CHAPTER 3

SEXUAL HARASSMENT VIS-À-VIS GENDER DISCRIMINATION

"Gender-based violence and all forms of sexual harassment and exploitation including those resulting from cultural prejudices, international trafficking are incompatible with the dignity and worth of human person and must be eliminated".


The status of Indian women is, after a long history of discrimination and subjugation undergoing a change in India. Women are now passing through a phase between subjugation and emancipation and are now entering the outside world leaving behind the age-old tradition of domestic confinement. However, gender based discrimination still represents the ugly face of the society. Gender bias has widened the gap between women and men and put the women in disadvantageous treatment.

The terms ‘sex’ and ‘gender’ are often used interchangeably, but in sociological literature they are frequently differentiated. The term ‘sex’ is applied to differences between men and women that are based on biological differences such as anatomy, physiology, hormones and chromosomes and in this respect people are either male or female. The term ‘gender’ is applied to the cultural aspect of male and female roles. In other words the behaviour, personality other
social attributes that are expected of males and females and these social attributes become the basis of masculine and feminine roles

3.1 VIOLENCE AGAINST WOMEN

Violence against women vary with different economic, social and cultural contexts, there is no doubt that the phenomenon is universal and a major factor in the subordination of women worldwide. In the 1980s, when violence against women first became a major issue for women’s movements in every region, the focus was on acts of overt physical and sexual violence. This include for example female infanticide, female foeticide, wife battering rape, wife burning in private sphere, sexual harassment, stoning and rape in public arenas.

By the 1990s the definition of violence had been expanded to include more structural forms of gender-based violence. Certain cultural practices, like son-preference, dowry customs, virginity tests etc., were high lighted as demeaning to women and fostering conditions that normalize and tolerate abuse of women’s rights. In this way, violence against women increasingly has been understood as encompassing an environment in which such abuses can be perpetrated with impunity and some times even with social sanction. Violence against women, regardless of the nature of the perpetrator an individual group, institution, the state or society is a human rights violation and is treated as such whether it happens in the home, within the family or out side of it.

1 Justice J.N. Bhatt, “Gender Equality; Turmoil or Triumph?”, Indian Bar Review, Vol.XXV(2) 1998, P.1
The term violence against women means "any act of gender based violence that results in or is likely to result in physical, sexual or psychological harm or suffering to women including threats of such acts, coercion or arbitrary deprivation of liberty whether occurring in public or private life."

3.1.1 Forms of Gender Violence

Various forms of gender violence are;
1. Physical violence – leading to injury;
2. Sexual violence – robbing women of their dignity not only by indecent behaviour but also raping;
3. Verbal violence – use of abusive and derogatory language, against a woman or her dignity;
4. Social violence – demeaning, disparaging and humiliating a woman;
5. Emotional violence – deprivation of love and affection, concern, sympathy and care;
6. Intellectual Violence – denial of rights to take part in decision making;
7. Other forms of violence include not providing women educational opportunities, denial of reproductive rights, denial of access to health facilities or committing atrocities like forcing women to enter into professions like trafficking and prostitution.

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3.1.2 Gender Asymmetry

Notwithstanding the enactment of the laws relating to violence against women, the ground reality is rather distressing. The report of the International Labour Organisation says: women constitute 50% of the population make up 30% of the labour force, perform 60% of all working hours, receive 10% of the world's income and own less than 1% of the world's property. An article on "status of women in India – A depressing scenario" which appeared in the tribune of Chandigarh edition on 15th April 1999 points out that rape takes place once in every 54 minutes; eve teasing in every 51 minutes; molestation once in every 26 minutes and dowry deaths in every 1000 minutes. According to the United Nations Population Fund, the national average dropped to 927 girls per 1,000 boys in 2001 from 945 per 1,000 in 1991. Punjab, Haryana, Gujarat and Himachal Pradesh had a child sex ratio of less than 900 girls for 1,000 boys. 70 Districts in 16 States and Union Territories recorded more than a 50 point decline in the child sex ratio in the last one decade. The reason behind decline of child sex ratio is – Gender based violence.

3.1.3 Gender Based Violence

Gender based violence is one of crucial social mechanisms by which women are forced into a subordinate position compared to men.

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3 Competition Success Review, March 2004 issue p.20
4 The Beijing Declaration and the Platform for Action. OP. Cit. P.74
Gender based sexual violence apart from being a dehumanizing act is an unlawful intrusion of the right to privacy and sanctity of female. It is a serious blow to her supreme honour and offends her self-esteem and dignity. It degrades and humiliates the victim.

