



HARVARD ILJ ONLINE  
VOLUME 51 – AUGUST 11, 2010

## Progress of Sexual Harassment Law in India, China and Hong Kong: Prognosis for Further Reform

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### I. SEXUAL HARASSMENT: A GLOBAL PROBLEM

This short article discusses tort liability<sup>1</sup> for sexual harassment of women in India, China and Hong Kong. Sexual harassment is a violation of a woman's freedom of her person, her dignity, bodily integrity and sexual autonomy. A woman may be sexually harassed virtually anywhere: in the workplace, educational institutions, hospitals, marketplace, shops, bars, discos, elevators, Internet bars, public buses, trains and even in planes. Sexual harassment occurs if the impugned act is unwelcome or unsolicited.

Incidents of sexual harassment are increasing exponentially, especially in Asian countries, which have over half the world's population. In India, a woman is sexually harassed every 12 minutes.<sup>2</sup> In China, 80% of working women experienced sexual harassment at some stage of their career.<sup>3</sup> In Germany, a survey indicated that 93% of working women were victims of sexual harassment as of 1998.<sup>4</sup> Approximately 6 of

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<sup>1</sup> See generally, D.K. Srivastava, *Recognizing Sexual Harassment as a Tort*, 1999 HONG KONG LAW.: OFFICIAL J. L. SOC. HONG KONG 33-38.

<sup>2</sup> National Crime Records Bureau (NCRB), *Crime Clock 2002*, available at <http://ncrb.nic.in/ciiprevious/data/cd-CII2002/cii-2002/crime%20clock.htm>.

<sup>3</sup> See D.K. Srivastava and Minkang Gu, *Law and Policy issues on Sexual Harassment in China: Comparative Perspectives*, OR. REV. INT'L L. 46 n.17 (2009).

<sup>4</sup> International Labour Organization, *When Working Becomes Hazardous*, WORLD OF WORK (1998), available at <http://www.ilo.org/public/english/bureau/inf/magazine/26/violence.htm>.

10 nurses in Australia have experienced sexual harassment.<sup>5</sup> In Hong Kong most complaints received by the Equal Opportunities Commission (EOC) in some recent years were of sexual harassment.<sup>6</sup> In the United States over 50% of employed women had been sexually harassed.<sup>7</sup> In Canada 51% of women reported having experienced sexual violence at least once<sup>8</sup> and in Singapore almost 50% women have been victims of sexual harassment.<sup>9</sup> The above statistics affirms that sexual harassment is a global problem.

Graver forms of sexual harassment such as rape, incest, violent assault have been criminalized in almost all countries. Efforts to address sexual harassment problems started with the enactment of anti-discrimination laws prohibiting sexual harassment in the workplace.<sup>10</sup> This movement was led by the United States. Title VII of the United States Civil Rights Act 1964 forbids sexual harassment (including same sex) in the field of employment.<sup>11</sup> Several factors contributed to the specific and explicit recognition of sexual harassment internationally as a wrong in the workplace including the following:

First, the emphasis on gender equality and the identity of women found in documents like the Preamble to the Charter of the United Nations and the Universal Declaration of Human Rights spurred greater focus on gender equality and identity of women.<sup>12</sup>

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<sup>5</sup> Julie Cugin & Alan Fish, *Sexual harassment – a touchy subject for nurses*, 23 J. HEALTH ORG. & MANAGEMENT 442-62 (2009).

<sup>6</sup> Equal Opportunities Commission, Work Review- Statistics, available at <http://www.eoc.org.hk/EOC/GraphicsFolder/ShowContent.aspx?ItemID=5157>.

<sup>7</sup> Jennifer Coburn, *Viewpoint: Sexual Harassment: Why is Society Shocked?*, NATIONAL ORG. WOMEN, available at <http://www.now.org/nnt/01-97/shocked.html>.

<sup>8</sup> SACHA Sexual Assault Centre, *Statistics*, available at <http://www.sacha.ca>

<sup>9</sup> Association of Women for Action and Research (AWARE), *Survey Report 2007-08*, available at [www.aware.org](http://www.aware.org)

<sup>10</sup> The United Kingdom also prohibits sexual harassment including same sex harassment in the employment field under the Sex Discrimination Act, 1975.

