

IN THE SUPREME COURT OF INDIA

IN THE MATTER OF:

Allegation of Sexual Harassment at Workplace made by an intern against a former Judge of this Hon'ble Court

AND IN THE MATTER OF:

Enquiry into allegations by 3-Judges Committee of this Hon'ble Court

AND IN THE MATTER OF:

Amicus Brief presented by Lawyers Collective Women's Rights Initiative to assist the Hon'ble Court and the Enquiry Committee

To the Hon'ble Chief Justice of India  
and his Companion Justices

The petition of the Amici most respectfully sheweth:

INTEREST OF THE AMICI CURIAE

1. That the Lawyers Collective Women's Rights Initiative is a civil society organization which has been actively working in the area of human rights and in particular women's rights for the last 3 decades. It has been an active part of the

movement for establishment and recognition of a number of protective laws relating to women, and their effective implementation, including the law relating to Sexual Harassment at the Workplace of Women. As far back as 2004, the Lawyers Collective also published the first legal text book on the subject, entitled 'Law Relating to Sexual Harassment at the Workplace' edited by its Founder, Ms. Indira Jaising, Senior Advocate. The organization continues to work closely on the development of the law. It is therefore in a unique position to be able to assist this Hon'ble Court in the present matter relating to the allegations made by an intern against a former Judge of this Hon'ble Court, and therefore craves leave to submit the present Amicus Brief.

2. It is further emphasized that the present Amicus Brief is not limited to the questions arising from the present incident of sexual harassment, but is concerned about myriad forms of sexual harassment at the workplace which occur in the justice system with regard to interns, law clerks, law students, advocates and legal professionals as well as others who access the system in the form of clients or litigants. In this light, it is submitted that the scope of the Committee set up by this Hon'ble Court must also extend beyond the single incident before it, to addressing the systemic nature of sexual harassment in the workplace in this institution. A Resolution of the Women Lawyers of the Supreme Court Bar Association signed by a number of women lawyers practicing in this Hon'ble Court is annexed herewith and marked as **Annexure A/1**.

#### FREEDOM FROM SEXUAL HARASSMENT IS A HUMAN RIGHT

3. Sexual harassment in the workplace has been defined internationally as a form of gender based discrimination against women, as well as a form of violence against women. Its importance on the global stage has increased dramatically as women have entered the workforce increasingly over the past 20 years. A

woman's right to a workplace free of sexual harassment has been framed in a rights-based context by the international community as well as States who are party to the core human rights treaties. Many jurisdictions globally have legal instruments for the protection of life and liberty and these instruments can be used to prevent and address sexual harassment in the workplace. In India, the landmark judgment in *Vishakha vs. State of Rajasthan (1997) 3(SCC) 242* (hereafter 'Vishakha judgment'), and more recently the *Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013* are grounded on the constitutional right to life and liberty (Article 21 of the Constitution of India), the right against discrimination (Article 14), and the freedom to practice any trade or profession without hindrance or let (Article 19(1)(g)). The importance of bringing sexual harassment in the workplace into the public domain is central to the promotion of women's human rights in India. Where systemic sexual harassment in any workplace is evident, there is a duty on a nation's legal institutions charged with protecting these rights to take action on what is essentially a human rights violation. Of particular concern is the present case where the sexual harassment is alleged by a young intern working in the precincts of the Supreme Court with a now retired Judge of this Hon'ble Court.

#### DEFINING SEXUAL HARASSMENT WITHIN THE OBLIGATIONS OF INTERNATIONAL INSTRUMENTS

4. *General Recommendation 19* to the *Convention on the Elimination of all Forms of Discrimination Against Women* (CEDAW) notes that, "equality in employment can be seriously impaired when women are subjected to gender-

specific violence, such as sexual harassment in the workplace"<sup>1</sup>. The Committee went on to define sexual harassment as:

*"such unwelcome sexually determined behavior as physical contact and advances, sexually colored remarks, showing pornography and sexual demands, whether by words or actions. Such conduct can be humiliating and may constitute a health and safety problem; it is discriminatory when the woman has reasonable ground to believe that her objection would disadvantage her in connection with her employment, including recruitment or promotion, or when it creates a hostile working environment."*<sup>2</sup>

5. The International Labor Organization (ILO) has addressed sexual harassment as a prohibited form of sex discrimination under the *Discrimination (Employment and Occupation) Convention* (No. C111)<sup>3</sup>. India ratified this document on 3 June 1960. It defines discrimination to include "any distinction, exclusion or preference made on the basis of . . . sex . . . which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation."<sup>4</sup> In this way also, it is clear that India has an obligation to prevent, prohibit, and address sexual harassment in the workplace as a gender discrimination issue of utmost importance.

