CHAPTER-VI

SEXUAL HARASSMENT AND SEXUAL EXPLOITATION OF WOMEN

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AN OVERVIEW

Sexual harassment of women is a phenomenon of recent origin that brings forward the fact that violation of women's body and mind may extend beyond the brutal instances of sexual offence like rape, to other aspects of men's conduct. Unlike rape, however, it is only comparatively recently that such conduct has been hauled up from its closet and has come to be viewed publicly as generating legally redressible harm. In other words women often face multiple barriers to being free and equal in the societies. Some barriers are based on their gender and some are on their sex. Sexual harassment of women is another form of gender based violence.[1]What is sexual harassment? Women in the workplace need to know. The law does not fully inform the women. It does not even fully define sexual harassment. How, then, to understand and protect oneself against the sexual harassment? Is it sex discrimination? Does it create hostile environment for a woman in the workplace? The present chapter tries to find out the answer of these questions as this particular crime against women has come up relatively recently on the surface of the country. Sexual harassment can be termed as the most complex crime against women considering the fact that a variety of conduct may constitute the offence and still the victim may be either ignorant of it or may herself ignore it simply because of the difficulty of proving it or because of threat perception. As there is a void in the Indian law, the present chapter makes a survey of foreign law and decisions. The victim in case of workplace harassment would be more helpless as because the harasser is none but his employer or a person of superior authority. An attempt therefore has been made to find out various legal remedies that are available under the existing system.

Ours is a patriarchally superior society, where, males are the preferred children and male have so-called rights and priorities from the beginning while

[1] Social Welfare,(December 2003), at p. 16.

the women are viewed as sexual object, or used as an item to be sold in the sleaze market. It would not be wrong to say that the present decade is the decade, where co modification of women is witnessed more increasingly. This commoditization of women has made so much inroad in the modern society that it becomes very difficult to understand whether a particular expression is obscene or not. The scientific discovery in the form of world web, the mass media, the commercialization of symbol of women and its physical beauty and its marketization are now started to be viewed as the manifestation of women's right, and the right to information and education for both male and female is posing a substantive question as to whether the existing law relating to obscenity can maintain the equilibrium between these conflicting rights which the constitution gives them and the rights of those which the criminal law seeks to protect. The present chapter besides discussing obscenity law and legal policy, focuses these issues.

Sexual exploitation of women, and minor children, namely prostitution has existed in some form or the other ever since the society attempted to regulate and control sexual relationship through the institution of marriage. One group of feminist argue that this oldest profession, is another form of general exploitation of women, which under mines the sanctity of marriage as a social institution, downgrades the status of women, undermines the sacredness of sexual ethics, serves as a source of many problem including organized trafficking and breeder of hard-to-be treated sexually transmitted disease.[2] Though, its history, culture and tradition vary from society to society, the only common thing is its prevalence and survival through out the ages. The global sweeping of prostitution notwithstanding, the problem in modern time is causing a great concern. India is not an exception to this booming flesh trade. The participants and perpetrators of this business have found some support from various organisations working for the prostitutes. They argue that the prostitutes also have freedom of trade and profession. True to the point voices are raised that they are the victim and not the perpetrator of the crime and until they are fully rehabilitated its decriminalization would lead to disaster. The present chapter therefore examines not only the legal intricacies regulations but also the emerging facets of prostitution and its menacing manifestations. In doing so the problematic of prostitution has been probed with a humanitarian view highlighting the complexities involved in combating the problem.

[2] Dr. S. P. Srivastava , "*Prostitution-Growing Monster With Many Faces*," Social Welfare, August-September, (2003), at p.53.

A) SEXUAL HARASSMENT

a) The Origin of the term 'Sexual Harassment'

The term sexual harassment gained currency in the very recent years, although the term has been apparently coined by Lin Farely in the mid 1970s.[3] The term "sexual harassment" first came into use in the late 1970s in the United States. The term's origin is generally traced to a course on women and work taught by Lin Farley at Cornell University. In 1979, Catherine MacKinnon, a legal scholar from the United States, made the first argument that sexual harassment is a form of sex discrimination prohibited by the constitution and civil rights laws of the United States. Since then many international bodies, national legislatures and courts have prohibited sexual harassment but have not agreed on a universal definition of the term.[4] MacKinnon described that:

> *"The legal concept of sexual harassment re-enters the society to participate in shaping the social definitions of what may be resisted or complained about, said loud or even felt."*[5]

Years of feminist effort created the term sexual harassment, now a legal wrong and a cultural colossus. But the phrase remains elusive, connoting no specific type of harm. Until recently no term event existed to describe what is now universally called 'Sexual Harassment' although the phenomenon itself was well known to women. Sexual harassment is now a term that brings no clear picture to mind.[6]

Millions of women suffer sexual harassment due to gender bias and discrimination and tradition of exclusion. From ancient Greece through nineteenth century Europe and beyond, intellectual leaders justified social economic and political inequality with reference to the transcendent gift of reason with which only man is credited. Those who could reason best were most fit to govern, to control property and its laws, and to make use of lesser creatures.[7] According to Aristotle the "deliberative faculty in the soul is not present at all in a slave; in a female it is present but ineffective; in a child present but undeveloped."[8] For Aristotle there could be no good life without reason. And thus a woman's life is always slavish, never fully human.[9] In the opinion of Kant women were not

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[3] Cynthia Grant Browman, ' *Street Harassment and the Informal Ghetoization of women*," Harvard Law Review, , vol-106, no-3, (January 1993),at p. 517.

[4] Ibid: See also Catharine MacKinnon, " *Sexual Harassment of Working Women: A Case of Sex Discrimination*", (1979), p. 250.

[5] Ibid.

[6] Anita Bernstein, " *Treating Sexual Harassment With Respect*", Harvard Law Review, vol-111, no-2, (December 1997), at p.445.

[7] Alison M Jaggar, " *Feminist Politics and Human Nature*", (1983), p. 36.

[8] See,Aristotle, " *The Politics*" , J.A. Sinclair translation (1962)

[9] Supra note 6 at p. 457.

capable of principles and that their philosophy is not to reason but to sense.[10] Even for Hegel women could not attain to the ideal of rational thought and therefore the difference between men and women is like that between animals and plants.[11] Rousseau denounced women as incapable of thought and unsuited to education.[12] Vestiges of this kind of belief persist in all the societies. Therefore, women still suffer and cannot enjoy her civil right; cannot participate in public affairs without fear.

The prohibition of sexual harassment in the workplace is closely linked with theories relating to the subordination of women to men that were first introduced in the United States in the 1970s. These theories associated sexual harassment with violence against women, the perpetuation of gender stereotypes and the assertion of economic power over women, all phenomena which serve to subordinate women to men. In general, the role sexual harassment is believed to play in the subordination of women in society has led many countries, including the United States, the United Kingdom, Canada, Australia, Japan and South Africa, to recognize sexual harassment as an actionable form of sex discrimination.

Over time, however, the legal standards and remedies applied to cases of alleged sexual harassment have not always reflected the theories, which gave, rise to sexual harassment law. Martha Chamallas notes with respect to law in the United States that "after over two decades of enforcement of sexual harassment laws, the results are decidedly mixed. There can be little question that, for many people, particularly the targets of harassment, a change in consciousness has occurred. What was once quite universally regarded as private, petty conduct (for which the target herself was often deemed responsible) can now be argued to be a serious infringement of a worker's civil rights. On the other hand, the development of the law of sexual harassment has not escaped some of the stultifying influences of the law of rape. . . . Many opinions in this unusually active area of litigation embody traditional views of proper behaviour for men and women and fail to see the connection between sexual harassment and women's subordination. The tendency to attribute causality to women's 'provocative' dress or behaviour and to credit myths about the motivations and credibility of complainants can sometimes make sexual harassment litigation look like the civil

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[10] Immanuel Kant, " *Observations on the Feeling of the Beautiful and Sublime*," John T Goldthwait translation,(1960), p. 81.
[11] Hegel, " *Philosophy of Right*," TM Knox translation,(Oxford University Press, 1967), p. 263.
[12] Supra note 6 at p. 457.

version of a rape trial."[13] It should be noted that literature concerning sexual harassment now includes alternative theories of sexual harassment which focus on the dignity of men and women in the workplace. These theories have led to the development of more gender-neutral legal standards for evaluating sexual harassment claims. For example, the harassment legislation of many European countries and the definition of sexual harassment adopted by the European Union make the violation of the dignity of a person in the workplace a central concern.

b) What is Sexual Harassment?

In American Jurisprudence and in UK the concept of sexual harassment has entered the law as a form of sex discrimination and they have their law to deal with this evil. In **Vishaka v State of Rajasthan**[14] for the first time in 1997 the Supreme Court has defined the term sexual harassment in the following words:

"Sexual harassment includes such unwelcome sexually determined behaviour (whether directly or by implication) as:

a) physical contact and advances;
b) a demand or request for sexual favours;
c) sexually coloured remarks;
d) showing pornography;
e) any other unwelcome physical, verbal or non-verbal conduct of sexual nature;

Where, any of these acts is committed in circumstances where under the victim of such conduct has a reasonable apprehension that in relation to the victim's employment or work whether she is drawing salary, or honorarium or voluntary, whether in Government, public or private enterprise such conduct can be humiliating and may constitute a health and safety problem. It is discriminatory for instance when the woman has reasonable grounds to believe that her objection would disadvantage her in connection with her employment or work including recruiting or promotion or when it creates a hostile work environment. Adverse consequences might be visited if the victim does not consent to the conduct in question or raises any objection thereto."[15]

Sexual Harassment includes any avoidable sexual advances either verbal or through gestures or through use of sexually suggestive or pornographic material, and includes amongst others; whistling, sexually slanting and obscene remarks or jokes; comments about physical appearance; demands for sexual

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[13] See, Martha Chamallas, " *Introduction to Feminist Legal Theory*", (2003),pp.237-254: See also Katharine Bartlettet, " *Gnder and Law: Theory, Doctrine and Commentary*",(2002), pp. 540-597.
[14] (1997) 6 SCC 241.
[15] Ibid.

favours; threats, innuendoes; avoidable physical contacts, touching, patting, pinching; physical assaults and molestation of and towards women workers by their male colleagues, or any one who for the time being is in a position to sexually harass the women."[16]

Sexual harassment is a syndrome of discrimination and exploitation. It creates a climate of threat, terror and reprisal. Sexual harassment is a form of sex discrimination that violates Title VII of the Civil Rights Act of 1964. Title VII applies to employers with 15 or more employees, including state and local governments. It also applies to employment agencies and to labour organizations, as well as to the federal government.

According to the United States Equal Employment Opportunity Commission Sexual harassment means:

> "Unwelcome sexual advances, requests for sexual favours, and other verbal or physical conduct of a sexual nature constitute sexual harassment when this conduct explicitly or implicitly affects an individual's employment, unreasonably interferes with an individual's work performance, or creates an intimidating, hostile, or offensive work environment.
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> a. Sexual harassment can occur in a variety of circumstances, including but not limited to the following:
> b. The victim as well as the harasser may be a woman or a man. The victim does not have to be of the opposite sex.
> c. The harasser can be the victim's supervisor, an agent of the employer, a supervisor in another area, a co-worker, or a non-employee.
> d. The victim does not have to be the person harassed but could be anyone affected by the offensive conduct.
> e. Unlawful sexual harassment may occur without economic injury to or discharge of the victim.
> f. The harasser's conduct must be unwelcome."[17]

There are a few common elements in definitions of sexual harassment worldwide:[18] Firstly, generally speaking, behaviour constituting sexual harassment in the workplace must:

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[16] Section 2(c) of the Draft Bill on Sexual Harassment of Women at their Workplace (Prevention Bill) 2003, Prepared by the National Commission for Women, India.

[17] European Foundation for the Improvement of Living and Working Conditions, "*Preventing Violence and Harassment in the Workplace*," 2003.

[18] Minnesota Advocates for Human Rights, 1st November 2003.

a. occur in the place of work or in a work related to environment;
b. occur because of the person's sex and / or it is related to or about sex;
c. be unwelcome , unwanted , uninvited, not returned, not mutual and
d. affect the terms or conditions of employment (quid pro quo sexual harassment) or the work environment itself (hostile work environment sexual harassment).

Many laws prohibiting sexual harassment recognize that both men and women may be harassers or victims of sexual harassment. It is important to note, however, that most victims of sexual harassment are women and most claims of sexual harassment are made by women. The European Foundation for the Improvement of Living and Working Conditions concludes that, "while there is evidence that men may also experience unwanted sexual attention and harassment, [sexual harassment] is still a problem that particularly affects women." In addition, more than 85% of sexual harassment claims made in the United States in 2002 were made by women.[19]

The United Nations General Recommendation to the Convention on the Elimination of all Forms of Discrimination against Women reaffirms these elements by defining sexual harassment to include:

> "such unwelcome sexually determined behaviour as physical contact and advances, sexually coloured remarks, showing pornography and sexual demands, whether by words or actions. Such conduct can be humiliating and may constitute a health and safety problem; it is discriminatory when the woman has reasonable ground to believe that her objection would disadvantage her in connection with her employment, including recruitment or promotion, or when it creates a hostile working environment."[20]

There are a few common elements in definitions of sexual harassment worldwide. Generally speaking, behaviour constituting sexual harassment in the workplace must:

a. occur in the place of work or in a work related environment;
b. occur because of the person's sex and/or it is related to or about sex;
c. be unwelcome, unwanted, uninvited, not returned, not mutual; and

[19] European Foundation for the Improvement of Living and Working Condition, "*Preventing the Violence and Harassment in the Workplace*", European Foundation for the Improvement of Living and Working Conditions, 2003, source, http://www.eurofound.eu.int/publication files/

[20] Article 19 of the Convention on the Elimination of all Forms of discrimination Against Women (1979).

d. affect the terms or conditions of employment (quid pro quo sexual harassment) or the work environment itself (hostile work environment sexual harassment).

The above definitions have their own limitation. The definitions are inclusive in their nature. Secondly some of these definitions speak only of what behaviours would constitute sex discrimination and therefore a sexual harassment. Further most of the definition given by various bodies of different countries gives the impression that there can be only sexual harassment of women in the workplace and therefore fails to address the problem as a whole. This becomes especially evident when we see that whether at the workplace, school, street or university, bus, train, station or the places to which the public generally has access. Sexual harassment can cause the environment to become hostile, intimidating or offensive. Sexual harassment is primarily an issue of power, not sex.[21] It occurs when a person with power abuses that power and brings unwanted attention of a sexual nature into what should be a sex neutral situation. Abuses of power in the form of sexual harassment can come from people in authority positions in formal settings, for example:

a. Employers
b. Supervisors
c. Professors
d. Masters
e. Any person who is in a superior position to dominate the mind and will of the other sex to which he/or she does not belong.[22]

Harassment also occurs in an informal setting it can come from colleagues, peers, and even people whom one sees as a source of authority. Informal harassment is often a play on existing power structures such as gender. Gender is a source of inequality and subordination, particularly for women. Men's whistles, remarks, and stares are an assertion of power and can feel threatening or embarrassing. Sexual harassment differs from consensual flirting or voluntary sexual relationships because it usually is unwanted, occurs in a power relationship in which the parties are not equal, and/or contains elements of coercion or threat or indignity or disturbs the peace of mind or causes an apprehension of danger in the mind of the target or it is degrading, humiliating, and has the effect of making a person to think that she has been made a subject of such things only because

[21] Breakthrough, "*Building Human Rights Culture*," 2004: For details see http://www.breakthrough TV.html.

[22] In the opinion of the author undue influence can be exercised by a person irrespective of sex: The spiritual leaders as found especially among the Hindu and Muslim tantrics, the gurus, the doctor can exercise undue influence and satisfy his or her lust. These, things are rampant in Indian societies and are overlooked by legal bodies.

of her being a person of a particular gender or being a person of an inferior position.[23]

These definitions fail to recognize domestic sexual harassment of women as well as street harassment which has been and is quite prevalent elsewhere of this world. In the view of this author the sexual harassment can even take place out of the message sent through message via mobile phone if it agonize the women. The element of harassment, that is to be determined and whether it is of sexual in nature as per the prevailing standard of pragmatic, scientific and theological discoveries that proves the potential of causing damage to the mind and physique of the person concerned. In broader perspective sexual harassment should be understood to include behaviour that has something to create apprehension in the mind of the victim or yet to be victim of such behaviour in a given context irrespective of the fact whether the victim is a male or female.[24] Considering all these things one can only say that sexual offences' can be committed against both woman and man. It should be addressed universally, as because it has become a global phenomenon whether it is committed in large number against the female or against the male. The Problem still remains with the way we think and define it; depending on the prevailing philosophy and accepted standard of the society in which we live and which is governed by the law of the stagnant law, which takes a lot of time to undergo a process of transformation depending inter-alia on the lives lived by the people and the forces within that play a pivotal role in shaping and moulding law and philosophy of a given period. It would be better if we think of harassment whether committed by male or female in the workplace or elsewhere. Harassment itself conveys that that there is an indignity to an individual whether female or male and is against the principle of human rights which recognizes that all individuals are equal. It is therefore a negation of equality irrespective of the fact whether it is committed by female or male.

c) Is Sexual Harassment a form of Sexual Discrimination?

In the US, claims against sexual harassment at the workplace are brought when an employer " fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment because of such individual's race, colour, religion, sex or national origin."[25]

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[23] History of women's rights shows that that power and authority along with social, religious and political reasons have/ had a role for the subordination of the weaker sex, since primitive period.

[24] The reason is that in the practical field not only women but also the man can be considered as one of weaker sex, in a given the circumstance. One can become the victim of the circumstances.

[25] Section 703(a) of Title VII of the Civil Rights Act (1964) 42 USCS 2000e.

In the UK, under The Sex Discrimination Act 1975[26] "a person discriminates against woman in any circumstances if:

(a) on the ground of her sex he treats her less favourably than he treats or would treat a man"

Section 5(3) provides:

"A comparison of the cases of persons of different sex... under Sections 1(1).. must be such that the relevant circumstances in the one case are the same or not materially different from others".

Section 4(1) provides:

"A person (: the discriminator") discriminates against another person purposes of any provision of this Act if he treats the person victimized other persons, and does so by reason that the person victimized has-

(a) brought proceedings against the discriminator or any other person under this Act."

Under Australian Sex Discrimination Act 1984,[27] "a person sexually harasses another person (the person harassed) if:

(a) The person makes an unwelcome sexual advance, or an unwelcome request for sexual favours to the person harassed; or

(b) Engages in other unwelcome conduct of a sexual nature in relation to the person harassed;

In circumstances, in which a reasonable person, having regard to all the circumstances, would have anticipated that the person harassed would be offended, humiliated or intimidated."

The majority of sexual harassment cases in the United States of America and United Kingdom have been decided under the respective statutes against sex discrimination in employment which do not expressly refer to "sexual harassment". In these countries the law classifies sexual harassment at the workplace as a type of sex discrimination in employment. Consequently, in deciding whether or not a claim of sexual harassment is made out, in addition to deciding whether or not the facts demonstrate sexual harassment, the courts are required to decide whether the conduct or circumstances are discriminatory towards women.[28]

US Law requires an investigation into whether the sexually harassing conduct constitutes a discriminatory term or condition of work. In the UK this requires an investigation into whether the employer would have acted in the

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[26] Section 1(1) of the Sex Discrimination Act 1975.

[27] Section 28A, of the Sex Discrimination Act 1984.

[28] Indira Jaishing, " Law Relating to Sexual Harassment at the Workplace", The Lawyers Collective Women's Rights Initiative, (Universal Law Publishing Co, 2004,) pp.14-15.

same way if the same circumstances had been in existence in respect of a comparator group.[29] However in UK the Equal Opportunity Commission emphasized the requirement of a specific definition of sexual harassment as the Sex Discrimination Act does not necessarily protect the victim of all kind of sexual harassment. The discriminatory treatment test, which automatically arises on the traditional understanding of equality law, shifts the focus of the inquiry in a sexual harassment case from the conduct complained at a comparative disadvantage with her co-worker, or whether such conduct in general places women employees at a comparative disadvantage to their male co-worker. Thus the discriminatory treatment test places an additional burden on the complainant in a sexual harassment case of not only proving the actions of the alleged perpetrator and their effect on her, but also of establishing that this conduct was in some respect discriminatory towards her vis-à-vis male co-workers.[30] This traditional understanding of equality as simply constituting the principle that like should be treated alike has been criticized by many feminist writers and legal scholars.[31] Their contention is that the mere application of a law or policy to similarly situated groups or individuals does not necessarily produce substantive equality, particularly when considering historically subordinated groups.[32]In Australia and New Zealand this additional test has been avoided by making sexual harassment at the workplace a distinct wrong in itself and not defining it in terms of discrimination, even though the legislation on this issue is found in statues that broadly deal with sex discrimination.[33]

In Canada, sexual harassment is itself viewed as a form of sex discrimination and therefore leaves a complainant from having to prove discrimination in addition to harassment.[34]Thus instead of making comparison based on likes, discrimination ought to be understood as a distinction based on grounds relating to the personal characteristics of the individual or group, which has the effect of imposing burdens, obligations or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of

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[29] A comparator group in the context of sexual harassment complaint is a class of persons of a different gender to the complainant, governed by the same circumstances as were prevalent in the case of the complainant.

[30] Indira Jaishing. " *Law Relating to Sexual Harassment at the Workplace*", The Lawyers Collective Women's Rights Initiative, (Universal Law Publishing Co,2004) ,p.-16.

[31] Catharine A. MacKinnon, "*Sex Equality*," (Foundation press, New York, 2001), pp.2-98.

[32] Ibid, at p.19.

[33] Section 28A & 28B of the Sex Discrimination Act 1984.

[34] Section 14 (1), 14(2) & 14(3) of the Canadian Human Rights Act.

society.[35] This approach to discrimination is particularly appropriate in the law regarding sexual harassment at the workplace as the perpetrator's conduct is based on a personal characteristic of the complainant, i.e. her being a woman, and has the effect of placing an undue burden on her employment entitlements, or by creating a hostile environment at the workplace.[36]

In India the Supreme Court seems to be inspired by the International Convention, Constitutional mandate and accordingly framed guidelines in **Vishaka**[37] case. These guidelines certainly recognize sexual harassment at the work place as a distinct type of wrong and consequently there is no need to prove sex discrimination in addition to proving sexual harassment. Though the definition given by the Supreme Court in the instant case makes it clear that sexual harassment may amount to a discriminatory act.[38]

d) Sexually Determined Behaviour and any Unwelcome Conduct of a Sexual Nature

Vishaka[39] Guidelines defines sexual harassment as including unwelcome sexually determined behaviour (whether directly or by implication); any other unwelcome physical, verbal or non-verbal conduct of sexual nature. The phrase sexually determined behaviour in the Vishaka Guidelines has to be interpreted to include not only behaviour that has sexual overtones or content, but also behaviour that is offensive or humiliating in a gender related matter. One must remember that the same court had taken this view in **Rupan Deol Bajaj.v. K.P.S. Gill,**[40] when the charge was of outraging the modesty of women was brought against an IPS officer. Contrary to Sections 354 and 509 of the IPC, it ruled that the alleged acts of the accused in the case amounted to outraging the modesty of the women for "it was not only an affront to the dignity of the lady- "*sexual overtones*" or not, *notwithstanding*." These italised words necessarily suggest that the conduct does not have to have sexual content to be prohibited for being offensive to women.

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[35] This view was expressed by the Supreme Court of Canada, in Andrews.v. Law Society of British Columbia (Andrews), (1989) 1SCR 143.
[36] Supra note 30 at p.20.
[37] Vishaka v State of Rajasthan, AIR 1997 SC 3011.
[38] Ibid:The Court made it clear by holding that such unwelcome or unwanted conduct " is discriminatory for instance when the woman has reasonable grounds to believe that her objection would disadvantage her in connection with her employment or work including recruiting or promotion or when it creates a hostile work environment".
[39] Ibid.
[40] (1995) 6 SCC 194.

American decisions also support the above view. In **Harris v. Forklift Systems,**[41] the conduct complained of, besides sexual innuendo, was comments such as: "you are a woman, what do you know"; "we need a man as the rental manager", and "dumb ass women". In **Oncale.v. Sunflower,**[42] the court while considering a sexual harassment complaint brought by a man against the other men at his workplace, held that harassing conduct need not have sexual content or connotation or be motivated by sexual desire.

As to the question of unwelcome ness of the conduct the **Vishaka**[43] guidelines define sexual harassment as "unwelcome" sexually determined behaviour and "unwelcome" physical, verbal or non-verbal conduct of a sexual nature. If a complainant satisfies the subjective –objective test, then it follows without more that the conduct was unwelcome to her. This is because, if it is reasonable for the women in the circumstances of the case to have felt sexually harassed by certain conduct, then it can not be said that such conduct was "welcome" to her. Conversely, if it can be proved that a women " welcomed", i.e, invited or encouraged the conduct that she alleges to have been sexually harassing, then she would fail the subjective- objective test because if it is proved that she invited the conduct, then she cannot reasonably claim that she had perceived it as demeaning, insulting or threatening.[44] A series of American cases lend support to this view. In **Hocevar v. Purdue Frederick Co,**[45] a female employee alleging unwelcome sexual advances lost her case when witnesses testified she seemed to enjoy spending time with the alleged harasser. Again a female employee alleging unwelcome sexual advances lost her case when witnesses testified she seemed to enjoy spending time with the alleged harasser in **Stephens v. Rheem Mfg. Co.**[46] These, decisions paves the way for opening the defence of the defendant that the complainant did not perceive the conduct as humiliating or invited the conduct complained against. At this point the defendant may attempt to establish this defence by pointing out the bad character or reputation, way or talking, use of language, dressing of the complainant. In this regard it may be submitted that inquiries into the allegation of sexual offences should be conducted in a manner that avoids pain and

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[41] 510 US (1993).
[42] 523 US 75 (1998).
[43] (1997) 6 SCC 241.
[44] McKenzie v. Illinois Department of Transportation, 92 F.3d 473, 167 Daily Lab. Rep. (BNA) E-1 (7th Cir.) : Here a federal court throws out a sexual harassment claim based on a handful of sexually suggestive comments made over a three-month period. This behaviour was not severe or pervasive enough to be unlawful harassment, even though the victimized employee subjectively perceived the behaviour as harassing.
[45] (2000) 216 F .3d 745 (8th Cir.)
[46] (2000) 220 F.3d 882,886(8th Cir)

embarrassment to the female victim. The decisions of the Supreme Court in **State of Rajasthan.v. Omprakash,**[47] **State of A.P.v. G.Satya Murthy,**[48] and **Delhi Domestic Women's Forum.v. Union of India and others,**[49] cases the court has already laid down what should be the exact manner of handling such issues.