<sup>11</sup> Mary Beard, *Woman as a Force in History, 1946: VII Equality as the Escape from Subjection*, <http://www.marxists.org/archive/beard/woman-force/ch07.htm>, See also Ac.

Krtashivananda Avt., *Women's Liberation Struggle* <http://www.scribd.com/doc/14018396/Womens-Liberation-Struggle>; Sheila Rowbotham, *Hidden from History: 300 years of Women's Oppression and the Fight Against It*,

<http://www.marxists.org/subject/women/authors/rowbotham-sheila/hidden-history.htm>.

<sup>12</sup> United Nations Charter, June 16, 1945, 59 Stat. 1031, T.S. No. 993, 3 Bevans 1153; The Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. GAOR, 3rd Sess., pt. 1, at 71, U.N. Doc. A/810 (1948).

Second, as women began to play an important role in political, social and economic spheres of society, they succeeded in politicizing what was private and domestic.<sup>13</sup>

Third, the United Nations and many countries through their constitutional framework and laws began to emphasize on the equality of individuals irrespective of their sex or sexual orientation. Scholars like Catharine MacKinnon attacked the stereotyping of women as a sexual being.<sup>14</sup>

Fourth, the attention to sexual harassment of women resulted both from humanistic and, more importantly, economic considerations- if women are not equally integrated into the workforce and not free from hostile work environment, it would lead to absenteeism and stress related healthcare problems resulting in increased cost of businesses and loss of production.

The author focuses on sexual harassment law and policy of three countries: India, Hong Kong and China with some reference to the Australian position. India, China and Hong Kong hold most of the female population of the world. While India and China epitomise Asian values that relegate women to the domestic and private spheres, Hong Kong represents a mix of traditional Asian culture with western characteristics.

## II. INDIA

India, in particular, presents irreconcilable contradictions. India produced the world famous book, Kama Sutra on the art of love making. Deriving inspiration from this classic on sex, in the 10th or 11th century, were built Khajuraho stone temples. On these temples are carvings explicitly depicting sexual acts by two or more persons in provocative postures. Women are also worshipped as goddesses in India. But on the other hand, they are objects of torture and harassment.

India does not have any specific legislation on sexual harassment yet. However, the Supreme Court of India in Vishakha<sup>15</sup> has declared sexual harassment to be unlawful under constitutional guarantee of the right to life and gender equality, other constitutional provisions, and international conventions.

The Supreme Court defines sexual harassment to include any unwelcome physical contact or advances, demands or requests for sexual favours, sexually coloured

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<sup>13</sup> For discussion on the public/ private divide, see NIVEDITA MENON, RECOVERING SUBVERSION: FEMINIST POLITICS BEYOND THE LAW 1-26 (2004).

<sup>14</sup> CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN 151-54 (1979).

<sup>15</sup> *Vishakha & Others v. State of Rajasthan*, A.I.R. 1997 S.C. 3011.

remarks, displaying of pornography and other unwelcome physical, verbal or non-verbal conduct of a sexual nature.<sup>16</sup> (The Supreme Court requires all workplaces, educational institutions and organised service sectors, private or public<sup>17</sup> with more than 50 employees to introduce sexual harassment prevention policy and set up a complaints committee to investigate into sexual harassment complaints. The complaints committee is required to submit an inquiry report which is treated as the last word on the incident.<sup>18</sup> Prior to Vishakha, the only remedy for sexual harassment was to initiate a criminal proceeding. The then law did not specifically provide for awarding monetary compensation. In Vishakha, the Supreme Court did not deal with the question of compensation to the victim. However in subsequent cases the courts have granted tort damages to sexual harassment victims.<sup>19</sup>

The National Commission for Women (NCW) can intervene where the Vishakha guidelines are not followed by an employer.<sup>20</sup> The NCW drafted the Sexual Harassment of Women at their Workplace (Prevention) Bill which is still pending before Parliament. The Bill does not apply to agriculture, construction and home based unorganised work sectors, among others<sup>21</sup> and excludes men and same sex harassment from its purview.<sup>22</sup> However it relaxes the burden of proof on a woman

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<sup>16</sup> *Id.*

<sup>17</sup> In this judgment, the Supreme Court went further than the general constitutional mandate in that it applied the law declared by it not only to public but also to private sectors. After the Supreme Court's decision, several universities introduced sexual harassment policies, *see, e.g.* University of Delhi, *Policy on Sexual Harassment*, <http://www.du.ac.in/du/SexHarass.pdf>. Universities all over the world have such policies, *see, e.g.* Harvard University Faculty of Arts and Sciences, *Sexual Harassment Guidelines*, <http://www.fas.harvard.edu/home/dean-and-administration/policies-for-faculty-students-and-staff/sexual-harassment-guidelines.shtml>.

