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### BOOK REVIEWS/JOURNAL

#### THE PROTECTION OF WOMEN AGAINST SEXUAL HARASSMENT AT WORK PLACE BILL 2007 — NEED FOR AN EARLY AND EFFECTIVE LEGISLATION\*

By

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#### INTRODUCTION

Sexual Harassment of Women at Work Place is a violation of human right. It offends several fundamental rights like right to equality, right against discrimination, right to practice profession, right to live with dignity, right against victimisation. It is the duty of our country to honour our International obligations, and to follow International Treaties, provisions of International Conventions.

#### *Objective of the Study*

The objective of the study is to analyse the need for specific legislation on the protection of women against sexual harassment. The study is aimed to look at existing legal provisions under different branches of Indian law for protection of women, guidelines given under *Vishaka's* judgment, subsequent developments of case

law. The study also aimed at critically evaluating the Draft Bill on Protection of Women against Sexual Harassment at Work Place, 2007. The study aims at comparing the Draft Bill with the law laid down by way of guidelines in *Vishaka's* case. The study aims at giving appropriate conclusions and recommendations on the subject concern.

#### *Limitation of the study*

The subject being very vast, the researcher could not cover certain areas like comparative legislations on subject concern in different countries, *etc.*

#### *Research Methodology*

The researcher has gone through several primary and secondary sources. Informal Interview method is adopted by interviewing Professors of Law Department of Osmania

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University, lady advocates of A.P. High Court. Secondary data, including statistics on the status of women, was collected from several sources, duly acknowledged.

The article is divided into four parts. Part I deals with some of the important provisions of Indian law with respect to protection of women. Part II deals with the structural justification for special legislation to protect women at the workplace. Part III deals with the development of case law on the subject concern in India. Part IV discusses origin of the Bills on the subject concern and critically evaluates the 2007 Bill.

### PART -I

#### *Constitutional Law*

The Indian Constitution guarantees equality of status and opportunity to men and women. The fundamental rights are enshrined in the Constitution of India. It must be borne in the mind that when the fundamental rights are infringed, the natural basic human rights, inherent in human beings, are violated. The relevant Articles of the Constitution of India, which bestow legal rights upon women, are<sup>1</sup>:

- (1) Article 14: confers the equality before law or the equal protection of the law to every person.
- (2) Article 15: 15(1) prohibits any discrimination on grounds of religion, race, sex, or place of birth. 15(3) empower the State to make any special provision for women and children.
- (3) Article 16: guarantees equality of opportunity for all citizens in matters relating to employment or opportunity to any office under the State and

forbids the discrimination on the grounds only of *inter alia* sex.

- (4) Article 19: guarantees the two important freedoms:
  - (a) freedom of speech and expression - Art. 19(1) (a); and
  - (b) freedom to practice any profession or to carry out any occupation, trade or business - Art. 19(1)(g).
- (5) Article 21: ensures; 'no person shall be deprived of his life or personal liberty except according to procedure established by law'. Women have a right to lead a dignified, honourable and peaceful life with liberty.

#### *Criminal Law (Indian Penal Code, 1860)*

In cases where the accused sexually harasses or insults the modesty of a woman by way of either - obscene acts or songs or by means of words, gesture, or acts intended to insult the modesty of a woman, he will be punished under Indian Penal Code, 1860. S.509.

Indian Penal Code, 1860 Sec 509<sup>2</sup> comes into effect when there is an intention to insult the modesty of any woman by the offender by uttering any word, making any sound or gesture or by exhibiting any object, with the intention that such word or such sound be heard, or that such gesture or object be seen by such a woman, or by intruding upon the privacy of such a woman.

In the case of *Rupan Deol Bajaj*<sup>3</sup> a Senior IAS Officer, *Rupan Bajaj* was slapped on the posterior body parts by the then Chief of Police, Punjab, K.P.S. Gill at a dinner party in July 1988. *Rupan Bajaj* filed a suit against him. The Supreme Court in January 1998 fined. *K.P.S. Gill* Rs.2.5 lakhs in lieu of three months

1. Meena Rao, "Ramification of Harassment of Women", 43 JILI, 2001 pp.305-335.

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

3. *Rupan Deol Bajaj v. Kanwar Pal Singh Gill*, (1995) 6 SCC 194.

rigorous imprisonment under Indian Penal Code, 1860 Ss. 294<sup>4</sup> and 509.

(7) The Dowry Prohibition Act, 1964.

### *Other Statutes*

Some of the other statutes and provisions of law affecting women significantly and to safeguard women and their interests are as follows:

- (1) The Employees State Insurance Act, 1948;
- (2) The Plantation Labour Act, 1951;
- (3) The Contract Labour (Regulation and Abolition) Act, 1976;
- (4) The Factories (Amendment) Act, 1986;
- (5) Indecent Representation of Women (Prohibition) Act, 1986; and
- (6) The Protection of Women from Domestic Violence Act, 2005.

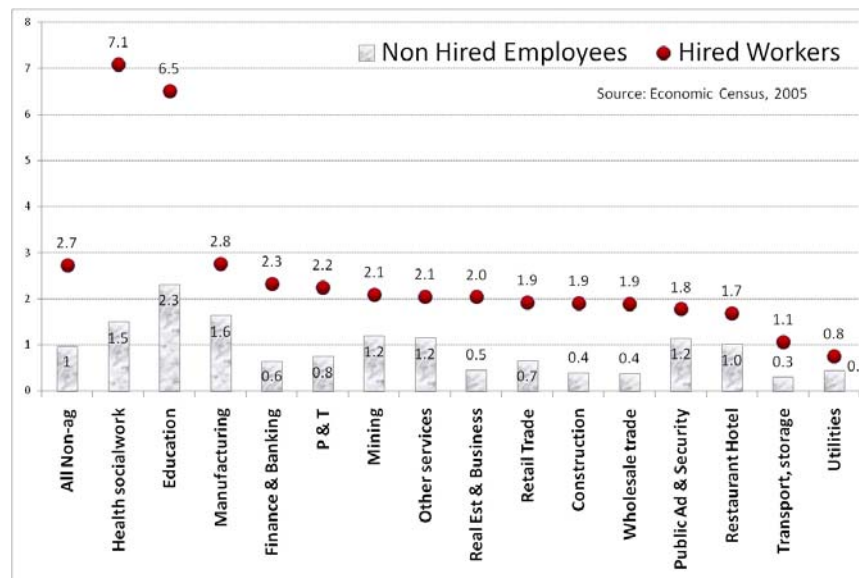
## **PART-II**

### *Structural Justification for Special Legislation to Protect Women at the Workplace*

The need for special protective legislation is embedded in the explosive and lop-sided growth of women's participation in the modern sector.

