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## **Prevention of Sexual Harassment of Women in the Workplace: Seeking Gender Equality at Work in India**

By Trishala Singh<sup>1</sup>

### **Abstract**

B.R. Ambedkar, the architect of the Indian Constitution, once stated that the measure of progress of a community is the degree of progress achieved by its women. Financial independence and education are two of the most essential sources of women's progress and empowerment. However, the process of achieving financial independence is often plagued with sexual harassment in the workplace, experienced by most women. This paper is an attempt to analyze the definition and components of sexual harassment, its extent and types. It analyzes the existing Constitutional and legal framework in India for prevention of sexual harassment in the workplaces in India through landmark judicial pronouncements and the Sexual Harassment of Women at Workplace Act, 2013.

*Keywords:* Sexual Harassment, International Legal History, Constitutional framework, Sexual Harassment of Women at Workplace Act, 2013, Indian women

### **Introduction: Defining Sexual Harassment**

Any act, action or behavior with an underlying sexual connotation done to intimidate or humiliate a victim can be classified as sexual harassment. It may comprise of a single act or a series of them, and there is no relevance attached to the intention of the perpetrator behind such action.<sup>2</sup> Certain common instances of sexual harassment include: leering at a female colleague's body, passing distasteful comments on her character or about the way she dresses, indulging in inappropriate sexual humor in the workplace to the discomfort of female colleagues, sexually suggestive gestures, displaying visual material with sexual content in the form of graffiti, cartoons, pin ups etc, calling up a female colleague late at night or persistently insisting her for lunch or dinner dates thereby making her uncomfortable or any other such verbal or physical conduct.

The popular perception that sexual harassment essentially constitutes overt physical acts is a major misconception in extending the ambit of the definition. The psychological element, including any subtle gesture or innuendo, is equally important. Women across all ages and professions face the problem of sexual harassment. However, some professions and positions are more vulnerable than others; for instance, women working in the film and modeling industries or those in the position of new recruits in private organizations are likely to be more prone to the menace of sexual harassment either due to the very nature of their profession or by being the junior

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<sup>2</sup> Jones v. Armas Nominees, (P) Ltd., 59 IR 61, per Judicial Registrar, Millane, quoted in Foster and Woolworth Ltd., [2000] NSWIRC 208, available at [www.austlii.org](http://www.austlii.org) (accessed on 28 May 2016)

most in the hierarchy of an organization headed by men. Having said this, no profession is truly and totally free from sexual harassment and no woman is truly protected despite the legislative and organizational frameworks claiming to protect them. For every woman that stands up against harassment there are numerous others who suffer in silence.

Sexual harassment speaks more to power relationships and victimization than it does to sex itself.<sup>3</sup> It is the improper use of power to extort sexual gratification and reflects a power relationship that is exploitative.<sup>4</sup> It results from a misuse of power and not necessarily sexual attraction.<sup>5</sup> It reflects a disparity in power between the perpetrator and the victim, which more often than not, mirrors the power differentials between men and women in society.<sup>6</sup> Legal scholars and jurists have emphasized that such conduct is objectionable because it does not only interfere with the personal life of the victim but also severely damages the victim's abilities and dignity.<sup>7</sup> Sexual Harassment is deeply rooted in the patriarchal societal setup where male power dominates. It can be seen as a form of discrimination based on sex since the expression of sexuality in the workplace is considered prejudicial to the dignity of women, aimed to maintain the system of exploitation based on unequal economic and social structures thriving in an atmosphere of threat, terror and reprisal.<sup>8</sup> This is particularly true in India, where there is a deep rooted gender bias against women, manifesting itself in high rates of female infanticide and sexual violence against women. Hence, unfavorable working conditions for women by undermining their capabilities as workers is quite prevalent in the Indian context. Thus, essentially, sexual harassment constitutes one of the components of the wider problem of sex based discrimination against women. It seeks to institutionalize the subordination of women.