6. As far back as 1989, the Supreme Court of Canada in *Janzen vs. Platy Enterprises Ltd. (1989) 1 SCR 1252* held as follows:

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<sup>1</sup> CEDAW Committee, General Comment No 19: *Violence Against Women*, 11<sup>th</sup> sess, UN Doc A/47/38, 1992. Available online at < <http://www.refworld.org/docid/453882a422.html> > at [1]

<sup>2</sup> CEDAW Committee, General Comment No 19: *Violence Against Women*, 11<sup>th</sup> sess, UN Doc A/47/38, 1992. Available online at < <http://www.refworld.org/docid/453882a422.html> > at [18]

<sup>3</sup> International Labour Organization (ILO), *Discrimination (Employment and Occupation) Convention, C111*, 25 June 1958, available at: < <http://www.refworld.org/docid/3ddb680f4.html> >

<sup>4</sup> International Labour Organization (ILO), *Discrimination (Employment and Occupation) Convention, C111*, 25 June 1958, available at: < <http://www.refworld.org/docid/3ddb680f4.html> > Art. 1(a)

"Clearly a person who is being disadvantageded because of her sex, is being discriminated against in her employment when employer conduct denies her financial rewards because of her sex, or exacts some form of sexual compliance to improve or maintain her existing benefits. *The evil to be remedied is the utilization of economic power or authority so as to restrict a woman's guaranteed and equal access to the work-place, all of its benefits, free from extraneous pressures having to do with the mere fact that she is a woman.*"(emphasis in original.)

7. The Court quoted with approval from a book by Dr. Arjun P. Aggarwal entitled *Sexual Harassment in the Workplace* (1987) observes (@ pg. 1):

*"Sexual harassment is a complex issue involving men and women, their perceptions and behaviour, and the social norms of the society. Sexual harassment is not confined to any one level, class, or profession. It can happen to executives as well as factory workers. It occurs not only in the workplace and in the classroom, but even in parliamentary chambers and churches. Sexual harassment may be an expression of power or desire or both. Whether it is from supervisors, co-workers, or customers, sexual harassment is an attempt to assert power over another person."*

8. The international law clearly recognises the gendered nature of social and economic dominance between the victim and the perpetrator, as an important reason why sexual harassment at the workplace is a human rights violation.

#### QUID PRO QUO HARASSMENT

9. The key elements of *quid pro quo* sexual harassment are a demand for a sexual favour and the threat of adverse job consequences if the demand is refused. It is implicit in the second element that the perpetrator has to be in a position to create adverse job consequences for the woman. Typically, such a

person would have to be in a position of authority over the victim, although a *quid pro quo* sexual harassment situation may also exist *vis-à-vis* a colleague of the same rank, e.g., where work evaluation takes into account comments from co-workers, or when a co-worker makes sexual demands a condition for co-operating on a team project. Adverse work consequences may be 'tangible' such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, a decision to cause a significant change in benefits, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits and significantly diminished material responsibilities. These are some examples listed by the US Supreme Court in the case of *Burlington v. Ellerth* 524 US 742 (1998). It should be stressed here that it is not necessary in an allegation of *quid pro quo* harassment for the threat of adverse employment action to have been carried out. It is sufficient for the complainant to prove that such a threat was made.

10. *Quid pro quo* sexual harassment has also been recognised by the Courts in India in the *Vishakha judgment*, and in a plethora of judgments thereafter.

11. There can be no gainsaying that an enormous social and professional gulf separates Judges from the law students/ clerks/ interns working in the institution of the Supreme Court. It is further trite that even after their retirement from this Hon'ble Court, Judges continue to exercise power over the professional lives of potential/ existing law clerks/ interns. In these circumstances, it is most respectfully submitted that incidents which occur subsequent to the conclusion of the official period of internship/ clerkship and/or subsequent to the retirement of the Judge from the Bench, also fall within the protection of the law.

## CREATION OF A HOSTILE WORK ENVIRONMENT

12. An essential element that is recognised in the global evolution of the law on sexual harassment in the workplace is that sexual harassment creates a 'hostile work environment'. Evidence that a hostile work environment has been created through a woman's exposure to sexual harassment is seen via detriment to the woman's physical integrity or mental health. Where there is evidence that a woman has been psychologically damaged by the conduct of her superior, and this conduct is of a sexual nature, it is clear that sexual harassment has created a hostile work environment. Sexual harassment can be a subtle and insidious poison which leaks slowly into the victim and can have life-long effects on a woman's life. Psychological damage in these circumstances can take years to manifest, and women often speak of feeling the guilt and shame associated with the experience long after the sexual harassment has ceased. Where there is evidence that a woman has been psychologically damaged by the conduct of her superior, and this conduct is of a sexual nature, it is clear that sexual harassment has created a hostile work environment.

13. In any event, sexual harassment at the workplace, whether quid pro quo or not, creates a hostile work environment not merely for the woman who is being harassed but for all working women in that environment, and therefore constitutes a violation of the precious right to life and liberty under Article 21 of the Constitution, the right to pursue the profession of one's choice under Article 19(1)(g), and is further a violation of the right to equality under Article 14. For this reason also, this Hon'ble Court would not be constrained by technicalities while taking a holistic view on the situation of violation of constitutional rights of the concerned intern as well as others, such as the class of women lawyers and law students, affected by such violation.

## PERVASIVE NATURE OF SEXUAL HARASSMENT AT WORKPLACE

14. The fact that women have to face sexual harassment across the world in all spheres of life is well documented. A look at some statistics will help to reiterate the pervasive nature of the problem and the urgent need to tackle it effectively.

