

Women's Human Rights

CEDAW in International, Regional and
National Law

STUDIES ON HUMAN RIGHTS CONVENTIONS

EDITED BY

Anne Hellum
Henriette Sinding Aasen

India's CEDAW story

MADHU MEHRA

1 Introduction

This chapter explores the interplay of factors that shaped ratification and domestication of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) in India, to understand the complex influences that shape the outcomes of the women question. Although the ratification of the CEDAW was not the consequence of demands from a domestic constituency, there has been considerable activity following ratification. In looking at the events and actors that lent momentum to the work around the CEDAW, and examining the contributions of the judiciary and the legislature in select thematic areas, this chapter contextualizes the possibilities and limitations of domestication of the CEDAW. This chapter is divided into three parts. The first part outlines the formal status of India's obligations under the CEDAW – covering its ratification, the scope of its reservations/declarations and the country reviews held thus. The second part looks at the influences and events that helped ground the CEDAW within India – tracing the domestic and international developments that propelled ratification of the CEDAW, providing an overview of actors and events that popularized the Convention and shaped the contours of the shadow report processes as well. The third part examines CEDAW implementation through judicial pronouncements and related legislative action with respect to three thematic areas – family, sexual violence and sex discrimination in the workplace. The selected

Madhu Mehra is a founding member and Executive Director of Partners for Law in Development (PLD), a legal resource group in India dedicated to the advancement of women's rights and social justice. The author has been part of the national processes on the CEDAW in India, and runs CEDAW programmes that include capacity building, resource production and advocacy. She is also part of CEDAW work in South Asia and in the Asia Pacific region.

themes relate to areas in which India has entered declarations limiting its obligations under the CEDAW, as well as those where no such declarations exist, to allow comparative insight into domestication with respect to both of these categories. The scope of this chapter does not allow for a comprehensive discussion of the select areas covered, let alone the telling of India's full CEDAW story; however, it does provide insights into the complex influences that shape the uneven domestication of treaty obligations.

2 Status of India's ratification, reservations and reporting to the CEDAW Committee

India signed the CEDAW on 30 July 1980 and ratified it on 9 July 1993 with two declarations and one reservation. The reservation to Article 29(1) is of little significance, as it does not touch upon the core obligations under the CEDAW.¹ India's declarations, however, seek to curtail its core obligations under Articles 5(a), 16(1) and 16(2). The two declarations read as follows:²

With regard to articles 5(a) and 16(1) of the Convention on the Elimination of All Discrimination Against Women, the Government of the Republic of India declares that it shall abide by and ensure these provisions in conformity with its policy of non-interference in the personal affairs of any Community without its initiative and consent.

With regard to Article 16(2) of the CEDAW, the Government of the Republic of India declares that though in principle it fully supports the principle of compulsory registration of marriages, it is not practical in a vast country like India with its variety of customs, religions and level of literacy.

These declarations limit India's obligations to eliminate discriminatory cultural stereotypes about women, promote equality in marriage and family relations, and establish the compulsory registration of marriages. The Committee has consistently expressed concern about the obstacle posed by the declarations towards implementation of the CEDAW, urging their withdrawal.³ Indeed, qualifications that are incompatible with the

¹ The reservation exempts referral of disputes (raised by States Parties) relating to interpretation or application of the Convention by India to arbitration.

² *India's Initial Report*, CEDAW/C/IND/1, 10 March 1999, paras. 2–3.

³ *Concluding Observations: India*, 2 April 2000, A/55/38, paras. 44 and 60; *Concluding Comments: India*, 2 February 2007, CEDAW/C/IND/CO/3, para. 11. The Concluding Comments of 2007 refer to the declarations as reservations.

object and purpose of the treaty are considered impermissible under the law regulating international treaties, regardless of whether such qualification is termed as a declaration or a reservation.⁴

In terms of fulfilling its obligations to report on the progressive implementation of the CEDAW, India has submitted its initial report, a combined second and third periodic report, as well as an exceptional report requested by the Committee; it is in the process of finalizing its combined fourth and fifth periodic reports. The initial report, due in 1994, was submitted in 1999 and reviewed in 2000; the second and third reports, which were due in 1998 and 2002 respectively, were combined and submitted in 2005 and reviewed in 2007; the combined fourth and fifth periodic report is expected to be submitted in 2012. In between the two country reviews of 2000 and 2007, the CEDAW Committee sought information on gender-based violence that was perpetrated during the carnage in Gujarat in 2002, its gendered impact and steps taken to address these issues.⁵ The Committee has raised these concerns since 2006, holding a special session on Gujarat in 2010, and intends to pursue the matter in the next periodic review.⁶ Although numerically India's reporting has progressed to the fifth periodic report, each of the reviews combined two periodic reports to make up for delayed reporting.

3 Influences and events that grounded the CEDAW in India

3.1 *Developments that catalyzed India's ratification*

At the time when the CEDAW was adopted in 1979, and later when it came into force in 1981, there were no constitutional impediments for India's ratification of the treaty. The Indian Constitution guaranteed to women equality before the law, while endorsing affirmative action for women.⁷ In addition, India had ratified the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) in 1979, which obligated

⁴ Article 19(c) of the Vienna Convention on the Law of Treaties 1969.

⁵ The targeting of Muslims in Gujarat in 2002 involved killing, looting, the destruction of property and the use of sexual violence.

⁶ *List of Issues and Questions by the Pre-Sessional Working Group: India*, 8 August 2006, CEDAW/C/IND/Q/3, para. 1; *Concluding Observations: India*, 2 February 2007, CEDAW/C/IND/CO/3, paras. 67–8; *Concluding Observations: India*, 22 October 2010, CEDAW/C/IND/CO/SP.1, para. 38.

⁷ Articles 14 and 15 of the Constitution of India guarantee equality before the law and non-discrimination on grounds of sex, and mandates affirmative action for women.

the country to prohibit sex discrimination. Yet India did not ratify the Convention until 1993, a little over a decade after it signed the Convention in 1980. The discussion below traces the domestic concerns that made it difficult for India to ratify the CEDAW in the decade of the 1980s, tracing as well the domestic legislative steps, together with the international considerations, that combined to create the momentum for India to ratify the CEDAW in 1993.

3.1.1 Events at the domestic level

Although there was no significant inconsistency between the Constitution of India and the CEDAW, the gap between the constitutional promise of equality and statutory standards was immense in the 1980s. Indeed, the penal and family law regimes reconstituted and entrenched the social and economic inequalities between men and women. Penal provisions relating to violence against women in the matrimonial home were introduced in the mid 1980s, and reform of the anti-rape law came about in the same period. The changes in penal laws came on account of a strong agitation mounted by the women's movements in response to judicial verdicts that showcased the apathy of the law with regard to systemic forms of violence against women. National campaigns against dowry deaths and custodial rape led to a slew of legislative reforms in the mid 1980s, introducing penal provisions on both of these issues.⁸ New offences were introduced to address cruelty, abetment to suicide and dowry death relating to women within the matrimonial home.⁹ Likewise, amendments to the anti-rape provision followed a nationwide campaign by the women's movement against acquittals in custodial rape.¹⁰ The amendments introduced the concept of custodial rape for the first time, recognizing the disproportionate power exercised by uniformed men in custodial situations.

⁸ R. Kumar, *The History of Doing: An Illustrated Account of Movements for Women's Rights and Feminism in India, 1800–1990* (New Delhi: Kali for Women, 1993) at Chapters 7, 8, 9.