Female employment in the modern sector has been growing fast, even explosively. For instance, in organised sector, women's employment has risen 2½ times over 1971 (Figure 1). In certain areas like Business services female employment is 14 times its level in 1971, while in other sectors like Transport, Trade, Hotels and Services, it is 3½-4 times its 1971 levels<sup>5</sup>.

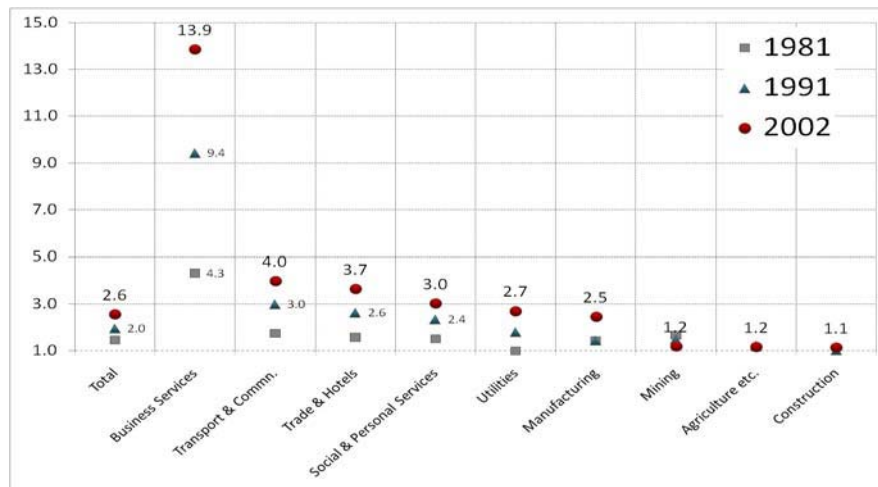
*Figure 1 Number of Women for ten Male Workers in Non-Ag. Establishments*



4. Whoever, to the annoyance of others-(a) does any obscene act in any public place, or (b) sings, recites, or utters any obscene song, ballad or words, in or near any public place, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine, or both.

5. It can be seen that in 2002, women's employment in Business, Financial, Insurance and Real Estate is 14 times the 1971 level! Women's employment in Transport and Communications, Trade and Hotel Industries is about 4 times, while employment in Social and Community Services, Utilities and Manufacturing is 2½-3 times the 1971 level. In contrast, employment in the traditional sectors of mining, agriculture and construction is only 1.2 times the 1971 level (Source, Men and Women in India, 2004, GOI, MOSPI).

Figure 2 Relative Size of Women's Employment in Organised Sector since 1971, 1971 = 1



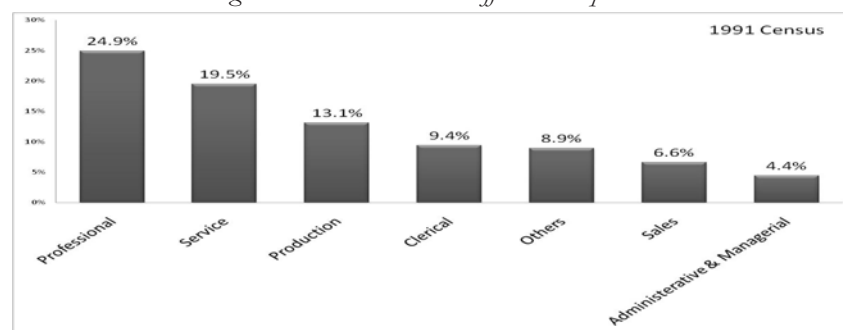
Owing to this rapid growth, women form an important part of the workforce in the modern economic sectors. In 2005, it was estimated that women formed nearly 21% of all hired workers in non-agricultural activities. If we ignore the children, and take adult hired workers alone, we find that there are about 2.7 women employed for every ten men in non-agricultural activities (Figure 2). It can be seen that while in Education, Health and Social work, there are 6½-7 women for every ten male workers, in most other sectors, the ratio is closer to two on ten.

Relatively speaking, female presence among hired workers by far outnumbers their presence among employers. Thus, we find

that there are only one woman on ten men among employers<sup>6</sup> in non-agricultural activities. With the exception of Education, Health and Manufacturing, where their presence is somewhat higher, female presence among employers is far lower in most other non-agricultural activities (see non-hired employees in Figure 2 above).

Thus, relatively speaking, women are substantively excluded from higher positions of power and authority in the modern sector. Even the 1991 census data that examines the presence of women in different occupations, bears out that they have only a marginal presence in higher administrative and managerial occupations (less than 5%, see Figure 3).

Figure 3 Female Share in Different Occupations



6. Otherwise called the non-hired employees of the establishment (See Figure 2).

The marginalisation of women from positions of power and authority in modern economic activity coupled with their substantial and large presence in the hired workforce makes them especially vulnerable to sexual harassment at the workplace.

Hence the need for an effective law to deter sexual harassment at the workplace.

### PART –III

#### *Sexual Harassment: The Law*

Sexual harassment has been recognised as most intimidating, most violating form of violence since long in countries like UK, USA and many countries have not only taken note of how degrading experiences of sexual harassment can be for women as well as employers but have adapted legislative measures to combat sexual harassment<sup>7</sup>.

