Sexcapades and the law

RATNA KAPUR

LURID stares, offensive remarks, sexual innuendos, sexual tones, embarrassing jokes and unsavory remarks are among the litany of conduct and expression that is being captured in the net of the sexual harassment law and policy as it is emerging in India. While sexual harassment of women (and other groups, including sexual minorities) remains a pervasive and systemic phenomenon, there is considerable skepticism whether cabining and containing sexual conduct and expression is an effective way in which to address the problem.

Do we want the heavy weight of the law to block the lurid stare? Silence the embarrassing joke? Modulate ones sexual tone? Are sex codes on university campuses going to empower women or lead to moral surveillance of sexual conduct? Is the National Commission of Women producing a code of conduct that liberates sex, sexual speech and conduct from the Victorian/Hindutva closet, or does it penalizes sex per se as a negative and contaminating force? These are some of the concerns provoked by the law and policy on sexual harassment which need to be debated and addressed if we are keen to produce an empowering project for women and deal effectively with the problem of sexual harassment.

In light of the above, I examine three concerns regarding sexual harassment. First, I discuss the implications of the sexual harassment law on women's rights as it is developing in India. I examine the Supreme Court decisions in Vishaka and the Apparel Export Promotion Council cases and how the judicial pronouncements on sexual harassment are being translated into policy. I focus on the National Commission of Women Code of Conduct, and the Draft University Policy on Sexual Harassment.

Second, I explore the implications of our focus on sexual wrongs, particularly in the context of the Hindu right's ascendance to power and its influence on the women's rights agenda. And third, I look at the way in which sexual harassment law is contributing to the production of a static, victimized politics for women.

My main argument is that sexual harassment law and policy as developing in India is compromising women's sexual and equality rights, reinforcing a conservative sexual morality and encouraging a

punitive response to what is deemed to be sexually unacceptable conduct. While endorsing the fact that women experience sexual harassment in the work-place and other public arenas, my major critique is that the current legal developments will not effectively address the problem of sexual harassment, at least not in a way that is especially liberating or beneficial to women.

I propose alternative ways of reducing sexual harms to women, without reinforcing the power of the state, a conservative sexual morality, or inviting protectionist responses to women's experiences of subordination and discrimination.

I

Sexual harassment law in India evolved through a series of cases, which ultimately culminated in the Supreme Court decision in Vishaka v. the State of Rajasthan (August 1997). The Vishaka case was a class action petition brought by a number of social action groups and non-governmental organizations, seeking legal redress for women whose work was obstructed or inhibited because of sexual harassment in the workplace.

The Supreme Court decision accepted that sexual harassment in the workplace violated women's equality rights and that employers were obligated to provide a mechanism for the prevention of sexual harassment and for the resolution, settlement or prosecution of sexual harassment. The court set out guidelines on sexual harassment in the workplace and declared the guidelines as constituting the law of the land until further action was taken by the legislature.

The legal definition of sexual harassment provided by the court is as follows: '...sexual harassment includes 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; and any other unwelcome physical, verbal or non-verbal conduct of a sexual nature where such conduct was humiliating and constituted a health and safety problem.' More specifically the court held that such conduct would constitute discrimination if a woman has reasonable grounds to believe that objecting to the conduct would disadvantage her in terms of her recruitment or promotion or when it creates a hostile work environment.

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. It also recommends that a complaint mechanism be created in the employer's organization to redress 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 workplace.[1] 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, or 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 position 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 decision is important in so far as it validates that women do experience sexual harassment in many different areas of their lives. However, I question the formulation of the sexual harassment guidelines for two primary reasons. The first is that the guidelines impugn a vast breadth and scope of sexual conduct. Second, they reinforce sexual conservatism and puritanism within our society (the Hindu right is among those who support these guidelines). These issues highlight the core concern that underlines this article, the erosion of the possibility for sexual freedom, which must be addressed if any effective redress is ever to be available to women for sexual wrongs.

The primary ingredient of sexual harassment as defined by the Supreme Court guidelines is that the sexual conduct must be unwelcome. A second requirement appears to be that the conduct must disadvantage a woman, such as affect her recruitment or promotion or create a hostile work environment. Unfortunately, the second leg of the definition seems to have been dispensed with in a subsequent Supreme Court decision, leaving open the possibility that any kind of sexual remark can be impugned under the guidelines.

Before elaborating on the development of sexual harassment law in India, I briefly examine how it has operated in other contexts. Sexual harassment has been read into law in a number of countries. The most influential and important legal development took place in the U.S. where sexual harassment was first developed as a part of sex-discrimination law.[2] The major ingredients of the definition are that the sexual conduct must be 'unwelcome' and second that the conduct is 'severe and pervasive enough' to create an 'abusive and hostile' work environment.

The major architect of the sexual harassment law is feminist scholar Catharine MacKinnon who argues that women are sexually harassed because sex is the primary tool for oppressing women.[3] She argues that men do not perceive women as workers, but as sexual beings in the work-place.[4] And when men are denied sexual relations with women they harass them through sexual putdowns and degrading remarks. Although the U.S. courts have not gone so far as to accept that sexual harassment lies at the core of women's subordination, they have recognized that sexual harassment does constitute part of gender-discrimination.[5]

The interpretation of the legal definition of sexual harassment by the U.S. courts has caused considerable concern amongst feminists, legal scholars and practitioners, who have begun to revisit the definition and its implications on the legal regulation of sexuality. The most disturbing results of sexual harassment law has been the extent to which it has encroached on freedom of speech and expression, a core right in any democracy. The sexual harassment definition has caught conduct that is neither severe nor pervasive, but may be offensive, sexist and bigoted. Courts have found themselves tangled up in knots in trying to determine what constitutes unwelcome sexual behaviour, or what is 'severe and pervasive' enough to create a hostile work environment, or at exactly what point does 'offensive' become 'hostile'.[6]

Ever since the sexual harassment standard was adopted into law more than 20 years ago in the United States, several scholars who question the ways in which sexual harassment law has actually denied women and other minorities, sexual or otherwise, the space for sexual expression have become hostage to the definition rather than empowered by this law.[7]

Research shows that the law has helped few women and not stopped sexual harassment in the workplace; though curtailing sexual speech in the workplace, it has encroached on rights to speech, equality and sexual autonomy of women in ways that had never been anticipated.[8] A further critique is that sexual harassment has exemplified a return of feminism to an outmoded representation of women as asexual, fragile and helpless.

