CHAPTER 4

LAW RELATING TO SEXUAL HARASSMENT
AT WORK PLACE

4.1 FRAME WORK OF LAW - SEXUAL HARASSMENT

In the beginning the courts treated sexual harassment as either a criminal violation such as assault or as a civil violation such as violation of privacy. The first decision in USA to grant relief for sexual harassment under title VII of the Civil Rights Act of 1964 was William v. Saxbe. In 1980, the first prohibitory statute was drafted by EEOC, which issued guidelines for the prevention of sexual harassment at work place. Other countries followed either through judicial decisions or statutes – though many of them have only been introduced in the 1990s.

The debate on where to situate the legal remedy to sexual harassment depends to some extent on the accepted definitions of sexual harassment, as well as on legal traditions such as statutes enacted if any, or case law in that country. Broadly sexual harassment is covered under four types of laws internationally, which are not necessarily mutually exclusive i.e., a country can have more than one type of Law.

\(^1\) (1976)
4.1.1 Criminal Laws Frame Work

This framework holds the accused liable irrespective of the context, work place or general. It is necessary particularly for cases of sexual harassment that do not fall within the employment context. The disadvantage of such a law is that it generally implies a fine levied on the accused rather than compensation for the victim. Further, it does not take into consideration the discriminatory aspects of sexual harassment in the work place, and consequently there is no employer liability.

France is a country with criminal law prohibiting sexual harassment. Until the enactment of Supreme Court guidelines, India too only had specific criminal statues.

4.1.2 Civil Laws / Discrimination Framework

This applies particularly to work situations. In addition to the accused, the employer is also liable for not providing a work place environment that is free from discrimination on the basis of sex. The complainant is entitled to compensatory damages from the employer.

The framework depends crucially on the definition of ‘unwelcome-ness’ of sexual harassment. Each complainant determines what is offensive / unacceptable behavior. This has led to considerable debate in countries adopting the civil laws
framework, between the right to freedom of expression such as pornography and offensive language in public places and the right to equal opportunity in the work place.

Equal opportunity laws define sexual harassment as a sex discrimination. Other countries that have laws / judicial decisions within this framework are United Kingdom, Australia, Ireland, Canada, Denmark, Germany, New Zealand, Sweden, and USA.

4.1.3 Labour Laws Framework

These are applicable in work situations. They have primarily been used in *quid pro quo* cases. Where unfair employment practices have shown as a result of the rejection of sexual harassment by the complainant. Like in the cases of civil laws, the employer can be shown to be vicariously liable. However, the disadvantage of only addressing the issue through labour laws is that sexual harassment outside the work place is not covered. Further the offence may not be seen as a distinct category of illegal behaviour.

In Belgium, Canada, France, New Zealand, Spain, the Labour Law explicitly prohibit sexual harassment. In Belgium the labour law directs the employer to protect workers against sexual harassment at work, including any action of verbal, non verbal or physical nature which one knows or ought to know would offend the dignity of men and women employees. Canada’s Federal Labour
Code States that all employees are entitled to employment free of sexual harassment. New Zealand labour law describes sexual harassment as personal grievance that can be taken up with the employer. France labour law prohibits an abuse of authority in sexual matters, and makes illegal the harassment or threatening of a subordinate with the aim of obtaining sexual favours for the benefit of the harasser or a third party\(^2\).

4.1.4 Tort Laws Framework

Tort laws provide protection to victims of sexual harassment. A tort is a legal wrong, other than a breach of contract, for which a court can grant a remedy, most commonly in the form of damages and interests. Tort laws encompass both negligent and careless acts as well as intentional acts causing harm. Sexual harassment is by its nature an intentional act and would qualify as an intentional tort under most circumstances.

In 1986 a landmark judgment in US case\(^3\), ruled that sexual harassment is a violation of an individual’s right to equal employment opportunities, and further defined, the employer is liable for sexual harassment claims. Tort laws have been prohibiting sexual harassment in Japan, Switzerland, UK and USA.


\(^3\) Vinson v. Meritor Saving Bank
In countries where sexual harassment is seen as a general phenomenon, the legal remedy is situated in the framework of criminal laws. In countries where it is seen as a work place phenomenon, the civil or labour laws framework is applied.

In some other countries where it is seen as an intentional act and intentional tort provided remedy under Tort Laws framework. The approach taken by the US courts, that sexual harassment is a form of sexual discrimination and as such, a barrier to women’s integration in labour market. There is no anti-sexual harassment legislation in India. But, in two land mark Supreme Court Judgments\(^4\), the approach was that each incident of sexual harassment is a violation of the Fundamental Rights of gender equality guaranteed under the Indian Constitution and the cases were dealt through Common Laws, IPC and Cr.PC, placing harassment within the frame work of Human Rights. Different nations have gone for different legal approaches to combat the menace of sexual harassment.

4.2 CONSTITUTIONAL PROVISIONS

The framers of our Constitution were well aware of the glaring inequality between the sexes in our male dominated society and they, in their own wisdom devised certain specific safeguards in the Constitution to make the concept of equality a living reality as far as women are concerned. These safeguards find explicit expression in the Preamble of the Constitution, the chapters on the Fundamental Rights and Directive Principles of State Policy. Such

Constitutionally guaranteed rights go a long way in ensuring that women in India are protected from the problem of sexual harassment at the work place.

4.2.1 The Preamble

In this country "WE THE PEOPLE" gave to ourselves a Constitution which guarantees, Justice – social, economic and political, Liberty of thought, expression, belief, faith and worship; Equality of status and of opportunity and to promote among them all; Fraternity, assuring the dignity of the individual and the unity of the Nation.

The ideals enshrined in the Preamble of the Constitution are to be secured to all the citizens. Women fulfilling the conditions of citizenship are as much a citizen of India as any one else. Hence they are entitled to all the rights, obligations, duties and protection under the Constitution. The realisation of the ideals cherished in the Constitution is possible only when all the citizens – men and women have the necessary conditions for the advancement of their individual personality.

The Preamble, which is a key of the Constitution, thus guarantees equality of opportunity and equal status to men and women. It directs that women shall not only have equal rights and privileges with men but also that the state shall make provisions – both general and special for the welfare and dignity of women.
4.2.2 Equality Code

Article-14 of the Constitution contains the quality guarantee. It ensures “equality before the law and equal protection of the laws”. Thus, women must be treated equal to men by the state and the state not to deny the equal protection of laws.

Article-15 prohibits discrimination on grounds of religion, race, caste, sex or place of birth:

Article-15(3) recognises systematic discrimination against women and authorises the state to make special provisions for women and children.

Article-16 guarantees equality of opportunity to both men and women in matters of public employment.

Sexual harassment at work place is discrimination on the basis of sex and violation of equality code.

4.2.3 Right to Work

Article-19(1)(g) states all citizens shall have the right to practice any profession, or to carry on any occupation, trade or business.
Every citizen has a right to carry on any profession, trade or business following the reasonable restrictions under clause (6) of Article-19. The fundamental right to carry on any occupation, trade or business or profession depends on the availability of a 'safe' working environment. When the work place is unsafe and working environment is abusive or hostile, it infringes right to carry on employment. This violates the freedom to work of both the victim and other female employees.

4.2.4 Right to Certain Freedoms

Article 19 (1) guarantees certain freedoms:

(a) freedom of speech and expression;
(b) to form associations and unions;
(c) to move freely throughout the territory of India;

Sexual harassment at work place threatens these freedoms. An act of sexual harassment can violate the freedom of speech and expression guaranteed under Article-19(1)(a) through the presence of threatening work environment and being compelled to work along side perpetrators;

The freedom of association guaranteed under Article-19(1)(c) by creating a hostile environment for the victim making it uncomfortable for her to participate in office group activities, meetings and social gatherings;
And the freedom of movement guaranteed under Article-19(1)(d) When the victim is compelled to avoid places of work because of the presence of the perpetrator.

4.2.5 Right to Life

A fruitful and meaningful life presupposes full of dignity, honour, health and welfare. In the modern “Welfare Philosophy”, it is for the state to ensure these essentials of life to all its citizens and if possible to non-citizens. While invoking the provisions of Article-21, and by referring to “Better to die ten thousand deaths than wound my honour”\(^5\). The apex court in *Khedat Mazdoor Chetana Sangath v. State of Madya Pradesh and others*\(^6\), posed to itself a question “if dignity or honour vanishes what remains of life”? This is the significance of the right to life and personal liberty guaranteed under the Constitution of India.

