

## SEXUAL HARASSMENT AT WORKPLACE IN INDIA: AN ANALYSIS OF PREVAILING LEGAL REGIME

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### ABSTRACT

*The legal regime for sexual harassment of women at workplace started with judge-made law or guidelines on it due to non-existence of any framework to treat the same. Gradually, these took the shape of the enactment by the legislature in the form of Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 which was an applaudable victory. Moreover, the provisions were progressive in nature, favouring the victims of such sexual harassment. But it has been seen that the workplace regime has not been sensitized over the years with issues of sexual harassments at a growing rate. Therefore, a re-look of the existing legal regime in respect to sexual harassment at workplace in India is essential so that fruitful steps can be undertaken to ensure a safe and healthy environment for working.*

### INTRODUCTION

Harassment of any kind violates a woman's right of freedom and life. The degree of such violation increases when it moves to its variant of sexual harassment. Furthermore, when that happens at workplace, it creates an insecure environment for the victim of such harassment. It leads to lesser participation in the work because of the insecurity created. It also causes reduced output among women.

What is to be seen is that at the conception of the society, the position of women has been brutally differentiated in regard to their counterpart. They were given lesser opportunities to move out of their home and to participate in society and in workplace. Slowly and gradually, things started changing and a new era came where education for women was given higher importance. Along with that, the need for further participation of women in jobs and taking up

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of work outside home was much appreciated and was seen as a step in removing the existing discrimination.

With that came the essential step towards realising of standing on their own feet and the financial stability for women in society. To also create a position and a distinct identity for themselves by active participation in every field was the need of the hour. But now when such a revolution was happening, the instances of sexual harassment of women at workplace were continuously heard but died away because of lack of legislation on the matter. What was lacking was the recognition of the plight of women at workplace by the legislative makers and the society. This happened through the legislation on the matter but not before several other steps that were taken in regard to it. But at the present instance, a relook to the existing legislation is necessary in regard to the dynamic world and changing workplace scenarios.

## **UNDERSTANDING SEXUAL HARASSMENT**

Before going to sexual harassment it is necessary to understand the meaning of harassment itself because sexual harassment is a variant degree of harassment. Harassment is any kind of behaviour that is unwanted or threatening in nature and causes humiliation or disgust. Harassment on its own causes disturbance and annoyance. Harassment can take form of any kind be it of race, or colour, or national origin, etc. and a conduct on such basis which leads to abusive or uninviting behaviour.<sup>2</sup>

Moving forward with the sexual harassment, it means the unwanted behaviour which is sexual in nature. It can range from verbal conduct of such nature or sexual advances and physical conducts. These are such inappropriate behaviours as is to treat women as sexual objects<sup>3</sup> and to undermine their individuality as a human being. In some countries, sexual harassment is treated as a violation of the rights and is legislated as well like in US<sup>4</sup>. The Equal Employment Opportunity Commission, a federal agency in US, has in fact given a detailed criterion for sexual harassment like unwanted touching, sexual comments, sexual gestures with hands or body movements, etc.

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<sup>2</sup> "Harassment"; U. S. Equal Employment Opportunity Commission; <https://www.eeoc.gov/harassment>

<sup>3</sup> McLaughlin, H., Uggen, C. and Blackstone, A., "The economic and career effects of sexual harassment on working women", 31 (3), *Gender & Society*, (2017), pp.333-358, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5644356/>

<sup>4</sup> Civil Rights Act, 1964; Employment Act, 1967; *Also see* Americans with Disabilities Act, 1990.

The thing to note is that in India, the cases on sexual harassment happen from health institutions, schools (at workplace level) to high-end corporate companies. It ranges even to the point of public and private sectors<sup>5</sup>, organised and unorganised sectors as regards to various data on the matter. Thus, a law and legislation on the matter was much needed to define sexual harassment and to aid the victims of it. Consequently, the amendments and the Act came with the same through the Indian Penal Code, 1860 (hereinafter referred as IPC) and the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 (hereinafter referred as Act, 2013). The definition in both of them is somewhat similar but a differentiation is there in regard to the scope and extended meaning in the Act, 2013.

It is to be noted that in Indian legislations throughout, the offences exclusively deals with the sexual harassment of “women” at workplace. Though the range of sexual harassment for women is more than that of men<sup>6</sup>, it cannot be justified or considered proper that sexual harassment at workplace happens only to women. Denying men the right to approach the court for violation of sexual harassment at workplace is a denial of justice itself. It creates discriminatory practice and sets a wrong principle.

