GENDER JUST LAWS
b u l l e t i n

No. 2, April 1998

INVITATION TO "OWN" THE GJL BULLETIN

We want to make this bulletin a dynamic medium of exchange and networking between groups that are committed to gender justice. So send us your comments, views, and news of events in your area. We hope dialogue on the issues raised in these bulletins would be ongoing through such communication. We would also like to experiment with the possibility of different groups "guest editing" the bulletin - i.e., on a specific issue, a group deeply involved with the issue would be invited (or could volunteer) to edit. The next issue of the bulletin will be on SEX-WORKERS & THE LAW, and *Sanlaap* (Calcutta) has agreed to be the guest editor. Articles or news for this issue can be sent directly to Sanlaap, or to us at ICHRL by June 30th, 1998.

The August 1997 Supreme Court judgement on Sexual Harassment of working women in the case of *Vishakha vs. the State of Rajasthan* has initiated debate on the issue not just among women's groups, lawyers and activists; but also among women in the workplace. Sexual harassment has now been explicitly legally defined. The guidelines are significant in that, for the first time sexual harassment is identified as a separate category of legally prohibitive behaviour. Considering sexual harassment a separate legal offense is important not because it is less serious (as some have argued), but because it is taken less seriously.

The critical factor in sexual harassment has been identified in the guidelines as the *unwelcomeness* of the behaviour. Thus it is the *impact* of behaviour on the recipient, rather than the *intent* of the perpetrator should be considered. By doing so they conform to the internationally accepted standards for sexual harassment. However, as experiences both in India and in other countries shows, the complainant has to prove the "unwelcomeness" of the behaviour. Anything less than a clear rejection of sexual advances could then create problems. Particularly in the absence of witnesses or other concrete proof, it often becomes the complainant's word against the harasser's.

Also notable is the fact that the guidelines have - again in accordance with international standards - identified sexual harassment as a question of power exerted by the perpetrator on the victim. Further, in addition to sexual harassment being defined as a violation of the right to safe working conditions, the Guidelines also proclaim it to be a violation of women's right to equal opportunity in the workplace.

Highlights of the Supreme Court guidelines were included in the last edition of this bulletin as a run-up to this edition. In this edition, we outline the debates on sexual harassment in the international context and in India. We include reports of cases; and the response of women's groups and trade unions to the Supreme Court guidelines. Potential strategies for implementation of the Guidelines , and other interventions towards comprehensive legislation on sexual harassment are presented. There is also a pull-out pamphlet on "myths" about sexual harassment, and strategies to deal with it.

CONTENTS

NOT *"just flirting"*

The types of sexual harassment include:

I. ***Verbal or physical contact with the intention of sexual relations***

A. ***Quid pro quo*** - i.e., "in exchange" for favours such as promotions, employment perks, better grades, etc. The power of the person in authority (employer, supervisor, professor, etc.) to sexually harass increases in direct co-relation to lack of organization of the potential victim group. Women labourers in the informal sector, temporary workers, students, women in institutions for the mentally / physically handicapped, etc. are among the most vulnerable groups.

B. ***Sexual harassment by colleagues***

C. ***Sexual harassment by clients*** - particularly in professions where women's role is "sexually packaged" - such as air hostesses, workers in beer bars, etc.

D. ***Sexual harassment of women in authority*** - to undermine the position of women. Recent - and increasing- cases of newly elected, active women members of panchayats being stripped naked and paraded - are examples.

II. ***Sexual objectification of an individual though sexual relations not intended*** This includes not only work situations, but also harassment in other public or social situations - for example, on the roads in colleges etc. This can also include negative comments like "you're fat / ugly" etc.

III. ***Hostile, anti-woman environment*** -(pornography in public places, foul language etc.). This may not be *directed* at any woman employee in particular, but the *effect* on women is one of discomfort.

landmark judgements on sexual harassment in india

OFFICIAL STATISTICS (1991) : 1 WOMAN MOLESTED EVERY 26 MINUTES

These statistics refer to the reported cases. If the unreported cases were to be added, it would probably be a question of seconds, not minutes. As women's groups know all too well, many women who come for assistance do not register their complaints. For the women who do, it is only in the past three years that there have been significant victories. Even then, it has taken the women who have won these victories at least 10 years of tortuous court process.

N. Radhabai vs. D. Ramachandran

In 1973, Radhabai, secretary to D.Ramachandran (the then State Social Welfare Minister) protested against his abuse of girls in welfare institutions. He attempted to molest her; and then dismissed her. In 1995, the Supreme Court passed a judgement in her favour, with back pay and benefits from the date of dismissal.

S.C Bhatia

Professor in the Department of Adult and Continuing Education, Delhi University was finally dismissed in 1992 after a campaign by women's groups demanding judicial inquiry into his sexual harassment of several women.

Rupan Deol Bajaj vs. K.P.S. Gill

A senior IAS officer, Rupan Bajaj was slapped on the posterior by the then Chief of Police in Punjab, Mr. K.P.S Gill at a dinner party in July 1988. Despite the general public opinion that she was "blowing it out of proportion", and attempts by all the top officials in the state to suppress the case, she pursued it through the lower courts. In January 1998, the Supreme Court fined Mr.K.P.S Gill Rs.2.5 lakhs in lieu of 3 months rigorous imprisonment, for offenses under Section 294 and 509.

International Debates On Sexual Harassment Legislation

(Source: *Combating Sexual Harassment at Work, ILO Conditions of Work Digest)*

Sexual harassment as a criminal offense first began to be recognized by courts in the United States in the late 1970s. In 1980, the first prohibitory statute was drafted by the *Equal Employment Opportunities Commission* which issued Guidelines for the Prevention of Sexual Harassment in the Workplace. Other countries followed - either through judgements or statutes - though many of them have only been introduced in the 1990s.

The debate on where to situate the legal remedy to sexual harassment depends to some extent on the accepted definitions of sexual harassment, as well as on legal traditions (statutes enacted if any, or case law) in that country. In countries where sexual harassment is seen as a general phenomenon, the legal remedy is situated in the framework of criminal laws. In other countries where it is seen as a workplace phenomenon, the civil and /or labour laws framework is applied. Within the workplace, there is the further question of whether the country's laws recognize *quid pro quo* and /or "hostile working environment" cases of sexual harassment.

Broadly, then, sexual harassment is covered by four types of laws internationally which are not necessarily mutually exclusive (i.e., a country can have more than one type of law).

Criminal Law

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

France is an example of a country with criminal laws prohibiting *quid pro quo* harassment. Until the enactment of the Supreme Court guidelines, India also had only specific criminal statutes.

In 1986, a landmark judgement in the U.S in the Vinson Vs. Meritor Savings Bank case ruled that sexual harassment is a violation of an individual's right to equal employment opportunities, and further defined the employer as liable for sexual harassment claims.

Civil (Anti-Discrimination) Law

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

This framework depends crucially on the definition of "*unwelcomeness*" of sexual harassment. Each complainant determines what is offensive/ unacceptable behaviour. This has led to considerable debate in countries adopting the civil laws framework, on the right to freedom of expression (pornography and offensive language in public places) vis-à-vis the right to equal opportunity in the workplace.

Countries which have laws/ judicial decisions within this frame work include United Kingdom, United States, Australia, Ireland, Canada.

Labour Law

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

New Zealand has the most comprehensive statutes covering sexual harassment as a personal grievance in the workplace. Other countries that have judgements on "unfair dismissals" due to sexual harassment include Austria, Denmark, Germany, Greece, Netherlands, Norway, Sweden.

Tort Law

These are non-contractual, judgement made civil laws, used in cases of sexual harassment on grounds of mental anguish, negligence, etc.

what the laws say: sexual harassment in india

Amendments to the laws on sexual violence enacted in the last two decades have failed to cover sexual harassment. So far, the rather inadequate aprovisions in the IPC and labour laws continue to be used. We have listed the relevant sections of the Indian Penal Code (IPC) here. We have also included other legal provisions under which prosecution for sexual harassment can be made - though these provisions have not yet been used to our knowledge.

Analysis of the existing laws in the Indian Penal Code by lawyers and women's groups have exposed the following important lacunae (aside from the general problems of non-implementation; and stereotypical responses of judges based on myths) which need to be highlighted:

- ⊗ **The Victorian terminology of "outrage" and "modesty" is vague and moralistic; and does not cover the range of behaviours that are sexually harassing.**
- ⊗ **The sexual history of the complainant can (and usually is) brought on record to disprove her credibility by the following provision in Section 155 (4) of the Indian Evidence Act (1872)**

  Section 155 - *Impeaching the Credibility of witness*

  (4) When a man is prosecuted for rape or an attempt to ravish, it may be shown that the prosecutrix was of generally immoral character.
- ⊗ **The "intent" of the perpetrator is considered primary, rather than the "effect" on the victim. The accused can argue his "friendly" behaviour was misinterpreted by the woman.**

I. Indian Penal Code

Section 209, IPC - *Obscene acts and songs* - 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 3 months or with fine or both. (Cognizable, bailable and triable offense).

Section 354, IPC - *Assault or criminal force to a woman with the intent to outrage her modesty* - whoever assaults or uses criminal force to any woman, intending to outrage or knowing it to be likely that he will thereby outrage her modesty, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine or both.

Section 509, IPC - *Word, gesture or act intended to insult the modesty of a woman* - whoever intending to insult the modesty of any woman utters any word, makes any sound or gesture, or exhibits any object intending that such word or sound shall be heard, or that such gesture or object shall be seen by such woman, or intrudes upon the privacy of such woman, shall be punished with simple imprisonment for a term which may extend to one year, or with fine, or both. (Cognizable and bailable offense).

II. Industrial Disputes Act

Shehnaz Mudbhatkal vs. Saudi Arabian Airlines
Shehnaz was subjected to sexual harassment by her boss in 1985, and dismissed when she complained to higher authorities. Her case was won in 1996 when the Bombay labour court judged it to have been a case of unfair dismissal under the Industrial Disputes Act. It ordered her reinstatement with full back payment, perks and promotions.

Rule 5 Schedule 5 - Cases can (and have been) argued on the basis of unfair labour practices listed in this schedule of the Industrial Disputes Act. Such cases can be filed if an employee suffers unfair dismissal or denial of employment benefits as a consequence of her rejection of sexual harassment. However, this would only be applicable in *quid pro quo* cases.

III. Civil suit

A Civil suit can be filed for damages under tort laws. Hence the basis for filing the case could be mental anguish, physical harassment, loss of income and employment caused by the sexual harassment.

IV. The Indecent Representation of Women (Prohibition) Act (1987)

The provisions of this act have the potential to be used in two ways. First, if an individual harasses another with books, photographs, paintings, films, pamphlets, packages, etc. containing "indecent representation of women"; they are liable for a minimum sentence of 2 years.

Second, a "hostile working environment" argument can be made under this act. Section 7 of this Act (Offenses by Companies) - holds companies, where there has been "indecent representation of women" (such as the display of pornography) on the premises, guilty . This is a cognizable, bailable offense, with a minimum sentence of 2 years.

what the women say: dialogues on reform

Dialogues on meaningful legislation on sexual harassment in India have until recently been located within the sexual assault discourse. Subsequent to the amendments in the rape laws in the past decade, two detailed documents were prepared on sexual assault : the *Draft Bill on Sexual Assault* prepared in 1993 by the National Commission for Women and the *Memorandum on Reform of Laws relating to Sexual Offenses* prepared in 1996 by the Feminist Legal Research Centre (FRLC), New Delhi. The former views sexual harassment as an offence on the continuum of sexual assault (see box for provisions of the Bill relevant to sexual harassmetn). The latter document critiqued this formulation as diluting the seriousness of the offense of rape. It instead advocated treating sexual harassment as an offense separate from sexual assault. It also recommended a separate civil law that would treat sexual harassment as a violation of the right to safe working conditions.