Article-21 which forms the arc of fundamental rights guaranteed under part-III of the Constitution enshrines that – No person shall be deprived of his life or personal liberty except according to the procedure established by law”.

This Article has its origin during the early 13\(^{th}\) century AD in the 39\(^{th}\) chapter of Magna Carta, a charter of English liberty. It plays the same role which the ‘Due Process Clause’ plays under the American Constitution and also under the Japanese Constitution\(^7\).

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\(^6\) 1994 AIR, SCW 4026

\(^7\) Supra Note 4
The Supreme Court in its interpretation of the ‘right to life’ under Article-21 has on many occasions stressed that, the right to life could not be equated to living out a mere animal existence. The right to life would necessarily imply the right to live with human dignity and would include those aspects of life that make life meaningful, complete and worth living.

Gender discrimination has been recognized as an obstacle to the full realization of the right to life under Article 21. In *C.Masilamani Mudaliar v. Idol of Sri Swaminathaswami Thirukoil*, the Court held that equality, dignity of person and the right to development are inherent rights in every human being. For the meaningful enjoyment of the right to life under Article 21, every woman is entitled to the elimination of obstacles and of discrimination based on gender. The Court reiterated that the State has an obligation to eliminate gender-based discrimination and to create conditions and facilities conducive for women to realise the right to economic development, including social and cultural rights.

In *Bodhisattava Gautam v. Subhra Chakraborty*, the Supreme Court stated that women have the right to life and liberty under Article 21. Similarly, they also have the right to be respected and treated as equal citizens. The Court held that offences of rape were acts of aggression aimed at degrading and humiliating women. Such offences were crimes against basic human rights and are also violative of the fundamental right to life under Article 21. The judges

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9 See also *Madhu Kishwar v. State of Bihar* (1996) 5 SCC
10 (1996) 1 SCC 490
emphasized that "the ... dignity of women cannot be touched or violated." Thereby, the right to life includes the right of women to live with dignity and to lead a peaceful life. In 2000, the Supreme Court in Chairman, Railway Board v. Chandrima Das\textsuperscript{11} reiterated that physical violence at the hands of government employees who outraged the modesty of women violates the right to dignity of women. Of special note in the case is that the Court held that the right under article 21 extends to non-citizens as well\textsuperscript{12}.

The right to life includes the right of women to live with dignity and lead a peaceful life. In Chairman, Railway Board v. Chandrima Das\textsuperscript{13}, a writ petition was filed against the state and its instrumentality seeking compensation to a victim of rape committed by its employees (railway employees). The petition also sought other reliefs including the eradication of anti-social and criminal activities at the railway station. The Supreme Court held that, physical violence at the hands of government employees who outraged the modesty of women violates the right to dignity of women.

Article-21 is the fundamental of fundamental rights under the Constitution of India. The Supreme Court has revolutionalised the interpretation of this article in Maneka Gandhi v. Union of India\textsuperscript{14}, and gave a new dimension to Article-21. It stated that, 'Right to Live' is not merely confined to physical existence but it

\textsuperscript{11} (2000) 2 SCC 465
\textsuperscript{12} The victim in this case was a Bangladeshi citizen.
\textsuperscript{13} Supra Note 11
\textsuperscript{14} 1978, 2 SCJ, 31.
includes ‘Right to Live with Human Dignity’. Today its significance is all pervading making the life beautiful, dutiful and fruitful.

It is very difficult to enumerate the meaning of the term ‘Human dignity’ in its general connotation, this term may be construed to mean living by a man in a manner required to live like a man in a right-thinking society. Therefore, it is a wider concept, it ensures freedom from torture, cruelty or unusual punishment or degraded treatment.

In Vishaka\textsuperscript{15} the apex court held that each incident of sexual harassment of women at the work place is a violation of right to life under article-21, which implies the right to dignity. The Supreme Court in Apparel Export Promotion Council v. A.K.Chopra held it to be beyond the scope of debate that sexual harassment of a female at the place of work is incompatible with the dignity and honour of a female.

Right to life and personal liberty under Article-21 has been interpreted so liberally that, now it covers in its ambit a variety of rights that constitutes personal liberty of man. Right to life includes all those rights that make human life worth living. Right to work in a profession of one’s choice and right to safe working environment are part and parcel of right to life and personal liberty. Thus, sexual harassment at work place is a violation of precious and valuable right of liberty, which includes human dignity.

\textsuperscript{15} (1997) 6 SCC 241
4.2.6 Right to Privacy

The right to privacy is a part of the right to life and personal liberty guaranteed under Article-21\(^{16}\). In *Gobind v. State of Madya Pradesh*\(^{17}\), the court held that the right to privacy in Article-21 should be interpreted in conformity with India’s International law obligations in the International Covenant on Civil and Political Rights\(^{18}\) and the Universal Declaration of Human Rights\(^{19}\).

In *Vishaka v. State of Rajastan*, the Supreme Court didn’t address this violation. The recent case of *State of Karnataka v. Krishnappa*\(^{20}\), which dealt with the issue of reduction in the sentence awarded in the case of rape of girl of tender years, the court observed that sexual violence, apart from being an act of physical violence, is an unlawful intrusion of the right to privacy and personal integrity. An act of sexual harassment is a violation of the right to privacy of a woman, and therefore of the right to personal liberty and life under article-21.

4.2.7 Right against Exploitation

Article-23 of the Constitution provides right against exploitation and prohibits immoral traffic in women. The harassment of women at work place by an employer amounts to exploitation of women, hence violation of her right.

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\(^{16}\) *Kharak Singh v. State of Uttar Pradesh* (1964) 1 SCR 332.

\(^{17}\) (1975) 2 SCC 148.

\(^{18}\) Article-17, ICCPR.

\(^{19}\) *PUCL v. Union of India* (1997)1 SCC 301.

4.2.8 Directive Principles of State Policy

The Directive Principles of State Policy are fundamental to the good governance of the country. While these principles are not enforceable by a court of law, the state is expected to be guided by these considerations while making law and framing policy. In *Keshavananda Bharti v. State of Kerala*\(^{21}\), it was laid down that directive principles embodied in part IV of the Constitution are as important as the rights of individuals and provides some special provisions for the welfare of the women and for the improvement in their socio-economic status.

The following directive principles of state policy are relevant for prevention of Sexual Harassment of Women:

(a) Article-39 (a) ensures that, the citizens, men and women equally have the right to adequate means of livelihood.

(b) Article-39 (e) states that, the health and strength of workers, men and women are not abused.

(c) Article-42 of the Constitution directs the state to make provision for just and human conditions of work and maternity relief. Thus, it is the duty of every state to provide safe and healthy working environment.

\(^{21}\) (19973)4 SCC 225, paras 634 and 646, as per Hegde and Mukherjea JJ.
(d) Article-51(c), which requires the state to foster respect for international law and treaty obligations in dealing with, organized peoples with one another. Primary among international treaty obligations protecting the human rights of women is CEDAW, which focuses on the principle of gender equality. India is a signatory to this convention and thereby the state is expected to ensure the fulfillment of its obligations towards women under this convention. Article-253 of the Constitution read with entry 14 of list 1 empowers the parliament to make laws to implement international treaties and conventions, thereby allowing the CEDAW and other human rights conventions to be made part of Indian domestic law and enforceable in national courts.

4.2.9 Fundamental Duty

Part IV-A added to the Constitution by 42nd Amendment Act 1976 prescribes a code of ten fundamental duties for citizens.

Article 51-A provides that it shall be the duty of every citizen of India

(i) Article 51-A(a) to abide by the Constitution and respect its ideals and institutions.

This would include the principles of gender equality and non-discrimination on the ground of sex enshrined in the quality code of the Constitution.
(ii) Article 51-A(e) also calls upon all citizens to renounce practices derogatory to the dignity of women.

It is the fundamental duty of every citizen to respect the dignity and honour of women and to renounce derogatory practices.

4.2.10 Constitutional Remedies

Sexual harassment at work place is a violation of fundamental rights guaranteed in part-III. Accordingly, a woman who has been sexually harassed can access to certain Constitutional remedies provided for the violation of fundamental rights.

Instead of leaving it to the general law of remedies under the civil law, the Constitution of India has provided certain special remedies for the enforcement of the rights created by the Constitution.