The committee established under the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) stated that, Gender based violence is a form of discrimination that seriously inhibits women's ability to enjoy rights and freedoms on the basis of equality with men.

The Committee concluded that definition of discrimination under Article 1 of the convention includes gender-based violence. Such violence may violate specific provisions of the convention regardless of whether violence is mentioned in those provisions. The committee defined gender-based violence as,

"Violence that is directed against a woman because she is a woman or that affects women disproportionately. It includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty."

The problem of gender-based violence is being recognised not only as a crime but also as a major obstacle in the enjoyment of various human rights eg.,

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5 General recommendation No.19, Eleventh Session, 1992
6 Ibid.
right to equality, freedom, life and security of person, peace and development by the women.

3.1.4 Declaration on the Elimination of Violence Against Women

The Declaration on the Elimination of Violence Against women adopted by the UN General Assembly on 20th December 1993, deals exclusively with the question of violence against women.

The Declaration is the first international instrument to express international political consensus that states have human rights obligations to prevent gender-based violence and to redress the harm caused. The aims of the Declaration are to answer the “need for a clear and comprehensive definition of violence against women, (and) a clear statement of the rights to be applied to ensure the elimination of violence against women in all its forms” and to establish a “commitment” by states and by the international community to eliminate violence against women.7

The Declaration defines violence against women as, ‘Any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life’.8

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8 Article 1 of “Declaration on the Elimination of Violence Against Women”
Article 2 of the Declaration identifies the site of violence as, violence in the family, violence within the general community and violence perpetrated or condoned by the State wherever it occurs. The definition of violence in the Declaration is not restricted to actual use of physical force, but includes all forms of action that disempower women because of the fear of violence, whether the fear is instilled by the State acts or the community or members of the family.

Article 4 of the Declaration enumerates state obligations with regard to the elimination of violence against women. Those are:

- The state is obliged to condemn violence against women and is expected to not to invoke custom, tradition, or religion to avoid the obligation;
- States should "exercise due diligence to prevent, investigate and in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons";
- "Adopt all appropriate measures, especially in the field of education, to modify the social and cultural patterns of conduct of men and women and to eliminate prejudices, customary practices and all other practices based on the idea of the inferiority or superiority of either of the sexes and on stereotyped roles for men and women";
• "Promote research, collect data and compile statistics, especially concerning domestic violence, relating to the prevalence of different forms of violence against women and encourage research on the causes, nature, seriousness and consequences of violence against women";

• Develop legal and administrative mechanisms to ensure effective justice for victims of violence;

• Ensure that there is specialised assistance in terms of support and rehabilitation for women victims of violence;

• Training judicial and police officials;

• Ratification of the Convention on the Elimination of All Forms of Violence Against Women; and

• Full reporting of the problem of violence against women to international human rights mechanisms”.

The Declaration on the Elimination of Violence Against Women is “a significant step towards building the normative framework applicable to violence against women. It underscores the connections between gender-based violence and women’s subordination in public and private life⁹.

3.1.5 Gender Discrimination

The essential fall-out of gender bias is gender discrimination which evades the very concepts of humanism, human rights and rationality. Women, throughout the world have been treated like sub-humans. Deeply ingrained prejudices against

⁹ Ibid
them, which have persisted through ages and still constitute a dominant feature of contemporary world have made mockery of the very concepts of scientific objectivity and perception and scientific progression of society in this context. This is evident from the fact that inspite of being aware of their equal work, ability and contribution to the society, no society of the world has been able to cast off its old worn-out notions and resultant practices against them. Discrimination is visible even in most advanced countries of the world.

A large number of countries have taken measures to ensure equal rights of women. Notwithstanding all these measures, declarations, global campaign for their empowerment, women face discrimination at every step and in every walk of life. It is also distressing to note that women are most discriminated against by those with whom they are most intimate and in whom they have placed utmost faith. As Stated by Mahatma Gandhi, “Of all the evils for which man has made himself responsible, none is so degrading, so shocking, so brutal as his abuse of the better half of humanity”.

The practice of treating a particular group in society less fairly than others or some form of disadvantageous treatment for one class of people is discrimination. When one gender of the society is subjected to persistent unfair or disadvantageous treatment, is gender discrimination.