## **SEXUAL HARASSMENT AT THE WORKPLACE**

When the workplace is threatened by unwanted activity, it discourages women to work and increases the gap of discrimination.<sup>7</sup> It creates a privilege of a sex in the workplace by increasing their dominance by justifying such harassment. This impacts the women both socially and mentally throughout their work affecting it immensely. The dignity of a woman is threatened by such a hostile workplace. The question which arises is what is a workplace? This is defined under the Act, 2013 through its Section 2 (o). It starts with workplace “includes”. With the word “include”, it gives the definition of workplace a wider scope. It includes these six places as well like a dwelling place or a house will also be considered as workplace; or a

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<sup>5</sup> Dakshita Sangwan and Amit Thakre, “Sexual Harassment at the Workplace in Public and Private Sectors in India: A Study at National Capital Region of Delhi 1”, 13 (1), International Journal of Criminal Justice Sciences, (2018), pp. 29-43, [https://scholar.google.com/scholar?hl=en&as\\_sdt=0%2C5&q=Sangwan%2C+Dakshita%2C+and+Amit+Thakre.&btnG=](https://scholar.google.com/scholar?hl=en&as_sdt=0%2C5&q=Sangwan%2C+Dakshita%2C+and+Amit+Thakre.&btnG=)

<sup>6</sup> Aparna Moitra, Syed Ishtiaque Ahmed and Priyank Chandra, “Parsing the ‘Me’ in #MeToo: Sexual Harassment, Social Media, and Justice Infrastructures”, 5 (CSCW 1, Article 111), Proceedings of the ACM on Human-Computer Interaction, (2021), pp. 1-34, <https://www.priyankc.com/files/V5cscw111-moitraA.pdf>

<sup>7</sup> M.M. Gupta, *Sexual harassment in the workplace*, Butterworths, (2000), <https://www.ijlsi.com/wp-content/uploads/2020/07/Sexual-Harassment-at-Workplace.pdf>

hospital or nursing home will be a workplace as well; etc. This is done so as not to preclude from its domain or purview certain workplaces.

The gruesome act of sexual harassment of women at the workplace puts a strain on their working condition along with creating a situation of intimidation. It, in such a case, treats women lesser than their counterparts and an unfair distinction originates by exuding harassment. Not only does harassment outrages the modesty of the women but sexual harassment at workplace dampens the treatment of women to a mere commodity.

### **CONSTITUTION AND INTERNATIONAL PERSPECTIVE**

Before moving forward, it is necessary to understand how sexual harassment violates the rights of women. The Constitution ensures right to equality to its every citizen within which is guaranteed the right to dignity through its Article 21 which has been held by the apex court<sup>8</sup> to be an integral part of the right to life and liberty. The sexual harassment at place of work causes this right to be violated since right under Article 21 is not merely a physical right but within its bounds include dignity as well.

Furthermore, since equality is to be ensured in all spheres of life when sexual harassment happens at workplace, it leads to the violation of equality principle<sup>9</sup> too. When this happens, it places a dominance of one over the other and a discriminatory behaviour which in turn is in violation of the rights of women. It attacks at the equal status principle by violating Article 14 and 15 of the Constitution. It perpetuates through the seeds of patriarchy and dangles on to establish correctness in such violence by treating them harmless. With that at hand, the provision of right to profession under Article 19 is hampered when such activities take place at the workplace. It discourages participation and creates an unsafe atmosphere for women to work.

At this stage, it is necessary to examine the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) which was adopted by the UN General Assembly in 1979 through its resolution 34/180. Article 11 provides that measures should be taken by each state party to ensure that no discrimination is there against women in employment and

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<sup>8</sup> Maneka Gandhi v. Union of India, 1978 AIR 597.

<sup>9</sup> Vincent J. Roscigno, "Discrimination, sexual harassment, and the impact of workplace power", Vol. 5, Sociological Research for a Dynamic World, (2019), <https://journals.sagepub.com/doi/pdf/10.1177/2378023119853894>

equality is ensured in right and opportunity. The Preamble itself talks about such measures to ensure employment opportunity is safeguarded. India ratified the same in 1993 and yet it took a long way to bring legislation on the matter of safe workplace.

