CHAPTER VII

CONCLUSION AND SUGGESTIONS

Sexual harassment of women is global and widespread and is tolerated as a social phenomenon, in institutions and customs and to some degree in law. It is not exclusively a new phenomenon because the behaviours it describes are centuries old. Sexual harassment, no doubt is a complex social problem but in the recent decades, it has achieved new dimensions and has brought within its teeth children, youth and women. With the advance of industrialization and urbanization, this evil is gradually rearing its ugly head all over the world. It has touched new heights and dimensions in the numbers and operational patterns use of violence that even fatal attacks have become more common than they were some times ago.

Sexual harassment may be homosexual as well as heterosexual. But the available data and court cases reveal that heterosexual mode is the most pervasive one. Women because of their oppressed and subjugated position in society are far more vulnerable to sexual harassment. The perpetrators of sexual harassment are males though the indulgence of females is not unheard of, but it comprises of extremely rare occasions. The available studies suggest that women are the recipients of physical and sexual abuse at least 10 times more frequently than are men.¹

The widespread sexual harassment of women around the world is based on consideration of her sex alone. It is intense, rampant and universal occurring in all cultures, races, communities and countries. The widespread prevalence and tolerance of sexual harassment is a major human rights problem which has been largely ignored or unacknowledged as a human rights issue. Sexual harassment frequently encountered by

women in all walks of her life—on the streets, roads, public transportations, farms, in educational institutions and in the workplaces and helplessness of the protecting agencies to eradicate the same, have today created an alarming situation in many countries of the world.

Thus sexual harassment is endemic—an everyday, every time and everywhere occurrence. The event is not new to women, it is the law of injuries that is new.\(^2\) It has been called by different names in different countries of the world like ‘eve-teasing’ in India, ‘droit de euissage’ or ‘sexual blackmail’ in France, ‘sekue hara’ in Japan, unsolicited, undesigned or unwanted intimacies in Netherlands, ‘gatal’ or miang(literally means itchy) in Malay, ‘sexual molestation’ in Italy, ‘sexual solicitation’ in some states of Canada like Ontario and Newfoundland.\(^3\) The terms used thus are interpreted differently and the problem of sexual exploitation, torture and victimization of women has remained largely unaddressed. It was not given any universally recognized name till 1970s. It was only due to the efforts of women in west particularly in US that the term sexual harassment came to be recognized in legal sense and subsequently exported from there to other countries of the world like Australia, Canada, New Zealand, Japan and a number of countries in Western Europe.\(^4\) In India, the term sexual harassment was first used in formal legal sense by the Supreme Court in the year 1997 in Vishaka v. State of Rajasthan.\(^5\)

Sexual harassment of women has remained unrecognized and unnamed for a long time due to huge areas of disagreement about which behaviors the term legitimately covers and large scale acceptance of certain behaviors as normal socialization patterns. But it is not an aberration, rather it is a part of whole syndrome of


\(^3\) ILO, “Action Against Sexual Harassment at Work in Asia and the Pacific 2001, p. 7.


\(^5\) AIR 1997 SC 3011, per JS Verma CJ.
discrimination and exploitation that women are subjected to.\textsuperscript{6} It is an outcome of long history of deprivation of socio-economic rights to women. It is a manifestation of historical unequal power relations between men and women which have led to domination over and discrimination against women and is a social mechanism by which the subordinate position of women is sought to be perpetuated.

In order to free themselves from the clutches of male domination and exploitation due to economic dependence by making them self-reliant economically and in some cases to support the family income, women come outside the confines of home, hitherto secluded from the outside glaze. But here new kind of exploitation, victimization and subordination is encountered by them in the form of sexual harassment. Thus sexual harassment in the workplace and elsewhere has become a very important agenda for women’s rights because of its widespread occurrence and its far reaching and disturbing effects.\textsuperscript{7}

There is broad unanimity that any human being can be subjected to sexual harassment but women continue to be the principal victims of sexual harassment due to the following determinants:

1. Patriarchal Ideology and Patriarchal Social Structure:

Patriarchal ideology and patriarchal social structure is based on the inequality of sexes and male dominance over the economic and material resources of the family and the society. In patriarchal set up, women’s economic independence and empowerment are rarely recognized. Because of the male dominance in all institutions of life, women are not considered to be having any decision making power but only as sexual objects to

\textsuperscript{7} Preliminary Report submitted by UN Special Rapporteur on Violence Against Women, Its Causes and Consequences, Ms. Radhika Coomaraswamay; para 190 (1994).
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be controlled and protected by the males. This paternalistic attitude considers control of female sexuality as effective tool to keep women under subjugation and subordination which in turn leads to sexual harassment of women at workplace.

2. Unequal Power Relations in Society:

Because of monopolization of material and economic resources of the community, men are considered to be powerful enough to exploit women economically and sexually. The powerlessness of women make them economically exploitative and sexually vulnerable. Thus unequal power relations between the sexes also negatively contribute to the sexual harassment of women at workplace because sexual harassment is an expression of oppression, intimidation, discrimination and victimization based on unequal relationship of power and authority.

3. Gender Stereotypes:

Masculinity is considered to be aggressiveness and dominance of men and femininity as passiveness, submissiveness, tenderness, meekness of the women. The women who do not stick to these gender defined stereotype roles are perceived by male co-workers or their superiors either as a threat to male control or a threat to masculine order of the workplace. Then they use the alternate strategies like characterizing the work as appropriate for men only, or by denigrating performance of women workers or their ability to master the job, providing them patronizing form of help (which is otherwise unsolicited rather imposed), withholding the training information or opportunity to learn to do the job well, deliberately sabotaging the work, giving sexist evaluation of work performance, denying promised promotions, to keep women workers under constant pressure and maintain the control of male co-workers. In some cases they even resort to sexual harassment to enforce the gender hierarchy at workplace.

4. Cultural Ideology:

Some cultures propagate the exercise of aggression and sexual conquest over women by men. The sexual harassment of women at workplace is because of sex role spill over which expects males and females to follow certain varying behaviors at workplace. The women’s job require them to be sexually attractive, to acquiesce to sexual demands of male superiors, to serve and to emotionally support them. And the men’s job is to exercise dominance, aggression, initiate sexual interaction etc. The sexual advances may be considered as normal socializing characteristics of masculinity. Thus cultural ideology may either justify or condone the sexual harassment of women at workplace.

5. Psychological Conditioning:

Although on the one hand, women are striving hard to economically empower themselves so that they can carve a niche in the society but on the other hand, men consider it as an invasion into their habitat i.e. workplace and threat to their hegemony at the workplace. The main objective behind sexual harassment is to deter women workers joining a profession or the workplace that has conventionally been male dominated. This goal is achieved whether harassment is addressed to a single target in sight that is certainly a woman worker because the same would unequivocally signal to entire class that women are not welcome in the workplace. Where they continue work even after that, the male workers may alternatively prefer to sexualize women thereby demean their dignity by questioning their job doing abilities at the workplace. This is purposefully done to suggest that women are well suited to satisfy only male desire and nothing more. Thus the sexual harassment is considered as a psychological warfare to psychologically disempower women so that they may not dare to intrude into the male’s terrain i.e. workplace.

10 Id. at 1206-1208.
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6. Poverty and Economic Inequalities:

Women’s work at home is unrecognized and unpaid because work in economic terms must be market oriented and have some value attached to it. Only a small percentage of women in India are professionals. A large majority are seen as highly dependent and non productive as they do not add value to the family. So women remain economically dependent on men. As most of the world’s poor are women so poverty leads to exploitation of women. Further, feminization of poverty and unemployment compels women to enter into employments unsuited to their work and dignity. In many cases, women are given lesser wages than men for work of equal value and consider them as soft targets for sexual gratification. Thus sexual demands or favours may be made the condition of getting and retaining the job and other work related rewards. Thus economic coercion is used to sexually harass a woman at workplace. These determinants sometimes used to justify or deny the occurrence of sexual harassment of women at workplace.