- According to a study conducted by the International Labour Organisation, 55.4% of women in the age group of 14-59 have faced sexual harassment at some point, and that 1 in 3 women faced sexual intimidations for career advancement. Even more disturbing is the fact that 55.6% of women who faced such sexual intimidations resigned from their jobs, pointing to the fact that sexual harassment at the workplace is a cause for the high rate of attrition among women in the workforce.
- According to another study conducted by the ILO in Hong Kong in 2007, 25% or one in four workers interviewed had faced sexual harassment.
- In the USA, the Equal Employment Opportunity Commission in 2006 received over 12,000 complaints of sexual harassment, which marked a 100% increase in just 5 years.
- The situation in India is even worse. Data from the National Crime Records Bureau as well as other sources shows that crimes against women (under all heads) is rapidly increasing, with the figure crossing 2,28,000 lakhs in 2011. According to the Central Statistics Office, GoI, the crimes against women during the year 2011 has increased by 7.1% over the year 2010. What is even more alarming is that the proportion of crimes committed against women towards total number of crimes has increased during last 5 years from 8.8% in the year 2007 to 9.4% during the year 2011. This means that not only are crimes against women increasing in number, they are also increasing at much higher rates than other crimes.

- A look at the data for Delhi is equally alarming. In the period 2008-2010, the highest number of incidents of crime against women (11,102 cases) were recorded in Delhi for 3 consecutive years. Rapes, molestations and sexual harassment (eve-teasing) constituted 27.89% of crimes against women in Delhi in 2008-2010. It was also found that women in the age group of 14-18 years were most vulnerable to rape, followed by the women in age group of 18-30 years. On an average, at least 1 incident of rape had occurred daily in Delhi in the period between 2008-2010 and 97.44% of the rapes were committed by men who were known to the victims. Conviction rates for such reported incidents of crime against women are well below the national average. The average conviction rate for IPC crimes against women is just 21.3%, which means almost four out of five accused walk free. The national average conviction rate for all IPC crimes is 38.5%.

15. The appalling state of affairs in the criminal justice system has now become part of a vicious cycle, where few women come forward with complaints because of numerous obstructions in the system and poor conviction rates, leading to a culture of impunity which results in an increase in the occurrence of such crimes. Perpetrators know they can get away with it, and they do.

16. In these circumstances, the responsibility of this Hon'ble Court to ensure compliance with the law, and send out a clear message that the days of tolerance of sexual harassment of women at the workplace are over. It is also the responsibility of this Hon'ble Court and its officers to ensure that in the present situation, where serious allegations have been made against a judicial officer of this Court in the public domain, every effort is made to preserve the sanctity of the institution as well as the rule of law.

## EARLY DEVELOPMENTS IN THE LAW

17. The term sexual harassment at workplace was first used by Prof. Catherine McKinnon<sup>5</sup> in the year 1977 in a paper written on the same topic. Two years later, McKinnon published "*Sexual Harassment of Working Women*", arguing that sexual harassment is a form of sex discrimination under Title VII of the *Civil Rights Act of 1964* (United States) and any other sex discrimination prohibition. A sustained campaign in the USA brought amendments to the law, recognizing that sexual harassment at the workplace was a form of gender discrimination and therefore an actionable wrong.

18. In India, prior to 1997, there existed no statutory remedy or definition of sexual harassment at the workplace, and such offences, where agitated at all, were broadly covered under outdated provisions of the *Indian Penal Code* relating to "outraging the modesty of a woman" (Section 354, IPC) and "insulting the modesty of a woman" (Section 509, IPC). Because of a gap between the offences of sexual harassment against women and the lacunae in the legislation, cases of harassment at workplace mostly went unreported and their gravity was not recognized by the employers. Even under the existing labour laws, while the State was accountable for injuries in the workplace and compensation was given for the same, sexual 'injuries' (in the form of sexual harassment and abuse) were not recognized by any piece of legislation and therefore, were by and large perceived to be trivial.

19. In *Rupan Deol Bajaj vs. K.P.S. Gill (1995) 6 SCC 194* this Hon'ble Court was confronted with a case where a senior IAS officer had been sexually harassed by her superior officer at a social function. At this point in time, there was no specific provision in the IPC that dealt with the offence of sexual harassment at workplace. The FIR under S. 354 and S. 509 of the IPC was quashed by the High Court.

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<sup>5</sup> Catherine McKinnon is a renowned American feminist, author, scholar, lawyer, teacher and activist.

However, the Supreme Court set aside the judgment of the HC and admitted the FIR on ground that sufficient material was on record under both these sections to make out a *prima facie case*.

20. Recognizing the glaring gap between the statutory law and the clear mandate of international convention law, it was this Hon'ble Court which stepped into the breach and first laid down the law relating to sexual harassment at the workplace in *Vishakha vs. State of Rajasthan (1997) 6 SCC 241*. It laid down the definition of sexual harassment and established guidelines to be followed by employers for the purpose of prevention as well as redressal of complaints.

21. This Hon'ble Court defined sexual harassment at the workplace as follows (@ para 17):

*"Sexual harassment includes such unwelcome sexually determined behaviour (whether directly or by implication) as:*

- a) physical contact and advances;*
- b) a demand or request for sexual favours;*
- c) sexually coloured remarks;*
- d) showing pornography;*

*e) any other unwelcome physical verbal or non-verbal conduct of sexual nature.*

*Where any of these acts is committed in circumstances whereunder the victim of such conduct has a reasonable apprehension that in relation to the victim's employment or work whether she is drawing salary, or honorarium or voluntary, whether in government, public or private enterprise such conduct can be humiliating and may constitute a health and safety problem. It is discriminatory for instance when the woman has reasonable grounds to believe that her objection would disadvantage her in connection with her employment or work including recruiting or promotion or when it creates a hostile work environment. Adverse consequences might be visited if the victim does not consent to the conduct in question or raises any objection thereto."*

22. This Court further observed (@ para 3):

*"Each such incident results in violation of the fundamental rights of 'Gender Equality' and the "Right to Life and Liberty". It is a clear violation of the*

*rights under Articles 14, 15, and 21 of the Constitution. One of the logical consequences of such an incident is also the violation of the victim's fundamental right under Article 19(1)(g) "to practice any profession or to carry out any occupation, trade or business".*

23. Taking note of the fact that the civil and penal laws in India did not adequately provide for specific protection of women from sexual harassment in work places and that enactment of such legislation would take considerable time, this Hon'ble Court found it necessary and expedient for employers in work places as well as other responsible persons or institutions to observe certain guidelines to ensure the prevention of sexual harassment of women, including the setting up of committees in every institution to deal with cases of sexual harassment.

