CCPR/C/GC/32 para 21.

3.3.1 Presumption of permanent consent in marriage

Indian courts usually refer to the degree of relationship between the man and the woman to determine whether the sexual act amounts to rape or not. This is observed in the *Farooqui* case, where the court took into consideration the fact that the victim and the perpetrator knew each other and had physical contact in the past in order to show that there was consent.[296]

This reliance on the stereotype of degree of relationship to determine rape is even more prominent in cases relating to rapes within marriage. In India, it is culturally presumed that by agreeing to the institution of marriage the woman also gives a permanent sexual consent to her husband.[297] Such a patriarchal bias in the law relating to marriage is observed even at the level of the legislature at the time of drafting of substantive laws. This premise of bias against married women is evidenced by the exception to the offence of rape in Section 375 (marital rape). With regard to the exception of marital rape, such rape is punishable only when spouses are judicially separated.[298] Even then, the punishment is a maximum of seven years whereas in other cases of rape, the minimum punishment is seven years imprisonment and the maximum is imprisonment for life.[299] This assumes that married women being raped is a less serious concern when compared with rape in other circumstances.[300]

As stated earlier, lawmakers have given a number of reasons for the marital exception to rape which varies from presence of alternative efficacious remedies and hesitation of criminal law to encroach in private sphere. In addition to these reasons, one of the major contributing but often silent reason for the non-criminalization of marital rape is the gender stereotype relating

[296] *Mahmood Farooqui v State (Government of NCT of Delhi)* Criminal Law Appeal No. 944/2016 (25 September 2017) para 78.
[297] Sanjay Sindhu and Monika Thakur, 'Indian Perspective on the legal Status of Marital Rape: An Overview' (2015) 2 (1) International Journal of Multidisciplinary Approach and Studies 235, 237. For instance, the *Upanishads* (Hindu religious scriptures) provide that a husband forcing his wife to have sex with him is not an aberration.
[298] Indian Penal Code 1860, section 376B.
[299] ibid at section 376.
[300] Sanjay Sindhu and Monika Thakur, 'Indian Perspective on the legal Status of Marital Rape: An Overview' (2015) 2 (1) International Journal of Multidisciplinary Approach and Studies 235, 240.

to the presumption of permanent consent for sex in a marriage.[301] Since marriage is presumed to guarantee a lifetime of sexual access, all cases of sexual activity (including rape) come under this umbrella, thus providing impunity to the perpetrator where the "conjugal rights" of a husband is presumed to be more important than the sexual consent of the wife.[302]

Moreover, it is also based on the rape myth that it is mostly strangers who are perpetrators of rape. This stereotype is recognized and heavily criticized by the CEDAW Committee in the *Vertido* case where the domestic court had stated that where there was sexual activity between acquaintances, consent can be presumed and thus, it did not amount to rape.[303] In response, the CEDAW Committee held that such gender stereotype amounted to discrimination and the state is responsible for removal of such stereotypes.[304] In the case of India, removal of such stereotypes with respect to marital rape would go a long way in its recognition as a criminal offence thus providing legal relief for victims of such rape.

3.3.2 Paradigm of shame and honour of rape victims

According to international and regional human rights bodies, presupposing an 'ideal victim' is discriminatory[305] and violates the victim's right to private life.[306] The presupposition of an 'ideal victim' still continues in India despite the fact that the construction of lack of physical resistance demonstrating consent is legally disallowed as a consideration during rape trials.

a. The chaste victim

In the Indian context, the association of the offence of rape with the 'honour' of a woman and against her 'chastity' is based on the gender stereotype of an ideal victim of rape.[307] An ideal

[301] Government of India, (Justice J.S.Verma Committee) Report of the Committee on Amendments to Criminal Law (New Delhi 2013) 113.
[302] Saptarshi Mandal, 'The Impossibility of Marital Rape-Contestations around Marriage, Sex, Violence and the Law in Contemporary India' (2014) Australian Feminist Studies 29 (81) 255, 260.
[303] *Karen Tayag Vertido v Philippines* CEDAW Committee Communication No.18/2008, U.N. Doc. CEDAW/C/46/D/18/2008 (22 September 2010) para 3.5.4.
[304] ibid at paras 8.4, 8.5.
[305] ibid at para 8.4.
[306] *M.C. v Bulgaria* App. No. 39272/98 (ECtHR, 4 December 2003) para 166.
[307] Mrinal Satish, 'Laws relating to Sexual Violence in India: Constitution and Human Rights' (2016) 15 National Human Rights Commission Journal 225, 228.