In addition to these predictors, there are other factors like lack of education, awareness regarding acts which amount to sexual harassment at workplace, lack of sensitization regarding severity of the problem and ways and means to handle and curb it, lack of redressal mechanism and ignorance regarding the same where they exist like how, where and whom to complain, lack of evidence and witnesses because mostly it is done secretively and sometimes by the employer or superior officer, tedious and expensive legal battles, insensitive attitude of law enforcement agencies and judicial machinery, fear of losing their income by losing job and job related rewards, lack of support from family, friends and colleagues, fear of stigmatization, fear of branding as trouble shooter and so effect on future job prospects dissuade most of the women from reporting the cases of sexual harassment which in turn leads to under reporting of cases of sexual harassment of women at workplace. Further acquittal or inaction against the harasser and victimization of the woman harassed aggravates the problem. The negative portrayal of image of women by media, commodification of women i.e. indecent representation in advertisements showing them as sex objects just like any other
commodity, using them in pornographic forms by media etc, rapid urbanization, industrialization, mobilization, break down of traditional family institutions and normative social order, lack of religious control and degradation in moral and ethical values, misuse of latest developments in science and technology like use of MMS, e-mails, screen saver etc. for black mailing or showing pornography also make women vulnerable to sexual exploitation and victimization in general and sexual harassment at workplace in particular. Besides the above mentioned determinants, and factors which on the one hand justify or deny the occurrence of sexual harassment and on the other hand aggravates the problem, there are some commonly held beliefs or myths and realities about sexual harassment of women at workplace. Some consider it as flirting, teasing or a bit of workplace fun to enlighten the workplace and outlet of their otherwise stressful work and atmosphere at work. But women are not the objects of fun rather they are the creators, dedicated professionals and home makers who cannot be subjected to sexual harassment according to the whims and caprices of the males. So sexual harassment of women at workplace is not a fun. It is often considered that sexual harassment is a trivial issue and exaggerated because of hyper sensitive nature of women and problem of socialization in hitherto monopolized masculine workforce. But sexual harassment of women at workplace is a serious issue because this is a dignity wrong and well planned strategy to psychologically, economically, emotionally and intellectually disempower women so that they may not dare to tread the place conventionally and traditionally reserved for men i.e. workplace.

It is often perceived that women who suffer sexual harassment are themselves responsible as they provoke it through their attire and openly interacting and intermingling with men. Throughout India, there are restrictions on everything from women’s attire to their conduct, all related in one way or another to preserve the oft-spouted gendered notion of modesty. The “forward”, outgoing woman – often perceived as “tickling the libidinous male instincts”- will usually get little sympathy as
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a target of sexual assault, because she invited it. The reality is that women of any caste, creed, community, religion, region, rural or urban areas can encounter sexual harassment because it is not only a matter of sex or lust but systematized discrimination on the basis of sex and women as a class are targets.

It is also perceived that women make false allegations of sexual harassment in order to draw attention or to seek revenge or on withdrawal of job-related benefits or break up of friendly relations or to bargain something. But tolerance due to economic coercion and avoidance of such behaviour for a long time should not be used to dispute the credibility of the complaint. By making false allegations women will gain nothing because ultimately it is to be proved with the help of evidence and witnesses rather. However, by doing so, they put at stake their dignity, character, family reputation, job, future job prospects and even penalties can be imposed. So it is not correct to allege that women make false allegations of sexual harassment.

Based upon the assumption that women often invite it, it is expected that women have to handle it by strictly condemning it at the very first instance. But in many cases women themselves are not aware of whether it constitutes sexual harassment despite being uncomfortable with the offensive conduct because sexual conducts so mingle with the normal conducts that it is difficult to differentiate. In some cases where they condemn the same, they are subjected to adverse consequences like stigmatization, branding them as women of easy virtue, termination, losing job benefits, more physical assaults like pouring acids, silting etc. Thus women alone cannot handle this systematized violence against them but collective effort on the part of organization, society and state is required.

11 Sonya Gill, State Secretary, All India Democratic Women’s Association quoted in Seema Sinha, “It’s tough being a Woman!” in Sunday Times-Times Life p.3, July 31, 2011.
12 Aruna Kashyap, “What Women Want- Protection Against Sexual Harassment shouldn’t be linked to outdated notions of modesty” in the Times of India, New Delhi/Chandigarh, July 29, 2011.
The above analysis depict that these commonly held perceptions, beliefs and myths are not correct but only camouflage the real problem and create confusion regarding the issue in the minds of people in society which is reflected in the trial and adjudication of cases of sexual harassment of women. Looking at the extreme gravity of the problem, efforts were made to define sexual harassment. In the beginning, scholars were simply concerned with identifying what kind of acts would constitute sexual harassment against women if discovered at workplace which are liable to action. Like the American Equal Opportunity Commission defines sexual harassment as unwelcome sexual advances, requests for sexual favours, and other verbal or physical conduct of a sexual nature when submission to such conduct is made either explicitly or implicitly a term or condition of an individual employment, submission to or rejection of such conduct by an individual is used as a basis for employment decisions affecting such individual, or such conduct has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile or offensive working environment.13

However the Employment Equality (Sexual Orientation) Regulations, 2003 of United Kingdom defines sexual harassment as unwanted conduct of sexual orientation with the effect of violating the dignity of the victim or creating an intimidating, hostile, degrading, humiliating, or offensive environment for him.14

The Canada Labour Code defines sexual harassment as meaning any conduct, comment, gesture, or contact of a sexual nature that is likely to cause offence or humiliation to any employee, that might, on reasonable grounds be perceived by that


14 The Employment Equality(Sexual Orientation) Regulations 5(1)(a)(b)
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employee as placing a condition of a sexual nature on employment or on any opportunity for training or promotion.\textsuperscript{15}

Further the Sex Discrimination Act, 1984 of Australia defines sexual harassment as an unwelcome sexual advance or an unwelcome request for sexual favours or other unwelcome conduct of a sexual nature in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that the person harassed would be offended, humiliated or intimidated.\textsuperscript{16} However in Queensland, the Anti-Discrimination Act defines sexual harassment in more elaborate terms as an unsolicited act of physical intimacy like patting, pinching or touching in a sexual way, deliberately brushing against a person; or an solicited demand or request (whether directly or by implication) for sexual favours from the other person such as sexual propositions; or remark with sexual connotations such as unwelcome and uncalled for remarks or insinuations about a person’s appearance or body; or any other unwelcome conduct of a sexual nature such as offensive telephonic calls, indecent exposure; with the intention of offending, humiliating or intimidating the other person; or in circumstances where a reasonable person would be offended, humiliated or intimidated by the conduct.\textsuperscript{17}

The Employment Contracts Act of New Zealand defines sexual harassment as a request for sexual intercourse, sexual contact or other form of sexual activity which contains an implied or overt promise of preferential treatment; or implied or overt threat of detrimental treatment in that employee’s employment; or an implied or overt threat about the present or future employment status of that employee; or the use of words (whether written or spoken of a sexual nature) or physical behavior which is unwelcome or offensive to that employee (whether or not that is conveyed to the

\textsuperscript{15} Canada Labour Code, Sec. 247.1, Part III Standard Hours Wages, Vacations and Holidays Division XV.1, R.S. 1985, C-9(Ist Supp.) S. 17.
\textsuperscript{16} The Sex Discrimination Act, 1984 as amended by the Sex Discrimination and Other Legislation Amendment Act, 1992, Sec. 28-A.
\textsuperscript{17} The Anti-Discrimination Act, 1991, Sec 119.
employee or representative) and which is either repeated or of such a significant nature that it has a detrimental effect on that employee’s employment, job performance or job satisfaction.\(^{18}\)

The Sri Lanka Penal Code, 1883 defines sexual harassment as an assault or use of criminal force which sexually harasses another person; or the use of words or actions which causes sexual annoyance or harassment to such other person; or unwelcome sexual advances by words or action used by a person in authority, in a working place or any other place.\(^{19}\)

However the European Union’s Equal Treatment Directive defines sexual harassment as any form of unwanted verbal, non-verbal or physical conduct of a sexual nature having the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment.\(^{20}\) And the International Confederation of Free Trade Unions in 1986 defines sexual harassment as any repeated and unwanted verbal, physical or gestural sexual advances; sexually explicit derogatory statements; or sexually discriminatory remarks made by someone in the workplace which are offensive to the worker involved, which cause the worker to feel threatened, humiliated, patronized or harassed; or which interfere with the worker’s job performance, undermine job security or create a threatening or intimidating work environment. It encompasses a wide range of unwanted sexual advances including unnecessary physical contact, touching or patting; suggestive or unwelcome remarks, jokes, comments about appearance and deliberate verbal abuse, leering and compromising invitations; use of pornographic pictures at the workplace; demands for sexual favours; or physical assault.\(^{21}\)

\(^{18}\) The Employment Contracts Act, 1999, Sec. 29(1).
\(^{19}\) The Sri Lanka Penal Code, 1883 as amended by Penal Code Amendment No. 22 of 1995, Sec. 345.
\(^{21}\) Women’s Bureau, ICFTU, Union Guide on Sexual Harassment at Work, 1986.
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Further the ILO’s Committee of Experts defines sexual harassment as any insult or inappropriate remark, joke, insinuation and comment on a person’s dress, physique, age, family situation etc.; a condescending or paternalistic attitude with sexual implications undermining dignity; any unwelcome invitation or request, implicit or explicit, whether or not accompanied by threats; any lascivious look or other gesture associated with sexuality; and unnecessary physical contact such as touching, caresses, pinching or assault.22

However the United Nations Committee on the Elimination of Discrimination Against Women defines sexual harassment as such unwelcome sexually determined behavior as physical contacts and advances; sexually coloured remarks; showing pornography; and sexual demands, whether by words or actions. 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.23

Whereas in India, in the absence of any statutory definition of sexual harassment, Supreme Court took the lead and recognised and defined the term for the first time in the year 1997 in Vishaka v State of Rajasthan.24 The Supreme Court took reference from international Conventions and norms and defines sexual harassment to include such unwelcome sexually determined behavior (whether directly or by implication) as physical contacts and advances; a demand or request for sexual favours; sexually – coloured remarks; showing pornography; any other unwelcome physical, verbal or non – verbal conduct of sexual nature.