<sup>18</sup> *Medha Kotwal Lele v. Union of India & Others* W.P.(Crl.) No. 173-177/1999.

<sup>19</sup> In other cases, the Supreme Court has also held that when a government employee sexually harasses a woman, the government is vicariously liable to pay her compensation. *See Bodhisattva Gautam v. Subbra Chakraborty*, A.I.R. 1996 S.C. 922; *State of Rajasthan v. Mst. Vidhyawati*, A.I.R. 1962 S.C. 933.

<sup>20</sup> *See* The National Commission for Women Act, No. 20 of 1990; INDIA CODE (1990).

<sup>21</sup> Almost 400 million of India's workforce is in unorganised sectors, of which at least 120 million are women. Kiran Moghe, *Understanding the Unorganised Sector*, <http://infochangeindia.org/200709206491/Agenda/Women-At-Work/Understanding-the-unorganised-sector.html>; Ministry of Labour and Employment, *Unorganised Sector in India: Social Security and Welfare Funds*, <http://labour.nic.in/ss/UNORGANISEDSECTORININDIA-SocialSecurityandWelfareFunds.pdf>.

<sup>22</sup> There are also criticisms that neither *Vishakha* nor the proposed Bill takes into account the plight of men. A complaints committee in the University of Delhi found a former vice principal guilty of harassing male students. Swaha Sahoo, *Delhi's Faculty of Shame*, HINDUSTAN T., Sept. 26, 2008. Critics of *Vishakha* say that a woman may sexually seduce a man with her extremely subtle ways, dressing and gestures and movements, which has never been considered sexual harassment. *See Sexual Harassment at Workplace Laws- Loopholes*, <http://www.citehr.com/18649-sexual-harassment-workplace-laws-loopholes.html> The same

complaining of sexual harassment,<sup>23</sup> and there is a proposal to amend the Bill to specifically cover students, research scholars and those working in unorganised sector.<sup>24</sup>

There is an all-out attempt to protect women. The Sexual Harassment Bill is but one example. There are national laws on eve teasing (street sexual harassment) and a Bill to reserve 33% of seats in the national Parliament and provisional assemblies to women in the pipeline.<sup>25</sup> In big cities like Delhi and Mumbai, seats are reserved for women in local trains, ladies special buses are running, and there are women-only taxis driven by women drivers.<sup>26</sup> One wonders if these extraordinary measures will reduce the incidents of sexual harassment. In the author's view such strategies are retrograde steps.

### III. CHINA<sup>27</sup>

The story of China is somewhat similar to India. Women occupy subordinate position to men and are traditionally viewed as a root cause of all evils.<sup>28</sup> If a husband has a mistress or a girl is sexually harassed, it is often treated that it was due to her fault. According to Confucius a woman must be dependent on her father, her husband or her son.<sup>29</sup> Chairman Mao Zedong said women "hold half the sky". Yet there has been no dramatic improvement in the position of women. Ironically, although they constitute 45% of the work force, they are still harassed in the

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critics question why women's groups in India do not address the issue of sexual harassment and abuse of men and boys.

<sup>23</sup> The Protection against Sexual Harassment of Women Draft Bill 2005, Chapter VI, § 54 (2005), available at <http://www.wcd.nic.in/draftsexharassment.htm>.

<sup>24</sup> See, e.g. Himanshi Dhawan, *Sexual harassment bill to cover students*, T. INDIA, June 18, 2010, available at <http://timesofindia.indiatimes.com/india/Sexual-harassment-bill-to-cover-students/articleshow/6060823.cms>; *Bill against sexual harassment likely in parliament's monsoon session*, T. INDIA, July 5, 2010, available at <http://timesofindia.indiatimes.com/india/Bill-against-sexual-harassment-likely-in-parliaments-monsoon-session/articleshow/6131681.cms>.

