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**United Nations Office on Drugs and Crime**  
**United Nations Division for the Advancement of Women**

**Expert Group Meeting on good practices in legislation on violence against women**  
United Nations Office at Vienna, Austria  
26 to 28 May 2008

**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.<sup>i</sup> 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.<sup>ii</sup>

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.<sup>iii</sup> 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.<sup>iv</sup>

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”.<sup>v</sup> 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.”<sup>vi</sup>

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 Penal Code (IPC) to file a complaint against an abusive spouse (which did not give the woman the right, for instance, to stay on in her matrimonial home or to demand maintenance from the abusive partner), the new law now provides her with a civil panacea. The Act also lays down stringent rules to prosecute men who harass/beat/insult their spouses. Partner abuse can now land a man in jail for one year or a fine up to Rs.20,000 or both. Unfortunately, the act is little relief for 70% of women in non-urban sectors especially with 3 million pending cases before the Supreme Court and 30 million pending at the district courts. What do we do when criminal laws continues to elude the reality of women’s lives, and even more promising civil remedies catch women in the quagmire of an over-loaded litigation system. How do we assign social change so that the

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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.

As we’ve seen up until the nineties, law reform was largely prescribed by a lack of innovative thinking and moral yardsticks. With little if any reference to the equality or human rights concerns around VAW, there was no legislative framework or thinking to promote the same. A significant change occurred in 1992 when women’s groups filed Public Interest litigation before the Supreme Court of India in *Vishaka v. State of Rajasthan* (1997).

In 1992, a *Saathin* (village level change agent) working for a State run Women’s Development Programme (WDP) in Rajasthan was gang raped by five upper caste men. It was an act of revenge for her campaign against child marriage. What followed was an appalling display of negligence and deliberate inaction by the police, medical personnel, and the magistrate, all of who worked to prevent her from registering a case. In the absence of state intervention, she faced the inevitable gang rape by five upper caste men.

A question which arose from the case was whether the state could camouflage its own accountability in the matter? Before the actual rape, the *Saathin* had complained of the harassment she experienced by the accused in response to her campaign. Her complaints went unheeded by local authorities (who in effect represented the state as her employer). The State’s failure to have a functional policy on sexual harassment for its village development workers therefore cast some degree of liability on the State. These amongst other questions became the basis of the not just litigation before the Supreme Court of India (*Vishaka*, 1997) but for potentially innovative legislation. Having defined and recognised the existence, extent and impact of sexual harassment, women’s groups adopted a human rights perspective to shift the focus from criminal wrongdoing to systemic discriminatory conduct which needs to be eliminated. Arguing for a comprehensive law on sexual harassment, women’s groups traveled to the Supreme Court of India to define their human rights at work adopting an equality principle based on CEDAW.

In the first of its kind judgment, the Supreme Court of India articulated gender equality based on the harm experienced by a grass roots woman activist. In doing so it recognised two clear social realities for women:

- i. That sexual harassment was not a fiction and

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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.<sup>vii</sup> 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"<sup>1</sup> or "insulting the modesty of a woman"<sup>2</sup> were the closest Indian law came to defining sexual harassment. Often that meant nothing short of attempted rape.<sup>3</sup> 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

<sup>1</sup> see section 354 Indian Penal Code, 1860

<sup>2</sup> see section 509 Indian Penal Code, 1860

<sup>3</sup> 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...."<sup>viii</sup>

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."<sup>579</sup> "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”<sup>4</sup> It is more than ten years since the *Vishaka* was

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<sup>4</sup> 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
-

- any other unwelcome physical; verbal or non-verbal conduct of a sexual nature.

While the current legislative definition does incorporate the elements of the original definition, at worst it suffers from bad drafting in not distinguishing the definition from the explanation (illustrations). Skillful drafting is commonly undervalued in the evolution of making legal enactments accessible and easy to understand- a fact which rarely finds mention in evaluating good practices in legislation. This can be especially hazardous when it comes to interpreting laws.

### **Creating Institutional Responsibility**

Vishaka clearly placed a positive onus on employers and other 'responsible persons' to prevent sexual harassment at work. That onus is what initiated employers and others to take proactive steps to prevent sexual harassment from occurring. In practical terms this has initiated employers to institute policies/ orientation and training on the issue to their workers others. In turn such persons have also been enrolled to intervene and/or act responsibly to prevent sexual harassment from occurring. In conceptual terms this approach (enrolling individuals as part of the 'preventive mechanism' so to speak) is far more inclusive and far-reaching in terms of building awareness, stakes and creating a measure for professional/appropriate workplace conduct. The approach is consistent with an equality perspective which always seeks to promote inclusiveness- here meaning, ensuring more voices are included in the prevention process. In the present bill, apart from having abandoned 'prevention' as an approach, the Bill resorts to a formal approach of imposing duties as opposed to responsibilities. In addition, their placement towards the latter part of the bill dilutes their importance.

### **Emphasising Prevention**

The novelty of *Vishaka* was its first time emphasis on prevention and attitudinal change rather than mere procedural change: "All employers or persons in charge of work place whether in the public or private sector should take appropriate steps to prevent sexual harassment." This meant all "responsible persons" were effectively required to address sexual harassment as a legitimate concern and to take steps for preventive action which as a result of the *Vishaka* must now include:

- i) affirmatively raising the issue of sexual harassment and its consequences at trainings, meetings or any other such gatherings of workers;
- ii) informing employees of their right to raise and how to raise the issue of harassment through both formal and informal procedures.
- ii) developing appropriate sanctions/ disciplinary measures, including dismissal and

Neither of the first two requirements are being met by the current Bill. An omission which betrays a failure to alleviate disadvantage- a fundamental goal of equality. It also ignores a growing demand for expertise by organization to develop work appropriate



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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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Several complaint committees have benefited from the resource base available to them as a result of an experienced ngo presence on sexual harassment committees. Such involvement has also stimulated the need for workplace training in this area. Removing the need for expertise undermines the knowledge and skill base of committees which come into existence.