24  AIR 1997 SC 3011.
The analysis of all these definitions signifies that the acts can be grouped into following heads:

(1) physical contacts, (2) verbal expressions, (3) non-verbal gestures, and (4) other non-verbal conduct. The physical contact may be a part of culture or a way of socialization or it may be accidental so it will not amount to sexual harassment. The physical contact in order to amount to sexual harassment must be forceful and have sexual connotations or sexual flavours. In the same way, verbal expressions like interacting sessions, commenting, complementing, criticizing, encouraging, caressing, joking, sharing personal feelings/information, family information, national information, seductive information, discussing social patterns, subjects, movie, media information, dating, making telephone calls etc. may not amount to sexual harassment. But the verbal expressions like unwelcome and uncalled for remarks or remarks with sexual connotations or insinuations, condescending or paternalistic remarks, insults based on sex, sharing information or discussing something to arouse or derive sexual pleasure, making offensive calls, inviting for parties, dinner with a demand or request for sexual favours, are offending and humiliating to the persons and hence may fall within the definition of sexual harassment.

The non-verbal gestures like whistling, blinking of eyes, hissing sounds, leering, licking lips, sighing etc. and gestures with other parts of the body may not constitute sexual harassment but lascivious looks and sexually suggestive gestures to derive sexual pleasures or creating humiliating, offensive or hostile circumstances for others may come within the ambit of sexual harassment.

The other non-verbal conduct such as showing of any book, pamphlet, paper, writing, drawing, painting, representation or figure may be in the interest of science, literature, art or learning or other objects of interest of science, art, literature or other objects of general concern or kept or used bonafide for religious purposes and hence will not amount to sexual harassment. However exhibiting derogatory posters, cartoons,
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drawings, sexually explicit pictures, pasting these on walls, writing derogatory remarks on walls, screen savers, internet sites, e-mails, indecent exposure etc. create hostile, intimidating and humiliating environment for others and therefore may be considered as sexual harassment.

From the above analysis, inference can be drawn that there is no strait-jacket formula to consider that physical contacts, verbal expressions, non-verbal gestures or other non-verbal conduct will be taken into consideration to determine sexual harassment in all circumstances because this is all about human behavior which keeps on changing with time and situations and accepted, rejected and interpreted accordingly

In determination of cases of sexual harassment, particular human behavior in question along with applying following approaches i.e. victim oriented, reasonability and unwelcome approach will address the problem in right earnest.

The victim oriented approach mainly focusses on the victim and view it from the perception of victim only. And the reasonability approach looks at the alleged behavior from the standard of reasonable person in the circumstances although reasonable person standard depends upon the interpretation of the adjudicator. However the unwelcome approach looks at the situation from the lens of the reaction of the recipient. If the advance, request, favor or conduct of the harasser is not solicited, invited, acceptable or tolerable to the recipient, then it is considered to be undesirable, offensive, unacceptable, intolerable and hence unwelcome by the recipient. Thus neither of these approaches can address the problem under hand in isolation because that may lead to grave injustice to the aggrieved person. Therefore the combination of all these approaches can effectively redress the grievances of the person harassed.
The subjective test i.e. reaction of the recipient and the objective test i.e. other factors like religious, cultural, ethnic or moral standards of the parties at a particular time, the content or circumstances in which that conduct was exhibited or otherwise, the age, sex or other qualifications of the parties etc. are to be applied to analyze and interpret the situation or behavior accordingly. From the above analysis, it is inferred that following are the essential elements of sexual harassment :- (i) the conduct or behaviour must be unwanted or unwelcome, (ii) the conduct or behaviour must be of sexual nature, (iii) it has the purpose or effect of violating the dignity of a person, and (iv) it is by creating an intimidating, hostile, degrading, humiliating or offensive environment.

Thus sexual harassment is other than bullying because the conduct is of sexual nature in sexual harassment cases and it is also different from friendly relationship which is mutual, consensual, invited, solicited, welcome or reciprocated.

Sexual harassment may be coercive or non-coercive i.e. the harasser offers a benefit or reward in return or threatens some harm or damage as the adverse consequence or simply to annoy or offend the person harassed rather than performing sexually for the harasser. These leads to further classification into two forms :- (1) quid pro quo harassment and (2) hostile environment harassment.

(1) Quid pro quo harassment is committed by the breach of trust and abuse of power or authority by the employer or his agent to whom authority over terms, conditions and manner of doing work by the employer is delegated. The harasser may demand or request for sexual favours in order to keep or obtain job benefits like hiring, promotion, training opportunity, rise in salary or transfer etc. So this can be termed as ‘sexual blackmail’. This is very dangerous because it is difficult to prove as it appears to be consensual act though there may be economic coercion behind it.
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(2) Hostile environment harassment is caused by sexually coloured remarks, jokes, teasing, showing pornography, sexual assaults, manhandling like touching, pinching, patting, brushing against the body etc. This type of harassment is also very perilous because it creates adverse, unfriendly, unwelcome, abusive, hostile and offensive work environment. By the creation of this type of environment, women as a class may be threatened because they are given the message that this is the adverse consequence of intruding into the hitherto exclusive terrain of men.

And the workplace is not only restricted to the physical environment or space in which paid work takes place for eight hours per day because a person can be subjected to sexual harassment at any place where work related activity is executed like at seminars, conferences, business trips, shopping trips, in educational institutions etc. However sexual harassment at workplace is not only confined to employer-employee, employer's agent-staff or between co-workers but it can extend to third parties also like customers, clients, suppliers, contractors, hotel or restaurant guests, passengers, other service providers, visitors etc. Thus third party or outsider can be perpetrator as well as victim of sexual harassment at workplace.

It may not be out of place to mention here that the harasser and the harassed may be of any age, sex, group, class, caste, race, religion, educational background, income or occupation. The available data\textsuperscript{25} exhibits that there may be same sex sexual harassment such as between heterosexuals i.e. man by man and woman by woman; homosexuals i.e. lesbian by lesbian and gay by gay and between heterosexual and opposite sex sexual harassment i.e. harassment of men by women or harassment of women by men. The statistics reveal that women are far more vulnerable to sexual harassment by men rather than vice-versa. Thus, sexual harassment is a grave problem because it adversely affects the victim, organization and the society and consequently the development of the country. The victims suffer from gastro-intestinal disturbances, loss of appetite, weight

\textsuperscript{25} See Chapter II of the present thesis.
loss, headaches, inability to sleep, lose self worth, self confidence and self esteem which disrupts their intellectual development, causes confusion, uncertainty, self doubt, reduced concentration, anger, disgust, anxiety and distrust of faculty in general. Not only this, it also affects the reproductive health of the women as it may lead to infertility, unwanted and unplanned pregnancies, miscarriage, abortions etc. All this affects them economically also.

Because of these effects on victims, the organization suffers in a number of ways like loss of or less productivity and profitability, affects organizational culture and team work, affects the image of the enterprise, leads to lack of and loss of efficient, effective, desired and valued workforce which in turn affects its financial position. All this further affects the society by affecting the employment avenues, productivity and development, morale, inter-personal relationships, economy, health and safety and ultimately human resource development of the society which consequently impacts the progress, prosperity and image of the country from the point of view of safer dwelling place for human beings.

The sexual harassment of women is considered to be discrimination on the basis of sex which in turn has its roots in the patriarchal social order and thus reflection of the status of women in society. The systematized prejudices, seclusion of women, economic dependence, violence and atrocities further relegates the status of women. So law of the land has a vital role in this aspect because law reflects the public opinion of the time and vice-versa. Thus the emphasis is on the study of actual social effects of legal institutions and legal doctrines, along with conducting sociological study in preparation for law making and studying the means of making rules effective.

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India, at the time of independence, was plagued with certain social maladies that had its roots in its history, customs, cultural moorings, myths and wrong perceptions. And on the other hand British had left this country with a rudimentary industrial and scientific base, tremendous poverty, social cleavages along caste and economic lines. So the framers of the Indian Constitution were deeply concerned to provide social, economic and political justice, 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 people. These benign goals have been enshrined in the preamble of the Constitution of India. Part III of the Constitution contains fundamental rights which are justifiable and no law can be made in violation of those rights. This part has been further strengthened under Article 35 which obligates the Indian parliament to make laws for giving effect to the provisions contained in this part i.e. part III of the Constitution.