In India, it has been only a decade since sexual harassment was for the first time recognised by the Supreme Court as human rights violation and gender based systemic discrimination that affects women's right to life and livelihood. The Court defined sexual harassment very clearly as well as provided guidelines for employers to redress and prevent sexual harassment at workplace<sup>8</sup>.

*Vishaka* guidelines<sup>9</sup> apply to both organized and unorganized work sectors and to all women whether working part-time, on contract or in voluntary/honorary capacity. The guidelines are a broad framework which put a lot of emphasis on prevention and within which all appropriate preventive measures can be adapted. One very important preventive measure is to adopt a sexual harassment policy, which expressly prohibits sexual harassment at workplace and provides effective grievance procedure, which has provisions clearly laid down for prevention and for training the personnel at all levels of employment.

#### *What Is Sexual Harassment?*

According to the Supreme Court definition, sexual harassment is any unwelcome sexually determined behaviour, such as:

1. Physical contact
2. A demand or request for sexual favours
3. Sexually coloured remarks
4. Showing pornography
5. Any other physical, verbal or non-verbal conduct of a sexual nature.

Sexual Harassment takes place if a person:

- o subjects another person to an unwelcome act of physical intimacy, like grabbing, brushing, touching, pinching *etc.*
- o makes an unwelcome demand or request (whether directly or by implication) for sexual favours from another person, and further makes it a condition for employment/payment of wages/ increment/promotion *etc.*
- o makes an unwelcome remark with sexual connotations, like sexually explicit compliments/ cracking loud jokes with sexual connotations/ making sexist remarks *etc.*
- o shows a person any sexually explicit visual material, in the form of pictures/ cartoons/pin-ups/calendars/screen savers on computers/any offensive written material/pornographic e-mails, *etc.*
- o engages in any other unwelcome conduct of a sexual nature, which could be verbal, or even non-verbal, like staring to make the other person uncomfortable, making offensive gestures, kissing sounds, *etc.*

*Quid pro quo* and *hostile work environment* are the two broad types of sexual harassment.

Sexual harassment at workplace is generally classified into two distinct types. *Quid pro*

7. Neeta Raymond, - "Combat Law," Volume 2, Issue 3, August-September, 2003, Page 2.

8. *Indira Jaising* (Ed.) Law Relating to Sexual Harassment at the Workplace, Universal Law Publishing, New Delhi, 2004; *Alok Bhasin*, Law Relating to Sexual Harassment at Work, Eastern Book Company, Lucknow, 2007.

9. *Vishaka and others v. State of Rajasthan*, (1997) 6 SCC P.241



*quo*’, means seeking sexual favours or advances in exchange for work benefits and it occurs when consent to sexually explicit behaviour or speech is made a condition for employment or refusal to comply with a ‘request’ is met with retaliatory action such as dismissal, demotion, difficult work conditions. ‘Hostile working environment’ is more pervasive form of sexual harassment involving work conditions or behaviour that make the work environment ‘hostile’ for the woman to be in. Certain sexist remarks, display of pornography or sexist/obscene graffiti, physical contact/brushing against female employees are some examples of hostile work environment, which are not made conditions for employment.

Unwelcome is the key in defining sexual harassment. It is the impact and effect the behaviour has on the recipient that will define the behaviour as sexual harassment.

The judgment<sup>10</sup> clearly holds that instances of sexual harassment in the workplace are a violation of the right to equality, under Article 14, right to practice any profession or carry out any trade or business, under Article 19(1)(g), and the right to life and liberty, under Article 21 of the Constitution. In addition, the Court referred to the right against discrimination on grounds of religion, race, caste, sex or place of birth, under Article 15(1), the directive principle to secure just and humane conditions of work, under Article 42, and the fundamental duty to renounce practices derogatory to women, under Article 51-A. In an attempt at creating a mechanism to deal with sexual harassment, the judgment adverts to Article 51 which enjoins the State to foster respect for International law and treaty obligations and Article 253 which gives power to Parliament to make laws to implement international treaties, agreements or conventions<sup>11</sup>.

The Court refers to provisions of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).

Article 11 of CEDAW enjoins State Parties to take measures to eliminate discrimination against women in employment, in order to ensure equality, right to safe working conditions and the right to work as inalienable rights of all human beings. Article 24 records that all State Parties undertake to adopt all necessary measures at the national level to achieve the rights recognised under the Convention. The general recommendations of CEDAW with respect to Article 11 are that equality in employment is seriously impaired when women are subjected to gender specific violence such as sexual harassment in the workplace. Sexual harassment includes unwelcome physical contact, advances, sexually-coloured remarks, showing pornography, and sexual demands whether by word or action. Such conduct was declared to constitute a health and safety problem, and effective measures for the redressal of complaints have to be set up by the State Parties to the Convention.

The Court noted that the Government of India had ratified the resolution, dated 25.6.1993, undertaking to adopt all necessary measures at the national level aimed at achieving full realisation of the rights recognised in CEDAW. Further, that at the Fourth World Conference on Women in Beijing, the Government of India made an official commitment to formulate and operationalise a national policy on women to guide action at every level; to set up a Commission for Women’s Rights to act as a public defender of women’s human rights; and to institutionalise a national-level mechanism to monitor implementation of the Platform of Action.

The judgment declared that in view of these developments, reliance could be placed on CEDAW for the purpose of construing the nature and ambit of the constitutional guarantee of gender equality in the Constitution. The Court observed that the fundamental rights guaranteed in the Constitution encompass all facets of gender equality including prevention of sexual harassment or abuse. The international

10. Ibid at P.247

11. *Rakesh Shukla*, “We need strong legislation to prevent sexual harassment in the workplace”, InfoChange News & Features, September 2007, [www.infochangeindia.org](http://www.infochangeindia.org)

conventions and norms can be read into the interpretation of fundamental rights especially in the context of lacunae in the domestic law.