Article 32 of the Constitution of India guarantees the right to move the Supreme Court through appropriate writ petitions for the enforcement of fundamental rights in part-III. Similarly Article 226 provides for the right to move the appropriate High Courts for the enforcement of fundamental rights and other legal rights. The right to approach the Supreme Court for the enforcement of fundamental rights under Article 32 is itself a fundamental right.\textsuperscript{22}

\textsuperscript{22} Bodhisatwa Gautam v. Subhra Chakraborty (1996) 1 SCC 490.
4.2.10.1 Advantages of Using Constitutional Remedies

There are certain broad advantages of using the Constitutional remedies in Articles 32 and 226 in a case of sexual harassment at work place.

The scope of Article 32 and 226 and the interpretation of the content of fundamental rights has been expanded. The Vishaka interpretation is itself an example of this expansive role undertaken by the court. In addition, the list of fundamental rights within the phrases ‘life and personal liberty’ of Article 21 includes the right to privacy and similar rights that are of relevance to a case of sexual harassment.

The court is entitled to evolve new principles of liability and new remedies under Article 32 and 226 to enforce fundamental rights to cover the gap until the legislature steps in or until the executive discharges its role.

In awarding a remedy in a writ proceeding, the court need not confine itself to the interests of the petitioner and the respondent alone. The court will also consider the interests of the public at large with a view to ensuring that public bodies or officials do not act wrongfully in the discharge of their public duty and do not fail in their public duty to protect the fundamental rights of citizens.

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24 Union Carbide v. Union of India, (1991) 4 SCC 584
When a person seeks compensation for an infringement of fundamental rights by an act of sexual harassment, the Supreme Court and High Court under Article 32 and 226 may award compensation in that very proceeding by way of penalizing the state for violating the fundamental right guaranteed by the Constitution apart from compensating the victim. Writ remedies can be used to do 'complete justice' to the person aggrieved.

In *Vishaka* case the court articulated the power of the court under Article 32 to make fundamental rights meaningful. The obligation of the court under Article 32 to enforce fundamental rights was seen to extend to the incorporation of progressive international law to provide for lacunae in the domestic law field and to hold that such judge made law would be treated as law declared by the Supreme Court under Article 141 of the Constitution.

### 4.2.10.2 Limitations of Article 32 and 226

I Articles 32 and 226 only apply against the 'state'

Fundamental rights are available only against the 'state'. This is laid down in Article 12 of the Constitution. This means only agencies, bodies organizations and individuals that fall within the ambit of the word 'state' can commit infringements of fundamental rights. Therefore, remedies under Article 32 and 226 will only be available against the state.

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27 Ibid
28 Ibid
Earlier law is that, private corporations are not considered as state, but the present law is that, some private bodies are considered as the state.$^{29}$

**Judicial Tests for 'state'**

Courts will consider the following factors, to decide if a body is the 'state' for the purposes of part III of the Constitution:

(i) Whether the entire share capital of the corporation is held by the Government;

(ii) Whether the financial assistance of the state is so much as to meet almost the entire expenditure of the corporation;

(iii) Whether the corporation enjoys monopoly status, which the state conferred or protected;

(iv) The existence of pervasive state control;

(v) If the functions of the corporation are of public importance and are closely related to government functions;

(vi) Specifically, if a department of government is transferred to a corporation.$^{30}$


While the courts have recognised impossibility of laying down a cut and dry formula providing the exact interpretation of state\textsuperscript{31} there have been several judicial efforts to lay down what is meant by state. This becomes important for institutions that are partly owned or controlled by the government, and can therefore be deemed to be instrumentalities or agencies of the government, and within ‘state’ for the purposes of Article 12.

II Problems of the Legal System :

Filing and following a writ petition in court may lead to undue delays. In addition, such process involves some cost to the litigant. Courts normally do not record evidence.

4.2.10.3 Writ Petition in Case of Sexual Harassment

A victim of sexual harassment may file a writ petition under Article 32 in the Supreme Court and under Article 226 in the High Court in the following circumstances:

against the employer, if there was an unlawful termination of her services upon refusal to comply with sexual favours;

against the employer, for non conduction of, an enquiry against the harasser, if sexual harassment was committed;

against the employer, for failure or refusal to take action, if sexual harassment was committed;

\textsuperscript{31}R.D.Shetty v. International Airport Authority; Chander Mohan Khanna v.NCERT, (2002) 2 SCC 167.
when the sexual harassment at workplace committee has passed an order in violation of principles of natural justice, it can be asked to set aside;

for a transfer from a place where the offender works;

for the transfer of the offender.

A woman who is a victim of sexual harassment employed in the public sector can file a writ petition for a declaration that her fundamental rights have been violated and for compensation. Ordinarily, as a matter of practice, such petitions ought to be filed in the relevant High Court, before approaching the Supreme Court\(^\text{32}\). However, it must be noted that such writs will be allowed only once an enquiry or court has held that sexual harassment at workplace has taken place and the co-worker and employer are held liable for the acts of harassment.

The *Vishaka* judgment states that the obligations under the judgement will be binding both on the public sector and on the private sector. However, ordinarily, the law does not permit a petition under Article 226 and 32 to be filed against the private sector. As the law stands, even if an employer in the private sector has violated the fundamental rights of a working woman by an act of sexual harassment, the woman would not be in a position to file a petition in the High Court or Supreme Court for appropriate relief as no such petition would lie against a private employer. She would have to file a suit against the employer in a civil court and seek compensation, or go under relevant labour law statutes.

The Vishaka judgment is, however, a major step forward for women in the public and private sectors because they are now in a position to file a petition in the High Court or Supreme Court for violation of their fundamental rights in the event of sexual harassment. But in such cases the court normally does not go into disputed question of fact and the only relief the court is likely to give is a direction to the employer to set up a sexual harassment committee to inquire into the sexual harassment and to provide compensation to the aggrieved woman if harassment is proved upon such enquiry. If a committee was already setup and the findings were against the woman she may also file a petition claiming that the findings are perverse.

4.2.10.4 Public Interest Litigation

The traditional rule of locus standi that a petition under Article 32 can only be filed by a person whose fundamental right is infringed has now been considerably relaxed by the Supreme Court. When there is a violation of fundamental or other legal rights of a person or class of persons who by reason of poverty or disability or socially or economically disadvantaged position cannot approach a court of law for justice, it would be open to any public spirited individual or social action group to bring an action for vindication of the fundamental or other legal right of such individual or class of individuals.\(^{33}\)

\(^{33}\) Infra Note 37
No rigid rule of *locus standi* can be applied to Public Interest Litigation. Therefore a writ petition may be filed not only by an aggrieved individual but also by a public spirited individual or a journalist, or a social action group, for the enforcement of the Constitutional or legal rights of some other persons provided such other person is unable to approach the court for redress due to certain impediments. Even where no particular person has been injured but a public injury has been caused by the violation of a Constitutional principle, such as the independence of the judiciary, any person who is likely to be affected by such public injury would be allowed to complain of such violation\(^{34}\).

In *S.P. Gupta v. Union of India*\(^ {35}\), Procedures adopted by the Court in cases of Public Interest Litigation can be particularly designed with a view to resolving the problem presented before it and to determine the nature and extent of relief accessible in the circumstances\(^ {36}\). An example of this is that even letters addressed to individual judges of the court may be entertained as a Public Interest Litigation\(^ {37}\). The *Vishaka* petition is itself an example of how a Public Interest Litigation was used to complete gaps in the existing law.

Public Interest Litigation may be used effectively in cases of SHW. They allow classes of employees to challenge the large-scale prevalence of SHW at their work places. The State may be directed through a Public interest Litigation to

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ensure safe work places for its employees as per Vishaka and to provide mechanisms for the implementation of the law.

4.2.10.5 Right to Compensation

In *M.C. Mehta v. Union of India*38, the Supreme Court held that the scope of Article 32 is wide enough to include the power to grant compensation for violation of fundamental rights. The power of the court under Article 32 is not merely preventive i.e., preventing the infringement of fundamental rights but also remedial in nature, i.e., power to grant compensation. The Court said, "The power of the court to grant such remedial relief may include the power to award compensation in appropriate cases". The Court then clarified that the compensation would be given only in "appropriate cases" and not in every case. The "appropriate cases" are those cases where "the infringement of fundamental right is gross and patent" and such infringement should be on a large scale affecting the fundamental right of a large number of persons or it should appear unjust or unduly harsh or oppressive on account of their poverty or disability or socially or economically disadvantaged position to require the person affected by such infringement to initiate or pursue action in civil courts.