Further, keeping in view that the Indian freedom struggle will be an unfinished mission until half of the population i.e. women are restored to their social, economic, political, intellectual, and cultural dignity in reality, the framers of Constitution laid down number of provisions in the form of fundamental rights and directive principles of the State Policy. The pursuance of this objective is reflected in part III of the Constitution which abolishes inequality between man and woman by laying down in Article 14 that equality is the rule. But equality can only be among equals. When unequals are to attain equality, as for example between men and women, the dynamics of egalite demands special measures of equalization and protection. The intrinsic or initial handicaps, biological and other, that women labor under, calls for remedial care— even as the historic inequality implicit in our conditioned culture and distorted legality demand provisions to neutralize ancient inferiorities. 28 Thus on the one hand sex discrimination is considered to be anathema to the Constitutional law 29 but on the other hand benign exception to this is enacted in article 15 (3). This provision enjoins the

29  See Articles 14, 15(1),(2) and 16(1), (2) of the Constitution of India.
State for protective discrimination in favour of women to rescue them from disabilities and to dissolve all discrimination for advancement of their interest and hence providing them justice. The insertion of clause 3 of article 15 in relation to women is a recognition of the fact that for centuries, women of this country have been socially and economically handicapped. As a result, they are unable to participate in the socio-economic activities of the nation on a footing of equality. It is in order 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 that clause (3) is placed in article 15. Its object is to strengthen and improve the status of women. The protection under this clause also extends to matters relating to employment and appointment under the State under Article 16 because sex cannot be the sole ground of ineligibility or discrimination against women.

In addition to this explicit guarantee, there are also implicit references for the protection of women in part III of the Constitution. State is authorized to make any special provisions for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and Scheduled Tribes. To further strengthen this struggle for advancement of certain sections of the society including women who have historically been backward, Article 16 (4) enjoins the State to make provisions for the reservation of appointments or posts in favor of any backward class of citizens which in the opinion of the State is not adequately represented in the services under the State. Article 17 abolishes untouchability and forbids its practice in any form. Article 19 guarantees six fundamental freedoms to all citizens which includes, inter-alia, to practise any profession or to carry on any occupation, trade or business.

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31 Supra Note 29, Art. 15(4)
32 Id, Art. 19(1) (g) read with cl. (6).
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Further considering that right to life constitutes the superstructure while other rights supply meaning to it, Article 21 provides that no person shall be deprived of his life or personal liberty except according to procedure established by law. However, right to life does not merely mean the continuance of a person’s animal existence. It means the fullest opportunity to develop one’s personality and potentiality to the highest level possible in the existing stage of our civilization. Inevitably, it means the right to live decently as a member of a civilized society. It includes within its ambit all freedom and advantages that would go to make life agreeable. The right denotes a reasonable standard of comfort and decency.  

So the term life as used in Article 21 means that something more than mere animal existence is required. The inhibition against its deprivation extends to all those limbs and faculties by which life is enjoyed. The provision equally prohibits the mutilation of the body by amputation of an arm or leg or the pulling out of an eye, or the destruction of any other organ of the body through which the soul communicates with the outer world. However, the right to life received a shot in arm at the hands of Justice Bhagwati with the observation that the right to life includes the right to live with human dignity and all that goes along with it, namely, the bare necessities of life, such as adequate nutrition, clothing and shelter over the head and facilities for reading, writing and expressing one-self in diverse forms, freely moving about, mixing and comingling with fellow human beings. New vistas were opened and it was recognized that right to reputation is an important part of one’s life. It is one of the finer graces of human civilization which makes life worth living. The Supreme Court observed that a good reputation was an element of personal security and was protected by the Constitution, equally with the right to the enjoyment of life, liberty and property. The

34 Kharak Singh v. State of UP, AIR 1963 SC 1295, the Supreme Court quoted with approval Field, J.’s Observation in Munn v. Illinois 94 US 113(1877). The same was reiterated with approval in Sunil Batra v. Delhi Administration, AIR 1978 SC 1675.
36 Prof. S. N. Hegde v. Lokayuktha, Bangalore, AIR 2004 NOC 169(kant.).
INDIAN WOMEN AND SEXUAL HARASSMENT AT WORKPLACE—NEED FOR A COMPREHENSIVE LEGISLATION AND PRAGMATIC PLANNING

Court affirmed that the right to enjoyment of a private reputation was of ancient origin and was necessary to human society.\(^{37}\) It also includes right to privacy which is defined as the state of being free from intrusion or disturbance in one’s private life or affairs.\(^{38}\)

And sexual violence apart from being a dehumanizing act, is an unlawful intrusion on the right of privacy and sanctity of a female. It is a serious blow to her supreme honour and offends her self-esteem and dignity. It is a crime against the entire society, a crime against basic human rights and hence violative of the victim’s most cherished of the fundamental rights i.e. rights to life contained in Article 21\(^{39}\).

Thus women also have the right to life and liberty, they also have the right to be respected and treated as equal citizens. Their honour and dignity cannot be touched or violated. They also have the right to lead an honourable and peaceful life. And rape is a crime against basic human rights and is also violation of the victim’s rights to life under Article 21\(^{40}\). Hence sexual harassment of women at workplace is violative of right to life and personal liberty under Article 21\(^{41}\).

Further Article 24 prohibits traffic in human beings and begar and other similar forms of forced labour. And traffic in human beings includes traffic in women for

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\(^{37}\) Smt. Kiran Bedi v. Committee of Enquiry ,AIR 1989 SC 714. Here SC referred to an American decision in D.F. Marion v. Minnie Davis, 55 American LR 171. Also see B. O.T. of Port of Bombay v. Dilip Kumar ,AIR 1983 SC 109 wherein SC referred to International Covenant on Civil and Political Rights, 1966 which recognized right to have opinions and the right to freedom of expression subject to the right of reputation of others and held that right to reputation was a facet of right to life.


immoral or other purposes, such as making them ‘devadasi’ or ‘jogins’.\(^{42}\) And the Immoral Traffic (Prevention) Act, 1956 made it a penal offence. Whereas begar and other similar forms of forced labour are punishable by the Bonded Labour System (Abolition) Act, 1976. Justice Bhagwati added another shot to the crusade towards protection of human beings including women against exploitation by expressing that force must be construed to include not only physical or legal force but also force arising from the compulsion of economic circumstances which leaves no choice of alternatives to person in want and compels him to provide labour or service even though the remuneration received for it is less than the minimum wage\(^{43}\). It was laid down that the State is duty bound to rescue such labourers and rehabilitate them and failure on the part of the State to do so would tantamount to violation of Article 21 and 23 respectively\(^{44}\).

Article 24 prohibits the employment of children below 14 years of age in factories, mines and hazardous employment. However building construction work held to be such hazardous employment where children below 14 years should not be employed and the prohibition contained in Article 24 could be plainly and indubitably enforced against everyone, whether state or private individual\(^{45}\).

Apart from Fundamental Rights, the drafters of the Constitution incorporated in part IV, Directive Principles of policy matter, inter-alia, for welfare of women. This part epitomizes the aspirations of the Constitution makers and of the people and describes it as a mechanism geared towards social levelling to which economic equality is a prelude. It is clear from Article 38 which directs the State to promote the welfare of the people by securing and protecting as effectively as is possible a social order in

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\(^{42}\) Vishal Jeet v. Union of India, AIR 1990 SC 1412.


which justice, social, economic and political shall inform all the institutions of the national life. And in order to achieve this, State shall in particular strive to minimize the inequalities in income and endeavour to eliminate inequalities in status, facilities and opportunities not only amongst individuals, but also amongst groups of people residing in different areas or engaged in different vocations. Thus social justice is a dynamic device to mitigate the sufferings of the poor, weak, dalits, tribals and deprived sections of the society.

Further the Principles of Policy provides, inter alia, that the men and women equally have the right to an adequate means of livelihood; there is equal pay for equal work for both men and women; emphasizes that the health and strength of workers, men and women and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength; and children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment.

