

## SEXUAL HARASSMENT OF WOMEN : ANATHEMA TO THE HUMAN RIGHTS JURISPRUDENCE

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At the dawn of twenty first century when we start evaluating the historical landmarks of the last century so that we can realise our wrongs and rights and give lesson to the future generation, we find some global changes and challenges which occurred more particularly in the last decade. On the one hand the violence against women has been rampant everywhere at the same time; there has been growing consciousness for the protection and promotion of the human right of women, on the other hand. The 'problem becomes more complex where the violence includes rape, sexual abuse, sexual harassment and intimidation and even goes beyond. Now the issue before us is how to protect the human rights of women and punish the violator in the absence of appropriate domestic law. The purpose of the present paper is to elaborate and examine the legal development in this respect and to suggest a viable solution.

Equality of status of woman and man with a special focus on gender equality and elimination of all forms of discrimination against women is the cry of the day. This equality is seriously impaired when women are subjected to gender specific violence, such as sexual harassment in the work place. Gender equality includes protection from sexual harassment and right to work with human dignity, which is universally recognised basic human right. It is discriminatory when the women has reasonable grounds to believe that her objection to the behaviour of the employer or next boss would disadvantage her in connection with her employment, including recruiting or promotion, or when it creates a hostile working environment. The safeguards against sexual harassment as an aspect of personal liberty were considered by the Supreme Court in *Vishaka v. State of Rajasthan*<sup>1</sup>. J.S. Verma, C.J., speaking for the court included the right to gender justice including the prevention of sexual harassment or abuse within the content of life and personal liberty guaranteed under Article 21. The right to social and economic empowerment was also

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1. AIR 1997 SC 3011, *see also, Gaurav Jain v. Union of India*, AIR 1997 SC 3021, 3028.

included into that article.<sup>2</sup>

The meaning and content of the fundamental right 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<sup>3</sup>. The international conventions and norms in this respect are to be read into them in the absence of enacted domestic law occupying the field where there is no inconsistency between them. It is now accepted rule of judicial construction that regard must be had to international conventions and norms for construing domestic law when there is no inconsistency between them and there is void in the domestic law. 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<sup>4</sup>. One of the logical consequences of such an incident is also the violation of the victim's fundamental right under Article 19(1)(g) to practice any profession or to carry out any occupation, trade or business. Such violations therefore, attract the remedy under Art, 32 for the enforcement of these fundamental rights of women.

It is not a mere matter of violation of an ordinary right of a person but the violation of fundamental rights which is involved. The Supreme Court of India in *Bodhisattwa Gautam. v. Ms Subhra Chakraborty*<sup>5</sup> has held 'rape' as an offence which is violative of the Fundamental Right of a person guaranteed under Article 21. The court aptly observed:

Rape is a crime not only against the person of a woman, it is a crime against the entire society. It destroys the entire psychology of a woman and pushes her into deep emotional crisis. Rape is therefore the most hated crime. It is a crime against basic human rights and is violation of the victims most cherished right, namely, right to life which includes right to live with human dignity contained in Article 21<sup>6</sup>.

The right to live with human-dignity with minimum sustenance and shelter and all those rights and aspects of life which would go to make a

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2. *Samatha v. State of U.P.*, AIR 1997 SC 3297.

3. *Vishaka's Case*, *id.* at 3015. see also, *Apparel Export Promotion Council v. A.K. Chopra*, AIR 1999 SC 625, at 634.

4. *Id.* at 3012.

5. AIR 1996 SC 922.

6. *Id.*, quoted and followed in *Chairman, Railway Board v. Chandrima Das*, AIR 2000 SC 988 at 994, *State of Punjab v. Ramdev Singh*, AIR 2004 SC 1290 at 1292.

man's life complete and worth living, would form part of the right to life<sup>7</sup>. Enjoyment of life and its attainment-social, cultural and intellectual-without which life cannot be meaningful would embrace the protection and preservation of life guaranteed by Article 21<sup>8</sup>. Thus the court developed the right to gender justice under Art.21 deriving principles from international conventions in order to protect the working woman from sexual harassment or abuse<sup>9</sup>. The sexual harassment therefore attracts the remedy under Art.32 for the enforcement of the fundamental rights of women. Apart from Art.32 there are other provisions which envisage judicial intervention for eradication of this social evil. The State is empowered to make special provisions for women<sup>10</sup>. Article 42 obliges the state to make provision for just and humane conditions of work. It shall be the duty of every citizen of India 'to abide by the Constitution and respect its ideals and institutions' and 'to renounce practices derogatory to the dignity of woman'<sup>11</sup>.