Indian law and jurisprudence allows a claim for compensation as a remedy in cases of violation of fundamental rights. Decisions of the Indian Supreme

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38 AIR 1987, SC 1086,
Court\textsuperscript{39}, indicates a trend of allowing for compensation in proceedings under Article 32 and 226 while seeking enforcement or protection of fundamental rights.

In \textit{Saheli v. Commissioner of Police}\textsuperscript{40}, the principle of compensation for public injury has been extended to mental harassment. The state is also liable for fundamental rights violations committed by its servants, and should therefore pay compensation for such injuries\textsuperscript{41}. In \textit{Bodhisathwa Gautam v. Subhra Chakraborty}\textsuperscript{42}, the court went a step further by saying that fundamental rights could be enforced even against private bodies and individuals.

\textbf{4.2.10.6 The Defence of Sovereign Immunity}

The defence of sovereign immunity is invoked to limit state liability for actions performed in the course of official duty. Compensation for fundamental rights violations is available irrespective of any defence of sovereign immunity. This trend was established in \textit{Nilabati Behera v. State of Orissa} \textsuperscript{43}.

In \textit{Chairman, Railway Board v. Chandrima Das}\textsuperscript{44}, the court rejected the argument that violating acts were not performed in the course of official duty and thereby the state may not be held liable. Instead, the court went a step further indicating that the theory of sovereign power was no longer available within the

\begin{thebibliography}{9}
\bibitem{40} (1990)1 SCC 422
\bibitem{41} Ibid
\bibitem{42} (1996)1 SCC 491.
\bibitem{43} (1993) 2 SCC 746.
\bibitem{44} (2000)2 SCC 465)
\end{thebibliography}
framework of a welfare state. The functions of the Government in a welfare state are manifold and extend to social, economic and political spheres. Court ruled that the failure to protect fundamental rights was a breach of the duty of the state and its entities, and compensation ought to be paid by them.

4.2.10.7 Compensation for Sexual Assault

The Supreme Court in the landmark case Delhi Domestic working women's Forum v. Union of India45, held rape and sexual assault of women to be a violation of their rights of personal liberty and life and awarded compensation for the same.

The Supreme Court with a view to assist rape victims has laid down the following broad guidelines (parameters):

(1) The complainants of sexual assault cases should be provided with legal representation. It is important to have someone who is well acquainted with the criminal justice. The role of victim's advocate would not only be to explain to the victim the nature of the proceedings to prepare her for the case and to assist her in the police station and in Court but to provide her with guidance as to how she might obtain help of a different nature from other agencies, for example, mind counseling or medical assistance. It is important to secure continuity of assistance by ensuring that the same person who

looked after the complainant’s interests in the police station represent her till the end of the case.

(2) Legal assistance will have to be provided at the police station since victim of sexual assault might very well be in a distressed state upon arrival at the police station, the guidance and support of a lawyer at this stage and whilst she was being questioned would be of great assistance to her.

(3) The police should be under a duty to inform the victim of her right to representation before any questions were asked of her and that the police report should state that the victim was so informed.

(4) A list of advocates willing to act in these cases should be kept at the police station for victims who did not have a particular lawyer in mind or whose own lawyer was unavailable.

(5) The advocate shall be appointed by the court, on application by the police at the earliest convenient moment, but in order to ensure that victims were questioned without undue delay, advocates would be authorised to act at the police station before leave of the court was sought or obtained.
(6) In all rape trials anonymity (name not be disclosed) of the victim must be maintained, as far as necessary.

(7) It is necessary, having regard to the Directive Principles contained under Article 38(1) of the Constitution to set Criminal Injuries Compensation Board. Rape victims frequently incur substantial financial loss. For example some are too traumatised to continue in employment.

(8) Compensation of victims shall be awarded by the Court on conviction of the offender and by the Criminal Injuries Compensations Board whether or not a conviction has taken place. The Board will look into account pain, suffering and shock as well as loss of earnings.

4.2.10.8 Compensation for Sexual Harassment at Work Place

Sexual harassment is a violation of fundamental rights in Art 14, 15, 19 and 21, as established by Vishaka and Apparel Export cases. Therefore, women who face sexual harassment at their place of work have legitimate claims for compensation.

In Vishaka case court referred to the International Covenant on Civil and Political Rights (ICCPR) and judgments like Nilabati Behera indicate ‘an enforceable right to compensation’.
4.3 CRIMINAL LAW PROVISIONS

The provisions of the Indian Penal Code (IPC) can aid in the event of sexual harassment in the workplace and sexual harassment of women. In the IPC, there is no chapter specifically dealing with "Crimes against Women" and there is no act listed or described as "Sexual Harassment". To invoke the operation of penal provisions, the sole requirement is that the act complained of, i.e., sexual harassment must have all the ingredients of the commission or commission of the offence.

In the well-known case of Vishaka the Supreme Court of India expressed its serious concern over sexual harassment. The Court stated that, where "conduct amounts to a specific offence under IPC or any other law" the employer is under a legal obligation "to initiate appropriate action in accordance with law by making a complaint with the appropriate authority".

The Supreme Court observed that "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-colored remarks;
(d) showing pornography;
any other unwelcome physical, verbal or non-verbal conduct of sexual nature.

Sections 292, 354 and 509 of the Indian penal code cover such behaviour. It may be noted that the definition of sexual harassment given by Supreme 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.

The provisions of the IPC that may be used in the case of sexual harassment at work place are:

<table>
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<tr>
<th>Sections</th>
<th>Act</th>
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<tr>
<td>120 A and 120 B</td>
<td>Criminal conspiracy.</td>
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<td>292 – 294</td>
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<td>Abatement of suicide.</td>
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<td>339 – 348</td>
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<td>354</td>
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<td>Defamation.</td>
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<td>503, 506 and 507</td>
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<td>509</td>
<td>Word, gesture or act intended to insult the modesty of a woman.</td>
</tr>
<tr>
<td>511</td>
<td>Attempt to commit offences.</td>
</tr>
</tbody>
</table>

Indira Jaising, The lawyers collective, women's Rights initiative, "Law relating to sexual harassment at the work place", p.146.
4.3.1 Obscenity

Section 294 of IPC provides whoever to the annoyance of others:

(a) does any obscene act in any public place or
(b) sings, recites or utters any obscene songs, ballads or words in or near any public place shall be punished for three months or fine or
(c) both.

Section 294 of IPC applies when "the offender has done any obscene act in a public place or has sung, recited or uttered in or near any public place; and has so caused annoyance to others".

In the workplace the following activities may fall under the obscene acts. Writing obscene words or making obscene figures on the wall or furniture of the workplace;

Making obscene gestures or statements or singing obscene songs in the workplace. Gestures explicitly or symbolically replicating or representing sexual activity would amount to obscene gestures.

Placing obscene material in one's personal or official belongings, e.g., in the purse, in the files or among any other tools or implements of work, in a

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47 Id at p.162.
computer etc., obscene material may include contraceptives, pornographic or like text, or pornographic pictures or other representations.

The concept of indecency or obscenity is 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, to contain and eradicate this growth of indecency and obscenity in the society.

Test and Definition of Obscenity

Section 292 of the IPC envisages definition of obscenity, which runs as follows:

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 purient 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 likely, having regard to all relevant circumstances, to read and see or hear the matter contained or embodied in it.

The definition enunciated in the provision literally corresponds to the test of obscenity as laid down in the *R v. Hicklin*48. It was first in this case where the

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48 (1863) 3 Q.B. 360.
court laid down the test for obscenity. The Hicklin test, that is laid more than a century ago is obsolete.

Finally, the Supreme Court of America abrogated the Hicklin test and developed the three-prong test in *Miller V. California*\(^49\), the test called for an examination of:

(a) Whether the average person, applying contemporary community standard, would find that work, taken as a whole, appeals to the purient interest in sex;

(b) Whether the work depicts or describes, in a penalty offensive way, sexual conduct defined specifically by the applicable state law;

(c) Whether the work taken as a whole, lacks serious literacy, artistic, political or scientific value.

The Miller test remains the Constitutional measure for establishing the parameters of obscenity\(^50\).