In addition to this, the mandate of the Constitution emphasizes on right to work and on making available the just and humane conditions of work in general and facilities like maternity relief to women workers in particular. This theme is further promoted by Article 43 which provides that the State shall endeavour to secure by suitable legislation or economic organization or in any other way to all workers, agricultural, industrial or otherwise, work, a living wage, conditions of work, ensuring a decent standard of life and full enjoyment of leisure and social and cultural opportunities. Although these principles are enshrined in part IV of the Constitution

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46 Added by Constitution (44th Amendment) Act, 1978.
48 Article 39(a),(d),(e) and(f) of the Constitution of India.
49 Id., Art. 41.
50 Id., Art. 42.
CONCLUSION AND SUGGESTIONS

which is non-justifiable but these are not less than a beacon light that would guide the State to man woman parity which is otherwise the first step towards achieving gender justice. It is clear from the observation of the Justice Bhagwati that the right to live with human dignity enshrined in Article 21 derives its life breath from the Directive Principles of State Policy and particularly from clauses (e) and (f) of Article 39 and Articles 41 and 42 and at the least, therefore it must include the protection of health and strength of workers, men and women and of the tender age of children against abuse, opportunities and facilities for children to develop in a healthy manner and in conditions of freedom and dignity, educational facilities, just and humane conditions of work and maternity relief. Thus part III and IV is complementary to each other. Being conscious of the fact that women in India are in a disadvantaged position because of cultural patterns, historical prejudices and attitudes, the provision in the form of the fundamental duty was incorporated by the Constitution 42nd (Amendment) Act 1976. It obligates every citizen of India to renounce practices derogatory to the dignity of women under Article 51 A (e). Thus it can be said that the dignity of womanhood has been the salutary cynosure of Constitutional concern.

Furthermore after independence, the first two five years plans promoted that industrialization and development of agricultural productivity would ultimately result in overall social development which would in particular generate conducive conditions for women to develop along. As a sequel to it, a ‘chapter on women and development’ was included for the first time in sixth and seventh five years plans and after this a number of beneficiary oriented programmes were introduced such as extending direct benefits to women as part of poverty alleviation policies. And move from alleviation to empowerment under the eighth and ninth five year plans. Eighth plan paid considerable attention to working conditions, welfare and social security measures and enforcement of labour laws for unorganized labour, women and child labour. And Ninth plan

stressed that national social assistance programme cover, inter-alia, maternity benefit and family benefit for girl child\textsuperscript{53}.

Now it was considered to be most opportune to create an open statutory body namely National Commission for Women\textsuperscript{54}. It is an institution that can act as surveillance agency and help the government to move forward for reviewing the Constitutional and legal safeguards for women and recommend the appropriate legislative measures and take up the cases of women with appropriate authorities and advise the government from time to time on all policy matters affecting women. Since its inception it has been performing various types of functions ranging from informal counselling advice to formal action to bring to book persons causing harassment, violence and cruelty to women. It has taken cognizance of number of complaints made from different parts of the country and in some cases even the members personally visited and enquired into the complaints and took the cases with appropriate authorities like Bhanwari Devi gang rape case could see the light of the day only because of efforts of the Commission\textsuperscript{55} and other cases of molestation and rape are also brought from time to time before the appropriate authorities as is evinced that during 2003 alone it received as many as 5160 cases of sexual harassment of women at workplace. Thus National Commission for Women is acting as a watch dog agency for the protection of rights of women\textsuperscript{56}.

On the same lines the Protection of Human Rights Act, 1993 enjoins the constitution of National and State Human Rights Commissions, inter-alia, to inquire into complaints of human rights violation and forward them to the appropriate authorities, review the safeguards provided by or under the Constitution or any law in force for the protection of human rights and recommend measures for their effective

\textsuperscript{53} Govt. of India, Ninth Five Year Plan 1997-2002 (Vol. II) pp.390,392 and 397.
\textsuperscript{56} “UP Tops List of Harassment Cases Against Women”, The Kashmir Times, p. 9, 8-1-2004.
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implementation. There seems to be overlapping between the National Commission for Women and National Human Rights Commission because human rights cover rights of the women to live with dignity which encompasses protection from harassment, violence, cruelty etc. The Commission’s ability to function as an autonomous body is yet to be established. The UN High Commissioner pointed out that NHRC lacks pluralism i.e. dominance of the Judiciary in the composition, investigations lack independence as secretary -general and director- general of investigation come on deputation from within the government; little engagement with human rights defenders, mechanism to handle complaints against human rights violation lacks credibility because these are entrusted to the police, which in most cases were the perpetrators of the alleged violations. The NHRC’s annual report was held up due to the government’s laxity as the latest available report was of 2007-08 and also it cannot be made public till the government is ready with the action taken reports57. Thus it is required that for the effective monitoring and implementation of rights of women and that liabilities are imposed in appropriate cases, these defects should be removed so that it can function as autonomous body to push through its recommendations and decisions.

These national policies and programmes to ameliorate the lot of women have achieved only a negligible progress. Because Indian woman is still unfree, exploited, sold as commodity, liquidated without the law and held hostage by an exploitative combination. Constitutional imperatives of equality of status and opportunity, social justice, dignity and personality for the Indian women remain paper rhetoric and fatuously futuristic so long as raw realities of life contradict with bleeding wounds and burnt flesh, daily humiliation and legal discrimination, the fighting creed writ into the founding deed58. This is evident from the statistics of the National Crime Record Bureau which exhibit that a total of 2,03,804 incidents of crime against women were reported in the country during 2009 as compared to 1,95,856 during 2008, recording an increase of 4.1% during 2009. Out of this figure, a total of 71,117 incidents of sexual

57 “India’s Clout ensures UN status for NHRC”, Times of India, 21-7 2011.
58 Supra note 28 at p. 1.
Indian women and sexual harassment at workplace—need for a comprehensive legislation and pragmatic planning

Violence i.e. rape, molestation and sexual harassment were reported. A survey conducted in Jammu on 3,113 women revealed that roadsides and public transport are the most vulnerable places where women face highest risk of sexual harassment. While most women face this at some point or the other, only two percent women approach the police to report the harassment. In another survey conducted on 135 women doctors and nurses, working in four hospitals in Kolkata, 77 admitted sexual harassment, however 50 of them did not complain. These statistics and findings point out that women encounter harassment when they managed to make gatecrash entry into such occupations and places that were conventionally monopolised by men. A survey conducted by an NGO ‘Sakshi’ mentioned that 98% of women were subjected to sexual harassment at the workplace. And in rural areas, women become victim of male chauvinism because they are against modernization which means to them equality and emancipation of women. Whereas in cities, it may be the male reaction against female workers giving up their stereotype roles or else it may be attributed to the male resistance against females venturing into the occupations generally a male domain.

Despite such intensity of the problem which is being a public wrong, the term is not used and defined in the criminal law of India. However the Penal Code recognizes three distinct forms of sexual violence, rape under Section 375-376, physical contact short of rape as molestation under Section 354 and without physical contact i.e. verbal or through gestures as eve-teasing under Section 509. And sometimes even Sections 292-294 which prohibit obscenity are used. However in the absence of the specific use of the term sexual harassment, the cases are being defined in terms of outraging or insulting the modesty of a woman. The modesty is to woman what fragrance is to flower has

59 Crimes in India, 2009, see www.ncrb.nic.in.
61 Survey conducted by International NGO, Population Council cited in Mukesh Jadav, “Sexual Harassment of Women –Current Scenario of Indian Hospitals”, JIAFM, 2007-29(4); ISSN: 0971-0973.
63 Ibid.
CONCLUSION AND SUGGESTIONS

rightly been defined\(^\text{65}\). But in the absence of exact definition of modesty in the Penal Code, it is open for judicial interpretation from time to time. As in State of Punjab v Major Singh\(^\text{66}\), the Sessions Judge and two of the three High Court Judges observed that a child of seven and a half month old being incapable of having a developed sense of modesty, the offence was not punishable under Section 354. The third judge of the High Court however quoted the dictionary meaning of modesty which is womanly propriety of behaviour, scrupulous chastity of thought, speech and conduct (in men or women) reserve or sense of shame proceeding from instinctive aversion to impure or coarse suggestion. This obviously does not refer to a particular woman but to the accepted motions of womanly behaviour and conduct. He further said that the object of this provision seems to have been to protect women against indecent behaviour of others which is offensive to morality. The offences created by Sections 354 and 509 of the Indian Penal Code are as much in the interest of the women concerned as in the interest of public morality and decent behaviour. These offences are not only offences against the individual but against public morals and society as well and that object can be achieved only if the word modesty is considered to be an attribute of a human female irrespective of fact whether the female concerned has developed enough understanding as to appreciate the nature of the act or to realize that it is offensive to decent female behaviour or sense of propriety concerning the relations of a female with others. However CJ Sarkar of Supreme Court differed with this view and observed that it depends upon reasonable man perception and he had to consider whether the woman concerned had developed a sense of modesty and also the standard of that modesty. As the notions of modesty of a child may be different than a woman of mature age so to say that every female of whatever age is possessed of modesty capable of being outraged seems to be laying down too rigid a rule which may be divorced from reality. There obviously is no universal standard of modesty. However the other two judge of the Supreme Court concurred with each other and held that any act done to or in the presence of a woman which is clearly suggestive of sex according to the common


\(^{66}\) AIR 1967 SC 63.
nations of mankind, must fall within the mischief of Section 354. Further, the essence of a woman’s modesty is her sex and from her very birth she possesses the modesty which is attributable of her sex. Hence, young or old, intelligent or imbecile, awake or sleeping, the woman possesses modesty capable of being outraged. The different interpretation of the judges reflect the patriarchal attitude and prejudices against women prevalent in society and die hard need for clear definition of the term.