And finally, MacKinnon's position on sexual harassment, which ignores differences among women and how race, religion, caste, sexual orientation, age, or culture mediate the way in which women may be harassed in a work setting has been challenged. She has been severely criticized for dismissing the implications of sexual harassment law on restricting or curtailing the right to free speech and expression, in particular women's rights to free speech and expression.[9] So we have reason to be concerned about importing this concept which has been exposed as being exclusive and unavailable to women who do not belong to sexual, racial or religious majorities.

Some of the critiques which are particularly relevant include the way in which subsequent case law has defined 'unwelcome' and 'hostile or abusive work environment'. The first leg of the test places the burden on the complainant to prove that the conduct was 'unwelcome'. As the case law reveals, a complainant may fail if she fails to conform to dominant sexual norms, leading to the conclusion that what happened to her was welcome, or that she deserved it.[10] For example, in one decision the U.S. Supreme Court held that a woman who drinks beer and hangs out with her male colleagues after work implicitly welcomes the unwanted sexual attention.[11]

The courts have also had to define what constitutes a hostile or abusive environment in order to ensure that mere bad manners or offensive behaviour which do not result in discrimination are not impugned in the sexual harassment law. They have been unable to develop a test which can differentiate between hostile and abusive work environment and merely an offensive work environment, except through applying a reasonableness standard. However, it is unclear from whose perspective is reasonableness to be determined – from the perspective of a reasonable man, a reasonable woman, or a reasonable victimized woman? These ambiguities have resulted in confused standards as well as inconsistent and contradictory judicial pronouncements.

It is unfortunate that we have not drawn on some of these contemporary insights when engaging with the problem of defining the scope and content of sexual harassment within our context. Neither the Supreme Court, nor the National Commission of Women, nor the university 'sex code' committees have reflected on the problems and limitations of sexual harassment law. The standard being developed mimics U.S. law, including all its flaws, and fails to take into consideration the different cultural, sexual and gender contexts in India.

In particular, we need to be concerned about the way in which the

law will inhibit and curtail women's rights to equality, freedom of speech and sexual autonomy, rather than advance such rights. The initiatives taken to enforce the Indian Supreme Court's definition of sexual harassment are producing a conservative, static politics, as informed by and interpreted within a sexually conservative environment, a protectionist response to women's rights claims, and a response to sexual behaviour based on 19th century attitudes towards the regulation of sexuality.

The early signs in India indicate that sexual harassment law will produce some of the same problems that have occurred elsewhere, with more serious consequences, given that we already live in a sexually conservative and highly moralistic environment. In the first major decision after the Vishaka judgment, the Supreme Court not only broadened the scope of the sexual harassment test, it also delivered a decision that should leave us worried about how the law is being used to reinforce women's sexual conduct along the boundaries of traditional sexual behaviour without necessarily remedying women's claims of sexual harassment.[12]

In the APOC (Apparel Export Promotion Council) decision, the complainant was the private secretary to the chairman of the company. The chairman had tried to molest the complainant on several occasions during the course of her work, including trying to sit beside her when she did not desire it and trying to molest her in a hotel elevator. The chairman was dismissed after a departmental inquiry. He challenged the order through the courts, arguing that he had never actually touched the complainant. The High Court held that 'trying' to molest a female employee was not the same as actually molesting her and that the chairman's conduct could not therefore be impugned. The company appealed to the Supreme Court.

Among the several questions considered by the Supreme Court, I want to focus on the following: (i) Does the action of a superior against a female employee, which is against moral sanctions and does not withstand the test of decency and morality, amount to sexual harassment? (ii) Is physical contact an essential ingredient of the charge?

The court accepted the definition of sexual harassment as laid out in Vishaka. However, it went on to determine the content of the sexual harassment, holding that 'any action or gesture which, whether directly or by implication, aims at or has the tendency to outrage the modesty of a female employee, must fall under the general concept of the definition of sexual harassment' (at page 775;

emphasis supplied).

The court further held that the 'victim's testimony' must be evaluated against the backdrop of the entire case, thus adopting a test of reasonableness that seems to be based on the victim's perspective. It accepted that sexual harassment violated a number of international conventions including the Convention on the Elimination of All Forms of Discrimination Against Women. Further, that the conduct of the chairman in trying to sit next to the complainant and to touch her, despite her protests, constituted 'unwelcome sexually determined behaviour' on his part and was an attempt to 'outrage her modesty'. His behaviour was against 'moral sanctions' and did not withstand the test of 'decency and modesty' and amounted to unwelcome sexual advances. Together, his actions constituted sexual harassment (para 23).

The court also considered the evidence of the complainant's colleague who stated that when she inquired into the complainant's distressed state she stated that 'being unmarried, she could not explain what had happened to her'. The court held that the material on record thus clearly established that the unwelcome sexual behaviour on the part of the chairman was also an attempt to outrage her modesty.

'Unwelcome' Signs: The core ingredient of the definition is that the sexual conduct must be 'unwelcome', which remains for the complainant to prove. However, this burden is conditioned by dominant sexual norms and the complainant's conduct. More specifically it means that the complainant's sexual past, mode of dress and conduct may be introduced as relevant evidence in determining whether the conduct was 'unwelcome'.

Dress, conduct and even profession, may thus be used to show that the harasser was incited to the conduct and thus constitute sufficient evidence to disqualify her claim of sexual harassment. Bar room dancers, waitresses, performers, are all vulnerable to such claims. Indeed the definition seems to provide scope for reproducing and reinforcing dominant assumptions about sex, women's sexuality and sexual practices.[13]

These concerns are reminiscent of the experience women have had with the operation of rape laws, and the requirement of 'lack of consent'. A rape victim's dress, speech, sexual history, chastity have all been deployed to undermine her claim that she was forced to have sexual intercourse against her will or without her consent. Her conduct invited sex. She asked for it. In rape law, a woman's consent has been contingent on her previous sexual history, her conduct at the time of the encounter (did she reasonably resist or simply submit?) – questions that have not been effectively addressed.

Indeed even in the legal arena, the constant call for the repeal of the legal provision that permits the defense to introduce facts about the victim's previous sexual history in court in order to discredit her testimony, have simply been ignored by the government and have not been pursued by women's groups.[14] 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. As long as women's sexual conduct remains constrained, conditional, and subject to moral scrutiny, sexual laws for her benefit will be subject to those very same constraints.