According to the Convention on the Elimination of all forms of Discrimination against Women, Discrimination against women means:
“Any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on the basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field”\textsuperscript{10}.

General Assembly of United Nations recognised in 1967 says:

“Discrimination against women, denying or limiting as it does their equality of rights with men, is fundamentally unjust and constitutes an offence against “human dignity”\textsuperscript{11}.

The United Nations proclaimed the year 1975 as International year of women for the abolition of discrimination against women. The resolution endeavors:

“To strive for equality between men and women; to promote a higher role of women in economic, political, social and cultural life of countries to promote their active participation in the struggle for the development of friendship and co-operation between nations, for peace and social progress”\textsuperscript{12}.

\textsuperscript{10} Art. 1 of CEDAW
\textsuperscript{11} Ibid.
\textsuperscript{12} Conventions Against Women’s Discrimination
3.1.6 Conventions Against Women’s Discrimination

The “Second World Conference on Human Rights” held at Vienna in June 1993, declared that, human rights of women and the girl child are inalienable, integral and indivisible part of Universal human rights. The full and equal participation of women in political, civil, economic and cultural life at the regional, national and international levels and the eradication of all forms of discrimination on grounds of sex. Vienna declaration specifically condemned gender based violence and all forms of sexual harassment and exploitation.

The “Fourth World Conference on women” held in Beijing in September 1995 reaffirmed that, gender equality is a fundamental prerequisite for social justice.

The Beijing conference was a milestone in the progress towards, women’s empowerment. A far reaching Platform For Action (PFA), based on the Nairobi Forward – Looking strategies, provided global commitments and action points in a wide range areas to achieve the three objectives of the conference equality, development and peace. The Beijing Platform For Action (PFA) describes violence against women as “an obstacle to the achievement of the objectives of equality, development and peace”. Some of the major themes that were incorporated in the PFA include in a rough order of priority.
a. Prevention and elimination of all forms of violence against women and girls;
b. Building women's capabilities by narrowing down the gender gaps in education, opportunities and progress;
c. Ensuring legal justice to women and creating atmosphere of peace so that women and girl children can enjoy all human rights;
d. Establishing / strengthening legal and non-legal institutional machinery to ensure implementation and monitoring of gender-empowerment policies;
e. Eradication of poverty based on sustained economic growth, requiring the involvement of women in economic and social development and;
f. Ensuring women's equal access to economic resources including land, credit, science and technology and vocational training.

The carefully chosen terminology of the concept reflects gender equality as synonymous of the end of the discrimination. However, gender discrimination in all its dimensions is so horrifying that it is not merely a question of equality, but of the very survival – physical, mental and emotional of the female half of humanity.

3.1.6.1 Discrimination Possess Deprivation

Discrimination in any form hurts as there is an element of deprivation of the legitimate expectations of classes of people upon whom the inevitable
consequences of any such action must necessarily fall. Any unfair and undue deprivation of any class of people is constitutionally impermissible\textsuperscript{14}.

Gender discrimination deprives women of their right to dignified life, security of person, freedom from fear and exploitations, right to development and a life of peace, right to health and freedom of movement. It also negates their right to education, work and participation in public life.

Acts or threats of violence whether occurring within the home or in the community or perpetrated or condoned by the state instill fear and insecurity in a women’s life. Even if violence does not take her life, she is deprived of her right to peace\textsuperscript{15}. Since peace for women includes “not only the absence of war, violence and hostilities at the national and international levels but also the equality and the entire range of human rights and fundamental freedoms within the society\textsuperscript{16}. The fear of violence including harassment is a permanent constraint on the mobility of women and limits their access to resources and basic activities. As such it is the greatest obstacle, for women’s right to equality and development\textsuperscript{17}.

\textsuperscript{14} \textit{Indra Sawhney v. Union of India,;} (1993 (1) SCJ 353
\textsuperscript{15} UN General Assembly recognized Right of People to peace by its resolution No.39/11 of 12 Nov. 1984.
\textsuperscript{17} UN General Assembly recognized Right to Development as an inalienable human rights by its ‘Declaration on the Right to Development’ on 4 December 1986. UNGA Res. No. 41/128.
3.2 SEXUAL HARASSMENT AS A FORM OF GENDER DISCRIMINATION – CONTEMPORARY APPROACH

3.2.1 Canadian Human Rights Act

In Canada, sexual harassment is prescribed under the Canadian Human Rights Act. Specially the Act defines harassment as discriminatory practice done to an individual.