The FRLC however, has revised its perspectives post the Supreme Court guidelines. (Refer to *The Legal Regulation of Sexuality - A Double Edged Sword* in this bulletin)

Highlights of the Draft Bill on Sexual Assault
(Ad-hoc Sub-committee of National Commission for Women, 1993)

- Emphasizes the violence aspect of sexual assault; rather than the sexual aspect, and articulates a gradation of categories of violence, and punishments.
- Proposes amendment of Section 375 to cover the range of sexual assault as follows:

Sexual Assault

1. Person commits sexual assault against another where such person engages in any of the activities set out in sub-section 2(a), 2(e) against the will or without the consent of the other person against whom such offense is committed.

2 (a).....2(c)

2(d) Where any person with a sexual purpose utters any word, makes any sound or gesture, or exhibits any object or part of the body intending that such word or sound shall be heard or that such gesture or exhibition shall be seen by a person or intrudes upon the privacy of such person.

- Proposes the repeal of Sections 294 and 509 since they would be rendered redundant by the above section.
- Proposes that the "burden of proof" be on the accused: i.e., in cases where sexual assault has been proved, presume that the woman did not consent in all cases, not just in cases of custodial rape (as is currently the law).

The Legal Regulation of Sexuality: A Double-Edged Sword

Ratna Kapur, Shomona Khanna & Shohini Ghosh, *Feminist Legal Research Centre*, Delhi.

The recent Supreme Court decision in Vishaka v. the State of Rajasthan (August 1997) sets out guidelines on sexual harassment in the work place. The legal definition of sexual harassment provided by the Court is as follows:

> "...sexual harassment includes such unwelcome sexually determined behaviour (whether directly or by implication) as :
> Physical contact and advances
> A demand or request for sexual favours
> Sexually coloured remarks
> Showing pornography
> Any other unwelcome physical, verbal or non-verbal conduct of a sexual nature".

The Court places an obligation on employers, in both the public and private sector to "take appropriate steps to prevent sexual harassment" and "provide appropriate penalties" against the offender. The criminal law should be resorted to where the behaviour amounts to a specific offence under the Indian Penal Code. The Court also recommends that a complaint mechanism be created in the employer's organization for redressal of the complaint made by the 'victim' and that such a committee should be headed by a woman, and not less than half its members should be women.

The Vishaka judgement is significant at a symbolic level for its validation of the problem of sexual harassment and recognition of the fact that it is an experience many women are almost routinely subjected to in the work place. As regards the definition, there are no doubt certain clear cases of sexual conduct that constitute sexual harassment - for instance, what has been called quid pro quo sexual harassment, in which a threat is made or a benefit offered in order to obtain sex. The employer who tells his office manager that she will receive a promotion if she has sex with him, and the professor who informs his student that she will not pass the class unless she goes on a date with him are engaging in this type of sexual harassment. In these situations, certain individuals use their positions of relative power to coerce or intimidate others in positions of lesser power to engage in sexual interactions. This type of behaviour, clearly constitutes sex discrimination and a remedy ought to be made available to the woman who is harmed.

The Supreme Court attempts to incorporate this experience into the law, and redefine the lines between legitimate and illegitimate sexual behaviour, to better capture women's experience of consent. We are of the view that this is a good thing, but are interested in raising for debate the recommendation by the Court to formulate codes, as well as the broader implications of this decision on women's rights. We are concerned about the breadth of the definition and the type of behaviour that is deemed to constitute sexual harassment. We are also concerned about the implications of the decision on sexual behaviour more generally, and women's sexual behaviour and conduct more specifically. Our concerns must be considered within the broader political and cultural context. This context presently includes a conservative sexual morality, a BJP government at the Centre as well as the increasing assertion of a cultural nationalism that regards sex and sexuality, their current representations and practices, as external contaminants which are eroding "Indian cultural values and ethos."

Regulating Women's Sexual Conduct?

Our primary concern is the impact of the harassment guidelines on women's human rights and sexual behaviour. Harassment is contingent on proving that the sexual behaviour or conduct in question was unwelcome. But, the history of the legal regulation of sexuality should lead us to at least question the way in which conduct is likely to be judged. For example, in rape trials, the courts have long focused on women's conduct in attempting to determine whether or not there was consent. And in the absence of "reasonable resistance", the courts have over and over again concluded that the woman must have consented.

There is reason to be concerned that a woman's conduct in the context of allegations of sexual harassment may be judged in similarly problematic ways (even though the standard of proof will presum-

ably be less stringent than the criminal standard). A woman's conduct will be key in determining whether or not the sexual behaviour is welcome or unwelcome. Her dress, speech, demur, personal history and relationship with the harasser will all be called into question to determine whether or not the sexual conduct in question was indeed unwelcome.

The Role of the Criminal Law

The Court does not suggest that the wrong of sexual harassment be treated as a criminal offence. And we endorse an approach that the criminal law has only a limited role to play in regulating sexual conduct. Historically, it has been seen that resorting to the criminal law ends up empowering the state and its institutions, rather than empowering women. However, the Court makes specific reference to the fact that the criminal law should be resorted to where the behaviour amounts to a specific offence under the Indian Penal Code. Several provisions under the Indian Penal Code that refer to women's chastity and modesty, have been critiqued by feminists and others as being based on an outmoded sexual morality. Unfortunately, several Delhi based women's groups have recently advocated the use of these provisions as a means to counter a range of sexual behaviour from such obvious harms as rape to less obvious harms such as singing a song or staring. These provisions include section 354 (assault or criminal force against a woman with intent to outrage her modesty), and section 509 (words, gestures or acts intended to insult the modesty of a woman).

It is ironic that provisions based on outmoded Victorian notions of sexual morality are being uncritically invoked to protect women from sexual harm. On the one hand, rape is clearly the sort of sexual harm that needs to be punished by the criminal law. However, appealing to the repressive power of the criminal law to stop an individual from singing a song or staring is a bit of overkill. Taking recourse to notions of outraging a woman's modesty does nothing to advance women's rights to bodily integrity or sexual autonomy, but reinforce notions of sexual purity and honour. This is not to suggest that staring and the singing of songs do not, at times, constitute sexual harassment. But we need to ask ourselves whether invoking the criminal law is the right place to start or, more importantly, whether it can change behaviour or help a woman at the end of the day. Or are we content to have the State, in particular, the police monitor the sexual behaviour of its citizens using the blunt instrument of the criminal law? The criminal law does not have a history of helping women. On the contrary, it has a long history of hurting women.. Mathura's case, Suman Rani's case and Bhanwari Devi's case are but a few well know examples. Are we content with pursuing a criminal law strategy in the hope that one day we will succeed, or do we want to take a step back and critically reflect upon what women have gained or lost by resorting to the criminal law for redressing sexual harms?