In the APOC decision, the complainants' pristine conduct, including her lack of knowledge about sex (as she was not married) were factors that redeemed her credibility. Had she been knowledgeable, and described in minute detail what happened to her (and it is not in the least bit clear from the reading of the decision what happened to her), then presumably her sexual knowledge would have damaged her credibility. Had she used foul language, or sexual language in her interactions, it could have undermined her claim that the conduct was unwelcome. Had she spoken in a language that is replete with sexual innuendos such as Punjabi, would that also have diminished her claim that the conduct was unwelcome?

I focus on the word 'unwelcome' in the definition of sexual harassment to emphasise the point that it is a qualified term. The requirement of 'unwelcome' will be informed by outdated stereotypes about women's behaviour and sexual conduct. If her speech or dress is found to be sexually provocative, it can be relevant in determining whether she found particular sexual advances unwelcome. The defense could well argue that her dress and manner welcomed sexual attention. How do we determine the distinction between sexual attention and unwelcome sexual conduct?

The court also read the notion of 'outraging the modesty of a woman' into the definition of sexual harassment. This phrase has not been defined in any statute or code, but has been interpreted by the Supreme Court as an action that could be perceived as one which is 'capable of shocking the sense of decency of a woman'.[15] Given that the origin of the 'outraging the modesty of a woman' standard is Victorian and colonial, it represents a understanding about women's sexuality that is chaste, pure, asexual, and disinterested in pleasure. There is little connection between this concept, which is being cast as a core 'Indian value' and contemporary understandings of women's sexuality.[16]

This decision is indicative of the way in which sexual harassment law will operate when formulated without sufficient attention to the Indian context – the content of the definition as well as to dominant sexual norms. It suggests that sexual harassment law is not a force for change for women. The APOC decision highlights how sexual harassment is contingent on a woman's sexual status and knowledge. A victim's narrative of the encounter is substantially qualified by the framework of dominant sexual norms. If she has transgressed any of these norms, then her story of sexual vicitmisation can be converted in a narrative of agency, invitation, provocation and 'welcomeness'.

Sex Talk Under Siege: My second concern is over the over-inclusiveness of the definition to the extent that all sexual speech and expression will be curtailed or implicated as sexual harassment. Unfortunately, this line was further extended by the Supreme Court in the APOC decision where it greatly weakened the second leg of the definition of sexual harassment, the requirement that the conduct result in an abusive and hostile working environment. By including the outraging of the modesty of a woman into the sexual harassment standard, the court did not build on the idea that sexual harassment was a violation of women's rights to equality, life and liberty. But rather, that a woman's modesty, a creation of 19th century Victorian and colonial mentality, was sufficient to succeed in a claim of sexual harassment. Indeed the decision represents a step backward in the creation of a workable sexual harassment law.

More broadly, I am concerned about the implications of sexual harassment on the current sexual climate. In the contemporary moment, women have fought hard to create space, public space, for the discussion and legal redress of sexual wrongs – this includes rape, sexual assault, child sexual abuse and other forms of sexual violence. At the public level there is now considerable awareness about these wrongs, though the legal means for redressing such wrongs remain inadequate. However, there has been little simultaneous effort to educate and develop legal strategies for claiming sexual rights.

We operate in an environment where there is increasing room to discuss sexual violence and sexual wrongs – indeed the only way in which people can openly and publicly talk about sex is through the lens of violence, harm and wrongs. There continues to be a lack of space, indeed an erosion of what little space exists for the expression, assertion and enforcement of sexual rights. There has not been a single piece of legislation nor constitutional decision promoting women's sexual rights. Sexual rights have not been read into law in the same way that sexual wrongs have. And yet sexual rights are intrinsic to women's right to equality, to life and liberty, to

free speech and expression.

Apart from legal encroachments on sexual rights, more recently, there is an increasing hysteria about the threat to Indian culture that is sweeping the country. And the threat, the risk, the enemy, time and again, appears to be sex and sexuality. The legal contest over the screening of Bandit Queen in India, convulsions around the holding of the Miss World Beauty pageant in India in November 1996, the deeply problematic response to the HIV/AIDS crisis, and to innocuous programmes such as Fashion television. All of these reflect an unease with the increasing publicity of sex and sexuality.[17]

All of these reactions regard sex as threatening to Indian cultural values, the Indian way of life, the very existence of the Indian nation.[18] The current moral paroxysms around culture must be seen in the wider context of the relationship between culture and sex negotiated in the 19th century.[19] The idea of sex and sexuality as a dangerous corrupting force, to be carefully contained at all costs within the family and marriage, was as Victorian as it was Indian. But, within the emerging fantasy of the nation, the chastity and purity of Indian women, wherein this dangerous and contaminating force was controlled, came to represent not only the purity of Indian culture, but also its superiority to the culture of the Empire.

I remain concerned how this understanding of sex and sexuality has constantly been taken up within the framework of negativity and contamination. Today, with the entry of satellite broadcasting, the mobilization of sexual minorities, whether gays and lesbians or sex workers claiming sexual rights, or the emergence of a generation of young people who are very conscious of their sexual identity and appearance, all meet with resistance and are cast as either cultural contaminants or corrupted by western culture and values. The representation of women on screen, through satellite television and in mass advertisements has come under increasing attack from the public, judiciary, feminist and non-feminist groups. The concern over sexual explicitness, obscenity and now ‘vulgarity’, is reaching a fevered pitch.

It is within such a climate that the sexual harassment issue has been raised. Although there is no doubt that sexual harassment is a pervasive phenomenon, the legal definition does not address the problem of sexual harassment. Rather it is emerging as a tool to

address the problem of sexual speech and expression, an area that has received little support.[20] The law appeals to employers to enforce the sexual harassment codes, a move that can lead to the sexual sanitisation of our work spaces and our university campus. The definition covers for example, sexually coloured remarks. At what point does a remark become sexual? In which language? And when is it unwelcome? In conversation? When it is overheard by the complainant?

Given the pressure on employers and the desire to avoid being subjected to litigation, employer drafted codes can declare that the work space be completely sexually sterile, or employers can announce a 'zero tolerance' policy on sexual humour. In one example in the United States, when a library employee complained about a co-worker's posting a cartoon that used the word 'penis' – with no sexually suggestive content at all – the library ordered that it be taken down.