⁹ The 1983 Amendments introduced: s. 498A of the Indian Penal Code on cruelty within the matrimonial home, and s. 113A in the Indian Evidence Act on presumption of abetment of suicide where a suicide of a woman occurred within seven years of marriage. The 1986 Amendments introduced: s. 304B of Indian Penal Code on dowry death, and s. 113B in the Indian Evidence Act, introducing a presumption that a death of a woman within seven years of marriage was a dowry death.

¹⁰ The offence of custodial rape places upon the accused the burden of proving his innocence. For an account of campaigns relating to custodial rape, see N. Shah and N. Gandhi, *The Issues at Stake: Theory and Practice in the Contemporary Women's Movement in India* (New Delhi: Kali for Women, 1992) 39–42 and 213–16.

The discriminatory citizenship laws saw change, in 1986 and in 1992, notably to allow citizenship to be transmitted by the mother on an equal footing with the father.¹¹ The amendments in citizenship law, however, were not the result of demands by the women's movement, but rather were a state initiative towards making the law compliant with the Constitution and international standards of equality. A contentious law addressing 'indecent' representation of women was enacted,¹² and amendments to marriage, divorce and succession laws of Parsis were introduced to address some areas of sex discrimination.¹³ Nonetheless, the family laws continue, in varying degrees, to be discriminatory against women. Special courts dedicated to family matters and the National Women's Commission were established.¹⁴ Finally, in 1992, a constitutional amendment provided for a reservation of a third of the total seats in elected local governing bodies for women.¹⁵ Consequently, it was not until the 1990s, after the completion of the first phase of law reforms relating to women, that India was able to step into the international arena with evidence of its willingness to pursue gender justice.

3.1.2 Impact of global developments

By the start of the 1990s the global economic environment had changed and these changes came to India's door. In 1991 India initiated structural adjustment programmes to meet the aid conditionality of the World Bank and the IMF. While the main objective of the restructuring involved liberalization of the economy to invite foreign investment,¹⁶ there was

¹¹ An amendment in 1986 reformed the Citizenship Act of 1955 to recognize transmission of citizenship by birth where either parent (as opposed to only the father) was Indian, and the amendment in 1992 similarly recognized citizenship by descent to those born outside the country where either parent was Indian.

¹² Despite a growing concern about the stereotyping/objectification of women in the media, the Indecent Representation of Women (Prohibition) Act 1986 lacked support from many sections of the women's movement for arbitrary powers of censorship. See M. Kishwar and R. Vanita, 'Using women as a pretext for repression', *Manushi* 37 (1987) 2–8.

¹³ The Parsi Marriage and Divorce Act 1936 was amended in 1988 to align it with the Hindu Marriage Act 1955; and the Indian Succession Act 1925 was amended in 1991 to grant equal rights to male and female heirs in interstate succession.

¹⁴ The Family Courts Act 1984 has been critiqued for promoting reconciliation rather than women's rights. The National Commission of Women Act 1990 established a national body, following which states gradually enacted laws establishing commissions at the state level.

¹⁵ The Constitution (Seventy-Fourth) Amendment Act 1992.

¹⁶ Structural Adjustment in India: Independent Evaluation Group, available at: www.worldbank.org.

a growing global pressure by the early 1990s that liberalization must be accompanied by good governance to result in growth and development.¹⁷ The civil society widened its net of alliances within and across regions to address problems emerging from the shared global economic order, pushing the human rights and social justice agendas forward within the international development and poverty reduction frameworks.¹⁸ The women's movements across regions joined forces in this backdrop, to engender world conferences.¹⁹ The participation of women from the different regions at the World Conference on Human Rights in 1993 strongly influenced the *Vienna Declaration and Programme of Action*, which acknowledged for the first time that women's rights are human rights, calling on all countries to ratify the CEDAW and recommending the adoption of an optional protocol.²⁰ The outcome document also endorsed the call of the UN Human Rights Commission for the creation of the new mandate of the Special Rapporteur on Violence against Women, its Causes and Consequences.

India at this point was not just aligning its economy with the global market, but was also positioning itself as a significant member of the international community – endorsing standards beyond those relating to economic liberalization, including those relating to women's rights.²¹

¹⁷ Responding to reports of the failure of structural adjustment programmes in Africa and Latin America, the International Monetary Fund and the World Bank began to integrate 'good governance' into aid conditionality. According to Shihata, the promotion of social and economic rights of the people (including women) was consistent with the Articles of Agreement and necessary to meet the changing needs of the times. I. F. I. Shihata, 'Human rights, development and international financial institutions', *American University Journal of International Law and Policy* 8:27 (1992) 27–37.

¹⁸ The participation of civil society in every world forum pressed for inclusion of social development in outcome documents of that period. See World Summit for Social Development (Copenhagen, 1995) A/CONF.166/9.

¹⁹ The Tribunal on Violations of Women's Human Rights at Vienna drew attention to violence against women and sought explicit recognition of women's rights as human rights: *Women Testify: A Planning Guide to Popular Tribunals and Hearings*, Centre for Women's Global Leadership (2005). Refer also to the World Conference on Human Rights in 1993 in Vienna and the International Conference on Population and Development in 1994 in Cairo.

²⁰ A/CONF.157/23, at paras. 18 and 37–44. Notably, para. 39 states: 'The World Conference on Human Rights urges the eradication of all forms of discrimination against women, both hidden and overt. The United Nations should encourage the goal of universal ratification by all States of the Convention on the Elimination of All Forms of Discrimination against Women by the year 2000. Ways and means of addressing the particularly large number of reservations to the Convention should be encouraged.'

²¹ The Government of India's initial report to the CEDAW Committee acknowledges the role of the women's movement in ensuring inclusion of violence against women, and

On 9 July 1993, less than a month after the *Vienna Declaration and the Programme of Action* was adopted by 171 states by consensus on 25 June 1993, India demonstrated its commitment to women's human rights before the global community through the ratification of the CEDAW. India's adoption of the outcomes of Vienna was a significant facet of its aspirations in the new global order. In the same vein, India also enacted the Protection of Human Rights Act 1993, under which human rights were defined to mean 'the rights relating to life, liberty, equality and dignity of the individual guaranteed by the constitution or embodied in the International Covenants and enforceable by courts in India'.²² Under this statute, independent national and state human rights institutions were created, as were human rights courts, for the promotion and protection of human rights. The references to international human rights obligations in the Human Rights Act 1993, following Vienna, stands in contrast to the earlier statutes constituting independent commissions to monitor discrimination relating to women and minorities.²³ The oversight bodies subsequent to Vienna, however, refer to international standards, such as those relating to child rights and disability.²⁴

3.2 *Events and actors that pushed the CEDAW centre stage*

The achievements of women at Vienna in 1993 shaped the ambitious nature and scale of the preparations for the Fourth World Conference on Women in Beijing in 1995. A two-year preparatory process for Beijing was initiated in India to expand participation of women activists in Beijing, to ensure diversity and inclusion of grass-roots constituencies.²⁵ Through a dedicated national secretariat called the Coordination Unit for Beijing, preparations along several thematic lines, including in relation to women's rights, were

gender-biased perceptions as areas of concern in the Eighth Five-Year Plan (1992–97) for the first time to reflect India's commitments in international forums in national policy. *India: Initial Report*, 10 March 1999, CEDAW/C/IND/1, paras. 71–7.

²² See section 2(d).

²³ Section 10 of the National Commission for Women Act 1990 and section 9 of the National Commission of Minorities Act 1992 refer only to the constitutional and legal framework.