**Constitutional Issue**

It is possible for the parliament and state legislatures to impose reasonable restrictions on freedom of speech and expression on the ground of *public decency and morality*, as enumerated under Article 19(2) of the Constitution. The ban on

\(^{49}\) 413 U.S. at 24.

\(^{50}\) Ian Saffer, "Obscenity Law and the Equal Protection Clause".
transmission of obscene messages is not unconstitutional because the pornography comes in low-speech category and the harm it produces is sufficient to justify the regulation of that expression. Supreme Court has ruled out in Ranjit D. Udeshi v State of Maharashtra\textsuperscript{51} that, speaking in terms of the Constitution can be hardly claimed that the obscenity which is an offensive to the modesty or decency is within the Constitutional protection given to free speech and expression because the Article dealing with right itself excludes it. The cherished right on which our democracy rests is meant for the free exchange of ideas and opinions in and out of the country is for advancement of human knowledge. This freedom is subject to reasonable restrictions under Article 19(2) in the interest of the general public and one such restriction is the interest of public decency and morality.

The Courts in various judgments have elaborated on the concept of obscenity, and have provided guidance as to what type of conduct may amount to obscenity and what type of situations may involve obscenity. Some are as follows:

When there is reference to sex in work having no literary, artistic or scientific value\textsuperscript{52},

When the work fall into the hands of a class of persons, who would suffer in their moral outlook, who would be depraved or who would have impure or lecherous thoughts developed in their minds\textsuperscript{53}.

\textsuperscript{51} AIR 1965 SC 881.
\textsuperscript{52} Samresh Bose v. Amal Mitra, AIR 1986 SC 1967
\textsuperscript{53} Supra note 51.
When the material would suggest to the minds of either sex thoughts of a most impure and libidinous character\(^54\).

### 4.3.2 Assault or Criminal Force

Section 354 of IPC deals with "Assault or criminal force to woman with the intent of outraging her modesty".

Whoever assaults or uses criminal force to any woman, intending to outrage 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.

An offence is said to be committed under section 354 when:

There is criminal use of force on any woman and

Firstly, this assault or criminal use of force is either with the intention to outrage the modesty of a woman or

Secondly, the person must know that it is likely that thereby he will outrage her modesty.

Requirement of showing assault or criminal force under section 354 of the IPC.

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\(^{54}\) (1868) 3 Q.B.360.
Under section 350 of the IPC "a person is said to use criminal force when he uses force on another person either to commit an offence or knowing that it will cause injury, fear or annoyance to another person".

- In the event of sexual harassment, criminal force is used if anything the woman is wearing, or has in her possession is moved or its state is altered or modified to intimidate or annoy her;

- If a woman is moving in a rickshaw or car and something is thrown upon her, or the movement of the vehicle is obstructed it shall also amount to use of criminal force;

- Leaving an intimidating/annoying message on the computer she works at, on the walls of her office, or on the official documents she deals with, or forwarding any intimidating or annoying message to her mobile phone shall also amount to use of criminal force. Unnecessarily inspecting her private documents or compelling her to give explanations unnecessarily coupled with overt or covert demands for sexual favours will fall in the range of the section;

- While passing by in a work place, if a male colleague lifts or drags or moves cloths worn by a woman (eg. Dupatta, Saree, Scarf, Shawl etc..) knowing that he is thereby likely to frighten, injure or annoy her.

Under section 351 of the IPC, a situation involves assault when a person intends or knows that he by his gesture or preparation he is causing apprehension in the other person (that criminal force is about to be used against the other person), and he makes that gesture or preparation (which may or may not be
accompanied by words). The explanation to the section says that mere words do not amount to an assault. However, the words which a person uses may give to his gestures or preparation such a meaning that they may amount to an assault.

The combination of the conduct and the request may fall under the description of assault. Sometimes any combination of words and physical action which effectively convey the injurious message will amount to assault, even if the actions by itself does not amount to assault.

4.3.3 Defamation

Under Section 499 of the IPC, a person is said to defame another person when the person, knowing or having reason to believe that such imputation will harm the reputation of another person, makes an imputation against him or her.

Any such imputation should have been made or published by words spoken or intended to be read, or by signs or visible representations. A direct or indirect imputation harms the reputation of another person when it:

In the estimation of other person lowers the moral or intellectual character of that person; or

Lowers the character of that person in respect of his caste or calling; or
Causes it to be believed that the body of the person is in a loathsome state; or
In a state generally considered as disgraceful\textsuperscript{55}.

Sexual harassment of women at work place can be pleaded under this section based on the following reasons.

- Imputation as to the character of a woman employee’s personal relationships;
- Imputation as to the professional efficiency and conduct of the employee;
- Imputation as to her chastity etc;
- Imputation as to her eligibility, qualifications, and her efforts to get at any position in public life;

4.3.4 Criminal Intimidation

According to section 503 of the IPC, the criminal intimidation occurs when:

(a) a person threatens another with injury to: his or her person, reputation or property or, to the person or reputation of any one in whom that person is interested,

(b) with the intention to cause alarm to that person, or

(c) to cause that person to do any act which he or she is not legally bound to do

\textsuperscript{55} Section 499, IPC, explanation 4.
(d) to omit to do any act which that person is legally entitled to do in order to protect himself or herself against the threat or to prevent the execution of the said threats against him or her.

This section will cover a situation where a woman at her work place is threatened with injury for resisting, sexual harassment and situations where she is threatened with injury to her family or employment.

A female employee is threatened with adverse consequences, for not accompanying the employer or the superior for a movie or a holiday etc.,

A female employee is threatened with dire consequences if she lodges a complaint against harassment;

A female employee who has already lodged a complaint is threatened not to pursue the matter further;

4.3.5 **Insult the Modesty of Women**

Section 509 of IPC deals with word, gesture or act intended to insult the modesty of 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 one year, or with fine or with both.

An offence under this section is said to be committed:

Firstly, when the offender has an intention to insult the modesty of woman and he with the intention utters any word or exhibits any object and while uttering the word or exhibiting any object, he further has the intention that such word or sound shall be heard or that such gesture or object shall be seen.

Secondly, when the intruder with the intention of insulting the modesty of woman intrudes upon the privacy of such woman. Outraging and intending to outrage make section 354 an offence entailing heavier punishment than section 509, where the act criminalises insulting the modesty of a woman. In other words, the phrase ‘outraging’ describes more serious conduct than ‘insulting’.

4.3.6 Modesty

In Bajaj v. KPS Gill, the Supreme Court held that, the ultimate test for ascertaining whether modesty has been outraged is that the action of the offender could be perceived as one, which is capable of shocking the sense of decency of a women. 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 withstanding.

After Bajaj, an act capable of 'shocking the sense of decency of women' may amount to insulting or outraging the modesty of a woman whether it has 'sexual overtones or not'.

In Bajaj, the concepts of modesty and privacy have been construed in a more egalitarian manner, so that any other kind of harassment convenience, be it in a women's private or public life, may amount to an offence. Now, subtler instances of outraging modesty and intruding upon a woman's privacy can be addressed under the said provisions.

Entering into a woman's work place or work station with an intention to commit an offence or intimidate, assault or annoy her will not only be covered under the above mentioned sections but may also amount to criminal trespass under section 441 IPC.

The range of Acts covered by sections 509 and 354 of the IPC. Having the intention to insult / outrage the modesty of a woman is an essential element of both the sections. Intention, as in all criminal offences, has to be proven from the acts of the accused and the attendant facts and circumstances.

Whenever an offence has been committed under the IPC, need to report it to the police. Thereafter, the police will investigate the matter and the courts will try the person for the offence under the rules laid down by the Criminal Procedure Code.

4.4 RECOUSE THROUGH TORT LAW

The existing tort regime in India does not provide sufficient recourse to victims of sexual harassment in the work place. In comparison to other areas, Indian tort jurisprudence is underdeveloped and tort law is under utilised and characterised by lengthy delays, over burdened courts, a multiplicity of appeals, prohibitive court fees, lack of sensitisation, lack of judicial awareness on sexual harassment at work place and limited damages.

In India, tort damages can be awarded for mental pain distress, indignity, loss of liberty and death. However, emotional distress per se without physical harm is not actionable. According to Saheli decision.

"An action for damages lies for bodily harm which includes battery, assault, false imprisonment, physical injuries and death. In cases of assault, battery and false imprisonment the damages are at large and represent a solatium for the mental pain, distress, indignity, loss of liberty and death”.