Taking recourse to notions of outraging a woman's modesty does nothing to advance woman's rights to bodily integrity or sexual autonomy, but reinforces notions of sexual purity and honour. This is not to suggest that staring and the singing of songs do not, at times, constitute sexual harassment. But we need to ask ourselves whether invoking the criminal law is the right place to start or, more importantly, whether it can change behaviour or help woman at the end of the day. Or are we content to have the State, in particular, the police monitor the sexual behaviour of its citizens using the blunt instrument of the criminal law?

Employer Drafted Codes

Another associated concern is the fact that the codes to prevent sexual harassment are to be formulated by the employer. If the power to evolve these codes is to be in the hands of the employer, then given the conservative sexual climate in which we live, what is to prevent the employer from producing a code that encourages gender segregation in the workplace. As one retired judge recently remarked, the codes could be formulated so as to discourage gender interaction in the workplace, or encourage the establishment of same sex schools and universities instead of co-

educational institutions. Perhaps more specific guidelines are required which provide that such sex segregation is not an appropriate response for dealing with sexual harassment. Employer liability for sexual harassment could also discourage employers from employing women. Of course, this argument can be a double edged sword as it can be used to argue against affirmative action measures more generally that are designed to provide substantive equality to those who have been historically discriminated against and excluded from the market. The point here is simply that sexual harassment cannot be discussed outside of the social climate in which it operates and the manner in which it mediates/determines sexual behaviour.

Given the conservative and censorious sexual environment in which we live, we submit that the codes will be drafted and/or used in a way that will intensify the moral regulation of sexual behaviour. CFLR has conducted a preliminary survey of the possible implications of sex codes in four university campuses that are currently discussing this issue. The concerns of those that favour a code range from the fact that campus rapes go unnoticed and are not effectively addressed, to the view that the campuses should not be a sexual space per se. The former concern is already addressed by the Indian Penal Code under the rape provisions. The fact that these provisions have not been effective is no a reason to further regulate sexual behaviour. (see CFLR Memorandum on the Reform of Laws Relating to Sexual Offences, March 1998). In the latter case, if sexual activity on campus is to be completely impermissible, then the university should make such a declaration. However, it is our belief that people will oppose such regulations or declarations as they will discourage rather than encourage dialogue between the sexes, and therefore be undesirable.

What happened to Sexual Rights?

A further concern emerging through our tentative survey is that when people are asked to identify sexual wrongs, their lists are endless. However, when they are asked to identify sexual rights, that is, what kind of sexual conduct should be allowed on campus, there is a debilitating silence. The inability to speak about consensual sexual relationships, or consensual sex is not new. But things are changing. Television and radio talk shows bear witness to the opening up of sexual speech and the articulation of "sexual rights". Some examples of these include Bindaas Bol, Balance Barabar, and Kaam Ki Batein,. Such a development needs to be encouraged, not curbed. However, we are of the view that rules and regulations concerned with prohibiting or regulating sexual conduct will serve to reinforce the idea that sex per se is a bad or dirty practice from which good and decent people ought to be protected. Such regulations will reinforce the stigma associated with sex (whether consensual/welcome or non-consensual/ unwelcome).

And things are not going to get better under a BJP regime. Indeed there is now a greater urgency to articulate women's sexual rights and the rights of sexual minorities within such a context as they are so vulnerable to restrictions and curtailment. A prime example is in the context of the Information and Broadcasting ministry, and Sushma Swaraj's controversial effort to impose a dress code on female news readers during the BJP's 13 day regime in 1996 or her current effort to prohibit condom advertisements 'between the sheets.' Remember also the recent disapproval expressed by the mayor of Delhi, Shakuntala Arya, of hugging and kissing in public, which she regards as a debauched Western practice. Suggestions that the definition of sexual harassment is deficient and recommendations to the National Commission of Women that "sexual favours...sought by homosexual or lesbian employers from employees of the same sex" also be included, seem to validate our concerns that the sexual harassment codes\regulations will be used to reinforce a conservative sexual morality. And the current right wing context will only intensify this approach.

...we are of the view that rules and regulations concerned with prohibiting or regulating sexual conduct will serve to reinforce the idea that sex per se is a bad or dirty practice from which good and decent people ought to be protected. Such regulations will reinforce the stigma associated with sex (whether consensual/welcome or non-consensual/unwelcome).

A Tool for Censors?

Another concern is the extent to

which sexual harassment laws and codes will end up being a tool in the hands of the censors. The application of these laws in other jurisdictions has revealed that sexual harassment is a lot more about sexuality and a lot less about harassment than might first appear. The experience of a hostile work environment depends on the subjective experience of the complainant. If the complainant is offended by pictures of the Mohenjodaro dancing girl put into a diary, or the display of M.F. Hussain's nude Saraswati, under such codes, it can be removed for offending the sensitivities of the employee. These examples are all too recent and too real for us to ignore.

We need to learn from our experiences in lobbying for reforms in the rape law and domestic violence laws. The law or legal regulations will not be interpreted according to a feminist understanding. The meaning ascribed to such rules will depend on the traditional perceptions about sex and sexuality, in particular, female sexuality. We need to question whether we are not arguing for sexual rights from the wrong end of the stick in constantly focussing our arguments on the need for curtailment and restriction of sexual behaviour and conduct. Are such arguments not more appealing and seductive to those in favour of a more puritanical sexual environment?

Questions for Debate

We need to promote a culture of sexual rights that women are entitled to enjoy, and our efforts should consciously be directed towards that end, and not focussed exclusively on sexual wrongs. This would include the right to bodily integrity, the right to sexual autonomy, the right to freedom of association, and the right to freedom of expression, which includes speech and attire. Arguing in favour of rights at the end of the day is a necessary step towards women's empowerment. Without it, any argument in favour of sexual restrictions will invite greater moral surveillance and state scrutiny of the citizens' sexual behaviour.