In the absence of enacted legislation to provide effective enforcement of gender equality, the Court laid down guidelines to ensure the prevention of sexual harassment of women in the workplace. The guidelines were declared to be binding and enforceable by law and were to be strictly observed in all workplaces for the preservation and enforcement of the right to gender equality of working women.

As the direction to Governments to consider taking measures, including legislation, indicates, the Court is aware that to tackle the issue of sexual harassment in the workplace there is a need for laws to be enacted by the Legislature. In the absence of laws, the Supreme Court has stepped in and laid down certain guidelines to be observed to ensure the prevention of sexual harassment in the workplace. The guidelines are necessarily general in nature, and the judgment does not create any particular mechanism or machinery for implementation. In fact, a number of Courts including the apex Court have failed to set up complaints committees despite having a sizeable number of women employees. Even in workplaces where employers have set up complaints committees, their functioning appears to lack effectiveness in tackling the menace of sexual harassment in the workplace. The committee at Delhi University is a case in point. There are long delays and inaction even after indictment by the committee, with the Vice-Chancellor taking

the view that sexual harassment is not an issue and unilaterally declining to take action<sup>12</sup>.

In the landmark judgment, *Apparel Export Promotion Council v/s A.K. Chopra*<sup>13</sup>: The first case where the Supreme Court applied the law as laid down under *Vishaka* guidelines. In this case, the Supreme Court recognised an important fact. It ruled that 'an attempt to molest' is equally an infringement of a woman's right to dignity at the workplace as a 'successful attempt of molestation'. The Supreme Court also recognised that in such cases, evidence and witnesses may not always be forthcoming. Hence, reliance has to be placed on the circumstantial evidence.

In the same case the Supreme Court also relied on observations made in *Vishaka's* case, held that sexual harassment of women at workplaces is violative of Articles 14, 16(2), 21, 42, 51, -A(e)&(f) of Indian Constitution as it is a form of sex discrimination and is incompatible with the dignity and honour of the women. It was further held that India is obliged under International Conventions to gender-sensitise its laws and Courts in India are obliged to respect such International Conventions and norms like resolutions passed at ILO Seminar held at Manila, (1993), Convention on the Elimination of All Forms of Discrimination against Women (1979), Beijing Declaration on Women and International Covenant on Economic, Social and Cultural Rights.

In another case<sup>14</sup> the Mumbai High Court observed that *Vishaka* guidelines are a law under Article 141 of the Constitution

12. The recent case of sexual harassment by the Head of the Political Science Department at the University of Delhi, *Bidyut Chakrabarty*, again brings into focus the issue of sexual harassment of women in the workplace. It appears that the apex complaints committee of the University has *prima facie* found the allegations levelled against the head to be true. Yet no action has been taken and *Chakrabarty* continues to hold the post of Head of Department and Dean of Social Sciences.

13. AIR 1999 SC 625

14. In Civil Writ Petition No.8826 of 2004, which came up in the Bombay High Court in a case involving Tata Metalliks Limited. Here, a lady Supervisor was subject to sexual harassment at the hands of the Deputy GM at the plant. The lady sought an inquiry and the Management, with the help of an advocate, conducted an inquiry. The perpetrator was exonerated on the basis of this and the services of the woman concerned was terminated. She challenged her termination in a complaint under the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971, which decided in her favour and declared that the employer was guilty of unfair labour practices and granted reinstatement with consequential benefits. However, the Management failed to comply with the order of reinstatement by the order of the Labour Court.

and that the power to deal with the complaint of sexual harassment of an employee and inquiry vests with the Complaints Committee and it cannot be decided by the Management<sup>15</sup>.

The Delhi High Court in the case of *S.K. Mallick*, Director of National Academy of Audit and Account (NAAA)<sup>16</sup> expanded the scope of definition of women by holding that the expression is broad enough to include women of all ages, including women who may be senior in years and status. The HC said this in response to a plea by the accused that he could not be accused of sexually harassing a senior officer towards whom he was not in a position to extend any sort of favour. In the same case the Court also expanded the scope of definition of 'Workplace' by holding that in the case of the private sector; it is common for senior officials to run their businesses from their residences with the advancements in information technology. Accordingly, a person can interact or do business with other persons, while located in some other country by means of video conferencing, even while an officer or teacher may work from the accommodation allotted to her or him. Therefore, if an officer indulges in an act of sexual harassment with the employee, it would not be open for him to claim that the act had not been committed at the workplace but at his residence and get away with that argument.

In *Vimmi Joshi's* case<sup>17</sup> wherein a lady teacher in an Army Public School was sexually

harassed by the Chairman of the school, the Supreme Court relied on the principles laid down in the *Vishaka's* case directed the High Court to appoint a three Member Committee headed by a lady, and if it is found that respondent was subjected to sexual harassment, the report may be sent to Army authorities for initiation of disciplinary action against appellants. The Court also adversely commented upon the management of the school, and found it guilty and directed to pay costs of the first respondent and Counsel's fee is assessed as Rs.50000/-.

In the same case, the Supreme Court relying on the principles laid in *Vishaka's* case as approved in *Apparel Export Promotion Counsel's* case, held "involving violation of human rights, the Courts must forever remain alive to the International Instruments and Conventions and apply the same to a given case when there is no inconsistency between the international norms and domestic law occupying the field."

