

ROSE LJ. I agree. By s 130 of the Supreme Court Act 1981, Parliament conferred on the Lord Chancellor a simple power, subject to the concurrence of the Treasury and judicial Heads of Division, to prescribe Supreme Court fees.

There is nothing in the section, or elsewhere, to suggest that Parliament contemplated, still less conferred, a power for the Lord Chancellor to prescribe fees so as totally to preclude the poor from access to the courts. Clear legislation would, in my view, be necessary to confer such a power and there is none.

Accordingly, this application succeeds and we shall make the declaration sought.

Solicitors:

Birdman & Partners for the applicant.

Treasury Solicitor for the Lord Chancellor.

a India

Vishaka and Others v State of Rajasthan and Others

b Supreme Court

Verma CJ, Manohar and Kirpal JJ

13 August 1997

c Constitutional law - Fundamental rights - Enforcement - Guidelines for enforcement of rights - Rights to life, liberty, equality and freedom of profession - Gender equality - Sexual harassment in workplace - Guidelines having force of law in lieu of legislation - Application of international agreements in interpreting rights and formulating guidelines - Constitution of the Republic of India 1950, arts 14, 15, 19, 21, 32, 51, 73, 252, Sch 7 - Convention on the Elimination of All Forms of Discrimination against Women 1979, arts 11, 24.

d Following the alleged gang rape of a social worker in Rajasthan, and in view of the prevailing climate in which the violation of working women's rights was not uncommon, the applicants, a group of social activists and non-government organisations, filed a petition under art 32 of the Constitution of India 1950 invoking the Supreme Court's powers under that provision to issue directions for the enforcement of the fundamental rights of working women to equal treatment, to practise any profession and to personal liberty guaranteed under arts 14, 19 and 21 of the Constitution.

Held: Directions delivered prescribing guidelines and norms for dealing with sexual harassment of women in the workplace.

f Article 32 of the Constitution empowered the Supreme Court to issue guidelines for the enforcement of constitutionally guaranteed rights, which would be binding law until such time as legislation was enacted for the purpose. Moreover, arts 51 and 253 of, and Entry 14 of Sch 7 to, the Constitution required the court to apply international agreements to which India was a signatory in interpreting those rights and formulating guidelines. In the absence of domestic law occupying the field, to formulate effective measures to check the evil of sexual harassment of working women at all workplaces, the contents of international Conventions and norms were significant for the purpose of the interpretation of the guarantee of gender equality, the right to work with human dignity in arts 14, 15, 19(1)(f) and 21 of the Constitution, and the safeguards against sexual harassment implicit therein. Indeed, it was an accepted rule of judicial construction that regard must be had to international Conventions and norms for construing domestic law when there was no inconsistency between them and there was a void in the domestic law. In the instant case it was clear that the incidents complained of were violations of, inter alia, the fundamental rights to equality, freedom of profession, and life and liberty guaranteed under arts 14, 15, 19(1)(f) and 21 of the Constitution. Accordingly, the court was empowered to interpret those provisions in

accordance with the Convention on the Elimination of All Forms of Discrimination against Women 1979 and, in particular, arts 11 and 24, which required states parties to take appropriate measures to eliminate discrimination against women in the field of employment and to undertake to adopt measures aimed at achieving the full realisation of the rights recognised in the Convention. Guidelines were therefore prescribed for due observance in workplaces and other institutions pending the enactment of legislation. The guidelines set out the duty of the employer or other responsible persons in workplaces and other institutions, required employers to take steps to prevent or deter sexual harassment and to take appropriate disciplinary action if it occurred; required the establishment of an appropriate complaints mechanism in the employers' organisation and requested central and state governments to consider adopting suitable measures, including legislation, to ensure the observance of those guidelines by employers (see pp 365-370, post). *Minister for Immigration and Ethnic Affairs v Teoh* [1995] 3 LRC 1 and *Nilbani Behera v State of Orissa* [1994] 2 LRC 99 approved.

Per curiam. The obligation of the Supreme Court under art 32 of the Constitution for the enforcement of fundamental rights in the absence of legislation must be viewed along with the role of judiciary envisaged in the Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA region, which principles represent the minimum standards necessary to be observed in order to maintain the independence and effective functioning of the judiciary (see p 3, 6, post).