#### FURTHER DEVELOPMENTS IN THE LAW

24. In *Apparel Export Promotion Council vs. A.K. Chopra (1999) 1 SCC 759* this Hon'ble Court sought to advance the law relation to sexual harassment at the workplace (@ para):

*"In a case involving charge of sexual harassment or attempt to sexually molest, the courts are required to examine the broader probabilities of a case and not get swayed by insignificant discrepancies or narrow technicalities or dictionary meaning of the expression molestation. They must examine the entire material to determine the genuineness of the complaint. The statement of the victim must be appreciated in the background of the entire case. Where the evidence of the victim inspires confidence, as is the position in the instant case, the courts are obliged to rely on it. Such cases are required to be dealt with great sensitivity. Sympathy in such cases in favour of the superior officer is wholly misplaced and mercy has no relevance. The High Court overlooked the ground realities and ignored the fact that the conduct of the respondent against his junior female employee was wholly against moral sanctions, decency and was offensive to her modesty. Reduction of punishment in a case like this is bound to have demoralizing effect on the women employees and is a retrograde step. There was no justification for the High Court to interfere with the punishment imposed by the departmental authorities."*

25. This Hon'ble Court gave a broader interpretation to the word 'molestation' to include any untoward act towards a female employee by a male employee that may cause her discomfort.

26. In December 2012, this Hon'ble Court in a judgment in *Medha Kotwal Lele & Ors vs. Union of India & Ors.* (citation) expressed its anguish at the non-implementation of the guidelines laid down in the Vishakha judgment. The Court stated that the attitude of neglect in establishing effective and comprehensive mechanisms in letter and spirit of the guidelines by the State as well as the employers in private and public sector had defeated the very objective and purpose of the guidelines.

27. Noting that 15 years after the *Vishakha* judgment, the guidelines laid down by this Court for the prevention and redressal of sexual harassment, many women still struggled to have their most basic rights protected at workplaces as the statutory law was not in place, this Hon'ble Court observed-

*"The implementation of the guidelines in Vishakha has to be not only in form but substance and spirit so as to make available safe and secure environment to women at the workplace in every aspect and thereby enabling the working women to work with dignity, decency and due respect. **There is still no proper mechanism in place to address the complaints of sexual harassment of the women lawyers in Bar Associations, lady doctors and nurses in the medical clinics and nursing homes, women architects working in the offices of the engineers and architects and so on and so forth.**"* (@ para 13) (emphasis supplied).

28. The Court was of the view that if there is any non-compliance or non-adherence to the Vishakha guidelines, orders of this Court following Vishakha and the above directions, it will be open to the aggrieved persons to approach the respective High Courts. The High Court of such State would be in a better position to effectively consider the grievances raised in that regard.

29. This Court held, further, that the report of the Internal Complaints Committee would be treated as a final report of a disciplinary enquiry/ domestic

enquiry, and was no longer to be treated as a preliminary enquiry report, as was the practice.

## STATUTORY PROVISIONS

30. Nearly 16 years after the *Vishakha judgment*, in April 2013 Parliament enacted a civil legislation as well as brought in amendments to the criminal law to address the issue of sexual harassment at the workplace.

31. Parliament also enacted the *Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013* (hereafter '2013 Act') which gave statutory force to many of the guidelines laid down by this Hon'ble Court in the *Vishakha judgment* and subsequently. A copy of the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 is annexed herewith and marked as **Annexure A/2**. This Act is a key instrument of the obligations that India has to protect women's human rights in the workplace. The application of the 2013 Act to the present case is crucial to ensuring that these obligations are not simply lip service, but mean real and meaningful change for the situation of women in India.

32. In addition, through an amendment to the Indian Penal Code, Parliament introduced Section 354A IPC which made sexual harassment a criminal offence for the first time, as under:

*"354A: Sexual harassment and punishment for sexual harassment.- (1) A man committing any of the following acts-*

*(i) physical contact and advances involving unwelcome and explicit sexual overtures; or*

*(ii) a demand or request for sexual favours; or*

*(iii) showing pornography against the will of a woman; or*

*(iv) making sexually coloured remarks,*

*shall be guilty of the offence of sexual harassment.*

*(2) Any man who commits the offence specified in clause (i) or clause (ii) or clause (iii) of sub-section (1) shall be punished with rigorous*

*imprisonment for a term which may extend to three years, or with fine, or with both.*

*(3) Any man who commits the offence specified in clause (iv) of sub-section (1) shall be punished with imprisonment of either description for a term which may extend to one year, or with fine or with both."*

