

Sexual harassment laws: used or misused?

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Abstract

The journey of the law relating to sexual harassment in India from its recognition in 1997 to the practical glitches of the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 has been prolonged and unperceptive to the needs of the complainant. To further add to the impediments in its journey to be a quintessential legislation, there is a fine line between consensual agreement to participate in sexual activity between colleagues at workplace and unwelcome sexual attention from a colleague especially a senior or supervisor. This paper argues that the success and failure of sexual harassment legislation in India to provide relief in court depends on what the society thinks and knows about consensual sexual behavior at work and how to respect boundaries at workplace.

The massive entry of women into new professions, greater acceptance of premarital sex and unwed motherhood are all transforming the dynamics of a man-woman relationship at workplace. As more and more women are joining the workplace, they are becoming less tolerant to infringement of their rights especially sexual harassment at work. Disputes over the right to work with dignity at the workplace have become the new battlefield.

There are loopholes in the present Act (such as the constitution of the IC where Members are persons from within the organization who find it very difficult to take a stand against a senior male employee) that are taken advantage of by the accused senior male employee and there are certain loopholes such as filing a complaint by the victim basis a frivolous act that may or may not constitute sexual harassment just to jeopardize the career/ reputation of any colleague at work. Thus, there is a need to restructure the current Act and ensure that all the stakeholders are on-board with it.

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Introduction

When Tarana Burke, an activist from Harlem, launched the ‘#MeToo’ movement in 2006 to aid underprivileged women of color affected by sexual abuse, she didn’t think that a decade later it would be a worldwide movement. In October 2017, it took one tweet from American actress Alyssa Milano for it to become a global movement when she encouraged women to ‘give people a sense of the magnitude of the problem’ of widespread prevalence of sexual assault and harassment, especially in the workplace².

For centuries women have been categorized as the weak and dependent on the man for their welfare and safeguard. The massive entry of women into new professions, greater acceptance of premarital sex and unwed motherhood are all transforming the dynamics of the man-woman relationship at workplace³. However, more the man-woman interactions at workplace more are the number of conflicts on sexual values and erotic conduct. As Dr. D. Narayana Reddy, a Chennai based sexologist⁴ states that ‘driven by the IT and services sector, pockets of metropolitan life are developing across the country. They are attracting young men and women from across the country. They live and work in close proximity, away from home and long working hours. The boundary between work life and private life often merges for many of them.’ In India, as more and more women are joining the workplace, they are becoming less tolerant to infringement of their rights especially sexual harassment at workplace. Disputes over the right to work with dignity at the workplace have become the new battlefield.

For the first time in 1997, the Supreme Court of India in *Vishakhav. State of Rajasthan*⁵ removed the veil from the harassment that occurs at workplace. By formulating the guidelines, the Apex Court not only defined sexual harassment at workplace but also tried to form limitations and boundary to sexual conduct at workplace. Before this landmark judgment, the Indian Legislature was a mute spectator to this violence occurring at work between the two genders. Even then, the Indian Legislature took sixteen sweet years to legislate a law that is riddled with faults, loopholes and confusions. Meanwhile, sexual

²Smartt, Nicole, *Sexual Harassment in the Workplace in A #MeToo World*, FORBES (Jan 16, 2018).

³Nanda Majumdar&DamayantiDatta, *Sex at Work*, XLIII No. 11, INDIATODAY, 54, 60 (2018).

⁴DamayantiDatta, *Sex at Work*, XLIII No. 11, INDIATODAY, 54, 60 (2018).

⁵Vishakhav. State of Rajasthan,A.I.R. 1997 S.C. 3011.

abuse and aberrations at the workplace have rocked the nations in instances of K.P.S. Gill⁶, Phaneesh Murthy⁷, TarunTejpal⁸ and R.K Pachauri⁹.

The journey of sexual harassment legislation: from guidelines to law

It took a sexual assault and rape of a social worker in 1992 to awaken India to the rising yet alien concept of sexual harassment at workplace. The case was filed for the enforcement of the fundamental rights of working women under Articles 14 (equal protection under the laws), article 15 (prohibition of discrimination on race, caste, religion, sex, etc.), article 19 (freedom especially to practice any profession or to carry out any occupation, trade or business) and article 21 (protection of life and personal liberty) of the Constitution of India in view of the prevailing climate in which the violation of these rights was not uncommon. The Apex Court held that the fundamental right to carry on any occupation, trade or profession depends on the availability of a "safe" working environment. The right to life also includes life with dignity. The primary responsibility for ensuring such safety and dignity through suitable legislation, and the creation of a mechanism for its enforcement, is a prerogative of the legislature and the executive. Thus, the Apex Court exercising its judicial activism under Article 32 Constitution of India laid down certain guidelines for an effective redressal for the protection of these rights to fill the legislative vacuum at that time.

This judgment is considered a game changer as not only did the Supreme Court acknowledged and relied to a great extent on international treaties that had not been transformed into municipal law, but the Supreme Court also provided the first authoritative decision of 'sexual harassment' in India. The judgment was unprecedented because confronted with a statutory vacuum; the Supreme Court of India applied creativity and proposed the route of 'judicial legislation'.

However, not everything changed at the workplaces. To begin with, very few institutions had taken the directions given by the Supreme Court seriously. Most public and private organizations had failed to set up complaints mechanisms as contemplated in the

⁶RupanDeol Bajaj v. KPS Gill, 1995 S.C.C. (6) 194.

⁷Information Technology businessman working in an IT MNC was terminated on grounds of sexual misconduct at work.

⁸ Founder Editor, