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Sexual Harassment and Law Reform in India

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* *The views expressed in this paper are those of the author and do not necessarily represent those of the United Nations.*

Introduction

Between 1980-89 almost every issue concerning violence against women resulted in a legislative reform. Yet violence against women has shown a steady exponential rise with abysmal rate of convictions.ⁱ Statistics apart, women complainants of violence have repeatedly emerged from the criminal justice system more humiliated, less empowered and with almost no sense of self left intact.ⁱⁱ

Given this reality, what does law reform have to offer women in situations of violence? This paper explores this question based on a newly emerged basis for law reform in response to sexual harassment in India.

Historical Trends in Law Reform

Historically, criminal sexual violence in India has been understood through the traditional language of rape. Originating in the 1860's, at a time when women had no influence over the shape or substance of legislation affecting them; the rape law remained on the statute books for 123 years before any attempt was made to challenge it.

When reform has been sought, it is commonly in reaction to a highly publicized occurrence. For instance, 1983 witnessed the gang rape of a tribal girl within the precincts of a police station. At the time, the girl's boyfriend and family members were standing outside the station. The Supreme Court of India branded the complainant a "vicious liar", "habituated to sexual intercourse" and whose failure to 'resist' implied consent to the abuse.ⁱⁱⁱ Uniquely, the case evoked national level outrage. The immediate community within the precincts of the police station compelled registration of the case, the media reacted sharply to the Courts comments and prominent legal academics demanded review of the case. Rather than respond, the Court directed all towards law reform. The case is a classic picture of myths and stereotypes which pervade legal responses to sexual crimes against women.^{iv}

The eighties became a decade in which most aspects of violence against women resulted in law reform. Yet from the start, law reformers were less inclined to articulate the goal of such reform and resorted instead to ad hoc, band-aid amendments. With the result, consent was never defined, past sexual history was retained and the police were absolved of accountability in failing to register cases. That response pattern has been characteristic of law reform ever since. In twenty years, perceptions of women and sexual violence remain the same; myths and stereotypes characterise most law reform as well as most judgments.

It is no surprise that the failure of law reform to adopt clearly defined and realistic goals in response to women's experience of sexual violence led to another fiasco six years later. In 1989 the Supreme Court of India reduced the conviction of two police officers in yet another gang rape of a tribal girl (who also was accompanied by her boyfriend). In

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providing a basis for doing so, the Court observed the complainant to be a girl of “easy virtue”, “used to sexual intercourse” and of “questionable character”.^v Such cases are no longer unique and therefore evoke less public response. Not only do they continue to illustrate in the extreme how terminology used for women entails strong moral judgment but also how law reform must work to re-engage public interest.

The year 2000 witnessed yet another instance of the Law Commission of India being directed to suggest amendments to the existing rape law. Again women’s groups pressed for two specific recommendations emerging from 20 years of experience. Consent in rape had created an easy entry point for defense counsel to introduce women’s sexual life and history to discredit her complaint. That allowance made it impossible to secure convictions in the absence of any clear definition. Women’s groups therefore proposed a specific definition of consent as “unequivocal voluntary agreement”. Unfortunately, the latest Law Commission of India Report rejected this proposal:

“We are however of the opinion that no such definition is called for at this stage, for the reason that the said expression has already been interpreted and pronounced upon by the courts in India in a good number of cases.”^{vi}

It was precisely because of such adverse pronouncements of the courts that a clear definition was being called for. Yet the Law Commission refused to consider a pattern of decision-making which clearly illustrated this need.

It was not until 2005 that a notable step exploring remedies beyond criminal law came about with the Protection of Women from Domestic Violence Act. Apart from covering a broad spectrum of relationships, the Act is inclusive in defining “domestic violence” as all forms of abuse -- physical, sexual, verbal, emotional and economic. Physical violence is defined as “beating, pushing, shoving and inflicting pain” while sexual violence covers a slew of offences such as “forced sex, forced exposure to pornographic material or any sexual act with minors”.

The Act also seeks to offer women victim’s civil remedies hitherto unavailable to them. Until recently, Indian women could only seek recourse in Section 498A of the Indian

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net of responsibility extends to a more inclusive vision and a collaborative strategy not limited by court arrears.

The Equality Measure- A Legislative Blueprint

Alec De Tocqueville once said, "Equality is the foundation on which all other rights are built," yet in the area which affects one in three women worldwide- sexual assault, domestic violence, sexual harassment, child sexual abuse- the principles of equality have been most at stake.

(In rights concerns around the world, the nineties, law reform was largely prescribed by a lack of innovative thinking and moral yardsticks. W

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- ii. That gender-based violence is discrimination and does violate a woman's basic human rights.

Having invoked international human rights language, the link with CEDAW allowed the Supreme Court to place the experience of sexual harassment within the language of women's equality rights. Defining sexual harassment, the Court accounted for a vast canvas of inappropriate sexual conduct.^{vii} And in meeting the concerns raised by women's groups, "workplace" was not defined, "employer" included all "responsible persons" and "employee" meant any woman worker whether salaried or voluntary.

The most inspiring outcome of the *Vishaka* judgment is that for the first time, the Supreme Court recognised the need to alter systematic violence against women. It did so by focusing on how to change attitudes. That approach led to broad-based guidelines on sexual harassment:

"In the absence of domestic law occupying the field....to check the evil of sexual harassment of women at all workplaces," said the Court, "the contents of International conventions and norms are significant for the purpose of interpretation of the guarantee of gender equality, [and the] right to work with human dignity....Any International Convention not inconsistent with the fundamental rights must be read into these provisions to promote the object of the Constitutional guarantees..."

By imposing an onus on "responsible persons"(including employers, persons in a position of trust or moral ascendancy), accountability for sexual harassment was no longer limited to the individual perpetrator but enlarged to cover institutions and their obligation to ensure a safe and healthy environment for women. An added novelty was the courts' acceptance of a proposal for mandatory complaints committee at all workplaces. The committee would have to comprise of third party *Ngo* presence familiar with the issue. *Vishaka* for the first time provided spaces for women to articulate violation of their sexual rights as discrimination. Before *Vishaka*, Outdated criminal law provisions of "outraging the modesty of a woman"¹ or "insulting the modesty of a woman"² were the closest Indian law came to defining sexual harassment. Often that meant nothing short of attempted rape.³ Moreover, such provisions reeked of moral overtones. Not surprisingly, rarely would a woman approach NGO's or the police to redress the crime of molestation. Even under existing Labour laws, while the State is accountable for injuries in the workplace for which compensation is payable, the type of injury most working women were likely to experience i.e sexual harassment/abuse as described above offered no redress and were by and large perceived as trivial. An issue which became all the more troublesome when the workplace for many women in India extended beyond the four walls of an institution. Finally the court itself acknowledged that the "present civil and penal laws in India [did not] adequately provide for specific protection of women from

¹ see section 354 Indian Penal Code, 1860

² see section 509 Indian Penal Code, 1860

³ see 1984 Cr.L.J. 786; 1984 Cr.L.J. 1254; AIR 1992 SC 2043; 1991 Cr.L.J. 411; 1989 Cr.L.J. 383 H.P.

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sexual harassment at workplaces and that the enactment of such legislation [would] take considerable time”

Finally is the strength *Vishaka* has given to Ngos both within India and the region to effectively campaign sexual harassment as a human rights abuse. That is the superior advantage of a rights-based focus especially in an over-litigious society like India, second only to the U.S. A legal approach that strengthens attitudinal change and encourages community collaboration will have far-reaching consequences to eliminate the effects of harmful discrimination and to empower individual women.

Meanwhile on the same set of facts that were placed before the Supreme Court of India, at the trial court, the trial judge acquitted the rapists based on the following reasoning:

"...it is beyond comprehension that those who live in rural culture... would in this manner commit a rape. Particularly in collusion with someone who is forty years of age and another who is seventy years of age and that too during broad daylight in the jungle in the presence of other men. The court is of the opinion that Indian culture has not fallen to such low depths, that someone who is brought up in it, an innocent, rustic man, will turn into a man of evil conduct who disregards caste and age differences and becomes animal enough to assault a woman...."^{viii}

The contradiction between the trial court acquittal of the rapists and the Supreme Court imposition of responsibility is perhaps the clearest example of the differences that emerge in understanding violence against women as an equality rights issue.

In the end, *Vishaka* provided a very clear basis for legislation and in effect filled a gap to meet the equality needs of women who face sexual harassment at workplace. At the same time, it also showed up the interpretive tools necessary to ensure legal language can be made to comply with contemporary needs.

Reforming Law

“Although critics have expressed concern that the *Vishaka* Court "stepped outside its bounds" and into the "domain of Parliament" by enacting guidelines to act as law, one Supreme Court advocate pointed out that this is "best classified as a necessary evil."⁵⁷⁹ "It is unfortunate that this has happened but. .. Parliament abdicated its responsibility by not taking action on a relevant and very much identifiable problem, and the Court then actually had to step in to plug it”⁴ It is more than ten years since the *Vishaka* was

⁴ Litigating Reproductive Rights: Using Public Interest Litigation and International law to Promote Gender Justice in India Avani Mehta Sood Center for Reproductive Rights , 2006 p.63. This is an excellent article which details the landmark process and impact of the *Vishaka* in terms of women’s human rights and sexual harassment.

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decided. Over that period of time, a vast range of experience has accumulated in implementing the *Vishaka* guidelines in both government and private institutions. The absence of legislation has inspired innovative efforts which have extended law and social change beyond the four walls of a court-room, directly into the workplace. Such experience ought to have formed the basis for creating a legislative enactment. The result however is The Protection of Women Against Sexual Harassment at Workplace Bill, 2007- which is currently pending introduction before the Indian Parliament. With such an impressive judge-made law, proposed legislation still has much to benefit from an equality perspective.