## PART-IV

### *Evolution of the Bill*

After the judgment in 1997, a number of women groups including the National Human Rights Commission came up with their report that still many organisations do not have Complaint Committees to embark upon the problem of sexual harassment. Thus in order to consider and clarify these issues, the Commission convened meetings with various departments<sup>18</sup>

15. A Pandey "Sexual harassment at the Workplace : Implement the Guidelines", *Combat Law*, December 21, 2008.

16. The Delhi High Court order in a judgment involving *S.K. Mallick*, Director of National Academy of Audit and Account (NAAA), is another case in point : *Mallick* filed a petition before the Delhi High Court after the Central Administrative Tribunal (CAT) refused to stay the departmental proceedings of allegations of sexual harassment against him by a senior woman colleague. *Mallick* had allegedly entered the room of the woman officer at Shimla in an inebriated condition and misbehaved with her. The woman filed an FIR the next day and also intimated senior officials of *Mallick's* conduct. This led to a departmental inquiry. *Mallick* was suspended on the basis of a criminal case pending against him. He then approached the CAT seeking to stay the departmental inquiry. When the CAT refused to stay the departmental proceedings, *Mallick* approached the Delhi High Court. The Delhi High Court while dismissing the petition made certain observations in respect of certain key definitions :

17. *D.S. Grewal v. Vimmi Joshi and others*, (2009) 2 SCC p.210 at 218, 219.

18. Like the Department of Personnel and Training (DOPT), educational departments/institutions like the Department of Secondary and Higher Education, Department of Elementary Education and Literacy of the Ministry of Human Resource Development, University Grants Commission (UGC), Central Board of Secondary Education (CBSE), Directorate of Education, National Capital Territory (NCT) of Delhi, etc. *Asha S. Menon*, 'what women want by'. (The Hindu)

<http://www.hinduonnet.com/thehindu/thscrip/pgemail.pl?date=2007/03/31/& prd=m p&>.



of the Government of India besides meetings with the legal fraternity guidelines. The National Commission for Women even came up with Code of Conduct at Workplace. The Department of Women and Child Development, through an order dated 08 June 2001, constituted a Committee to monitor the implementation of the guidelines laid down by the Supreme Court in the *Vishaka* judgment. Then after further lobbying the National Commission for Women drafted a Bill in 2003, 'Sexual Harassment of Women at their Work Place (Prevention) Bill, 2003'. Then another draft Bill came up in 2005. The Protection of Women against Sexual Harassment at workplace Bill 2007 prepared by the Ministry of Women and Child Development intended to provide for the protection of women against sexual harassment in the workplace. The Ministry has put up the same on its website and has invited comments. The passage of this Bill, then, would seem to be yet another milestone in fulfilling the constitutional promise of rendering gender equality and justice in the country<sup>19</sup>.

### *Significance of the Bill*

The large presence of women among hired workers in the modern sector, coupled with their marginal presence in the ranks of employers, makes women especially vulnerable to sexual harassment at the workplace.

In June 2004, the National Commission for Women (NCW) and the Press Institute of India jointly released a report that found that a majority of women experienced gender discrimination at their workplaces. But a vast majority of cases are unreported to authorities. The woman is usually scared of being disbelieved, ostracised or accused of 'inviting' attention in some manner<sup>20</sup>.

Many women choose the path of least resistance and quit their jobs. To make matters worse, the Bill does not contain any provisions

for the protection of the witnesses. The company is not under any obligation to protect the witnesses from being victimised during or after the proceedings. Workplace sexual offenders are often important within the power structure of a company or valuable to the business. It is often in the company's interest to retain them and lose the woman, who is usually a subordinate. Given these considerations, the woman must have adequate legal protection so that she may continue in her job without being humiliated, threatened or persecuted in any manner. Without adequate guidelines on these matters, inappropriate or insensitive questions may be asked during the proceedings. Surprisingly, the Bill has also omitted many of the preventive measures recommended by the *Vishaka's* guidelines. To be truly effective in checking the scourge of sexual harassment at workplace, the Bill needs to be much more comprehensive and practical.

### *Critical Evaluation of the Bill*

Many of the women's organizations felt that the definitions of the words women and sexual harassment is narrow and need to be more broad based.

### *The Definition of the Word 'Woman' and 'Sexual Harassment' at Work Place to be expanded*

The definition under Section 2(a) of aggrieved woman needed to be substituted as aggrieved woman/female child. Aggrieved woman may give a connotation that it refers to only woman who is major. Many times minor children are subjected to sexual harassment, exploitation either at schools or Junior colleges or work places as domestic help. The critics of the Bill comment that sometimes men are also sexually harassed or discriminated at workplaces by the women superior officers. Since the Bill relates only to protection of women against sexual harassment at work place such proposed

19. *Mahalaxmi Tiwary*, "The Sexual Harassment of Women at the Workplace (Prevention and Redressal) Bill, 2007 : A Critique", <http://www.indlaw.com>

20. *Sengupta, Anindita*, 'It must be comprehensive', *Deccan Herald*, New Delhi, 14 September 2007, at <http://www.deccanherald.com/Content/Sep142007/panorama 2007091325216.asp>.

enactment is permissible in terms of Section 15(3) of the Constitution of India.

As per *Vishaka's* guidelines<sup>21</sup> the definition of sexual harassment a broad interpretation is given as it is not only workplace sexual harassment but also discrimination and victimization which will have far reaching consequences on woman's personality, health, safety, *etc.* It is a violation of human right and dignity to work.

The corresponding definition of Sexual Harassment at Workplace under Section 3<sup>22</sup> of the 2007 Bill on the Protection of Women Against Sexual Harassment at Workplace is restrictive and focuses more on sexual harassment at work place but does not reflect victimization, discrimination, violation of human right. The definition under the Bill did not absorb the broader perspective of victimization in the spirit of *Vishaka's* guidelines.

### ***Employer's Behavior at Work Place to be Stressed***

The Bill does not focus on employer's misbehaviour towards the women employees.

Both the *vishaka's* guidelines<sup>23</sup> as well as 2007 Bill<sup>24</sup>, lays down on the duty of the employer. But they do not focus on the behaviour of the employer in the workplace. Unfortunately, as can be seen from the cases referred above employers themselves misbehave with women employees. Either the employer or top ranking officials in organizations are in fiduciary relationship with employees, their committing sexual harassment against female employees have to be taken more seriously. The necessary changes have to come in the Draft Bill to focus on mandatory good behaviour of the employer towards female employees and consequent high penalties and punitive punishments for committing sexual harassment of female employees. If the employer himself is the respondent, the Bill has to focus in terms of penalties and punishments/monetary compensation being punitive, as in the case of Custodial Rape under Indian Penal Code 1860.