33. The offence is bailable, cognizable and is triable before any Magistrate.

34. Subsequently, in pursuance of orders passed in a public interest litigation filed before this Hon'ble Court, being *Binu Tamta and Anr vs. High Court of Delhi and Others (Writ Petition (Civil) No. 162 of 2013)*, this Hon'ble Court has taken cognizance of the fact that the courts are not exempt from the malaise of sexual harassment at the workplace, and women who are attending the Courts either as administrative staff, lawyers, clients or in any other capacity, must also be protected from the intimidating and unacceptable work environment created by pervasive sexual harassment. A clear message, therefore, was sent by this Hon'ble Court through the notification of the *Gender Sensitization & Sexual Harassment of Women at the Supreme Court of India (Prevention, Prohibition and Redressal) Regulations, 2013* (hereafter '2013 Regulation') on 21.9.2013. A true copy of the Gender Sensitization & Sexual Harassment of Women at the Supreme Court of India (Prevention, Prohibition and Redressal) Regulations, 2013 as notified on 21.9.2013 is annexed herewith and marked as **Annexure A/3**.

#### WHAT IS 'UNWELCOME' BEHAVIOR?

35. The question of what is an "unwelcome" sexual advance has been subject of considerable cogitation for many years, with some arguing that it depends purely upon the perception of what the individual woman, subjectively, perceives as being unwelcome and offensive, while others argue that it depends upon what a "reasonable" woman would perceive as unwelcome. While there are no easy

answers to this, efforts at development of jurisprudence around this question have been made in some jurisdictions.

36. In Australia, the *Sex Discrimination Act, 1986* adopts a dual subjective and objective test in determination of what is unwelcome behavior in a particular situation, requiring that:

*“in circumstances in which a **reasonable person**, having regard to all the circumstances, would have **anticipated the possibility** that the person harassed would be offended, humiliated or intimidated.”* [emphasis added] (Section 28A(1))

A similar rule is followed in New Zealand as well.

37. The International Labour Organisation (ILO) writes that, “deep-rooted socio-cultural behavioral patterns, which create a gender hierarchy and which tend to place responsibility on the victim, work against equality in the work place and in society in general.”<sup>6</sup> It is important that cultural factors work to *further* an understanding of how sexual harassment can be prevented and addressed, rather than cultural factors being used as an ***excuse or hindrance to deny equal rights*** that are inherent in the human dignity of any person. The obligation of a woman in regards to ensuring that the alleged harasser is aware that their conduct is unwelcome and unreasonable does not lie squarely with the victim. In the evolution of sexual harassment in the workplace law, international instruments, as well as domestic laws of other countries utilise a combination of subjective and objective reasoning in order to make a fair assessment that is sensitive to socio-cultural factors but prevents making them an excuse for allowing sexual harassment to continue. For example, in situations where there is an imbalance of power in the relationship between the victim and the alleged harasser, it can be difficult, near impossible, for the victim to find their voice to

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<sup>6</sup> Tine Staermose (02 September 2013) “*India must have zero tolerance for workplace sexual harassment*”, ILO Decent Work Technical Support Team for South Asia and Country Office for India. Available online at <[http://www.ilo.org/asia/info/public/WCMS\\_220527/lang--en/index.htm](http://www.ilo.org/asia/info/public/WCMS_220527/lang--en/index.htm)>

speaking out directly against the behaviour. The aggrieved person may find it easier to speak out anonymously through the powerful tool of social media or perhaps make an anonymous complaint on behalf of colleagues who have suffered the same treatment. It is a brave and courageous step for victims of sexual harassment to speak out against entire institutions and especially in circumstances where systemic sexual harassment exists in a powerful institution such as the Supreme Court.

38. In some circumstances it would be unfair of the law to accept nothing less than a verbal “no” from the victim to the alleged harasser. Sexual harassment law is in place to protect the victim, and this goal should not be forgotten. Nor should the test for “unwelcomeness” be so unreasonable as to expect the victim to go above and beyond what can reasonably be expected of her in the circumstances. Doing such a thing places the blame squarely on the victim and perpetuates the belief that apart from the fact that a woman does not have the right to an environment free from sexual harassment, it affirms the false argument that the victim bears the sole duty to stop the harassment. Such a duty is not legally founded in light of the evolution of sexual harassment law and the kind of conduct it seeks to protect women from. In circumstances where the alleged harasser is aware of vulnerabilities of the victim it is even more important to objectively consider what should be defined as unwelcome and unreasonable behaviour.

39. An early decision of 1986 of the Human Rights Equal Opportunity Commission in Australia is instructive, and still remains good law in that jurisdiction. In *Aldridge v Booth (1986) HREOCA 1* the complainant was a woman who was 19 years old when she took up employment with the respondent. On several occasions, the respondent approached the complainant and made sexual advances towards her. When she refused, he indicated that she might lose her job if she did not acquiesce. Eventually, the complainant agreed to have sexual intercourse with the respondent. The Commission noted that, over time, the

complainant began to exhibit an ambivalent attitude towards the respondent's sexual advances, but nevertheless found that the advances were unwelcome and violated the *Sex Discrimination Act*. In so deciding, the Commission emphasized the fact that the complainant was young and inexperienced. It also noted that the complainant, having been unemployed for some 12 months prior to taking employment with the respondent, was very eager to keep her job, a fact which was known to the respondent. In this situation, therefore, despite what would have been perceived as a 'consensual' relationship, the Commission found in favour of the complainant that she had been subject to sexual harassment by her employer.