In today's context of HIV/AIDs where sexually explicit language, including penis, sexual intercourse, and vagina, must be used in posters and advertisements if HIV education is to have any impact whatsoever, could such material be implicated in the sexual harassment law? Or would sex education strategies have to curtail their content in order to ensure that there is no discomfort in the work-place? Is this a progressive stand? Is it liberating or emancipatory for women?

And what space is left for sexual rights and sexual expression once we consider that sex per se must only be framed within the language of protectionism, modesty or violence? Who determines whether an action has crossed the boundaries of modesty or is unwelcome? Bandit Queen and the film Fire were impugned for their sexual explicitness and vulgarity. Although both films were ultimately screened, they were subjected to the censors' scissors, masticated by the moral brigade of the Hindu right and even some feminists.

One argument advanced in the context of Bandit Queen was about the explicitness of the rapes, in particular that the portrayal of the 'posterior' of the rapist ad resulted in the sexual harassment of the women in the audience. This skewed logic omitted the entire history of the case. The controversy around the film – about whether cuts should be made, and if so which scenes needed to be cut – were at least partially responsible for the creation of a particular kind of audience for the film.

The censorship controversy created expectations among a certain

segment of young men that this was a 'dirty' or 'sexy' film, who then in turn rushed to see it. The censors' focus on the 'sex scenes' in the film has reduced the film to one that is about sex. The extraordinary paradox is that this film, which in part is about the horrifying nature of sexual violence against women, poor, rural, lower caste women in particular, has come to be associated with 'sex' and 'titillation' at the level of popular discourse.

There is no question that a good deal of sexual imagery and offensive language can be very sexist or misogynist. Yet in a country which is new to free speech and expression, a country in which the full content of speech and expression have never been fully explored, and a country that does pride its democracy, the value of free speech cannot be minimized. Nor can such a right for women in particular be compromised or curtailed too readily.[21]

Sexually explicit representations have an important role to play in flouting conventional sexual norms. It is not enough to simply focus on the negative dimensions of sexist representations, but also to attempt to create space for more positive representations of women's sexuality. Such a space has enormous potential for women who are confined by the normative understandings of female sexuality as passive, modest and without agency. It is thus important to encourage images that promote women's sexual pleasure, and affirm women's sexual experiences/fantasies.

However, sexual harassment law, placed within the context of an increasingly censorious climate and sexual puritanism, can operate to deter sexual expression, expression that is valuable, educative and affirming. In fact the vast scope of sexual harassment law as set out by the Supreme Court and further expanded by the National Commission of Women (discussed below) and the draft university code, to include a wide variety of 'sex talk' threatens to relinquish all such speech into the closet and cast sexual speech as having neither educative nor constitutional value whatsoever.

What is most troubling about the definition is that any sexual remark which is unwelcome can be read as constituting sexual harassment. Once again, legislatures and courts elsewhere have required that the sexual conduct not only be unwelcome but also not contribute to the creation of an abusive and hostile work space. The purpose of the second element is to ensure that offensive speech does not fall within the scope of sexual harassment, as this would encroach on the rights to free speech and expression.[22] However, the APOC decision substantially weakens this requirement, by including the outraging of the modesty of a woman as sufficient to constituting sexual harassment. Any sexual remark, depiction or conduct in the workplace can be held as outraging a woman's modesty. Sexual harassment is turning into a tool of censorship and sexual repression.

II

The way in which the Supreme Court guidelines are turning into a tool of sexual repression and censorship rather than as a tool of empowerment for women is evident in the way in which the definition is being translated into policies and codes of conduct.

The National Commission of Women adopted a code of conduct presumably based on the Supreme Court definition. A major part of the definition of sexual harassment as set out in the code is reproduced below:

Sexual harassment shall include such unwelcome sexually determined behaviour by any person either individually or in association with other persons or by any person in authority whether directly or by implication or as: (i) eve teasing; (ii) unsavoury remarks; (iii) jokes causing or likely to cause awkwardness or embarrassment; (iv) innuendos and taunts; (v) gender based insults or sexist remarks; (vi) unwelcome sexual tone in any manner such as over telephone (obnoxious telephone calls) and the like; (vii) touching or brushing against any part of the body and the like; (viii) displaying pornographic or other offensive or derogatory pictures, cartoons, pamphlets or sayings; (ix) forcible physical touch or molestation; and (x) physical confinement against one's will and any other act likely to affect one's privacy including any act or conduct by a person in authority and belonging to one sex which denies or would deny equal opportunity in pursuit of career development or otherwise make the environment at the workplace hostile or intimidating to a person belonging to the other sex, only on the ground of sex.

Eve-teasing will include any person willfully and indecently exposing his person in such a manner as to be seen by other employees or use indecent language or behave indecently or in a disorderly manner in the workplace. It will also include any work, gesture or act intended to insult the modesty of a woman by making any sound or gesture or exhibit any object intending that such word or sound shall be heard or that such gesture or object shall be seen by such women or intrudes upon the privacy of a woman employee...' (emphasis supplied).

The NCW definition brings within its scope even more sexual activity and conduct than the Supreme Court definition. However, the conduct is conditioned upon the impact it has on the complainant. There should be a reasonable apprehension that the conduct will or does affect her health and safety or constitutes sex discrimination or results in adverse consequence should she refuse to consent to the overture or unwelcome sexual behaviour. The code

also places an obligation on the employer to prevent or deter the commission of sexual harassment in the workplace and also states that no employee shall make a sexual overture to any female employee.

Read in its entirety, the code has the affect of curtailing all sexual conduct, to render to the workplace as a sexual sterile environment. Some would argue that this is indeed agreeable – that sexual contact or communication of any kind should not be introduced into the work environment. We might question the wisdom of such an austere recommendation and sexual shakedown which evicts sex from the public arena. How does such a move contribute to the development of a healthy sexual environment? To the development of healthy sexual relationships between adults?

The introduction of the modesty standard in the proposed policy places sexual harassment within the box of conservative sexual morality. What is most significant about such a move is that it takes sexual harassment out of the equality or sex discrimination box. Sexist speech or sexual harassment is bad because women are embarrassed by sex talk, and her level of discomfort, whether it is humiliating and affects her health, or has adverse consequences merely because sex talk is unfamiliar and per se bad and something which only corrupt and indecent people talk about and engage in, will fall within the sexual harassment standard.