[Editors' note: Article 32 of the Constitution of India 1950, so far as material, provides: '... (2) The Supreme Court shall have power to issue directions or orders or writs ... whichever may be appropriate, for the enforcement of any of the rights conferred by this Part.'

Article 14 of the Constitution provides: 'The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.'

Article 19 of the Constitution, so far as material, provides: '(1) All citizens shall have the right ... (f) to practise any profession, or to carry on any occupation, trade or business.'

Article 21 of the Constitution, so far as material, provides: 'No person shall be deprived of his life or personal liberty except according to procedure established by law.'

Articles 15 and 51 of the Constitution, so far as material, are set out at pp 364-365, post.

Article 253 of the Constitution is set out at p 363, post.

Schedule 7 to the Constitution, so far as material, is set out at p 365, post.

Article 11 of the Convention on the Elimination of All Forms of Discrimination against Women 1979, so far as material, is set out at p 366, post.

Article 24 of the Convention is set out at p 366, post.]

Cases referred to in judgment

Nilbani Behera v State of Orissa [1994] 2 LRC 99, 1993 (2) SCC 746, Ind SC

Minister for Immigration and Ethnic Affairs v Teoh [1995] 3 LRC 1, (1995) 183 CLR 273, Aus HC

a Legislation referred to in judgment

Australia

Constitution of the Commonwealth of Australia 1900

India

Constitution of the Republic of India 1950, arts 14, 15, 19(1)(f), 21, 32, 51(c), 73,

141, 253, Sch 7

Indian Penal Code

Industrial Employment (Standing Orders) Act 1946

Protection of Human Rights Act 1993, s 2(d)

Other sources referred to in judgment

c Beijing Statement of Principles of the Independence of the Judiciary 1995

Convention on the Elimination of All Forms of Discrimination against Women 1979 (18 December 1979; GA Res 34/180, UN Doc A/34/46), arts 11, 24

International Covenant on Civil and Political Rights (New York, 16 December 1966; TS 6 (1977), Cmdd 6702), art 32

d UN Committee on the Elimination of Discrimination against Women Recommendations, 17, 18, 24

Petition

e A group of social activists and non-governmental organisations brought as a class action a petition under art 32 of the Constitution of the Republic of India 1950 invoking the Supreme Court's power under that provision to issue directions for the enforcement of certain fundamental rights incorporated in the Constitution that were being violated by the continued practice of sexual harassment of women in the workplace in India. The facts are set out in the judgment of the court.

f *Ms Meenakshi Arora and Ms Nalwa Kapur* for the petitioners.

The Solicitor General for the respondents.

Shri Fali S Nariman appeared as amicus curiae.

13 August 1997. The following judgment of the court was delivered.

g VERMA CJ, MANOHAR and KIRPAL JJ. This writ petition has been filed for the enforcement of the fundamental rights of working women under arts 14, 19 and 21 of the Constitution of the Republic of India 1950 in view of the prevailing climate in which the violation of those rights is not uncommon. With the increasing awareness of and emphasis on gender justice, there is an increase in the effort to guard against such violations; and the resentment towards incidents of sexual harassment is also increasing. The present petition has been brought as a class action by certain social activists and NGOs with the aims of focusing attention towards this societal aberration, assisting in finding suitable methods for the realisation of the true concept of 'gender equality', to prevent sexual harassment of working women in all workplaces through judicial process, and to fill the vacuum in existing legislation.

i The immediate cause for the filing of this writ petition is an incident of alleged brutal gang rape of a social worker in a village of Rajasthan. That

incident is the subject matter of a separate criminal action and no further mention of it by us is necessary. The incident reveals the hazards to which a working woman may be exposed and the depravity to which sexual harassment can degenerate, and the urgency for safeguards by an alternative mechanism in the absence of legislative measures. In the absence of legislative measures, the need is to find an effective alternative mechanism to fulfil this felt and urgent social need.