It may be submitted that the presence of the word "unwelcome" in the definition of sexual harassment does not require a complainant show some overt act on her part that demonstrated to the alleged perpetrator that his conduct was unwelcome. If such a requirement was to be read into the definition of sexual harassment, it would be a fallacy. This is because in the first place, an overt act on the part of the women could be made by her only after she has been subjected to the unwelcome conduct, and the objective of the law regarding sexual harassment is to prevent the occurrence of such behaviour from the very beginning. Secondly, a hostile environment sexual harassment claim can be made by a person[50] who is not herself the target of the actions being complained against; and in such cases it would be illogical to require the complainant to demonstrate that behaviour that was not directed at her was "unwelcome."[51] This line of approach has been taken by the foreign courts. **Simpson v. Consumer's Association of Canada,** [52] the Canadian Court of Appeal took the view that conduct may be found to be "unwelcome" in a sexual harassment case even if there is no overt expression of its being unwelcome on the part of the complainant. On the same line the court of New Zealand in **Read.v. Mitchell,**[53] ruled that the fact that the victim either voices robust objection or elects to tolerate the harassment, however unwelcome and offensive, is irrelevant to

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[47] (2002) 5SCC 745at 754.
[48] (1997) 1 SCC 272.
[49] (1995) 1 SCC 14.
[50] Onacle .v. Sundowner Offshore Services, (1998) ,Inc. 76, FEP Cases 221: In this case on sexual harassment in employment the American Supreme Court held that men as well as women can bring sexual harassment claims and that Title VII applies to " same sex harassment". Here an oil Platform worker alleged that male co-workers subjected him to sexual assault and threatened with rape. He quit and sued the company for failing to stop this conduct. The court held that Title VII does not specifically protect men from gender based harassment by other men, the general principles of sex discrimination and harassment do apply to that conduct. This does not mean that Title VII creates " a general civility code for the American Workplace," for "social context," and " common sense" will still control whether particular gender based conduct is severe enough to create a hostile environment for a reasonable person under the circumstances: See also Shepard.v. Slater Steels Corp, 168 F3d998, 79 FEP Cases 311(7th Cir) where the US Court held that a male employee can sue for sexual harassment on the basis of gross behaviour by his male co-worker even if the harasser is also vulgar to a female co-worker, even if much of his conduct is not sexual, and even if he is not gay. In so ruling, a U.S. appeals court reasons that pervasive harassment is actionable if the words and conduct of the harasser imply he is motivated by the victim's gender.
[51] Supra note 30 at p.25.
[52] For details see. www. Ontariocourts.on.ca: www.law.harvard.edu/ library/ref/anglo_ref/Canada.htm.
[53] (2000) 1NZLR 470.

determining whether or not there is a detriment to the victim or a hostile or demeaning work environment. The Court further observed that:

> *"It would not be a defence to a claim that the issue of sexual harassment was not raised earlier or in another forum as many women, in particular, will put up with an environment in which unwelcome or offensive conduct is prevalent rather than run the risk of losing employment, getting offside with fellow workers, or having a confrontation with a dominant employer. For many making a complainant will be the last resort."*[54]

e) Forms of Sexual Harassment:

Sexual harassment occurs in a variety of settings; within the case laws the workplace is the most of these settings. Workplace sexual harassment, according to an early manifesto by Catharine MacKinnon may be divided into two categories; Quid pro quo harassment and hostile or abusive environment harassment.[55]This division has been accepted by American Courts.

In common law jurisdictions, the law generally categorizes sexual harassment at the workplace into two types. The first, termed "quid pro quo harassment", consists of sexual demands accompanied by the threat of adverse job consequences if the demands are refused. The second, termed "hostile environment" harassment consists of conduct that renders the environment at the workplace offensive or derogatory to the victim by reason of her gender. Both types of sexual harassment are incorporated in the definition of sexual harassment in Article 2 of the **Visahaka**[56] Guidelines. The concept of "quid pro quo harassment" is present in Article 2 in reference to unwelcome sexually determined behaviour in circumstances such that a woman believes that "her objection would disadvantage her in connection with her work." Article 2 also refers to unwelcome sexually determined behaviour that creates a "hostile work environment". Since the definition of sexual harassment in the Vishaka Guidelines draws from law developed in other common law countries, judgments from these countries on sexual harassment can be referred to in illustrating and explaining the meaning of SHW.

According to the Supreme Court of Canada in the case of **Janzen v. Platy Enterprises, Ltd,**[57] conduct that constitutes sexual harassment varies "from overt gender based activity, such as coerced intercourse to unsolicited physical contact to persistent propositions to more subtle conduct such as gender based

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[54] Ibid.
[55] Catharine MacKinnon, " *Sexual Harassment of Working Women: A Case of Sex Discrimination*", (1979), p.32.
[56] Vishaka v State of Rajasthan, AIR 1997 SC 3011.
[57] (1989) 1 SCR 1252.

insults and taunting, which may reasonable be perceived to create a negative psychological and emotional work environment."

The Court quoted with approval from a book entitled Sexual Harassment in the Workplace by Arjun P. Aggarwal the statement that "sexual harassment is any sexually-oriented practice that endangers an individual's continued employment, negatively affects his or her work performance, or undermines his or her sense of personal dignity."[58]

The Court also quoted with approval from another book entitled The Secret Oppression: Sexual Harassment of Working Women by Constance Backhouse and Leah Cohen the following definition of sexual harassment:

> *"Sexual harassment can manifest itself both physically and psychologically. In its milder forms it can involve verbal innuendo and inappropriate affectionate gestures. It can, however, escalate to extreme behaviour amounting to attempted rape and rate. Physically the recipient may be the victim of pinching, grabbing, hugging, patting, leering, brushing against, and touching. Psychological harassment can involve a relentless proposal of physical intimacy, beginning with subtle hints which may lead to overt requests for dates and sexual favours."*[59]

i) Quid Pro Que Harassment

The key elements of quid pro quo sexual harassment are a demand for a sexual favour and the threat of adverse job consequences if the demand is refused. It is implicit in the second element that the perpetrator had to be a position to create adverse job consequences for the woman. Typically, such a person would have to be in a position of authority over the victim, although a quid pro quo sexual harassment situation may also exist vis-à-vis a colleague of the same rank, e.g., where work evaluation takes into account comments from co-workers, or when a co-worker makes sexual demands a condition for co-operating on a team project.[60]

Adverse work consequences may be 'tangible' such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, a decision to cause a significant change in benefits, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits and significantly diminished material responsibilities.

The US Supreme Court in the case of **Burlington v. Ellerth**[61] made it clear that it is not necessary in an allegation of quid pro quo harassment for the threat of adverse employment action to have been carried out. It is sufficient for

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[58] Supra note 30, at p.4.
[59] Ibid. at p. 5.
[60] Ibid.
[61] 524 US 724(1998).

the complainant to prove that such a threat was made. An adverse employment action may also be 'intangible' in the sense that it creates a hostile or poisoned work environment, as held by the High Court of Auckland, New Zealand in the case of **Read v. Mitchell**[62]**.** Here the Court ruled out that a complainant need not demonstrate any so-called 'tangible' adverse employment action over and above a hostile or demeaning environment.

An instructive judgment on the issue of what constitutes a detrimental employment action is the English case of **Shamoon v.Chief Constable of the Royal Ulster Constabulary**[63]. In this case, the House of Lords held that it was not necessary for the victim to demonstrate physical or economic consequences. It also held that compensation for injury to feeling can be awarded where an employment action is taken that results in the complainant's role and position being subsequently undermined, or on her being increasingly marginalized at work.

The US Supreme Court decision of **Harris v. Forklift Systems** [64] is illustrative, where the Court held that it is not necessary to show that the behaviour complained of impaired the work of the victim or that the conduct caused psychological injury. According to the Court, The Court observe that

> *"A discriminatorily abusive work environment, even one that does not seriously affect employees' psychological well-being, can and often will from employees' job-performance, discourage employees from remaining on the job, or keep them from advancing in their careers. Moreover, even without regard to these tangible effects, the very fact that the discriminatory conduct was so severe or pervasive that it created a work environment abusive to employees because of their race, gender, religion, or national origin was contrary to the principle of workplace equality."*[65]

This means that unlawful conduct may lie between conduct that is "merely offensive" and conduct that causes a tangible psychological injury.

ii) Hostile Environment Sexual Harassment

The phrase "hostile work environment" is found in Article 2 of the **Vishaka** Guidelines. This phrase is also used in the subsequent decision of Apparel **Apparel Export Promotion Council .v. A.K Chopra,**[66] where the Supreme Court relied on the statement in the relevant enquiry report that the perpetrator's environment." The Court `cited this as one of the reasons for reversing the finding of the High Court that there had been no sexual harassment. However,

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[62] (2000) 1 NZLR 470.
[63] For details see,http:// www. Parliament.the-stationery –office.co.uk.
[64] 510 US (1993).
[65] Ibid.
[66] (1999) 1 SCC 759.

the phrase "hostile work environment" is not defined in either decision of the Supreme Court. For this one may refer to the hostile environment cases decided in other common law countries.

In **Meritor Savings Bank v. Vinson**[67] , the US Supreme Court undertook a detailed analysis of what constitutes "hostile environment" sexual harassment. In this case, the Court quoted with approval the Federal Equal Employment Opportunity Commission Guidelines on sexual harassment. The Guidelines stated that sex-related misconduct which "has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment," whether or not it was directly linked to an economic quid pro quo constituted sexual harassment. The environment free from discriminatory intimidation, ridicule and insult" and that "a requirement that a man or a woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets."

The Court of Appeal for Ontario, Canada in **Bannister v. General Motors of Canada Limited** [68] has taken the view that sexual harassment at the workplace is a wrong not simply because it may lead to adverse job-related consequences but "is a demeaning practice, one that constitutes a profound affront to the dignity of the employees forced to endure it.

A parallel example of a hostile environment, namely, one that is based on race, can be found in the US Supreme Court case **Meritor Savings Bank v. Vinson** [69]. The Court quoted with approval the case of **Rogers v. EEOC,**[70] where the Court of Appeal for the fifth circuit found racial discrimination on the part of an employer towards its Hispanic employee on the basis of the discriminatory service given by the employer to its Hispanic clientele.

The U.S. Supreme Court's approval of Rogers implies the recognition of the fact that the conduct which creates a hostile environment need not necessarily be directed towards the complainant. In **Rogers**[71], discrimination was fond to exist on the basis of actions of the employer towards its customers, and not actions that wee directed at the employee who made the complaint. The same view was taken by the Court of Appeal in Ontario, Canada in the case of **Simpson v. Consumer's Association of Canada,**[72], which ruled that it is not only those in the workplace who are the direct victims of sexual harassment who

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[67] 477 US 57(1986).
[68] 40 O.R. (3[d]) 577 (1998).
[69] 477 US 57(1986).
[70] 454F. 2d 234(5[th] Cir. 1971).
[71] Ibid.
[72] Source: www. Ontariocourts.on.ca: www.law.harvard.edu/ library/ref/anglo_ref/Canada.htm.

may have a complaint about the conduct of a harassing employer. Others may also be affected by receiving less favourable treatment, by enduring an unwelcome sexually charged atmosphere, or by having to deal with the consequences of complaining about the situation.

The words "unwelcome sexually determined behaviour" are qualified by the phrase "directly or by implication" in Article 2 of the Vishaka Guidelines. This means that a conduct may constitute sexual harassment even if it comprises acts or words though innocent in themselves, have sexual overtones. Since the phrase "and advances" is used after "physical contact" in the list of sexually harassing conduct in Article 2 of the Vishaka Guidelines, attempted physical contact would constitute sexual harassment and it is not necessary for there to have been actual physical contact. This position was also taken by the Supreme Court in the case of **Apparel Export Promotion Council .v. A. K Chopra**.[73] In this case, the High Court found that there was no sexual harassment as the perpetrator had "not managed" to make any physical contact with the complainant but had only "tried" to "molest" her by sitting too close to her and making suggestive comments. This finding was reversed by the Supreme Court which held that even assuming that there had been no physical contact "it did not mean [that the perpetrator] had not made any objectionable overtures with sexual overtones."

iii) Street Harassment or Sexual harassment on the Street

There is yet another type of sexual harassment that profoundly affects women's lives; is the harassment of women in public places by men who are strangers to them which may be termed as street harassment.[74] Street harassment is a phenomenon that has not generally been viewed by academics, judges, or legislators as a problem requiring special legal redress, either because they have considered it trivial and thus not within the proper scope of law.[75] The law of every nation gives its citizen the right to movement and association and International Law also recognizes the freedom of movement and association as an integral part of human rights. The security to move in public in other words is one of the most basic civil rights and essential to participation in public affairs and admission to the public realm.[76]Thus, when the law fails to protect women from street harassment, it deprives them of one of the basic goods for which the government was ordained.[77]

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[73] (1999) 1 SCC 759.

[74] Cynthia Grant Browman, *' Street Harassment and the Informal Ghetoization of women*," Harvard Law Review, vol-106, no-3 (January 1993), ,at p.519.

[75] Id: See also Robin L West, "*The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*," Wis Women's L.J,(1987), pp. 83-85.

[76] Hannah Ardent, "*Between Past and Future*," (Penguin Books, 1977) at 263.

[77] Supra note 74 at p.521.

Mary Nagle a student studying in Equador offers the most common example of street harassment to which she is almost daily subjected. She describes her experience:[78]

> *"I don't mean to brag, boast or sound awfully egocentric, but ever since I have been studying abroad here in Ecuador this semester, I can't walk five feet without being complimented, from head to toe — literally. I mean, I know I am attractive, but this just seems excessive. Most of the time the compliments are somewhat unintelligible: random hand gestures, hissing sounds, loud laughter, attempts to charm my ass in broken English. And as flattering as it sounds, I think I would actually prefer to walk to school every morning without having to hear about the curvature of my ass. When I share my discontent with other peers, I receive a variety of answers. Usually they tell me that I am overreacting; I need to calm down and accept the culture in which I chose to study for a semester. Besides, it's nice to know that someone finds you attractive. But that's precisely the problem: the aim of sexual harassment in the streets is not the appreciation of the imminent beauty of the female form. If these men really wanted to show their profound appreciation for my body, they could write me poetry, paint a picture or simply respond with a coherent sentence when I ask them why they were making masturbatory motions at me — instead of laughing and slapping their buddies' backs. Today we live in a world where the majority of persons living in poverty are women — a world where women labour for poverty wages while also labouring to raise the world's children and maintain the world's homes (without receiving any sort of compensation), a world where women suffer the violence of institutionalized militaries, governments and the men in their own families. At the foundation of all of this lies a society in which it is commonplace for men to sexually harass women in the streets. For the sake of all women, and the men whose lives depend on them, it is time to put an end to sexual harassment. Sexual harassment in the streets is merely an extension of an institutionalized violence against women in a patriarchal society. Now when I walk down the streets in Ecuador, the United States or anywhere else in the world and a man makes a crude gesture, noise or comment, I show him a part of my body he has yet to compliment: my erect middle finger. I don't see the waving of my middle finger as the solution to this colossal, complicated and far-reaching problem. Instead, the solution lies in the hands of all individuals of whom our society consists. The day sexually harassing a woman in the streets is considered more inappropriate than criticizing a president's war is the day we can begin to deconstruct the established sexual violence against women that permeates every sector of our society. I am anxiously awaiting that*

[78] Mary Nagle. "*Getting to the Bottom of Sexual Harassment*" The Hoya Tuesday 4th November 4 2003: For details see,http:// www.thehoya. Com.

day. Until then, I will be waving my middle finger gaily at all those gentlemen who wish to compliment my fine figure."[79]

Like sexual harassment in the workplace, street harassment encompasses a wide variety of behaviour, gestures and comments, but it has some defining characteristics: a) the targets of street harassment are female; b) the harassers are male; c) the harassers are generally unacquainted with their targets; d) the encounter is in most of the cases are face to face; e) the forum is a public one, such as a street, sidewalk, bus, bus station, taxi, or other place to which the public generally has access; f) the content of the speech, if any is not intended as public discourse, rather the remarks are aimed at the individual(although the harasser may intend that they be overheard by comrades or passer-by) ; g) the gesture or remarks are degrading, objectifying, humiliating, disturbing and frequently threatening in nature or has the potential of causing fear in the mind of the target.[80]

In our country to the cases of street harassment is dealt with the provisions of Criminal law. Indian Penal Code does not formally recognize sexual harassment but only incorporates provisions which cover the situation of sexual harassment. Of course what is known is eve- teasing is punishable under the Code.[81]

iv) Domestic sexual harassment

There yet remains another area where sexual harassment against women takes place. Indeed women are often subjected to sexual harassment in the e area of private sphere. Sexual offences like marital rape, incest rape or an attempt to commit the same are yet to be criminalized in most of the societies. But that does not negate the existence of sexual harassment in the private sphere namely, the domestic sexual harassment. It has become the conventional wisdom that we live our lives in private and public. The policy of law is that criminal law should not intervene in private lives of citizens or seek to enforce any particular pattern of sexual behaviour further than is necessary to preserve public order and decency to protect the citizen from what is offensive of injurious and to provide sufficient safeguards against exploitation and corruption of others.[82] The most blatant example has been the lack of recognition of rape in marriages.

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[79] Ibid.

[80] Supra note 74 at p.521.

[81] Section 534 and 509 of the Indian Penal Code make insulting or outraging the modesty of a women a crime.

[82] Criminal Law Revision Committee UK 1984, Para.1&5: See also Wolfeden Report(UK) 1957, para 13.

Sexual offences do take place in public sphere but it is more likely to take place in private space, where there are rarely witnesses.[83] In other words it can be said that domestic sexual harassment needs to be addressed rather than ignored. In such harassment the victim ranges from a child to married women. Domestic sexual harassment and incest are the most reprehensible crimes and are never reported as these domestic gender issues includes offenders like uncles, elder cousins, step fathers, step brothers, fathers, brothers, and elder brother of the husband of wife. There are instances where a 12 year old girl becomes a victim of rape allegedly by her father and three sons of her father's elder brother.[84] There are instances where a 16 year old girl Reshma being tortured by her 55 years old father Ajaz Ali and her 21 year old brother Afroz.[85]And because of the policy of criminal law they are placed in most disadvantageous position.[86] The story did not end here. Reshma's elder sister Afisa at the age of 18 committed suicide around four year ago after being raped by the same father Ajaz Ali. In 1991 a 21 year old house wife was severely bashed up, stripped nacked and paraded in the streets by nine of her relatives in a village near West Godavari District of Andhara Pradesh.[87]Thus the domestic sex offender can escape liability at ease. In general terms, the private sphere is characterized by being the unknown or unobserved area of life and an area in which free behaviour is permitted without interference. Within this area consensual sex is permitted. But if it was not consensual then the shield of marriage or other pretending relations are left to prevail over the victim. This has been so far the policy of the so called civilized societies.

f) Constitution; Vishaka[88] and the Supreme Court on Sexual Harassment Against Women

The phrase "equality before law" finds a place in all most all written constitution that guarantees fundamental right. Our constitution of India similarly has put an obligation on the state that it shall not deny to any person (including women) equality before the law and the equal protection of law will be given to all

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[83] Terry Thomas, " *Sex Crime- Sex Offending and Society*," 1st Indian Reprint, (Lawman India Pvt. Ltd, 2003), p.12.
[84] Hindustan Times, 21-5-1994.
[85] The Telegraph, April 23, 2005.
[86] The Criminal Law has always paid deterrence to matters of privacy. Non recognition of marital rape; adultery against women under Indian penal Code reflects this policy. In case of adultery the impression is given that the husband is the only protector of adulterous women, and not the women herself. It is left for the husband to decide whether prosecute the male adulter or not.
[87] The Indian Express, December 30, 1991.
[88] (1997) 6 SCC 241: AIR 1997 SC 3011.

persons (including women)[89] Thus article 14 embodies the general principle of equality before law and prohibits unreasonable discrimination between persons. The concept of equality which is embodied in our constitution speaks for the rule that like should be treated alike and not that unlike should be treated alike.[90] The principle of equality must be read in the light of equality of justice. Our Indian judiciary has evolved for this purpose the theory of reasonable classifications to meet out the eventuality and to make the equality effective and in the real sense.

To make the equality clause more pragmatic the framers of the Constitution provided on the other hand that the state shall not discriminate on grounds of religion race, caste, sex or place of birth.[91] In the same way the equality of opportunity in matters of employment or appointment to any office under the state is assured to all citizens including women.[92] These provisions make it amply clear that both man and women will be treated equally. On the other hand founding father of our constitution were also conscious of the pitiable and miserable condition of the weaker section of the society, therefore, they made some special provisions for them and empowered the state to make further provisions for the protection and welfare of women and children.[93] This means that some special care has been taken to provide a socio economic framework of justice to equality in regard to women and children.[94] Finally, the state is under duty to see that no person is deprived of his life or personal liberty except according to the procedure established by law.[95]

In effect Article 14 embodies the idea of equality expressed in the preamble. The succeeding Articles, that is Article 15 and 16 lay down the specific application of the general rule laid down is Article 14. While Article 14 places a duty on the state to follow the rule where by equal is to be treated equally. It also makes way for unequal treatment in unequal circumstances and provides the scope for reasonable classification. Besides incorporating the principle of natural justice and making it a essential component of law, Article 14 ensures fairness, equality of treatment and implies the absence of arbitrariness in every sphere of

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[89] Dr. R.N. Sharma "The problem of working women and her economic independence in Indias society" in Shamsuddin Shams(ed). "*Women law and social change*"(Ashish Publishing House, New Delhi, 1991) at p. 116.

[90] Dr. V.N. Shukla – "*Constitution of India*", 9th Edition,.(Eastern Book Company, Luchnow, 1994), p. 38.

[91] Art 15 (1)-States that-the state shall not discriminate against any citizen on grants only of religion role, caste, sex place of berth or any of them.

[92] Art 16 (1) States that – There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.

[93] Art 15 (3) States that – "Nothing in this article (Art 15) shall prevent the state from making any special provision for women and children."

[94] Supra note 89 at p. 117.

[95] Article 21 of the Constitution of India.

state action[96] while Art 15(1) puts prohibition of discriminations only on grounds of religion, race caste, sex or place of birth, (implying that sex above not be made a ground of discrimination), Article 15(3) enables the state to make special provision for women and child, implying that protective discrimination is allowed in favour of women and child. Not only this, Article 16(1) further ensures equality of opportunity in matters of public employment. In the ultimate these provisions besides upholding the concept of socio-economic justice, and many other thing also speaks that there is urgent need to take special care for the protection and welfare of the women and there is room for that too. Article 21 which is considered to be the mother of many fundamental rights may be used to rescue the women victim of rape a crime against basic human rights and may be used for the preventions of sexual harassment of working women.

The directive principles of state policy, sets out the aims and objectives to be taken up by the state in the governance of the country. Article 38 gives a direction that the state shall in particular; strive to minimize inequalities in income, and endeavour to eliminate inequalities in status, facilities and opportunities not only amongst individuals but also among groups of people residing in different area and engaged in different vocation. The state is also under a duty to direct its policy towards securing right to an adequate means of livelihood to men and women equally.[97] It is the duty of the state to secure that there is equal pay for equal work for both man and women[98] and ensure that the health and strength of workers men and women and children are not abused.[99] Not only this, the state is again under a duty to make provision for securing just and human conditions of work and for maternity relief.[100] Article 43 requires the state to secure by suitable legislation or economic organization to all workers agricultural, industrial or otherwise a living wage.[101] This concept of living wage includes in addition to bare necessities of life, such as food, shelter, clothing, provision for education of children and insurance etc.[102]

Article 38 and 39 in effect embody the jurisprudential doctrine of distributive justice, implying the fact that our constitution permits and even directs the state to administer what may be termed distributive justice. Pursuant to Article 39(d), parliament has enacted the Equal Remuneration Act 1976. In

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[96] E.P. Royappa. V. State of Tamilnadu AIR 1974 SC 555; Maneka Gandhi v. UOI AIR 1978 SC 597; R.D. Shetty v. Airport Authority AIR 1979 SC 1628.
[97] Art. 39(a)
[98] Art. 39(d)
[99] Art. 39(e)
[100] Art. 42
[101] Art. 43
[102] Dr. J. N. Pandey, " *Constitutional Law of India*", 35th Edition, (Central Law Agency, Allahbad, 2000), p. 336.

Randhir Singh v. U.O.I,[103] the Supreme Court has held that the principle of equal pay for equal work though not a fundamental right is certainly a constitutional goal and, therefore, capable of enforcement through constitutional remedies under Art 32 of the Constitution. The doctrine of equal pay for equal work is equally applicable to persons employed on a daily wage basis. They are also entitled to the same wages as other permanent employees in the department employed to do the identical work.[104] In view of these it can be said that there is no dearth of constitutional provision for the women including working women.[105]

The above Constitutional guarantee and mandate of the Constitution really spells out the guidelines for the legislature and obligates upon the state to make integrated effort to see that socio-economic justice as well as gender justice is done to women. This was realized by our Apex Court by recognizing certain crime like rape and sexual harassment against women as a crime against basic human rights as well as violation of the fundamental rights enshrined in the Constitution in **Vishaka v. State of Rajasthan.**[106] The facts of the case are as follows:

In 1985, X was appointed as a ***saathin*** i.e., a female village level worker, under the Women's Development Programme by the Government of Rajasthan. The project was initiated for the empowerment of women. As a part of her work, X was supposed to encourage village people to send their children to school, to discourage child marriages, to help widows get their pension and other similar activities. But in 1992, X was gang-raped by five 'upper-caste' men in revenge for her campaign against child marriage. The incident exposed both the hazards to which a working woman may be exposed in the course of her work and the urgent need to put into place safeguards that would prevent the occurrence of such incident. This incident of alleged brutal gang rape of a social worker in a village of Rajasthan compelled the social activist NGO to file a writ petition with the aim of focusing attention towards this societal aberration, and assisting in finding suitable methods for realization of the true concept of 'gender equality'; and to prevent sexual harassment of working women in all work places through judicial process, to fill the vacuum in existing legislation.