The Supreme Court decision has also spawned a series of initiatives on different campuses in the country to develop sex codes that address the problem of sexual harassment. There is a great deal again to be said in favour of developing healthy sexual relationships between students and in the context of the university. However, I once again question the wisdom of adopting sex codes, especially in an academic and educational environment, as an effective tool for pursuing this objective.

I briefly examine one such attempt – the Mumbai Draft Policy on Sexual Harassment for Universities.[23] The draft adopts the definition of sexual harassment as set out in the Vishaka judgment. However, it also proceeds to provide an explanation of the definition of sexual harassment. It includes:

i) When submission to unwelcome sexual advances, requests for sexual favours, and verbal or physical conduct of a sexual nature are made, either explicitly or implicitly, a term or condition of instruction, employment, participation or evaluation of a person's engagement in any university or college activity.

ii) When unwelcome sexual advances and verbal, non-verbal, or physical conduct such as loaded comments, remarks or jokes, letters, phone calls or e-mail, gestures, showing of pornography, lurid stares, physical contact or molestation, stalking, sounds or display of a derogatory nature have the purpose or effect of interfering with an individual's performance or of creating an intimidating, hostile or offensive university or college environment.

Sexual harassment of university students by professors and lecturers has become an endemic feature in educational institutions. Female students have become increasingly vocal and less tolerant of the libidinous advances of their teachers and faculty members. Yet the code that has been put forward as a model code for addressing the issue of sexual harassment on the campus, offers a swollen definition of sexual harassment that has little regard for academic freedom or for women's sexual autonomy.

The breadth of the activity embraced in the draft code is surprising in so far that it encompasses much more activity than the Supreme Court definition, and quite remarkably, is also broader than the definition proposed by the National Commission of Women. How will a court assess whether a lurid stare has intimidated an individual's performance, or a sound has created a hostile working environment? Would college beauty pageants be subject to a complaint that they constitute a display that is offensive? And what space remains then for offensive conduct, remarks and ideas on campus that have rendered universities historically as avenues of change, growth, even revolution.

Another concern is that such a restrictive code has been recommended for a university setting. There is no simultaneous code listing out the sexual rights that students are entitled to engage in and to assert on campus. Once again, some would argue that sexual rights have no place on a campus. And yet the increasing interaction between the sexes in the public space would suggest that some affirmative space needs to be created for the protection of consensual sexual contact. It was not so long ago that couples were unable to hold hands in any public forum without facing harassment for engaging in the demonstration of public affection. This example indicates the desperate need we have to draw the line in favour of sexual rights and expression, rather than smothering the very limited space students in any case have for such expression and conduct.

The problem with the NCW and the model university codes that have been proposed is that they compromise on fundamental human rights. They implicate rights to equality, freedom of speech and expression and even life and liberty because of the sweeping breadth

of their scope, as well as the protectionist responses that they invite towards women. I would argue that they are both open to constitutional challenge, unless they shift to standards that incorporate women's rights to sexual autonomy, the right of free speech and expression, including sexual speech, and focus on welcome and not simply unwelcome conduct. In matters of sex and sexuality, everyone seems to be an expert at what should not be allowed and suffers from muteness when invited to list what kind of sexual conduct should be allowed or is permissible.

In both the context of the university campuses and the workplace, the onus is on the employer to ensure that sexual harassment does not occur. The employer is responsible for ensuring that the codes to prevent sexual harassment are formulated. 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?

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 hiring women.

Of course, this argument can be a double-edged sword as it can be used to argue against affirmative action measures more generally designed to provide substantive equality to those historically discriminated against and excluded from the market. The point here is simply that the 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, I am concerned that the sex codes will be drafted and/or used in a way that will intensify the moral regulation of sexual behaviour. Some concerns that have been expressed from 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 sexual spaces 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.[24] In the latter case, if sexual activity on campus is to be completely impermissible, then the university should make such a declaration. However, I suspect that people will oppose such regulations or declarations as they will discourage rather than encourage dialogue between the sexes, and therefore be undesirable.

III

In this section, I examine the ways in which sexual harassment can be disempowering for women. I briefly consider how the Hindutva agenda for women is reinforced by the emerging definition of sexual harassment and also how the focus on the victim subject in sexual harassment law and policy is producing a politics that has adverse affects on women's rights and denies women a sense of agency and ability to be sexually active and empowered subjects.

The concerns about the implication of sexual harassment law on the rights to equality, free speech and women's sexual autonomy become all the more important in the context of the ascendance of the Hindu right and Hindutva politics. The reinforcement of dominant sexual norms by sexual harassment law, especially norms that ironically concern female behaviour, becomes even more alarming when considered within the context of the Hindu right's ascendance to power.

The Hindu right has continued to offer considerable evidence of its disdain for sexual speech and representations and to controlling sexual conduct primarily through the avenue of the criminal law (not civil rights law). This concern has been most visibly expressed in its response to satellite broadcasting and Indian commercial film song and dance sequences. It has continuously lobbied for the censorship of ads and film songs that it argues are derogatory to women and violate Indian cultural values. And in so doing, the concerns expressed often come uncomfortably close to those feminists who also call for censorship.

Recently, Sushma Swaraj campaigned against fashion television on grounds that it was unfit for family viewing and Indian cultural values.[25] The controversy was resolved only after the producers agreed to re-fashion the programme to be culturally sensitive, that is, to exhibit less skin.[26]

The Hindu right alleges that such images deprave and corrupt society. It is specifically concerned with how obscenity violates women's traditional identity, in particular their roles as wives and mothers. Respect for family values and tradition constitutes their position. Some feminists are motivated by a concern with women's right to equality, in particular the right to be free from sexual harassment. Yet both are of the view that there is direct and quantifiable causal relationship between the images viewed and the harm resulting. This strange alliance between a part of secular women's movement and the Hindu right position condemns obscenity and vulgarity and calls for stricter censorship. In this section, I consider the implications that such a position has on women's rights.

Against this backdrop we need to be concerned with 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 anti-sexual direction of current sexual harassment law and policy should make us take a step back and reflect on the strategies we are endorsing.[27]

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 focusing 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?

In dealing with issues of sex and sexual wrongs, women can only avoid the trap of being reduced to the evil, sexually obsessed female, who deserves what happens to her by appealing to her victim status and positioning herself as sexually innocent and un-knowledgeable. It is both a strategic as well as a normative move.