### **Sexual Harassment: Extent and Types**

While literature is available which studies the extent of sexual harassment, defines the actions which constitute harassment, this section proposes to provide an overview of the problem and offer a space for existing definitions.

#### *Determining the Extent of the Problem (with reference to India)*

To assess the problem it is necessary to understand its extent and types. In India most women choose to remain silent for fear of generating a disproportionate reaction that incurs their greater suffering. Moreover, most cases of sexual abuse go unreported because of the traumatic trial procedure that follows and the social stigma attached to it.<sup>9</sup> The humiliation of recounting the entire incident in explicit detail during the trial and the opposition's continuous attempts to discredit her entire testimony play psychological havoc with the minds of the victims. This is coupled with threats of demotion or firing from a job if the harasser occupies a position of

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<sup>3</sup> *Sexual Harassment in the Work Place: Opportunities and Challenges for legal redress in Asia and Pacific*; International Women's Right Action Watch Asia Pacific, 2005 .p. 2.

<sup>4</sup> Rehana Sikri, *Women and Sexual Exploitation: Harassment at Work*, Kanishka Publishers, 1999 pp. 130, 131.

<sup>5</sup> William Petrocelli and Barbara Kate Repa, *Sexual Harassment on the job*, Nolo Press. 1992 p. 1-9.

<sup>6</sup> ILO. Technical Report for Discussion, ILO- Japan Regional; International Women's Right Action Watch Asia Pacific 2005. p. 2

<sup>7</sup> G. Saqlain Masoodi, Lalita Dhar, *The Jurisprudence of Sexual Harassment: Old Beginnings and new Thinking*, Indian Socio-Legal Journal 2006 Vol. XXXII Nos, 1&2, p. 95

<sup>8</sup> Rajashri Das Gupta; *Politics of Silence Sexual Harassment at Workplace*, Sanhita, Kolkata, 2001

<sup>9</sup> Subhash Chander Singh, *Sexual Harassment of Women at Workplaces: Need for a Comprehensive Legislation*, 1998 Cri.L.J. (Journal) 33 at 37.

authority. There is a lack of statistical data regarding the actual extent of the crime due to a large number of cases going unreported. Oxfam India's survey showed that 17% of working women faced sexual harassment in India.<sup>10</sup> In an earlier survey across 23 countries 15- 30% women were reported to have fallen prey to sexual harassment at workplaces.<sup>11</sup> A study including a national online poll with three Multi National Corporations, 28 focus groups and individuals was carried out to gauge the scenario in developed countries, it was held that 52% of the most highly qualified women quit their jobs and 63% of them attributed it to sexual harassment at workplace.<sup>12</sup> In India, a woman is sexually harassed every 12 minutes.<sup>13</sup>

### *Types of sexual harassment*

This section aims to classify the various types of sexual harassment in the workplace by dividing them into two categories. The division is based majorly on US precedents; however, the objective is to lay down a general understanding of the concept by putting forth a broad classification. The first one is where the harasser promises to give an economic advantage in lieu of sexual gratification received from the victim; in the second type, there is no difference in the economic position of the victim, but the continuous harassment leads to unfavorable and hostile working conditions.

The first category seemingly works on the principle of *quid pro quo*. It refers to situations where an employer or superior at work makes tangible job related promises of promotion, higher pay, advancement etc., conditional upon obtaining sexual favors from the employee.<sup>14</sup> In countries like India, where jobs are scarce the pressure of survival in a situation of scarcity, added to their low status in the society, keeps women silent and causes sexual harassment to become structural.<sup>15</sup> Consequences of this type of harassment can be of two types.