Where it is not practical or possible for a local committee to be constituted or where the employer is accused of sexual harassment, the Bill also enables State Governments to appoint district officers (from a legal background i.e. Magistrate, District Commissioners etc.) to establish local committees. While this may be understood in informal sectors, the reference to an 'employer' accused of sexual harassment leaves the definition of employer ambiguous. In many organizations for example an 'employer' accused of sexual harassment is represented through several designations and/or individuals. By addressing all "responsible persons", *Vishaka* sought to extend responsibility to situations/relationships of a fiduciary nature.

By placing the role of redress entirely in the hands of Constituted Committees, the possibility of informal conciliation has been marginalized. For instance, several policies that have come into existence create the option for informal/formal processes, assigning a Complaints Committee to a place of last resort. In practice this has meant some workplaces provide for training first instance persons to address inappropriate behaviour on the spot. Many women want inappropriate conduct to stop without escalating it into a case. While this still addresses the problem, it does not dilute the issue. It also enrolls leadership within both formal and informal workplaces to take responsibility.

The most glaring omission within the current bill has been the absence of accountability. How will we know it's working? While *Vishaka* had already set the standard for creating accountability by requiring all organisations to make an annual report to the "relevant" government department Government has never identified such a nodal agency to facilitate such reporting. In both online exchanges and subsequent debates over the bill, one of the clearest demands amongst different sectors has been for a nodal agency to be established to monitor implementation of the law. This would also safeguard against bias and pressure in instances where conciliation is opted for.

Finally and most notable in the existing Bill is a provision which allows for prosecution of "false cases". Through the many versions of this bill, there has been a resounding demand to delete such provisions as it simply nullifies the law's purpose. Not only does it project mistrust as a starting point but it serves to discourage women who already know and understand the pitfalls 'proving' sexual harassment.

### **A Good Practice Opportunity**

Despite the struggle to clobber together a Bill that meets the interests of all, it has taken seven years and many drafts to get it right. Yet there is still a way to go. Having initiated

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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 "false charges", a claim unique to violence against women
7. Ensure a cross-disciplined understanding and response to the issue in design and delivery of prevention and redressal mechanisms
8. When including objective third party participation in addressing sexual harassment at the workplace, identify the qualities/qualifications essential for such expertise. It is not enough to induct only those "committed to the cause of women" as this can never provide for informed effective intervention in making the law responsive. Civil society groups must also rise to the skill and knowledge requirements of issue specific law and practice.
9. Human rights is about promoting responsible behaviour. Therefore definitions need to be clear about who is responsible and accountable. In the current bill for example, to fudge an understanding of employer is critical to rendering accountability.

## **Conclusion**

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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 the heart of true equality: freedom, respect, and dignity. This is ironic given that women were at the forefront of constitutional equality. Law reform must prepare to encompass these values and apply equality as the goal of law reform, without which legislation can not rise to providing a just haven for women in situations of violence. The proposed Sexual Harassment Bill is an opportunity to change that. Unlike predecessor reforms, the force of international agreements such as the UDHR, CEDAW encompassed in *Vishaka* have rejuvenated Equality. Enough to provide a positive, tested blueprint to alter how legislation can truly and effectively respond to women's equality concerns at work.

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<sup>i</sup> In 2001 the Deccan Herald revealed that for every one case of rape reported, 68 go unreported and that the ratio of reported/unreported cases of sexual harassment is approx 1 to. 10,000. The National Family Health Survey of India has shown that 1 in 5 women face domestic violence from their husbands. global statistics are estimated between 20-50%. The National Crimes Record Bureau 2005 recorded 1,55,553 cases of VAW in India.

<sup>ii</sup> Sakshi. *Gender & Justice: A Judicial Point of View*. New Delhi, India. 1996; "The victims have invariably found rape trials a traumatic experience..." Delhi Domestic Working Women's Forum v. UOI & Ors. (1995) 1 SCC 14

<sup>iii</sup> Tukaram v. State of Maharashtra AIR 1979 SC 185

<sup>iv</sup> Pre-1983, the inadequacy of the law of rape, manifested in a number of judgments of the Supreme Court of India (e.g.; Bharwada Bhoginibahi AIR 1983 SC 753; Sidheshwar Ganguly AIR 1958 SC 143) which compromised justice for women. Strong protests by women's organizations, social scientists and jurists against the law to adequately protect complainants of rape ultimately led to legal amendments. In 1979, the Government of India referred the matter of revision of rape laws to the Law Commission and in 1980 a comprehensive Criminal Law (Amendment) Bill was introduced in Parliament. The same was passed in 1983.

<sup>v</sup> Prem Chand v. St. of Haryana 1989 Supp (1) SCC 286

<sup>vi</sup> The Law Commission of India, 172<sup>nd</sup> Report on Sexual Assault Law Reform, 2000.

<sup>vii</sup> Defining sexual harassment, the Court attempted to account for a vast canvas of inappropriate sexual conduct including:

- physical contact and advances
- a demand or request for sexual favours
- sexual coloured remarks;
- showing pornography
- any other unwelcome physical; verbal or non-verbal conduct of a sexual nature.

<sup>viii</sup> Translated extract from the trial court judgment of the District and Session court (Jaipur, Rajasthan) in State vs Ramkaran and others (The Bhanwari Gang rape case), pp. 17