## **IPC AND VISHAKA GUIDELINES**

Vishaka Guidelines came as a rescue to the growing menace of sexual harassment of women at workplace and furthered the dialog on the matter. The apex court in its landmark decision<sup>10</sup> through the PIL filed before it laid down these guidelines which will operate until the enactment on this particular issue of sexual harassment of women at workplace is brought. The petition which was filed by several groups and social activists on the gang rape of a social worker named Bhanwari Devi who was trying to stop child marriage. With the lack in safeguard mechanism and any law on the matter, the court issued the guidelines<sup>11</sup> and ruled in accordance to that meanwhile directing the appropriate authorities for enactment on the matter. These guidelines are somewhat now incorporated as a part of the Act, 2013 but the important thing to note is that it took almost two decades to bring the legislation on such an important matter. This showed the lethargic attitude towards sexual harassment of women at workplace and measures to curb it. But these guidelines came even before the offence of sexual harassment was incorporated within the domains of Indian Penal Code, 1860 (hereinafter referred as IPC).

In IPC, sexual harassment has been categorized into different kinds after the amendment in the Indian Penal Code, 1860<sup>12</sup> through the Criminal Law (Amendment) Act, 2013<sup>13</sup> by providing specific pointers under the same. One of the important parts of this provision in the IPC is that it is a bailable offence and the highest punishment prescribed is of 3 years. It defines sexual harassment in general terms and does not specifically deal with workplace offences. It says that sexual harassment is when done by a man in regard to the certain acts that are particularly mentioned under Section 354 A of the IPC. These acts are:

1. *[Physical contact and advances which are unwelcome and have explicit sexual overtures;*
2. *A demand or request for the sexual favours;*

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<sup>10</sup> Vishaka v. State of Rajasthan, (1997) 6 SCC 241

<sup>11</sup> *Id.*

<sup>12</sup> The Indian Penal Code, 1860; Section 354 A.

<sup>13</sup> Act No. 13 of 2013, in force from February 3<sup>rd</sup>, 2013.

3. *Showing pornographic content which is against the will of the women; and*
4. *Making sexually coloured remarks.*”]<sup>14</sup>

The punishment prescribed for the first three acts are of three years or levying of a fine or both while for the last act it is of one year or fine or; both fine and imprisonment.

### **THE POSH ACT, 2013**

The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act 2013<sup>15</sup> (POSH, 2013) was the landmark law that brought about changes in the workplace with its introduction. This was the new statute that was brought after the 2013 Criminal Law Amendment after inculcating the offence of sexual harassment in IPC. The legislation which was introduced in Parliament in 2010 through a Bill replaced the Vishaka Guidelines in 2013 through its enactment. The Act was brought to ensure safe working place and to contribute towards gender equality, dignity, and improving women’s participation in work by empowering them through secure working conditions.<sup>16</sup> Thus, there is no denial that the need was definitely felt for this Act since the Vishaka Guidelines in 1997, with almost 16 years of difference.

Within the ambit of definitions, certain important are the ones are firstly, aggrieved women who will be a) of any age, b) employed or not, and, c) subjected to sexual harassment in accordance with Section 2<sup>17</sup> of the Act. Further, the important definitions in regard to employee<sup>18</sup> and employer<sup>19</sup> are necessary to be known but more than that the ambiguity arises in the definition of respondent. Respondent is someone against whom the complaint is filed in the court. The ambiguity arises in the fact that it does not specify whether this definition of respondent can include woman or transgender. Thus, the silence of the act on the interpretation

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<sup>14</sup> The Indian Penal Code, 1860; Section 354 A, sub-section 1

<sup>15</sup> Act No 14 of 2013, in force from December 9<sup>th</sup>, 2013.

<sup>16</sup> Handbook on Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013; Ministry of Women and Child Development, Government of India, November 2015, <https://www.bopter.gov.in/assets/pdf/handbook-on-sexual-harassment-of-women-at-workplace2.pdf>

<sup>17</sup> The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013; Section 2 (a)

<sup>18</sup> The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013; Section 2 (f)

<sup>19</sup> The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013; Section 2 (g)

of the word “person” causes a certain lacuna of it.<sup>20</sup> With regard to the definition of sexual harassment, it is an inclusive one and presents with additional point in regard to IPC which is unwelcome physical conduct, or verbal conduct, or non-verbal conduct that is of sexual nature under Section 2 (n) (v) of the Act. Thus, the verbal and non-verbal behaviour will also amount to sexual harassment condition being it is of sexual nature. This widened scope is much appreciated.