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 arts 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 art 19(1)(f) 'to practise any profession, or to carry out any occupation, trade or business'. Such violations therefore attract the remedy under art 32 for the enforcement of these fundamental rights of women. This class action under art 32 of the Constitution is for this reason. A writ of mandamus in such a situation, if it is to be effective, needs to be accompanied by directions for prevention, as the violation of fundamental rights of this kind is a recurring phenomenon. The fundamental right to carry on any occupation, trade or profession depends on the availability of a 'safe' working environment. Right to life means life with dignity. The primary responsibility for ensuring such safety and dignity is through suitable legislation, and the creation of a mechanism for its enforcement, is of the legislature and the executive. When, however, instances of sexual harassment resulting in violation of fundamental rights of women workers under arts 14, 19 and 21 are brought before us for redress under art 32, an effective redressal requires that some guidelines should be laid down for the protection of these rights to fill the legislative vacuum.

The notice of the petition was given to the state of Rajasthan and the Union of India. The learned Solicitor General appeared for the Union of India and rendered valuable assistance in the true spirit of a law officer to help us find a proper solution to this social problem of considerable magnitude. In addition to Ms Meenakshi Arora and Ms Naina Kapur who assisted the court with full commitment, Shri Fali S Nariman appeared as amicus curiae and rendered great assistance. We place on record our great appreciation for every counsel who appeared in the case and rendered the needed assistance to the court which enabled us to deal with this unusual matter in the manner considered appropriate for a cause of this nature.

Apart from art 32 of the Constitution, we may refer to some other provisions which envisage judicial intervention for eradication of this social evil. Some provisions in the Constitution in addition to arts 14, 19(1)(f) and 21 which have relevance are:

'Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth'

15.—(1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them ...

(3) Nothing in this article shall prevent the State from making any special provision for women and children ...

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'Provision for just and humane conditions of work and maternity relief'
42. The State shall make provision for securing just and humane conditions of work and for maternity relief.'

'Fundamental duties'
51A. It shall be the duty of every citizen of India—(a) to abide by the Constitution and respect its ideals and institutions ... (c) to promote harmony and the spirit of common brotherhood amongst all the people of India transcending religious, linguistic and regional or sectional diversities; to renounce practices derogatory to the dignity of women ...'

Before we refer to the international Conventions and norms having relevance in this field and the manner in which they assume significance in application and judicial interpretation, we may advert to some other provisions in the Constitution which permit such use. These provisions are:

'Promotion of international peace and security'
51. The State shall endeavour to ... (c) foster respect for international law and treaty obligations in the dealings of organised people with one another ...'

'Legislation for giving effect to international agreements'
253. Notwithstanding anything in the foregoing provisions of this Chapter, Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body.'

'Seventh Schedule: List 1—Union List:'
14. Entering into treaties and agreements with foreign countries and implementing of treaties, agreements and conventions with foreign countries.'

In the absence of domestic law occupying the field, to formulate effective measures to check the evil of sexual harassment of working women at all workplaces, the contents of international Conventions and norms are significant for the purpose of the interpretation of the guarantee of gender equality, the right to work with human dignity/in arts 14, 15, 19(1)(f) and 21 of the Constitution, and the safeguards against sexual harassment implicit therein. Any international convention not inconsistent with the fundamental rights and in harmony with its spirit must be read into these provisions to enlarge the meaning and content thereof, to promote the object of the constitutional guarantee/This is implicit from art 51(c) and the enabling power of Parliament to enact laws for implementing the International Conventions and norms by virtue of art 253 read with Entry 14 of the Union List in Sch 7 to the Constitution. Article 73 also is relevant. It provides that the executive power of the Union shall extend to the matters with respect to which Parliament has power to make laws. The executive power of the Union is therefore available until Parliament enacts legislation expressly to provide measures needed to curb the evil.

Thus, the power of the court under art 32 for enforcement of the fundamental rights and the executive power of the Union have to meet the challenge to protect working women from sexual harassment and to make their fundamental rights meaningful. Governance of the society by the rule of law mandates this requirement as a logical concomitant of the constitutional scheme. The exercise performed by the court in this matter is with this common perception shared with the learned Solicitor General and other members of the Bar who rendered valuable assistance in the performance of this difficult task in the public interest.

The progress made at each hearing culminated in the formulation of guidelines to which the Union of India gave its consent through the learned Solicitor General, indicating that these should be the guidelines and norms declared by this court to govern the behaviour of the employers and all others at the workplaces to curb this social evil.

Gender equality includes protection from sexual harassment and the right to work with dignity, which is a universally recognised basic human right. The common minimum requirement of this right has received global acceptance. The international Conventions and norms are, therefore, of great significance in the formulation of the guidelines to achieve this purpose.