57 Saheli v. Commissioner of Police (1990)1 SCC 422.
4.4.1 Assault and Battery

Assault is defined as an attempt or threat to do a corporeal hurt to another, coupled with an apparent present ability and intention to do the act.

Battery is defined as the intentional and direct application of force to another person\textsuperscript{58}.

Assault and battery often serve as the base for tort action in sexual harassment cases in the United States and are included in the same cause of action\textsuperscript{59}.

In California, statutes prohibiting sexual battery and stalking have been enacted in addition to the general ban on battery\textsuperscript{60}.

Although tort claims for battery have been successfully brought in India, Indian battery Law has not been applied to cases of sexual harassment.

4.4.2 False Imprisonment

False imprisonment is defined as a total restraint of the liberty of a person, for however short a time, without lawful excuse. This requires the total restraint of the liberty of the person and the detention must be unlawful. It is also defined as

\textsuperscript{58} Winfield and Jolowicz on Tort, p.71.
\textsuperscript{59} \textit{Infra} note 62
\textsuperscript{60} California Civil Code 1708.5-7.
the infliction of bodily restraint which is not expressly or impliedly authorised by law.\textsuperscript{61}

Under California law, the tort of false imprisonment comprises the "non-consensual, intentional confinement of a person, without lawful privilege, for an appreciable length of time, however short". Acts of sexual harassment are actionable as false imprisonment, including impeding an individual's movement, blocking the door to an office so that an individual cannot leave, or using one's authority to force a subordinate employee to go somewhere he or she does not wish to go\textsuperscript{62}.

In India, although false imprisonment cases have been successfully litigated, the tort has never been applied to sexual harassment.

\textbf{4.4.3 Defamation}

Defamation may be found when one individual publishes, either orally or in writing, a false statement about another that results in harm. The type of harm contemplated by this tort include exposure to hatred, contempt of ridicule, injury to trade, business or profession, and ostracism from society. The provision of employment references may also implicate defamation. For example, a defamation claim may be brought when an employer comments on employees sexual relations or flirtatious behaviour, keeping photographs in the computer etc.,

\textsuperscript{61} \textit{Infra} note 64 at p.81.

Defamation is of two kinds. Libel and slander;

Libel is a publication of a false defamatory statement tending to injure the reputation of another person without lawful justification or excuse. The statement must be expressed in some permanent form e.g., writing, printing, pictures etc.,

Slander is a false or defamatory statement by spoken words or gestures tending to injure the reputation of another.

4.4.4 Privacy

The concept of privacy in India is established. Privacy is a recognised tort applying against a private company. In *R.Rajagopal v. State of Tamil Nadu*\(^6\)\(^3\), the Court stated:

"The right to privacy is an independent and distinctive concept originated in the filed of tort law under which a new cause of action for damages resulting from unlawful invasion of privacy was recognised. The right has two aspects, which are two faces of the same coin,

(1) the general law of privacy which affords a tort action for damages resulting from an unlawful invasion of privacy and

\(^6\)\(^3\) (1994) 6 SCC 632.
(2) the Constitutional recognition given to the right of privacy which protects personal privacy against unlawful governmental invasion ... In recent times, however, this right has acquired Constitutional status.

Therefore, the tort of invasion of privacy may be used as a ground for actionable sexual harassment. The invasion of privacy concept may also be invoked as a Constitutional claim if state acts are involved.

4.4.5 Negligence

Negligence is a breach of a legal duty to take care which results in damage to the claimant. In sexual harassment cases, failure to investigate or take effective corrective action will constitute a breach of the employer's duty.

Under California's FEHA statute, a standard of care is established which can give rise to independent claims of negligence. Claims can also be brought for negligent hiring and negligent supervision, eg., when an employer failed to request references when the accused was hired.

In India, claims of negligence have been successfully litigated under the Motor Vehicles Act (MVA, 1988). Principles of contributory negligence and compensation quantification are set out in these cases, providing a useful foundation for sexual harassment at workplace claims to build upon.

64 Winfield and Jolowicz on Tort, p.103.
65 Supreme Court Digest on Recent cases (2003) 8, 731.
An employer is under a common law duty to have regard for the safety of his or her employees, and owes certain common law and statutory duties to his or her employees. Employer liability arises when the employer's personal action either directly or indirectly infringes a protected right, or when the employer authorizes or condones in appropriate behaviour of employees. Thus an employer is obliged to take such steps as are reasonably necessary to ensure the safety of his or her employees.

Safe System of Work

An employer may be held liable under the common law tort of failure to provide a safe system of work. This applies not only to physical harm, but also to conduct resulting in severe emotional trauma that affects employment and work performance. The basic principle underlying this particular tort was expanded by the House of Lords in *Mc Dermid v. Nash Dredging & Reclamation Co. Ltd.*, 66. In this case, it was held that the principle may be divided into three parts:

1. An employer owes to his or her employee a duty to exercise reasonable care to ensure that the system of work provided for him or her is a safe one.

2. The provision of a safe system of work has two aspects (a) the devising of such a system and (b) the operating of it.

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3. The duty has been described as personal or non-delegable. This qualification does not mean that the employer cannot delegate it but only that the employer cannot escape liability if the duty has been delegated and then not properly performed.

In the context of sexual harassment at workplace, the employer may have a duty to ensure that female employees have an environment free from hostility in which to work. Additionally, in terms of the second part of the duty, the employer should devise guidelines prohibiting acts of sexual harassment and should provide a forum for grievances as well as disciplinary mechanisms to deal with offences.

The Vishaka guidelines provide that, "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 woman employee should have reasonable grounds to believe that she is disadvantaged in connection with her employment". Thus, as noted above, an employer can be held liable for the failure to provide a safe working environment and sexual harassment at the workplace may constitute a health and safety problem.

Vicarious Liability of the Employer

The employer is liable for every wrong of the servant or the agent committed in the course of service for the employer's benefit, though no express command or privity of the employer is provided\(^67\).

The Supreme Court in *State Bank of India v. Shyama Devi*\(^{68}\), held that, before the master is held liable, it must be shown that the damage complained of was caused by the wrongful act of the servant or agent done within the scope or course of employment. The employer is liable for conduct of his or her employee or supervisors, which constitutes sexual harassment at the work, as long as the said act was performed in the "course of employment", whether or not for the benefit of the employer or the master. It is a question of fact in each case whether the act was committed in the course of employment.

**Employer's Liability for Third Party Harassment**

Careful review of cases in other jurisdiction establishes that an employer can be held liable for the harassment of employees by third parties. An employer not only has a duty to protect an employee from fellow employees but also has a duty to protect an employee from harassment by third parties. This duty clearly arises in the employment context whether the harasser be a customer a member of the public, or anyone else who comes into contact with the employee while she is at work.

The *Vishaka* guidelines provides that, it is the duty of the employer or person in charge to prevent sexual harassment by a third party and to take steps for the protection from the same. The guidelines state:

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\(^{68}\) (1978) 3 SCC 399.
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.

4.5 RECOUSE THROUGH LABOUR LAWS

The Industrial Dispute Act lists the following as "unfair labour practices":

To interfere with, restrain from, or coerce workmen in the exercise of their right to engage in concerted activity for the purpose of collective bargaining or other mutual aid or protection.

To discharge or dismiss workmen by way of victimisation or not in good faith or for patently false reasons, on patently trumped up charges or in utter disregard of the principles of natural justice in the conduct of a domestic enquiry.

To transfer a workman *malafide* from one place to another, under the guise of management policy.

To show favouritism or partiality to one set of workmen regardless of merit.

69 Section 2, r/5, 5th Schedule of the ID Act.
To indulge in an act of force or violence.

Therefore, applying these generic principles to the context of sexual harassment at work place, the following, action could constitute unfair labour practice\textsuperscript{70}.

If the management tries to restrain or coerce a woman employer or interfere in her efforts to assist or agitate a case of sexual harassment at work place.

If the management discharges or dismisses her for complaining against sexual harassment at work place.

If the management transfers her, for complaining against sexual harassment at work place, from one place to another, under the guise of management policy.

If the management favours or shelters a perpetrator of sexual harassment at work place.

If the management fails to take appropriate preventive and protective action against sexual harassment at work place.