But focusing on the complainant's victim status, identifying her with the fragile, asexual woman, produces a subject and a politics that is neither empowering nor emancipating for women. There is no question that in the context of law and human rights it is invariably the abject victim subject who seeks rights primarily because she is the one who has the worst things happen to her. It is also a subject that has allowed women to speak out about abuses that have remained hidden or invisible. Indeed it has provided an important location from which women have been able to speak more broadly to the human rights and the international community.

The second advantage of appealing to the victim subject is that it provides a shared location from which women from different cultural, regional, religious, class and social contexts can speak. It provides women with a subject that repudiates the atomized, decontextualized, and ahistorical subject of liberal rights discourse, while at the same time providing a unitary subject that enables women to continue to make claims based on a commonality of experience – their victimization.

However, there are some serious limitations to an exclusive reliance on the victim subject to make claims for rights and women's empowerment. The articulation of the victim subject is based on

gender essentialism, that is, essentialist claims about women, which are overgeneralizations.[28] As Chandra Mohanty points out, it assumes that 'women have a coherent group identity within different cultures... prior to their entry into social relations.'[29]

Such generalization are hegemonic in that they represent the problems of privileged women, who are often, though not exclusively, middle class, heterosexual, married and Hindu. These generalizations efface the problems, perspectives, and political concerns of many women who are marginalized in terms of their class, religion, ethnicity, and sexual orientation. The victim subject ends up relying on a universal subject, a subject that resembles the uncomplicated subject of liberal discourse. It is a subject that reflects an inability to accommodate an experience that is multi-layered.

The victim subject and the focus on violence, invites remedies and responses from states that have little to do with promoting women's rights. Thus a related concern is that the victim subject position has invited protectionist and even conservative responses from states. The construction of women exclusively through the lens of violence, more specifically sexual violence, has triggered a spate of domestic and international reforms that have focused on criminal law and justified state restrictions of women's rights for their protection.

Early feminist interventions struggled to move away from such protectionist responses though the anti-discrimination discourse. However, the almost exclusive focus and success of the sexual violence initiatives which are contingent on the victim subject have taken feminists back into a protectionist, and conservative, discourse.

I am wary of this construction for two reasons. An exclusive focus on gender without regard to other issues can result in producing a politics that is exclusive rather than inclusive. Indeed the black feminists, postmodern scholars, sexual minorities, have all criticized feminists such as Catherine MacKinnon and Andrea Dworkin whose exclusive focus on gender oppression had produced theory that excludes the concerns of other disadvantaged groups.[30] Even post-colonial writers and feminists have critiqued the exclusive preoccupation of some feminists in the international arena which are contingent on the victim subject, exclusive of the concerns of women in the developing, post-colonial world and resulting in the formulation of plans and policies that are often imperialist, racist and anti-minority women.[31]

These critiques have led to a constructive reflection and focus on

producing a politics that is inclusive, a theory of disadvantage that is not based only on gender identity but examines how gender intersects with other identities, such as race, religion, sexual and marital status.

The emphasis on a woman's victim status also reduces her to a helpless subject, in need of assistance or protection. It often invites paternalistic rather than empowering responses. The proposal by L.K. Advani to introduce the death penalty in the rape law is but one example of the extreme protectionism that is triggered through a strategy that focuses exclusively on victimization, and on sexuality as negative and abusive. Indeed what we cannot but fail to see is that such responses falling from the lips of the Hindu right speak to law and order, control of women's sexual conduct and morality, and not to sexual rights, women's empowerment and freedom of sexual expression.

IV

This article is not arguing against sexual harassment. It is a serious problem and affects women across the social spectrum. 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.

My concern is to question the response to the problem. Does a sexual harassment law or sex codes on campus help address the problem of sexual harassment? I have argued that it does not – at least not in ways that are emancipating or liberating for women. These responses do end up reinforcing sexual normativity, sexual puritanism, sexual exclusions, a protectionist approach towards women, and promoting the right wing agenda regarding women.

I have expressed concern about the breadth of the definition and type of behaviour that is deemed to constitute sexual harassment. I am also concerned about the implication of the decision on sexual behaviour more generally and women's sexual behaviour and conduct more specifically. These 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.'

How do we create a space for sexual freedom, a healthy freedom, and at the same time remain attentive to the sexual wrongs or abuse women do experience? I would suggest that we seriously question the course that is currently being pursued which is entrenching sexual harassment into the legal domain. Any legal initiative around sex while we have a strong conservative environment as well a Hindutva agenda on the anvil which proposes to address women's rights, is unlikely to produce a progressive politics or prove sexual liberating for women.

I would argue that a combination of legal and non-legal strategies must be deployed. Chastity laws that impugn women's conduct when she fails to conform to sexual norms must be repealed. These would include laws that permit the defense to introduce evidence of a women's sexual history to discredit her testimony,[32] that make a Hindu woman's right to maintenance contingent on her chastity,[33] eliminate a husband's right to rape his wife,[34] remove criminalization of consensual sexual activity,[35] including sodomy.[36] Antiquated laws such as the outraging of a woman's modesty or eve-teasing, which are informed by 19th century Victorian and colonial lawmakers need to be rethought. Finally, a women's right to mobility cannot be curtailed because of her sexual identity or conduct.

It is not at all self-evident that the response to sexual harassment should be a legal one. Law is based on established sexual norms and values which are exclusive and have not proved to be all empowering for women. At the same time, sexual harassment law is becoming a reality. I would argue that the law can be disruptive of dominant sexual norms if used as a political tool rather than as a solution to the problem of sexual harassment, which I have argued the law is incapable of providing.

For example, sexual harassment complaints of sexual minorities could be a specific political and legal project. The harassment of sex workers on the street, or gays and lesbians by employers could be a part of the sexual harassment project. The purpose of such a strategy would be to unmask the dominant sexual and conservative norms that are incorporated into law as well as into the public psyche. It might also expose the privileged location of sexual harassment, that is, as a tool available to heterosexual, chaste, women whose behaviour conforms to dominant sexual norms and behaviour that has been legally and socially prescribed for women.

Two further non-legal strategies would be to give priority to sex education programmes. Such a strategy is all the more critical in the

context of HIV/AIDs. In light of the recent, historic special session of the U.N. General Assembly session to consider the HIV/AIDS crisis, we have been alerted to our responsibility in foregrounding this issue. Providing information about safe sex is crucial to any strategy on HIV/AIDS. Yet how would safe sex posters, codes, or ads sit with the sex codes advocated by sexual harassment campaigners? In the workplace? On campus, where presumably information about safe sex would be critical? Sex education is also essential to any effort towards promoting a healthy attitude on issues of sex as well as producing healthy human relationships.