The Vishaka case sought the enforcement of fundamental rights of working women under Article 14, 19 and 21 of the Constitution. The Court observed that:

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[103] Randhir Singh v. U.O.I. AIR 1982 SC 879.

[104] Daily Rated Casual Labour v U.O.I. State of U.P. (1988) 1 SCC 122 : Surinder Singh v. Engineer-in-Chief, C.P.W.D. AIR 1986 SC 534; Dhirendra Chamoli v. State of U.P. (1986) 1. SCC 637.

[105] Biswajit Chatterjee. "*Liberation of Working Women and Realisation of Goals Enshrined in the Constitution- A Synthesis.*" Calcutta Law Times, (2004)1 part III& IV, (R.Cambrary Pvt Ltd, Marth-April 2004) at p.39.

[106] (1997) 6 SCC 241: AIR 1997 SC 3011.

"Each such incident results in violation of the fundamental rights of 'Gender Equality' and the 'Right to Life and Liberty'. It is a clear violation of the rights under Articles 14, 15 and 21 of the Constitution. One of the logical consequences of such an incident is also the violation of the victim's fundamental right under Art. 19(1)(g) 'to practice any profession or to carry out any occupation, trade or business'. Such violations, therefore, attract the remedy under Article 32 for the enforcement of these fundamental rights of women. This class action under Artticle 32 of the Constitution is for this reason. A writ of mandamus in such a situation, if it is to be effective, needs to be accompanied by directions for prevention; as the violation of fundamental rights of this kind is a recurring phenomenon. The fundamental right to carry on any occupation, trade or profession depends on the availability of a "safe" working environment. Right to life means life with dignity. The primary responsibility for ensuring such safety and dignity through suitable legislation, and the creation of a mechanism for its enforcement, is of the legislature and the executive. When, however, instances of sexual harassment resulting in violation of fundamental rights of women workers under Arts. 14, 19 and 21 are brought before us for redress under Art. 32, an effective redressal requires that some guidelines should be laid down for the protection of these rights to fill the legislative vacuum."[107]

The meaning and content of the fundamental rights guaranteed in the Constitution of India are of sufficient amplitude to encompass all the facets of gender equality including prevention of sexual harassment or abuse.[108] Taking note of the fact that the present civil and penal laws in India do not adequately provide for specific protection of women from sexual harassment in work places and that enactment of such legislation will take considerable time the court besides defining what is sexual harassment issued the following Guidelines:[109]

"1. **Duty of the Employer or other responsible persons in work places and other institutions:**

It shall be the duty of the employer or other responsible persons in work places or other institutions to prevent or deter the commission of acts of sexual harassment and to provide the procedures for the resolution, settlement or prosecution of acts of sexual harassment by taking all steps required.

2. **Definition:**

For this purpose, sexual harassment includes such unwelcome sexually determined behaviour (whether directly or by implication) as:

a) physical contact and advances;

b) a demand or request for sexual favours;

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[107] AIR 1997 SC 3011, at- 3013.
[108] AIR 1997 SC 3011, at- 3015.
[109] Id, at 3016-17.

c) sexually coloured remarks;

d) showing pornography;

e) any other unwelcome physical, verbal or non-verbal conduct of sexual nature.

Where any of these acts is committed in circumstances where under the victim of such conduct has a reasonable apprehension that in relation to the victim's employment or work whether she is drawing salary, or honorarium or voluntary, whether in Government, public or private enterprise such conduct can be humiliating and may constitute a health and safety problem. It is discriminatory for instance when the woman has reasonable grounds to believe that her objection would disadvantage her in connection with her employment or work including recruiting or promotion or when it creates a hostile work environment. Adverse consequences might be visited if the victim does not consent to the conduct in question or raises any objection thereto.

3. **Preventive Steps:**

All employers or persons in charge of work place whether in the public or private sector should take appropriate steps to prevent sexual harassment. Without prejudice to the generality of this obligation they should take the following steps:

(a) Express prohibition of sexual harassment as defined above at the work place should be notified, published and circulated in appropriate ways.

(b) The Rules/Regulations of Government and Public Sector bodies relating to conduct and discipline should include rules/regulations prohibiting sexual harassment and provide for appropriate penalties in such rules against the offender.

(c) As regards private employers steps should be taken to include the aforesaid prohibitions in the standing orders under the Industrial Employment (Standing Orders) Act, 1946.

(d) Appropriate work conditions should be provided in respect of work, leisure, health and hygiene to further ensure that there is no hostile environment towards women at work places and no employee woman should have reasonable grounds to believe that she is disadvantaged in connection with her employment.

4. **Criminal Proceedings:**

Where such conduct amounts to a specific offence under the Indian Penal Code or under any other law, the employer shall initiate appropriate action in accordance with law by making a complaint with the appropriate authority.

In particular, it should ensure that victims or witnesses are not victimized or discriminated against while dealing with complaints of sexual harassment. The victims of sexual harassment should have the option to seek transfer of the perpetrator or their own transfer.

5. **Disciplinary Action:**

Where such conduct amounts to misconduct in employment as defined by the relevant service rules, appropriate disciplinary action should be initiated by the employer in accordance with those rules.

6. **Complaint Mechanism:**

Whether or not such conduct constitutes an offence under law or a breach of the service rules, an appropriate complaint mechanism should be created in the employer's organization for redress of the complaint made by the victim. Such complaint mechanism should ensure time bound treatment of complaints. @page-SC3017

7. **Complaints Committee:**

The complaint mechanism, referred to in (6) above, should be adequate to provide, where necessary, a Complaints Committee, a special counsellor or other support service, including the maintenance of confidentiality.

The Complaints Committee should be headed by a woman and not less than half of its member should be women. Further, to prevent the possibility of any undue pressure or influence from senior levels, such Complaints Committee should involve a third party, either NGO or other body who is familiar with the issue of sexual harassment.

The Complaints Committee must make an annual report to the Government department concerned of the complaints and action taken by them.

The employers and person in charge will also report on the compliance with the aforesaid guidelines including on the reports of the Complaints Committee to the Government department.

8. **Workers' Initiative:**

Employees should be allowed to raise issues of sexual harassment at workers' meeting and in other appropriate forum and it should be affirmatively discussed in Employer-Employee Meetings.

9. **Awareness:**

Awareness of the rights of female employees in this regard should be created in particular by prominently notifying the guidelines (and appropriate legislation when enacted on the subject) in a suitable manner.

10. **Third Party Harassment:**

Where sexual harassment occurs as a result of an act or omission by any third party or outsider, the employer and person in charge will take all steps necessary and reasonable to assist the affected person in terms of support and preventive action.

11. The Central/State Governments are requested to consider adopting suitable measures including legislation to ensure that the guidelines laid down by this order are also observed by the employers in Private Sector.

12. These guidelines will not prejudice any rights available under the Protection of Human Rights Act, 1993."

Accordingly, the court directed that the above guidelines and norms would be strictly observed in all work places for the preservation and enforcement of the right to gender equality of the working women. These directions would be binding and enforceable in law until suitable legislation is enacted to occupy the field. It is necessary and expedient for employers in work places as well as other responsible persons or institutions to observe certain guidelines to ensure the prevention of sexual harassment of women.[110]

g) Vishaka and International law

The Supreme Court while deciding Vishaka Case was well aware of the legislative vacuum in field and therefore said that In the absence of domestic law occupying the field, to formulate effective measures to check the evil of sexual harassment of working women at all work places, the contents of International Conventions and norms are significant for the purpose of interpretation of the guarantee of gender equality, right to work with human dignity in Artcles 14, 15, 19 (1) (g) and 21 of the Constitution and the safeguards against sexual harassment implicit therein. Any International Convention not inconsistent with the fundamental rights and in harmony with its spirit must be read into these provisions to enlarge the meaning and content thereof, to promote the object of the constitutional guarantee.[111] It also reminded the Government of its obligation under International law.[112]

The Court relied on the content of International Conventions and norms, including the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) which requires the State parties to take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular:[113] a) the right to work as an inalienable right of all human beings; b) the right to the same employment opportunities, including the application of the same criteria for selection in matters of employment; b) the right to free choice of

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[110] Ibid, at p.3016.

[111] Ibid, at p. 3014.

[112] Ibid: As because India was a signatory to the Convention on the Elimination of All Forms of Discrimination Against Women, 1979 and also ratified the Vienna Declaration 1993, on 19-6-1993 and acceded on 8-8-1993.

[113] Article 11 of the Convention on the Elimination of All Forms of Discrimination Against Women, 1979.

profession and employment, the right to promotion, job security and all benefits and conditions of service and the right to receive vocational training and retraining, including apprenticeship, advanced vocational training and recurrent training; d) the right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the quality of work; e) the right to social security, particularly in cases of retirement, unemployment, sickness, invalidity and old age and other incapacity to work, as well as the right to paid leave; f) the right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction.[114]

The Court took notice of the General Recommendation of the CEDAW Committee in respect to the above obligation which says that:[115]

> *"Equality in employment can be seriously impaired when the women are subjected to gender specific violence, such as sexual harassment at the workplace. Sexual harassment includes such unwelcome sexually determined behaviour as physical contacts and advances, sexually coloured remarks, showing pornography and sexual demands, whether by words or actions. Such conduct can be humiliating and may constitute a health and safety problem; it is discriminatory when the woman has reasonable grounds to believe that her objection would disadvantage her in connection with her employment, including recruiting or promotion, or when it creates a hostile working environment. Effective complaints procedures and remedies, including compensation, should be provided. States should include in their reports information about sexual harassment, and on measures to protect women from sexual harassment and other forms of violence of coercion at the work place."*[116]

The court also referred to Article 24 of the CEDAW[117] and relied on the official commitment of the Indian Government made at the Fourth World Conference on Women in Beijing, to formulate and operationalize a national policy on women which will continuously guide and inform action at every level and in every sector; to set up a Commission for Women's to act as a public defender of women's human rights; to institutionalize a national level mechanism to monitor the implementation of the Platform for Action.[118]

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[114] Ibid.
[115] AIR 1997 SC 3011, at p. 3015.
[116] Ibid.
[117] Article 24 of the CEDAW requires the State parties to undertake to adopt all necessary measures at the national level, aimed at achieving the full realization of the rights recognized under the Convention.
[118] The Fourth World Conference on women, Beijing (China) 4th to 15th September, 1995: The outcome of this Conference was a Platform for Action that emphasized the human rights of women and the need to mainstream a gender perspective in all sectors and at all levels of policy making and planning to achieve gender equality. The Commission on the Status of Women was charged with the responsibility for monitoring the implementation of the Platform and it was left to the United Nations General

h) An Assessment of Vishaka Judgment

The most significant aspect of the Vishaka judgment is undoubtedly the fact that it recognized openly the legislative vacuum in the field of law to deal with the problem of sexual harassment. It recognized the structural and systematic nature of sexual harassment at the workplace. The problem of sexual harassment was effectively couched in the language of the fundamental rights violations. Recourse was also made to progressive international law in the absence of national law.[119] It must be noted that while the Vishaka case involved acts of sexual assault namely rape, the reference to the term sexual harassment at the workplace made in the judgment includes a whole range of sexually offensive conduct. One must admit that the Vishaka judgment was a land mark event as sexual harassment was legally recognized and that the Guidelines have the effect of the following;

i. First of all it has laid down the obligation of the employers or persons in charge of the workplace whether in the public or private sector.
ii. It has the effect of amending service rules and standing orders to include the prohibition of sexual harassment. Accordingly the Industrial Employment (Standing Orders) Act 1946 and Central Civil Service Conduct Rules, which govern the government employment, were amended.
iii. The Vishaka judgment specifically provided that the private employer ought to take steps towards the prohibition contained in the standing orders.
iv. The Guidelines has the effect of creating awareness of the rights of the women employees.
v. They have the effect of allowing disciplinary action to be taken, if an act of sexual harassment amounts to misconduct.
vi. The Guidelines allow the initiation of appropriate criminal action by making a complaint in case such conduct amounts to a specific offence.
vii. They set up a complaint committee which is headed by a woman, which is made up of at least 50% women, and which includes an NGO member.
viii. They have the effect of permitting workers to raise issues of sexual harassment at workers meetings and allow it to be affirmatively discussed at employer-employees meetings.

Assembly to asses the follow-up and proposes further action and initiatives in its special session in June 2000.

[119] Supra note 30 at p.47.

ix. The Guidelines also help employee if a third party causes the sexual harassment.

There are, however certain limitation of the Vishaka judgment. The court recognized that sexual harassment amounts to violation of fundamental right contained in violation of Articles 14, 15, 19 (1) (g) and 21 of the Constitution. But this declaration that sexual harassment is a violation of fundamental rights is of little practical relevance to women in the private and un-organized sectors, as they are not provided with an affordable and expedious remedy in the form of writ petitions.[120] Accepted constitutional jurisprudence makes fundamental rights applicable against the State and Public Authorities, leaving most private actors outside the ambit. At the same time, the Vishaka Guidelines seem to have been conceived to fit a traditional office based employment scenario. Apart from the public sector bodies, which have been forced by government resolution to implement the Guidelines, and some large private companies and educational institutions, Vishaka has been a non starter.[121] It is difficult to visualize the implementation of the Vishaka machinery in situations of migrant labour, sole proprietorships, piece rate work and different form of unorganized labour. The biggest irony of the Guidelines remains that, although such guidelines arose as a response to the gang rape of a social worker in the State Development programme, the remedies suggested may be of little use to the victim.[122]

The vagueness of the guidelines on the internal grievance mechanism has left organizations with a great deal of room to manipulate the process or bypass it altogether.[123]

The Composition of Complaint Committee, as prescribed by the Supreme Court in Vishaka was that there should be headed by a woman and not less than half of its member should be women. Further, to prevent the possibility of any undue pressure or influence from senior levels, such Complaints Committee should involve a third party, either NGO or other body who is familiar with the issue of sexual harassment. This does not guarantee that an impartial inquiry will take place. It puts in place some safeguards that might have a bearing on how a complaint is handled.[124] The post Vishaka scenario proves that most Complaint Committees have not adhered to these guidelines and have in fact been used by the management to threaten, intimidate and force women, who complain of

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[120] Ibid, at p.48.

[121] Sheba Tejani, " *Sexual Harassment at the Workplace: Emerging Problems and Debates*," Economic and Political Weekly . Vol-xxxix. no-41, October 9, 2004. at 4491.

[122] Sexual Harassment at the Workplace India Study Report, International Labour Organization, New Delhi.

[123] Supra note 121 at p. 4491.

[124] Ibid at p.4491.

sexual harassment, into silence or submission particularly when the accused belonged to the top rung of the hierarchy.[125]

Sexual harassment also violates certain freedoms contained in Article 19 (a), 19(c), 19(d) and this violation was not addressed by the Vishaka Court.[126] A single act of sexual harassment can violate the freedom of speech and expression through the presence of a threatening work environment and being compelled to work along side perpetrators of sexual harassment. It can also violate the freedom of association by creating a hostile environment for the victim making it uncomfortable for her to participate in the office group activities meetings and social gathering, and the freedom of movement when the victim is compelled to avoid places at work because of the presence of the perpetrator.[127] Vishaka Court failed to address the violation of the right to privacy contained in the Constitution and violation of certain directive principles of State Policy.[128]

i) Post Vishaka Scenario

a) Legal front:

It is nine years since the Supreme Court, in the absence of appropriate civil or penal laws, laid down the Vishaka Guidelines to deal with sexual harassment women at the workplace. In **Apparel Export Promotion Council v. A.K. Copra,**[129] the Supreme Court reaffirmed that sexual harassment was gender discrimination. This was the first case in which the Supreme Court applied the law laid down in the case of **Vishaka v. State of Rajasthan**[130] and upheld the dismissal from service of a superior officer who was found guilty of sexual harassment of a subordinate female employee at the place of work on the ground that it violated her fundamental right guaranteed by Article 21 of the Constitution. The respondent was working as a Private Secretary to the Chairman of the Apparel Export Promotion Council, a private company. He tried to molest a women employee of the Council who was working as a clerk-cum typist. She was not trained to take dictations. The respondent, however, insisted that she go with him to the business Centre at Taj Palace Hotel for taking dictation from the Chairman and type out the matter. Under the pressure of the respondent, she went to Taj Hotel to take the dictation from the Chairman and type out the

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[125] Id: See also 'Post Vishaka Scenario' in this chapter.

[126] Article 19(a) provides for freedom of speech and expression: Article 19(c) provides for freedom of association and unions: Article 19(d) provides for freedom of movement.

[127] Supra note 30 at p. 56.

[128] Article 39(a) directs the state to direct its policy towards securing that all citizens, men and women equally, have the right to an adequate means of livelihood: Article 42 directs the state to ensure provision for just and humane condition of work and maternity relief.

[129] (1999) 1 SCC 759.

[130] (1997) 6 SCC 241: AIR 1997 SC 3011.

matter. While she was waiting for the Director in the room, the respondent tried to sit too close to her and despite her objection did not give up his objectionable behaviour. After taking the dictation, the respondent told her to type it at the Business Centre of the Taj Hotel which was located in the basement of the Hotel. He volunteered to show her the Business Centre and taking advantage of the isolated place again tried to sit close to her and touch her despite her objections. The Chairman corrected the draft matter and asked her to retype it. The respondent again went with her to the Business Centre and repeated her overtures. According to her the respondent had tried to molest her physically in the lift also while coming to the basement but she saved herself by pressing the emergency buttons. She orally narrated the whole incident to the Director and submitted a written complaint also. The respondent was suspended and a charge sheet was served on him. The respondent denied the allegations and said that they were imaginary and motivated. He contended that he merely attempted to molest her but had not actually molested her. The enquiry officer found the charges levelled against the respondent to be proved. The Disciplinary Authority of removing him from service.

The Supreme Court held that the act of the respondent was wholly against moral sanctions, decency and was offence to female subordinate's modesty and undoubtedly amounted to sexual harassment and hence the punishment of dismissal from service imposed on him was commensurate with the gravity of his objectionable behaviour and valid.

Regarding the nature of approach that courts should take the court said that:

> *"While dealing with the cases of sexual harassment at the workplace or attempt to sexually molest the, Courts are required to examine broader probabilities of the case and not swayed by insignificant discrepancies or narrow technicalities or dictionary meaning of the expression "molestation" or "physical assault". They must examine the entire material to determine the graveness of the complaint. The statement of the victim must be appreciated in the background of the entire case. Where the evidence of the victim inspires confidence, as is the position in the instant case, the courts are obliged to rely on it. Sympathy in such cases in favour of the delinquent superior officer is wholly misplaced and mercy has no reference."*[131]

In spite of these decisions the position of women in India did not change much and they continued to suffer from sexual harassment at the workplace. In most of the cases it was found that the Complaint Committees were not properly constituted and also being manipulated by the accused who happens to held a

[131] (1999) 1 SCC 759.

higher rank or had a higher position of authority. Thus in **Medha Kotwal and Others.v. Union of India,**[132]several women's group moved the Supreme Court through a writ petition in the year 1999 asserting that Complaints Committees were not being properly instituted, while also seeking expansion of the coverage and scope of Vishaka. It took several year for the court to give the judgment. In the mean time the Central Government issued instructions in an office memorandum on 12 December 2002, directing that a Compliant Committee presided over by a woman hold the preliminary inquiry, and that its findings be binding on the Disciplinary Authority when it decides whether to initiate disciplinary action. On 26 April 2004 the Supreme Court passed an order in relation to **Medha Kotwal** case[133] and clarified that Complaints Committee will be the authority that will conduct the regular enquiry. The implication of this decision is that the victim need not be exposed to the trauma of going through her case with any enquiry or disciplinary authority alone that is most often a man.

b) Incidents of sexual harassment:

An Indian woman in this country encounters sexually harassment in every 53 minutes.[134] A crime of molestation is committed against women in every 15 minutes.[135] During the year 2004 a total of 10,001 cases of sexual harassment were reported in the country. It comprises 0.9 percent of the total crime committed during 2004.[136] A total number of 34,576 molestation cases were reported in the country showing an increase of 4.9 percent rise over the year 2003.[137]Though it can not be denied that under the Indian condition or system many crime remains unreported. In view of this it may be assumed that the above rate of sexual harassment is only a tip of the iceberg. While gender discriminations regarding service conditions, equal status, payment and wages, some benefits are still a continuing reality in our country – can be termed as traditional, a new type of injury to women is emerging in the shape of mental or sexual harassment mostly in the corporate sector.[138] Praneesh Murthy[139] episode has brought sexual harassment in the workplace out at the closet. As a result of the suit against the highest-paid Infosy's executive which was finally settled out of court for $3 million – companies are busy updating their role books. The same episode naturally raises a questions as to how rampant is the problem in India as

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[132] Medha Kotwal Lele & Others.v. U.O.I, Order dated 26 April 2004, in W.P.(Crl) No. 173-177/1999.
[133] Ibid.
[134] Crime Clock, 2004, Crimes in India, National Crime Record Bureau, 2005.
[135] Ibid.
[136] Crimes In India, National Crime Record Bureau, Reporting 2005, Table 5.
[137] Ibid.
[138] Supra note 105 at p. 39.
[139] The Telegraph, 1st July 2003.

it involves one of India's most reputed companies? Are we ready and prepared to defend and protect the other half of the society against the acts affecting not exactly the human body but mind from mental or sexual harassment due to sexual advancement and inducement and consequent indignity to the womanhood? There are numerous examples where the working women have not only been sexually harassed but also defamed. One such incident had happened with P.E., Usha, a non-teaching female employee of Calicut University. She charged Prakashan, a male colleague, with making sexually coloured remarks about her in their work-place.[140] This happened after she was assaulted sexually on a bus by a stranger late in the evening on December 29,1999. Prakashan is said to have propagated a distorted version of the incident, i.e., that it occurred with Usha's consent and cooperation. Usha registered complaint with the Registrar of the university and the Kerala Women's Commission (KWC) seeking action specifically under the provisions of the Supreme Court judgment. It bears mention that while Prakashan was a member of the CPI (M)-led employees union (EU) and Usha belonged to the much smaller Calicut Univercity Employees Forum (CUEF), not affiliated to any one party. According to Usha this fact has delayed and blatantly partisan proceedings of the university on her complaint. For their part Prakashan and EU functionaries maintain that Usha's complaint was motivated by union rivalry. KWC held Prakashan guilty of indulging in unfair practices against Usha. They recommended to the government and university that Prakashan should be suspended. Usha should be offered an option of transfer. The KWC report and recommendations were forwarded to the social welfare department on November 11, 2001.On January 15, 2001, the department of higher education forwarded the KEC recommendations to the university and sought information on the action taken. Meanwhile, in December, Prakashan had obtained a stay from the High Court on the order to suspend him. This was vacated by a division bench of the High Court on February 2, 2001 with the stipulation that Prakashan may be given an opportunity to present his grievances before the department of higher education about the procedures adopted by the KWC. Meanwhile Usha had made public her intention of going on indefinite strike from April 8 before the university administrative office. Subsequently, Usha called off her fast on the ninth day after mediation by Justice Krishan Iyar and on the assurance that the minister of education had told the press that he had signed the government order. The University has since suspended Prakshan in June 2001. Moving to the another cases, Nalini Netto filed a complaint with the

[140] Dr. D. Singh, "*Human Rights Women & Law*," 1st Edition,(Allahabad Law Agency, Faridabad, 2005) at 167.

government on February 9, 2000 alleging that on December 21,1999 Neelaohitadasan Nadar, minister for forests, had assaulted her sexually, in his legislative chamber. She also registered a first information report. At the time of making the complaint she was transport secretary but was forest secretary when she was assaulted. The minister was forced to quit and an inquiry by the crime branch charged him under Section 173 of the Criminal Procedure Code. In a questionable move, considering the ongoing police inquiry and the Supreme Court judgment, the government appointed the Justice Sasidharan Commission to look into Nalini's complaint. The commission's attitude towards Nalini was hostile right from the beginning. It refused her request for in camera proceedings, arguing that if Monica Lewinsky could stand public trial, why not Nalini, who refused to answer its summons, making it seek like she was fleeing from justice. Nalini, like Usha felt forced to resort to long leave and sought the intervention to Kerala Women's Commission and the High Court. The former recommended that the commission be scrapped as the policy inquiry was complete and the High Court recently issued a stay order against it. Also in response to a petition filed by Kerrala Stree Vedi, challenging the appointment of a one man judicial commission the High Court directed the state government to produce before it the affidavit filed by it before the Supreme Court that it would take effective steps to deal with sexual harassment of women in government and private institutions in the State. Subsequently, the recently formed government refused to extend the term of the judicial commission.[141] These incidents really reveal the nature of the problem involved in sexual harassment and also the extent to which the male dominance can go to protect the harasser.

In the year 2004 A woman employee of NALCO, who accused its chairperson and managing director of molestation, was put through a harrowing investigation at the hands of the Complaint Committee.[142] Here the Complaint Committee insisted on a 'physical demonstration' of the molestation and asked her prejudicial questions such as whether she had consumed liquor on the night of the incident.[143] The High Court finally threw out the finding of the Committee saying that they were' vulgar, totally biased and intended to proving the petitioner a liar.'[144] At Lala Lajpat Rai College, Mumbai, a teacher suffered something like a public shaming when she complained to the women's cell of

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[141] Economic and Political Weekly, August 2001, at 3170.

[142] "*High court Stays Vulgal NALCO Probe into Sexual Harassment*," The Indian Express, April 23, 2004.

[143] Supra note 121 at p.4492.

[144] "High Court Slams Probe into NALCO Molestation Case," The Times of India, April 23, 2004.