Our civil and criminal laws are not enough to deal with the problem of sexual harassment. In the absence of domestic law occupying the field, to formulate effective measures to check the evil of sexual harassment of working woman at all workplaces, 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 Arts. 14, 15, 19(1) (g) and 21 of the Constitution and the safeguards against sexual harassment implicit therein<sup>12</sup>. Any International Convention not inconsistent with 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.

All human beings are born free and equal in dignity and rights<sup>13</sup>. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood. The Convention on the Elimination of All Forms of Discrimination against Women requires that 'State Parties shall take all appropriate measures to eliminate discrimination against woman in the field of employment in order to ensure, on a basis of equality of men and women, the

7. *Samatha's Case*, *id.* note 2 at 3330.

8. For a detail account of the right see, B.P. Dwivedi, *The Changing Dimension of Personal Liberty in India*, 1998, Wadhwa & Company, Allahabad.

9. *Id.* at 239.

10. Article 15 (3) the *Constitution of India*.

11. Article 51A (a)& (c).

12. *Vishaka's Case*, *id.* note 1 at 3013, 3014.

13. Article 1, *Universal Declaration of Human Rights*, 1948.

same rights<sup>14</sup>. The general recommendations of CEDAW states:

Sexual harassment includes such unwelcome sexually determined behaviour as physical contacts and advances, sexually coloured remarks, showing pornography and sexual demands, whether by word or actions...Effective complaints procedures and remedies, including compensation should be provided<sup>15</sup>.

The Govt. of India has ratified the above resolution on June 25, 1993. Apart from the above the General Assembly, also while adopting the Declaration on the Elimination of Violence against Woman by its resolution dated 20<sup>th</sup> December 1993 observed *inter alia* that violence against woman shall be understood to encompass, but not be limited to :

Physical, sexual and psychological violence occurring within the general community, including rape, sexual abuse, sexual harassment and intimidation at work, in educational institutions and elsewhere, trafficking in women and forced prostitution<sup>16</sup>.

The International Covenants and declaration as adopted by the United Nations have to be respected by all signatory state and meaning given to the above words in those declaration and covenants have to be such as would help in effective implementation of these rights. The applicability of the Universal Declaration of Human Rights and principles thereof may have to be read, if need be, into the domestic jurisprudence<sup>17</sup>. The most remarkable feature of the expansion of Article 21 is that many of the non-judicial Directive Principles embodied in Part IV of the Constitution has now been resurrected as enforceable fundamental rights<sup>18</sup>. The court established a triangular relationship between Article 21, Directive Principles and International Conventions. The Supreme Court in *Peoples Union for Civil Liberties v. Union of India*<sup>19</sup>, laid down:

The provisions of the Covenant which elucidate and go to effectuate the fundamental rights guaranteed by our constitution, can certainly be relied upon by courts as facets of those

14. Article 11, (1) C.E.D.A.W.

15. Quoted and relied upon by the Supreme Court in *Vishaka's case* *id* note 1 at 3015.

16. Article 2(b), D.E.V.A.W.

17. *Chairman Railway Board v. Chandrima Das*, AIR 2000 SC 988, at 997.

18. For detail discussion on the issue, see, B.P.Dwivedi, *id*, note 8, at 121-123.

19. AIR 1997 SC 1203.

fundamental rights and hence, *enforceable as such*<sup>20</sup>.

This was made possible, it is submitted, by establishing the international human rights embodied as integral part of our constitution in the Directive Principles, into Art. 21 and the Directive Principles now stand elevated to inalienable fundamental human rights. Even they are justiciable by themselves<sup>21</sup>. Now in view of the Protection of Human Rights Act, 1993, a few International Conventions would be enforceable directly to effectuate the human rights, the right to life, liberty and dignity. The court in subsequent cases<sup>22</sup>, firmly linked Article 21 with the international Conventions. Article 21 reinforces 'right to life' – a fundamental right which is an inalienable human right declared by the Universal Declaration on Human Rights and the sequential conventions to which India is a signatory<sup>23</sup>.