rape victim is thus considered to be one who is 'chaste' and is protective of her virginity and in case she is not married, she would be in agony as it would terribly affect her chances of getting married.[308] Post-rape, the ideal rape victim is supposed to suffer horribly on account of rape due to loss of her honour and is expected to be embarrassed when asked to talk about the experience during the trial and anywhere in public.[309] Courts describe this extent of shame as "….what is lost by a victim is face. The victim loses value as a person."[310]

Although courts have delivered progressive judgements in relation to rape by following the amended laws, the basis of these judgements is the notion of rape as a loss of honour which brings shame to the victim. For instance, in the case of *Bharwada Bhoginbhai Hirjibhai v State of Gujarat*, though the Supreme Court held that victim's sole testimony was enough to convict the accused, the judges stated that this ruling was given as they believed that an Indian woman (in contrast to the 'Western woman') would not falsely file a rape case as it would lead to ostracization by her family as well as the society since she was no longer a virgin.[311] Although this case was decided way back in 1983, the construction of an ideal rape victim continues even today as is reflected in the recent judgements of the Supreme Court.

For instance, in the case of *Madan Gopal Kakkad v Naval Dubey*, the Supreme Court has held that the result of such rape led to a pitiable state of the victim and "there was no monsoon season in her life" as it led to loss of her virginity which is a woman's prized possession.[312] More recently, in the case of *State of Madhya Pradesh v Madanlal*,[313] though the Supreme Court delivered a progressive ruling that a compromise or settlement cannot be done in cases of rape, such compromise was disallowed as the judges felt it was against her honour.[314] The

[308] Mrinal Satish, 'Laws relating to Sexual Violence in India: Constitution and Human Rights' (2016) 15 National Human Rights Commission Journal 225, 228.
[309] Mrinal Satish, *Discretion, Discrimination and the Rule of Law – Reforming Rape Sentencing in India* (Cambridge University Press, 2016) 43.
[310] ibid at 44. See also *State of Uttar Pradesh v Chhote Lal* (2011) 2 SCC 550, 563.
[311] *Bharwada Bhoginbhai Hirjibhai v State of Gujarat* AIR 1953 SC 753.
[312] *Madan Gopal Kakkad v Naval Dubey* 1992 SCC (3) 204.
[313] *Madhya Pradesh v Madanlal* Criminal Appeal No. 231 of 2015 (1 July 2015).
[314] ibid.

judges equated a woman's body to a temple and stated that such an offence harms her reputation in society.[315]

As the highest court of the land, this reasoning sets a dangerous precedent for future cases, where instead of viewing rape as a crime against the bodily integrity and private life of a woman, it is treated a matter of honour and reputation which aggravates the social stigma faced by rape victims in the society. This is also condemned in the Verma Committee Report where it is stated that rape is not a source of stigma for the victim but is rather a "stigma against the society".[316] The report further states that such paternalistic explanation of courts about notions of chastity and the stigma of rape was problematic as they treat the rape victim with sympathy instead of treating rape as violation of her inherent human right.[317] This form of stereotyping is also denounced by the United Nations wherein it is expressly stated that states should treat rape as a violation of bodily autonomy and not as a violation of honour and a source of stigma.[318]

b. The sexually experienced victim

The emphasis on virginity in rape trials also has an adverse effect in cases where the victim is not a virgin or is married. Although the previous sexual experience of the victim is legally disallowed to be brought into question during a trial or be considered as relevant evidence during the course of the trial,[319] the courts still take such facts into account during the sentencing stage. For instance, in the case of *State of Punjab v Gurmit Singh*,[320] though the court set positive and victim-centric guidelines regarding victim-privacy in rape trials, in the

[315] *Madhya Pradesh v Madanlal* Criminal Appeal No. 231 of 2015 (1 July 2015).
[316] Government of India, (Justice J. S. Verma Committee) Report of the Committee on Amendments to Criminal Law (New Delhi 2013) 90, 91.
[317] ibid.
[318] UN Women, 'Handbook for Legislation on Violence against Women' (2012) 24 <http://www.unwomen.org/~/media/headquarters/attachments/sections/library/publications/2012/12/unw_legislation-handbook%20pdf.pdf?v=1&d=20141013T121502> accessed 24 April 2017.
[319] Code of Criminal Procedure 1973, section 146; Indian Evidence Act 1872, section 53A.
[320] *State of Punjab v Gurmit Singh* (1996) 2 SCC 384.