Mumbai University that the principal was sexually harassing her.[145] The non-teaching staff and student's council were up in arms against her and they declared an indefinite strike in support of the principal, even when no enquiry into the allegation had been made. The group raised slogan against the complainant during the strike and put up posters saying that she had shamed the college and that they backed the principal. The management did nothing to allow the willing students and teachers access to classrooms and it became evident that they tacitly supported the activities.[146]

In this Case the Mumbai High Court had to intervene and ask the college to reconstitute the Complainant Committee that had been formed earlier, as it was heavily biased against the complainant and she had refused to appear before it. Not only this, an employee of Sahara Monoranjan herself became the target of a 'Fact Finding Mission' when she lodged a complaint with the police about a colleague's misdemeanour. This incident came at the back of repeated harassment by top management, which had offered 'quid pro quo' benefits for favours of a sexual nature, and then threatened her with consequences when she did not comply. This team found her guilty of misconduct and of making baseless allegation against the company.[147] In this case she was transferred to Lucknow and, when she went to the press with the story, her services were terminated. In spite of the intervention of the Maharashtra State Commission for Women, the Complaints Committee that was subsequently formed blatantly flouted the Vishaka Guidelines and was not acceptable to the complainant. Not only this, the government departments like police department which is expected to be free from such incident came under a scanner.[148] Delhi Police have been hauled up for being biased while treating a sexual harassment case which rocked the department seven years ago. The Delhi High Court has held that the department did not apply its mind while reposting the accused, the then director of the finger-print bureau, back to the department. The official concerned, who is of an ACP rank, was posted out of the department and later suspended almost five years after the alleged incident. Although the officer was treated partially, the assistant sub-inspector who was complainant in the case was immediately transferred out of the finger-print bureau. This action was in violation of the Supreme Court

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[145] Supra note 121 at p. 4492.

[146] Gokhale, Sandhya, Meena Gopal and Chayanika(2004): Visit to Lala Lajpat Rai College of commerce following media reports of an alleged call for strike by non-teaching staff and students: A Report, unpublished report, Forum Against Oppression of Women and India Centre for Human Rights and law, Mumbai, September 2004.

[147] '*Women Alleges Abuse at Work, Gets the Sack*,' The Telegraph, April 29, 2004.

[148] Legal News and Views, January 2006, at p-12.

guidelines which had been laid down in the **Vishaka'**[149]s case. Coming to the aid of the complainant, the High Court has ordered Delhi Police to reconsider her request for transferring her back to the finger-print bureau. Justice Ravindra Bhat Said: "In the light of the discussion and conclusion, a direction is issued to the department not to post the ACP to the finger-print bureau until the conclusion of the departmental proceedings.....It is also under an obligation to give an option to the petitioner(Complainant) back to the finger-print bureau."[150] All these prove that after **vishaka**[151] nothing has changed. Women's in India are and will be raising complaints of sexual harassment in an extremely hostile environment with the risk of backlash, humiliation, injury whether mental or physical and a complete loss of confidentiality.[152] The post Vishaka development reflects the scenario of the reaction of most institutions; trying to bury the matter, vilify and target the women or hurriedly convene a committee to conduct a token slipshod or completely adverse investigation. It also reveals that plight of the complainant of sexual harassment specially when the accused is the owner or part of management, or occupies a position of authority which curtails the possibilities of an impartial inquiry.

c) Efforts of the Women's Group

In an attempt to translate the Vishaka Guidelines of the Supreme Court into an Act, the National Commission for Women has drafted a Bill entitled Sexual Harassment of Women at their Workplace (Prevention Bill) 2003.The aforesaid Draft Bill, one must admit is more comprehensive than Vishaka. However the Bill contains ambiguities and omissions that need to be addressed to ensure that the system works for a variety of women workers, and that women's rights are protected at all times. This is specially so in terms of the lack of specificity of procedures of complaint for different workers and the neglect of the process of enquiry.[153] The Bill has been criticized by many on various grounds. Vishaka Guidelines had left informal workers, who make the bulk of work force, outside its purview. The present Bill has included a variety of formal and informal workplaces within its scope, but it is much more difficult to institute rules in occupations where there is no clearly identifiable employer, even workplace at times, and where the nature of work itself might be seasonal.[154] The Draft Bill incorporated a two tiered grievance mechanism for sexual harassment i.e, an internal complaints committee (ICC) akin to CCs; and another district level body called the local

[149] (1997) 6 SCC 241.
[150] Supra note 148 at p-13.
[151] (1997) 6 SCC 241.
[152] Supra note at p. 4493.
[153] Ibid.
[154] Ibid.

complaints committee (LCC).[155] It is difficult to understand how the Complaints Committees will be constituted and how their working can be free from interference or manipulation as they are to be constituted by the owners. Various women's groups have suggested that standing committees, which do preventive and awareness raising work, can be formed at the workplace and that complaints committees of fixed tenure can be constituted from them. The important point is that the committee should already be formed when a woman makes a complaint, rather than commencing the whole process at the point of filing complaint, and thus risking bias or delay. There must be an option of appeal, if the complainant feels that a particular member might be biased against her. The Bill made the way for inclusion of three representative members from NGO's, which is a good side of the Bill as these members will have a crucial role by reason of being external member. Thy can function independently. But the Bill simply mentions "three non-government organization or bodies familiar with the issue of sexual harassment,"[156] and fails to ensure that the said organization does not have some association or connection with the employer. The Bill does not give the complainant to bypass the ICC if she feels it to be ineffective or biased, and go directly to the LCC. This option is not available to the woman complainant in the present Draft Bill. According to the proposed mechanism, in the Bill, informal sector workers can go directly to the District level LCC, which will be chosen from a group of experts. The group of experts itself will be constituted by a special district officer, not less than the rank of assistant labour commissioner, who will also receive complaints.[157] An LCC committee at the district level might still be too remote, inaccessible and intimidating for a variety of rural and informal workers. As such the Bill could have considered for an arrangement at the block level. The Bill also fails to cover informal workers comprehensively. It also fails to separately define different grievance mechanisms and related procedures for each workplace. Various women group have mooted the idea of designating an ombudsperson for sexual harassment in custodial situations, such as in police stations, court premises, remand homes etc, as the nature of crimes there tend to be very serious and need to be dealt with separately. The present Bill overlooks this aspect. It also fails to spell out the right of a woman during the inquiry, as also the defendant. The bill provides for separate proceedings for the accused and complainant, and allows the complainant to be accompanied by one representative. But it is not clear if that representative will be one of the

[155] Section 11,12, 13, 15,16 of the NCW Draft Bill 2003, on Sexual Harassment.
[156] Section 13 clause (i) of the Draft Bill.
[157] Section 16 of the Draft Bill.

complainant's own choice, or whether it can be an external party or even a lawyer. The Bill does not say anything regarding burden of proof once it is shown that the alleged act took place. In other words the post Vishaka period has witnessed the steady rise of the incident of sexual harassment of women and non-compliance/ implementation of the Guidelines has emerged as a most significant problem which need to be addressed adequately. However the N.C.W's Draft Bill 2003 did not have the adequate provision in this regard. The bill should have provided for the liability on the part of the employer/ head of a workplace in case of his failure to comply with its provision. The bill has missed provision on awareness as well as preventive measures.[158] Discretion with regard to transfer, posting and promotion, leave, etc. often becomes a reason for what is known as quid pro quo sexual harassment. Therefore, the Bill should have provision making it mandatory for every workplace to have clear and uniform rules, policies or criteria in this regard for all its workers.[159]

All the aforesaid criticism has compelled the National Commission for Women to come up with a fresh Draft Bill entitled 'The title of the Bill is 'The Sexual Harassment of Women at Work Place (Prevention, Prohibition and Redressal) Bill, 2006. The Bill is yet to be passed by the parliament. Under the Bill an aggrieved "Aggrieved Woman /Women" means any female person/persons, whether major or minor, who alleges that she/they have been subjected to sexual harassment.[160] The Bill also brought within its ambit contractual services which "Contractual Services" would mean any contract for service whereby one part undertakes to render services to or for another in the performance of which he/she is not subject to detailed direction and control but exercises professional or technical skill and uses his/her own knowledge and discretion.[161] The Bill has also widened the ambit of the term worker /employees which would mean a person employed for any work directly, or by or through any agency (including a contractor), with or without the knowledge of the principal employer, whether for remuneration or not, or working on a voluntary basis or otherwise , whether the terms of employment are express or implied, and any person employed as a temporary, casual, badli, piece-rated or contract worker, probationer, trainee, apprentice or by any other name called; and includes a domestic servant employed in a house or dwelling place.[162] The Bill has also widened the range of

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[158] Ajay Pandey, " *Prevention of Sexual Harassment of Women at Their Place of Work*," Legal News and Views, (June 2003), at p. 25.
[159] Ibid.
[160] Section 2(a) of The Sexual Harassment of Women at Work Place (prevention, prohibition and Redressal) Bill, 2006, prepared by the NCW.
[161] Section 2 (c) of the NCW Draft Bill, 2006.
[162] Section 2(f) of the NCW Draft Bill, 2006.

meaning of the term employer which would mean (i). In relation to an undertaking or department which is carried on by or under the authority of the Central Government, or a State Government, the authority prescribed in this behalf, or, where no authority is prescribed, the head of the department / undertaking;(ii). In relation to an workplace under any local body/authority, the authority prescribed in this behalf, or, where no person is so prescribed, the Chief Executive Officer;(iii). In any workplace not covered under (i) and (ii) hereinabove, the person who, or the authority which, whether called a Manager, Managing Director, President, Managing Agent, contractor or by any other name, is responsible for the ultimate supervision and control of the affairs of the workplace, in which the employee is employed, and in respect of a contract employee includes the Principal Employer of the workplace in which the employee is working, as well as the contractor; (iv) In any other case, the person who is in a position of authority whether supervisory, evaluatory, pecuniary or fiduciary including the owner or trustee of an educational institution or any professional body, society, trust, etc providing any services.[163] The present Bill also clarified the term services which would mean service of any description irrespective of whether it is provided for any consideration or not which is made available to potential users and includes the provision of facilities in connection with banking, financing, insurance, transport, processing, supply of electrical and other energy, boarding, housing or lodging, entertainment, sporting activities, amusement, the purveying of news of other information or the rendering of any service by a professional /professional body or under a contract of personal service.[164]

The most unique feature in the Bill is that it has brought within its umbrella the unorganized sector which means that all private unincorporated enterprises including own account enterprises engaged in any agriculture, industry, trade and/or business and includes sectors as mentioned in schedule II of the Bill[165] are covered by the Bill. The Bill has given a wide coverage for the unorganized sector worker which would imply a person who works for wages or income; directly or through any agency or contractor; or who works on his own or her own account or is self employed; in any place of work including his or her home, field or any public place.[166] On the same line it has widened the scope of the term work place which would mean (i) any department / organization, establishment or undertaking wholly or substantially controlled by the Central

[163] Section 2 (g) of the NCW Draft Bill, 2006.
[164] Section 2 (n) of the NCW Draft Bill, 2006.
[165] Section 2 (o) of the NCW Draft Bill, 2006.
[166] Section 2 (p) of the NCW Draft Bill, 2006.

Government or the State Government or local or other authority under the control of the central or the state government; (ii) any venture, business, organization or institution or department carrying on systematic activity by co-operation for the production, supply or distribution of goods and/or services irrespective of whether it is an "industry" within the meaning of section 2 (j) of the Industrial Disputes Act, 1947 or whether it is performing any inalienable sovereign function and irrespective of whether the goods and/or services are provided for any remuneration or not and
(iii) any place where an aggrieved woman or defendant or both is/are employed or work/s, or visits in connection with work during the course of or arising out of employment, and (iv) Such other statutory and/or professional bodies, contractual and other services and (v) Includes but is not limited to the illustrations in Schedule I.[167]

The Bill prohibits[168] and defines sexual harassment in definite language, which would mean such unwelcome sexually determined behaviour such as physical contact, advances, sexually coloured remarks, showing pornography or making sexual demands, whether verbal, textual, graphic or electronic or by any other actions, which may contain; (i) implied or overt promise of preferential treatment in that employee's employment or (ii) an implied or overt threat of detrimental treatment in that employee' employment or an implied or overt threat about the present or future employment status of that employee and includes the creation of a hostile Working environment. (iii) the conduct interferes with an employee's work or creates an intimidating, hostile or offensive work environment or (iv) such conduct can be humiliating and may constitute a health and safety problem.[169] It has also clarified the confusion by explaining that it is the reasonable perception of the woman that would be relevant in determining whether any conduct was sexually coloured and, if so, whether such conduct was unwelcome or not and that her objection would disadvantage her in connection with her employment, including recruitment or promotion, or when it creates a hostile working environment.[170]

The Bill imposes a duty upon every employer or management of the workplace to take all necessary and reasonable steps to ensure that the no women employed in the establishment is subjected to sexual harassment.[171] The

[167] Section 2 (q) of the NCW Draft Bill, 2006.
[168] Section 4 of the of the NCW Draft Bill, 2006.
[169] Section 2 (m) of the NCW Draft Bill, 2006.
[170] Explanation 2 of the NCW Draft Bill 2006.
[171] Section 4 of the NCW Draft Bill 2006.

same shall be the duty of the head of the professional body or institution in cases where an employer-employee relationship does not exist.[172]

The Bill proposes for the constitution of two different types of complaint committee. The first is the constitution internal complaint committee which shall be the duty of the workplace to constitute.[173] The second is the constitution of local complaint committee which shall be the responsibility of the district officer for every district.[174] One must admit that the Bill is a comprehensive one as compared to that of the earlier one considering the fact that the present Bill incorporates every details starting from the constitution of the authorities under the bill, constitution and, duties,[175] jurisdictions of the authorities and complaint committees; their powers, duties of the workplace, procedure for lodging[176] and dealing with complaint[177], etc.

It is submitted the Bill if translated into law would fill up the void of law and remove the confusion among the working women regarding sexual harassment and its redressal. As the Bill covers a wider range of worker engaged in workplace starting from contractual service to that of unrecognized sector, it would bring a huge number of working women within its protective shield.

B) Sexual Harassment; a Criminal Law Perspective

A glaring example of a total lack of law is in the area of sexual harassment which has and continues to affect a large number of working women in India. The Government has completely neglected to legislate in this area.[178] In the Indian Penal Code, there is no chapter specifically dealing with crimes against women and there is no specific reference of sexual harassment.[179]Cases of sexual harassment have thus either been dealt with under criminal law under section 354[180] or under the 'eve-teasing' section 509 of the IPC or under the general conduct rules relating to 'moral turpitude.'[181] In **Jai Chand v State**[182] a hospital orderly assaulted a nurse within the premises of the hospital. An offence was made out but there was no reference to it having been sexual harassment. The

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[172] Section 5 of the NCW Draft Bill 2006.
[173] Section 8 of the NCW Draft Bill 2006.
[174] See Section 11 and 12 of the NCW Draft Bill 2006.
[175] See Chapter IV of the NCW Draft Bill 2006.
[176] See Chapter V of the NCW Draft Bill 2006.
[177] See Chapter VI of the NCW Draft Bill 2006.
[178] Kirti Singh, " *Law, Violence and Women in India,*" A study supported by UNIFEM/UNICEF at-11.
[179] Though IPC does not formally recognize sexual harassment but particular offences defined therein cover situations of sexual harassment.: See section 509, 354, 376, 503,339, 342. However it has a reference of sexual offence of rape.
[180] 1996 Cr.L.J 2039.
[181] J. Jaishankar v. Government of India,(1996) 6SCC204.
[182] 1996 Cr.L.J 2039.

sexual harassment of women by words, gestures, or stalking only found recognition in section 509.In fact this section is couched in completely irrelevant and out dated language and talks about making gestures and sounds with the intention to insult the modesty of a woman.[183] So far as this section is concerned the only change suggested by the Law Commission of India is related to the enhancement of punishment.[184]

a) Outraging the Modesty of Women

i) A Popular Misconception

Eve teasing lives in post-colonial India as a cognitive category that refers largely to sexual harassment of women in public spaces, thereby constituting women as 'eves', temptresses who provoke men into states of sexual titillation. This popular perception of sexual harassment posits the phenomena as a joke where women are both a tease and deserve to be teased. Most of the people tend to classify verbal harassment as eve teasing and physical harassment or sexually explicit behaviour as sexual harassment.[185] By treating sexual harassment as eve teasing, structural violence against women is disguised as an individualized act of deviancy categorized as natural heterosexist male behaviour towards women who provoke men.[186]

While legal definitions refer to crimes that outrage the modesty or insult women, in many Indian states the category of *eve teasing* of women finds popular usage. Eve teasing (an English phrase) refers to all forms of harassment women face in public spaces that are considered trivial, funny and part of everyday life, thus acting as normal mechanisms legitimizing harassment by positioning the very presence of women in public spaces as 'provocative'. Eve teasing as a cognitive category and culturally sanctioned practice denotes the tensions that inhere in the manner in which the private and the public as gendered domains are constantly redefined. It normalizes and escalates violence against women in public spaces while simultaneously making invisible forms of violence in the domestic arenas as the distinction between the two domains is

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[183] Supra note 178 at p. 12.

[184] Law Commission of India, 172nd Report for Review of Rape Laws, March 25, 2000:

[185] A study conducted by way of survey, by the students and teachers of the University of Delhi found that most women respondents felt that eve teasing constituted male behaviour that could be overlooked and ignored; it amounted to sexual harassment only when it crossed the threshold of their tolerance. Verbal harassment tended to be classified as eve teasing and physical harassment or sexually explicit behaviour as sexual harassment. They distinguished the two by the harm caused to them by each – eve teasing as largely harmless and sexual harassment as harmful.

[186] Pratiksha Baxi, "*Sexual Harassment*," Breakthrough Building Human Rights Culture:For details see, http//www.sha/505/htm.

increasingly challenged.[187] Not only this, at the level of implementation, the police's translations in interpreting crimes moves between legal and cultural categories, thereby proffering an important resource in the analysis of the contestation around sexual harassment. The classification of the IPC crimes, contained in sections 354 and 509, have been classified and documented as 'crimes against women', in the 'Crimes in India' Reports published by the Crimes Records Bureau.[188] The report classified section 354 as molestation and section 509 as eve teasing :(See below Table- 6:1)

Table – 6:1

Crimes in India a Popular Mis Conception of the State

Year	Molestation/ Eve Teasing Section 354 IPC	Sexual Harassment, Section 509 IPC
1992	20385	10751
1993	20985	12009
1994	24117	10496
1995	28475	4756

Molestation then was read against those offences that use force or assault to outrage the modesty of women. Eve teasing was recognized as a popular form of harassment of women in public spaces, but the popular understanding that it falls short of molestation underlay the distinction between molestation and eve teasing. Eve teasing was then classified as those offences that outrage the modesty of women by word, gesture or act, thereby reifying popular and normative distinctions between physical and verbal (or non physical form) of harassment. It affirmed the idea that eve teasing is not assault and causes lesser 'hurt' than molestation.[189]

Any form of sexual violation that does not fall within the narrow ambit of the offence of rape falls under Sections 354 and 509 of the IPC. Even though these sections intend to protect women's 'modesty', the IPC nowhere defines what constitutes 'modesty'. Since the understanding of 'modesty' is moralistically constructed, the section can get subjectively interpreted to apply to only certain kind of women (chaste, sexually innocent/passive, etc) who can be said to be the sole possessors of 'modesty'. The Law Commission of India in its 172nd Report

[187] Ibid.
[188] Crimes In India Report, 1995, at p.222, National Crime Record Bureau.
[189] Supra note 186.

recommended for the insertion of a new section in the Indian Penal Code. The recommended section namely, section 376E reads:[190]

"376E. Unlawful sexual contact (1) Whoever, with sexual intent, touches, directly or indirectly, with a part of the body or with an object, any part of the body of another person, not being the spouse of such person, without the consent of such other person, shall be punished with simple imprisonment for a term which may extend to two years or with fine or with both."[191]

(2) Whoever, with sexual intent, invites, counsels or incites a young person to touch, directly or indirectly, with a part of the body or with an object, the body of any person, including the body of the person who so invites, counsels or incites, or touches, with sexual intent, directly or indirectly, with a part of the body or with an object any part of the body of a young person, shall be punished with imprisonment of either description which may extend to three years and shall also be liable to fine.

(3) Whoever being in a position of trust or authority towards a young person or is a person with whom the young person is in a relationship of dependency, touches, directly or indirectly, with sexual intent, with a part of the body or with an object, any part of the body of such young person, shall be punished with imprisonment of either description which may extend to seven years and shall also be liable to fine.

Explanation: "Young person" in this sub-section and sub-section (2) means a person below the age of sixteen years."[192]

The latest Law Commission in its Report also recommended for the amendment of section 509, IPC with the following:

"509. Word, gesture or act intended to insult the modesty of a woman: Whoever, intending to insult the modesty of any woman, utters any word, makes any sound or gesture, or exhibits any object intending that such word or sound shall be heard, or that such gesture or object shall be seen, by such woman, or intrudes upon the privacy of such woman, shall be punished with simple imprisonment for a term which may extend to three years and shall also be liable to fine."[193]

The above recommendations are yet to receive government attention. The present provisions in the Penal Code work on a moralistic premise that

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[190] Law Commission of India 172nd Report on Review of Rape Laws, 25th March 2000, D.O. No. 6 (3)(36)/2000_LC(LS)

[191] Ibid.

[192] Ibid at Para 3.5.1.

[193] Ibid at Para 3.7.

understands 'modesty' to be possessed only by certain kinds of women who appear to be 'modest', and thus lay down invisible qualifications through which women can avail of the guarantee in them. For example, a woman's mannerisms, walk, make-up, mode of dressing, hour of the day when she is out may be deciding factors when she claims the protection of her 'modesty.'[194]

ii) Judicial Interpretation of Modesty

Under our penal code word, gesture or act intended to insult the modesty of a woman is a punishable with simple imprisonment for a term which may extend to one year, or with fine, or with both.[195] If a person assaults or uses criminal force to woman with intent to outrage her modesty he becomes liable to be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.[196] The object of these provisions is to protect a woman against indecent behaviour of others, which is offensive to morality. In fact the offences created by section 354 and 509 of the IPC are as much in the interest of the woman concerned as in the interest of public morality and decent behaviour.[197] Again section 354 has a limitation because to attract the provision it is not enough to merely to show that the accused assaulted a woman; it must further be proved that he did so either with the intention to outrage her modesty or with the knowledge that it was likely that he will thereby outrage her modesty.[198] Thus the sole concern of these two sections seems to protect the modesty of women by making outraging the modesty of woman a crime, but leaving the definition of modesty of woman for others. The Judicial decisions as to the question what constitute modesty have not been uniform.

In State **of Punjab.v. Major Singh,**[199] the accused caused injury to the private part of a female child giving vent to his unnatural lust was held guilty under section 354 of the IPC. Justice Bachawat while concurring with the majority in the case observed that:

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[194] Debolina Dutta, " *The absurdity of Laws*," Infochange Agenda,Source: http//www.infochangeindia/ /news/features/agenda/theabsurdityof laws/htm.

[195] Under section 509 of the IPC Whoever, intending to insult the modesty of any woman, utters any word, makes any sound or gesture, or exhibits any object, intending that such word or sound shall be heard, of that such gesture or object shall be seen, by such woman, or intrudes upon the privacy of such woman, shall be punished with simple imprisonment for a term which may extend to one year, or with fine, or with both.

[196] Under section 354 of the IPC whoever assaults or uses criminal force to any women, intending to out rage or knowing it to be likely that he will thereby outrage her modesty,shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

[197] K.D.Gaur, " *Criminal Law Cases and Materials*," 3rd Edition, (Butterworth,1999) at 482.

[198] Ram Das.v. State of West Bengal AIR 1954 SC 711.

[199] AIR 1967 SC 63.

"The essence of a woman's modesty is her sex. The modesty of an adult female is writ large on her body. Young or old, intelligent or imbecile, awake or sleeping, the woman possesses modesty capable of being outraged. Whoever uses criminal force on her with the intent to outrage her modesty commits an offence punishable under section 354. The culpable intention of the accused is the crux of the matter. The reaction of the woman is very relevant, but its absence is not always decisive, as for example, when the accused with a corrupt mind stealthily touches the flesh of a sleeping woman. She may be an idiot, she may be under the spell of anaesthesia, she may be sleeping, she may be unable to appreciate the significance of the act, and nevertheless the offender is punishable under this section. Where the victim is a baby seven and a half months old, she nevertheless, from her very birth possesses the modesty which is the attribute of her sex."[200]

However, Chief Justice A.K. Sarkar while giving dissenting opinion observed that:

"In order that a reasonable man may think that an act was intended or must be taken to have been known likely, to outrage modesty, he has to consider whether the woman concerned had developed a sense of modesty and also the standard of that modesty. To say that every female of whatever age is possessed of modesty capable of being outraged seems to be laying down too rigid a rule which may be divorced from reality. There is obviously no universal standard of modesty."[201]

In **Rupan Deol Bajaj.v. K.P.S.Gill,**[202] the Supreme Court held that slapping a women on her posterior amounted to outraging of her modesty within section 35 4 and 509 of the Indian Penal Code. Apart from the offence under Section 354, IPC - an offence under Section 509, IPC has been made out on the allegations contained in the FIR as the words used and gestures made by Mr. Gill were intended to insult the modesty of Mrs. Bajaj.