*Tangible:* This was laid down by the US Supreme Court in the case of *Burlington v. Ellerth*. The Court held this type of consequence to be visible 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 significant decrease in wage or salary, a less distinguished title, a material loss of benefits and significantly diminished material responsibilities.<sup>16</sup> In an allegation of this type it is sufficient for the complainant to prove that such a threat was made.<sup>17</sup>

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<sup>10</sup> The Survey was conducted in Delhi, Mumbai, Bangalore, Chennai, Kolkata, Lucknow, Ahmadabad and Durgapur by Oxfam India and Social Rural Institute, Reported on Nov. 2012; available at <http://twocircles.net/node/307393> (last accessed on 28 May 2016)

<sup>11</sup> Sexual Harassment at Workplace in Vietnam: An Overview of the Legal Framework, A research report of ILO, March 2013; available at [http://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---ilo-hanoi/documents/publication/wcms\\_206106.pdf](http://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---ilo-hanoi/documents/publication/wcms_206106.pdf); (last accessed on 28 May 2016)

<sup>12</sup> Hewlett and her six co authors, "The Athena Factor: Reversing the Brain Drain in Science, Engineering and Technology," *Harvard Business Review*, May 22 2008; available at [www.chicagotribune.com](http://www.chicagotribune.com); (last accessed on 28 May 2016)

<sup>13</sup> D.K.Srivastava, Progress of Sexual Harassment Law In India, China and Hong Kong. Prognosis for future reforms, *Harvard International Law Journal* Vol.51, Aug. 11, 2010, p. 172.

<sup>14</sup> International Women's Rights Action Watch Asia Pacific Occasional Papers series No.7, Sexual Harassment in the Workplace: Opportunities and Challenges for Legal Redress in Asia and Pacific, p. 8.

<sup>15</sup> *Ibid.*

<sup>16</sup> *Burlington v. Ellerth*, (524) U.S. 742 (1998).

<sup>17</sup> The complainant need not establish or prove that such a threat of adverse action was actually carried out as discussed in *Burlington v. Ellerth*.

*Intangible:* In this type of adverse employment action, a complainant need not demonstrate any so called tangible adverse employment action over and above a hostile and demeaning environment.<sup>18</sup>

The US Supreme Court explained the second category of harassment in the case of *Harris v. Forklift Systems*. It was held that when a Work Place is permeated with discriminatory intimidation, ridicule and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment<sup>19</sup> it adversely affects her working capacity. This was followed by the decision of House of Lords in England where it held that it was not necessary for the victim to demonstrate physical or economic consequences and that the compensation for injury to feeling can be awarded where an employment action is taken that results in complainants role and position being substantially undermined or her being increasingly marginalized at work.<sup>20</sup>

### **Sexual Harassment: Undermining Fundamental Rights and Basic Human Dignity of Indian Citizens**

The very notion of Sexual Harassment in the workplace intrinsically violates certain basic fundamental rights guaranteed to the citizens of India, enshrined in and protected by the Indian Constitution. Thus, any act or conduct amounting to sexual harassment is against the very basic structure of The Constitution of India that seeks to ensure and safeguard the dignity of its citizens. Such provisions are:

1. **Article 14:** Equality before the law or the equal protection of the law.
2. **Article 15:** Prohibition of discrimination on the grounds of sex.
3. **Article 19:** Right to practice any profession or to carry out any occupation, trade or business which right includes within its ambit "a right to a safe environment free from sexual harassment."<sup>21</sup>
4. **Article 21:** Right to life and personal liberty which includes right to life with dignity.

### **Vishaka and Others. V. State of Rajasthan:<sup>22</sup> The Recognition of Sexual Harassment as an Offence**

The offence of Sexual Harassment in India had no statutory reference till as late as 1997. Before this, Section 354 and Section 509 of the Indian Penal Code dealt with such acts. Section 354<sup>23</sup> deals with the Criminal assault of Women to outrage Women's modesty. Section 509<sup>24</sup> dealt with using a word, gesture or act intended to insult the modesty of a woman. There was no legal obligation upon institutions or management to protect and prevent women employees from experiencing sexual harassment. The Indian Judiciary, for the first time in *Vishaka v. State of Rajasthan* gave voice to the rising concerns of sexual harassment by laying down a formal procedure to check harassment in the workplace. The newly adopted definition of sexual

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<sup>18</sup> Read v. Mitchell, (2000) 1 NZ LR 470

<sup>19</sup> Harris v. Forklift Systems Sys., 510 US 17 (1993).