The obligation of this court under art 32 of the Constitution for the enforcement of these fundamental rights in the absence of legislation must be viewed along with the role of judiciary envisaged in the Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA region. These principles were accepted by the Chief Justices of Asia and the Pacific at Beijing in 1995 as those representing the minimum standards necessary to be observed in order to maintain the independence and effective functioning of the judiciary. The objectives of the judiciary mentioned in the Beijing Statement are:

'Objectives of the Judiciary

10. The objectives and functions of the Judiciary include the following:
(a) to ensure that all persons are able to live securely under the Rule of Law;
(b) to promote, within the proper limits of the judicial function, the observance and the attainment of human rights; and (c) to administer the law impartially among persons and between persons and the State.'

Some provisions in the Convention on the Elimination of All Forms of Discrimination against Women (18 December 1979; GA Res 34/180, UN Doc A/34/46) of significance in the present context are:

'11.—(1) States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular: (a) The right to work as an inalienable right of all human beings ... (f) The right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction ...'

'24. States Parties undertake to adopt all necessary measures at the national level aimed at achieving the full realization of the rights recognised in the present Convention.'

The general recommendations of the UN Committee on the Elimination of Discrimination against Women in this context, in respect of art 11 are:

'17. Equality in employment can be seriously impaired when women are subjected to gender-specific violence, such as sexual harassment in the workplace.

18. Sexual harassment includes such unwelcome sexually determined behaviour as physical contact and advances, sexually coloured 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.

24. ... (i) Effective complaints procedures and remedies, including compensation, should be provided; (j) States parties should include in their reports information on sexual harassment, and on measures to protect women from sexual harassment and other forms of violence of coercion in the workplace.'

— The government of India ratified the above Resolution on 25 June 1993 with some reservations which are not material in the present context. At the Fourth World Conference on Women in Beijing, the government of India also made an official commitment, inter alia, to formulate and operationalise a national policy on women which will continuously guide and inform action at every level and in every sector; to set up a commission for Women's Rights to act as a public defender of women's human rights; and to institutionalise a national level mechanism to monitor the implementation of the Platform for Action. We have therefore no hesitation in placing reliance on the above for the purpose of construing the nature and ambit of the constitutional guarantee of gender equality in our Constitution.

The meaning and content of the fundamental rights guaranteed in the Constitution are of sufficient amplitude to encompass all the facets of gender equality including prevention of sexual harassment or abuse. Independence of judiciary forms a part of our constitutional scheme. The international Conventions and norms are to be read into them in the absence of enacted domestic law occupying the field when there is no inconsistency between them. — It is now an accepted rule of judicial construction that regard must be had to international Conventions and norms for construing domestic law when there is no inconsistency between them and there is a void in the domestic law. The High Court of Australia in *Minister for Immigration and Ethnic Affairs v Teoh* [1995] 3 LRC 1 has recognised the concept of legitimate expectation of its observance in the absence of a contrary legislative provision, even in the absence of a Bill of Rights in the Constitution of Australia.

In *Nilbari Behera v State of Orissa* [1994] 2 LRC 99 a provision in the International Covenant on Civil and Political Rights (New York, 16 December 1966; TS 6 (1977), Cmd 6702) was referred to to support the view taken that 'an enforceable right to compensation is not alien to the concept of enforcement of a guaranteed r... as a public law remedy under art 32, distinct from the

private law remedy in torts. There is no reason why these international Conventions and norms cannot therefore be used for construing the fundamental rights expressly guaranteed in the Constitution of India which embody the basic concept of gender equality in all spheres of human activity.—

In view of the above, and the absence of enacted law to provide for the effective enforcement of the basic human right of gender equality and guarantee against sexual harassment and abuse, more particularly against sexual harassment at workplaces, we lay down the guidelines and norms specified hereinafter for due observance at all workplaces or other institutions, until legislation is enacted for the purpose. This is done in exercise of the power available under art 32 of the Constitution for enforcement of the fundamental rights and it is further emphasised that this would be treated as the law declared by this court under art 141 of the Constitution.

The GUIDELINES and NORMS prescribed herein are as below.