The facts of the case are as follows;

"In the evening of July 18, 1988 Mrs. Bajaj accompanied by her husband had gone to the residence of Shri S.L. Kapur, a colleague of theirs, in response to an invitation for dinner. Reaching there at or about 9 p.m. they found 20/25 couples present including Mr. Gill, who had come without his wife, and some other senior Government officers (names in the FIR). The party had been arranged in the lawn at the back of the house and as per tradition in Indian homes, the ladies were sitting segregated in a large semi-circle and the gentlemen in another large semi-circle with the groups facing each other. Around 10 p.m. Dr. Chutani and Shri Gill walked across to and sat in the ladies circle. Mrs. Bajaj, who was then talking to Mrs Bijlani and Mrs. Bhandari, was requested

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[200] Ibid.
[201] Ibid.
[202] AIR 1996SC309.

by Mr. Gill to come and sit near him as he wanted to talk to her about something. Responding to his request when Mrs. Bajaj went to sit in a chair next to him Mr. Gill suddenly pulled that chair close to his chair. Feeling a bit surprised, when she put that chair at its original place and was about to sit down, Mr. Gill again pulled his chair closer. Realising something was wrong she immediately left the place and went back to sit with the ladies. After about 10 minutes Shri Gill came and stood in front of her so close that his legs were about 4" from her knees.He then by an action with the crook of his finger asked her to "get up immediately" and come along with him. When she strongly objected to his behaviour and asked him to go away from there he repeated his earlier command which shocked the ladies present there. Being apprehensive and frightened she tried to leave the place but could not as he had blocked her way. Finding no other alternative when she drew her chair back and turned backward, he slapped her on the posterior in the full presence of the ladies and guests."[203]

The moot point as to whether the above allegations constituted any or all of the offences for which the case was registered, the court first turned to Sections 354 and 509 IPC, both of which relate to modesty of woman and observed that:

> *"Since the word "modesty" has not been defined in the Indian Penal Code we may profitably look into its dictionary meaning. According to Shorter Oxford English Dictionary (Third Edition) modesty is the quality of being modest and in relation to woman means "womanly propriety of behaviour; scrupulous chastity of thought, speech and conduct". The word "modest" in relation to woman is defined in the above dictionary as "decorous in manner and conduct; not forward or lewd; shame fast", Webster's Third New International Dictionary of the English language defines modesty as "freedom from coarseness, indelicacy or indecency; a regard for propriety in dress, speech or conduct". In the Oxford English Dictionary (1933 Ed) the meaning of the word 'modesty' is given as "womanly propriety of behaviour; scrupulous chastity of thought speech and conduct (in man or woman); reserve or sense of shame proceeding from instinctive a version to impure or coarse suggestions".*[204]

The court also referred the case of **State of Punjab v. Major Singh,**[205] where it had held that, when any act done to or in the presence of woman is clearly suggestive of sex according to the common notions of mankind that must fall within the mischief of Section 354, IPC. Needless to say, the 'common notions of mankind' referred to by the learned Judge have to be gauged by contemporary

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[203] Ibid, at p.313.
[204] Ibid.
[205] AIR 1967 SC 63.

societal standards.[206] The Court laid down the test for ascertaining whether modesty has been out raged or not in the following words:

> *"The ultimate test for ascertaining whether modesty has been outraged is, is the action of the offender such as could be perceived one which is capable of shocking the sense of decency of a woman. When the above test is applied in the present case, keeping in view the total fact situation, it cannot but be held that the alleged act of Mr. Gill in slapping Mrs. Bajaj on her posterior amounted to 'outraging of her modesty' for it was not only an affront to the normal sense of feminine decency but also an affront to the dignity of the lady "sexual overtones" or not, notwithstanding."*[207]

Again in **Raju Pandurang Mahale.v. State of Maharastra,**[208] the apex court had the occasion to define modesty in the following words:

> *"Modesty is defined as the quality of being modest; and in relation to a woman, 'womanly propriety behaviour; scrupulous chastity of thought, speech and conduct.' It is the reserve or sense of shame proceeding from instinctive aversion to impure or coarse suggestions."*[209]

In this case the Court again reasserted the fact that, what constitutes an out rage to female modesty is nowhere defined. The essence of women's modesty is her sex. The culpable intention of the accused is the crux of the matter. The reaction of the woman is very relevant, but its absence is not always decisive. Modesty is an attribute associated with female human being as a class. It is a virtue which attaches to a female owing to her sex.[210]

iii) Bajaj and the Device of Slight harm

In this case Mrs. Bajaj before seeking relief from the Supreme Court had registered a FIR and a complaint to the court of the Chief Judicial Magistrate. But on an appeal the High Court quashed the complaint and FIR. One of the arguments which found favour with the High Court was that, in view of section 95 of the Indian Penal Code, the harm caused did not entitle Mrs. Bajaj to complain.[211] Section 95 reads as:

"Nothing is an offence by reason that it causes, or that it is intended to cause, or that it is known to be likely to cause, any harm, if that harm is so slight that no person of ordinary sense and temper would complaint of such harm".[212]

The Supreme Court however, reversed the judgment of the High Court and referred **Veeda Menezes v. Yusuf Khan**[213] where it has observed that:

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[206] Ibid, at 67.
[207] AIR 1996SC309
[208] (2004) 4 SCC 371: See also AIR 2004 SC 1677.
[209] Ibid, at Para 13.
[210] Ibid at Para 12.
[211] As if it was a slight harm and not the outraging the modesty.
[212] Section 95 of the Indian Penal Code, 1860.

"The object of framing the section was to exclude from the operation of the Indian Penal Code those cases which from the imperfection of language may fall within the letter of the law but are not within its spirit and are considered, and for the most part dealt with by the Courts, as innocent. In other words, the section is intended to prevent penalization of negligible wrongs or of offences of trivial character. In interpreting the expression 'harm' appearing in the section this Court said that it is wide enough to include physical injury as also injurious mental reaction."[214]

As regards the applicability of the Section in a given case, this Court observed as follows:

"Whether an act which amounts to an offence are trivial would undoubtedly depend upon the nature of the injury, the position of the parties, the knowledge or intention with which the offending act is done, other related circumstances. There can be no absolute standard or degree of harm which may be regarded as so slight that a person of ordinary sense and temper would not complain of the harm. It cannot be judged solely by the measure of physical or other injury the act causes."[215]

Viewed in the light of the above principles the Court came to the opinion that section 95 IPC has no manner of application to the allegations made in the FIR and observed that:

"On perusal of the FIR we have found that Mr. Gill, the top most official of the State Police, indecently behaved with Mrs. Bajaj, a Senior lady I.A.S. Officer, in the presence of a gentry and in spite of her raising objections continued with his such behaviour. If we are to hold, on the face of such allegations that, the ignominy and trauma to which she was subjected to were so slight that Mrs. Bajaj, as a person of ordinary sense and temper, would not complain about the same, sagacity will be the first casualty."[216]

b) Other Provisions of IPC which may be used in the case of Sexual harassment against women

It has been seen that sexual harassment may take place in a variety of settings. In **Vishaka**[217] the Supreme Court in its Guideline 4 made it clear that where the conduct amounts to a specific offence under the Indian Penal Code or under any other law, the employer shall initiate appropriate action in accordance with law by making a complaint with the appropriate authority.[218] The definition

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[213] AIR 1966 SC 1773.
[214] Ibid, at 1775.
[215] Ibid.
[216] AIR 1996 SC 309, at p. 315.
[217] (1997) 6 SCC 241.
[218] AIR 1997 SC 3011, at p. 3017.

of sexual harassment given by the court is an inclusive one. It does not preclude the possibility of other serious manifestations of sexual harassment being covered under offences that are already defined in the Penal Code.[219] Apart from section 354 and 509 the act or conduct of a harasser may amount to an offence in other provision which may be applied in case of sexual harassment are, section 107-109[220], 120 A& 120B[221], section 306[222], section 319-331[223], section 339-348[224], section 415-417[225], section 499-500[226], Section 503[227], section 507[228], section 508[229], section 511[230], and section 292-294[231] of the Indian Penal Code and the harasser may be held liable. To invoke the operation of the aforesaid penal provision, the sole requirement is that the act complained of,e.g. sexual harassment must have all the ingredients of the commission or omission of the of the particular offence.

C) Obscenity

a) The Meaning of 'Obscenity'

The word obscenity is derived from the Latin word 'obscene or obseaneus', owes its origin in the 16th century, which meant ill-omenned or abominable.[232]Any behaviour that shocks and offends people because it involves nudity, sex, violence, bodily function, etc. in an unpleasant or indecent way is known as obscenity.[233] Hence, the behaviour of the harasser in the context of sexual harassment, may amounts to obscenity which punishable under the Penal Code. Obscenity has several connotations. *Obscenity* and its parent adjective *obscene* take their derivation from the Greek terms *ob skene*, which literally means "offstage". This is because violent or sexual acts in Greek theatre were committed off stage. It then descends into the Latin word *obscenus*, meaning "foul, repulsive, detestable", (possibly derived from *ob caenum*), literally "from filth".[234]

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[219] Supra note 30 at p. 145.
[220] Deals with the offence of abatement.
[221] Deals with the offence of criminal conspiracy.
[222] Deals with the offence of abatement of suicide.
[223] Deals with the offence relating to hurt and grievous hurt.
[224] Deals with the offence relating to wrongful restrain and wrongful confinement.
[225] Deals with the offence of cheating.
[226] Deals with the offence relating to defamation.
[227] Deals with the offence of criminal intimidation.
[228] Offfence of criminal intimidation by anonymous communication.
[229] Act caused by inducing the person to believe that he will be rendered the object of divine displeasure.
[230] Attempt to commit offence.
[231] Deals with the offence relating to obscenity.
[232] Oxford Dictionary, Tenth Edition,2000,at 982.
[233] Accroding to Collins Cobuild English Language Dictionary.
[234] The American Heritage Dictionary of the English Language, 4th Ed, 2004.

The term is most often used in a legal context to describe expressions (words, images, actions) that offend the prevalent sexual morality of the time.[235]

Despite its long formal and informal use with a sexual connotation, the word still retains the meanings of "inspiring disgust" and even "inauspicious; ill-omened", as in such uses as "obscene profits", "the obscenity of war", and the like. It can simply be used to mean profanity, or it can mean anything that is taboo, indecent, abhorrent, or disgusting. The definition of obscenity differs from culture to culture, between communities within a single culture, and also between individuals within those communities. Many cultures have produced laws to define what is considered to be obscene, and censorship is often used to try to suppress or control materials that are obscene under these definitions, usually including, but not limited to pornographic material. Because the concept of obscenity is often ill-defined, it can be used as a political tool to try to restrict freedom of expression. Thus, the definition of obscenity can be a civil liberties issue.[236]

b)Obscenity Law in UK & USA

Until the mid-nineteenth century and the Victorian era in Great Britain and the United States, sexually explicit material was not subject to statutory prohibition. Obscene publication in the United Kingdom is governed by the Obscene Publication Act, 1959 which has been supplemented and amended to respectively by the Obscene Publications Act, 1964 and the Criminal Law Act, 1977.[237] Under English law an article is taken as a whole, which has a tendency to deprave and corrupt persons who are likely to read, see or hear it has to be regarded as obscene. While a book has to be judged as a whole, a magazine can be considered on item to item basis as the publisher has a wide choice as to what to include and what not. There are two defences available under English law. Firstly it is permissible for the accused to show that he had not examined the article in question and thus had no reason to suspect that it was obscene.[238] Secondly the accused may take the defence that publications are for public good, that is, in the interest of science, literature, art, learning or other objects of general concern.[239]The other defence available to the accused the federal Comstock Law of 1873 criminalized the transmission and receipt of "obscene," "lewd," or "lascivious" publications through the U.S. mail. U.S. courts looked to

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[235] Wikipedia Obscenity: See also Legal Encyclopadea- Thompson Gale: For details see, http://www.answers.com/topic/obscenity.

[236] Legal Encyclopedia, information about obscenity, West's Encyclopedia of American Law,1998.

[237] Note that in the UK, obscene performances like the sex shows are no longer considered common law libel.

[238] This defence can be taken by the accused under section 2 (5) of the Obscene Publications Act, 1959.

[239] This defence is available under section 4 (1) of Obscene Publication Act, 1959.

the English case of **Regina v. Hicklin,**[240] for a legal definition of obscenity. The *Hicklin* test was "whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall."

This test permitted judges to look at objectionable words or passages without regard for the work as a whole and without respect to any artistic, literary, or scientific value the work might have. In 1930 Massachusetts courts declared both Theodore Dreiser's novel *An American Tragedy* and D. H. Lawrence's novel *Lady Chatterly's Lover* obscene. An important break from *Hicklin* came in a lawsuit over the U.S. publication of James Joyce's novel *Ulysses* in **United States v. One Book Called 'Ulyses'**[241]. Both at the trial and appellate levels, the federal courts held that the book was not obscene. The courts rejected the *Hicklin* test and suggested a standard based on the effect on the average reader of the dominant theme of the work as a whole.

In 1957 the U.S. Supreme Court retired the Hicklin test in **Roth v. United States,**[242] Justice William J. Brennan, Jr., stated that obscenity is "utterly without redeeming social importance" and therefore was not protected by the First Amendment. He announced, as a new test, "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to a prurient [lewd or lustful] interest." The new test was applicable to every level of government in the United States.

The *Roth* test proved difficult to use because every term in it eluded a conclusive definition. The Supreme Court justices could not fully agree what constituted "prurient interest" or what "redeeming social importance" meant. Justice Potter Stewart expressed this difficulty at defining obscenity in **Jacobellis v. Ohio,**[243] when he remarked, "I know it when I see it" The Supreme Court added requirements to the definition of obscenity in a 1966 case involving the bawdy English novel *Fanny Hill.* In **Memoir v. Massachusetts,**[244] 383 U.S. 413, 86 S. Ct. 975, 16 L. Ed. 2d 1, the Court concluded that to establish obscenity, the material must, aside from appealing to the prurient interest, be "utterly without redeeming social value," and "patently offensive because it affronts contemporary community standards relating to the description of sexual matters." The requirement that the material be "utterly" without value made prosecution difficult. Defendants presented expert witnesses, such as well-known authors,

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[240] 3.L.R-Q.B.360(1868).
[241] 72 F 2d 705(2nd Cir. 1934).
[242] 345 U.S. 476 (1957),
[243] 378 U.S 184, S 84 S.Ct.1676, 12 Ed. 2d 793(1964)
[244] 383. U.S.413, 86 S. Ct.975, 16l.Ed.2d.1.(1966).

critics, or scholars, who attested to the literary and artistic value of sexually charged books and films.

The Supreme Court did make conclusive rulings on two other areas of obscenity in the 1960s. In **Ginzburg v. United States,**[245] the Court held that "pandering" of material by mailed advertisements, designed to appeal to a prurient interest, could be prosecuted under the federal obscenity statute. Even if the material in publisher Ralph Ginzburg's *Eros* magazine was not obscene, the Court was willing to allow the government to punish Ginzburg for appealing to his prospective subscribers' prurient interest. In **Stanley v. Georgia,**[246] the Court held that the First and Fourteenth Amendments prohibited making the private possession of obscene material a crime.

The failure of the Warren Court to achieve consensus over the *Roth* test kept the definition of obscenity in limbo. Then in 1973, aided by conservative justices Lewis F. Powell, Jr., and William H. Rehnquist, Chief Justice Warren Earl Burger restated the constitutional definition of obscenity in **Miller v. California.**[247] Burger explicitly rejected the "utterly without redeeming social value" standard:

> "The basic guidelines for the test of fact must be (a) whether the "average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest ..., (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value."[248]

Burger noted that the new test was intended to address " 'hard core' sexual conduct," which included "patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated ... masturbation, excretory functions, and lewd exhibitions of genitals."

In 1987 the Supreme Court modified the "contemporary community standards" criteria. In **Pope v. Illinois,**[249] the Court stated that the "proper inquiry is not whether an ordinary member of any given community would find serious literary, artistic, political, and scientific value in allegedly obscene material, but whether a reasonable person would find such value in the material, taken as a whole." It is unclear whether the "reasonable person" standard represents a liberalization of the obscenity test.

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[245] 383. U.S.463, 86 S. Ct.942, 16l.Ed.2d.31.(1966).
[246] 394 U.S. 557, 89 S. Ct. 1243, 22 L. Ed. 2d 542 (1969).
[247] 413 U.S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419.
[248] Ibid.
[249] 481 U.S. 497, 107 S. Ct. 1918, 95 L. Ed. 2d 439.

In 1989 the Supreme Court unanimously held that the First Amendment's guarantee of free speech protected indecent, sexually explicit telephone messages in **Sable Communications of California, Inc. v. Federal Communications Commission.**[250] The Court ruled that a federal law that attempted to ban "Dial-a-Porn" commercial phone services over interstate telephone lines (Pub. L. No. 100-297, 102 Stat. 424) to shield minors from obscenity was unconstitutional because it applied to indecent as well as obscene speech. The Court indicated, however, that obscene calls could be prohibited.

In 1996 President Bill Clinton signed into law the Telecommunications Act of 1996. Title V of the act includes provisions of the Communications Decency Act of 1996 (CDA), codified at 47 U.S.C.A. § 223(b), as amended, 47 U.S.C.A. § 223(b). The CDA was designed to outlaw obscene and indecent sexual material in cyberspace, including the Internet. Section 223 makes it a federal crime to use telecommunications to transmit "any comment, request, suggestion, proposal, image, or other communication which is obscene or indecent, knowing that the recipient of the communication is under 18 years of age, regardless of whether the maker of such communication placed the call or initiated the communication."

The American Civil Liberties Union (ACLU) and twenty other plaintiffs immediately filed a lawsuit challenging the constitutionality of the CDA's provisions, especially that part of the CDA that deals with indecent material. The ACLU did not contest the prohibition on obscene material. In **American Civil Liberties Union v. Reno,**[251] the Supreme Court held that the CDA was unconstitutional because it violated the First Amendment.[252]

c) Our Obscenity law and the Approach of the Judiciary

Some of the laws that work as a tool in the hands of the state to regulate sexuality in the name of preserving 'morals' and protecting 'decent' people from 'sexual contamination' can be found in section 292-294 of the Indian Penal Code deal with the offences relating to obscenity, can be used to prevent sexual harassment of women. Under the present law a book, pamphlet, paper, writing, drawing, painting, representation, figure or any other object, shall be deemed to be obscene if it is lascivious or appeals to the prurient interest or if its effect, or (where it comprises two or more distinct items) the effect of any one of its items, is if taken as a whole, such as to tend to deprave and corrupt persons who are

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[250] 492 U.S. 115, 109 S. Ct. 2829, 106 L. Ed. 2d 93.
[251] 929 F. Supp. 824 (E.D. P. 1996).
[252] Wikipedia `Obscenity: See also Legal Encyclopadea- Thompson Gale:For details see, http://www.answers.com/topic/obscenity.

likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it.[253]

Obscenity is behaviour that shocks and offends people because it involves nudity, sex, violence, bodily functions, etc. in an unpleasant or indecent way.[254] the definition of obscenity both in language and in law is vague. Neither Sections 292 to 294 of I.P.C. 1860 nor Section 2 of the Indecent Representation of Women (Prohibition) Act, 1986 make even feeble attempt to define 'obscenity' and the courts, all over the globe, in general and in India in particular, resort to the test, laid down by the Hon'ble Chief-Justice Cockburn, in famous Hicklin's case.[255] which is whether the tendency of the matter, charged as obscene, is to corrupt those whose minds are open to such immoral influences.

In **Zafar Ahmad Khan v State of UP,**[256] the accused addressed a young girl in the following way:

> "Ao meri han mere richey per baithjao, main tumko pahuncha doonga main tumhara intizar kar raha hun." (O' my darling, come, sit on my rickshaw, I will take you to your destination, I am waiting for you.)

The Court held that a person who addressed respectable young girls not acquainted with him openly in the hearing of others in a public place, inviting them to accompany him in his rikshaw in amorous words suggestive of illicit sex relation with them, commits an 'obscene act' within the meaning of s 294.

In this case the court admitted that no precise or arithmetical definition of the word 'obscene' which would cover all possible cases can be given. It will have to be judged on the facts of each case whether in the context of its surrounding the questioned act is obscene or not. The words addressed by the offender were clearly offensive to the chastity and modesty of the girls. The words were likely to express and personate to the mind of the hearers, including the girls, something which delicacy, purity and decency forbids to be expressed. The girls, as also others who were present, must have suffered a moral shock to hear such sensuous words addressed to them by an utter stranger. They are suggestive of unchaste and lustful ideas and are impure, indecent and lewd and, therefore, in the context of the surrounding circumstances, 'obscene' words. Annoyance caused to members of the public is sufficient to prove the offence under s 294.[257]

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[253] Section 292 (1) of the Indian Penal Code, 1860.
[254] Collins Cobuild English Language Dictionary.
[255] 3.L.R-Q.B.360(1868).
[256] AIR 1963 All 105.
[257] Ibid.

In **Ranjit D Udeshi v State of Maharashtra,**[258] it was argued that section 292 of the Indian Penal Code is void as being an impermissible and vague restriction on the freedom of speech and expression guaranteed by Art 19(1) (a) of the Constitution of India and is not saved by clause (2) of the same Article. The Supreme Court held that the provision relating to the offence of sale of obscene books etc contained in section 292 of the Indian Penal Code is not ultra vires in view of Art 19(2) of the Constitution. The book 'Lady Chatterley's Lover is an obscene literature within s 292, as it does not pass the permissible limits judged from Indian standards and no social gain is achieved to the community which can justify its sale holding this their lordships observed that:

> *"Even though it is no doubt this article guarantees complete freedom of speech and expression but it also makes an exception in favour of existing laws that impose restrictions on the exercise of the right in the interests of public decency or morality. It can not be denied that it is an important interest of society to suppress obscenity. There is, of course, some difference between obscenity and pornography in that the latter denotes writings, pictures etc. intended to do so but which have that tendency. Both of course, offend against public decency and morals but pornography is obscenity in a more aggravated form."*[259]

The Court in the instant case further observed that:

> *"Speaking in terms of the Constitution it can hardly be claimed that obscenity that is offensive to modesty or decency is within the constitutional protection given to free speech or expression, because the Article dealing with the right itself excludes it. That cherished right on which our democracy rests is meant for the expression of free opinions to change political or social conditions or for the advancement of human knowledge. This freedom is subject to reasonable restrictions that may be thought necessary in the interest of the general public and one such is the interest of public decency and morality. Section 292 of the Indian Penal Code manifestly embodies such restriction because the law against obscenity, of course, correctly understood and applied, seeks no more than to promote public decency and morality."*[260]

In this case the Court went on to assert that obscenity is offensive to the modesty. But then it is not clear whether modesty of women or man.

In **Raj Kapoor v State (Delhi Administration),**[261] the court held that Certificate granted by the Film Censor Board under sections 6 and 5A of the Cinematography Act 1952 does not bar Criminal Courts jurisdiction to try offences under sections 292,293 of the Indian Penal Code.

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[258] AIR 1965 SC 881.
[259] Ibid.
[260] Ibid.
[261] AIR 1980 SC 258 IPC.

In **Samaresh Bose v Amal Mitra,**[262] again the Court explained concept of obscenity and said that obscenity- concept of morality differs from country to country, depending on the standard of contemporary society in different countries. Obscenity and vulgarity are not the same: vulgarity arouses feelings of disgust and revulsion and also boredom, but does not have the effect of depraving and debasing and corrupting the morals of any reader as in case of obscenity. Novel in question was not obscene, though vulgar at some places.

This implies that in the opinion of the Court a vulgar writing is not necessarily obscene. The question whether a publication is, or is not obscene is a question of fact; if a publication is in fact obscene is it no defence to a charge of selling or distributing the same that the intention of the person so charged was innocent. A nude picture of a woman is not per se obscene. If it is not incentive to sensuality and does not excite impure thoughts in the mind of an ordinary man of normal man of normal temperament it can not be regarded as obscene under this section. In order to come to the conclusion whether a picture is obscene or not one has to consider to a great extent the surrounding circumstances the posture, the suggestive element in the picture, and the person into whose hands it is likely to fall. The test for determining whether a particular object is obscene or not, would depend on various circumstances. The idea as to what is to be deemed to be obscene has varied from age to age region to region, depend upon particular social conditions. A concept of obscenity would differ from country to country depending on the standard of morals of contemporary society. But to insist that the standard should always be for the writer to see that the adolescent ought not to be brought into contact with sex or that if they read any reference to sex in what is written whether that is the dominant matter would be to require the author to write books only for the adolescent and not for the adults. The standard of contemporary society in India is also fast changing. If a reference to sex by itself is considered obscene, no books can be sold except those which are purely religious.

In **Boby Art International etc.v. Om Pal Sing Hoon,**[263] The writ petition was filed by the first respondent to quash the certificate of exhibition awarded to the film "Bandit Queen" and to restrain its exhibition in India. The film deals with the life of Phoolan Devi. It is based upon a true story. Still a child, Phoolan Devi was married off to a man old enough to be her father. She was beaten and raped by him. She was tormented by the boys of the village; and beaten by them when she foiled the advances of one of them. A village panchayat

[262] AIR 1986 SC 967: See also (1985) 4 SCC 289.
[263] AIR 1996, SC 1846

called after the incident blamed Phoolan Devi for attempting to entice the boy, who belonged to a higher caste. Consequent upon the decision of the village panchyat, Phoolan Devi had to leave the village. She was then arrested by the police and subjected to indignity and humiliation in the police station. Upon the intervention of some persons she was released on bail; their intervention was not due to compassion but to satisfy their carnal appetite. Phoolan Devi was thereafter kidnapped by dacoits and sexually brutalised by their leader, a man named Babu Gujjar. Another member of the gang, Vikram Mallah, shot Babu Gujjar dead in a fit of rage while he was assaulting Phoolan Devi. Phoolan Devi was attracted by Vikram Mallah and threw her lot in with him. Along with Vikram Mallah she accosted her husband, tied him to a tree and took her revenge by brutally beating him. One Sri Ram, the leader of gang of Thakurs, who had been released from jail, made advances to Phoolan Devi and was spurned. He killed Vikaram Mallah. Having lost Vikram Mallah's protection, Phoolan Devi was gangraped by Sri Ram, Lalaram and others. She was stripped naked, paraded and made to fetch water from the village's well under the gaze of the villagers, but no one came to her rescue. To avenge herself upon her persecutors, she joined a dacoits' gang headed by Baba Mustkin. In avenging herself upon Sri Ram, she humiliated and killed twenty Thakurs of the village of Behmai. Ultimately, she surrendered and was in jail for a number of years.The Court observed that:

> *"Bandit Queen' is the story of a village child exposed from an early age to the brutality and lust of man. Married off of a man old enough to be her father, she is beaten and raped. The village boys make advances which she repulses; but the village panchayat finds her guilty of the enticement of a village boy because he is of high caste and she has to leave the village. She is arrested and, in the police station, filthily abused. Those stand bail for her do so to satisfy their lust. She is kidnapped and raped. During an act of brutality the rapist is shot dead and she finds an ally in her rescuer. With his assistance she beats up her husband, violently. Her rescuer is shot dead by one whose advance she has spurned. She is gang-raped by the rescuer's assailant and his accomplice and they humiliate her in the sight of the village; a hundred men stand in a circle around the village well and watch the humiliation, her being stripped naked and walked around the circle and then made to draw water. And not one of the villagers helps her. She burns with anger, shame and the urge for vengeance. She gets it, and kills many Thakurs too. It is not a pretty story. There are no syrupy songs or pirouetting round trees. It is the serious and sad story of a woman turning: a village born female child becoming a dreaded dacoit. An innocent who turns into a vicious criminal, because lust and brutality have affected her psyche so. The film levels an accusing finger at*

members of society who had tormented Phoolan Devi and driven her to become a dreaded dacoit filled with the desire to revenge."[264]

It is in this light that the individual scenes have to be viewed. First, the scene where she is humiliated, stripped naked, paraded, made to draw water from the well, within the circle of a hundred men. The exposure of her breasts and genitals to those men is intended by those who strip her to demean her. The effect of so doing upon her could hardly have been better conveyed than by explicitly showing the scene. The object of doing so was not to titillate the cinemagoer's lust but to arouse in him sympathy for the victim and disgust for the perpetrators. The revulsion that the Tribunal referred to was not at Phoolan Devi's nudity but at the sadism and heartlessness of those who had stripped her naked to rob her of every shred of dignity.[265] Nakedness does not always arouse the baser instinct. The reference by the Tribunal to the film 'Schindler's List was apt. There is a scene in it of rows of naked men and women, shown frontally, being led into the gas chambers of a Nazi concentration camp. Not only are they about to die but they have been stripped in their last moments of the basic dignity of human beings. Tears are a likely reaction; pity, horror and a fellow feeling of shame are certain, except in the pervert who might be aroused. We do not censor to protect the pervert or to assuage the susceptibilities of the over-sensitive. In the opinion of the court 'Bandit Queen' tells a powerful human story and to that story the scene of Phoolen Devi's enforced naked parade is central. It helps to explain why Phoolen Devi became what she did: her rage and vendetta against the society that had heaped indignities upon her.