If an employee suffers unfair dismissal or denial of employment benefits as a consequence of her rejection to sexual advances, this constitutes an unfair labour practice.

\textsuperscript{70} Supra note 46, p.201.
In *shehnaz v. Saudi Arabian Airlines* case, Shehnaz was subjected to sexual harassment by her boss in 1985, and dismissed her from services when she complained to higher authorities. In 1996 Bombay Labour Court held that, her dismissal was unfair under the Industrial Dispute Act and ordered for her reinstatement with full payment with retrospective effect, perks and promotions.

The following table lists the types of sexual harassment at work place in respect of which an industrial dispute can be raised.

<table>
<thead>
<tr>
<th>ACTION</th>
<th>EMPLOYER'S REACTION</th>
<th>TYPE OF RELIEF</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Resist advances</td>
<td>• Dismissal</td>
<td>• Reinstatement</td>
</tr>
<tr>
<td>• Complain about SHW</td>
<td>• Denial of</td>
<td>• Restoring of status quo ante (previous status)</td>
</tr>
<tr>
<td>• Support a victim of SHW</td>
<td>• Promotion, demotion/taking away of <em>adhoc</em> promotional post</td>
<td></td>
</tr>
<tr>
<td>• Given testimony in departmental inquiry against abuser</td>
<td>• False charges such as theft, negligence</td>
<td>• Quashing of the false inquiry</td>
</tr>
<tr>
<td>• Participate in protest against abuser or management inaction.</td>
<td>• <em>Malafide</em> transfer</td>
<td>• Transfer of abuser</td>
</tr>
<tr>
<td>• Refuse to work with the abuser or decline late right/out station assignments.</td>
<td>• Protection of the abuser</td>
<td>• Cancellation of your transfer or a favour posting away from the environment.</td>
</tr>
<tr>
<td></td>
<td></td>
<td>• Disciplinary action against abuser, if he is a workman.</td>
</tr>
<tr>
<td></td>
<td></td>
<td>• Payment of compensation for SHW.</td>
</tr>
</tbody>
</table>
An "unfair labour practice" is also punishable under section 25T read with section 25 u of the ID Act with imprisonment for a term which may extend to 6 months, or with a fine of up to one thousand rupees, or both. However, for this to be the case the complaint has to be filed by the Department of Labour which, under section 34 has to sanction prosecution of the complaint.

4.5.1 Who Can Raise an Industrial Dispute

An industrial dispute usually espoused by a trade Union whether such Union is recognised by the management or not. An individual workman can also independently raise an industrial dispute in relation to his or her discharge, dismissal, retrenchment or termination without having to approach a union.

However, in case of victimisation for complaining against sexual harassment at work place takes the form of a transfer, a demotion, biased treatment
or harassment at work, the dispute would have to be raised or espoused by a trade union since an individual cannot directly access the machinery under the ID Act.

4.5.2 How to proceed with an Industrial Dispute

The court in General Manager, Security paper Mill Hoshangabad v. R.S. Sharma⁷¹, summed up the role of a conciliation officer as follows:

Even though a conciliation officer is incompetent to adjudicate upon the dispute between the management and its workmen, he is expected to assist them to arrive at a fair and just settlement. He is to play the role of an adviser and friend of both parties and should see that neither party takes undue advantage of the situation.

⁷¹ (1986) Lab IC 887 (669).
Section 3 of the ID Act provides that in units employing more than 100 workmen, the Government can direct the management to constitute a Works Committee (WC). According to the vishaka guidelines, the Central Government issued instructions in an office memorandum dated 12th December, 2002, directing that a Complaints Committee presided over by a woman should hold the preliminary inquiry and that its findings be binding on the disciplinary authority then the disciplinary authority decides whether to initiate disciplinary action.

The Supreme Court in Medha Kotwal Lele and Others v. Union of India\(^{72}\), has clarified that, the complaints committee shall be deemed to be an inquiry authority for the purposes of the Central Civil Services (Conduct) Rules (1964) and that the Complaints Committee’s report shall be deemed to be an inquiry report.

4.6 SERVICE LAW

In India, Service Law covers public employment, including Government employees, employees of statutory corporations, employees of public sector undertakings, and employees of banks and educational institutions.

4.6.1 Misconduct Under Service Law

Misconduct is a generic term and means a conduct amiss; to mismanage; wrong or improper conduct, bad behaviour; or unlawful behaviour or conduct. It includes malfeasance, misdemeanor delinquency and offence.

\(^{72}\) WP (Cr.) No.173-177/1999 decided on 26-04-2004.
Some acts that are considered to be misconduct are: unauthorised absence from duty, drinking alcohol on duty, misappropriation of Government money, gross negligence, disobedience, acting beyond one's authority, illegal gratification, lack of discipline and insubordination.

Until 1997, the conduct rules, regulations, by-laws, etc., did not list out sexual harassment as misconduct though it was possible to show sexual harassment as an act 'unbecoming of a Government Servant' or 'act subversive of discipline'. Taking note of this lacuna in the law, the Supreme Court of India in *Vishaka* laid down broad guidelines concerning conduct that amounts to sexual harassment and the manner in which complaints of sexual harassment should be dealt with. The court also directed that all employers include sexual harassment as misconduct in their rules, regulations, standing orders etc.,

Sec 3(I)(iii) of Central Civil Services (Conduct) Rules provides that any act of sexual harassment of women employees will be as an act, unbecoming of a Government Servant and amounts to misconduct.

Sexual harassment in the work place is a misconduct for which disciplinary action will be taken.

4.7 CYBER LAWS

Every day the electronic technology is growing by leaps and bounds and the whole world is at the fingertips of an individual in second's time through the cyber medium commonly known as the Net (Internet).
Cyber stalking is a relatively new form of electronic crime. Its victims are mostly invisible and its violence is primarily verbal. Harassment on net can take place in many forms a woman may incur sexual harassment at work place on net.

In order to check the cyber crimes. The parliament of India passed its first cyber law, Information Technology Act, 2000, which provides the legal infrastructure for e-commerce in India. The said Act received the assent of the president of India on June 9, 2000 and became the law of the land73.

The following two sections can be used in the instances of sexual assault.

Section 67: Publishing of information which is obscene in electronic form.

Whoever, publishes or transmits or causes to be published in the electronic form, any material which is lascivious or appeals to the prurient interest or if its effect is such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it, shall be punished on first conviction with imprisonment;

Of either description for a term which may extend to five years. And with fine which may extend to one lakh rupees. And in the event of a second or subsequent conviction with imprisonment of either description for a term which may extend to ten years. And also with fine which may extend to two lakh rupees.
Section 72: Penalty for breach of confidentiality and privacy.

Any person who, in pursuance of any of the powers conferred under this Act, rules or regulations made there under, has secured access to any electronic record, book, register, correspondence, information, document or other material without the consent of the person concerned discloses such electronic record, book, registers, correspondence, information document or other material to any other person shall be punished with imprisonment for a term which may extend to two years or with fine which may extend to one lakh rupees or with both.

The company becomes liable not only due to harasser’s status as employee but because they actually make their company a party to the harassment by using company resources to harass co-workers. The onus is on the company to take effective and appropriate action to terminate the net harassment.

The Minister for Information, Technology and Communication, Dayanidhi Maran laid a 10 point agenda for the Indian Information Technology industry. Government has announced National Broad Band Policy, it deals with net work service providers like Websites, Internet service providers and mobile service providers 74.

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73 Crime and the Cyber laws, Crime and Detective, April, 2005.
Parliament enacted the Indecent Representation of Women (Prohibition) Act, 1986 to prohibit indecent representation of women through advertisements or publications, writings, printings, figures or in any other matter.

As per section 2 (c)\textsuperscript{75}, of the 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 to injure the public morality or morals.

Although it is not known to have been used in cases of sexual harassment, the provisions of this Act have the potential to be used in sexual harassment at work place in two ways.

Firstly, if an individual harasses another with books, photographs, paintings, pamphlets, packages etc., containing indecent representation of women, shall be made liable under section 4 of the Act\textsuperscript{76}.

Secondly, a 'hostile working environment' type of argument can be made punishable under section 7 of the Act (offence by companies) – holds companies, where there has been ‘indecent representation of women’ (such

\textsuperscript{75} The Indecent Representation of Women Act 1986.

\textsuperscript{76} Ibid.
as the display of pornography) on the premises are guilty of offence under this Act.