In Rupan Deol Bajaj v K.P.S. Gill\textsuperscript{67}, the High Court quashed both the FIR and the complaint with the observation that in the present case there were 48 more persons, 24 ladies and equal member of gentlemen. It sounds both unnatural and unconscionable that the petitioner (accused) would attempt or dare to outrage the modesty of the author of the first information report in their very presence inside the residential house of Financial Commissioner Home and the nature of harm allegedly caused to the complainant did not entitle her to complain about the same in view of Section 95 of the IPC i.e. being of trivial nature. Thus the modesty was again interpreted in the light of the ordinary sense and temper and reasonable person standard which further depends upon different perceptions and interpretations. However the Supreme Court holding that the High Court had committed a gross error of law in quashing the FIR and the complaint, in that the accused, the topmost official of the state police, indecently behaved with a senior lady IAS Officer, in the presence of a gentry and in spite of her raising objections, continued with his such behaviour. If we are to hold, on the face of such allegations that, the ignominy and trauma to which she was subjected to was so slight that (the complainant), as a person of ordinary sense and temper, would not complain about the same, sagacity will be the first casualty. Further defining modesty (according to Dictionary meaning) as womanly propriety of behaviour, scrupulous chastity of thought, speech and conduct, the Supreme Court held that in slapping the complainant on her posterior amounted to outraging 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

\textsuperscript{67} AIR 1996 SC 309.
lady- sexual overtones or not, notwithstanding and observed that the common notions of mankind have to be gauged by contemporary societal standards.

Further the accused put the allegation that the prosecution acted in connivance with some others to malign the accused and that the whole incident was falsely foisted on him with ulterior motives. But the Supreme Court refused to set aside the order of two courts and affirmed by the High Court in revision. Thus the accused tried to tilt the law in his favour with the help of power (being DGP of Police) by taking advantage of absence of definition of modesty in IPC and on the other hand concocting a false story by putting aspersions on the credibility of the complainant.

Another sordid story which tells its tale is that of sexual assault cases where consent, corroboration and character of the victim are taken into consideration which further hampers the protection of women. Like in Tukaram v State of Maharashtra, the trial court acquitted the accused on the basis of ‘tacit’ consent on the part of the victim. But the Bombay High Court convicted Ganpat (Constable) for rape and Tukaram (Head Constable) for molestation on the ground that consent and passive submission were different from each other, and that mere passive or helpless surrender of her body and her resignation to the other’s lust under threats or fear could not mean consent on her part. However, the Supreme Court set aside the conviction and held the accused not guilty by making observation that woman was not subjected to fear of death or hurt and it was not a case of passive submission as held by the High Court because there were no marks of injury on her person which showed that the whole affair was a peaceful one with consent. This judgment justify the charge of male chauvinism in a male dominated society which prevails even over the thinking of the persons who rise to the stature in their profession to occupy the seat at the apex body of adjudication of the country i.e.

69 AIR 1979SC 185: (1979) 2 SCC 143. In this case Mathura an 18 years old Harijan orphan girl was called to the police station on abduction report filed by her brother. The constable instead of looking into her grievance raped her and head – constable made attempt to rape her as he was heavily drunk at that time.
Supreme Court. This judgment was criticized and it raised a lot of hue and cry in the country because it pushed them to such a level from where they started the struggle for amelioration of lot of women.

That is why a year later Krishna Iyer, J, observed that the inherent bashfulness, the innocent naïveté and the feminine tendency to conceal the outrage of masculine sexual aggression are factors, which are relevant to improbable the hypothesis of false implication in a rape charge. He warned that the courts would lose their credibility if they rebel against realism. After all, a law court is not an unnatural world. Therefore, a socially sensitized judge is a better statutory armour against gender outrage then long clauses of a complex section with all the protection writ into it. The court cannot cling to a fossil formula and insist on corroborative testimony, judicial response to human rights cannot be blurt by legal bigotry.

Similarly the Supreme Court emphasized that in the Indian setting, refusal to act on the testimony of a victim of sexual assault in the absence of corroboration as a rule, is adding insult to injury. The court deprecated viewing evidence of victim of rape or sexual molestation with the aid of spectacles fitted with the lenses tinged with doubt, disbelief or suspicion. To do so is to justify the charge of male chauvinism in a male dominated society. While expressing the need for corroboration and subject it to relentless and remorseless cross-examination, we must do so with a logical and not an opinionated eye in the light of probabilities with our feet firmly planted on the soil of India, with our eyes focussed on the Indian horizon. We must not be swept off the feet by the approach made in the western world which has its own social milieu, its own social mores, its own permissive values and its own code of life. It is wholly unnecessary to import the said concept on a turnkey basis and to

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transplant it to on the Indian soil regardless of the altogether different atmosphere, attitudes, mores, responses of the Indian society and its profile, the identities of the two worlds are different, therefore solution cannot be identical. A girl or woman in the tradition bound non permissive society of India would be extremely reluctant even to admit that any incident which is likely to reflect on here chastity had ever occurred. She would be conscious of the danger of being ostracized by the society including by her own family members, relatives, friends and neighbours. She would have to brave the whole world. On principle, the evidence of victim of sexual assault stands at par with evidence of an injured witness. Therefore if it does not suffer from any basic infirmity and the probabilities factor does not render it unworthy of credence. There is no reason to insist on corroboration except from the medical evidence where the same can be expected to be forthcoming.

Imposing sexual intercourse on a woman, no matter whatever her character or status in life is condemnable because even a woman of early virtue is entitled to privacy and no one can invade into her privacy as and when he likes. So also it is not open to any and every person to violate her person as and when he wishes. She is entitled to protect her person if there is an attempt to violate it against her wish. She is equally entitled to the protection of law, therefore, merely because she is a woman of easy virtue, her evidence cannot be thrown overboard.

Adopting similar principle in State of Punjab v Gurmit Singh, the Supreme Court disapproved the approach of the trial court in casting a stigma on the character of the victim by characterizing her as a “girl of loose morals” or “such type of a girl”. The Court observed that even if in some cases the acceptable material on the records shows the victim to be habituated to sexual intercourse, no such inference that the victim is of

loose moral character was permissible. Even in such cases the victim had a right to refuse to submit herself to sexual intercourse to anyone and everyone because she was not a vulnerable object or prey for being sexually assaulted by anyone and everyone. However the victim’s past sexual history can be ignored but for her sexual relationship with the accused. This is more popularly recognized under the law of England and Scotland\(^75\).

In order to remove defects and plugging loopholes in the existing criminal law, the Government of India enjoins the Law Commission from time to time to suggest desired measures for the same. Based upon the 84th report of the Law Commission of India\(^76\), the Criminal Law (Amendment) Act, 1983 was enacted which introduced a number of changes in the criminal law i.e. custodial sexual assault, presumption that she did not consent, trial in camera etc. However no changes are introduced in Sections 354 and 509 except two State amendments like in Andhra Pradesh\(^77\) where punishment from 5 to 7 years is prescribed under Section 354 and in Orissa\(^78\), offence is made non bailable.

However in the year 1992, gang rape was committed on a ‘Saathin’ working for a State run Women’s Development Programme in Rajasthan by five upper caste men as an act of revenge for her campaign against child marriage. And then appalling display of negligence and deliberate inaction by the police, medical personnel and the magistrate, all of who worked to prevent her from registering a case. In the absence of State intervention, she faced the inevitable gang rape because before the actual rape, she had complained of the harassment she experienced from the accused in response to her campaign. Her complaints went unheeded by local authority (who in effect represented

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\(^76\) The Law Commission of India, 84\(^{th}\) Report on Rape and Allied Offences, Ministry of Law and Justice, Govt. of India, (1980).

\(^77\) Andhra Pradesh Act no. 6 of 1991, proviso to Sec.354 IPC.

\(^78\) Orissa Act no. 6 of 1995, Sec.3 (w.e.f.10-3-1995).
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the State as her employer). This led to the filing of a class action by certain social activists and NGO’s with the aim of focussing attention towards societal aberration and assisting in finding a suitable method for the realization of the true concept of gender equality and preventing sexual harassment of working women.