end, it awarded low sentences to the offenders by taking into account the victim's marriage as one of the mitigating factors.[321] Such an attitude of the judges is also observed in the case of *Prem Chand v State of Haryana*,[322] which involved the rape of a woman by some policemen and the medical report indicated that she was not a virgin. While sentencing, the court, without citing any relevant reason, held that the victim's conduct and the peculiarity of facts in the case led to the reduction of the sentence.[323]

Hence, these instances of the court relying on the past sexual experience of the victim to determine consent and to establish rape at the trial stage as well as the sentencing stage is not in conformity with international human rights standards which state that such victim-blaming attitude amounts to discrimination.[324]

Conclusion:

This chapter has highlighted the responses to rape by the legislature, executive and the judiciary in the Indian criminal legal system. In doing so, it has also simultaneously compared the extent of conformity of these practices in cases of rape to the standards laid down by the UNHRC, the CEDAW Committee and the ECtHR.

At the law-making stage, the Indian legal framework broadly adheres to the international human rights definitions of rape with respect to terms such as 'consent' and by recognition of varying degrees of rape. However, it falls short of international standards as it still relies on the term 'penetration' to prove rape. Although the 2013 Amendment Act has widened the scope of such 'penetration', the express mention of this term within the definition of the rape without recognition of the surrounding coercive circumstances proves that it is only in partial

[321] *State of Punjab v Gurmit Singh* (1996) 2 SCC 384, 402. See also Mrinal Satish, *Discretion, Discrimination and the Rule of Law – Reforming Rape Sentencing in India* (Cambridge University Press, 2016) 74.
[322] *Prem Chand v State of Haryana* 1989 Supp (1) SCC 286.
[323] ibid.
[324] *LNP v Argentine Republic* Human Rights Committee Communication No. 1610/2007, U.N. Doc. CCPR/C/102/D/1610/2007(16 August 2011) para 13.3.

compliance with international human rights standards. Moreover, a severe lacuna exists with respect to the law in case of rape within marriage which falls short of the international standards. The chapter concludes that India has to exercise due diligence to criminalize marital rape in the light of these human rights standards.

At the procedural stage, though the laws in the Indian criminal justice system have tried to conform to the international standards of protection of victim's privacy during rape trials and introduction of provisions relating to non-consideration of lack of physical resistance as an indicator of consent, it is not strictly followed in practice. For instance, at the investigation stage, some medical procedures examine the fact whether the victim is a virgin or not and the past sexual history is also taken into account at the sentencing stage in a rape trial.

In addition to these express legal procedures, gender stereotypes prevailing at every step of the criminal justice system in India also discourages a victim to pursue criminal remedies as in addition to the high standards of legal proof she has to meet the social standards of an 'ideal victim'. Moreover, as these stereotypes are not expressly mentioned in the law, or named by the courts, such stereotypes continue to permeate and adversely affect the impartiality of the trials by influencing the outcome and hence, amount to discrimination according to international and regional human rights standards.

CONCLUSION AND RECOMMENDATIONS

In this section, the contents of the preceding chapters are summarized and observations made from these chapters are recorded. Furthermore, on the basis of these findings and observations, recommendations and future research possibilities are highlighted.

In Chapter 1, as a starting point, the thesis has identified the nature and causes which contribute to rape in order to find out the mechanisms which are best suited to address the problem of rape. On the basis of analysis of different international and regional human rights instruments such as the CEDAW, ICCPR, ECHR, IACHR and UN resolutions and declarations, this chapter finds that the structural problem of unequal power and hierarchy between the two genders contributes to such gender-based violence as the woman is not raped on an individual basis but on the basis of her gender. Taking this discussion forward, the thesis has examined elements of rape in criminal law definitions such as 'penetration/sexual violation', 'use of force' and 'absence of consent' from a right-based approach in order to determine the nature of rape - whether 'rape is violence' or 'rape is sex'. The result of such examination is that human rights standards consider both the theories of 'rape as violence' and 'rape as a sexual act' cumulatively with consent being the connecting factor wherein the absence of consent as a defining element to establish such sexualized violence. The last part of this chapter has dealt with rape in the private sphere, such as marital rape, which is not considered as an offence in the criminal law of many countries such as India. In this regard, this section concludes that in the absence of standards in criminal law, standards in international human rights law such as due diligence impose a duty on states to effectively deal with rape in the private sphere instead of isolating it.

Chapter 2 has unpacked the contents of the due diligence standard and has examined the decisions of the international human rights bodies such as the UNHRC, the CEDAW

Committee and the ECtHR to understand the extent and applicability of the due diligence standards. With respect to prevention of rape and protection of victims, this thesis has found that states have to take measures for effective criminalization of rape, especially in cases of rape in the private sphere by non-state actors (such as cases of marital rape) otherwise it amounts to a violation of the victim's right to private life. The findings indicate that unlike traditional remedies in criminal law which focus on criminalization of offence to combat rape, the standards in international law are holistic and also take into account the responsibility of the state to combat rape at the stage of investigation, prosecution and punishment. In this regard, the human rights bodies such as the UNHRC and the ECtHR view the delay of investigation or improper medical examination as violation of private life and hence fix a duty on the state to address these problems. In addition to this, the last part of this chapter also indicates how the human rights bodies deeply condemn the stereotypes in relation to rape such as an 'ideal victim' and 'lack of physical resistance amounting to consent' and declare them as acts of gender-discrimination. These findings also show that these gender stereotypes need to be eliminated by the state in order to ensure a fair and impartial trial to the victim in the criminal justice system.

Chapter 3 has evaluated India's conformity to the international human rights standards in relation to rape. This chapter has found that *prima facie* the definition of rape in the Indian law appears to be in conformity with the international standards with the expansion of the term 'penetration' and victim-centric definition of 'consent'. However, on a closer look, the thesis observes that the term 'penetration' does not take into account the surrounding coercive circumstances of a victim. Moreover, the term 'consent' have been narrowly construed by the courts. Most importantly, the exception in the definition, stating marital rape is not a criminal offence, violates the right to privacy of a woman and does not conform to international standards. Similarly, in the stage of investigation and prosecution, the thesis finds that though

the statute tries to provide for procedural safeguards protecting the privacy and dignity of the victim, the degrading two-finger test during medical examinations is an indicator that the previous sexual life of the victim is still considered in a trial. This is in sharp contrast to the international standards which expressly state that such state measures violate women's right to privacy and hence should be abolished. Moreover, consideration of gender stereotypes such as an 'ideal rape victim' and 'rape as a source of shame and violation of honour' overshadows the victim-centric notion of rape as a violation of sexual autonomy. This puts an additional burden on the victim to live up to the standard of the 'ideal victim' to prove the act of rape which is not in conformity with the international standards.

The thesis finds how the mode of affixing state responsibility in the domestic context by applying international human rights standards is highly beneficial. Firstly, it highlights the structural causes of rape which when applied to criminal law, expands the scope of definition of rape not only to the physical act (which is usually phallocentric) but also to the emotional and psychological implications of rape from the victim's perspective. Secondly, it advances the idea that international human rights law, in addition to treating rape as a violation of human rights, also treats the inaction of the state to combat rape as a human rights violation. This effectively expands the liability of rape not just to the perpetrator (usually a private actor) but also makes the state equally accountable by placing a responsibility to prevent and punish in cases of rape. Thirdly, in furtherance to allocation of responsibility on the state, the thesis delineates the exact contents of this responsibility by affixing specific duties on lawmakers, police, medical experts, lawyers and judges to act effectively at every stage of the criminal justice system.

In addition to this, the thesis, by application of these standards to the Indian system, brings a research focus on how the applications of these international human rights standards will help

to alleviate the problems faced by a victim in her quest for criminal justice in India which has not been addressed adequately in the earlier literature. Therefore, this thesis significantly contributes to the victims' rights discourse both at the ideological level as well as the ground level. At the ideological level, the rights-based approach takes into account the victim's experience of rape as a form of discrimination and violation of her sexual autonomy which was erstwhile absent in the male-centric definitions of criminal law. At the ground level, it brings positive victim-centric changes at the stage of legislation, investigation as well as adjudication in cases of rape.

The earlier research focus in India is concentrated on the importance of newer laws on rape. However, even after sweeping reforms in the criminal law(such as the 2013 Criminal Law Amendment), rapes still continue to occur which further strengthens the position that mere legal protection is not enough to combat rape. Hence, this thesis focuses not just on prevention of rape by framing laws but also mandates effectiveness at other stages such as the investigation stage as well as the trial stage simultaneously by relying on the due diligence standard of international human rights law. Moreover, in addition to the written laws, the thesis also identifies the unwritten and often less-researched social standards (in form of reigning gender stereotypes) which have a great impact on the access of criminal justice and equally contribute as human rights violations.

This thesis also contributes by way of serving as a model of evaluation of state action through the usage of human rights standards as a benchmark to identify the shortcomings in state action. This research can be used as an example for application of these standards in other countries to gauge the state effectiveness to rape in their domestic systems. Furthermore, this thesis builds a counter-discourse in response to the state discourse relating to reasons for its inaction. This is especially true in the case of efforts for criminalization of marital rape to which the state

response is that it is a private matter and thus does not warrant state intervention. In this context, by the due diligence framework, this thesis creates a counter-dialogue by affixing state responsibility even in cases of rape in the private sphere. Overall, the thesis has used these standards as a mechanism to steer the state to take immediate action as part of its international obligations by virtue of its membership to these international conventions.

In this background, the thesis recommends the Indian state to take cognizance of its responsibility by placing a duty on all the stakeholders of the criminal justice system to ensure effective justice to the rape victim. It is recommended that the focus on the term 'penetration' be removed from the definition and more importance should be given on the surrounding coercive circumstances and other acts of sexual nature. Moreover, the interpretation of elements such as 'penetration' and 'consent should be defined clearly in order to avoid ambiguities in its interpretation at the trial stage. In addition to this, the thesis recommends that the lawmakers should remove the exception of marital rape from the Indian Penal Code and bring it within the ambit of the general offence of rape. The medical examination of the victim should exclude the two-finger test in order to protect the sexual privacy of the victim. In addition to this, there should be guidelines or directives issued by the state to ensure that the medical professionals, police and other investigative authorities as well as judges are victim-sensitive and also ensure that there is no delay in investigation or the trial process. In relation to gender stereotypes, it is recommended that the judges should explicitly name these stereotypes during the trial and declare expressly that they are discriminatory and violates the victim's right to a fair trial. It should be specifically laid down in the law that consideration of gender stereotypes such as presumption of consent according to degree of relationship or victim's age, way of living, past sexual experience at any stage of the trial or at the sentencing stage is illegal.

In ensuring the aforementioned reforms, the NGOs, civil society organizations and individuals can use the due diligence standards as a benchmark to expose and make the public aware of the inadequacies in the current criminal justice framework in relation to rape. In addition to this, the inadequacies can also be reported to the international human rights bodies such as CEDAW, UNHRC at the time of reporting in order to put international pressure on the Indian government to introduce these reforms at the earliest.

Although the thesis has highlighted the positive aspects of application of international human rights standards to the Indian criminal system, it is stressed that it should not be considered as the only instrument to solve the problem of rape. In addition to introduction of these standards in the criminal justice system, socio-economic measures such as gender-sensitization and training of public officials, victim-support centres, counselling and compensation also need to be employed for adequate redress and to address the stigma faced by the victim. Moreover, it should be understood that due to the universal nature of international law, these standards should be carefully adjusted to the peculiar Indian context. For example, the international standards define the stereotype of an 'ideal victim' in a particular manner and treat it as a form of discrimination. However, in the Indian context, though such a stereotype would still count as discrimination, the definition of the 'ideal victim' may vary in the Indian context taking into account her caste, religion, economic position as well as socio-cultural constructions of honour and shame. Hence, the universalist standards of international law have to be applied in a manner which is in tandem with the socio-cultural context of India.

Although the aforementioned limitations in the thesis are recognized, it still opens up future research possibilities wherein the public discourse on the application of international human rights law in the domestic context can be strengthened by looking for ways to put additional pressure on the government to sign the Optional Protocol to CEDAW. This would ensure that

in case the reforms are not introduced at the domestic level, the victims of rape can directly approach the Committee for redress. This thesis also leads to implications for future research in victim-rights where these standards can be evolved for better involvement of the rape victim in the criminal justice system especially at the stage of trial where the victim's participation is often overshadowed by the state authorities. As the thesis explores the applicability of international standards in the criminal justice system, it also sets an example for future research in public policy and law wherein such application can also be done similarly in the fields of civil laws, media, healthcare and other related areas in order to provide safeguards and for effective redress to the rape victims.

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