²⁴ See Preamble and section 2(b) defining 'child rights' in the Commission for Protection of Child Rights Act, 2005. Similarly, the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act 1995, enacted before the UN Convention, refers to international/regional proclamations.

²⁵ A coalition of donors, led by Danida, constituted an Inter-Agency Facilitating Committee for Beijing to pool resources for coordinating preparations for the Fourth World Conference on Women in Beijing, led to the establishment of a national secretariat, the Coordination Unit (CU), to undertake preparations through 1994 to 1995.

facilitated from 1994 to 1995.²⁶ As the CEDAW was relatively unknown at the time, with India having just ratified it in 1993, country-wide orientations and creation of information materials on the CEDAW became integral to the preparations on women's rights, as did a collectively produced shadow report to the CEDAW Committee in anticipation of, rather than in response to, an actual country report.²⁷ Although this shadow report was eventually not used, since India's initial country report was submitted much later in 1999, it set a precedent of collective report writing for future shadow report processes. Not surprisingly, organizations and activists integral to the Beijing preparatory processes within the country were amongst the first to be mobilized in the CEDAW review process in 1999 when India's initial report was submitted, and they continued to play a significant role in the shadow review processes that followed.²⁸

The run-up to Beijing was also marked by alliance building between women's groups and activists in India with regional organizations at the Asia Pacific level. In the context of capacity development and monitoring of the CEDAW, one such organization, the International Women's Rights Action Watch – Asia Pacific (IWRAP-AP) sustained its work in India long after Beijing, contributing significantly to the development of human and institutional resources.²⁹ With CEDAW compliance by states becoming central to the United Nations Development Fund for Women's (UNIFEM) approach to human rights programming,³⁰ the UNIFEM South Asia Regional Office played a key role in supporting civil society initiatives, alongside providing technical and facilitation support to

²⁶ The preparations towards Beijing were along four themes: livelihoods, political participation, health and women's rights, led by a thematic convenor. The women's rights stream was convened by the author of this chapter.

²⁷ *Indian NGOs Report on the Convention on the Elimination of All Forms of Discrimination against Women* (Coordination Unit for the World Conference on Women, India, 1995).

²⁸ The National Alliance of Women's Organisations (NAWO) that coordinated the production of shadow reports for both of the country reviews is a network of state-level NGOs that constituted the advisory board to the Coordination Unit during the Beijing preparatory processes. Upon closure of the Coordination Unit after the Beijing conference, the members of this advisory board reconstituted themselves as NAWO. NGOs and individuals that were active during the Beijing process contributed the chapters to the initial shadow report.

²⁹ IWRAP-AP, which began its Global to Local Programme from 1998, has facilitated preparation of shadow reports and the participation of women's groups from all regions at the country reviews.

³⁰ See Helen Hintjens, *UNIFEM, CEDAW and the Human Rights-based Approach*, available at: <http://repub.eur.nl/res/pub/17998/2DevelopmentChangeGenderRightsUNIFEM.pdf> (last accessed 27 February 2013).

governments to enable fulfilment of their CEDAW obligations. The nodal ministry concerned with the CEDAW, the Ministry of Women and Child Development,³¹ has partnered with UNIFEM, amongst other things, on capacity development, orientations at the national and South Asia regional levels, as well as issues involving the reporting and reviewing processes.³²

With the presence of donor aid, regional alliances, technical support and NGOs flushed with the experience of the Beijing conference, the CEDAW appealed to many as an effective forum in which to pursue accountability for women's rights. The CEDAW work grew considerably, corresponding to the diverse strengths of the various actors and their spheres of work. Of these, capacity development, creation of knowledge resources and application of the Convention to thematic issues have evolved as long-term engagements. The CEDAW country review processes have been moments of convergence between women's groups at local, state and national levels, for the collective production of shadow reports, as well as opportunities for simultaneous engagement with the government.

Even as this backdrop conjures up an image of a vibrant community of organizations and activists at the state and national levels working on the CEDAW, many sections of the women's movements have chosen to not engage with CEDAW processes.³³ Likewise, the framing of concerns in activism, or in legal challenges, have not always been with reference to the CEDAW, even if CEDAW review processes have eventually served to reinforce the demands. Of the several forums and methods with which to agitate, engage and advocate for realization of women's rights, the CEDAW review process is just one. Accordingly, some have developed a dedicated organizational interest in the periodic CEDAW reviews, but others have approached CEDAW reviews more selectively, only for pursuing concerns where dialogue with the state was particularly difficult – as, for example, in relation to the Gujarat carnage, and in respect of violence against lesbians and bisexuals.³⁴ Regardless of the nature of

³¹ Formerly, a department under the Ministry of Human Resource Development, it was elevated to the Ministry in 2004.

³² The South Asian inter-governmental peer learning platforms have been organized periodically by UNIFEM.

³³ Some prefer domestic forums, on account of exclusivity, distance and resource requirements, making international forums beyond the reach of affected constituencies. For others, the scepticism relates to the transformatory capacity of law and human rights discourses in addressing unequal structures of power.

³⁴ *India: Second and Third NGO Alternative Report on CEDAW* (NAWO, 2006).

engagement with the CEDAW, a growing reliance on international law and mechanisms is evident across human rights sectors.

4 CEDAW implementation and the law

This section examines ways in which judicial pronouncements have advanced women's equality,³⁵ touching upon legislative action connected with the subject matter of the judgments. The areas covered are limited to family law, sexual assault and sex discrimination in the workplace, for a comparative understanding of domestication where state obligation has been expressly curtailed by India's declarations to the CEDAW, and areas in which no such curtailment exists.

The judicial pronouncements discussed here are those from the Supreme Court of India – that is, the final court of appeal, which exercises writ jurisdiction and has the power of judicial review.³⁶ Being a federal state, the courts are multi-tiered, with the Supreme Court being the highest in the hierarchy, and the final court of appeal. It is followed by the high courts at the helm in each of the states of India, below which are the district courts. The legal system is based on common law, where both judicial precedents as well as statutes comprise the legal framework, and these are expected to be in compliance with the Constitution, which occupies the highest normative status in the country. While the jurisdiction of lower courts is limited to application of the statutory laws under civil and criminal jurisdictions, the high courts and the Supreme Court exercise judicial review, which allows them to harmoniously interpret a law to achieve compliance with the fundamental rights (that enshrine human rights in the Constitution), or indeed, to strike down an inconsistent law. All three arms of the state – the judiciary, legislature and the executive – are independent of each other.

4.1 *Family law*

The laws relating to family and marriage, called the personal laws in India, are derived from religion, resulting in community-specific laws for Muslims, Christians, Parsis and Hindus. The Hindus comprise a broad

³⁵ Full texts of all judgments from India, are available at: www.indiankanoon.org; <http://scconline.co.in>; www.liiofindia.org/in/cases/cen/INSC/; and www.worldlii.org/in.

³⁶ Article 13 of the Constitution of India 1949 declares laws inconsistent with or in derogation of the fundamental rights as void.

legal category that includes within its ambit those who are not any of the former groups.³⁷ While the codification of Hindu law has flattened caste, sect and regional diversities, it allows customs to override the codified law, where these have continued uninterrupted over time. The tribal or the indigenous communities differ widely from each other, and are governed by their community-specific uncoded customary laws.³⁸ In addition, there is the Special Marriage Act 1956, which facilitates inter-religious marriage without requiring either party to the marriage to change their religion. The family laws across communities are discriminatory to women in different ways. Registration of marriage under Hindu law and those governed by custom is not a necessary requirement under the law. Given the diversity of communities, and the prevalence of uncoded customs and practices, many marriages are not registered.