<sup>25</sup> Eve teasing is currently punished by the Indian Penal Code. INDIA PEN. CODE §§ 292, 294.5, 509.

<sup>26</sup> *Joy of India's women-only trains*, BBC NEWS, Oct. 10, 2009, available at [http://news.bbc.co.uk/2/hi/south\\_asia/8290377.stm](http://news.bbc.co.uk/2/hi/south_asia/8290377.stm); *My City*, HINDUSTAN T. March 14, 2010 at 6; Geeta Pandey, *Delhi launches women-only buses*, BBC NEWS, Dec. 31, 2002, available at [http://news.bbc.co.uk/2/hi/south\\_asia/2617757.stm](http://news.bbc.co.uk/2/hi/south_asia/2617757.stm).

<sup>27</sup> This part of the article is much based on Srivastava & Gu, *Law and Policy Issues on Sexual Harassment in China: Comparative Perspectives*, *supra* note 3.

<sup>28</sup> *Id.*

<sup>29</sup> See, e.g. KEITH PRATT, SEX AND AESTHETICS IN TRADITIONAL CHINA 3-4 (1997); Delia Davin, *Women in the Countryside of China*, in WOMEN IN CHINESE SOCIETY 243 (Margery Wolf & Roane Witke eds., 1975); JULIA KRISTEVA, ABOUT CHINESE WOMEN (1977).

workplace. Further only 30% of sexual harassment claims of women succeed.<sup>30</sup> This success rate is however higher than in Hong Kong.

A national law against sexual harassment of women was implemented in 2007<sup>31</sup> declaring sexual harassment of women violates public security and subjects the wrongdoer to penalties as well as civil claims.<sup>32</sup> There are also provincial laws declaring sexual harassment unlawful.<sup>33</sup> Interestingly, a Sichuan Province law prohibits male political leaders from employing female secretaries.<sup>34</sup> Chinese courts have granted monetary compensation and other remedies to victims of sexual harassment but the compensation given to them appears to be just a token. Again, sexual harassment law in China (like India) only protects women when they are harassed by men. Further, it does not relax the victim's burden of proof or provides for an effective 'internal complaints committee' to investigate sexual harassment complaints. Moreover, there is no mandatory requirement for companies and institutions in China to promulgate a code of conduct for employees to warn them against committing sexual harassment.

#### IV. HONG KONG

Hong Kong, inhabited overwhelmingly by Chinese people, remains one of the leading international business centres in Asia and the world. There are a large number of foreign tourists throughout the year and many non-Chinese are employed in

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<sup>30</sup> Srivastava & Gu, *Law and Policy Issues on Sexual Harassment in China: Comparative Perspectives*, *supra* note 3.

<sup>31</sup> Law on the Protection of Women's Rights and Interests (Apr. 3, 1992) (amended Aug. 28, 2005) (P.R.C.). "Gender equality has been written into China's law system for the first time since August, 2005 when the Amendment to the Law was passed at the 17<sup>th</sup> meeting of the Standing Committee of the 10<sup>th</sup> National People's Congress. In April 2007, a sexual harassment case in Shaanxi Province was first to use this revised law in China and the victim won the lawsuit." See *Law on the Protection of Women's Rights to be Improved*, available at [http://www.womenofchina.cn/Issues/Rights\\_Protection/200269.jsp](http://www.womenofchina.cn/Issues/Rights_Protection/200269.jsp).

<sup>32</sup> Protection of Rights and Interests of Women ch. VII, art. 58 (P.R.C.), 2006 CHINA LAW LEXIS 10212. In China, national legislation usually sets out general principles while administrative bodies or local governments implement rules and regulations. See ALBERT HONGYI (HUNG-YEE) CHEN, AN INTRODUCTION TO THE LEGAL SYSTEM OF THE PEOPLE'S REPUBLIC OF CHINA (LexisNexis 3d ed. 2004).