A second strategy is to promote sexual rights. In seeking to address sexual wrongs, we have surrendered too much space for talking about and claiming sexual rights. The only groups in the contemporary moment that are claiming or asserting these rights are sexual minorities – gays, lesbians, sex workers, and hijras – the primary movements that have been creating space for the affirmation of sexual difference, sexual rights and consensual sex.[37]

There is a crippling silence around such issues, a silence that fosters a clandestine, stigmatized space rather than create an open and healthy sexual space. Human rights groups, feminists and political activists need to promote a conscious strategy around sexual rights. In the current context, such a strategy is viewed with suspicion and considered anti-cultural. Yet an exclusive focus on sexual wrongs, which is the primary focus of many who support women's rights, whether on issues of rape, child sexual abuse, sexual assault or sexual harassment, without a sexual rights strategy, reinforces 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).

If we fail to pursue a more radical and affirmative strategy on matters related to sex we will fail to adequately address the sexual harms women continue to experience. Sexual harms have never been eradicated through regulation of sexual conduct, muzzling sexual speech, or moral surveillance of women's lives. Such strategies have only perpetuated sexual stereo-types, sexual orthodoxy, and compromised on women's fundamental rights.

Footnotes:

* I am grateful to Roshni Basu for her comments and research assistance.

1. The case is the first one to set down guidelines for dealing with sexual harassment, implicitly recognizing the inadequacy of the existing law. Earlier cases have attempted to read sexual harassment into the existing provisions but with limited success. See Rupan Deol Bajaj v. K.P.S. Gill, where a senior IAS officer, Rupan Bajaj was slapped on the bottom by the then Chief of Police in Punjab, 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, in January 1998, the Supreme Court fined K.P.S. Gill Rs 2.5 lakhs in lieu of 3 months rigorous imprisonment for offenses under Section 294 and 509. Also see N. Radhabai v. D. Ramachandran. When 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 subsequently dismissed her. In 1995, the Supreme Court passed a judgement in her favour, with back pay and perks from the date of dismissal. Also see the case of S.C. Bhatia, a professor in the Department of Adult and Continuing Education, Delhi University, who was finally dismissed in 1992 after a campaign by women's groups demanding a judicial inquiry into his sexual harassment of several women.

2. The U.S. Supreme Court firmly established that sexual harassment could be the basis of a claim of 'hostile environment' in Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986).

3. Catharine MacKinnon, Sexual Harassment of Working Women, Yale University Press, New Haven, 1979, pp. 151-154. She argues that sexual harassment should be examined under a theory of inequality that would recognize the systematic subordination of women. It should be understood within the context of the way women are forced to have sex.

4. Catharine MacKinnon, The Sexual Harassment of Working Women, 1979.

5. See Title VII of the Civil Rights Act of 1964 as amended by the Equal Opportunity Act of 1972 which deals with sex discrimination. It has also been addressed under tort law, where the complainant has been granted damages on the grounds of the mental anguish, caused by the harassment. In 1986, a landmark judgement in the U.S. in the Vinson v. Meritor Savings Bank case ruled that sexual harassment was a violation of an individual's right to equal employment opportunities, and further defined the employer as liable for sexual harassment claims.

6. See Eugene Volokh, 'What Speech Does 'Hostile Work Environment' Harassment Law Restrict? '85 Georgetown Law Journal 627 (1997).

7. Comments by Janet Halley, presented at the panel on sexual harassment at the New England School of Law, 31 March, Boston; Vicki Shultz, 'Reconceptualizing Sexual Harassment', 107 Yale L. J. 1683 (1998); Drucilla Cornell, The Imaginary Domain, Routledge, 1995.

8. For a thorough review of the theoretical limitations of sexual harassment law, see Katherine M. Franke, 'What's Wrong With Sexual Harassment Law?' 49 Stanford Law Review 691 (1997), which argues that the existing sexual harassment law provides no doctrinal basis on which to proceed and challenges the assumption that sex subordination can be explained as only something that is done to women by men. She argues in favour of a gender harassment wrong to address the limits of the existing law that can apply to same-sex harassment and firmly locates the conduct in the right to equality.

9. See Marcy Strauss, 'Sexist Speech in the Workplace', 25 Harvard Civil Rights-Civil Liberties Law Review 1 (1990).

10. See Harris v. Forklift Systems Inc., 114 S.Ct. 367 (1993). We also need to be conscious of how closely these responses parallel the response to a rape victims complaint.

11. See Harris v. Forklift Systems Inc., ibid., and Gayle Rubin, 'Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality', in Carol Vance (ed.) Pleasure and Danger: Exploring Female Sexuality, (1992) 267 where she discusses the features of this dominant understanding of sexuality.

12. Apparel Export Promotion Council v. A.K. Chopra (1999) 1 Supreme Court Cases, 759.

13. See Joshua Burstein, 'Testing the Strength of Title VII Sexual Harassment Protection: can it support a hostile work environment claim brought by a nude dancer', New York University Review of Law and Social Change, (1998) 271.

14. 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 presumably be less stringent than the criminal standard.

15. See sections 354 and 509 of the Indian Penal Code 1860, which penalize acts that outrage the modesty of a woman ; see also Rupan Deol Bajaj v. Kanwar Pal Singh Gill, (1995) 6 Supreme Court Cases 194 . See also the State of Punjab v. Major Singh (1966) Supplemental Supreme Court Reports 286.

16. Satellite broadcasting, MTV music video channel, Indo-pop, the contemporary song and dance sequences of film heroines in Indian commercial cinema, Shobha De, the Madhuri Dixit phenomenon, the assertion of sexual rights by sexual minorities, including sex workers and lesbians, all attest to the emergence of extremely diverse and divergent representation of women's sexuality and conduct in the current Indian context.

17. Ratna Kapur, 'The Profanity of Prudery: The Moral Face of Obscenity Law in India', 8:3 Women: A Cultural Review (1997) 293. See also 'Imperial Parody', 2:1 Feminist Theory 79 (2001), critiquing Martha Nussbaum's reliance on the subject of the Indian woman as a victim has both imperialist and racial overtones.