There are several other aspects of the current Draft Bill which can be further improved or clarified.

21. Vishaka op.cit p.252.

22. No woman employee at a workplace shall be subjected to sexual harassment including unwelcome sexually determined behaviour, physical contact, advances, sexually coloured remarks, showing pornography, sexual demand, request for sexual favours or any other unwelcome conduct of sexual nature whether verbal, textual, physical, graphic or electronic or by any other sections, which may include,

(i) implied or overt promise of preferential treatment in employment; or  
(ii) implied or overt threat of detrimental treatment in employment; or  
(iii) implied or overt threat about the present or future employment status;  
(iv) conduct which interferes with work or creates an intimidating or offensive or hostile work environment;  
or  
(v) humiliating conduct constituting health and safety problems.

23. Vishaka, op.cit, P.244-5

24. DUTIES OF EMPLOYER

Duties of the Employer 17. The employer shall—

(a) provide a safe working environment at the workplace;  
(b) display at any conspicuous place in the workplace the Office Order made under sub-section (1) of Section 4;  
(c) undertake workshops and training programmes at regular intervals for sensitizing the members;  
(d) provide necessary facilities to the Committee or the Local Committee, as the case may be, to deal with the complaint and conduct enquiry;  
(e) ensure the attendance of respondent and witnesses before the Committee or the Local Committee, as the case may be;  
(f) make available such information to the Committee or the Local Committee, as the case may be, as it may require with regard to the complaint made under sub-section (1) of Section 7.

### ***Constitution of Internal Complaints Committee***

As per Section 4(1)<sup>25</sup> of the Bill every employer of the workplace shall constitute an internal Complaints Committee. Section 4(2)(a) states that the Chairperson must be a woman as per the *Vishaka's* guidelines, the Chairperson must be a woman from within the organisation. It is submitted that any committee or cell formed or headed by the member of the same organisation will in all probability work to suppress the complaint. The person heading may never be independent and the system takes its toll, in the process it conveys the message - to bear with. Normally most of the organisations nominate the most amicable persons as the Chairperson, thus the purpose again frustrated. It is advisable in case of Government organization/department the appointment of Chairperson of ICC may be done by the concerned ministry. Ministry may draw an Inter-organization of women officer (preferable Group-A Officer) along with their place of current posting. Availing the above list of women officer, the ministry must appoint a Chairperson to the various originations, based on the location of the

organisation and women officer who are posted in that region.

### ***The Local Complaints Committee not permanent (LCC)***

The Section 6<sup>26</sup> of the Draft Bill stipulates the Constitution of a Local Complaints Committee (LCC) in a block wherever 'at a workplace, constitution of the committee is not possible or practicable'. Firstly, the constitution of the LCC is at the discretion of the District Officer. The Bill does not give any role to the LCC but just mentions it. Ideally the LCC must exist as a permanent body at all times, and when a case comes up, an Enquiry Committee, may be drawn out of the LCC. Secondly, the LCC must have the power to penalise employers when they have themselves indulged in sexual harassment, or in case of negligence, delay in enquiry *etc.* Thirdly, the LCC must be accessible to women workers of unorganised sector as in respect of those sections of unorganised workplaces where an internal Complaints Committee may not exist. But if complaint is against employer, then maybe the woman may go to the LCC.

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25. The Sexual Harassment of Women at the Workplace (Prevention and Redressal) Bill, 2007, S.4 :

(1) For the purpose of this Act, every employer of a workplace shall constitute, by an Office Order in writing, an Internal Complaints Committee.

Provided that where the offices or administrative units of the workplace are located at different places or divisional or sub-divisional level, the Committee shall be constituted at all administrative units or offices.

(2) The Committee shall consist of the following members namely :

(a) a Chairperson, from amongst employees, who shall be a senior level woman, committed to the cause of women. In case a senior level woman employee is not available, the Chairperson shall be appointed from a sister organization or a non-governmental organisation;

(b) not less than two members from amongst employees committed to the cause of women or who have had experience in social work; and

(c) one member from amongst such non-governmental organisations or associations or other interests committed to the cause of women, as may be specified :

Provided that at least 50 per cent of the members so nominated shall be women.

(3) The Chairperson and every member of the Committee shall hold office for such period, not exceeding three years, from the date of their nomination as may be specified.

(4) The Chairperson and members of the Committee shall be entitled to such allowances or remuneration as may be prescribed.

(5) Where the Chairperson or any member of the Committee contravenes the provisions of S.14, such Chairperson or member, as the case may be, shall be removed from the Committee and the vacancy so created or any casual vacancy shall be filled by fresh appointment in accordance with the provisions of this section.

26. The Sexual Harassment of Women at the Workplace (Prevention and Redressal) Bill, 2007, S.6 :

### ***Conciliation proceedings are not adequately discussed***

Chapter III of the 2007 Bill deals with lodging of complaint and conciliation. The Bill does not discuss the steps and procedure to be followed in conciliation proceedings.

### ***Delay in proceedings***

Section 9(3) of the Bill states that the enquiry contemplated under sub-section (1) shall be completed within a period of 90 days. As per Section 11(4) of the Bill wherein any recommendation has been made to the employer or the District Officer under sub-section (1) he shall act upon the recommendation within ninety days of its receipt by him: Provided that where the employer or the District Officer is not in agreement with any conclusion arrived at or recommendation made by the Committee or the Local Committee, he may alter the conclusion or recommendation in consultation with the Committee or the Local Committee, as the case may be, and the parties concerned in such manner as may be decided

in the consultation and shall act upon the recommendation within ninety days of completion of the consultation.

When we analyse the above provisions of the Bill it shows a time dragging mechanism. The period of 90 days for enquiry is too long and the enquiry can be completed within 30 days. For the implementation of the recommendation under Section 11(4) 90 days time is long. In fact, 15 days is sufficient to implement the recommendation. Again in case of disagreement of employer or the District Officer with the recommendation of the Committee the time given under the Bill is 90 days, which again is very long. Necessary changes shall be made to the Bill to cut short the enquiry period, implementation of recommendation and resolving of disagreement of the employer/District Officer with the Committee.