The rape scene also helps to explain why Phoolen Devi became what she did. Rape is crude and its crudity is what the rapist's bouncing bare posterior is meant to illustrate. Rape and sex are not being glorified in the film. Quite the contrary it shows what a terrible, and terrifying, effect rape and lust can have upon the victim. It focuses on the trauma and emotional turmoil of the victim to evoke sympathy for her and disgust for the rapist. Too much need not, we think, be made of a few swear words the like of which can be heard every day in every city, town and village street. No adult would be tempted to use them because they are used in this film. In sum, the court recognized the message of a serious film and applied this test to the individual scenes thereof and allowed the film to, with only the caution of an 'A' certificate. 'Adult Indian citizens as a whole may be relied upon to comprehend intelligently the message and react to it, not to the

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[264] Ibid.
[265] Ibid.

possible titillation of some particular scene'[266] expressing this, the court further explained that:

> *"A film that illustrates the consequences of a social evil necessarily must show that social evil. The guidelines must be interpreted in that light. No film that extols the social evil or encourages it is permissible, but a film that carries the message that the social evil is evil cannot be made impermissible on the ground that it depicts the social evil. At the same time, the depiction must be just sufficient for the purpose of the film. The drawing of the line is best left to the sensibilities of the expert Tribunal. The Tribunal is a multi-member body. It is comprised of persons who gauge public reactions to films and, except in cases of stark breach of guidelines should be permitted to go about its task."*[267]

In the present case, apart from the Chairman, three members of the Tribunal were women. It is hardly to be supposed that three women would permit a film to be screened with denigrates women, insults Indian womanhood or is obscene or pornographic. The Tribunal took the view that it would do women some good to see the film. Therefore, the Court found nothing objectionable. It seems that adult citizen as a separate class having access to nudity was not objectionable in the opinion of the court. But then, what about the minor and young children who never misses an opportunity to see this kind of film containing nude picture of women?. The film showed the naked posterior of Babu Gujjar in the rape scene. As noticed by the Division Bench by stop watch, this scene ran for about 20 seconds. It showed sexual intercourse by the man and his physical movement, with his posterior exposed. Here the audio visual content got approval of the Apex Court. While in its earlier decision, the book 'Lady Lady Chatterley's Lover' only in printed form was found to be objectionable to the court.[268] These decisions of the courts in most of the cases turned to protect the values which underlie our law, one is individual liberty-liberty in the negative sense of freedom from coercion, deception, fear, and so on, and also liberty in the positive sense of freedom to join in a public demonstration within limits, express one's sexuality within limits. In **Samaresh Bose v Amal Mitra**,[269] courts finding of vulgarity only but not obscenity in contrast with other cases proves that our legal policy leaves the awkward issue of drawing line between what is obscene and what is decent, a line which fluctuates not only with time but from locality to locality.

One of the concerns of our criminal law and Judiciary has been the enforcement of one version of morality. The policy of law and judicial behaviour

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[266] AIR 1996, SC 1846, at 1854.
[267] Ibid.
[268] AIR 1965 SC 881.
[269] AIR 1986 SC 967: See also (1985) 4 SCC 289.

reveals the line of reasoning that public manifestations of any sexual conduct carry a high risk of affecting the young and other vulnerable groups, and therefore transgress the principle of paternalism. But equally practical response to this argument is that it depends where the allegedly indecent event or displays occur: if young people have no access to the place, does the argument not fail? One must argue that a theory about morality and the criminal law must be based on a secured definition of morality, not one which confuses it with mere feelings of distaste and disgust.[270]

D) Indecent Representation of women

i) The Statutory Provisions

The latest trend in the indecent representation of women has appeared through the voluptuous display of women in the advertisements of films. The advertisements influence the minds of young generation to see these films. One does not need to be inordinately perceptive in dissecting the text of women's representation in popular Television advertisements. The sexism inherent to the media language, manifesting itself in countless instances of women's comodification, is stepped in the area of a reductonist aesthetic.

Sections 292,293 and 294 of the I.P.C, 1860 deal with the law relating to obscenity. None of the prohibitions of the I.P.C. have any special reference to the indecent representation of women and perhaps due to this lacuna a tendency started growing to represent women in a very indecent manner; specially in publications and advertisements indecent representation of women or references to women started affecting the morality of the society and had the effect of denigrating women.[271] To deal with such a situation the Indecent Representation of Women Bill, 1986 was introduced in the Rajya Sabha on 20th August, 1986 to prohibit indecent representation of women through advertisement or in publications, writings, paintings, figures or in any other manner. The Bill was passed by both the House of Parliament and assented by the President on 23rd December, 1986.[272]

Section 4 of the Act prohibits publication, selling, hire, distribution, production, circulation etc. of books, pamphlet, paper, slide film, writing, drawing

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[270] Andrew Ashworth, "*Principles Criminal Law*," Clarendon Law Series,(Clarendon Press, Oxford, 1992),at p.22.

[271] Dr. D. Singh, " *Human Rights Women and Law*," 1st Edition,(Allahabad Law Agency, Faridabad, ,2005) ,p. 114.

[272] Indecent Representation of Women (Prohibition) Act, 1986(Act 60 of 1986).

etc., containing indecent representation of women. It makes an exception in following cases:-

(a) Publication for the public good in the interest of art, science, literature etc.

(b) Anything protected by the Monument and Archaeological Sites and Remains Act, 1958.

(c) Any film to which Cinematograph Act, 1952 is applicable. In Section 5 the power to enter and search is provided. Section 6 provides the penalty for imprisonment up to two years and fine up to two thousand, on first conviction. On subsequent conviction, minimum imprisonment for six months and maximum five years and fine up to one lakh but not less than ten thousand. Section 3 provides for the advertisements containing indecent representation of women. Section 7 defines the offences under this Act by the companies and liability thereof. Under Section 8 it is provided that the offences are to be cognizable and bailable. Section 9 protects the action taken by any officer of central or state government in good faith, for the purpose of this Act; Section 10 gives the rule-making power to the Central Government.

ii) The Reality

The number of incidents registered under the Indecent Represent of Women (Prevention) Act 1986, in the year 2004 has shown an increase of 32.1 % in over the year 2003.[273] During the year 1378 cases were reported. No doubt the Act is a welcome step taken by the Government. Women are used as sex-commodity and sex-symbol in the magazines, advertisements, film, and television shows etc., and this The Act has failed to prevent indecent representation of women. This has been the general presumption among the feminists as well as general people.[274] But question remains what if the women themselves offer to be represented in an indecent way?[275] Again one may argue that man is the supreme lord over his body and mind. And thus he or she has a right to exhibit his or her body in a way he or she likes. It can not be denied that the era where we are living has become an era of media, fashion shows and also the fact that 'gravitation is the greatest force in the material force in the material universe, so

[273] Crimes in India , National Crime Record Bureau 2005.

[274] One may come to the same conclusion in view of the unabating incidents of indecent representation and the response of the administration.

[275] It is also observed that women know it that their beauty and looks are being used for commercial purpose. They do it and they have hardly any objection to it.

is the sex the greatest form in the world of spirit.'[276] Thus, the heart may have its reasons that are not always understood by the head. Fashion shows are being regularly organized by various big corporations. These shows are avenues through which younger men women in the name of beauty represent themselves in a manner which is not less than showing naked body and flesh. The winner gets the publicity and becomes celebrity. The rational behind the Act is mainly, the issue of protecting youth from being morally depraved. But does the government really believe that it can stop young people from engaging with sex and sexuality, in this era of globalization especially in view of the technological advancement which has offered use of internet with necessary evil of cyber pornography? More over it can not be denied that what the youth of today need is information, education and dialogue. With the kind of wide-ranging global exposure ensured by the communication and IT industry, it is criminal to limit the young under the guise of protection. The young have a right to information; they have a right to education; let's open up the subject and give them the information; this kind of voices has been heard. It is a matter of time to see how our law responses to this area.

Another problem in this regard that we have in our legal policy, is the idea of certifying newspapers into categories like 'Adults Only' or 'Parental Guidance Advised' sounds rather far-fetched if not out rightly hilarious. An even bigger problem lies with Television programmes. Some of the programmes that are regularly aired by both national and foreign channels truly stretch the borderline of taste. , but even 15 years since cable TV mushroomed in India, the Government appears unable as well as unwilling to act. Occasionally, there has been talk of setting up a Media Council to cover both print and TV or a Broadcast Authority of India on the lines of the Advertising Council, but none has fructified. During the recent controversy over India TV's sting operations, the Government said it proposed to legislate to control such reportage. Nothing has come of that either. But there ought to be a level playing field for the two principal arms of the media - print and electronic. If sexually explicit content is the issue, TV is certainly guiltier than newspapers.[277] Of course, here too, the same argument can be made. Just as readers have the choice of not subscribing to a newspaper they don't like, they also have a remote control gadget in their hands and are, therefore, not compelled to watch offending channels. Freedom of the Press does not mean license to print quasi-obscene or vulgar material with purely

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[276] Prabhat Kumar Basumallik, "*Obscenity,*", Criminal Law Journal,(1993) at p.55.

[277] Chandan Mitra, "*Stretching the border of Taste*": For details see, http://www.dailypioneer.com/ /columnist 1asp.

commercial interests in mind. In the West, where society is much more permissive than India, publications are clear about their target readership. Thus, there are tabloids and magazines almost specializing in explicit content while the mainstream papers and journals studiously avoid descent into prurience. In India, however, it is the mainstream rather than niche publications that are guilty of promoting near-pornographic material. Laws in this regard are much more liberal in the West, which means that the issue cannot be resolved by legislation. It is for the media itself to ponder the consequences of its current policies. We need to define our responses to the most potent and wide-reaching impact of the media generated sub text that has increasingly become am apparatus for hegemonic intervention on the nature of identity and agency. For women to register a meaningful presence in the cross-current of our public and private life, popular media has to work towards a transformative vision, even through the immensely effective means of advertising, for positive social change leading to the expansion of human interest at large.[278]

In the Indian context, pornography and obscenity have become synonymous. The IPC declares any representation as obscene which is "lascivious or appeals to the prurient interest or if its effect ... is, if taken as a whole, such as to tend to deprave and corrupt persons who are likely ... to read, see or hear the matter contained or embodied in it."[279] This provision incorporates the **Hicklin** test[280] based on the then prevalent narrow moral considerations and is not reflective of the current thinking on the subject.[281]

At least four different positions have emerged among feminists concerning obscenity, namely, liberal, moral right, anti porn and feminists against censorship.[282] The liberal position defines pornography "as sexually explicit material designed for sexual arousal", and argues "that there is no scientific evidence that pornography causes harm to society and there are no sound reasons for banning it or taking any other action against it'.[283] The position of the moral right is that pornography is a preoccupation with sex that is not related to

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[278] Chandan Mitra, "*Stretching the border of Taste*," :For details see http://www.dailypioneer.com/ /columnist 1asp.

[279] See section 292 of the IPC.

[280] R.v. Hicklin (686) LR 3 QB 360: Namely whether the tendency of the matter charged as obscene is to deprave and corrupt those whose minds are open to such immoral influences and into whose hands a publication of this sort may fall.

[281] See Ved Kumari, "Gender Analysis of Indian Penal Code," in "*Engendering Law: Essays in Honour of Lotika Sarkar*," Edited by Amita Dhanda and Archana Parasar, (Eastern Book Company, 1999), at pp.139-160.

[282] Ibid: Comments by the Centre for Feminist Legal Research on the First Report of the UN Special Rapporteur on Violence against Women, including its causes and consequences, Centre for Feminist Legal Research. New Delhi, 1995, at 6-7.

[283] Ibid.

the purpose of sex. They view pornography as a threat to traditional family values which reserve sex for procreation and within marital relations.[284] The anti-porn feminists too take a similar position and view pornography as "the material which depicts violence against women and is itself violence against women".[285] The approach taken by feminists against censorship is that it is not the images that cause men to rape but the fact that the pornographic genre is becoming the dominant form of representing women. The experience of Denmark demonstrates that when pornography is exposed to the light of day it loses its power, while censorship or suppression of such images brings pornography into existence, gives it power and invites policing.[286]

Censorship curtails the space for other forms of representation and alternative erotica. Feminists against censorship argue in favour of a multiplicity of images and the creation of space for alternative images. Suppressing existing images will end up simultaneously silencing alternative representations and interpretations that could help in promoting feminist, anti-racist or egalitarian values. This approach exposes the danger of resorting to legal strategies to fight pornography.[287] Such recourse, in their opinion invariably collapses feminists' concerns about degradation and objectification into the discussion on how sex depraves and/or how representations of violence cause actual violence.

The Indian law does not reflect any of these new developments and continues to be limited to narrow moral considerations.[288] The conception of depravity being limited to sexual depravity, images denigrating to women's equal status, reinforcing sexism, gender discrimination and misogyny are ignored by the legal regime. Sexually explicit images are interpreted as tending to deprave and corrupt persons and therefore to be prohibited but the sexist, gender discriminatory or misogynous messages of other images are not considered as tending to deprave or corrupt persons. The sexism in non- sexually explicit representations remains untouched by any penal liability. Even the comparatively recent Indecent Representation of Women (Prohibition) Act 1986 has focused on the "depiction ... of the figure of a woman ... as to have the effect of being

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[284] Ibid.

[285] The anti- porn approach has been criticized by other feminist on the following grounds: a) the anti-porn position reduces misogyny and sexism to sexuality and its representations; b) it diverts attention from the sexism and misogyny at work within the traditional institutions like family, religion, judiciary; c) the focus on explicitness assumes that it is the explicitness that causes men to rape; d) it poses the danger of providing a ground for mitigation of sentence of rapists; e) it also risks forming alliances with the moral right which are pro-family and anti-feminist.

[286] Ibid, at p 7.

[287] Supra note 281 at pp.139-160.

[288] Ibid.

indecent.'[289] 'Indecency' too, is guided closely by conceptions of morality. Its focus on what is explicitly indecent diverts the attention from derogatory messages as well as from other derogatory though not explicitly indecent images of women. Such derogatory messages and images are much more harmful to women and responsible for increasing violence against women, but they remain outside the purview of legislation. The following standard of indecency has been suggested[290] for inclusion in the Indecent Representation of Women Act-

> *"The depiction in any manner of the figure of a woman, her form or body or any part thereof in such a way, as to have the effect of being indecent, or derogatory to, or denigrating women or is likely to deprave, corrupt or injure the public morality or morals. 'Derogatory Representation of Women' means the depiction in any publication in any manner, visual or otherwise, of the figure of a woman, her form or body or any part thereof in such a way as to have the effect of being indecent or derogatory to her dignity as a person."*[291]

Recent censorship and the litigation thereafter relating to the film Bandit Queen[292] do reflect the conflicting perceptions about what constitutes obscenity. It is time for the laws in India to recognize at the least that the words 'deprave and corrupt' are clearly capable of bearing a wider meaning. It has been held in other countries that depravity and corruption is not confined to sexual depravity and corruption.[293] **Miller v. Califomia**[294]has expanded the test laid down in *Hicklin*. What is obscene can be determined by asking-

a. whether the average person, applying contemporary standards, would find that the work, taken as a whole, appeals to prurient interest,
b. whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and
c. whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value.

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[289] Section 29(c) of the Indecent Representation of Women (Prohibition) Act 1986.
[290] See the amendments proposed by students of National Law School Of India University, included in "Shifting Boundaries: A report and commentary on the workshop on women, law and media," Centre for Feminist Legal Research in an association with the Asia Pacific Forum on Women, Law and Development, Annexure N, Centre for Legal Research, New Delhi, 1994.
[291] Ibid.
[292] Bobby Art International .v. Om Pal Singh Hoon (1996) 4 SCC 1.
[293] In Calder (john) Publication Ltd. V. Powell 1965(1) All ER 195: It was held that Cabin's Book might properly be found obscene, on the ground that it "highlighted as it were, the favourable effects of drug-taking and so far from condemning it, advocated it, and that there was a real danger that those into whose hands the book came might be tempted at any rate to experiment with drugs and get the favourable sensations highlighted by the book."
[294] 413 US 15(1973).

E) Sexual Exploitation of Women

i) Sexual Exploitation Generally

Sexual exploitation may be defined as a practice by which women are sexually subjugated through abuse of women's sexuality and/ or violation of physical integrity as a means of achieving power and domination including gratification, financial gain and achievement.[295] Sexual exploitation of women and minor girls, namely prostitution is another area which needs a better regulation of law. Sexual exploitation through prostitution and the accompanying evil of traffic in persons for the purpose of prostitution are incompatible with the dignity of the human person and endanger the welfare of the individual, the family and the community.[296]At the international it has been declared long ago that whoever procures, entices or leads away, for the purposes of prostitution, another person even with the consent of that person or whoever exploits the prostitution of another person, even with the consent of that person is punishable.[297] Keeping or managing or knowingly financing or taking part in the financing of a brothel or knowing letting a building or any part thereof is in the similar way punishable.[298] The UN protocol to prevent, Suppress and Punish Trafficking in Persons defines trafficking in persons as the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or the use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability, or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs. Black's Law Dictionary defines traffic as:[299]

(i) Commerce; trade, the sale or exchange of things as merchandise, bills, and money

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[295] Article 1 of the (Draft) Convention on the Elimination of All Forms of Sexual Exploitation of Women, developed by the Global Alliance Against Trafficking in Women (GAATW) to replace the 1949 Convention on the Suppression of Trafficking in Persons and the Exploitation of the Prostitution of Others.

[296] Preamble of the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of others, 1949.

[297] Article 1 of the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of others, 1949.

[298] Article 2 of the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of others, 1949.

[299] As Quoted in G.V.Reddy's, "*Prevention of Immoral Traffic and Law*," 1st Edition (Gogia Law Agency, Hydrabad,2004),p. 1.

(ii) The passing or exchange of goods or commodities from one person to another for an equivalent in goods or money

(iii) People or things being transported along a route

(iv) the passing to and for people, animals, vehicles, and vessels along a transportation route. Almost all the constitutions in Democratic nations are sensitive to this issue, more particularly with regard to right against exploitation.

Trafficking affects virtually every country in the world. The largest number of victims comes from Asia, with over 225000 victims each year from Southeast Asia and over 150,000 from South Asia. The former Soviet Union is now believed to be the largest new source of traffic for prostitution and the sex industry, with over 1,00000 trafficked each year from that region. An additional 75,000 or more are trafficked from Central and Eastern Europe. Over 1,00000 come from Latin America and the Caribbean, and over 50,000 victims are from Africa. Most of the victims are sent to Asia, the Middle East, Western Europe and North America.[300] One of the fastest growing areas of international criminal activity, trafficking in persons has become a serious concern for many countries, regardless of whether they are countries of origin, transit or destination. International criminal groups, whose activities often include other forms of illicit trade and smuggling such as drugs and arms, control trafficking in persons on a global scale. The crime represents a form of abuse of human rights; labour and migration law, and is a problem of national and international security. It also involves frequent and serious violations of other laws, including laws against kidnapping, slavery, false imprisonment, assault, battery, fraud, and extortion.

Around the globe, many countries recognize the imperative need to address the issue of trafficking in persons at national, regional and global levels by promoting bilateral, regional and multilateral cooperation to combat it. The European Union, the Group of Eight, the United Nations, and the Organization for Security and Cooperation in Europe (OSCE) have launched concerted efforts to curb the menace. The International Labour Office (ILO), views with serious concern the increasing volume and children. United States Agency for International Development (USAID) plays an important role in the effort to resolve factors contributing to trafficking. The Agency campaigns opportunities for the poor and vulnerable, expand girls' education, and promote anti-corruption efforts and legislative reform.

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[300] U.S. Congressional Research Service report titled "*Trafficking in Women and Children : The U.S. and International Response*",2004.

The Global Programme against Trafficking inhuman Beings (GPAT) was designed by the UN Office on Drugs and Crime (UNODC) in collaboration with the United Nations Interregional Crime and Justice Research Institute (UNICRI) and launched in March 1999. GPAT assists Member States in their efforts to combat trafficking in human beings. GPAT highlights the involvement of organized criminal groups in human trafficking and promotes the development of effective ways of cracking down on perpetrators. Its overarching objective is to bring to the foreground the involvement of organized criminal groups in human trafficking and to promote the development of effective criminal justice-related responses. The term "trafficking" is used to describe activities in which women and children are forced into exploitative situations promising a job or a marriage.

i) The Indian Penal Code

Inducing any minor girl under the age of eighteen years to go from any place or to do any act with intent that such girl may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person, is an offence under the Penal Code and punishable with imprisonment which may extend to ten years, and also fine.[301] Importation into India from any country outside India or from the State of Jammu and Kashmir any girl under the age of twenty-one years with intent that she may be, or knowing it to be likely that she will be, forced or seduced to illicit intercourse with another person, is punishable with imprisonment which may extend to ten years and shall also fine.[302] Kidnapping or abduction of any person in order that such person may be subjected, or may be so disposed of as to be put in danger of being subject to grievous hurt, or slavery, or to unnatural lust of any person, or knowing it to be likely that such person will be so subjected or disposed of, is serious offence under the Code which is punishable with imprisonment of either description for a term which may extend to ten years, and shall also fine.[303] Whoever, knowing that any person has been kidnapped or has been abducted, wrongfully conceals or confines such person, shall be punished in the same manner as if he had kidnapped or abducted such person with the same intention or knowledge, or for the same purpose as that with or for which he conceals or detains such person in confinement.[304]

ii) The Immoral Traffic (Prevention) Act, 1956[305]

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[301] Section 366A of the Indian Penal Code 1860.
[302] Section 366B of the Indian Penal Code 1860.
[303] Section 367 of the Indian Penal Code 1860.
[304] Section 368 of the Indian Penal Code 1860.
[305] Substituted by the Supression of Immoral Traffic in Women and Girls (Amendment) Act, 1986, by Act 44 of 1986(w.e.f 26-1-1987)

The Immoral Traffic (Prevention) Act was passed and implemented in the year 1956. Subsequently it was amended in the year 1986 to check the age old evil of prostitution. The name of the new Act is Suppression of Immoral Traffic in Women and Girls (Amendment) Act, 1986. Sections 372 and 373 of Indian Penal Code are also meant to check it. However, these laws, inter alia does not justify the recent rise of crime against women in this regard. The crimes of kidnapping and abduction in 2004 showed an increase of 17.2 % as compared to previous year 2003.[306] A total of 89 cases of importation of girls were reported in the country during 2004 compared to 46 cases in 2003 accounting for a significant increase of 93.5 % over 2003.[307] A total number of 5748 cases were registered under the Immoral Traffic (Prevention) Act showing an increase of 4.3 % during 2004 as compared to the previous year 2003 where 5510 cases were registered.[308]

Prostitution has been an age old problem in India and throughout the world.[309] The ancient name ganikas[310] now have acquired the different new names like sex performer, physiotherapist in the massage centre or beauty parlour. The laws have helped to regularize this practice but some dimensions have been added to those professions like entry of minor girls, prostitution in the name of beauty parlours, fate of children of prostitutes etc.[311] The most concerning area is rehabilitation of the children. In the absence of a comprehensive plan to rehabilitate them, they feel neglected in the society. They do not know the name of their father and mother's name they do not want to disclose. As a consequence they too are compelled to join the profession. The

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[306] Crimes in India, Crime Against Women during 2003-2004, at 245, National Crime Record Bureau,2004: In 2004, 15,578 cases of kidnapping and abduction were reported. In 2003, the number was 13296.

[307] Ibid, Table 5A.

[308] See Cimes Against Women, Crimes In India, Chapter 5, pp. 245&246.National Crime Record Bureau, 2004, Ministry of Home Affairs, Government of India

[309] The well known social-political treatise, Arthashastra written by Kautilya sometime between 300 BC and 150 AD, states that providing sexual entertainment to the public using trained 'ganikas' (prostitutes) was an activity strictly controlled by the state and was also,for the most part,carried in by state-owned establishments. The ganikas had to pay taxes, usually one-sixty of their income. The chief controller of entertainment was responsible for maintaining accounts regarding state expenses for ganikas and payments made to them :See L.N. Ragajan, Kautilya : The arthasthastra (1992),p. 21.

[310] See also, Vatsayana's Kama Sutra compiled sometime between 100 and 400 AD refers to courtesans and eunuchs who depended on their livelihood on providing varieties of sexual entertainment to men. The long list of 64 qualities courtesans were expected to acquire, besides beauty and a pleasant dispostition, indicates that the courtesans referred to in Kama Sutra catered only to high-class men:See, Richard Burton and F.F Arbuthnot, "The Kamasutra of Vatsayana,"(1993).