We need to promote a culture of sexual rights that women are entitled to enjoy, [which] would include the right to bodily integrity, the right to sexual autonomy, the right to freedom of association, and the right to freedom of expression

The questions that still require greater debate amongst lawyers, judges, human rights, and women's groups, is that in constantly raising issues of sex and sexuality in the context of violence, harm or injury, are we not just reinforcing the stigma associated with sex and the broader attitudes towards sex as something bad and corrupting? What is the responsibility of these different constituencies towards contributing to the creation of a healthy sexual environment, by supporting women's sexual rights? The Vishaka judgment marks an important first step in addressing concerns that affect most women. There is a need to ensure that women's rights to equality in the workplace are not secured at the cost of or set up in opposition to their rights to sexual autonomy, freedom of speech and association. The questions being raised in this article are intended to ensure that sexual harassment concerns are effectively addressed in support of and not at the cost of women's human rights.

TESTING GROUND

Ammu Abraham, Women's Centre, Bombay

The sexual harassment of a female crew member of Air India by a male crew member in December 1989 in Rome has led to what could be a test case for many aspects of the problems faced by working women. It raises a number of issues about the odds that have to be faced by a working woman who decides to register a complaint and fight the case. It also brings up questions about the interaction of criminal law, labour law and worker's rights and the Supreme Court guidelines seeking to prevent sexual harassment in the work place.

In early 1990, after a protest demonstration organized by several women's groups and organizations at their main office in Bombay, the Air India management charge sheeted the employee and conducted a domestic inquiry. Women's groups had demanded at that time that the management should consider sexual harassment at the workplace to be serious misconduct and spell it out as such in the Rules and Regulations. Air India, without changing anything in their Rules and Regulations, brought to bear on the incident an existing clause about misconduct and indecent behaviour. The in-house inquiry unanimously found the workman guilty of serious misconduct and his services were terminated.

Eight years later, this inquiry is going to be conducted all over again in the Labour court. The male crew member had challenged his termination and the inquiry findings before the Central government industrial tribunal in 1996 on mainly six grounds:

1) that he was not allowed legal representation at the inquiry,
2) that he had not been provided copies of all pertinent documents,
3) that the inquiry committee filled up lacunae in the case by asking prolonged clarifications from the main witness,
4) that the complainant/ witness had tampered with the evidence,
5) that the charge sheet was converted from Regulations to Standing Orders and
6) that the inquiry report was given to him along with conclusions of the punishment to be imposed denying him the chance to challenge the findings.

He argued that the inquiry was against the principles of natural justice and the findings of the inquiry officer perverse and that he should be re-instated with back wages and continuity of service. While rejecting most of the workman's arguments, the tribunal accepted that principles of natural justice were indeed violated when the workman was not allowed legal representation and that the findings were "perverse" because there was no "proper" cross-examination. The tribunal wanted the hearing to be re-held in the Labour Court with the management leading evidence to substantiate their penal action.

The points to be noted here are that the legal representative the workman sought to bring in was a prominent criminal lawyer in Bombay and that the aim was mainly hostile cross-examination of the complainant. The status of the complainant in the inquiry is only that of a witness. She does not have the right to be represented by her own lawyer and cannot even get a copy of the proceedings. This is indeed the principle in criminal law proceedings. A rape victim is only a witness and the public prosecutor leads the evidence for the State while the defendant's lawyer cross-examines the "witness", trying to take her story and her past to pieces. But should the same procedure and principles apply also to a domestic inquiry on the complaint of a working woman so that prominent criminal lawyers can be brought in to "cross-examine" the complainant, presumably questioning her character and conduct and past sexual history, thus effectively putting the complainant in the dock? Why is representation that workmen and women get during inquiries for other forms of misconduct not sufficient in this case? In the Air India case, a criminal complaint has also been filed, though it has not come up in the courts all these years. Does the complainant / witness have to go through the humiliation of the domestic inquiry, the criminal proceedings in the court if any and also labour court inquiry? Will any working woman or any woman stand up to three inquiries spread over 8 years? ***In short, it is not clear why in-house inquiries have to proceed along the same lines as proceedings in a criminal court.*** This will not empower women workers to register complaints or lead to gender equality in the workplace. The Bombay High Court has confirmed the need for re-conducting the inquiry on the ground that the Air India inquiry committee's procedure for eliciting clarifications from the witness runs into a lot of pages, that therefore it was an attempt to fill up the lacunae in the management case and this "vitiates" the whole inquiry. The Supreme Court judgement asks for a whole mechanism of grievance procedure to be set up by managements to give justice to victims of sexual harassment at the workplace. Penal action is called for, but not prescribed. ***If all penal action in such cases can be challenged in the labour courts and fresh inquiries ordered on technical grounds, there is need for much greater clarifications about the points raised here.*** The questions raised by this case point to some of the lacunae in the Supreme Court judgement at the level of implementation. The Air India case might set a precedent for the way in which criminal law, labour law and the procedure for domestic inquiries interact in future cases of sexual harassment of women workers.

QUESTIONING THE GUIDELINES

Since the onus for setting up the Committee appointed for investigation of sexual harassment complaints is on the employer, the uppermost concern of women's groups is whether these cases will be taken seriously. Another important question is legal basis of the inquiry conducted by the Committee. Would it be based on criminal law procedures (where guilt has to be proven beyond all reasonable doubt) or on civil law procedures (where the less stringent "balance of probabilities" is used to establish guilt)? In either case, inquiry into the victim's morals and sexual history has not been explicitly prohibited as admissible evidence.

Further, the lack of defined criteria by which the NGO for the Committee will be selected could be a loop-hole. This could be used by employer's to set up dummy or "stooge" NGOs to cater to their requirements.

Women's groups are also looking for ways to include sections of women who have not been explicitly covered in the guidelines - particularly women workers in the informal sector, women in institutional settings such as schools & colleges, homes for orphans, mentally & physically handicapped etc, and even women sexually harassed within families.