40. Recognizing that this area of law was likely to become a matter of debate in India as well, the *Report of the Committee on Amendments to Criminal Law* headed by late Justice J.S. Verma, Former Chief Justice of India (and author of the *Vishakha* judgment) observed:

*"We are of the view that the present definition of "sexual harassment" contained in Section 2(n) and the consequential provision relating to the prevention of sexual harassment contained in Section 3 of the Sexual Harassment Bill is satisfactory and should be retained in any future bill.*

*"However, it is important to note that the definition requires some clarification inasmuch as any interpretation of the word "unwelcome" as contained in the said definition must give due weight to **both objective as well as subjective criteria** in order to ensure that women of differing perceptions and comfort levels are given appropriate protection. Therefore, we suggest that after the definition of "sexual harassment", the following explanation may be inserted:*

*"Explanation: In determining whether the behaviour or act complained of is unwelcome, one of the factors to be given due weight shall be the subjective perception of the complainant."*

41. It is most respectfully submitted that the aforesaid standard of what constitutes "unwelcome" behavior in the context of sexual harassment at the workplace in India should be adopted by this Hon'ble Court in the present context, given the enormous power and gender imbalances which pervade most

workplaces, and particularly the legal profession with respect to law clerks and interns.

#### LEGAL ISSUES ARISING IN THE PRESENT CASE

42. It is the submission of the Amici that a number of legal issues of far-reaching importance arise in the present case, and the manner in which this Hon'ble Court addresses the same will have far-reaching consequences as well.

#### **A. Whether this Court has a constitutional obligation to intervene in the present situation of sexual harassment**

43. As stated earlier, the definition of sexual harassment contained in *Vishakha judgment* also contains detailed observations regarding quid pro quo harassment by a person in a position of dominance in the workplace. Sexual harassment, accordingly, has been defined by this Hon'ble Court as under (@ para 17):

*"For this purpose, sexual harassment includes such unwelcome sexually determined behaviour (whether directly or by implication) as:*

- (a) physical contact and advances;*
- (b) a demand or request for sexual favours;*
- (c) sexually-coloured remarks;*
- (d) showing pornography;*
- (e) any other unwelcome physical, verbal or non-verbal conduct of sexual nature.*

*Where any of these acts is committed in circumstances whereunder the victim of such conduct has a reasonable apprehension that in relation to the victim's employment or work whether she is drawing salary, or honorarium or voluntary, whether in government, public or private enterprise such conduct can be humiliating and may constitute a health and safety problem. It is discriminatory for instance when the woman has reasonable grounds to believe that her objection would disadvantage her in connection with her employment or work including recruiting or promotion or when it creates a hostile work environment. Adverse consequences might be visited if the victim does not consent to the conduct in question or raises any objection thereto."*

44. It is established, therefore, that the sexual harassment can take place between a former Judge and between a former intern by virtue of the position of dominance.

45. A former Judge and former intern are in circumstances where the intern can entertain a reasonable apprehension that adverse consequences may occur if she does not consent to the conduct in question or raises any objection thereto.

46. Given the relationship of dominance which arises by virtue of office of a Supreme Court Judge, whether a sitting or a former Judge, in relation to an intern/law student who has interned in the institution, whether with him or not with him, the apprehension can be said to be reasonable.

47. A law student looks forward to advantage in his or her career in law, or to employment in an academic institution, or in an academic alliance, flowing from a period of internship in the institution of the Supreme Court. The relationship of the dominance between a Judge and an intern/ law student therefore is apparent in the work situation.

48. The position of dominance is further emphasized by the fact that the judge in question was also closely associated with the very academic institution in which the intern in question was a student. He was also on the Selection Committee of the Vice Chancellor in the very same institution in which she was a student. The relationship of dominance therefore stands established.

49. The reported facts indicate that the Judge in question called the intern/ law student to a hotel as a part of a continuing work relationship. It is there that the alleged sexual advances took place. She is reported to have resisted the advances. In the circumstances, sexual harassment at the workplace, prima facie, exists.

50. The above quoted passage from *Vishakha* also makes it clear that the said sexual harassment is an act of discrimination and therefore, violation of Article 14, Article 19(1)(g) and Article 21 of the Constitution of India.

51. The *Sexual Harassment of Women at Workplace (Prevention, Prohibition, and Redressal) Act, 2013* was enacted by Parliament and brought into force in the year 2013. Subsequently, in September 2013 this Court notified the *Gender Sensitization & Sexual Harassment of Women at the Supreme Court of India (Prevention, Prohibition and Redressal) Regulations, 2013*.

52. It is submitted that notwithstanding the said Act of 2013, nor the Regulations of 2013, the judgment of this Hon'ble Court in *Vishakha* continues to have full force of law. Nothing stated in the 2013 Act nor the 2013 Regulations can diminish the declaration of law in the *Vishakha judgment*.

53. Even otherwise, the intern/ law student in the present case would fall within the definition of "aggrieved woman" in Section 2 sub-clause (a) of the 2013 Act, and the "hotel" which she allegedly visited and where the alleged sexual harassment occurred, would fall within the definition of "workplace" Section 2 sub-clause (o)(v), as under:

*"(v) any place visited by the employee arising out of or during the course of employment including transportation provided by the employer for undertaking such journey."*

54. The 2013 Act defines widely the terms "aggrieved woman" (in Section 2(a)), "employee" (in Section 2(f)), "employer" (in Section 2(g)) and "workplace" (Section 2(o)(v)) to cover a myriad work relationships and geographical areas as well as environments and situation. The objective of the statute, clearly, is to address that the rapidly evolving working environment and work relationships taking place in the context of the present technological advancements, and ensure that no working woman is excluded from the protection of the law.