4.9 INTERNATIONAL INSTRUMENTS ON SEXUAL HARASSMENT

Global trade and investment patterns are having a dramatic impact on employment relations and work arrangements. Due to globalization / economic liberalization economic outcomes are now influenced more by market forces than by legal norms or state interventions\textsuperscript{77}. Globalization has meant rapid change in the world of work. It has resulted in greater integration of markets and increased mobility of goods and services. There has also been much greater flexibility in the movement of capital across countries leading to the rise of multinational corporations. There is also a growing awareness as regards human rights at work and equality, conceptualizing violence against women as a violation of human rights was a critical first step in framing abuses of women's rights within the international human rights system. The recognition of violence against women as a human rights violation, and the implementation of legal and policy measures to make this recognition a reality, have been pivotal goals of the international movement for women's human's rights.

4.9.1 Sexual Harassment at Work Place-Violation of Human Rights

Human Rights are those rights, which inhere in every human being by virtue of being a member of human family.

\textsuperscript{77} 'Decent Work', \emph{International Labour Office Publication}, 1999.
Mrs. Rene Cassin, the Noble Peace Prize Winner, the person most respectable for the draft of the Universal Declaration of Human Rights gave a deductive definition: the Science of human rights is defined as a particular branch of the Social Sciences, the object of which is to study human relations in the light of human dignity while determining those rights and faculties which are necessary as a whole for the full development of each human being's personality.


The Universal Declaration of Human Rights, 1948 adopted on 10th December, 1948, proclaims that “All human beings are born free and equal in dignity and rights” under Article 1.

Article 2 set out the general ban on discrimination of any kind, including on the basis of sex.

Article 23 says “Everyone has the right to work, to free choice of employment, to just and favourable conditions of work”.

The International Covenant on Economic Social and Cultural Rights 1966 promises women’s equality of status and proclaims that.
Everyone has right to work under Article 6 and every one has right to fair conditions of employment under Article 7.

The International Covenant on Civil and Political Rights 1966 prohibits discrimination and guarantees to all persons equal and effective protection against discrimination on all grounds including sex under Article 26.

4.9.2 Convention on the Elimination of Discrimination Against Women

The most important conceptual advance in the international law of women’s rights is the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW). Which provides that women shall be given equal rights with men. Article 11 and 24 of CEDAW ensures Right to work and Equality at work; free of violence.

In the light of these Articles, CEDAW recommends that,

I) States parties should include in their report information on sexual harassment and on measures to protect women from sexual harassment … in the work place.

II) Preventive measures, including public information and education programmes to change attitudes concerning the roles and status of men and women.
The Government of India has ratified the above resolution on 25th June, 1993.

4.9.3 International Labour Organisation

Among the specialized agencies of the United Nations system, the International Labour Organisation (ILO) has been in the vanguard in addressing discrimination against working women, particularly through the adoption of the discrimination (Employment and Occupation) Convention, 1958 (No.III). In examining states reports of Convention No.III over the years the International Labour Organisation, Committee of experts on the application of conventions and recommendations has often noted with interest the advances made in the elimination of sexual harassment in employment.

The International Labour Organisation has the distinction of being the only international body to have adopted an instrument containing protection against sexual harassment. The International Labour Organisation attention to the issue is also evident in a number of non binding instruments;

The 1985 International Labour Conference Resolution on equal opportunity and equal treatment for men and women in employment;

The conclusions of the 1989 International Labour Organisation Meeting of Experts on Special protective Measures for Women and Equality of
opportunity and treatment, categorizing the personal security of workers (notably sexual harassment and violence arising from work) as a safety and health problem;

The conclusions of the 1992 Tripartite symposium on Equality in Employment in Industrialised Countries, referring specially to sexual harassment;

1991 International Labour Conference Resolution Concerning ILO action for women workers requesting the International Labour Office to develop guide lines, training and information materials on issues of specific and major importance to women workers, such as sexual harassment in the work place.

The ILO Mission Statement of Decent work

Decent work, the ILO's current goal has essentially been formulated keeping in mind the view that it is becoming increasingly important to view economic growth vis-à-vis fundamental rights at work.

India is a signatory to ILO conventions and has enacted a plethora of Labour and Industrial Laws aimed at interalia securing healthy and favourable conditions of work.
Other international agencies have also addressed the problem of sexual harassment notably the International Monetary Fund, the World Bank and UNESCO.

None of the provisions discussed in this chapter target sexual harassment directly. They are either too general, too indirect or too vague. The word “sexual harassment” has neither been defined in the IPC nor in any other statute. Rate of commission of cyber crimes or Internet sexual harassment in India is increased with the spread of computer and network popularity. Most of our laws are outdated and not upgraded or fine-tuned with the change in latest technology.

There is no direct legislation to prevent sexual harassment at work place. There is indirect Constitutional, legal and human rights protection to women on sexual harassment at work place. The apex court guidelines assume great significance in the absence of direct legislation.

4.10 PROPOSED BILL ON SEXUAL HARASSMENT

National Commission for Women took up the task of formulating a comprehensive legislation to deal with sexual harassment at work place. For drafting the law it set up a group of civil society activists and finally a law came to be drafted. This Bill in turn was submitted to the ministry of Human Resource Development, Department of Women and Child Development, which made amendments to this Bill and invited suggestions from the public at large. When Medha Kotwal's case came up in Supreme Court in late 2004, the Solicitor General
made a statement that the Government was serious in introducing a law to deal with sexual harassment at workplace and court adjourned the matter so that the petitioners and other organisations could study the Bill and make recommendations.

A National Consultation on the sexual harassment bills was held on the 23rd and 24th of October 2004 involving organizations from across the country, working on the issue of sexual harassment at workplace.\(^78\) The objective of the consultation was a sound discussion of the Government's Bill\(^79\) and the alternate draft bill suggested by the organizations. The alternate Bill is more in the nature of a revised Bill as it does in many respects accepts the framework of the Government Bill. However there are major areas where the Government Bill lacking either in substance or in details.

Some of the major victims of sexual harassment are service beneficiaries (who are not employees) such as students in educational institutions, patients in hospitals, customers in banks, etc. Though the Government Bill does include students and other service beneficiaries in a peripheral manner there is no focus on these victims. The alternate Bill devotes a new Chapter for the service beneficiaries.

Similarly, there is widespread sexual harassment indulged in by professionals such as doctors, lawyers and others. This may not be at any workplace but at any place where an intra professional or inter professional relationship

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\(^78\) Mihir Desia, "Starting the Battle", *Cambat Law* Jan 2005, p.15

\(^79\) Supplemented in the Annexure-I
exists. For instance a lawyer may be harassed by an entirely unrelated lawyer in the court premises. The Government's Bill does not deal with this issue. The alternate Bill brings in these relationships also into its sweep with the idea that at least statutory bodies of these professionals such as the Medical Council, Bar Council, etc. start treating such actions as professional misconduct.

One of the major lacuna of the Government Bill concerns the unorganised sector. Though there is a mention that Local Committees will be set up to deal with those employers having less than 50 employees, no details are provided about the function and jurisdiction of these committees. The alternate Bill tries to rectify this by providing detailed mechanism for dealing with complaints of sexual harassment within the unorganized sector.

The Government Bill has also not dealt extensively with protection of the victim within the domestic enquiry in terms of the manner and type of questions which would be put, etc. It is trite to say that most women who are subjected to sexual harassment or molestation have to undergo a harrowing time while being cross examined about their past sexual history and similar other questions. The alternate Bill tries to remedy this by giving adequate protection to women who are under cross examination.

The Government Bill proceeds on the footing that as soon as a complaint of sexual harassment is made a full fledged, enquiry must follow. In most of the cases women may not want this and they may only want counselling services. Many cases get sorted out by the Committee just sternly talking to the man or giving him
a warning. Some cases may even be sorted out by mediation. Though the Government Bill does talk about mediation, no framework for counselling is provided and again the alternate Bill takes this into account.

There are many minor changes in terms of procedure of enquiry, selection and functions of committees, etc. which are also suggested in the alternate draft. The alternate draft also focuses on providing compensation to the victim.

Again recently in April 2005 the Government has invited public comment on a revised new Bill to replace Supreme Court norms to deal with sexual harassment at workplace. So, far Bill is not passed.

Hope the comprehensive legislation to combat sexual harassment at workplace, amended according to latest technological developments will soon become a reality.