A significant question arises in this respect is : whether the judiciary can make law in this area. The judicial legislation for protecting the life and liberty has gained a firm ground to fill the legislative gap. It is the duty of the executive to fill the vacuum by executive order because its field is conterminus with that of the legislature and when there is inaction even by the executive, the judiciary must step in to provide a solution till such time a legislature acts to perform its role by enacting proper legislation to cover the field<sup>24</sup>.

In the absence of the enacted law to provide for the effective enforcement of the basic human right of gender equality and guarantee against sexual harassment and abuse, more particularly against sexual harassment at work places, the Supreme Court laid down the guidelines and norms for due observance<sup>25</sup>. 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. For this purpose sexual harassment includes such unwelcome sexually determined behaviour (whether directly or by implication) as:

- a) Physical contacts and advances,
- b) a demand or request for sexual favours,
- c) sexually coloured remarks,

20. *Id* at 1207-8 (*emphasis added*).

21. *Air India Statutory Corpn. v. United Labour Union*, AIR 1997 SC 645 at 668, see also, *PUCL v. Union of India*, AIR 1997 SC 508, *PUCL case id.* note 19, *Vishaka's case id.* note 1, *Samathds case id.* Note 2.

22. *Samatha's Case id.* note 2.

23. *Id* at 3329.

24. *Vineet Narain v. Union of India*, AIR 1998 SC 889, 916.

25. *Vishaka's case id.* note 1, at 3016.

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

The Supreme Court subsequently in *Apparel Export Promotion Council v. A.K. Chopra*<sup>26</sup>, analysed and explained the above definition. Dr. A.S. Anand, C.J.I., took the view that the ‘the sexual harassment is a form of sex discrimination projected through unwelcome sexual advances, request for sexual favours and other verbal or physical conduct with sexual overtones, whether directly or by implication’<sup>27</sup>. The situation is further exacerbated when submission to or rejection of such a conduct by the female employee was capable of being used for effecting the employment of the female employee and unreasonably interfering with her work performance and had the effect of creating an intimidating or hostile working environment for her. The court rightly expanded the meaning of sexual harassment and held the respondent guilty by a conduct which was against moral sanctions and which did not withstand the test of decency and modesty and which projected unwelcome sexual advances.<sup>28</sup> Such an action on the part of the respondent would be squarely covered by the term ‘sexual harassment’.

Express prohibition of sexual harassment as defined above at the work place should be notified, published and executed in appropriate ways. The most significant issue relating to the right against sexual harassment is the problem of enforcement. The judiciary, in this respect, went beyond the technical or dictionary meaning and adopted a broader perspective. In a case involving charge of sexual harassment or attempt to sexually molest, the courts are required to examine the “broader probabilities of a case and not get swayed by insignificant discrepancies or narrow technicalities or dictionary meaning of the expression “molestation”<sup>29</sup>. The Supreme Court called upon the judges to deal with such cases with utmost sensitivity and aptly observed:

The courts are, therefore expected to deal with cases of sexual crime against women with utmost sensitivity. Such cases need to be dealt with sternly and severely. A socially sensitized judge, in our opinion, is a better statutory armour in cases of crime against woman than long clauses of penal provisions, containing complex exceptions and provisos.”<sup>30</sup>

Attempts, although futile, were made to make a law on the above

26. AIR 1999 SC 625.

27. *Id.* at 633.

28. *Id.*

29. *Id.* at 634.

30. *State of Punjab v. Ramdev Singh*, AIR 2004 SC 1290, at 1292 .

subject<sup>31</sup>. President Dr. A.P.J. Abdul Kalam addressing the joint sitting of Parliament declared that ‘a bill on protection against sexual harassment is shortly to be finalized.’<sup>32</sup> Any right without proper definition and sanction remains a right without protection. When we travel through the *jungle* of provisions of few drafts of the Bills we find a half hearted approach on the part of the government institutions. The Bills of 2002 and 2006(II) introduced in the Rajya Sabha mainly concentrated upon the imposition of deterrent punishment.<sup>33</sup> However, it is significant for creating separate offence of ‘sexual harassment’ and providing punishment in the form of imprisonment and fine both together. It rightly proposed to impose the burden of proving innocence on the accused. The Bill of 2006 (II), although provided for setting up of complaint committee, it missed in particular a provision of penalty for the contravention of the same.