Supreme Court held in Vishaka v. State of Rajasthan that gender equality includes protection from sexual harassment and right to work with dignity which is a universally recognized basic human right. Thus to protect the right of gender equality under Articles 14, 15 (1), 16(2), right to life and personal liberty under Article 21, right to carry on the profession, occupation, trade or business of one’s choice under Article 19(1) (g) of the Constitution of India and to fulfill the country’s obligations under International instruments, the Supreme Court laid down certain guidelines and norms relating to sexual harassment at workplace. These guidelines have incorporated the definition of sexual harassment from General Recommendation 23 to Article 11 of CEDAW. The guidelines lay down onus on responsible persons including employee to take preventive steps. In case of sexual harassment, disciplinary action is to be taken by the employer and to take recourse to criminal proceedings where the conduct of the harasser amount to offence under IPC, 1860. Thus accountability for sexual harassment was no longer limited to the individual perpetrator but enlarged to cover institutions and their obligations to ensure a safe and healthy environment for women. The mandatory complaint committee proposed was an added novelty. The court acknowledged that the present civil and penal laws in India did not adequately provide for specific protection of women from sexual harassment at workplaces and that the enactment of such legislation would take considerable time. So emphasized that these guidelines are law of the land under Article 141 of the Constitution of India and is mandatory for compliance.

79 Supra note 55.
81 UN Convention on Elimination of All Forms of Discrimination Against Women was signed by India in 1979 and ratified in 1993; India also signed UN Declaration on Elimination of Violence Against Women(1993); Universal Declaration of Human Rights(1948); International Covenant on Civil and Political Rights(1966) and International Covenant on Economic, Social and Cultural Rights(1966).
in all work places and institutions. The Supreme Court underlined the need for legislative action to address this grave problem as there is no domestic law pertaining to sexual harassment.

Thus Vishaka Judgment heralded a new era in the struggle of Indian women for gender equality, right to work with dignity, economic independence and hence emancipation because for the first time the term sexual harassment was recognized and defined by the judge made law. However, in the absence of statutory enactment on the subject, elaborate legal framework for redressal of victims of sexual harassment is not available and legal redressal mechanism is also required to develop completely.

In order to give effect to these guidelines, National Commission for Women has drafted a Code of Conduct for workplace in 1998 and six draft bills. For the finalization of the draft, National Commission for Women has called several meetings of experts, of various organizations, employers and employees, NGO’s, social workers, lawyers, journalists and feminist activists. From 2000 to 2010, title of Draft Bill was modified from prevention to protection and then prohibition to give the clear cut message that it is to prohibit sexual harassment of women at workplace. The issue of criminalization of sexual harassment at workplace is also a debatable issue, except first two bills which consider it as a criminal offence, all other draft bills recognize it as misconduct. The liability of the employer is also another important aspect which require considerable attention. Because employer is duty bound to provide safe working environment free from sexual harassment which is the fundamental right of every person. But as fundamental rights (except Articles 17, 23, 24) can be enforceable only

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83 Draft Bill on Sexual Harassment of Women at their Workplace (Prevention) Bill, 2000; Draft Sexual Harassment of Women at their Workplace (Prevention) Bill, 2003; Draft The Sexual Harassment of Women at the Workplace (Prevention and Redressal) Bill, 2004; Draft The Protection Against Sexual Harassment of Women Bill, 2005; Draft The Protection of Women Against Sexual Harassment at Workplace Bill, 2007; Draft The Prohibition of Sexual Harassment of Women at Workplace, Bill, 2010.
against State, the private sector which do not come within the ambit of State as per Article 12 whether their employees can get the same relief as can be claimed in case of violation of fundamental rights is another important aspect. As it is not only a private affair where one person causes harm to another but it is a systematized wrong which has serious repercussions on the workplace and the society, so great responsibility lies on the employer and the State to effectively monitor the situation. In case of educational institutions, sexual harassment has very serious impact because here the relationship between teacher and taught is not only fiduciary but also of respectability. The whole confidence of the student may be shattered and hence future prospects may be threatened and it also leads to violation of right to education and right to live with dignity.

In case of unorganized sector like in household jobs where domestic workers remain within the confines of four walls of the house and in the exclusive charge of employer, where the sense of powerlessness is strong, the situation needs cautious approach. Taking a clue from the studies showing that this section of the labour market is especially vulnerable to trafficking, financial and sexual exploitation and forcible confinement\(^\text{84}\), it is urgently required to include such disadvantaged section of women under the proposed legislation regarding sexual harassment at workplace. Although the draft bill of 2010 includes domestic worker but the bill approved by the Union Cabinet excludes this term despite the fact that at least 4.75 million domestic workers employed in private households in India, of which 3.4 million or roughly 72 percent are women\(^\text{85}\). These issues require serious attention on the part of the government.

In the absence of enacted law on sexual harassment provisions of other enactments like the Indecent Representation of Women (Prohibition) Act, 1986, the


\(^{85}\) Ibid. This is according to ILO study.
Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 and Information Technology Act, 2000 in addition to provisions of Indian Penal Code, 1860 are explored to redress the grievances of women. At the global level international community was also conscious of the prejudices, biases and practices prevalent against women. So the preamble of the UN Charter expressed the resolve of the people of the world to strive and uphold fundamental human rights, dignity and worth of human person and equal rights of men and women. The Charter articulates this theme by laying down that its purpose is to achieve international cooperation in solving international problems of economic, social, cultural or humanitarian character and in promoting and encouraging respect for human rights and fundamental freedoms for all without distinction as to race, language or religion. It further declares that United Nations shall place no restrictions on eligibility of men and women to participate in any capacity and under conditions of equality in its principal and subsidiary organs. In order to strengthen the idea of equality, the Charter lays down that General Assembly shall initiate studies and make recommendations for the purpose of promoting international cooperation in the economic, social, cultural, educational and health fields and assisting in the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language or religion. The observance of human rights and fundamental freedoms was further reiterated in Articles 55 (1), 62(2), 76(c). In order to suggest practical measures for the promotion of political, economic, civil, social and educational rights of women on the basis of which Conventions may be developed, the Economic and Social Council established the Commission on the Status of Women in 1946 whose relevance in the present context cannot be lost sight of. The guiding principle of the Commission was, ‘whereas a woman is as much human as a man, she should share freedom and equality in the interests of the well being of society and to achieve democratic peace by eliminating fascist ideology. Its purpose was to raise the status of women, irrespective of nationality, race, language or religion to

87 Id., Art. 8.
88 Id., Art. 13(1)(b).
89 The composition of the Commission is based on the principle of equitable geographical representation. It comprises of 45 members out of which 13 members are taken from African States, 11 from Asian States, 4 from Eastern European States, 9 from Latin American and Caribbean States and 8 from Western European States.
equality with men in all fields of human enterprise and to eliminate all discrimination against women in statutory laws and in the maxims, rules and interpretations of customary law. Thus Commission on Status of Women started working in close coordination with other United Nation’s bodies such as ILO and UNESCO to gather the factual information relating to the existence of discrimination against women in law and practice which may ultimately help in the codification of law relating to rights of women.

Further Universal Declaration of Human Rights also reaffirms faith in the equal rights of men and women and that everyone is born free and equal in dignity and rights and has right to life, liberty and security of person and these rights are available to everyone without distinction of any kind such as race, colour, sex etc. The legally binding instruments enacted in pursuance of this i.e. International Covenant on Civil and Political Rights, 1966 and the International Covenant on Economic, Social and Cultural Rights, 1966 reinforces the same. The Declaration on Elimination of Discrimination Against Women, 1967 proceeded a step further and laid down under Article 1 that discrimination against women is fundamentally unjust and constitutes an offence against human dignity and so Article 10 directs that all appropriate measures be taken to ensure to women equal rights with men in the field of economic and social life particularly right to receive vocational training to work, to free choice of profession and employment advancement; right to equal remuneration with men and to equality of treatment in respect of work of equal value and right to leave with pay.

Further considering that despite a number of efforts made at the international level, extensive discrimination against women continue to exist, the Convention on the Elimination of All Forms of Discrimination Against Women was adopted in 1979 with

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91 See Preamble, Arts.1, 2 and 3 of Universal Declaration of Human Rights, 1948.
the twin objectives of ‘prohibiting discrimination’ and ‘ensuring equality of sexes’. For the first time, the word ‘discrimination’ was defined extensively and State parties are required to make provisions not only for the protection of the women but also for their advancement in all fields and particularly social, economical, political and cultural fields. The Convention mandates the State parties to modify the social and cultural conduct of men and women with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotype roles for men and women. Besides eliminating discrimination, State parties are required to ensure equality between men and women, inter-alia, regarding education; work; employment opportunities, free choice of profession and employment, promotion, job security and all benefits and conditions of service; remuneration, social security and paid leave; protection of health and safety in working conditions. However the Convention does not specifically prohibit sexual harassment of women at workplace because at that time, movement against sexual harassment was in rudimentary stage as the term was coined only in 1970s. But the General Recommendation No. 12 of 1989 of the Committee on the Elimination of Discrimination Against Women recognized sexual harassment as a form of violence against women and General Recommendation 19 of 1992 of the Committee characterized gender based violence as a type of sex discrimination and therefore a breach of CEDAW. It also defines sexual harassment which was adopted by the Supreme Court of India in Vishaka’s case. This Convention was ratified by India in 1993 but till date has not been given effect by the statutory enactment.