Canadian jurisprudence of sexual harassment stems from the Cherie Dell Case in 1980. The judgment prohibited sexual harassment as a form of sexual discrimination.

The Question before the court of Canada, Ottawa, 4 May 1989 was, “Is Sexual Harassment a form of gender discrimination?”

Diana Janzen & Tracy thought the toughest part about working, as waitresses at Pharos restaurant would be dealing with a few difficult customers. As it turned out, it was Tommy the cook who made their work intolerable.

The cook was verbally abusive and he grabbed the waitresses in rude and inappropriate ways. When Diana & Tracy resisted his sexual advances, he told them to shut up or be fired. He yelled at them in front of staff and criticized their work. Eventually Diana was forced to quit and Tracy was fired. Both women filed complaints under the Manitoba Human Rights Act18.

The Court answer was unanimous. Sexual harassment at work place was defined as “any unwanted sexual behaviour that negatively affects the work environment or causes the victim to suffer unfavourable job related consequences”. Tommy’s rude attention was certainly undesired and negatively affected the waitresses working conditions.

Court found sexual harassment was to be a form of gender discrimination, because only the female employees ran the risk of being harassed. The men who worked as waiters, cashiers had never been harassed. Diana & Tracy had put up with harassment only because they were women. In other words women were treated differently than men because they were women – and that was discrimination.

In 1987, before the Supreme Court of Canada handed down its ruling, the Manitoba Human Rights Act was replaced by the Human Rights Code. Section 19 of new code expressly mentioned sexual harassment is a gender discrimination and prohibits its practice in any form19.

3.2.2 American Practice

At the beginning sexual harassment was treated as only a criminal violation or tortious act or violation of privacy. The Supreme Court argument in the Gebser Texas School Girl case, Chief Justice Rehnquist asked a simple question. “was there anything showing that it was discriminatory”? He asked, referring to allegations that the ninth-grade teacher had an affair with his student.

Rehnquist was not convinced with the argument that the term sexual harassment is synonymous with discrimination. The teacher not treated the students of one sex differently from another, the teacher singled out this young girl

Rehnquist in 1986, wrote the opinion for the court in the *Meritor* case declaring unequivocally that a bank supervisor who coerced one of his employees repeatedly to have sex was practicing a form of sex discrimination. "Without question, when a supervisor sexually harasses a subordinate because of the subordinate’s sex, that supervisor discriminates on the basis of sex.

The Court came to a view of sexual harassment as a form of gender discrimination. Discrimination usually implies some form of contempt for a class of people being singled out for disadvantageous treatment as a consequence of their shared characteristics. Unwanted advances, by contrast, often involve a man’s attraction to a particular woman because of her unique characteristics.

Early judicial rulings in the 1970’s refused to recognize sexual advances as a form of gender discrimination. On the ground that they were motivated by personal proclivities rather than by gender animus. Desire may be rampant, but it is not general. A man doesn’t hit on a gender.

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21 *Meritor v. Vinson* 477, US at 64
In 1970’s court held that a supervisor, who threatens to fire a woman because he is attracted to her and is uncomfortable working with her after he has been rebuffed, is discriminating on the basis of her rejection of his sexual advance and not on the basis of her sex. It would clearly be sex discrimination, however, if all women in the workplace were forced to endure the ordeal of being threatened with losing their jobs, unless they succumbed to sexual advances, because the terms and the conditions of employment would then be different for women than men.

3.2.2.1 Catherine Mackinnon’s Contribution for sexual harassment as Gender Discrimination

Unless, of course, you believe that a woman is a gender: and that there is no significant distinction between a class and a member of a class: and every member of a class stands for the class, and is essentially and definitionally fixed in her identity by her membership in the class. Catharine Mackinnon, it was she who provided the theoretical arguments for considering harassment a form of discrimination.

In sexual harassment of working women24, Mackinnon compared two mutually inconsistent, competing theories of liability. The first, which she called the “different approach” asks the following question. How can you tell that this happened because one is a woman, rather than to a person who just happens to be a

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woman? According to Mackinnon, the basic answer, which presupposes sex comparability, is: a man in her position would not be or was not so treated. Mackinnon believes that the gender really cannot be compared in meaningful ways, because women are socially subordinate to men. Mackinnon observes although it might be reasonable to compare the sexual harassment of men and women in a world in which the sexes were equal, in this society, it is not, because of that social inequality which discrimination law exists to eliminate.25

Mackinnon explored the difference approach as a litigation strategy, but she preferred an alternative, mutually inconsistent, and far more radical approach to the question of how sexual advances could be considered sex discrimination. She called it “the inequality approach”. In her words, “practices which express and reinforce the social inequality of women to men are clear cases of sex-based discrimination in the inequality approach.