WIDENING THE SCOPE

Supreme Court guidelines discussed at the Sixth National Conference of Women's Movements (Ranchi, December 1997)

At a meeting called by *Sakshi* (Delhi) and *Forum Against Oppression of Women* (Mumbai), the guidelines were shared with 60-65 women. Identifying ways to widen the scope of these guidelines to include other institutions and contexts was at the core of the discussion.

It was suggested that the phrase "other responsible authorities" be interpreted broadly when constituting the Committee - that is, not just restricted to "employers". Within the rural context, the possibility of elected members of the Panchayat setting up such Committees to inquire into cases of sexual harassment in the village/ block was suggested. Another suggestion was the Construction Workers Tripartite Boards (employers, workers, and government) currently being constituted should set up the Committee for women construction workers.

Within the rural context, the possibility of elected members of the Panchayat setting up such Committees to inquire into cases of sexual harassment in the village/ block was suggested. Another suggestion was the Construction Workers Tripartite Boards (employers, workers, and government) currently being constituted should set up the Committee for women construction workers.

There was also some debate on whether women's groups should, with the guidelines as support, push for enacting a bill on sexual harassment. However, representatives of *Sakshi* were against this move. They argued that until the guidelines are actually implemented and its scope tested, it would be difficult to offer a comprehensive critique and alternative suggestions.

newsflash

TRAIN CAMPAIGN FOR WOMEN'S SAFETY WHILE TRAVELLING

Returning from the Ranchi conference, a woman was assaulted on the train. A common experience for women travelling. This time though, she, and the women with her protested. And they continue to do so in an ongoing campaign launched by *Jagori, Nirantar, Sakshi* and other women's groups in Delhi this March 8th. New Delhi Railway station was the venue for a unique celebration of International Women's Day. Women spent the day pasting posters inside train compartments and handing out pamphlets to travellers and railway employees. They have urged the Railway trade unions to actively take up the issue.

what the trade unions say

Within the formal sector, trade unions have largely been the guardians of *male* working class interests. Women's concerns therefore have a low priority on their agenda, and sexual harassment has not been taken up as an issue until recently. However, it is only in cases where an employer or manager is accused of sexual harassment that the issue might be addressed by the union. Male trade union members perceive a "conflict of interest" in cases of worker-worker complaints of sexual harassment. That is, they fear that such cases would be used with punitive or divisive purpose by the management. Further, often the victim herself may be too scared of the union to complain to the management

Public Sector Units and Government departments can now be forced to implement the Supreme Court guidelines but given their disempowering working conditions, woman unionists are afraid of the male backlash if stringent punishments are applied. As the women employees of Mahanagar Telephone Nigam Limited said in an interview to Jyoti Punwani: "If the committee [on sexual harassment] has the guts to punish those who tease us, who will protect us from them when we go home at night?" (Jyoti Punwani, "A Welcome Recognition." *The Hindu)*

Punwani canvassed the opinions of lawyers and trade union activists and found a general skepticism about the value of the guidelines. Some saw its usefullness as a deterrent, and as a measure for creating awareness at the workplace. Others emphasized the need for training of women to recognize sexual harassment and guard against it, and for training of men on what is offensive behaviour.

TRADE UNION RESPONSIBILITY TOWARDS WOMEN WORKERS - THE CASE OF SEXUAL HARASSMENT

Sujata Gothoskar

Women and Trade Unions - the background

Trade unions have historically been an important organizational form for workers, including women. They have over the years struggled for issues that concern the working as well as living conditions of workers. Yet unfortunately, the history of trade unions is also a history of exclusion of various sections of workers, including women. In the earlier period, trade unions worked against the interests of women – by excluding them from membership, by campaigning against their entry into wage work, and by isolating them. (Lewanhak, 1977). Where it was no longer possible to continue with this exclusion, due to pressure both from the women and form the employers, men attempted, often successfully, to confine and segregate women to jobs which were graded lower than those of men. (Walby, 1986). The early twentieth century therefore witnessed the formation of several women's trade unions in Britain as a reaction to women's exclusion from the existing trade unions.

Trade unions in India were strongly influenced by the labour movement in Britain and were formed at a time when the major British trade unions were already being opened out to women. (Rohini, Sujata and Neelam, 1983). However, the attitude and structure of the trade unions were no less patriarchal here than elsewhere.

For women, work has always meant much more than the eight or nine hours at the factory, office or farm. It means a large part of the time spent at home as well. The work as well as the anxiety involved in translating the wage earned into a cooked meal, a clean home and healthy household members is neither shared nor taken into account, nor is the impact of housework on paid work considered seriously by unions. So, "work issues" in a broad sense a kept beyond the purview of unions.

On the other hand, work issues in a narrower sense as restricted to paid work are taken up only conditionally as we saw in the earlier period. By conditionally is meant that they are addressed when they do not conflict with the interests of other sections of union membership.

Hence, in effect what gets addressed in trade unions by and large could be considered the lowest common denominator of problems faced by workers, i.e.,

not the specific issues that concern the less dominant but only the most general issues. The result is that trade unions end up supporting the existing social hierarchy without challenging any of the elements that constitute it. It is in this larger context that we must examine the response of trade unions to the Supreme Court Guidelines on sexual harassment

The Issue of Sexual Harassment

In a meeting organized by a newly formed central trade union in March 1998, one experienced trade unionist, who heads a union which used to have a large membership of women till the recent Voluntary Retirement Scheme introduced by the management, said about the recent Supreme Court Guidelines on Sexual Harassment : "They are attacking the working class by different methods. Now they are bringing a new Act against sexual harassment of women. When there are not enough jobs, where is the question of sexual harassment?"

There are several strands to this statement. There are several strands that this statement ignores.

1. A legislation that purports to "protect" women workers and give them rights against being sexually harassed is seen as an attack on the working class and trade unions. This could mean that women are not a part of either and it is only male workers who are represented in both. It could also mean that management will also "use" women to victimize male workers and unionists.
2. There seems to be no recognition that till today employers and male workers have been victimizing women without any compunction.
3. There is also no recognition of the fact that in a situation where jobs are scarce, women are most vulnerable and will be forced to tolerate any sort of harassment for the sake of retaining the job. (Gothoskar, 1990).