The Recommendations of the Committee were given the form of Declaration on the Elimination of Violence Against Women in 1993. It acknowledges that violence against women encompasses physical, sexual and psychological violence including rape, sexual abuse, sexual harassment and intimidation at work, in educational institutions and elsewhere, perpetrated or condoned by the State, wherever it occurs. It

92 See Arts. 1,2,3,4,5 and 11 of the Convention on the Elimination of All Forms of Discrimination Against Women,1979.
also recognized inter-alia the right to life, the right to be free from all forms of discrimination; the right to just and favourable conditions of work. It also requires the States to condemn violence against women and adopt appropriate laws and policies to eliminate it.\footnote{See Arts. 1,2,3 and 4 of the Declaration on the Elimination of Violence Against Women,1993.}

Besides these, other progressive efforts made by the United Nations Organization like Mexico World Conference on Women, 1975 incorporated principles for ensuring equality between men and women in all spheres of life which would in turn lead to elimination of all forms of discrimination against women. The second World Conference on Women i.e. Copenhagen Conference of 1980 and Programme of Action emphasized that the problems of underdevelopment and socio-economic structures, which place women in inferior position, should be solved. The third World Conference on Women held in Nairobi in 1985 formulated the Nairobi Forward looking strategies for the development of women, suggested measures for the empowerment of women and measures to prevent workplace sexual harassment. In the same way fourth World Conference on Women held in Beijing in 1995 and Platform for Action also considers sexual harassment as both a form of violence against women and a barrier to their equality as it is an affront to a worker’s dignity and prevents women from making contribution commensurate with their abilities. Thus requires the governments, trade unions, employers, community, youth organizations and NGO’s to eliminate sexual harassment at workplace, specifically governments are required to enact and enforce laws and administrative measures for the same. But India has failed to fulfill this pledge made at the Beijing platform even after 16 long years.

Even the World Conference on Human Rights convened in Vienna in 1993 and Vienna Declaration and Programme of Action considers sexual harassment as
incompatible with dignity and worth of human person and urges the elimination of all forms of sexual harassment of women.


In addition to efforts at international and regional level, at the national level also specific legal provisions to deal with sexual harassment have been enacted and in some countries existing provisions are interpreted to redress the grievances of sexual harassment. Like in United States of America, Title VII of the Civil Rights Act, 1964 deals with sexual harassment at work place as sexual harassment is considered as a form of sex discrimination. Title IX of the Education Amendments of 1972 deals with complaints of sexual harassment against educational institutions and their employees. American Equal Opportunity Commission Guidelines; the Federal Criminal Code, 1986, deal with sexual harassment. The term quid pro quo and hostile work environment were used for the first time in Merritor Savings Bank v. Vinson\textsuperscript{94} by the

\textsuperscript{94} 477 US 57 (1986).
CONCLUSION AND SUGGESTIONS

US Supreme Court to deal with sexual harassment at workplace and subsequently these terms acquired their own significance.\(^{95}\)


Therefore it can be irresistibly inferred that depending upon the national legal system, the victim of sexual harassment can seek redressal under non-discrimination and equal opportunity laws, civil laws like Labour Law and Tort Laws and Criminal Laws but no single branch can effectively take stock of the problem of sexual harassment of women at workplace. Although the legal scenario is changing to the relief of victims of sexual harassment yet the problem is so pervasive that it reflects too much tolerance of it due to insufficient legal recourse to get protection and redressal. The insufficiency and inadequacy of legal system further aggravates the sexual harassment of women at workplace. The inherent lacunae in the conceptualization and various obstacles that impede the effective implementation of existing provisions of law underlines the need for not only a comprehensive legislation but also pragmatic planning to deal with this sensitive issue.

INDIAN WOMEN AND SEXUAL HARASSMENT AT WORKPLACE—NEED FOR A COMPREHENSIVE LEGISLATION AND PRAGMATIC PLANNING

It may not be out of place to mention here that sexual harassment of women at workplace is an ‘occupational hazard’ because it is used as an oppressive tool to control and dominate women. A detailed analysis of contours of sexual harassment, societal response, adverse impact on the stakeholders, existing legal framework, response of the law enforcement agencies and attitude of the judiciary reveals that sexual harassment of women is a crime originating from abuse and misuse of power, the conceptualization of which is highly gendered being motivated by the patriarchal ideology and hegemony of normative social order. As sexual harassment is systematised discrimination on the basis of sex and threatens the very basis of civilized society, so it should not be considered as merely a wrong against woman who is harassed but against the institutions where she works and the nation which gets demeaned and demoralized due to such kind of aberrant human behaviour. Therefore great responsibility lies on the State to frame appropriate legal measures and issue necessary regulations to ensure the compliance of the same in letter and spirit so as to protect women against this societal aberration.
CONCLUSION AND SUGGESTIONS

SUGGESTIONS

In the light of above, following suggestions need consideration for the effective redressal of sexual harassment of women at workplace:

A. THE SUBSTANTIVE LAW

1. CLASSIFICATION AND DEFINITION

(i) In India Section 354 and Section 509 of Indian Penal Code, 1860 are viewed through the prism of obsolete and outmoded concept of ‘modesty’ However, since the precise definition of modesty is conspicuous by its absence, the same is attempted to be derived from various judicial pronouncements. But in view of the divergent interpretations vagueness is intrinsic in the very conceptualization of modesty. Further, as modesty is linked to morality which itself being a varying concept and the same cannot be alluded to give the extract the exact meaning of the same. It is, therefore, suggested that the terminology which has outlived its utility should be done away with lock, stock and barrel and new terminology be adopted.

(ii) Sexual harassment should be incorporated as an offence in Indian Penal Code, 1860, which encompasses all forms of sexual harassment prevalent in the community.

2. PUNISHMENT

(i) In case of sexual harassment involving physical contact, the punishment should be extended up to 5 years of imprisonment with fine and where there is no physical contact, punishment extending up to 3 years of imprisonment or with fine or both.

(ii) In case of aggravated sexual harassment, mandatory minimum punishment of at least 3 years which may extend up to 7 years should be provided.

(iii) In case of sexual harassment at workplace, mandatory minimum punishment of 5 years with fine of Rs 50,000/- in case of quid pro quo harassment should be specified.
However, in case sexual harassment is caused by creating hostile work environment, mandatory minimum punishment of 3 years with fine of Rs 25,000/- should be provided.

(iv) The offence of sexual harassment should be made cognizable.

B. SUPPORTIVE MECHANISM AND SENSITISATION:

(i) The administration and police should play a more proactive role in detection and investigation of cases involving sexual harassment.

(ii) Increasing the overall representation of women in police forces to make it gender friendly so that victims of sexual harassment may not face the wrath of stereotype attitude of male police man in taking the complaints in a casual manner.

(iii) Sensitizing the law enforcement machinery towards sexual harassment of women by way of well structured training and awareness programmes, meetings and seminars etc. for police personnel at all levels as well as other functionaries administering the criminal justice system.

(iv) There should be no delay whatsoever in registration of FIR in all cases of sexual harassment of women.

(v) Sensitizing the general public and work places including education institutions etc. regarding the sexual harassment and legal provisions dealing with it through awareness programmes, seminars, workshops, training, media-both print and electronic.

(vi) Help-line numbers of ‘Cells for complaints of Sexual Harassment’ should be exhibited prominently in work places including hospitals, education institutions and in other suitable places.

(vii) Special steps should be taken for security of women working in night shifts of call centers and other organizations.
C. SPECIAL LEGISLATION ON SEXUAL HARASSMENT

A comprehensive legislation specifically dealing with sexual harassment of women at workplace, in addition to its incorporation in the Penal Code, is the crying need of the hour.

The proposed legislation should include the following:

(i) The employer or other responsible person at workplace must set up an internal complaints committee comprising at least half the members as women. The committee should be headed by a woman who must be senior enough in position to redress the grievance of the victim without fear or favour.

(ii) In case of organized sector, a special female protection officer should be appointed at the workplace to whom the victim of sexual harassment can approach for forwarding the complaint to the internal complaints committee.

(iii) In case of unorganized sector, a special lady protection officer should be appointed at the district level.

(iv) A local complaints committee should be constituted by the district level officer to take action in case of inaction at the organizational level.

(v) The District level officer should direct the local complaints committee to investigate into cases of harassment by the employer.

(vi) The victim should also have the option to approach the National Commission for Women or State Commission for Women in case of alleged harassment by the employer himself.

(vii) Employer should be liable to pay compensation to the victim in case he is not able to provide an amenable work environment.

The aforesaid suggestions if considered while enacting the specific legislation relating to sexual harassment and necessary modifications in the existing legal
framework, will go a long way in ameliorating the lot of women who face all pervasive sexual harassment day in and day out.