This inequality is not merely social or political. It is a much deeper and more indelible disadvantage, sexuality itself, Mackinnon has famously argued, is the lynchpin of gender inequality. “The male sexual role... Centers on aggressive intrusion on those with less power26 – namely, women. “A feminist theory of sexuality”, therefore, locates sexuality within a theory of gender inequality meaning the social hierarchy of men over women. Anatomy is destiny; or rather, law.

25 Ibid
MacKinnon wrote in an elusive piece in *The New York Times* during the Lewinsky affair\(^{27}\). Courts also recognize that sexual coercion can be situational: power differences can be a form of force. Sex under conditions of extreme inequality can be coerced and exploitative; sexual compliance can be coerced. But sex cannot be harassment at work by law unless the woman or man really didn't want to have it\(^{28}\).

In the United States, sexual harassment law has been created mostly as case law, under Title VII of the 1964 Civil Rights Act\(^ {29}\) which states that in business with 15 or more employers an employer may not “fail or refuse to hire or discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race, colour, religion, sex or national origin”. In order to address sexual harassment under Title VII, legal scholars lawyers and judges had to argue that sexual harassment is a case of sex discrimination in employment.

### 3.2.3 The United Kingdom – Sex Discrimination Act

Sexual harassment cases are covered under the Sex Discrimination Act of 1975 (SDA). The SDA makes it unlawful for employers to discriminate on sex. Sexual harassment of women is actionable as a form of discrimination under the SDA.

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\(^{28}\) Ibid.

\(^{29}\) Section 703(a)
In the Scottish case of Porcelli and Strathclyde Country Council, (1986) IRCR 134. Sexual harassment is viewed as less favourable treatment meted out to a woman on grounds of sex, because it is a weapon used against one gender which would not be used against the other. However in the recent case of, Pearce v. Governing Body of Mayfield School, the House of Lords disregarded the observations made in Porcelli’s case, that where harassment is gender specific in form, there will necessarily be less favourable treatment on the grounds of sex. The House of Lords adopted the contrary view that the Sex Discrimination Act focuses on the reason for less favourable treatment, not on the form that treatment takes. The fact that harassment is gender specific in form cannot stand alone, be regarded as establishing conclusively that the reason for the harassment is “on grounds of her sex”. This is a severe set back to the application of SDA. It remains to be seen how the tribunals will apply this case;

3.2.4 Analogous Position in India

A woman feels as keenly, thinks as clearly, as a man. She in her sphere does work as useful as man does in his. She has as much right to her freedom – to develop her personality to the full – as a man. When she marries, she does not become the husband’s servant but his equal partner. If his work is more important in the life of the community, her is more important in the life of the family. Neither can do without the other. Neither is above the other or under the other. They are equals.

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30 SDA 1975, Ch.65, Section I.
31 2003, IRCR 512
According to Dr. Ambedkar, “Discrimination is a menace to be guarded against, if fundamental rights were to be real”. To attain equal justice principles, Constitution of India guarantees equality and prohibits discrimination. Indian women are the beneficiaries of these rights in the same manner as Indian men. Article 14 ensures ‘equality before law’ and Article 15 prohibits any discrimination. Article 16 guarantees equality of opportunity and prohibits discrimination, in respect of employment or appointment to any office under the state.

Judicial interpretations of the Equal Justice and Prohibition of Gender discrimination under Constitution of India: Equality is guaranteed in the Indian Constitution and their judicial interpretations have been dominated by the formal approach to equality under Article 14, 15 and 16 are examples of this formal approach to equality.

3.2.4.1 New Concept of Equality

Equality is a dynamic concept with many aspects and dimensions and it cannot be cribbed, cabined and confined within traditional and doctrinaire limits, from a positive point of view, equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies; One belong to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch. When an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violation of Article 14.\(^{33}\)

\(^{33}\) Bhagawati J. Propounded the concept in *E.P. Royappa v. State of Tamil Nadu* AIR 1974, SC 555.
In International Airport Authority case\textsuperscript{34}. Bhagwati J. reiterated the same principle. "It must... therefore now be taken to be well-settled that what Article 14 strikes at is arbitrariness because an action that is arbitrary must necessarily involve negation of equality. Hence Article 14 gives protection against arbitrariness and guarantees natural justice.