<sup>20</sup>Shamoon v. Chief Constable of the Royal Ulster Constabulary, [2003] UKHL 11.

<sup>21</sup> Apparel Export Promotion Council v. A.K. Chopra, AIR 1999 SC 625.

<sup>22</sup>Vishaka and Others Vs. State of Rajasthan and Others (JT 1997 (7) SC 384.

<sup>23</sup> Indian Penal Code, 1860.

<sup>24</sup> Indian Penal Code, 1860.

harassment was in tandem with that laid down by CEDAW, United Nations Convention on the Elimination of all Forms of Discrimination against Women which came into force in 1979. India signed the Convention on 30 July 1980 and ratified it on 9<sup>th</sup> July 1993 (with certain reservations). The court laid down certain guidelines to ensure a safe and conducive working environment for women in their workplaces.

### **Vishaka Guidelines**<sup>25</sup>

The following guidelines were clearly put forth in the Vishaka case:

1. The Employer or other responsible persons became duty bound to prevent or deter the commission of acts of sexual harassment and to provide procedures for resolution.
2. For this purpose the term sexual harassment was formally and clearly defined.
3. Preventive steps were clearly outlined: prohibition of harassment was to be notified, published, and circulated in appropriate ways. The rules and regulations of government and public sector bodies had to incorporate rules and regulations prohibiting harassment and provide for appropriate penalties.
4. Private employers had to include the prohibitions in the standing orders under the Industrial Employment (Standing Orders) Act 1946.
5. Hostile work environments had to be eliminated for women in the work place. Work conditions had to be appropriate even for leisure, hygiene and health.
6. In case the conduct qualified as an offence under the Indian Penal Code or under any law the employer was responsible for initiating action in accordance with the law with the appropriate authority.
7. Where the commission of an offence amounted to misconduct as defined in the service rules, then the appropriate disciplinary action had to be initiated by the employer in according to the rules.
8. An appropriate complaint mechanism had to be in place for redressal of the complaint made by any victim. The complaint mechanism had to ensure time bound action on the complaints.
9. There should be a Complaints Committee to look into complaints and should be adequate to provide counseling and support service and maintaining confidentiality.
10. It further provided that it should be headed by a woman and not less than half its members should be women. Also to pre-empt the possibility of use of any pressure or influence from senior levels the committee would involve a third party who was familiar with the issue.
11. Employees were to be encouraged to raise issues in meetings.
12. Awareness had to be created in the workplace by prominently notifying the guidelines.
13. In case the harassment occurred as a result of an act or omission by any third party or any outsider, the employer had to ensure assistance and support to the victim.

The Vishaka Guidelines were taken as the basis on which The Sexual Harassment of Women in the Workplace (Prevention, Prohibition and Redressal) Act 2013 was drafted, taking care to strengthen areas and sections which needed strengthening.

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<sup>25</sup> Guidelines and norms laid down by the Hon'ble Supreme Court in Vishaka and Others vs. State of Rajasthan and others –JT 1997 (7) SC 384

## **The Sexual Harassment of Women in the Workplace (Prevention, Prohibition and Redressal) Act, 2013--Analysis**

The act extends to the whole of India and seeks to achieve three major objectives:

- I. Protection of women against sexual harassment in workplaces
- II. Prevention of conduct amounting to sexual harassment in workplaces
- III. Establish mechanism for redressal of complaints pertaining to sexual harassment

### *Section 2: Definitions*

Section 2(n) of the Act defines the term Sexual Harassment as<sup>26</sup>: Sexual Harassment includes any one or more of the following unwelcome acts or behavior (whether directly or by implication meaning):

1. Physical Contact or advances
2. A demand or request for sexual favors
3. Making sexually colored remarks
4. Showing pornography
5. Any other unwelcome physical, verbal or non verbal conduct of sexual nature

*Section 2(o)* of the Act defined the term “workplace” as<sup>27</sup> “any place visited by the employee arising out of or during the course of employment, including transportation provided by the employer for undertaking such a journey.”