55. It is further submitted that the definition of the "Supreme Court of India precincts" in Clause 2 sub clause (l) is an inclusive definition and hence, will not exclude situations envisaged by the 2013 Act or by the judgment of *Vishakha* itself.

56. It is submitted that, accordingly, the Supreme Court of India is liable to enquire into the alleged sexual harassment of a former intern by a former Judge.

## **B. Remedies available to such a person**

57. The question that arises is what are the remedies available to such a person. The *Vishakha judgment* provides the answer (@ para 17):

### *3. Preventive steps:*

*All employers or persons in charge of workplace whether in the public or private sector should take appropriate steps to prevent sexual harassment. Without prejudice to the generality of this obligation they should take the following steps:*

*(a) Express prohibition of sexual harassment as defined above at the workplace should be notified, published and circulated in appropriate ways.*

*(b) The rules/regulations of government and public sector bodies relating to conduct and discipline should include rules/regulations prohibiting sexual harassment and provide for appropriate penalties in such rules against the offender.*

*(c) As regards private employers steps should be taken to include the aforesaid prohibitions in the standing orders under the Industrial Employment (Standing Orders) Act, 1946.*

*(d) Appropriate work conditions should be provided in respect of work, leisure, health and hygiene to further ensure that there is no hostile environment towards women at workplaces and no woman employee should have reasonable grounds to believe that she is disadvantaged in connection with her employment.*

### *4. Criminal proceedings:*

*Where such conduct amounts to a specific offence under the Indian Penal Code or under any other law, the employer shall initiate appropriate action in accordance with law by making a complaint with the appropriate authority.*

*In particular, it should ensure that victims, or witnesses are not victimized or discriminated against while dealing with complaints of sexual harassment. The victims of sexual harassment should have the option to seek transfer of the perpetrator or their own transfer.*

*5. Disciplinary action:*

*Where such conduct amounts to misconduct in employment as defined by the relevant service rules, appropriate disciplinary action should be initiated by the employer in accordance with those rules.*

*6. Complaint mechanism:*

*Whether or not such conduct constitutes an offence under law or a breach of the service rules, an appropriate complaint mechanism should be created in the employer's organization for redress of the complaint made by the victim. Such complaint mechanism should ensure time-bound treatment of complaints.*

*7. Complaints Committee:*

*The complaint mechanism, referred to in (6) above, should be adequate to provide, where necessary, a Complaints Committee, a special counsellor or other support service, including the maintenance of confidentiality.*

*The Complaints Committee should be headed by a woman and not less than half of its members should be women. Further, to prevent the possibility of any undue pressure or influence from senior levels, such <sup>254</sup> Complaints Committee should involve a third party, either NGO or other body who is familiar with the issue of sexual harassment.*

xxx

*8. Workers' initiative:*

*Employees should be allowed to raise issues of sexual harassment at workers' meeting and in other appropriate forum and it should be affirmatively discussed in employer-employee meetings.*

xxx

*10. Third-party harassment:*

*Where sexual harassment occurs as a result of an act or omission by any third party or outsider, the employer and person-in-charge will take all steps necessary and reasonable to assist the affected person in terms of support and preventive action."*

58. It is submitted that a victim of sexual harassment at the workplace can exercise the writ jurisdiction of this Hon'ble Court under Article 32 or of the

concerned High Court under Article 226 of the Constitution. In addition, she can also seek statutory remedies under the 2013 Act as well as initiate criminal proceedings under Section 354-A of the Indian Penal Code. In the present case, the concerned victim has, till the time of filing the present brief, done none of the above. However, this does not discharge the constitutional obligation of the Supreme Court of India, as an institution, to enquire into the serious allegations made, and take necessary action.

59. The law as laid down by this Hon'ble Court in *Vishakha* has over-arching application in the present case, notwithstanding the enactment of the 2013 Act and the 2013 Regulations. Accordingly, the Supreme Court of India as an institution is under a constitutional obligation to conduct an enquiry into the alleged incident of sexual harassment by a Judge of the Court of an intern.

### **C. Constitution of the Internal Complaints Committee**

60. The next question which arises is constitution of the Internal Complaint committee.

61. Regardless of the 2013 Act and or any Regulation that may be framed by the Supreme Court of India, there are overarching obligations in the *Vishakha judgment* for all persons in-charge of a workplace to appoint a complaints mechanism. The composition of the complaints mechanism has also been laid down in the said judgment, namely, that two-thirds of the members should be women, the Committee should be headed by a woman, and the Committee should include third party from outside the organization to rule out any pressure or influence from the senior level.

62. The Supreme Court of India has framed two sets of Regulations in the year 2013, one for those who are in service, and another for those who are not in service, being the 2013 Regulation aforesaid.

63. It is submitted that the mechanism constituted under the 2013 Regulation is not in compliance with the *Vishakha Judgment*.

64. The present three-member Committee, not being in conformity with the Guidelines in the *Vishakha* judgment, requires to be reconstituted. It is therefore recommended that the three-member Committee constituted by this Hon'ble Court to enquire into the present incident be reconstituted, so that at least two-thirds of its members are women, it is headed by a woman, and there is at least one outside/ external member.