Article 15(1) prohibits discrimination on the basis of sex. The use of the word "only" in this Article has enabled courts to segregate sex from gender and uphold blatantly discriminatory legislation in some circumstances. Courts have been reluctant to expand the scope of Article 15(1) to cover cases of discrimination against women, when such cases may be attributed to factors additional to sex. In \textit{Air India v Nergesh Meerza},\textsuperscript{35} decided in 1981, where air hostesses (AH) were seeking parity with male Assistant Flight Pursers (AFP) the Court held that while the rule terminating employment of an air hostesses on first pregnancy was patently unconstitutional, AH and AFP could still be considered as different categories for the purpose of remuneration and other conditions of service. The court held "what Article 15(1) and 16(2) prohibit is that discrimination should not be made only on the ground of sex. These articles of the Constitution do not prohibit the state from making discrimination on the ground of sex coupled with other consideration.

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\textsuperscript{34} R.D.Shetty v. International Airport Authority AIR 1979, SC 1628. \\
\textsuperscript{35} (1981) 4 SCC 335
\end{flushright}
In effect, the court validated the discrimination between AH and AFP on the basis that the discrimination was based on considerations of recruitment and sex and not sex alone.

In the more recent case of *Air India Cabin Crew Association v. Yeshaswinee Merchant* 36 in this case, the early retirement ages for air hostesses was challenged as violative of Article 14, 15 and 16 in 2003. The Court justified a special retirement age of fifty for air hostesses, using the ‘but for sex’ test. According to the court, the ‘but for sex’ test was developed to mean that no less favourable treatment is to be given to women on gender based criterion which would favour the opposite sex and women will not deliberately be selected for less favourable treatment because of their sex 37. Accordingly, the Court held that Articles 15 and 16 prohibit discriminatory treatment but not preferential or special treatment of women, which is a positive measure in her favour. The constitution does not prohibit the employer from considering sex in making employment decisions where it is done pursuant to a properly or legally chartered affirmative action plan 38.

Article 15(3) has largely been interpreted as an exception to the principle of non-discrimination guaranteed by Article 15(1). Under Article 15(3), the state is authorized to make special treatment for women and children and to discriminate in favour of them. This unambiguous positive discrimination extended to women is an important aspect of the equality guarantee in the constitution. Under this

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36 (2003) 6 SCC 277
37 Id., paras 41, 42, p.302
38 Ibid.
provision, the state may take progressive measures to protect women from violence and sex discrimination, including acts of sexual harassment.

In Government of Andhra Pradesh v. P.B. Vijayakumar\textsuperscript{39}, the court noted the purpose of Article 15 (3) to be the recognition of the fact that for centuries women have been socially and economically handicapped. As a result, women were unable to participate in the socio-economic activities of the nation on a footing of equality. Article 15(3) is meant to eliminate this socio-economic backwardness of women and to empower them in a manner that would bring about effective equality between men and women. The court in Vijayakumar case stated that, while the object of the provision was to strengthen and improve the status of women, "the important limb of this concept of gender equality is creating job opportunities for women". Therefore, making special provisions for women in respect of employment or posts under the state is an integral part of Article 15(3)\textsuperscript{40}. It is also important to note that the court in Vijayakumar case interpreted the phrase 'special provision' to mean either affirmative action or reservation \textsuperscript{41}.

In the year 2003 in Vijaya Lakshmi v. Punjab University\textsuperscript{42}, the Supreme Court upheld the classification between male and female for certain posts, providing for the appointment of a lady principal as a proper exercise of constitutional obligation under Article 15(3). The court also referred to the earlier decision of Dattatreya Motiram More v. State of Bombay\textsuperscript{43}. In this case, reserved

\begin{itemize}
\item \textsuperscript{39} (1995) 4 SCC 520
\item \textsuperscript{40} Id, para 7
\item \textsuperscript{41} Id., para 8.
\item \textsuperscript{42} (2003) 8 SCC 440
\item \textsuperscript{43} AIR 1953, Bom 311
\end{itemize}
seats for women in the election were challenged on the ground that they offended Articles 14, 15 and 16 of the constitution, where it had been held that "as a result of the joint operation of Article 15(1) and Article 15(3) the state may discriminate in favour of women against men, but it may not discriminate in favour of men against women".