<sup>33</sup> The Shanghai implementation of the National Law on the Protection of Rights and Interests of Women prohibits the "sexual harassment of women in the form of spoken and written language, images, electronic information and bodily gestures..." *Shanghai Legislators Specify Forms of Sexual Harassment*, XINHUA NEWS AGENCY, Oct. 26, 2006, available at [http://www.gov.cn/english/2006-10/26/content\\_423978.htm](http://www.gov.cn/english/2006-10/26/content_423978.htm).

<sup>34</sup> Huang Xianming, *Sichuan Issues New Rules Prohibiting Employment of Female Secretaries by Men Holding Leadership Positions*, HUAXI CITY NEWSPAPER, July 14, 2003, <http://news.sina.com.cn/c/2003-07-14/10431338407.html>.

private and public sectors, judiciary and educational institutions. Almost all well known international companies have offices in Hong Kong and Hong Kong's culture and practices are different from those of China. Hong Kong laws are heavily influenced by the English legislation and common law. The law on sexual harassment is contained in the Sex Discrimination Ordinance (SDO) enacted in 1996.<sup>35</sup> The SDO makes sexual harassment a tort. The provisions of the SDO are modelled upon Australian federal and state laws. Hong Kong's legislation is an improvement on its Australian counterpart. Hong Kong perhaps presents one of the better pieces of legislation on sexual harassment in the common law world. But while the legislators have succeeded, the judges have not proved equal to the task. The SDO § 2 (5)(a) provides that a person sexually harasses a woman<sup>36</sup> if the person makes an unwelcome sexual advance, or makes an unwelcome request for sexual favours, or engages in other unwelcome conduct of a sexual nature in relation to her in circumstances in which a reasonable person having regard to all the circumstances would have anticipated that she would be offended, humiliated or intimidated. Section 2(5)(b) provides that a person, alone or together with other persons, engages in conduct of a sexual nature, which creates a sexually hostile or intimidating work environment for her.

There are several salutary features of the Hong Kong legislation. First, it declares sexual harassment unlawful not only in employment but also in educational institutions and other fields.<sup>37</sup> Second, it specifically provides under section 46(3) that anything done by a person in the course of employment shall be treated as done by the employer as well as by him, whether or not it was done by the employer's knowledge or approval unless the employer took reasonable steps to prevent the employee from perpetrating the alleged act of sexual harassment, which is difficult for the employer to prove. This provision was enacted to make employers proactive in protecting their employees for otherwise the worse the sexual harassment was the less the likelihood of the employer being liable. Third, the SDO expressly provides for awarding punitive and exemplary damages to a victim of sexual harassment.<sup>38</sup> By contrast many other jurisdictions (e.g. Australia) do not provide for awarding such damages.<sup>39</sup> Fourth, the SDO requires the Equal Opportunities Commission of Hong Kong to play a constructive role in resolving sexual harassment disputes and provide legal assistance to victims. Fifth, the SDO also specifically declares creating a sexually hostile or intimidating work environment unlawful.

Despite these salutary aspects of the SDO, it has many shortcomings. First, although the definition of sexual harassment is fairly comprehensive, it does not cover sexual harassment unless the act of the wrongdoer can be brought within the scope of

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<sup>35</sup> Sexual Discrimination Ordinance, (1996) Cap. 480, 1. (H.K.) [hereinafter SDO].

<sup>36</sup> *Id.* at §§ 16, 17, 23, 24, 39.

<sup>37</sup> *Id.* at § 2.

<sup>38</sup> *Id.* At § 82

<sup>39</sup> For example, in Australia only compensatory damages can be awarded.

the harassee's employment, educational or other participatory activities set out in the SDO.<sup>40</sup> Second, the emphasis in the SDO is on the protection of women and not men, so same sex sexual harassment is not covered. Third, the burden of proof on the complainant is heavy. The courts apply an objective test to determine whether or not sexual harassment was committed. This test is problematic.<sup>41</sup>

Claims have been rejected on the ground that the complainant:

- 1) was highly sensitive to physical contact;
- 2) did not resist the unwelcome sexual act
- 3) flaunted herself;
- 4) had a prior consensual relationship with the wrongdoer;
- 5) delayed reporting the matter;
- 6) did not object out of economic considerations; and
- 7) complained of a statement which was couched in neutral terms (e.g. sex is beautiful, sex is good and such terms).