18. For a more detailed analysis of these debates see Ratna Kapur, 'Post-Colonial Erotic Disruptions – Legal Narratives of Culture, Sex and Nation in India', Columbia Journal of Law and Gender (forthcoming summer 2001).

19. In the late 19th century, Hindu nationalists and revivalists reconstituted the home – along with sex and sexuality – as a 'pure' space of Indian culture, uncontaminated by the colonial encounter. See Partha Chatterjee, 'The Nationalist Resolution of the Women's Question', in Recasting Women: Essays in Colonial History, Kumkum Sangari and Sudesh Vaid, eds., Kali for Women, 1989, 233 at 247. Chatterjee links this transformation of the woman through nationalist ideology with the disappearance of social reform in the late 19th century. The nationalists of that period were completely opposed to social reform as it would open the door to the colonial power to act in the domain where the nationalists regarded themselves as sovereign. Thus, the issue of female emancipation disappeared in the late 19th century precisely because of the refusal on the part of nationalists to allow any political negotiation of the women's question with the colonial power. The lives of women during this period had already changed rapidly, but in a manner that was consistent with the terms of nationalist ideology. Partha Chatterjee has argued that as there were no public spaces or institutions available to nationalists for constructing a national culture, the modern nation was fashioned in the autonomous private domain of culture. The 'official' culture of Indian middle class nationalism was elaborated in the private domain, that is, the home. This official culture had important implications on the role of sexuality in nationalist discourse. The home as the repository of national identity had to be protected from colonial intrusions by women, through their virtues of 'chastity, self-sacrifice, submission, devotion, kindness patience and the labours of love.' See Tanika Sarkar, 'Colonial Lawmaking and Lives/Deaths of India Women: Different Readings of Law and Community', in Ratna Kapur, ed., Feminist Terrains in Legal Domains: Interdisciplinary Essays on Women and Law, Kali for Women, 1996, p. 210, where she argues that the reconstitution of the norms of elite sexuality in India were also a product of the dynamics of orthodox and traditional social forces in the consolidation of elite hegemony in India. Sarkar argues in contrast to Chatterjee, that the home was also a highly contested space, and women were not simply the preservers of cultural identity. The age of consent controversies gave rise to a plethora of medical and administrative literature, which revealed the extent of violence experienced in particular, by girls married off at the age of puberty. See further Lata Mani, 'Contentious Traditions: The Debate on Sati in Colonial India', in Sangari and Vaid, at 88, where she has examined how the sati debate earlier in the 19th century set the discursive stage on which nationalists later in the century performed the gender and sexuality script, that is, through the intertwining of sexuality and nationalism.

20. A considerable amount of attention has been focused on the Hindi film industry and the allegedly 'vulgar and indecent' representations of women within these films. In 1993, choli ke peechey kya hai, (what's behind the blouse?), a hit song

from the film Khalnayak became the focus of public controversy and a legal challenge brought by a BJP supporter. The petition alleged that the song was 'vulgar, against public morality and decency'. The case was dismissed by the trial court, and on appeal, by the high court. Even though the case was not successful in legal terms, it succeeded in stirring up public opinion around the controversy. This controversy was subsequently taken up by politicians and led to a stricter approach by the central board of film certification (censor board). A similar controversy followed the release of the film song 'sexy, sexy, sexy' from Khuddar which triggered a debate in parliament on the increasing vulgarity and obscenity in Hindi films. Frequently, it was alleged that such images were not only degrading for women, but also encouraged sexual harassment of women.

21. Catharine MacKinnon has argued that the free speech argument is being made by those who 'value speech in the abstract more than they value people in the concrete.' See Catherine MacKinnon, Feminism Unmodified 115 (1987), adopting a position that one must chose between rights, in this instance between equality or speech, rather than attempt to reconcile these rights and ensure access to and enjoyment of both.

22. See Brooms v. Regal Tube Co., 881 F.2d at 919 (7th Cir. 1989); Ellison v. Brady 924 F.2d 872 (9th Cir. 1991), Lipsett v. University of Puerto Rico, 864 F.2d. 881, 898 (1st Cir. 1988). Courts have, however, continued to struggle with how to distinguish between mere offensive speech and conduct and the creation of a hostile and abusive work environment.

23. See Draft Policy to Prevent and Deal with Sexual harassment in the University, A proposal by the Mumbai Campaign Against Sexual Harassment, downloaded on 15 June 2001: http://altindia.net/gender/harassment/draftguidelines.html.

24. See Centre for Feminist Legal Research, Memorandum on the Reform of Laws Relating to Sexual Offences, March 1998.

25. Ma Sushma, 'If Leggy Models Threaten Us, We'll Use Remotes, Thank You', Indian Express Tuesday, 16 January 2001, p. 8.

26. Vir Sanghvi, 'The Nipple Police', The Hindustan Times, New Delhi, Sunday, 11 February 2001, p. 15.

27. See Jane Gallop, Feminist Accused of Sexual Harassment, Duke University Press, 1997.

28. See for example, Angela Harris, 'Race and Essentialism in Feminist Legal Theory', 42 Stanford Law Review 581(1990); Marlee Kline, 'Race, Racism, and Feminist Legal Theory', 12 Harvard Women's Law Journal 115 (1989).

29. Chandra Talpade Mohanty, 'Under Western Eyes: Feminist Scholarship and Colonial Discourses', in Third World Women and the Politics of Feminism 90 (Chandra Talpade Mohanty, Ann Russo and Tourdes Toreres, eds.,1991).

30. See for example, Rajeswari Sunder Rajan, Real and Imagined Women, Routledge, 1997; Judith Butler, Bodies that Matter, Routledge, 1991; Wendy Brown, States of Injury:Power and Freedom in Late Modernity, Princeton University Press, 1995.

31. See for example, Patricia Williams, The Alchemy of Race and Rights, Harvard University Press, 1991; Chandra Talpade Mohanty, supra note 29.

32. Section 154 of the Indian Evidence Act, 1872.

33. Section 18(3) of the Hindu Adoption and Maintenance Act, 1956.

34. Section 375 of the Indian Penal Code, 1860.

35. Sections 7 and 8 of the Immoral Traffic Prevention Act, 1956.

36. Section 377 of the Indian Penal Code, 1860.

37. However, see Mary John and Janaki Nair, (eds.), A Question of Silence? which examines the eroticization of women, particular in heterosexual, marital

relationships in contemporary times.