Article 16(1) of the CEDAW obligates States Parties to eliminate discrimination against women at the point of entering into marriage, during the subsistence of marriage and at its dissolution.³⁹ Article 5(a) touches upon the ideological origins of discrimination, covering social/cultural/customary norms and practices that contribute to the subordination of women.⁴⁰ Article 16(2) calls for compulsory registration of marriages.

³⁷ Section 2(1) and (3) Hindu Marriage Act 1955.

³⁸ The Constitution provides for notification of tribes under Article 342; and only those notified are considered as Scheduled Tribes according to Article 366(25). The areas with majority tribal population are notified as Scheduled Areas under 5th Schedule of the Constitution, where application of laws may be curtailed/modified. Section 2(2) of the Hindu Marriage Act 1955 excludes its application to tribal members.

³⁹ Article 16(1): 'States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women: (a) the same right to enter into marriage; (b) the same right freely to choose a spouse and to enter into marriage only with their free and full consent; (c) the same rights and responsibilities during marriage and at its dissolution; (d) the same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount; (e) the same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights; (f) the same rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of children, or similar institutions where these concepts exist in national legislation; in all cases the interests of the children shall be paramount; (g) the same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation; (h) the same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.'

⁴⁰ Article 5(a) reads: 'States Parties shall take all appropriate measures: (a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the

Despite India's declarations to all three Articles, piecemeal legislative action and judicial pronouncements have addressed discrimination in relation to family law. However, the legislative changes relating to areas under Articles 16(1) and 16(2) vary considerably, providing comparative insights into the political complexities that shape the 'reform' related to these two distinct areas.

The declarations are rooted in the politics of patriarchy, cultural identity and electoral gain, in which the women question is embedded in India.⁴¹ Religion-based family law has come to be positioned as an exercise of religious freedom that trumps sex equality, although both are equally placed as constitutionally guaranteed fundamental rights.⁴² The Constitution viewed religion-based family law only as an interim arrangement, envisaging the enactment of a 'uniform civil code' in due course as part of a nationalist vision of uniting all communities under one law rather than ensuring gender equality.⁴³ Given the history of India's partition on lines of religion, and the sentiments attached to religious identities, the debate on the uniform civil code was deferred. By the 1980s, however, liberal secular politics veered towards accommodating the male religious orthodoxy's demands with respect to the family law of minorities. With the emergence of the Hindu Right as a force in national politics in the 1990s, the uniform civil code agenda was resurrected as a test of nationalism for minorities, specifically targeting the Muslim law.⁴⁴ With gender equality becoming irrelevant to the national discourse on family law, the women's movement distanced itself from the civil code agenda, focusing instead on possibilities of law reform within the community.⁴⁵ The judiciary is

elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.'

⁴¹ For a comprehensive discussion on the political influences in which the women question is framed and negotiated, see R. S. Rajan, *The Scandal of the State: Women, Law, Citizenship in Post Colonial India* (New Delhi: Permanent Black, 2003); F. Agnes, *Law and Gender Inequality: The Politics of Women's Rights in India* (Oxford University Press, 1999).

⁴² Articles 14 and 15 guarantee equality before the law, and non-discrimination on grounds of sex (including affirmative action for women); Articles 25, 26, 27 and 28 assure freedom of religion; and Article 29 stipulates protection to interests of minorities (defined by language, script or culture).

⁴³ Article 44 of the Indian Constitution states: 'The State shall endeavor to secure for the citizens a uniform civil code throughout the territory of India' (author's emphasis).

⁴⁴ For discussion on the uniform civil code, Muslim law and identity politics, see Rajan, *The Scandal of the State* at 147–76 and Agnes, *Law and Gender Inequality* at Chapter 8.

⁴⁵ Agnes, *Law and Gender Inequality* at Chapter 12.

aware of the pitfalls of striking down family law provisions in this political context, preferring, instead, to harmoniously read the statute with the Constitution to minimize discrimination. •

The threat of legislative backlash against judicial rulings upholding women's rights with respect to the family law of minorities was not unfounded in view of the hasty enactment of the Muslim Women's (Protection of Rights on Divorce) Act 1986. The legislation sought to undo the Supreme Court ruling upholding Muslim women's right to claim maintenance from their former husbands under a general law,⁴⁶ limiting the husband's obligation to support the divorced wife only for a period of three months following the divorce, and not thereafter.⁴⁷ This law was challenged more than once for its inconsistency regarding equality and right to life. The petition by *Maharshi Avadhesh v. Union of India* invoked the Hindu Right arguments in favour of a uniform civil code, combined with tangential concerns for Muslim women, to plead for the striking down of the 1986 law and the complete erasure of Muslim law, which was rejected as the reliefs transgressed into legislative ambit.⁴⁸ In a subsequent case of *Daniel Latifi and Another v. Union of India*⁴⁹ that challenged the constitutional validity of the 1986 Act, the Court interpreted the provisions of the law expansively to read the three months to be the period within which all payments and future maintenance was to be completed. Observing that 'a reasonable and fair maintenance for the future of the divorced wife' meant payment for the period beyond the three months, including maintenance, ought to be made within the three months following the divorce, the Court avoided inconsistency with the Constitution and the prospect of striking down the law. Although without reference to the CEDAW, this ruling radically transformed the scope of entitlement available under the controversial law, and finds mention

⁴⁶ The *Shah Bano* case [1985 SCC (2) 556] upheld the right of a divorced Muslim woman to claim maintenance from her husband under section 125 of the Criminal Procedure Code that is uniformly available to dependent wives across all religions. Following a backlash by the Muslim orthodoxy against the judgment, the liberal secular Congress Party (then in government) hastily enacted the Muslim Women's (Protection of Rights on Divorce) Act 1986, that sought to exclude divorced Muslim women from recourse to section 125.

⁴⁷ The *iddat* period corresponds to three menstrual cycles after divorce where the woman may not marry to ascertain paternity in the event of pregnancy. See section 3(1) of the Muslim Women's Act 1986.

⁴⁸ 1994 SCC, Supl. (1) 713.

⁴⁹ (2001) 7 SCC 740.

in India's combined second and third periodic reports to the CEDAW as evidence of change within the community.⁵⁰

In *Gita Hariharan and Anr. v. Reserve Bank of India*,⁵¹ the Court addressed two separate petitions, both of which challenged the constitutional validity of section 6 of the Hindu Minority and Guardianship Act 1956, and section 19 of the Guardian and Wards Act 1890, for placing the mother in an inferior position with regard to the guardianship of a minor.⁵² Both petitioners were women personally affected by this law, one a writer and the other an environmental activist who challenged the law assigning guardianship to the mother only 'after' the father, read literally to mean after the death of the father. Rather than striking down the provision as discriminatory, the Court granted relief to the petitioners by holding that the word 'after' meant 'in the absence of', thereby extending guardianship to mothers while the father was living, or in circumstances where the father was physically absent, had delegated his right or was found unfit. Citing the CEDAW, the *Beijing Declaration* and the Constitution, the Court opted to read the law harmoniously with equality standards, to extend to mothers the right to guardianship of their child in more situations than the law originally intended.⁵³ By acknowledging mothers as guardians in circumstances during the lifetime of the father, the Court avoided disturbing the legal text declaring the father as the natural first guardian of the child. Yet the same Court had dismissed an earlier petition in 1994, seeking a declaration that the mother also be included as a natural guardian under Hindu guardianship, reportedly terming it 'luxury litigation' by a women's organization. In this case, the petitioner Neela Deshmukh, whose divorced husband challenged her

⁵⁰ *Combined Second and Third Periodic Report: India*, 19 October 2005, CEDAW/C/IND/2-3, para. 5.

⁵¹ AIR 1999 SC 1149.

⁵² Section 6 (Hindu Minority and Guardianship Act 1956) states: 'natural guardian of a Hindu minor, in respect of the minor's person as well as in respect of the minor's property ... are – (a) in the case of a boy or an unmarried girl – the father, and after him, the mother; provided that the custody of a minor who has not completed the age of five years shall ordinarily be with the mother'. Section 19 (Guardian and Wards Act 1890) forbids the court to appoint guardians in certain cases, including 'of a minor whose father is living and is not, in the opinion of the Court, unfit to be guardian of the person of the minor'.

⁵³ General Recommendation No. 21 at para. 20 states: 'The shared responsibilities enunciated in the Convention should be enforced at law and as appropriate through legal concepts of guardianship, wardship, trusteeship and adoption.'

custody over their children, had approached the Court with Manushi, a women's organization, in 1986.⁵⁴

The Court has consistently sidestepped calls to strike down the family laws. The case of *Ahemdabad Women's Action Group and Others v. Union of India* involved several petitions filed by women's groups seeking a declaration that discriminatory provisions in various family laws (Hindu, Muslim and Christian) offended the constitutional provisions of equality and non-discrimination, and were therefore invalid.⁵⁵ Observing that the petitions 'wholly involve issues of State policies' for which the relief lay with the Parliament, the Court rejected these.

In *C. Masilmani Mudaliar v. Idol of Shri Swaminathaswami Thirukoil and Others*,⁵⁶ the Court considered the validity of the right of a woman to sell property that was bequeathed to her for a life term, in lieu of the testator's obligation to maintain her. The sale of the bequeathed property by the woman was challenged by the beneficiary named in the will, to whom the property was to devolve upon the demise of the woman. It was argued that under section 14(2) of the Hindu Succession Act 1956, women do not have complete ownership over property given by a gift, will or any other instrument, or under a decree or order of a civil court or under an award where the terms of the gift, will or other instrument, or the decree, order or award prescribe a restricted estate in such property. The new owners who had purchased the property from the woman rebutted this position, stating that because the woman had a pre-existing absolute right to maintenance irrespective of the will, section 14(2) would not apply. Instead, section 14(1) of the said statute would apply, giving those with a pre-existing right in the 'gift' an absolute title to the bequeathed property. This absolute title allowed the woman to dispose of the property by sale. While the High Court held that the woman could not sell the property, the Supreme Court, on appeal, held that the woman had a pre-existing right in the property under section 14(1), giving her an absolute title and right to sell it. In determining that section 14(2) did not apply to this case, the Court avoided the question of the woman's 'limited title' to the estate gifted to her. Additionally, the Court referred to several international human rights documents (including the CEDAW) to emphasize

⁵⁴ For discussion on the case, see M. Kishwar, 'Public interest litigation: one step forward, two steps backwards', *Manushi* 81 (1994) 11–23. For the text of the petition, see 'Is a father a natural guardian? Hindu Guardianship Act challenged', *Manushi* 35 (1986) 32–6, available at: www.manushi-india.org.

⁵⁵ 1997 (3) SCC 573. ⁵⁶ (1996) 8 SCC 525.

the primacy of sex equality. While referring to India's declaration in relation to Article 5(a) of the CEDAW, the Court noted that India's obligations under Article 2(f) read with Articles 3, 14 and 15 of the CEDAW, denuded the declaration of any effect and made it inconsequential. This case is significant in that sex equality was achieved without reinterpreting or striking down the statutory provision in question, and most importantly, for discounting the legal validity of India's declarations.

In the case of *Madhu Kishwar v. State of Bihar*,⁵⁷ the majority decision of the Supreme Court concurred with the state-level Tribal Advisory Board holding that discriminatory tribal customary laws of succession were necessary to protect land from alienation and fragmentation, and for the preservation of tribal culture. The editor of a women's magazine and two tribal women who challenged the law in the public interest had argued for women's equal rights to succession to land tenancies, relying upon the constitutional guarantee of equality. They had pleaded that tribal women were not just rendered landless upon the demise of the landholder through whom they enjoyed rights over the land, but also rendered destitute as their livelihood was linked to land. The majority held that the threat of destitution could be tackled through women's right to use of land (without title) to be asserted against the next male successor – offering tribal women survival instead of equality. The Court referred to the Universal Declaration of Human Rights (UDHR) and the CEDAW, along with the Constitution and the Protection of Human Rights Act 1993, to direct the state: 'by appropriate measures including legislation, modify law and abolish gender based discrimination in existing laws, regulations, customs, and practices which constitute discrimination against women'.⁵⁸

The sole dissenting judge, however, also relied upon the CEDAW, the directive principles of state policy⁵⁹ and the fundamental rights to hold that there was a need to overturn sex discrimination in succession to tenancy rights.⁶⁰ Tribal laws remain unchanged despite proposals by women's groups seeking equal succession with conditions to regulate land alienation.⁶¹

⁵⁷ (1996) 5 SCC 125. ⁵⁸ *Ibid.* para. 11.

⁵⁹ Chapter 4 of the Indian Constitution sets out social and economic guidelines for state policy, which are not justiciable.

⁶⁰ Justice Ramaswamy was the sole dissenting judge. See critique of the majority ruling, Kishwar, 'Public interest litigation', *supra* note 54.

⁶¹ M. Mehra and G. Sharma, *Negotiating Gender Justice, Contesting Discrimination: Mapping Strategies that Intersect Culture, Women and Human Rights* (New Delhi: Partners for Law in Development, 2010) at 95–113.

In contrast to the approach of the Supreme Court to challenges relating to substantive aspects of family law, a more radical position was taken in relation to (compulsory) registration of marriages, an area covered by Article 16(2) of the CEDAW, also the subject of India's declaration. The case of *Seema v. Ashwani Kumar* pertained to the matter of compulsory registration of marriages, a concern that the Supreme Court framed on its own initiative, in the context of a husband's denial of the marriage to avoid his wife's maintenance claim.⁶² The Court inquired into the legislative status of the compulsory registration of marriages in each state to safeguard against such denials by husbands, and sought the opinion of the National Commission for Women, which recommended compulsory registration, attributing to it benefits of preventing child marriage, forced marriages, illegal polygamy and desertion of wives; besides enabling wives to secure residence in the matrimonial home, claim maintenance and inheritance; and deter selling daughters under the guise of marriage.⁶³

The Court held that marriages of all persons irrespective of religion should be compulsorily registered in their respective states, and asked the states to report on the status of the law. While about five states had laws on compulsory registration, a few others had laws pertaining to voluntary registration of marriages. Despite India's declaration, the Court laid down guidelines for the states to enact rules with regard to compulsory registration of marriages, with penalties attached to non-registration.⁶⁴ Further, the states that had not given specific details regarding their compliance were directed to appraise the Court on the specific measures taken by them. Although projected as a solution to several wrongs, the state laws do not ensure monogamy, are not entirely compulsory or enforceable, and are not an irrefutable proof of marriage.⁶⁵

⁶² (2005) 4 SCC 443; (2006) 2 SCC 578; and 2008 (1) SCC 180. This case was a matrimonial suit in the Delhi civil court transferred to the Supreme Court, on its own motion.

⁶³ These reasons are listed in the affidavit filed by the National Commission for Women before the Supreme Court in *Seema v. Ashwani Kumar* (2006) 2 SCC 578. CEDAW General Recommendation No. 21 at 39 requires States Parties to register all marriages – whether contracted civilly, according to custom or religious law – suggesting a linkage between marriage registration and equality between partners in terms of a minimum age for marriage, prohibition of bigamy and polygamy, and the protection of the rights of children.

⁶⁴ Most of the states that enacted rules relating to compulsory registration of marriage impose a fine on the party to the marriage (bride and groom, and in one case, guardians of the bride and groom) of up to INR. 1000/- for failure to register within the stipulated period.

⁶⁵ Interestingly, some state laws allow registration of multiple marriages of the groom (as marriage is not defined as legal marriage, but includes custom); the proposed rules of

Some women's groups view compulsory registration as counter-productive, in that it potentially excludes many women from staking legal claims, even as it fails to secure claims of women who hold proof of marriage. Linking marriage registration to basic rights arising from cohabitation would hit women in diverse domestic relationships, including 'relationships in the nature of marriage' under the Protection of Women from Domestic Violence Act 2005, and potentially in the future, to same-sex partners.⁶⁶ The matrimonial wrongs that compulsory registration seeks to remedy are the result of structurally entrenched gender inequality in society that requires substantive rather than administrative interventions. A better approach might be to broaden the definition of 'wife' to include customary unions, live-in relationships and cohabitations for the purposes of securing rights related to maintenance, as is currently under the consideration of the Supreme Court in *Chanmuniya v. V.K. Singh Kushwaha*.⁶⁷

4.2 Sexual assault

This section discusses judicial activism relating to reparative justice, the definition of rape and child sexual abuse – highlighting the pace of legislative responses on areas where the state obligation is not limited by any reservation, or encumbered by considerations of religion or cultural identity.

In *Delhi Domestic Working Women Forum v. Union of India and Ors*,⁶⁸ an NGO working with migrant domestic workers approached the Supreme Court in the matter of the rape of four tribal girls in a train by army men. Noting the absence of restorative support to rape survivors, the Court framed guidelines mandating provisioning of support services, legal aid,

the state of Rajasthan allow registration of child marriages, and the rules of Bihar state that registration of marriage shall not be an irrefutable proof of marriage. However, to address concerns relating to the prevention of child marriage, polygamy and the wife's right to maintenance through proof of marriage, the rules seem to recognize that they cannot address these issues.

⁶⁶ See M. Mehra, *Rights in Intimate Relationships: Towards an Inclusive and Just Framework of Women's Rights and the Family* (New Delhi: Partners for Law in Development, 2010).

⁶⁷ 210 INSC 829, dated 7 October 2010. The reference arose from a case involving the husband's rejection of his wife's claim for maintenance on the ground that the marriage was merely a custom and was not legally valid. The custom required a widow to marry her younger brother-in-law upon the death of her husband. While upholding the wife's claim for maintenance, the Supreme Court referred to a larger bench the question of clarifying the definition of the term 'wife'. Partners for Law in Development, together with other organizations, have sought permission to assist the Court in this matter, placing on record its resource book by Mehra, *Rights in Intimate Relationships*.

⁶⁸ (1995) 1 SCC 14.

counselling, rehabilitation and compensation to rape survivors – noting that rehabilitation and recovery were essential parts of justice. They called for a compensation scheme and the establishment of a Criminal Injuries Board to dispense compensation regardless of outcome of the rape trial and assigned the responsibility to draft such a scheme to the National Commission for Women. Although the CEDAW was not relied upon in this case, this judgment is important for recognizing reparative aspects of gender justice in the context of sexual assault for the first time.

After several deliberations and draft schemes on compensation for rape victims, the government has framed 'Financial Assistance and Support Services to Victims of Rape – a scheme for restorative justice, 2011' more than fifteen years after the Court's guidelines. The scheme has been approved by the central government, but is not yet functional as it is contingent on state notification, creation of federated boards at the district and state levels, and resource allocation, amongst other things.⁶⁹

The issue of compensation for rape survivors arose again, in the case of *Chairman, Railway Board and Ors v. Mrs. Chandrima Das and Ors*,⁷⁰ which involved the question of compensation by the state railways to a rape survivor, because the perpetrators were state employees and the crime occurred on state property. The petitioner, a lawyer of the Calcutta High Court, sought compensation for the survivor, a Bangladeshi national. The High Court awarded compensation, holding that the Railway Board was vicariously liable for the rapes perpetrated by its employees in buildings belonging to the railways. On appeal in the Supreme Court, the following questions arose – whether compensation could be awarded for rape as a constitutional rather than a private remedy; whether fundamental rights guaranteed by the Constitution could extend to a foreign national; and finally, whether the railways were vicariously responsible for the private actions of its staff. The Court awarded compensation, holding that the public law remedy for compensation was available for wrongs done by government agents.⁷¹ The Court also relied upon the UDHR and the Declaration on the Elimination of Violence against Women 1993, as well as principles relating to the application and interpretation

⁶⁹ The scheme has been critiqued for inadequate compensation, the time limit for applying, the compulsion to pursue criminal prosecution and exclusion of women who 'appear' to be involved in solicitation. See www.indg.in/social-sector/women-and-child-development/financial_assistance_and_support_services_to_victims_of_rape.pdf (last accessed 27 February 2013).

⁷⁰ AIR (2000) SC 988.

⁷¹ *Nilabati Behera v. State of Orissa* (1993) 2 SCC 746 drew upon the International Covenant on Civil and Political Rights to uphold that compensation was available as part of enforcement of a fundamental right as a public law remedy, as distinct from a private tortious remedy.

of international law set out by several judicial colloquia,⁷² to uphold that fundamental rights, particularly the right to life, vest in 'persons' regardless of nationality, and not merely citizens – to uphold the survivor's right to compensation under the Constitution.

The Indian Penal Code has three offences relating to sexual assault and harassment of women – of which only rape is treated as grave in terms of requiring prompt arrest, bail to the accused with permission of the court and substantial punishment. However, rape is narrowly defined to cover penile vaginal penetration, leaving out forms of penetrative sexual assault. Grave sexual offences such as forced nudity and parading fall within the scope of lesser offences.⁷³ Apart from the inadequate coverage of sexual offences, there are problems with related evidentiary and procedural requirements.⁷⁴ Although the women's movement has been campaigning for a comprehensive sexual assault law for more than two decades, and the Committee has urged legal reform relating to sexual harassment, rape and other critical areas within a reasonable time frame,⁷⁵ the Criminal Law Amendment Bill 2010⁷⁶ falls short of incorporating all the demands.⁷⁷ There is no explicit law on child sexual abuse – which has been prosecuted

⁷² The proceedings of the judicial colloquia referred to are: Commonwealth Secretariat and Interights, *Developing Human Rights Jurisprudence, Volume 1: First Judicial Colloquium on the Domestic Application of International Human Rights Norms: Bangalore, India, 24–26 February 1988* (London: Commonwealth Secretariat, 1988); A. Byrnes and K. Adams (eds.), *Gender Equality and the Judiciary: Using International Human Rights Standards to Promote the Human Rights of Women and the Girl-child at the National Level* (London: Commonwealth Secretariat, 2000); and A. Byrnes, J. Connors and L. Bik (eds.), *Advancing the Human Rights of Women: Using International Instruments in Domestic Litigation: Papers and Statements from the Asia/South Pacific Regional Judicial Colloquium, Hong Kong, 20–22 May 1996* (London: Commonwealth Secretariat, 1997).

⁷³ Sections 375, 354 and 509 of the Penal Code relate to rape, outraging the 'modesty' of a woman and sexual harassment by 'indecent' word or gesture, respectively. The latter two are smaller offences that attract smaller sentences – a maximum of two years and one year, respectively. The terminology of 'modesty' and 'indecent' has been critiqued for invoking popular morality to judge women, and is frequently applied as such.

⁷⁴ From reporting, to investigation and trial, the rape proceedings have been critiqued as being hostile and demeaning to women. The medico-forensic examination continues to rely upon two finger tests to ascertain rape, and use references such as 'habitual to sex'. With no victim or witness protection, and long, hostile legal procedures, many survivors are unable to continue with the proceedings.

⁷⁵ Concluding Observations, 2 April 2000 at paras. 59, 69, 71, 72; and Concluding Comments, 2 February 2007 at paras. 9, 23, 24, 25.

⁷⁶ [http://mha.nic.in/writereaddata/12700472381_CriminalLaw\(Amendment\)Bill2010.pdf](http://mha.nic.in/writereaddata/12700472381_CriminalLaw(Amendment)Bill2010.pdf) (last accessed 27 February 2013).

⁷⁷ See for example T. K. Rajalakshmi, 'Half measure', *Frontline* 27:4 (2010) 13–26; T. K. Rajalakshmi, 'Bill not comprehensive', *Frontline* 27:13 (19 June–2 July 2010) online.

innovatively through a penal provision on 'unnatural sexual offences', which until recently also criminalized homosexuality.⁷⁸

The issue of the limitations of the penal law relating to sexual assault, and the legislative gap relating to child sexual abuse came before the *Supreme Court in Sakshi v. Union of India and Ors.*⁷⁹ In that case, the petitioners, a women's organization, raised the issue of the narrow scope of section 375 in terms of the limited definition of penetration. Citing the CEDAW, the CRC, the right to life guaranteed under the Constitution and feminist legal jurisprudence, the petitioners raised concerns arising from the legal vacuum with respect to sexual abuse of children. While emphasizing the urgency for legislation in this regard, the Court set out preliminary guidelines for conducting trials in cases of child sexual abuse. In light of the complex nature of the legislative changes required, the Court highlighted the need for a new law on child sexual abuse. Nearly a decade after the *Sakshi* case, the government has produced a Protection of Children from Sexual Offences Bill 2011, which remains to be enacted.

4.3 Sex discrimination in the workplace

Sex discrimination in the workplace is an area where the CEDAW has been invoked most directly to frame guidelines that operate until a law is enacted. Of the three cases discussed in this section, two were initiated by corporations unconnected with women's groups.

In *Vishaka v. State of Rajasthan*,⁸⁰ a women's organization from Rajasthan drew attention to the risks to and protection gaps for women workers in the absence of a sexual harassment law. This public interest petition backed by the women's movement was triggered in response to a retributive gang rape of a rural social worker in Rajasthan who was working towards stopping child marriages. The Supreme Court referred inter alia to General Recommendation No. 19 on violence against women and Article 11 of the CEDAW, alongside Articles 14, 15, 19(1)(g) and 21 of the Constitution of India,⁸¹ to highlight the need for safe working

⁷⁸ On 2 July 2009 the Delhi High Court decriminalized homosexuality in *Naz Foundation v. Govt of NCT, Delhi*, 2009 (160) DLT 277. Section 377 of the Penal Code was retained for prosecuting non-consensual homosexual sex and child sexual abuse. See the special issue of the *NUJS Law Review* 2:3 (2009) on the case. Several appeals seeking reversal of the judgment were filed in the Supreme Court, the hearings of which concluded in March 2012. The verdict is awaited.

⁷⁹ AIR 2004 SC 3566. ⁸⁰ (1997) 6 SCC 241.

⁸¹ The Articles pertain to equality before the law, special provisions for women and children, freedom to practise any trade and profession, and the right to life respectively, guaranteed in the chapter on fundamental rights of the Constitution of India.

environments for women as an extension of non-discrimination, the right to practise any profession, as well as the right to life. The Court drew upon the principle of 'legitimate expectation' that flowed from ratification of a treaty⁸² and General Recommendation No. 19 to set out guidelines to act as law, thereby plugging the legislative vacuum on sexual harassment in the workplace. Despite the judgment's emphasis on the urgent need for a law on sexual harassment in the workplace, and the Committee's recommendations reinforcing this,⁸³ problems continue to plague the Bill fifteen years on, and a law remains to be enacted.⁸⁴

In another case pertaining to sexual harassment in the workplace, the *Apparel Export Promotion Council v. A.K. Chopra*,⁸⁵ the Court noted that '[t]he domestic courts are under an obligation to give due regard to International Conventions and norms for construing domestic laws when there is no inconsistency between them'.⁸⁶ In this case, the Court held that 'attempted' molestation was covered by the offence of sexual harassment. Although this judgment relies upon the guidelines set out by the Supreme Court in the *Vishaka* case, it does not refer to terms such as unwelcome conduct or the creation of a hostile workplace that are found in the language of the sexual harassment guidelines. Instead, it describes the conduct in patriarchal terms as being 'wholly against moral sanctions, decency and ... offensive to her modesty', terminology that has often served to discredit the victim. While this case sets positive standards, there remains a need for aligning terminology with international standards, to break away from the language of morality that has historically served to judge women unfairly.

The Court's judgment in *Anuj Garg v. Hotel Association of India*⁸⁷ elaborates the principle of substantive equality, to strike down a protectionist law that barred women from working in premises where liquor is consumed. The case relates to the validity of a colonial law relating to excise matters that prohibits from employment men below the age of twenty-five years and women absolutely, from premises where liquor or intoxicating drugs are consumed by the public. The respondents, representing the hospitality

⁸² The Court invoked the doctrine of legitimate expectation that upholds aspirations for protection of rights set out in treaties ratified by the state, which is to say that citizens may legitimately expect that rights enshrined in a treaty ratified by the state will be protected.

⁸³ Concluding Observations, 2 April 2000 at paras. 37, 59, 69.

⁸⁴ The Protection of Women against Sexual Harassment at Workplace Bill 2010 was referred to a Parliamentary Standing Committee to examine concerns of different constituencies relating to exclusion of domestic workers from the ambit of the Bill, penalty for a false complaint and demand for gender-neutral law. See summary of the Committee's report at www.prsindia.org.

⁸⁵ AIR (1999) SC 625. ⁸⁶ *Ibid.* para. 14.

⁸⁷ AIR (2007) SCC 663.

industry, challenged the constitutional validity of this provision on the grounds, *inter alia*, of sex discrimination, and had the law struck down.

The judgment refers to precedents such as the *Gita Hariharan*, *Vishaka* and *Madhu Kishwar* cases where the CEDAW was relied upon (all discussed in this chapter), and feminist legal texts to elaborate the scope of substantive equality. Highlighting the contradictions between the contemporary social and economic realities, of increasing training and employment opportunities in the hospitality sector with protectionist laws that curb women's freedom to practise a profession, as well as autonomy of choice and equality, the Court noted that: '[i]nstead of prohibiting women employment in the bars altogether the state should focus on factoring in ways through which unequal consequences of sex differences can be eliminated. It is the state's duty to ensure circumstances of safety which inspire confidence in women to discharge the duty freely in accordance to the requirements of the profession they choose to follow.'⁸⁸ It further observed that: 'No law in its ultimate effect should end up perpetuating the oppression of women. Personal freedom is a fundamental tenet which cannot be compromised in the name of expediency unless there is a *compelling state purpose*.'⁸⁹

5 Conclusion

The predominant use of the CEDAW in judicial pronouncements has been interpretive, helping to engender constitutional rights to minimize explicit discrimination in the law. While the CEDAW may not be an explicit source of reference in all the cases that have tackled sex discrimination, they nonetheless have aided fulfilment of treaty obligations. There appears to be greater caution with respect to family law of minority communities – which in the case of *Madhu Kishwar* manifested as judicial capitulation to political risks, but in *Daniel Latifi* strikes a fine political balance that entirely transformed the import of the controversial 1986 Act. The state has delegated the responsibility of initiating family law reform with respect to minorities upon the judiciary and the male religious orthodoxy, as is evident from India's second and third periodic reports to the CEDAW.⁹⁰ This is despite the Committee pressing the state to recognize women's demands as community initiatives and to work with and support women's groups as members of these communities.⁹¹

⁸⁸ *Ibid.* para. 41. ⁸⁹ *Ibid.* para. 45 (author's emphasis).

⁹⁰ *Combined Second and Third Periodic Report: India*, 19 October 2005, CEDAW/C/IND/2-3, paras. 4-5.

⁹¹ Concluding Observations, 2 April 2000 at paras. 60-61, and Concluding Comments, 2 February 2007 at para. 11.

The difference in the judicial approaches to the two areas covered by India's declarations, family law and marriage registration, provide comparative insights into the two issues: the former involving the substantive rights of women, and the latter involving administrative aspects. The judicial approaches of reading down explicit or *de jure* discrimination in substantive areas of family law contrasts with the proactive directions in the *Ashwani Kumar* case for legislating on compulsory registration of marriage. The approach taken in the *Anuj Garg* case is equally striking, in declaring the offending law void – but it must be distinguished as it involves women's equality within the public domain in the context of globalization, where the hospitality industry and the employment of women are considered a necessary facet of national growth. While the *Ashwani Kumar* judgment stands out for its radical approach, and it seeks only to implement the letter of the CEDAW, in spirit it does not advance or protect women's rights in the context of India.

That the judiciary has played a leadership role in domesticating the CEDAW is demonstrated through the setting out of guidelines for law-making, much more than may be possible through a politically charged legislature. In four cases, guidelines were formulated to plug the legal vacuum, urging legislative reform to follow. The judgments in *Delhi Domestic Working Women Forum*, *Vishaka*, *Sakshi* and *Ashwani Kumar* are illustrative of this trend – covering restorative justice, sexual harassment in the workplace, child sexual offences and compulsory registration of marriage. The promptness of legislative action on registration of marriage contrasts with pending bills relating to sexual assault, areas

Addendum: Since the writing of this chapter, three key legislative reform agendas originating from judgments (pursuant to test cases by women's groups) were finally passed by the parliament. The passage of the Protection of Children from Sexual Offences Act in May 2012 filled a longstanding legislative vacuum (see <http://wcd.nic.in/childact/childprotection31072012.pdf>). The new law criminalises graded sexual contact, ranging from touching to penetrative sexual assault with and between children, defined as below the age of 18 years, prescribes mandatory reporting and sets out child sensitive procedures. In collapsing all legal minors (i.e. under 18 years) as children, the law disregards the evolving capacities of young persons to engage in consensual sex, thus criminalizing consensual sexual contact between young persons. This does not serve the best interests of young persons, and to this extent, has been critiqued for being inconsistent with international standards. In the backdrop of violent policing of inter-caste/ inter-community relationships in India, the law lends itself as a tool of retribution in the hands of family members, community leaders and vigilante groups (see Geeta Ramaseshan, 'Law and the age of innocence', *The Hindu*, 19 June 2012).

After the dismal offerings of the Criminal Law Amendment Bill, 2010 (discussed in the chapter), a similarly disappointing 2012 version followed which amongst other things, did not account for graded forms of sexual violence that fell between the two ends of the spectrum: penetrative sexual violence and the trivial offence of 'outraging the modesty

unencumbered by declarations and where judicial guidelines have existed longer. To that extent, declarations are often political postures necessary to assuage a domestic constituency, but do not imply easier progress in areas where no declaration exists. The story of domestication is a continuing one, involving much more than laws. However, the struggle for norm-setting in law remains a fundamental part of the change, in which the contribution of the courts has been significant, as discussed in this chapter.

of women'. In December 2012, after the homicidal gang rape of a young student in Delhi, widespread public outrage engulfed the streets of Delhi and spread across metros and towns in response to which the government constituted a high level committee headed by retired Supreme Court judge, Justice Verma. In its recommendations, the Committee adopted the demands of the women's groups on changes in the criminal law, covering as well, aspects of prevention, education and accountability beyond the law. With the Verma recommendations being widely welcomed by social movements, the public and lauded internationally, including by the UN High Commissioner on Human Rights (see www.un.org/apps/news/story.asp?NewsID=44000&Cr=india&Cr1=rights#.US8EnKJxS3E), there was pressure for a introducing a new bill that sought to implemented the recommendations. The Criminal Law Amendment Bill, 2013 was enacted against this backdrop of events (see http://164.100.24.219/BillsTexts/LSBillTexts/PassedLoksabha/63C_2013_En_LS.pdf). Its positive features include an expanded definition of rape that goes beyond the penile vaginal penetration; creation of new offences such as stalking, voyeurism, forced disrobing of woman and acid attack; strengthened penal accountability for public servants who disobey the law to the detriment of the victim; and a waiver of the requirement of prior sanction from the government for prosecuting a public servant for sexual offences. In addition, the law stipulates mandatory free medical treatment to victims from public and private medical facilities backed by penalties for failure to do so. Although a significant step forward, the new law does not fully implement the holistic reforms set out by the Verma Committee.

Sixteen years after the *Vishaka* guidelines, the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act 2012 was passed in February 2013 (see http://164.100.24.219/BillsTexts/LSBillTexts/PassedLoksabha/144C_2010_LS_Eng.pdf). The law defines what constitutes sexual harassment, extending its application to the formal and informal sectors, including domestic workers. It requires any organization, which employs more than ten people to set up an internal complaints committee, backed by a penalty for not doing so. Despite these achievements, the bill dilutes rather than builds on *Vishaka* guidelines by allowing conciliation between the complainant and the defendant, even prior to an inquiry. In face of the known power differentials and the hostility against complainants, this can become a channel for coercion. It also prescribes action against the complainant for malicious or false complaints, deterring rather than encouraging women to report harassment.

The recent enactments have followed a long contested legislative journey, coming to fruition just prior to India's next general elections scheduled in 2014, as well as the fifth and sixth periodic review by the CEDAW, expected in the same year. The advances of the Criminal Law Amendment Bill, 2013, are distinct, given the substantial departure it makes from the earlier bills on the subject. This development must be viewed against the backdrop of unrelenting public pressure, international attention and the Verma report, all of which lent force to the demands of women's groups. The need for governments to act, or appear to have acted is of significance for its domestic and international constituencies, which conjoined on the issue of sexual offences against women at a particular historic moment.