65. In this context, the present Amici would strongly recommend that this Hon'ble Court consider including as a member of this Committee as a member of this Committee Dr. Syeda Saiyidain Hameed, presently member of the Planning Commission of India, and also Chancellor, Maulana Azad National Urdu University, Hyderabad. Dr. Hameed is a learned and highly respected senior professional, author and peace activist in her own right, and in 2007 was awarded the Padma Shri by the President of India. A Committee of which Dr. Hameed is a member will gain tremendously from her erudition and vast experience.

#### **D. Lack of Adequate Guidelines on Internships and Clerkships**

66. The primary issue relates to the lack of adequate guidelines or mechanisms for monitoring of legal clerkships and internships of young lawyers and law students with the Hon'ble Judges of this Hon'ble Court, and the need therefore to address this breach. A detailed analysis in this regard has been made in an article entitled *If it may please the Supreme Court* by Arun Mohan Sukumar published in 'The Hindu' November 15<sup>th</sup>, 2013. A true copy of the article dt. 15.11.2013 is annexed herewith and marked as **Annexure A/4**.

67. In the present system, while a mechanism for selection of law clerks exists, there is no mechanism for monitoring their functioning nor any mechanism for addressing their working conditions, and violation of their rights, if any. In case

of internships, no mechanism exists at all, with the selection of interns and their terms and conditions of work as well as supervision being left to the discretion of the Judge.

68. It is submitted that it is well recognised that Judges of this Hon'ble Court are held in high esteem not only within this country but also internationally. Therefore, for a young lawyer or law student, a position of clerkship or internship with a Judge of this Hon'ble Court is a matter of great prestige. It is important to state that there is an enormous imbalance of power between such a law student/lawyer and the Judge concerned, for the simple reason that while the former is at the threshold of his/her legal career, the latter has reached the highest possible pinnacle of success and status possible.

69. It is also important to emphasize that this Hon'ble Court must actively pre-empt a possible backlash against women law clerks and legal interns, resulting in the decline or cessation in their engagement as such with Judges of this Hon'ble Court on the spurious ground that such engagement is likely to result in complaints of sexual harassment at the workplace arising. It is the duty of this Court, in accordance with the constitutional mandate contained in Article 14 and Article 15, to ensure equality for women law clerks and interns and ensure that they are not discriminated against. Accordingly, it is submitted that a clear message be sent out through the declaration of an affirmative policy which encourages women law clerks and women law interns with Judges of this Hon'ble Court.

70. In these circumstances, it is even more important that there should be adequate guidelines to ensure that this imbalance does not, advertantly or inadvertently, result in an abuse of power and exploitation. It is even more imperative to ensure that women lawyers and law students, who are doubly disempowered by their gender in a male-dominated legal profession, are protected. It is imperative that guidelines for the appointment, engagement, and

conditions of work of interns/ law clerks/ law students by Judges of this Court need to be laid down in order to ensure such incidents do not occur in future.

## **PRAYERS**

71. In the aforesaid circumstances, the Amici most respectfully prays that this Hon'ble Court may be pleased to grant the following prayers:

Prayers having general application:

- (a) Reconstitute the three Judges Committee constituted by it to enquire into the present incident, in order to bring it in conformity and compliance with the Guidelines of this Hon'ble Court in the *Vishakha* judgment;
- (b) Recast the **Gender Sensitization & Sexual Harassment of Women at the Supreme Court of India (Prevention, Prohibition and Redressal) Regulations, 2013** to meet with the requirements of the *Vishakha* judgment, in order to ensure that the Regulations do not exclude from their protection interns, lawyers, law-students, clients and any other persons, and also in order to refine the definition of 'Supreme Court of India precincts' in Clause 2(l) bringing the same in conformity with the definition of 'workplace' under Section 2(o) of the 2013 Act;
- (c) Develop a regulatory regime for interns, law students and law clerks interning with Judges of this Hon'ble Court, including application procedure, conditions of work, terms of engagement, etc., which included an affirmative declaration encouraging the engagement of women interns and women law clerks in accordance with the mandate of Article 15(3) of the Constitution;

- (d) Issue a public notice inviting persons aggrieved to depose before the Committee in relation to the present incident or any other similar incidents;

Prayers specific to the present case:

- (e) Pass directions restraining the person complained against from approaching the woman aggrieved in the present case, either directly or indirectly, in order to ensure there is no obstruction in the process of justice;
- (f) Pass directions to ensure witness protection and confidentiality of all witnesses which may come forward to depose before the Committee;
- (g) Invite by public notice other aggrieved persons or other persons to provide information on the issues being addressed by this Committee, with a categorical statement that their identities will be kept strictly confidential;
- (h) Any other such or further orders as the Court may deem fit.

Date: 18.11.2013

Submitted by

Place: New Delhi

Mr. Anand Grover  
Senior Advocate, and  
Trustee, Lawyers Collective-  
Womens' Rights Initiative

**IN THE SUPREME COURT OF INDIA****IN THE MATTER OF:**

Allegation of Sexual Harassment at Workplace made by an intern against a former Judge of this Hon'ble Court

**AND IN THE MATTER OF:**

Enquiry into allegations by 3-Judges Committee of this Hon'ble Court

**AND IN THE MATTER OF:**

Amicus Brief presented by Lawyers Collective Women's Rights Initiative to assist the Hon'ble Court and the Enquiry Committee

**(FOR INDEX PLEASE SEE INSIDE)**

Date: 18.11.2013

Submitted by:

Place: New Delhi

Mr. Anand Grover  
Senior Advocate, and  
Trustee, Lawyers Collective-  
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