The Act defines the Unorganized Sector as: any enterprise owned by an individual or a group of self-employed workers engaged in the production or sale of goods or providing services of any kind; any enterprise which employs less than 10 workers.

As per this definition, a workplace covers both the organized and un-organized sectors. It also includes all workplaces whether owned by Indian or foreign companies having a place of work in India. It includes Government organizations cooperatives and societies; Hospitals and Nursing Homes; Sports Facilities or any other dwelling places.

### *Section 3: Prevention of Sexual Harassment*

The Act under Section 3(2) provides that a woman shall not be subjected to sexual harassment at any workplace as defined within the Act. As per the statute, presence or occurrence of circumstances of implied or explicit promise of preferential treatment in employment; threat of detrimental treatment in employment; threat about present or future employment; interference with work or creating an intimidating or offensive or hostile work environment; or humiliating treatment likely to affect a female employee’s health or safety may amount to sexual harassment.<sup>28</sup> Certain circumstances if they occur or are present in relation to or in connection with

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26 Section 2(n), The Sexual Harassment Of Women in the Workplace (Prevention, Prohibition And Redressal) Act, 2013.

27 Section 2(o), The Sexual Harassment Of Women in the Workplace (Prevention, Prohibition And Redressal) Act, 2013.

<sup>28</sup>**Section 3(2) of The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013:** The following circumstances, among other circumstances, if it occurs or is present in relation to or connected with any act or behaviour of sexual harassment may amount to sexual harassment:

any unwelcome act or behavior, are also treated as sexual harassment. For example: implied or explicit promise of preferential treatment in employment or humiliating treatment likely to affect a woman's health or safety constitute sexual harassment. These circumstances have also been clearly defined in section 3 (2) (i) to (v) clearly making the Act strong.

#### *Section 4: Constitution of Internal Complaints Committee*

The act under Section 4 (2) (a) provides for the establishment of an Internal Complaints Committee in all administrative units or offices for each workplace. The committee requires four members out of which three should be employees and one should be a non-employee. Half of the members of the committee are supposed to be women and it is also required for it to be headed by a senior level woman employee belonging to that workplace.<sup>29</sup> A woman of any age whether employed or not who alleges to have been subjected to any act of sexual harassment in the workplace may make a complaint against any person to the Internal Complaints Committee or if not constituted then to the local committee.

However, in a subsequent report on Amendments to Criminal Law it was suggested that a more adequate forum would be an independent employment tribunal to handle complaints in a more efficient manner, which would simultaneously be preferable to a victim.<sup>30</sup>

#### *Section 10: Conciliation*

This Section provides that the Internal Committee or the Local Committee, on the request of the aggrieved woman, can take steps to settle the dispute between the victim and the accused through the process of conciliation.

#### *Section 11(3): Inquiry into Complaints and Power of Civil Court*

The powers vested upon the Committee are similar to that of a Civil Court. Thus, the committee becomes a quasi-judicial body. It is not compulsory for the constituting members to have a legal background. The committee under Section 13(3) has also been given the discretionary power to deduct sum from salary or wages in accordance with prescribed service rules. The committee can also compel the accused to pay compensation to the victim if found guilty according to the inquiry report.

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- (i) implied or explicit promise of preferential treatment in her employment; or
  - (ii) implied or explicit threat of detrimental treatment in her employment; or
  - (iii) implied or explicit threat about her present or future employment status; or
  - (iv) interference with her work or creating an intimidating or offensive or hostile work environment for her; or
  - (v) Humiliating treatment likely to affect her health or safety.

<sup>29</sup>**Section 4(2) (a) of the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013–Penalty for noncompliance with provisions of Act-** Constitution of Internal Complaints Committee. The Internal Committee shall consist of the following members to be nominated by the employer, namely: Presiding Officer who shall be a woman employed at a senior level at workplace from amongst the employees: Provided that in case a senior level woman employee is not available, the Presiding Officer shall be nominated from other offices or administrative units of the workplace referred to in sub-section. Provided further that in case the other offices or administrative units of the workplace do not have a senior level woman employee, the Presiding Officer shall be nominated from any other workplace of the same employer or other department or organization.