Moving forward, the Internal Committee (IC) is an important part of the Act where its constitution is dealt under Section 4 whereby the setting up of such committing for hearing the complaint regarding sexual harassment at workplace and address such grievances. Further, in the state of Telangana and Maharashtra, it has been ordered by appropriate order for registration of such committee.<sup>21</sup> But this is not seen in other states which causes issue when such committees for redressal are not available at the time of dispute. Moreover, the issue arises in regard to the expertise of such appointed people in the committees which has not be adequately referred to in the Act and that causes uncertainty and might lead to incorrect decisions. This committee works at the place of work. At local level another committee is instituted which is Local Committee (LC) at district level by the government for places where less than 10 members are in the unorganised sector through its Section 5.

The complaint mechanism is to be done with the IC or LC within three months as given under Section 9 of the Act. One of the lacunas that exist in this is the provision for the police complaint to be filed though the IC and LC are given wide powers to inquire in the matter. Moreover, the major portion the Act covers is in regard to the compensatory part and does not deal with the imprisonment portion. This puts the Act at a non-serious position when the position is completely different.

An important portion that the Act, 2013 covers which is much appreciated is that of the duties of the employer to ensure a safe working environment along with timely redressal through Section 19. But the important point is that even with all the committees and duties defined the

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<sup>20</sup> Aasawari Dogra & Nimrit Kaur Ahluwalia, *Sexual Harassment At Workplace (Prevention, Prohibition And Redressal) Act, 2013: A Critical Analysis*, Academike (Feb. 3, 2015), <https://www.lawctopus.com/academike/sexual-harassment-workplace-prevention-prohibition-redressal-act-2013-critical-analysis/>

<sup>21</sup> Prevention of Sexual Harassment at the Workplace (POSH); Nishith Desai Associates, December 2020, [https://www.nishithdesai.com/fileadmin/user\\_upload/pdfs/Research%20Papers/Prevention\\_of\\_Sexual\\_Harassment\\_at\\_Workplace.pdf](https://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research%20Papers/Prevention_of_Sexual_Harassment_at_Workplace.pdf)

reason for shortcoming of the Act, 2013 is in the form of lack of a strong and appropriate authority to deal with such matters. Over the years, the research clearly establishes that there are significant amount sexual harassment instances both at private sector and public sector.<sup>22</sup> So, a collected effort in every sector is a must. With that, there is a requirement for the inclusion in the labour laws and employment laws on the matter related to sexual harassment.<sup>23</sup> If it is not present, this causes distrust and leads to uncertainty in the present legislative position. Thus, a change in these conditions is must, not only in the Act, 2013 but a comprehensive understanding and a re-look of the laws in such regard is necessary.

## **CONCLUSION AND SUGGESTIONS**

One can look at the demographic of awareness in the matters of sexual harassment which causes more harm than other. These cases moreover, at times go unreported because of lack of support and related issues. It also is because of the attitude of authorities to such an issue which paves the room for the sexual harassment victims to not approach them. Taking up the matter forward to the appropriate authorities or committees is mostly not done. Thus, a lack of trust and confidence on them is visible. Another major issue is the awareness part which is to be ensured because when women become aware of their rights, they take step towards securing those rights. Thus, reporting of the matter and awareness of the rights go hand in hand.

The inclusion of sexual harassment in the labour and employment codes and laws is a definite must. The sexual harassment instances in different fields are definitely observed and along with that are observed the ambiguity in certain provisions under the Act, 2013. Therefore, what is needed is a holistic change by incorporating the changes in the Act, 2013 itself or to bring amends in the other allied laws as well. Furthermore, usage of alternative dispute mechanisms can also be adopted, if accepted by the victim, to resolve the matter.

To conclude, sexual harassment at workplace is a very important matter that needs certain amends in the existing laws so that positive change can be brought to improve the condition. With this, a safe and secure environment is necessary free from discrimination and sexual harassment.

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<sup>22</sup> Sangwan, D. and Thakre, A., Sexual Harassment at the Workplace in Public and Private Sectors in India: A Study at National Capital Region of Delhi 1, *International Journal of Criminal Justice Sciences*, 13(1), p.29, 2018.

<sup>23</sup> Supra n. 6.