   This is happening today, especially in the unorganized sector where women have to keep quiet whether the perpetrator is the employer, the supervisor or a colleague. It is a common experience with women whose jobs are insecure that they are forced to agree to and put up with inhuman and undignified written and unwritten rules in order to continue to earn for themselves and their households. The large majority of women are today in work situations where they are more or less completely unorganized. No trade unions represent the interests of these sections of women.
4. The assumption is that where trade unions do exist, they represent the interests of all or at least the majority of workers and protect the interests of all sections of workers or at least the more dominant or vocal ones.

   By and large, historically as well as in the current scenario, organized work forces are dominated by men workers, except in very few sectors like nursing .Also, historically, unions have been dominated by men. This more often than not, tilts the power equation against women.

Not many actual cases have been reported where unions have taken a stand on the issue of sexual harassment. Here we will look at a few of those that were either "discovered" in the course of discussions with women workers, or those where women took the initiative and fought it out at various levels.

In a large multinational company in Bombay, a woman employee who was not a union member was being continually harassed by one of her male colleagues who was a union member. The harassment reached such a level that she had to lodge a police complaint. The evidence against the man was overwhelming, and he was suspended from work. The union demanded that the suspension be revoked or alternately, the woman who had complained because she was harassed be also suspended. Ultimately the man was taken back to work. (Gothoskar, 1992)

In another diamond processing company in SEEPZ, where there were two factions of the union, a woman worker was targeted and sexually harassed by demeaning graffiti on the walls of the women's toilet . The "motive" apparently was to silence her and make her withdraw from being active in the union.

The common experience of women workers in several industries has been that "....going to trade unions or other men has not helped; whilst their employers have attempted to curb sexual harassment or bring the culprit to boom. Trade unions have taken the issue lightly with either a reprimand or with indifference. This is true of other unions as well. Older workers especially women usually

help out by reprimanding and appealing for better behaviour. But complaining to the boys never works. He and his friends will challenge and pick up a fight with the eve teaser...." (Gandhi, 1997)

This leaves women rather vulnerable. Given the "special interests" of women in the case of sexual harassment, in terms of being different and possibly antagonistic vis-à-vis those of at least some male colleagues as well as vis-à-vis the employer, separate pressure groups within unions possibly with the co-operation of women's organizations - need to be instituted. This may ensure that women's voices are not lost when they need to raise them the most.

REFERENCES

1. Gandhi, Nandita. *The Diamond Processing and Jewellery Industry - a Report.* Monograph, WWOS of FREA-ISS, Bombay, 1997.
2. Gothoskar, Sujata. *Declining employment of women in the organized sector.* Workers Solidarity Centre, Bombay, 1990.
3. Gothoskar, Sujata. *Struggles of women in the Pharmaceutical industry in Bombay,* in Struggles of Women at Work, Vikas Publications, 1992.
4. Gothoskar, Sujata. *Women workers and labour unions* in Sites of Change, FES, New Delhi, 1996.
5. Lewanhak, Shiela. Women and trade unions, Ernest Benn, London and Tonbridge, 1977.
6. Rohini, Sujata, Neelam. My life is one long struggle Pratishabd Publications, Belgaum, 1983.
7. Walby, Sylvia. Patriarchy at Work, Polity Press, London: 1986.

BIBLIOGRAPHY

1 Anonymous. "How elite is elite: Women in the Civil Services." *Manushi,* No.56, 1990, pp 18-21.

2 International Labour Organization. *Combating Sexual Harassment at Work* Conditions of Work Digest, Volume 11, ILO, Geneva: 1990.

3 Kapur, Naina. "Equal but different: Sexual Harassment in India". *Symposium on Women's Rights at the Workplace: Emerging Challenges and Legal Interventions Proceedings and Select Papers/ Presentations.* Ed. Asha Bajpai; Tata Institute of Social Sciences, 1997.

4 Kishwar, Madhu. "Sexual Harassment: Ways to Obtain redressal at the workplace." *Manushi,* No.69, 1992, pp 17-19.

5 Kishwar, Madhu. "Sexual Harassment and Slander as Weapons of Subjugation." *Manushi,* No.68, 1992, pp 17-19.

6 Kapur, Ratna & Shomona Khanna. *Memorandum on Reform of Laws relating to Sexual Offenses.* Centre for Feminist Legal Research, New Delhi: 1996.

7 Mackinnon, Catherine. *Sexual Harassment of Working Women.* Yale University Press, New Haven: 1979.

8 Punwani, Jyoti. "A Welcome Recognition." *The Hindu* (Madras), 7 September, 1997.

9 Sandler, Bernice. "Strategies for Handling Sexual Harassment" from *About Women on Campus,* Excerpted in *Women's International Network News* 23-4 Autumn, 1997, pp 37.

10 Seddon, Vicky. "Keeping Women in their place." *Marxism Today,* June 1983.

11 Vetticad, Anna. "Workplace Nightmare." *India Today,* December 15, 1996.

This edition of the Gender Just Laws Bulletin has been prepared by Bina Fernandez. Acknowledgements are due to Mihir Desai, Nandita Shah, and Gomathy N.B for their comments and contributions.

Published by: India Centre for Human Rights and Law

INDIA CENTRE FOR HUMAN RIGHTS AND LAW

5th Floor, CVOD Jain High School, 84 Samuel Street, Dongri, Mumbai 4000 009

Tel.: 370 2592, 379 0699 E-mail: huright@giasbm01.vsnl.net.in

"no means no" (or should!) : myths about sexual harassment

"She's saying no, but she really means yes" - the Hindi film heroine image re-inforced in film after film where the hero chases an initially reluctant heroine around the trees, singing and dancing - ultimately persuading her to fall into his arms. Men are "expected" to make the first moves in courtship, and women are equally "expected" passively receive male attention. This is the most pernicious myth about sexual harassment - it's just "normal male flirting" and women are being "over-sensitive". All women are supposed to "like" this male attention. Women who are beautiful, westernized, wear revealing clothes, are single or divorced supposedly "ask for it". To consider such "attention" as *unwelcome* and *offensive* to a woman would require a shift in thinking for many men.