[311] Dr. D. Singh, " *Human rights Women & Law,*" 2005, 1st Edition,(Allahabad Law Agency, 2005), pp. 79-81.

present Immoral Traffic (prevention) Act 1956 which was amended in 1986[312] still have some lacunae in its provisions.

a) Prostitution Under the Act

Prostitution under the Act means the act of a female offering her bodies for promiscuous sexual intercourse for hire, whether in money or in kind.[313] Acts of improper sexual intercourse are acts of prostitution in one strict sense of the term. But proof of more than that is required. The ordinary and commonly understood meaning of the word promiscuous sexual intercourse with men and that must be taken to be its meaning in the section. The word 'prostitution' is not confined to acts of natural sexual intercourse, but includes any act of lewdness. Prostitution is proved if it is shown that a woman offers her body for purposes amounting to common lewdness in return for the payment of money.[314] From behavioural point of view, prostitution can be defined as the act or practice of a person, female of male, who for some kind of reward- monetary or otherwise- engages in sexual relations with a number of persons, who may be of the opposite or same sex.[315] Unless otherwise stated, in reality prostitution implies women providing sexual pleasure to men in exchange of cash or kind. 'Sexual relation' is not a very precise term. Ordinarily, it means sexual intercourse or, more precisely, vaginal and anal intercourse. But other types of sexual relations may also involve exchange of cash or kind- for example, oral sex, masturbation, petting, deep kissing, and phone sex. Do they fall under the rubric of prostitution? There is no universally applicable answer to this question. Definition of prostitution in India common parlance is quite narrow. It is regarded as the act of a female who hires her body to a number of males for sexual intercourse in exchange of money.[316]

It is clear from the definition of 2(a) of the Act as amended by the Act 44 of 1986 that is it not necessary that there should be evidence of repeated visits by persons to the place for the purpose of prostitution. A single stance coupled with surrounding circumstances is sufficient to establish both that the place was being used as a brothel and that the person alleged was so keeping it.[317] Section 3 of the Act provides for punishment for keeping a brothel on first conviction rigorous imprisonment for the term of one year to three years and fine up to two

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[312] Gazette of India, 20 August 1986, Part II at 9.
[313] Section 2(f) of the Immoral Traffic (Prevention) Act, 1956.
[314] Ratan Lal and Dhiraj Lal, "*Law of Crimes*" (2000) p. 1769
[315] Dr. D. Singh, " *Human rights Women & Law*," 1st Edition,(Allahabad Law Agency,Faridabad, 2005), p. 65.
[316] Anthropological Perspective on Prostitution and AIDS in India, Economic and Political Weekly, (October, 2001), at p. 4025.
[317] Krishnamurthy v. Public Prosecutor, Madras AIR 1967 SC 567.

thousand rupees, on subsequent conviction rigorous imprisonment for two to five years and fine up to two thousand rupees. Section 3 penalizes the keeper of manager of brothel who assists in the keeping or managing of a brothel. It is intended to hit at persons who establish and maintain houses of prostitution or act or assist in keeping or managing them. It was never intended that the women used for such traffic should be liable to punishment.[318] In **Manomani Ammal v.Emperor,**[319] it was held that where there was no evidence that a girl who was being used for prostitution was jointly keeping or managing or acting or assisting in the management of brothel she can not be convicted. It can not be said that she was living on the earning of the prostitution of another person. An inference can be drawn from this section that a married woman carrying on prostitution for her own livelihood without being involved in the maintenance of her house, the offence is not committed under this section.[320]

b) Keeping of Brothel

Keeping of brothel or allowing one's premises to be used as a brothel is an offence under the Act.[321] However the onus entirely remains on the prosecution.[322] The legislature has not deemed it fit or necessary to shift any part of the onus on the accused in any circumstances. The only evidence brought in this type of cases is from pimps and prostitute- pimps procure the visitors for gain and prostitutes offer their body for money. Either of them is, therefore, an accomplice and judicial decisions have settled the value of an accomplice's evidence.[323] The act also makes Procuration, inducing or taking of person for the purpose of prostitution, a punishable offence.[324] Detaining a person in the premises where prostitution is carried on is also an offence under the Act.[325] The Act also prohibits 'carrying of prostitution in or in the vicinity of public places' and makes it punishable with imprisonment for a term which may extend to 3 month.[326] The expression 'carrying of prostitution in or in the vicinity of public places' has been interpreted in a favourable way in holding not guilty a female prostitute. In **Shanta.v. State,**[327] the court observed that:

> *"In effect, therefore, and having regard to the use of the words carrying on prostitution, suggestive of more than a solitary instance of prostitution, it is clear*

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[318] State v. Ganga, 1960 Cr.L.J.893.
[319] 1940 Criminal. Law Journal, 960.
[320] Supra note 315 at p. 61.
[321] Section 3 of the Immoral Traffic (Prevention) Act, 1956.
[322] See subsection 2A of section 3 of the Immoral Traffic (Prevention) Act, 1956.
[323] Dr. G.B. Reddy, "*Prevention of Immoral Traffic and Law*," 1st Edition (Gogia Law Agency, Hydrabad,2004) ,pp.41-42.
[324] Section 5 of the Immoral Traffic (Prevention) Act, 1956.
[325] Section 6 of the Immoral Traffic (Prevention) Act, 1956.
[326] Section 7 of the Immoral Traffic (Prevention) Act, 1956.
[327] AIR 1967 Gujrat 211.

that there must be indiscriminate sexuality requiring more than one customer of the prostitute before she can be held guilty under section 7(1) of the Act."[328]

c) Seducing or Soliciting for the Purpose of Prostitution

"Seducing or soliciting for the purpose of prostitution" in public places is an offence under the Act, and punishable with imprisonment for a period of not less than 7 days but which may extend to three months.[329] However, 'Seducing or soliciting for the purpose of prostitution' would imply that the female must herself solicit another person in order that he may avail himself of her body for promiscuous sexual intercourse. It has been overlooked that persons other than the prostitute could urge or accost others for purposes of prostitution and indeed it is not unoften that the soliciting is indulged in more by the mobile middleman than by the prostitute herself.[330] The Act it self has not defined the word 'solicits.' Presumably, the word 'solicits' conveys something more, and has the essential import or an oral entreaty or persuasion, used to achieve the object of prostitution.[331]

d) Identical Provisions & Consequent Discrimination

The requirements for taking action under section 7 or under section 8 are identical. The Act leaves the choice of action under one or the other provision to the executive in case of persons similarly situated and thus can lead to discrimination without there being any rational basis for the same.[332] The consequences of an action in one case is of extremely penal nature whereas in the other case, that is, under section 18 of the Act of comparatively inconsequential nature. The discrimination can come, where in the case of a number of prostitutes, who carry on their profession within two hundred yards of a public place as defined in section 7, the authorities may take action against some of them under section 18 and against the others under section 7. The scheme of the Act also does not give any key for such sort of discrimination between person of the same class and similarly situate.[333]

e) Rehabilitation of the Prostitutes

The Act also contains provisions for rehahavilitation of the prostitutes. However some of these provisions are clearly arbitrary and discriminatory.[334] Section 10A prescribes detention in a corrective home only when the offender is a

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[328] Ibid.
[329] Section 8 of the Immoral Traffic (Prevention) Act, 1956.
[330] State.v. Premchand, AIR 1964, Bom, 155.
[331] Dr. G.B. Reddy, "*Prevention of Immoral Traffic and Law,*" 2004, Gogia Law Agency, at 57.
[332] Dr. G.B. Reddy, "Prevention of Immoral Traffic and Law," 1st Edition (Gogia Law Agency, Hydrabad, 2004), p.55.
[333] Ibid.
[334] S. Mutslidhar, " The case of the Agra Protective Home," in Amita Dhanda, Archana Parashar(ed) "*Engendering - Essays in honour of Lotika Sarkar,*"(Eastern Book Company, 1999), at p. 316.

woman, and at the time of her discharge from there six months later, the state government has to be satisfied that she will lead a useful and industrious life. Section 10A (4) says the conditions on which an offender may be discharged. These conditions may include requirements relating to residence of offender and supervision over the offender's activities and movements. These provisions, therefore, has been described as a text book example of a provision which at one stroke offends the right to life, dignity, privacy, residence and movement. Further the punishment for seduction for the purposes of prostitution under section is less for a man. Not only this, the statutory powers given to magistrates to order surveillance of the movements of prostitute women and order their deportation are wide and uncanalised.[335] In reality this provisions have been patently abused. In the ultimate the easy target of the law has been the prostitute women herself and she is seen as an easy tool for exploitation by not just the brothel owners and traffickers but the police as well. A fact finding team that investigated the forced evictions of prostitute women from Baina slum in Vasco, Goa noted that:

> *"Women are arrested while having tea in the shop, or from inside their home and at least on one occasion from the sulabh toilets. They are dragged by their hair by male police man and taken to the lock up and they get released after paying a fine of Rs. 500. However, in the process, they have to suffer indignity and humiliation and also a night or two in jail. Besides they have to spend money for lawyer's fees and to bribe the police."*[336]

The irony in the instant eviction case was that the eviction took place despite a restraint order issued by the National Human Rights Commission.[337] The team found that majority of the women from Andhra Pradesh was brought on contract for a tourist season. The parents were paid around Rs. 4000 to 5000. The women herself did not get any money.

f) Role of Corrective Institutions and Protective Homes

The Act of 1986 provides for these institutions and homes. Corrective institution defined in Section 2(b) which means a licensed institution in which persons who are in need of correction may be detained and includes which people who are in need of correction may be detained and includes a shelter where under trials may be kept. Protective homes have wider scope as defined in Section 2(g). It means a licensed institution in which, persons who are in need of care and protection are kept and technically qualified persons, equipment and other facilities have been provided to them. These institutions are established or

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[335] Id: See section 20 of the Immoral Traffic (Prevention) Act, 1956.
[336] A fact finding teams report, "*Evictions in Goa: Case Study of Baina*," Bailancho Saad, Goa, November 1997 at 22-23.
[337] In July 1997 by the NHRC.

licensed by the State Government under Section 21 of the Act. Any person who is involved in prostitution in any way may make application to the Magistrate for an order that he may be kept in a protective home. This is provided in Section 19 of the Act.

Women and girls found in the flesh trade are usually sent to protective homes, where in addition to informal education, they receive some form of vocational training. The neglect and abuse are two of the main reasons children are placed in juvenile homes or other places as found fir by the State Government. Various educational training centres have been opened in many states to impart vocational training to the fallen women and their children. People who are concerned about child sexual abuse often feel they "know what is best" for them, but those who have actually been sexually exploited often have very strong, tough and different points of view about what they are willing to do. It is necessary for us to take into account the wide range of exploitative factors that have led to the victims to adopt such obnoxious profession. Many social scientists have attempted to describe the right policy and approach for dealing with problem. But there is no perfect protective policy in our country to safeguard the interest of girl child. This is true for different reasons. First, it is nearly impossible to design a comprehensive welfare programme that many of us will think is satisfactory.

Every girl child who is found in the brothel is brought within the protective umbrella of the protective home. Institutionalization causes many other problems including further degradation and sexual exploitation by the staff members and outsiders. Any step that can be taken after the girl is rescued from the brothel may lead to feelings of more insecurity. A number of studies have shown how far the institutionalized women and girl child showed general impairment in their relationship to the general public, and many more have been diagnosed as neurotic and with other serious mental disorders at the time of discharge from the protective homes. Often, the best that society can do to the victims of flesh trade is to provide them with good education and vocational training so as to make them competent to participate themselves into respectable and meaningful avocation and self employment schemes. Second, various protective homes which have been established in different states have different missions. Most of these institutions, work as custodial centres only having no reference to the protection, care, treatment and rehabilitation of the victims. The idea of such institutionalization is to provide only informal educational and training in the production soap, chalk, making khadi and weaving activities which have nothing to do with the rehabilitation of the victims. The idea of our welfare programme

should be that the foul practice is totally eradicated and the victims are redeemed from the plight and are not again trapped into the prostitution.[338]

The Agra Protective Home case[339] brought forward the problem with institutionalization and the Immoral Traffic (Prevention) Act that facilitates it. It was on the basis of a letter addressed by the petitioners that this writ petition came to be entertained by the Court. The petitioners pointed out in the letter which was treated as a writ petition that the conditions in which girls were living in the Government Protective Home at Agra were abominable and they were being denied their right to live with basic human dignity by the State of Uttar Pradesh which was running the Protective Home. The Court thereupon made various orders from time to time with a view to improving the living conditions of the girls in the Protective Home and ensuring a decent and healthy standard of living for them. The Court also asked the District Judge to make periodic inspections of the Protective Home with a view to monitoring full and effective implementation of the various orders made by the Court from time to time. The District Judge himself or an Additional district Judge nominated by him, inspected the Protective Home from time to time and submitted Inspection Reports which came up for consideration before the Court on various occasions. it appears that the efforts made by the petitioners aided by Dr. R. S. Sodhi, Honorary General Secretary, Association for Social Health in India, were nearing successful conclusion when everything which had been done by the Court in order to improve the living conditions of the inmates of the Protective Home was set at naught by the State Government by shifting the Protective Home from its location in Vijaynagar colony to Adarsh Nagar Rajwara.[340]. In this case the Supreme Court issued certain guidelines. The guidelines required the person who is either removed under section 15(4) or rescued under section 16(1) of the Immoral Traffic (Prevention) Act and produced before a magistrate, to be heard either in person or through a lawyer (assigned by the Legal Aid Committee of the District/Court concerned) to be heard at every stage of the proceedings including admission to a Protective Home, intermediate custody as well as discharge. The Guidelines further required that the proceedings under the Act should as far as possible, be held in camera, respecting the dignity of the person and in a non-intimidatory atmosphere making sure, however, that the lawyers for both the person as well as the state are present. Where a person removed or rescued

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[338] Dr. D. Singh, " *Human rights Women & Law*," 1st Edition, (Allahabad Law Agency, 2005),p. 75. See Subhash Chandra Sing, " *Child Prostitution: Some Legal Aspect*," Criminal.Law Journal,(1999),at p. 199.

[339] Upendra Baxi & Latika Sarkar.v. State of U.P (1998) 9 SCC 388: AIR 1987 SC 191.

[340] AIR 1987 SC 191at 192.

happens to be a child, the magistrate will ensure that the child is placed in an institution established or recognized under the Juvenile Justice Act, 1986.

In **Gaurav Jain v. Union of India,**[341] a PIL was filed by the seeking improvement in plight of prostitutes/fallen women and their progeny. The Court issued directions issued for prevention of induction of women, in various forms into prostitution; their rescue from the vile flesh trade; and rehabilitation through various welfare measures so as to provide them with dignity of person, means of livelihood and socio-economic empowerment.

Justice K. Ramaswamy observed that:

> *"It is the duty of the State and all voluntary non-government organisations and public spirited persons to come into their aid to retrieve them from prosecution, rehabilitate them with a helping hand to lead a life with dignity of person, self-employment through provisions of education, financial support, developed marketing facilities as some of major avenues in this behalf. Marriage is another object to give them real status in society. Acceptance by the family is also another important input to rekindle the faith of self-respect and self-confidence. Housing, legal aid, free counselling assistance and all other similar aids and services are meaningful measures to ensure that unfortunate fallen women do not again fall into the trap of red light area contaminated with foul atmosphere. Law is a social engineer. The Courts are part of the State steering by way of judicial review. Judicial statesmanship is required to help regaining social order and stability. Interpretation is effective armoury in its bow to steer clear the social malady, economic reorganization as effective instruments remove disunity, and prevent frustration of the disadvantaged, deprived and denied social segments in the efficacy of law, and pragmatic direction pave way for social stability peace and order. This process sustains faith of the people in rule of law and the democracy becomes useful means to the common man to realize his meaningful right to life guaranteed by Article 21."*[342]

The Court was concerned in this case more with the rehabilitation aspect than with prevention of the crime. Therefore it emphasized on the review of the relevant law in this behalf, effective implementation of the scheme to provide self-employment, training in weaving, knitting, painting and other meaningful programmes to provide the fallen women the regular source of income by self-employment or, after vocational education, the appropriate employment generating schemes in governmental, semi-governmental or private organisations.[343] In addition, the Supreme Court appointed the Committee to enquire into problem of children of fallen women and submit a report. The report

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[341] AIR 1990 SC 292.
[342] Ibid, Para 26& 60.
[343] Ibid.

was accordingly submitted after extensive travelling to far and wide parts of the country; it studied not the problem of the children of the fallen women but also the route cause of the menace of child prostitution and the prostitution as such and the need for its eradication. The prevailing conditions have been pointed out in the Report and beneficial actions already taken by some of the Social Action Groups have been pointed and also noted. They have also dealt with the problems of the children. The State Governments and the Central Government were supplies with the copies of the Report and they have not even objected to the recommendations; in fact, they cannot be objected to since it is a fact prevailing, unfortunately, in the country. Therefore, the relief cannot be restricted to the pleadings or to the scope of the directions earlier issued; the Court can take cognizance from indisputable or the undisputed facts from the Report of Committee and other reports and articles published in recognized Journals and act upon it. Placing reliance thereon, the directions given in the Order, aim not only at giving benefits to the children but also to root out the very source of the problem as has been pointed out in the first part of the Order, it is for the Government to evolve suitable programme of action.[344] The court further reminded the Government that it should make reparation to prevent trafficking in women, rescue them from red light areas and other areas in which the women are driven or trapped in prostitution. Their rehabilitation by socio-economic empowerment and justice is the constitutional duty of the State. Their economic empowerment and social justice with dignity of person are the fundamental rights and the Court and the Government should positively endeavour to ensure them.[345]

g) Child Prostitution

Many unfortunate teen-aged female children and girls in full bloom are being sold in various parts of the country, for paltry sum even by their parents finding themselves unable to maintain their children on account of acute poverty and unbearable miseries and hoping that their children would be engaged only in household duties or manual labour. But those who are acting as pimps or brokers in the 'flesh trade' and brothel keepers who hunt for these teen aged children and young girls to make money either purchase or kidnap them by deceitful means and unjustly and forcibly inveigle them into 'flesh trade'. Once these unfortunate victims are taken to the dens of prostitutes and sold to brothel keepers, they are shockingly and brutally treated and confined in complete seclusion in a tiny claustrophobic room for several days without food until they succumb to the

[344] Ibid, Paras 50 & 90.
[345] Ibid, Paras 51,52,60.

vicious desires of the brothel keepers and enter into the unethical and squalid business of prostitution. These victims though unwilling to lead this obnoxious way of life have no other way except to surrender themselves retreating into silence and submitting their bodies to all the dirty customers including even sexagenarians with plastic smile. This was the argument made by the petitioner in **Vishal Jeet.v. Union of India,**[346] where, a Division Bench or the Supreme Court speaking through Justice Ratnaval Pandian dealt with a PIL seeking issuance of Certain directions, to CBI:

(1) to institute an enquiry against those police officers under whose jurisdiction Red Light areas as well Devadasi and Jogin traditions are flourishing and to take necessary action against such erring police officers and law breakers;

(2) to bring all the inmates of the red light areas and also those who are engaged in "flesh trade" to protective homes of the respective States and to provide them with proper medical aid, shelter, education and training in various disciplines of life so as to enable them to choose a more dignified way of life and

(3) to bring the children of those prostitutes and other children found begging in streets and also the girls pushed into "flesh trade" to protective homes and then to rehabilitate them.[347]

The Court held that it was neither practicable and possible nor desirable to make a roving enquiry through the CBI throughout the length and breadth of this country and no useful purpose will be served by issuing any such direction, as requested by the petitioner. Further, this malignity cannot be eradicated either by banishing, branding, scourging or inflicting severe punishment on these helpless and hapless victims most of whom are unwilling participants and involuntary victims of compelled circumstances and who, finding no way to escape, are weeping or wailing throughout. However, it would be appropriate if certain directions are given in this regard to State Governments and Union Territories.[348]

Regarding child prostitution the Court said that:

> *"There are provisions in Penal Code and under Juvenile Justice Act which are meant for protection of children. In spite of these stringent and rehabilitative provisions of law under various Acts, it cannot be said that the desired result has been achieved. It cannot be gainsaid that a remarkable degree of ignorance or callousness or culpable indifference is manifested in uprooting this cancerous growth despite the fact that the day has arrived imperiously demanding an objective multi-dimensional study and a searching investigation into the matter relating to the causes and effects of this evil and requiring most rational measures*

[346] AIR 1990 SC 1412.
[347] Ibid at p.1413.
[348] Ibid.

to weed out the vices of illicit trafficking. This malady is not only a social but also a socio-economic problem and, therefore, the measures to be taken in that regard should be more preventive rather than punitive."[349]

The matter is one of great importance warranting a comprehensive and searching analysis and requiring a humanistic rather than a purely legalistic approach from different angles. The questions involved cause considerable anxiety to the Court in reaching a satisfactory solution in eradicating such sexual exploitation of children. No denying the fact that prostitution always remains as a running sore in the body of civilization and destroys all moral values. The causes and evil effects of prostitution maligning the society are so notorious and frightful that none can gainsay it. This malignity is daily and hourly threatening the community at large slowly but steadily making its way onwards leaving a track marked with broken hopes. Therefore, the necessity for appropriate and drastic action to eradicate this evil has become apparent but its successful consummation ultimately rests with the public at large.[350]

The Court further observed that:

"It is highly deplorable and heartrending to note that many poverty stricken children and girls in the prime of youth are taken to 'flesh market' and forcibly pushed into the 'flesh trade' which is being carried on in titter violation of all canons of morality, decency and dignity of humankind. There cannot be two opinions - indeed there is none - that this obnoxious and abominable crime committed with all kinds of unthinkable vulgarity should be eradicated at all levels by drastic steps."[351]

It is obvious that in a civilized society the importance of child welfare cannot be over emphasized, because the welfare of the entire community, its growth and development, depend on the health and well-being of its children. Children are 'supremely important national asset' and the future well-being of the nation depends on how its children grow and develop.[352] Therefore the Court issued the following direction:[353]

1. All the State Governments and the Governments of Union Territories should direct their concerned law enforcing authorities to take appropriate and speedy action under the existing laws in eradicating child prostitution without giving room for any complaint of remissness or culpable indifference.
2. The State Governments and the Governments of Union Territories should set up a separate Advisory Committee within their respective zones consisting of the

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[349] Ibid, Para 11A.
[350] Ibid.
[351] Ibid at p. 1415
[352] Ibid.
[353] Ibid at p. 1417.

Secretary of the Social Welfare Department or Board, the Secretary of the Law Department, sociologists, criminologist members of the women's organizations, members of Indian Council of Child Welfare and Indian Council of Social Welfare as well the members of various voluntary social organizations and associations etc., the main objects of the Advisory Committee being to make suggestions of :

(a) the measures to be taken in eradicating the child prostitution, and

(b) the social welfare programmes to be implemented for the care, protection, treatment, development and rehabilitation of the young fallen victims namely the children and girls rescued either from the brothel houses or from the vices of prostitution.

3. All the State Governments and the Governments of Union Territories should take steps in providing adequate and rehabilitative homes manned by well-qualified trained social workers, psychiatrists and doctors.

4. The Union Government should set up a committee of its own in the line, we have suggested under direction No. (2) the main object of which is to evolve welfare programmes to be implemented on the national level for the care, protection, rehabilitation etc. etc. of the young fallen victims namely the children and girls and to make suggestions of amendments to the existing laws or for enactment of any new law, if so warranted for the prevention of sexual exploitation of children.

5. The Central Government and the Governments of States and Union Territories should devise a machinery of its own for ensuring the proper implementation of the suggestions that would be made by the respective committees.

6. The Advisory Committee can also go deep into Devadasi system and Jogin tradition and give their valuable advice and suggestions as to what best the Government could do in that regard.

7. The copies of the affidavits and the list containing the names of 9 girls are directed to be forwarded to the Commissioner of Police, Delhi for necessary action.

In Gaurav Jain v. Union of India,[354] the Supreme Court appointed the Committee to enquire into problem of children of fallen women and submit a report. The report was accordingly submitted after extensive travelling to far and wide parts of the country; it studied not the problem of the children of the fallen women but also the route cause of the menace of child prostitution and the prostitution as such and the need for its eradication.

The V.C. Mahajan Committee has identified ten types of prostitutes like street walkers, religious prostitutes, prostitutes in brothel, singing and dancing

[354] AIR 1990 SC 292.

girls, bar nude, massage parlour and some call girls. Another committee's report reveals that the age group of the prostitutes below 20 years of age are 75%, 21 to 30 years are 40%, 30 to 35 years are 18% and above 35 years 12%. At the time of entry in the prostitution they are neglected juveniles and the major reasons for induction in the prostitution are poverty and unemployment or lack of appropriate rehabilitation etc. All abhor stigma, 16% due to family tradition and 9% due to illiteracy, 94.6% prostitutes are Indians, 2.6 are Nepali and 2.7 are Bangladeshi, 84.36% are Hindu, 18.8% are Muslim and 3.5% are Christians, 24% belong to other backward classes,36% dalits and scheduled tribes and 40% others. In terms of martial status of prostitutes, 10.6% are married, 34.4% are unmarried and 54.2% are divorced or widows.[355]

h) Decriminalization of Prostitution-The Silence of Indian Law

The criminal law as contained in the IPC and the Immoral Traffic (Prevention) Act 1986 perceive prostitution as a necessary evil which should be contained but not be completely prohibited. The laws do criminalize the outward manifestations like soliciting, brothel-keeping, trafficking in women for prostitution, but do not ban prostitution per se. Formulated in this manner; women in prostitution are exposed to harassment by the police and exploitation by pimps and customers.[356] Now under the Guidelines the Magistrate is required to maintain a list of those who have been given safe custody of persons rescued or removed on the furnishing of undertakings, and in the event of it being brought to the Magistrate's notice that such person has returned to prostitution, the giver of the undertaking would after an enquiry be debarred from furnishing any undertaking in any proceedings under the Immoral Traffic Prevention Act 1986. The Court also suggested that the post of the Special Officer shall whenever possible be held by a woman police officer and that there should at all the time be in place the Advisory Board consisting of five workers to be associated with the Special Police Officer.

The Act is not constitutionally invalid as offending Article 19(1) (g). It is no doubt true that the Act curtails the fundamental rights of prostitutes to carry on their trade. These restrictions have been enacted under Articles 23 and 26 of the Constitution and therefore override the fundamental rights guaranteed by Article 19(1) (g).[357]. The Act does not aim at abolition of prostitutes and prostitution as such and make it per se a criminal offence or punish a woman because she

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[355] Gaurav Jain v. Union of India, AIR 1997 SC 3043.

[356] Ved Kumari, " Gender Analysis of Indian Penal Code,", in Amita Dhanda and Archana Parasar (ed)"*Engendering Law: Essays in Honour of Lotika Sarkar*,"(Eastern Book Company, 1999) at pp. 139-160.