Clause 2 of Article 16 prohibits discrimination on the ground of sex in matters of public employment. In *C.B. Muthamma, IFS v. Union of India*\(^4^4\), in this case service rules under the Indian Foreign Service (Conduct and Discipline) Rules (1961) discriminated against married women in service. Rule 8(2) stipulated that a woman would have to take the permission of the Government in writing before her marriage is solemnized and she may be required to resign if at any time the Government felt that her marriage and domestic commitments were likely to come in the way of the discharge of her duties. Rule 18(4) laid down that no married woman had the right to be appointed to the service. The court recognized the need to bridge the gap between the constitutional prohibition on sex discrimination in Article 16 and the actual law in practice.

Sex discrimination is prohibited under the constitution, on a combined reading of the provisions of the 'equality code' – with Articles 15 and 16 being interpreted as facets of Article 14. The Supreme Court has on several occasions held that "gender equality enshrined in Article 14 is one of the basic principles in the constitution"\(^4^5\). Feminist critiques of violence against women suggests that the

\(^{4^4}\) (1979) 4 SCC 260  
\(^{4^5}\) *Githa Hariharan v. Reserve Bank of India* (1999) 2 SCC 228.
issue of sexual harassment of women should be seen in the larger context of patriarchy and gender hierarchies which women are constantly subjected to. At the international level, work of Catherine Mackinnon, a leading feminist and legal scholar, recognized that link between and helped to situate sexual harassment of women at the work place within the larger problem of sex discrimination. At the national level, the Vishaka Court recognised this linkage.

In Vishaka v. State of Rajastan\textsuperscript{46}, Supreme Court defined sexual harassment and stated that, it is discriminatory, for instance, when the woman has reasonable grounds to believe that her objection would disadvantage her in connection with her employment or work (including recruitment or promotion), or when it creates a hostile work environment. Each incident of sexual harassment of women at the work place results in the violation of the fundamental rights to gender equality and the right to work with dignity\textsuperscript{47}.

In Apparel Export Promotion Council v. A.K.Chopra\textsuperscript{48}, the Supreme Court reaffirmed that sexual harassment at work place as gender discrimination. The Court found the attempt at and action of molestation of a superior towards a female employee to constitute sexual harassment of women. The court relied on the holding and guidelines laid down in the Vishaka judgment to conclude that the incident of sexual harassment resulted in violation of the fundamental right to

\textsuperscript{46} (1997) 6 SCC 241
\textsuperscript{47} Id at para (3).
\textsuperscript{48} (1999) 1 SCC 75a
gender equality under Article 14 and 15, and right to life and liberty under Article 21. Courts are placed under a constitutional obligation to protect and preserve fundamental rights, including all facets of gender equality. The Court also brought to light the fact that sexual harassment of women at the work place was recognized as a form of gender discrimination against women at the International Labour Organization, Seminar held at Manila, as early as 1993. Further international instrument such as CEDAW and the Beijing Declaration cast an obligation on the Indian State to gender-sensitize their laws and to take appropriate measures to prevent all forms of discrimination against women.

3.2.4.2 Convention on 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. India is a signatory to CEDAW, thereby making it mandatory for the state to fulfill its obligations to women under this convention:

Article 1 of CEDAW provides that woman be given rights equal to those of men on equal terms. The preamble maintains that, “the full and complete development of a country, the welfare of the world and the cause of peace require the maximum participation of women on equal terms with men in all fields”.
Article 11 of CEDAW

State parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on the basis of equality of men and women, the same rights, in particular:

a. The right to work as an inalienable right of all human beings.

b. The right to protection of health and safety in working conditions, including the safeguarding of the function of reproduction.

The General Recommendations of the CEDAW Committee in respect to Article 1 indicates:

Equality in employment can be seriously impaired, when women are subjected to gender-specific violence such as sexual harassment in the workplace. Sexual harassment includes such unwelcome sexually determined behaviour as physical contact and advances, sexually coloured remarks, showing pornography and sexual demands, whether by words or action. Such conduct can be humiliating and may constitute a health and safety problem: it is discriminatory when the woman has reasonable grounds to believe that her objection would disadvantage her in connection with her employment, including recruiting or promotion, or when it creates a hostile working environment.