### ***Pending enquiry the reliefs given to the complainant are not on par with Vishaka's<sup>27</sup> Guidelines***

Chapter IV of the Bill deals with enquiry into complaint and determination of

(1) Where at a workplace, constitution of the Committee is not possible or practicable, or where the complaint is against the employer himself, the District Officer may, constitute at every Block, a Local Complaints Committee.

(2) The Local Committee shall consist of the following members :

(a) a Chairperson to be appointed by the appropriate Government from amongst women committed to the cause of women;

(b) one member to be appointed by the appropriate Government from amongst the registered trade unions or workers associations functioning in that block or district;

(c) two members, of whom at least one shall be a woman, to be appointed by the appropriate Government from amongst such Non-Governmental Organisations or associations or other interests committed to the cause of women, as may be specified.

(3) The Chairperson and every member of the Local Committee shall hold office for such period, not exceeding three years, from the date of their appointment as may be specified.

(4) The Chairperson and Members of the Local Committee shall be entitled to such allowances or remuneration as may be prescribed.

(5) The jurisdiction of the Local Committee shall be limited to the area within the Block level where it is constituted.

(6) Where the Chairperson or any member of the Local Committee contravenes the provisions of S.14, such Chairperson or member, as the case may be, shall be removed from the Local Committee and the vacancy so created or any casual vacancy shall be filled by fresh appointment in accordance with the provisions of this section.

27. Vishaka op.cit. P.253

compensation. Section 10(1) of the Bill states that the Committee or Local Committee, as the case may recommend to the employer to—

- (a) Transfer to the aggrieved women or the respondent to any other workplace.
  - (b) Grant leave to aggrieved women or
  - (c) Grant to the aggrieved women any other relief which may be prescribed.
- (2) On the recommendation of the Committee or the Local Committee as the case may be, under sub-section (1), the employer or the District Officer may take such necessary action as may be deemed proper.

On the other hand in *Vishaka's case*<sup>28</sup> the Honourable Supreme Court held that the victims of sexual harassment should have the option to seek transfer of the perpetrator or their own transfer. Thus the latest Bill dilutes the relief a complainant may get by substituting the word 'May' to 'shall' with respect to option to seek transfer.

### ***Initiation of criminal proceedings and Protection of Witnesses is not stressed***

As per *vishaka's* guidelines<sup>29</sup> with respective criminal proceedings it was observed that where such conduct amounts to a specific offence under the Indian Penal Code or under any other law, the employer shall initiate appropriate action in accordance with law by making a complaint with the appropriate authority. In particular, it should ensure that victims or witnesses are not victimized or discriminated against while dealing with complaints of the sexual harassment. The victims of sexual harassment should have the

option to seek transfer of the perpetrator or their own transfer.

Surprisingly the Bill does not talk about the initiation of criminal proceedings by the employer against the guilty. It provides for compensation to the victim, which only trivialises the anguish and trauma of the crime. Simultaneously, the maximum fine that may be imposed on an employer who has not set up a Committee is Rs.10,000/- which is a pittance. The Draft Bill does not embolden the aggrieved woman to file a complaint.

In fact in one of the recent cases<sup>30</sup> the Apex Court heavily came down on an Army Public School for not constituting Complaints Committee. It was held "no Complaints Committee has been constituted; no mechanism has been put in place for redressal of the complaint made by the victim. For one reason or the other DSG failed and/or neglected to take appropriate action. It is a matter of great regret that the Army which is a disciplined organisation failed to provide a complaint mechanism and ignored the decision of Supreme Court which was bound to be given effect to in terms of Article 144 of the Constitution of India." It was further held<sup>31</sup> "as the management of the School is guilty of violating guidelines issued in *vishaka's* case, the management directed to pay and bare all the costs of the first respondent. Counsel's fee is assessed as Rs.50,000/-.

The above ruling and observations made by the Supreme Court in the above case reveals the inadequacy and lack of seriousness in the Bill in terms of implementation of guidelines issued in *vishaka's* case<sup>32</sup>.

The Protection of Women against Sexual Harassment at Workplace Bill, 2007 did not

28. Ibid.

29. Ibid.

30. D.S. Grewal v. Vimmi Joshi and others, (2009) 2 SCC P.210

31. Ibid

32. Vishaka, op.cit.



include the protection of witness as envisaged under guideline 4 of *vishaka's* case<sup>33</sup>.

In fact in a recent case<sup>34</sup> the Supreme Court observed “in most of the cases, witness of victims of the crime, most vulnerable among them are women and children. Under the existing system they are mere pawns in the criminal trial and there is very little concern for protecting their real interest. The protection is necessary so that there is no miscarriage of justice. But protection is also necessary to restore in them, a sense of human dignity. Since the witness seeks the protection so that he or she can depose freely in the Court, the same has to be provided. It is therefore directed that if a person who is examined as a witness needs protection to ensure his or her safety to depose freely in a Court he/she shall make an application to Special Investigation Team (SIT) and SIT shall pass necessary orders in the matter and shall taking into account all the relevant aspects and direct such police officials as it considers proper to provide the protection to the person concerned.” In terms of *Visaka's* guidelines and latest Supreme Court judgments it is necessary to include provision to protect women witnesses.

***Section 12 of the Bill may scare women or anybody on their behalf to lodge complaint of sexual harassment at workplace***

Section 12(1) & (2) of the Bill enables the employer or District Officer, on the recommendation of Committee or Local Committee to take action against the women or any other person complained on her behalf, if they have made any false or malicious allegation, produced forged or misleading document or given false evidence during the enquiry. No doubt it is a safeguarding provision for innocent men at

workplace for not being harassed by cantankerous women. At the same time for the fear of complaint not being proved and they may be further harassed by the management or employer, the women may silently suffer sexual harassment for the fear of provisions under Sec.12 under the Bill.