[357] Shama Bai v.State of U.P., AIR 1959 All.57.

prostitutes herself but its purpose is to inhibit or abolish commercialized vice. But certain exception in Section 7 inhibits the woman herself from the practice of her profession in contravention of its terms and to that extent renders prostitution a penal offence.[358]

The argument behind decriminalization is that unnecessarily police harasses the parties on the one hand and increases the burden of investigation, prosecution and trial. Thus, in India prostitution is decriminalized. The prostitution can enter into business openly and not clandestinely within or outside public places. They can advertise about their services and the brothel owners and racketeers probably will at least have less control over them. Police and court have lost their jurisdiction to some extent and can not interfere in the matter unless there is a complaint from either party about "sexual exploitation or abuse."[359] Decriminalization is the deletion of a crime from stature. Then is prostitution decriminalized? There seems to be no direct answer to this question. At this juncture most one can say that prostitution is neither totally criminalized nor totally criminalized.

i) The Shifting in Paradigm in the West

The first international campaign in respect of prostitution began with an attempt to repeal the Contagious Disease Act of the British origin that applied to all the countries under British rule. The then Contagious Disease Acts, of 1864, 1866, and 1869 were then used to control the spread the venereal diseases. This reflects that the sex workers were then viewed as the carrier of sexually transmitted diseases.[360] Under these Acts the sex workers were required to register with the police, and they had to submit to regular medical examination. Those suffering from sexually transmitted diseases were confined to special lock hospitals until they cured. In case of refusal to go to medical test the police used to forcibly take them to the hospital. The result was that many sex workers disappeared to avoid police harassment. The purpose of those Acts was mainly to protect the health of the British soldiers who were a regular visitor to brothels. It was women like Josephine Butler who first sought the issue of this kind of 'white slave trade' to international agenda and argued that the Acts were a real threat to the civil liberties of all women. After the repeal of the Acts 1883, the feminist movement shifted from the government control of women's sexuality to social

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[358] AIR 1967 Gujrat 211.

[359] Dr. J. Mahanta, "*Silent Decriminalisation of Prostitution in India*," Criminal Law Journal (1992),at p. 45.

[360] Judith Walkowitz, "*Prostitution and Victorian Society*", Women Class and the State, (Cambridge University Press, 1982), pp.10-70.

purity movement, which dominated the international arena for about one hundred years.[361]

If we look to the international forum, we will see that a number of conventions and international agreements have been concluded and adopted by the members of the international community, 'but all have proved to be a good business for academics.'[362]

The trend is quite visible which shows that from the late nineteenth century to the mid-1980 an abolitionist perspective dominated the international discourse, defining prostitution as a form of slavery and a violation of human rights, and aiming to abolish prostitution itself. Since 1980s, however, a paradigm shift is now evident and the international campaign moved from abolitionist approach to women's right to self-assertion, and determination in all fields, including prostitution.[363]In the west, decriminalization of certain crimes closely followed the victimless crime movement that started in 1940s. The crimes in which both victims and offenders agree to commit the crimes are known as victimless crimes. However, it is difficult to indicate what those are. Normally the authorities on the subject include certain crimes like prostitution, homosexuality, gambling, smuggling, bootlegging etc. In the international front contrary to the anti-trafficking lobby, the World Charter for Prostitutes Rights 1985 raised a demand of decriminalizing all aspects of adult prostitution resulting from individual decision.[364]

International Committee for prostitutes, rights had declared the following rights of the prostitutes.[365]

(i) Decriminalize all aspects of adult prostitution resulting from individual decision.

(ii) Regulate third parties according to standard business codes to prevent the abuse and stigmatization of prostitutes.

(iii) Enforce criminal laws against cases of fraud, coercion, violence, child sexual abuse etc. everywhere and across national boundaries.

(iv) Eradicate laws that can be interpreted to deny freedom of association and travel;

(v) Guarantee prostitutes all human rights and civil liberties.

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[361] Dr. Subhash Chandra Singh, "*Prostitution And Trafficking in Women: International Feminist Perpespectives,*" Criminal Law Journal, (2003) at p.8.

[362] Ibid.

[363] Ibid.

[364] The demand was made by the International Committee for Prostitutes Rights: See, Gail Pheterson (ed) "*A Vindication of the Rights of Whores, Seattle*",(The Seal Press, 1989) at pp.40 &42.

[365] World Charter for Prostitutes Rights, 1985 http:/ www. Walnet. Org/csis/group/icpr- charter htm.

(vi) There should be no law which implies systematic zoning of prostitution.

(vii) All women and men should be educated to periodical health screening for sexually transmitted diseases.

(viii) Develop educational programs to change social attitude which stigmatize and discriminate against prostitutes and ex-prostitutes of any race, gender or nationality.

A debate at the International level is going on, regarding the appropriate law reform relating to sex trade and human rights. It has always been demanded by the sex workers that at least basic human rights which are being enshrined in the democratic Constitutions of civilized nations, like, freedom of economic activity and freedom of association should be made available to them also. So that labour laws are applicable to them also. The World Whores Congress in Amsterdam in 1985 that demanded decriminalization and protection of rights of prostitutes. The intense phase of discussions began with the two International Conferences on this subject, held in 1994 in Mai (Thailand) and Utrencht (Netherlands).[366] Both the conferences supported the idea of sex workers' right to self-determination which include the ability on the right of the individual of decide to work as a prostitute, and the prostitution be taken as a form of work, consequently, sex workers' right to safe working conditions. The UN Special Rapporteur on Violence Against Women, Radhika Coomaraswamy argues that a discussion of prostitution must accept that prostitution as a phenomenon is the aggregate of social and sexual relations which are historically, culturally and personally specific. There is a distinction between voluntary and forced prostitution.[367] Some women become prostitutes through rational choice while others become prostitutes as a result of coercion, deception, or economic enslavement. The final document of the United Nations Fourth World Conference on Women in 1995 in Beijing condemns only forced prostitution and not prostitution. This was a major shift towards a new approach to prostitution. The distinction between voluntary and forced prostitution has implicitly been recognized by the International Community. No International Convention condemns the abuse of human rights of prostitutes who join the profession voluntarily. The global society has sustained this profession for its own urges but neither gave its due in the society nor legal recognition.[368] All these proves that a

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[366] Supra note 361 at p. 12.

[367] Radhika Coomaraswamy, "Report of the Special Rapporteur on Violence against Women," Geneva, UN Document 1995.

[368] Dr. D. Singh, " *Human rights Women & Law*," 1st Edition, (Allahabad LawAgency,Faridabad,2005) p. 68:

greater emphasis is now being given by the international community to the social and economic conditions which determine prostitution as sex work and to the diversity of issues affecting women who practice the profession of prostitution.[369]

j) Indian Solution to the Problem of Prostitution

i) The Identification of Traditional & Emerging Factors That Promotes Prostitution

The factors and forces which promote prostitution today are as numerous too/ to enumerate. No catalogue or inventory has so far been framed to adequately explain the reasons which encourage a woman to become a prostitute.[370] Traditional explanations of poverty, allurement and exploitation, traumatic personal and social experience, individual personally based predisposition, family culture and tradition etc, do not however, adequately explain the matrix of the problem of prostitution in modern times. Sociologists believe that prostitution today has assumed the proportion of an organized crime, and is more of a business than a despicable and dehumanizing occupational alternative of those women who are often without resources to earn a respectable living either for themselves or for their dependents. One must understand that economic want, poverty, dearth and destitution can not be the sole reason for the booming growth of this business in modern times. There has emerged a class of prostitutes particularly of young girls and women, both married and unmarried, who are driven to prostitution not on account of necessity but on account of an overpowering desire to earn easy money for the fulfilment of their desire for luxuries.[371] Some women of well to do class take to prostitution as a part-time business, for the purpose of raising money and fulfilling their other desire. In other words a separate class of sophisticated prostitution has emerged in modern day world especially in the metros where women are joining in prostitution in an increasing number. For them prostitution is a matter of greed and not need. In today's world the traditional concept of brothel is under going rapid changes, which the Indian law is yet to take in to account. Now the owner of any hotel, park, resorts, beauty parlour or private place, is either giving a helping hand to this new genre of people or people having sufficient money. Now if a person have sufficient money he or she can by booking these places escape the clutches of law. In the most metros one can order sex like just one order a pizza.[372] In the big cities prostitution is no longer causes a moral horror. It is accepted as an

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[369] Dr. Subhash Chandra Singh, "*Prostitution and Trafficking in Woman : International Feminist Perspective*", Criminal Law Journal, (2003), at pp. 10-13.

[370] Dr. S. P. Srivastava, "*Prostitution- Groing Monster With Many Faces,*" Social Welfare, August-September (2003) at p.53.

[371] Ibid, at 54.

[372] Times of India, New Delhi, June 22, 2003.

inevitable consequence of consumerist culture where every thing is available for price.[373]

The Internet has heralded boom time for this profession. It lures people who would earlier shy away from openly visiting brothels or transaction with taxi drivers and hotel room-boys. They no longer feel vulnerable. The complete anonymity that the internet provides ensures that prospective clients- and the call girls, for that matter- can easily maintain their facade of respectability. Besides the faster communication, the internet has also broadened the call girls' area of operation and the tantalizing advertisements popping up in the adult websites. The only thing that counts here is cash, hard cash and plenty of it. The pimps promise quality- the girls sometimes come from 'respectable' families, they are college students and models wanting to make a fast buck. The Police of course, look at it all as another headache to investigate net crimes, pleads helplessness in dealing with the rampant prostitution thorough the Internet. Controlling the flesh trade has always been tough. We just do not have the resources to detect or investigate the wide gamut of paid sexual propositions being made on the internet, cutting across state borders. In India first came the cell phones and now the internet. The call girls are having it easy. It may look easy, but it is not actually. The pimps and the call girls try to take precautions while negotiating with prospective clients. Firstly, their e-mail addresses are always opened under a fictitious name and address. Even when meeting clients, they never reveal their real names. Rather, they keep changing the names they work under.[374]

The problem is that in most of the cases a highly organized network of pimps and brothel owner is tricking young girls from various part of the country into prostitution in India. From pushing relatives into the trade, traffickers changed tactics and found that false marriages sham love affairs and promise of lucrative jobs not them easy gains. Early marriage being a common practice in India, trick them into coming to certain parts of the country and sell them. The police know of many traffickers who have married 10 or 15 times, delivering each of the wives to brothels. Increased vigilance on trafficking activity has meant evolving more and more devious ways of getting the girls across the border. If 'married' to their trafficker, the girls co-operate in being taken across the border without arousing the suspicion of the border police. Pretending to be visiting relatives across the border, or going for treatment are common pretences in

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[373] Dr. S. P. Srivastava, "Prostitution- Groing Monster With Many Faces," Social Welfare, August-September (2003) at p.55.
[374] Hindustan Times, Chandigarh2nd December, 2001.

which the trafficked girl actively joins without realizing what waits her across the border.

According to police officials, trafficking in women and children is the third largest source of profit for organized crime, coming close behind only drugs and arms. Crores of rupees being involved in the trade, large organized groups, connected to criminal elements, have entered the business. India is the route for traffickers to the UAE and European countries and Delhi and Mumbai serve as the main transit points for international trafficking. [375] Unfortunately, the illegal profession of prostitution still takes place on one excuse or the other. Law takes its own course but it takes time. Prostitution is for livelihood or commercial purpose it is a matter of legal interpretation, and it takes lots of time and gives lots of scope to grow this profession. At present this profession has added new problem with the inflow of girls from Nepal and Bangladesh, influence of the cyber system, beauty parlours etc. the HIV menace is another problem which has its genesis in this profession. Something is required to be done to save the rights of the prostitutes. Presently, the law takes care of these women who are compelled to adopt the prostitution but law does not take care of those women who join this profession voluntarily.

ii) Implementation of Human Rights Agenda for them

Sociologists, social thinkers, social activists, voluntary women organizations and statutory women like National Commission for Women, among others, are now a days engaged in the empirical studies and applying their mental faculties to the question whether prostitution be legalized. Protagonists for legalization are trying to justify their view-point, inter alia. On the ground that it would help socio-legal treatment of rehabilitation, footing while opponents of legalization apprehend that it would lead to spurt in this profession- a remedy worse than the disease. Be that as it may, both the groups are working on the assumption that under the existing law the profession of prostitution is not legal

The rise of prostitution has also contributed in the increased number of HIV patients. The HIV epidemic is newly emerging phenomenon which requires immediate and effective control. AIDS pandemic is not only a threat to the socio-economic development and public health but also a challenge to the women's right, status and dignity. Discriminatory treatment exists in the area of prostitution. Prostitution is an offence in India. Public health protection requires that HIV test should be conducted. In case of prostitution women are only forced to undergo HIV test. But men also must be forced to undergo the test. The Article 47 of the Constitution of India, one of the directive principles of State policy

[375] Hindustan Times, Chandigarh, 27th January, 2002.

states that it is the duty of the state to improve the public health of the people. There are proposals that in case of prostitution, women must undergo medical test and should be tested whether they are free from HIV or not. But this discriminatory approach compelled to undergo HIV test. The National Commission for Women should take utmost care in plucking all discriminatory aspect while making any legislation for women. The women rather than suffering silently have to prove their greatness by protecting themselves and the society from the clutches of AIDS pandemic. To achieve this all kinds of unequal and discriminatory treatments should be rooted out from the society, socially, economically, psychologically, medically, legally and attitudinally.[376].

According to United Nations Report by the mid 1990s, a quarter or more of prostitutes in New Delhi, Hyderabad, Pune, Tripura and Vellore cities tested positive for HIV. In Mumbai, the prevalence of HIV among prostitutes has reached 70 percent. In India when people tall about AIDS, the single group of people that comes to their mind most commonly is that of prostitutes. The earliest and widely publicized detection of HIV infection in India among a few prostitutes in Chennai in 1986 and subsequent media reports of the rapid increase of HIV prevalence among prostitutions in a Mumbai red-light area during the next few years are perhaps responsible for such public perception. This perception, however perhaps represents the reality. In India prostitutes are indeed extremely vulnerable to HIV/AIDS. It is true that HIV infection has by now spread among all sections of urban and rural population of India but as a single group, perhaps the client of prostitutes may be blamed for the spread. Many of them, often because of their reluctance to use condoms, get the HIV infection from prostitutes and then transmit it to wives and other prostitutes. There is one in the three chances that infected women, when pregnant, transmit the infection to the new born babies. It has been observed in many HIV/ AIDS intervention projects in red-light areas of India that it is not difficult to educate and motivate prostitutes regarding use of condoms for protection but the prevalence of condom use among them does not increase adequately because prevalence of condom use among them does not increase adequately because their clients are unwilling to do so. Clients usually agree that that do not get full pleasure in sexual intercourse if condom is used. Prostitutes are mostly powerless, economically and otherwise to insist on the use of condoms by their clients. Hence, for making a HIV/AIDS intervention project

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[376] Dr V. Hemalata Devi , "*Undermining the Dignity of Women- An evaluation from AIDS View Point*," Criminal Law Journal, (1996) at pp. 113-116.

among prostitutes effective, it is necessary to include in it a strategy for community development among prostitutes and for their empowerment.[377]

Prostitution is being regulated by the law, but still there are some grey areas which need correction, voluntary prostitution, the children of prostitutes are the most stigmatized and helpless group in the society. The exigencies of her work result in the children of prostitute being neglected as well as starved of the normal childhood. The surrounding environment in the brothel gives a wrong direction to the children of prostitutes. There should be law to save the human rights of voluntary prostitutes and strict implementation of law to rehabilitate the prostitution should be minimized. The attempts made by the legislators and law enforcing agencies have not succeeded so far because the problem concerning prostitution is not only legal one but it has social dimension too. Law has its own limitation and it can not eradicate the social problems immediately. For the eradication of social evils, a change of social behaviour is required. It needs social revolution through education and economic empowerment of women. No woman should be compelled to join the flesh trade by the fraud of others.

Sex trafficking, like other forms of globalization, violates human rights across the borders. There are no barriers to free movement of the object of sexual object for sexual services. In our country the paralogics of human rights movements remained insufficient to translate into meaningful social reality of staging movement against sex trafficking. The existing human rights discourse has failed to address the politics of cruelty involved in sex trafficking. The law still fails to stop this kind of rape for profit. The morality of aspiration demands as civic duty a serious concern with the ways of promoting social economic structures that attend to causes of distress and destitution, desexualisation and dehumanization, pauperization and powerlessness, anomie and alienation- all of which enable sex trafficking not merely to exist but to grow apace. The justice in the flesh or the corporeal notion of justice accords a foundational dignity to gender equality in ways no incorporeal notion of justice either aspires or archives.[378] One must realize that appropriate law reform with regard to sex trade is rooted in human rights agenda. It has always been a demand of the sex workers that the fundamental rights enshrined in the democratic constitution encompasses their freedom of profession or trade and association, the right of self determination. Prostitution and other activities in the informal sphere should

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[377] Anthropological Perspective on Prostitution and AIDSs in India, Economic & Political Weekly, 20-26 Oct. 2001, at 4029.

[378] Upendra Baxi, "From Human Rights to the Right to be women," in Amita Dhanda & Archana Parashar (etal), in "*Engendering : Essays in honour of Lotika Sarkar*," (Eastern Book Company, 1999) at p.290.

be recognized as a form of work. Prostitutes and other sex workers should enjoy the right to safe working condition like other human being. Indeed a due recognition of their existing realities is warranted for the protection of the human rights of a vast majority of people who themselves constitute as a separate class in terms of social status and indignity. The International Committee for Prostitutes Rights (ICPR) in 1985, the two World Whores Congress held respectively in Amsterdam(Netherlands) in 1985 and Brussels(Belgium) in 1986, the creation of the World Charter for Prostitutes Rights through these two Congresses, the World Summit in 1989 demonstrates that there is urgent need to realize that prostitutes human rights movement helps us to understand that criminalization of prostitution serves to drive this business into a hidden economy that makes sex workers vulnerable to further marginalization and exploitation to an extent which leaves them without recourse to legal and health protection. Freedom of occupational choice, protection of health and safety, and prosecution of those who commits acts of violence against sex workers are central to the struggle.[379] Our law so far has been unresponsive to all these development. The individual right to self determination allows one the ability and right of one individual to decide to work as a prostitute. This is necessary for reducing the vulnerability of prostitutes and others to trafficking. In this context prostitution and other activities in the informal sphere should be recognized as a form of sex work. Prostitutes and other sex workers have a right to safe working condition, and right to health by reason of being a human being. The legal policy of any state can not be ignorant of the vast majority of the people engaged in this profession voluntarily or in voluntarily.[380]

F) A Sum Up

1. An individual's status in society depends upon the totality of the legal rights available to and enjoyed by him or her in different aspects of life whether it is marital, social, political or economic. In other words women often face multiple barriers to being free and equal in the societies. Some barriers are based on their gender and some are on their sex. Sexual harassment and sexual exploitation of women operates as a barrier to their free and equal participation in the society in a dignified way, and make them an object or item of sex which can fulfil the unwelcome and

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[379] Dr. Subhash Chandra Shing, "*Prostitution and Trafficking in Women: International Feminist Perspectives,*" Criminal Law Journal,(2003) at p. 13.

[380] Note that in India a single State West Bengal the Mahila Samanwya Committee is the India's first sex workers organization and is one of the largest organization founded Calcutta in 1994. By 1997 the number of sex workers associated with the organization in West Bengal has crossed 30,000.

unwanted lust or desire of the physically, economically or otherwise strongly placed masculine gender. It must be admitted that sexual harassment and exploitation of women are incompatible with the dignity and worth of human person, and must be eliminated by legal measure, national and international co-operation in such fields such as economic and social development, education, health care, poverty alleviation and social support.

2. The latest development of law relating to sexual harassment of working women has raised the concern of the working women to some extent. The protection is no doubt available to the women working in the public and private sector. But it is doubtful whether the present law can prevent sexual harassment of women working in various un-organized sector.
3. So far as sexual harassment is concerned the role of the Apex Court has been significant for many reasons. Firstly the Court in **Vishaka**[381] recognized the fact of sexual harassment as a true phenomenon. Secondly the court recognized openly that there were legislative vacuum in the field of law to deal with the problem of sexual harassment. Thirdly it recognized the structural and systematic nature of sexual harassment at the workplace. Fourthly by declaring sexual harassment as the violation of fundamental right the Apex Court raised the protectional aspect of women from such harassment at least theoretically. Fifthly it directed for setting up of machinery for the prevention of sexual harassment of working women. Sixthly the Apex Court in the instant case issued guidelines in response to a gang rape of a social worker in the State Development Programme.[382] This active and progressive legal realism must be given credit in a country which is riddled with so many things namely, gender bias, historical and religious myth, illiteracy superstition, and above all corruption, that starts from womb to the tomb Sixthly the Court in the absence of any legislation and explicit though not identical statutory provision, had taken the recourse of provisions of progressive international law. This is silent averments that the legislature should follow not blindly but wisely.

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[381] (1997) 6 SCC 241.

[382] Some people consider this as the biggest irony as the remedies suggested by the court in the instant case was of little use to the victim. This because the guidelines arose as a response to the gang rape of a social worker in the State Development Programme, the remedies suggested may be of little use to the victim. The researcher however appreciates and understands the courage and tenacity shown by the Apex Court in various matter by the Apex court in a country which gets a rank in terms of corruption in the world.

4. The Apex Court delivered its judgment in Vishaka in the year 1997. But this declaration that sexual harassment is a violation of fundamental rights is of little practical relevance to women in the private and un-organized sectors, as they are not provided with an affordable and expedious remedy in the form of writ petitions. It is difficult to visualize the implementation of the Vishaka machinery in situations of migrant labour, sole proprietorships, piece rate work and different form of unorganized labour.
5. In spite of these decisions the position of women in India did not change much and they continued to suffer from sexual harassment at the workplace. In most of the cases it was found that the Complaint Committees were not properly constituted and also being manipulated by the accused who happens to held a higher rank or had a higher position of authority.
6. Even after Vishaka All these prove that after Vishaka nothing has changed. Women's in India are and will be raising complaints of sexual harassment in an extremely hostile environment with the risk of backlash, humiliation, injury whether mental or physical and a complete loss of confidentiality. The post Vishaka development reflects the scenario of the reaction of most institutions; trying to bury the matter, vilify and target the women or hurriedly convene a committee to conduct a token slipshod or completely adverse investigation. It also reveals that plight of the complainant of sexual harassment specially when the accused is the owner or part of management, or occupies a position of authority which curtails the possibilities of an impartial inquiry.
7. 'The Sexual Harassment of Women at Work Place (Prevention, Prohibition and Redressal) Bill, 2006', if translated into law and implemented would do justice to many working women of this country. This is because of the fact that the Bill if translated in to Act would mean and imply the following; a) the coverage that the Bill gives, b) the prohibition and definition of sexual harassment in workplace, and the explanation that the Bill gives, c) the protection that the Bill gives to a variety of women working under different umbrella, d) the coverage that the Bill includes in terms of employees and employers, e) the definition of sexual harassment and the accompanying explanations as to what it means and what it includes, f) the ambit of the Bill that brings within its ambit i.e., the contractual service, unorganized sectors, g) the clarity of definition as to women and employer and employees for the purposes of the Bill, h) the proposal as to the establishment of various authorities and complaint

committees and the rules thereto as to the constitution and their power, i) the detailed provision as to who is an aggrieved women and the jurisdictions of the authorities and complaint committees; their powers, duties of the workplace, procedure for lodging and dealing with complaint, j) the widening of the concept of workplace and the duty of the workplace and also the duty of the employer in the respective workplace.

8. Sexual exploitation of the women and child, namely the prostitute is another area which suffers the neglect of our legal policy. At various levels it has been considered that women also have human rights. The need of the hour is the identification and a proper realization of the reasons both traditional as well as emerging factor that are contributing towards the unabated rise of prostitution. The menacing march of materialistic culture, out of which prostitution now derives strength, support and sustenance, needs to be refashioned through carefully crafted programmes of moral regeneration, poverty alienation, and other programme so that no new victim joins this profession of exploitation. It is submitted criminalization of prostitution would be a remedy worse than the disease until a complete and full proof rehabilitation programme is made and effectively implemented. The brazen marketization of sex needs to be prevented and controlled through vigorous law enforcement measures backed and buttressed by preventive action initiated by governmental agencies, NGOs. A proper health care programme is also necessary for those victims who have already fallen prey to this menace.
9. The role of the Apex Court has been appreciable in as much as the court has realized that this malignity (prostitution) cannot be eradicated either by banishing, branding, scourging or inflicting severe punishment on these helpless and hapless victims most of whom are unwilling participants and involuntary victims of compelled circumstances and who, finding no way to escape, are weeping or wailing throughout. The Court therefore issued various directions to the Central and State Government and other bodies to take immediate action for the eradication of child prostitution. It has appointed a Committee which it studied not the problem of the children of the fallen women but also the route cause of the menace of child prostitution and the prostitution as such and the need for its eradication.
10. Governmental protective homes have their problem with institutionalization and the. Most of the homes do not provide a decent and healthy standard of living for them.

11. The voices against sexual harassment of working women were raised considerably but only to protect a particular class of women. Consequently it was overlooked that prostitutes who are also entitled to enjoy human rights of the women, have their right to livelihood. It is in the brothel or the place where they carry on their profession they regularly become the victim of sexual harassment, including unnatural lust. More over the status which they carry in our mind due to their profession make them no entity and thus no case of sexual harassment of the prostitute is reported and they also do not dare to report it. In the absence of any authentic data one can argue that their profession being prostitution they offer sex in return of money as such no possibility of sexual assault or harassment is imaginable. But if one turns to the so called civic society, would see that in spite of having laws to prevent sexual harassment of working women, such incidents are happening. Consequently it can not be denied that the evil which takes place in the sphere which is under regulation of law is surly to take place in the sphere which is yet to be regulated or brought under the regulation of law.

12. The concept of obscenity has always linked with the concept of morality in the society. Law and morality are almost similar but not identical concepts. Where morality prescribes the standard code of conduct, law prescribes punishment for its violation. Thus law and morality are concepts; complimentary to each other. They strengthen and reinforce each other. In fact morality is the blood, which runs through the portals of law. The concept of obscenity or indecency is also a part of the larger body of our system of social morality. Social morality is something, which has the vocal and tacit approval of the society. What is beyond the accepted and established norms of society becomes immoral. Law comes into play, only to contain and eradicate this growth of indecency and obscenity in the society.