<sup>30</sup>Justice J. S. Verma, Justice Leila Seth, Gopal Subramaniam, Report of the Committee on Amendments to Criminal Law, January 23, 2013 available at, <http://www.prsindia.org/uploads/media/Justice%20verma%20committee/js%20verma%20committe%20report.pdf> (last visited May 28, 2016).



### *Section 19: Duties of Employer*

This section<sup>31</sup> lays down a list of duties that employers needs to observe towards their female employees. These include providing a safe working environment in the workplace including safety from the persons coming into contact in the workplace; putting up notices at conspicuous places in the workplace displaying the penal consequences of sexual harassment; and the order constituting, the Internal Committee

The Employer is duty bound to organize workshops and awareness programmes at regular intervals to sensitize employees with the provisions of the Act and orientation programmes for the members of the Internal Committee in the manner as may be prescribed.

The Employer should provide necessary facilities to the Internal Committee or the Local Committee, as the case may be, for dealing with the complaint and conducting an inquiry. The Employer should assist in securing the attendance of the respondent and witnesses before the Internal Committee or the Local Committee and should make available such information to the Committee as it may require having regard to the complaint made.

The Employer should provide assistance to the woman if she chooses to file a complaint in relation to the offence under the Indian Penal Code or any other law.

The Employer should treat sexual harassment as misconduct under the service rules and initiate action for such misconduct and should monitor the timely submission of reports by the Internal Committee.

### *Section 26: Penalties for Non-Compliance*

The Act provides a monetary fine of Rs 50,000 to be paid by the Employer in the case of non-compliance. In case of continuation of the offence, the punishment can be doubled followed by/along with the revocation of the business license or cancellation of the registration of the entity.

### **Conclusion**

The Vishaka Case brought to the fore the institutional manifestation of gender inequality in workplaces in the form of sexual harassment. The Apex Court in its decision equated a safe and healthy working condition as a requisite for human dignity under the Right to Life clause of the Indian Constitution. By laying down strict guidelines to prevent and redress sexual harassment in the workplace, the court ensured that the offence was accorded the gravity which was due. “Sexual harassment” has come to be viewed as a violation of the fundamental right to equality.

The Act provides a comprehensive legislative framework to protect and safeguard the interest of women in the workplaces. It seeks to establish favorable working conditions conducive to the growth and development of women. The Committees established under this Act have been clothed in quasi-judicial authority giving them enormous powers to redress grievances and award punishment for any misconduct provided for by the Act. India has come a long way since it first recognized sexual harassment as an offence, but it has a lot further to go to achieve what is so poignantly stated in Section 3(1) of the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 as:

*“No woman shall be subjected to sexual harassment any workplace”*

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<sup>31</sup> Section 19 of *the Sexual Harassment of women at workplace (Prevention, Prohibition and Redressal) Act, 2013*

The legal systems were put in place in 2013, but it they are still so new that their social impact can be understood only after the passage of time. Sufficient data is not yet available to study the repercussions of the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013. However there are some areas where it has made a significant impact. It has succeeded in creating awareness in society about the alternative legal recourse available to women in distress in their workplaces. Previously, many women preferred to suffer in silence than to go through the torture of a criminal justice system with its accompanying complicated and delayed procedures. Now, women have the option of pursuing legal recourse through a simple and time-bound processes. Help is provided to the victim and a conciliation is also possible. Perhaps its most significant success has been the development of an awareness of the Act's existence. Companies have become more compliant with the law and they have done their bit to create workplace awareness. Women have become more confident and the environment in the work place has become significantly more woman friendly. A recent survey (2016) by the Fraud Investigation and Dispute Services shows a rise in the number of complaints which indicates that women maintain their faith in this system of justice.

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