Even when sexual harassment is accepted as inappropriate behaviour, it is often seen as a "personal problem" - i.e., a problem between the two individuals involved. If anything, it is viewed as the woman's problem in not being able to maturely handle the situation. The reality is that it is a pervasive public problem, needing public solutions. It is also an employer problem because of the costs of sexual harassment to employers of absenteeism, low productivity, employee turnover, legal fees and damages to victims in the case of law suits.

Another common assumption is that women use sex to get ahead - i.e. sleep their way to the top. A variation on the theme is: women misuse claims of sexual harassment. In other words, "she said yes, and now she's saying she meant no - she's doing it for personal gain". Some have argued that it is women's subordinate position within the workforce that compell some women to use sex to further their careers. Further, while this may be true for a handful of women, the majority of women suffer sexual harassment in silence.

Linked to the idea of women using sex as coinage is the myth that prostitutes cannot be sexually harassed. Sex is their work, and quite literally they "ask for it". In reality, sex workers are regularly harassed by the police who extract sex as a form of blackmail. Further often a sex worker can be harassed by a client with whom she may chose not to have sexual relations. Women sex workers too, should - but don't - have the right to say no to sex.

"Men cannot be sexually harassed" - is another notion that needs debunking, since sexual harassment is inextricably a question of power. A harasser is usually someone in a position of power. While incidences of men actually being harassed by women are few - primarily since the percentage of women in positions of power over men remains small in a patriarchal society. However, there have been cases of men being sexually harassed by men. In a recent case, Joseph Oncale a young entrant to an all male oil rig in the U. S was sexually harassed by his supervisor (*The Telegraph*, Calcutta, 28 January, 1998). Ruling in Oncale's favour, the Justice department argued that the purpose of the law prohibiting sexual harassment was to make a person's sex irrelevant in the work place.

reality check: the effects of harassment on women

- *Loss of job* - A woman may quietly quit or protest and quit. Most women are ultimately forced to the point where they leave their job or are dismissed because they resisted. For some women however, changing their situation by changing their jobs is not an option due to the fear of unemployment.
- *Psychological rape* - in many cases, women go through the same reactions as they do post rape: nervousness, loss of self-esteem & confidence, humiliation, avoidance, changing dress and behaviour, guilty feeling that somehow they "caused the behaviour"
- *Restriction on women's mobility* vis-à-vis late night shifts and public transport
- *Victim turned into wrong doer* as her complaint is invariably turned on its head by slander against her morals and character. The threat of being pushed from the "izzatdar bahu beti samaj" to the "patita samaj" by slander effectively silences women (Kishwar, *Manushi*, No.68).

strategies for handling sexual harassment

By: Bernice Sandler; Excerpted in *Women's International Network News* 23-4 Autumn, 1997, pp 37.

The idea behind many of these strategies is to break the cycle of sexual harassment by doing something unexpected. Not everyone will be comfortable with all of these responses, nor are all appropriate for every situation. Some harassers will keep on harassing no matter what you do or say.

- ✓ *The Sexual Harassment Notebook:* Buy a notebook and write in bold letters on the cover "Sexual Harassment". When the behaviour happens, take out the notebook and casually state, "Could you say that again? I want to write it down." Make a big show of asking for the date, time, etc.
- ✓ *The Sexual Harassment Research Project.* This is a variant of the Sexual Harassment Notebook and is particularly helpful in dealing with recurrent sexual harassment, including by a group..
- ✓ *Writing a letter to the Perpetrator.* This technique has been extraordinarily successful in dealing with sexual harassment as well as other forms of interpersonal conflict. The letter is in three parts: - first the writer describes what happened in a very factual manner.... Next the writer describes how she feels about the incident(s), again without evaluation... - Finally, a very short description of what the writer wants: "I want this behaviour to sop at once". The letter is sent by certified mail, return receipt requested.
- ✓ *Create a Witness to the Behaviour* - inform a trusted colleague and try to insure that s/he is an eye or ear witness to an situation where you are being sexually harassed. This will be useful later if you chose to file a formal complaint.
- ✓ *Naming or Describing the Behaviour.* "That comment is offensive to women; it is unprofessional, and probably is sexual harassment. That behaviour has to stop," or "This is the third time you have put your arm around me. I don't like it, and I don't want you to do that anymore".
- ✓ *Pretending Not to Understand.* This is particularly useful with sexist or sexual remarks and jokes. Keep a deadpan expression and state that you "don't get the point of this" or "I don't understand what this means". You follow up by asking the person to repeat what they just said, and again claim that you don't understand...
- ✓ *The "Miss Manners" Approach.* "I beg your pardon!" This coupled with strong facial expressions of shock, dismay and disgust can be used whenever you cannot think of anything else to say or do. A variant of this is "I can't believe you actually said that!"
- ✓ *Keep a diary or some sort of record if sexual harassment happens more than once or if you experience a serious incident:* write down the date, time, place, witnesses, what happened and what was your response. Months later it might be important to remember these details.
- ✓ *Don't ignore sexual harassment in the hope that it will go away. It won't:* When women ignore sexual harassment, it is often interpreted as a sign of approval
- ✓ *Talk to others:* You are probably not the only one who is being harassed by this person. Virtually all harassers are serial harassers...
- ✓ *Read you institution's or office policy, brochures and any other materials published on sexual harassment:* This may help you understand more about sexual harassment and help you decide how to deal with it.
- ✓ *Send a copy of the institution policy brochure to the person who is making you uncomfortable, with the appropriate sections underlined*
- ✓ *If you are a member of a labour union, talk to your union representative*
- ✓ *Report the behaviour to the appropriate person, such as the individual in charge of sexual harassment at your place of work.* You can bring a friend with you if that will make you feel more comfortable. The person in charge should be able to offer you options about how the situation could be handled, including formal and informal actions.
- ✓ *File a formal complaint* - If informal methods such as those outlined above, have not stopped the harassment, you should file a formal complaint Generally this is done within the institution / business. If there is no action file charges with the appropriate government agency or explore what other formal actions are available.