Coming to the Draft Bill of 2006(I) prepared after long exercises of National Commission for Women, Lawyers Collective and Department of Women and Child Development, Government of India, we find it more frustrating<sup>34</sup>. It rightly recognises the right of every woman to be free from sexual harassment and prohibits the same.<sup>35</sup> Further, it provided the right to claim compensation from the defendant without requiring the person aggrieved to establish her claim.<sup>36</sup> It proposes to establish ‘Internal Complaints Committee’, ‘District Officer’ and ‘Local Complaints Committee’ as the authorities under the Act.<sup>37</sup> However, these authorities were not given powers to execute the process as the same are to be executed by already overburdened authority that is the District Judge.<sup>38</sup> In case of failure to constitute ‘Internal Complaints Committee’ and in other cases of the contravention of the provisions a fine of not less than Rs. 10,000/- has been provided however, it missed in

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31. See generally, Prevention of Sexual Harassment of Woman Employees at their Work Places Bill, 1998; The Prevention of Sexual Abuse and Harassment of Woman and Girls at Work Places Bill, 2002; The Sexual Harassment of Women at their Work Place (Prevention) Bill, 2003; The Sexual Harassment of Women at the Work Place (Prevention and Redressal) Bill, 2004; The Protection Against Sexual Harassment of Women Bill, 2005; The Sexual Harassment of Women at Work Place (Prevention, Prohibition and Redressal) Bill, 2006,(I) and the Working Women (Prevention of Sexual Harassment at Workplaces) Bill, 2006.(II)

32. Feb, 16, 2006.

33. *Id.* note 31.

34. *Id.*

35. Sections 3 & 4 of the Bill..

36. Sections 6 & 7 of the Bill.

37. Sections 8, 11 & 12.

38. Section 27

prescribing the upper limit in such cases.<sup>39</sup> The definition of 'sexual harassment' is not up to date as it ignores the sexual harassment by sending SMS which is very common now-a-days.<sup>40</sup> The persons entitled to file complaint included the registered trade union, woman organization or non-governmental organization and co-employee that restricts the operation of the Act.<sup>41</sup> The persons who can file a PIL, it is submitted, should also be allowed to file complaints in such cases.

The most significant lacuna in the proposed draft Bill above is that it does not create an offence of 'sexual harassment' while it is well established that the existing law is inefficient to deal with the same. Further the provisions for 'conciliation between the parties,'<sup>42</sup> to resolve the matter and a written apology by the defendant 'to the aggrieved woman clearly indicating that such behaviour will not be repeated'<sup>43</sup> prove lack of knowledge of the law laid down by the Supreme Court in such cases being contradictory to the stand taken by the Court in *A.K. Chopra's*<sup>44</sup> case that 'sympathy in such cases is uncalled for and mercy is misplaced'. The submission of apology by the respondent was, infact, rejected by the Court in the above case.

The whole discourse relating to the enactment of a law on the above subject, however remains academic and due to the states apathy even after a decade of the judicial pronouncement in the *Vishaka* there is still no law on the Indian Statute book. The guarantee of fundamental right has no meaning unless there exist the means to enforce. For this purpose Articles 32 and 226 provide effective and appropriate remedies for enforcing the right against sexual harassment. The right to move the S.C. is not affected or subjected to the existence of any other alternative remedy. Further, in case of violation of the right the victim can be duly compensated in the writ proceeding itself. The order of compensation can be made even against private persons<sup>45</sup>. The matter may be brought before the court even by any person as Public Interest Litigation. Thus we conclude that an effective and enforceable fundamental right of woman against sexual harassment has emerged. Let us strengthen this human right of women, lest it loose the battle.

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39. Section 7.

40. Section 2(m).

41. Section 17.

42. Section 23.

43. Section 31(c).

44. *Ibid* note 26 at 635.

45. *Bodhisattva Gautam v. Suhra Chakraborty*, AIR 1996 SC 922, see also, *Vishaka's case id.* note 1, *Chandrima Das case, id.* note 6.