49 Art. 1 para 17
Article 24 of CEDAW

Which requires state parties to undertake to adopt all necessary measures at the national level, aimed at achieving the full realization of the rights recognised under the convention.

3.2.4.3 International Labour Organisation

In 1993, at the ILO seminar held at Manila, it was recognized that sexual harassment of women at the work place was a form of “gender discrimination against women”. The contents of the fundamental rights guaranteed in our constitution are of sufficient amplitude to encompass all facets of gender equality, including prevention of sexual harassment and abuse. The sexual harassment of a female at the place of work is in compatible with the dignity and honour of a female.

In *Valsamma Paul v. Cochin University*, the Apex Court held “Human Rights are derived from the dignity and worth inherent in human person. Human rights and fundamental freedoms have been reiterated in the Universal Declaration of Human Rights. Democracy, development and respect for human rights and fundamental freedoms are inter dependent and have mutual reinforcements. The human rights for women including girl child are, therefore inalienable, integral and individual part of the Universal human rights. The full development of personality

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50 AIR 1996, SC 1020
and fundamental freedoms and equal participation by women in political, social and economic and cultural life are concomitants for national development, social and family stability and growth – cultural, social and economical. All forms of discrimination on grounds of gender is violative of fundamental freedoms and human rights.

3.2.4.4 Sexual Harassment is Gender-Based Violence and Amounts to Gender Discrimination:

- Because members of one sex (usually women) are targeted for abusive behaviour. Male employees generally can not run the risk of sexual harassment at work place.

- Sexual harassment at work place curtails the right to work and equality principles and women’s rights instruments.

- sexual harassment at work place not only harms the victim but also creates threat among the other working women (collective or group problem).

- Sexual harassment at work place checks the free entry of women into work force or institutions.

- Sexual harassment at work place affects the personal and academic personality of women and stunts the function as workers.
• Sexual harassment at work place keeps the women in inferior status (in and out of work place) it degrades their women-hood and dignity.

• Sexual harassment at work place is a violation of socio legal rights of women.

• Utter disregard for women’s interests, emotions, aspirations, likes and dislikes dwarfs their developments as well as national development.

• Sexual harassment deprives women to participate freely in the public life.

• Sexual harassment puts the women’s health and lives at risk and violates the right to equal access to health care.

• Sexual harassment violates the economic democracy and economic justice of the women\textsuperscript{51}.

• Sexual harassment violates fundamental right of right to education\textsuperscript{52}

Dr. Carolyn Elliott\textsuperscript{53}, says sexual harassment is a form of discrimination, because it prevents a woman from doing her job properly and risks her continuing employment or advancement.

\textsuperscript{51} Art. 39 of Constitution of India provides equitable utilisation of the countries resources and means of production).

\textsuperscript{52} Guaranteed by Article 21 of Constitution, 83\textsuperscript{rd} Amendment Act.

\textsuperscript{53} Director, American Studies Research Centre, Hyderabad.
3.2.4.5 Advantages of Considering Sexual Harassment as Gender Discrimination

- To consider sexual harassment as a group defined injury, suffered by women because of their sex. The group injury aspect of sexual harassment is contended to change the society to prevent the recurrence of discriminatory behaviour and to restrict the group libel.

- To ban sexual harassment and pornography to protect the reputation of women in general.

- To protect the legal person-hood of women. Men and women are defined by their sex rather than by their individual personalities and choices, and gender is constitutive of personhood.\(^{54}\)

- The gender discrimination aspect provides Equal Employment Opportunity and prevents further incidents of sexual harassment.

Violence against women should be viewed as one of the most crucial social mechanisms by which they are forced into a subordinate position. It is a manifestation of unequal power relations, which has led to men's domination over and discrimination against women.

There is no anti-sexual harassment legislation in India. But in two landmark judgments Supreme Court recognised sexual harassment as a form of gender

\(^{54}\) School of Radical feminism, Mackinnon view of argument.
discrimination. It is very painful to note that, where as biases of caste and creed are fast disappearing gender biases are not $^{55}$.

To tackle the problem of gender bias or sexual harassment, we require an absolute legal protection and hence, the researcher has gone through the framework of laws in the field of criminal law, civil laws, labour laws, tort laws and various provisions of Constitution of India dealing with the problem of elimination of any kind of discrimination, harassment affecting the modesty and dignity of women in the ensuing chapter.