—HAVING REGARD to the definition of 'human rights' in s 2(d) of the Protection of Human Rights Act 1993;

—TAKING NOTE of the fact that the present civil and penal laws in India do not adequately provide for specific protection of women from sexual harassment in workplaces and that enactment of such legislation will take considerable time

—It is necessary and expedient for employers in workplaces as well as other responsible persons or institutions to observe certain guidelines to ensure the prevention of sexual harassment of women as follows.

1. *Duty of the employer or other responsible persons in workplaces and other institutions.* It shall be the duty of the employer or other responsible persons in workplaces or other institutions to prevent or deter the commission of acts of sexual harassment and to provide the procedures for the resolution, settlement or prosecution of acts of sexual harassment by taking all steps required.

2. *Definition.* 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 a sexual nature. Where any of these acts is committed in circumstances where under 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.

3. *Preventative steps.* All employers or persons in charge of a 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 employed woman 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 victimised 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 organisation for redress of the complaint made by the victim. Such a 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 complaints committee should involve a third party, either an NGO or other body who is familiar with the issue of sexual harassment. The complaints committee must make an annual report to the government department concerned of the complaints and action taken by them. The employers and person in charge will also report on the compliance with the aforesaid guidelines including on the reports of the complaints committee to the government department.

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

9. *Awareness.* Awareness of the rights of female employees in this regard should be created in particular by prominently notifying the guidelines (and appropriate legislation when enacted on the subject) in a suitable manner.

10. *Third party harassment.* Where sexual harassment occurs as a result of an act or omission by any third party or outsider, the employer or person in charge

will take all steps necessary and reasonable to assist the affected person in terms of support and preventative action.

11. The central/state governments are requested to consider adopting suitable measures including legislation to ensure that the guidelines laid down by this order are also observed by employers in the private sector.

12. These guidelines will not prejudice any rights available under the Protection of Human Rights Act 1993.

Accordingly, we direct that the above guidelines and norms would be strictly observed in all workplaces for the preservation and enforcement of the right to gender equality of the working woman. These directions would be binding and enforceable in law until suitable legislation is enacted to occupy the field. These writ petitions are disposed of, accordingly.

Saint Vincent and the Grenadines

Russell and Another v Attorney General and Another

Privy Council

Lord Mustill, Lord Nicholls of Birkenhead, Lord Hoffmann, Lord Clyde and Lord Hutton

27-28 January, 15 May 1997

Constitutional law – Parliament – Elections – Constituency Boundaries Commission – Requirement that commission be appointed following population census – Failure to appoint commission before general election – Defeated election candidates seeking constitutional relief – Appointment of commission soon afterwards – Whether appointment of commission precedent to valid election – Whether defeated parliamentary candidates possessing locus standi to bring action for declaratory relief – Availability of discretionary relief to applicants with 'relevant interest' – Constitution of Saint Vincent and the Grenadines 1979, ss 33(3), 48(1), 96(1), (3).

In 1991 a census of population was held in Saint Vincent and the Grenadines. Following a general election in February 1994 the first and second appellants, two of the defeated candidates, issued a notice of motion in the High Court claiming, inter alia, that the failure to appoint a Constituency Boundaries Commission as required under s 33(3) of the Constitution was a breach of the Constitution, making the entire election process a nullity, and seeking relief under s 96(1) of the Constitution. In June 1994 a commission was appointed. The judge at first instance dismissed the applications. On appeal, the Court of Appeal upheld the decision to deny relief to the first and second appellants but made declarations in respect of the third and fourth applicants (in related litigation) that, inter alia, compliance with procedural rules was a condition precedent to the validity of electoral petitions, that the applicants' right to be registered and vote had been infringed for which they were awarded \$1,000 compensation each. The appellants appealed to the Privy Council where the appellants' case was transformed: following some concessions on the part of the respondents the appellants no longer sought to contend that the election was invalid but merely sought declaratory relief that there had been a failure to comply with the requirements of the Constitution. The respondents sought leave to cross-appeal against the award of damages to the third and fourth applicants.

HELD: Appeal dismissed. Respondents' application for leave refused.

The appointment of a boundaries commission under s 33(3) of the Constitution of Saint Vincent and the Grenadines was not a condition precedent to a valid election, although such a commission had to be appointed within a reasonable time after the holding of a population census. It would be absurd to hold that a commission which failed to be appointed could leave the state with no government and no