How does the current Bill then compare to what *Vishaka* has already established for both women and workplaces?

The key elements highlighted by the judgment are four-fold:

- Defining Sexual Harassment according to an equality principle
- Creating Institutional responsibility
- Emphasizing prevention
- Providing for effective redress

At the outset, the current bill does not at present provide for a statement of objects or reasons. In the absence of knowing what goal is to be served by the law, the detail lacks both context and hence is unclear. At most the title invokes language which is protective and restrictive rather than expansive and rights based. A fact which is surprising since earlier versions of the Bill (the National Commission for Women version) sought to emphasize a Bill that focused on Prevention.

Defining Sexual Harassment

The definition of sexual harassment in *Vishaka* was initially arrived at through consultations with rural women of the unorganized sector. It so happened that such definition compliment what was provided for in CEDAW (Recommendation #19). Coupled with equality and right to life provisions under the Indian Constitution, the vision of *Vishaka* was clearly to address sexual harassment in contexts of “...all acts of gender equality including prevention of sexual harassment or abuse... .” Defining sexual harassment, the Court attempted to account for a vast canvas of inappropriate sexual conduct including “unwelcome”:

- physical contact and advances
 - a demand or request for sexual favours
 - sexually coloured remarks;
 - showing pornography
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policies and induction awareness. In particular NGO's have been called upon to orient and train workplaces on the issue. Not only has this inspired collaborative processes but it has further required workplaces and ngos to understand and adapt to the language and culture of one another.

Creating an onus to prevent inappropriate behaviour has demonstrated the possibility of orienting employers and others towards attitudinal change (the very obstacle which has historically denied women access to equal and fair decision-making). By imposing responsibility on "responsible persons", accountability was no longer limited to the individual perpetrator but enlarged to cover institutions and their obligation to ensure a safe and healthy environment for women.

The current Bill has lost sight of this difference and instead imposed duties on the employer. This implies a more coercive approach and so invites 'unwilling' compliance. Merely imposing a duty on employers to build awareness, train or display an office order about a Committee's existence is not the same as enrolling them to responsibly do so. It is unfortunate that the language and emphasis of prevention has been wholly lost in the present draft bill. Action needs to enable not alienate

Effective Redress

Despite that women's groups and ngos have been participating within workspaces to develop preventive mechanisms, the entire emphasis of the enactment is on the creation and functioning of a Complaints Committee. For many of this was meant as a place of last resort.

The constitution of the committee has been retained in terms of having 50 percent women and a woman chairperson. However *Vishaka* had specifically provided for a third party presence who is well versed with the issue of sexual harassment to be on such committees. This criterion has been diluted to include ngos committed to "the cause of women". Addressing cases on committees requires a sound understanding about skill in addressing sexual harassment as a specific issue, its nuances and the legal implications. The motivation behind the original proposal was to place and onus on ngos who act as committee members to ensure their informed understanding, skill upgradation and expertise on the issue. Instances have arisen where even under *Vishaka* workplaces have resorted to inviting women from sister concerns to act as the third party presence. Experience has shown that the presence of skilled ngo persons has allowed for a two fold benefit:

- i. the presence of someone who is knowledgeable and experienced on sexual harassment as an issue and
- ii. being able to orient others on the committee vide that knowledge and expertise

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a changed vision, *Vishaka* provides all the elements to ensure that a Bill on sexual harassment and legislative thinking can reorient law and legislative thinking towards the equality goal. For this reason, it is till possible for not only this law but others affecting women's inequality to demonstrate good practice by considering some essential elements:

1. Ensure all legislative change for women now finds place within the culture and language of equality and human rights.

2. Be receptive to contemporary needs which find expression through public interest law - in this case *Vishaka*

3. Give expression to an equality measure which invokes substantive social change rather than band-aid amendments. That includes emphasizing partnerships and prevention.

4. Share the burden of responsibility for promoting equal and fair justice for women through community collaborations. That means adopting lateral approach which is inclusive and enables institutions rather than government to implement compliance. In this context a proposed nodal representative agency would be highly useful in ensuring accountability and compliance.

5. Emphasise the language of responsibility over duty so as to promote healthy workplace conduct that feels beneficial to all and enrolls cross-disciplines (eg. Human resources, Education, Ngos, Workplaces).

6. Remove the out-date assumption that continues to haunt women's human rights i.e. the myth of all pervading "fal8o h3he out-dnta115 Tw 0ed x9 -0.0015 Tw 11.55 -1.d[(s thanla9(ple ty quo convi

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In the history of law reform around women and violence in India, legislation has rarely opted for equality as a baseline measure to challenge a conservative status quo. Instead it has ignored addressing the values which lie at