***Third party Harassment***

As per *vishaka* guidelines<sup>35</sup>, the Supreme Court directed that where the sexual harassment occurs as a result of an act or omission by any third party or outsider, the employer and person incharge shall take all steps necessary and reasonable to assist the effected person in terms of support and preventive action. Unfortunately the role of ‘third party’ in the Bill has also not been clearly spelt out. Third party harassment and ramifications of widening the definition on the phenomenon of third party harassment, extent of control of the employer on such harassment, recognizing outsiders harassing service accessory that is third party to third party harassment. If during the discharge of services/duties of an employee, harassment from the third party is meted out, employers may be approached and possibly a warning may be issued. Also if during the discharge of an employee’s duties, a member of the third party experiences sexual harassment, the employee must be liable for punishment.

***Conclusions and Recommendations:***

The foregoing discussion above emphasises need for an early legislation on the Protection of Women against Sexual Harassment at Workplace. The successive Bills on the same subject including the 2007 Bill could not become an enactment in spite of the Supreme Court commenting upon lack of legislation on a serious subject like the Sexual Harassment of women at workplace. The

33. Ibid.

34. NHRC v. State of Gujarat (2009) 6 SCC 769

35. Vishaka, op.cit. P.246

Supreme Court issued guidelines in exercise of power available under Article 32 for the enforcement of the Fundamental Rights and further emphasised that this would be treated as the law declared by the Supreme Court under Article 141 of the Indian Constitution.

When we compare the guidelines issued by the Supreme Court in *vishaka's* case, and Draft Bill of 2007 on the Protection of Women against Sexual Harassment at Workplace, we notice that the Bill is narrower and less adequate than the guidelines right from the definition of the Sexual Harassment at Workplace. Pending enquiry the reliefs to be given to complainant, the initiation of criminal complaints by the employer, protection of witnesses, proposed punishments for committing the offence are also not on par with *vishaka's* guidelines.

The Constitution of Internal Complaints Committee (ICC) and Local Complaints Committee (LCC) may be changed as per the recommendations given in Part- IV of the Article.

Continuation or alteration of Section 12 of the Bill also to be considered in terms of scare that may be created in the mind of complainant or anybody on her behalf.

It is surprising that a Draft Bill that came after a decade of *Vishaka's* case, is diluting the spirit of guidelines. Even the costs awarded in *Vimmi Joshi's* case, by the Supreme Court indicated the penalties included in the Draft Bill are only mockery.

A very important suggestion is employer himself or any top officer is proved guilty of Sexual Harassment at Workplace the penalties or punishments to be awarded have to be more stringent as in the case of punishment for custodial rape under Indian Penal Code -1860.

The whole procedure of enquiry and giving relief to the complainant should be

within a framework of six weeks. It is suggested that the 2007 Draft Bill on Sexual Harassment at Workplace should be modified adhering to the guidelines of *vishaka* and be more contemporaneous.

Patriarchal attitudes and values are the biggest challenge in implementation of any law concerning women in our society. Combating these attitudes of men and women and the personnel involved/responsible for implementation of laws and systems is most crucial in prevention of unwanted sexual behaviour. Preventing and avoiding sexual harassment involves all levels of employees/persons in any organisation-employees and colleagues, management and bodies like trade unions. Most importantly it requires for the employer to act before a problem occurs.

### ***Steps that Employers can take to Prevent Sexual Harassment***

A policy/procedure designed to deal with complaints of sexual harassment should be regarded as only one component of a strategy to deal with the problem. The prime objective should be to change behaviour and attitudes, to seek to ensure the prevention of sexual harassment. The employer at workplace may adopt the following Sex harassment policy, Communicate policy and Enforcement policy.

#### ***1] Adopting Sexual Harassment Policy:***

A basic policy should set forth the following:

1. An express commitment to eradicate and prevent sexual harassment and express prohibition of sexual harassment;
2. A definition of sexual harassment including both *quid pro quo* and hostile work environment giving examples;
3. An explanation of penalties (including termination) the employer will impose

for substantiated sexual harassment conduct;

4. A detailed outline of the grievance procedure employees should use;
5. A clear statement that anyone found guilty of harassment after investigation will be subject to immediate and appropriate disciplinary action;
6. A clear understanding and strict rules regarding harassment of or by third parties like clients, customers *etc.*;
7. Additional resource or contact persons available for support and consultation;
8. An express commitment to keep all sexual harassment complaints and procedures confidential and time bound;
9. Provisions for training of employees at all levels.
10. An anti retaliation policy providing protection against retaliation to complainants, witnesses, Complaints Committee Members and other employees involved in prevention and complaints resolution.

Policies and procedures should be adopted after consultation or negotiation with employee representatives. Experience suggests that strategies to create and maintain a working environment in which the dignity of employees is respected are most likely to be effective where they are jointly agreed.

### *II] Communicate Policy:*

The employer should issue a strong policy from the top authority against sexual harassment taking a “zero tolerance” approach make sure it gets out to all his employees either through the employee handbook or in memo form or with pay packets or with appointment letter, have the employees sign it to acknowledge that they received and read the policy. The policy can also be posted in the workplace. If he has employees whose primary language is not English, get his sexual harassment policy translated or communicated to them in their primary language. He shall discuss the policy with all new employees ensure that third-party such as suppliers and customers are aware of your sexual harassment policy. He should review the policy with his employees on a regular basis.

### *III] Enforcement Policy:*

Employer should take complaints of sexual harassment seriously and investigate all sexual harassment charges quickly and thoroughly and professionally. Maintain accurate records of the investigation and the findings. Make sure employees who bring charges do not face retaliation. Ensure confidentiality and time bound response to complaints. Take immediate action when sexual harassment is discovered or suspected. Discipline appropriately any employee found to have engaged in sexual harassment. Safeguard his employees from third-party work-related sexual harassment.