JUDICIAL ACTIVISM OR OVERREACH?

- Prashant Narang

In *Vishaka and others vs. State of Rajasthan and others WP (Crl.) Nos.666-70 of 1990* decided on 13.08.1997, the Supreme Court (‘the Court’) found itself dealing with the issue of sexual harassment of women in the workplace. The Court laid reliance on international conventions and Art 14, Art 19 and Art 21 of the Constitution to formulate guidelines to prevent sexual harassment of working women in all workplaces through judicial process.

**Facts**

There was no specific case in hand to judge. The writ petition was brought as a class action by certain social activists and NGOs following an incident of brutal gang rape of a social worker in a village of Rajasthan. The judgement, if it can be called so, does mention, albeit very briefly, a separate criminal action going on to redress that rape. This exercise was premised to frame guidelines to prevent sexual harassment of working women in all workplaces through judicial process as the rape victim had repeatedly reported sexual harassment to which she was exposed through her work; but the State as an employer made no attempts to protect her.¹

**Analysis**

The Court formulates an *ex ante* procedure for all institutions to prevent sexual harassment without any case or facts in hand, by invoking Art 141. Here is judiciary stepping in shoes of parliament and legislating law without any *lis to judge.*

Secondly, invoking fundamental rights in this case to frame guidelines that are applicable to even private parties is at best a jurisprudential distortion. The Court did not deal with whether or not the then-existing alternative remedies under criminal law and tort law were efficacious; and if not, then why not. Fundamental rights, especially Article 14, 19 and 21 act as checks and balance against powers and actions of the State, not on private individuals.² The Court didn’t specifically label State’s omission as an employer to provide redressal to its women employees against sexual harassment as a breach of fundamental right. In fact, the Court treated legislative deficit as a violation of fundamental right. Despite noting the Australian case recognising the concept of legitimate expectation,³ the Court invokes fundamental rights a number of times in the judgment. In simple words, an alleged offence which is not an offence as per domestic law but an offence as per an international convention ratified by a member state, can be made an offence by courts of that member state, in absence of law to the contrary. Did the Court really need to invoke Fundamental Rights?

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² Reference was also made to the judgment of this Court *Vishaka and Others v. State of Rajasthan [(1997) 6 SCC 241], in which this Court held that all employees, both public and private, would take positive steps not to infringe the fundamental rights guaranteed to female employees under Articles 14, 15, 21 and 19(1)(g) of the Constitution.” (para 28, dissenting opinion, *Society for Unaided Schools of Rajasthan v Union of India and Anr. [(2012) 6 SCC 1])

³ *Minister for Immigration and Ethnic Affairs v Teoh* 128 Aus LR 353.
Thirdly, the Court attempts to accord legitimacy to this judicial law writing exercise on the ground that Union of India gave consent to formulation of guidelines through the learned Solicitor General. This is unusual and has no constitutional or legal backing.

The Court relies heavily on CEDAW to frame binding guidelines against sexual harassment in the workplace. The judgement does illustrate a positive role taken up by the judiciary in implementing international rights obligations in the national legislation albeit at the cost of distorting the rules of *locus standi*, the requirement of suitable *lis* and the Doctrine of Separation of Powers. However, with the enactment of new sexual harassment law, the guidelines are obsolete now.

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4 The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013