For example, one case held that asking a junior employee what sexual services, short of sexual intercourse, might be offered by a prostitute or whether or not a prostitute could be a virgin was not sexual harassment of the employee because that question was not particularly directed against her.<sup>42</sup>

## V. PROGNOSIS FOR REFORM

It is not easy to change the ingrained attitude of perpetrators of the wrong of sexual harassment. However, the following comments and suggestions may be noted:

First, despite the magnitude of the problem, Asian countries have not adopted a holistic approach to dealing with the problem of sexual harassment. Legislation declaring sexual harassment unlawful, judicial decisions awarding damages, or complaints committees giving out punishment cannot control the widespread prevalence of sexual harassment. The whole society, including political leaders, social scientists and religious reformers should be involved in spreading the message that sexual harassment is a heinous and demeaning practice. The media, the television, radio and newspapers must engage in concerted attempts to change the mindset of harassers.

Second, complaints committees, complaints tribunals, equal opportunity commissions, grievance federations (if any), human rights commissions and courts dealing with sexual harassment cases should have adequate representation of women.

<sup>40</sup> See SDO, *supra* note 35 at §§ 16 (trade unions etc.), 17 (qualifying bodies), 23 (employment), 39 (educational establishments), and 40 (other sexual harassments). See also *Id.* at § 24.

<sup>41</sup> D.K. Srivastava, *Proving the Wrong of Sexual Harassment: The Futility of Applying the Objective Test*, 5 J. CHINESE & COMP. L., 205-220 (2002).

<sup>42</sup> *Ratcliffe v Secretary for Civil Service and Another* [1999] 4 HKC 237.



In India the Sexual Harassment of Women at their Workplace Bill 2007 as well as the Vishakha guidelines provide that a sexual harassment complaints committee must be chaired by a woman and half its members must also be women. These steps may prevent male bias against women and ensure that fairer decisions are made.

Third, sexual harassment is pervasive, but legislation covers only limited, specified situations in which it occurs.<sup>43</sup>

Fourth, since there are inherent difficulties with proving a case of sexual harassment, once the complainant has established a prima facie case, the burden of proof should shift to wrongdoer to prove his innocence.

Fifth, the low level of damages awarded in Hong Kong<sup>44</sup> means that being convicted may have no deterrent effect on the wrongdoer. Unfortunately, the SDO's direction to grant exemplary damages had not had much impact on the judges in Hong Kong. The damages awarded in Hong Kong do not take into account the area's high per capita income. In the United States, the average out-of-court settlement for a victim of sexual harassment is US \$300,000.<sup>45</sup>

Sixth, to control sexual harassment at the workplace, employment contracts must contain a clause that if an employee is found guilty of sexual harassment that would lead to termination of the employee's job after due procedure.

Seventh, sexual harassment cases may lead to problems for the victim's family. This must be dealt with by women organizations and they should provide counselling services to the victim as well as her family members.

Eighth, women organisations and civil society should play a proactive role to change the patriarchal norms and standards that have largely permeated within the fabric of Asian societies.<sup>46</sup>

There is no duty higher than treating women with respect, dignity and honor.

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<sup>43</sup> The SDO does not ban all forms of sexual harassment, but instead requires the victim's case to fall within a list of situations specified in the SDO. See SDO §§ 16, 17, 23, 24, 39 and 40.

<sup>44</sup> SDO, *supra* note 35 at § 82 ("The financial penalty imposed under subsection (5) shall not exceed \$10000 for the first occasion on which a penalty is imposed, and \$30000 for the second and any subsequent occasion on which a penalty is imposed in respect of the same person.").

<sup>45</sup> *An ounce of prevention can avert a million-dollar lawsuit*, UC BERKELEY NEWS, Jan. 26, 2006, available at [http://berkeley.edu/news/berkeleyan/2006/01/26\\_training.shtml](http://berkeley.edu/news/berkeleyan/2006/01/26_training.shtml).

<sup>46</sup> Even in the contemporary liberalised Indian society, an off the cuff remark by a woman that she endorses pre-marital sex could lead to 22 criminal cases against her. See *Supreme Court: Khushboo free to opine on pre-marital sex*, REUTERS, April 28, 2010, available at <http://in.reuters.com/article/idINIndia-48073220100428>.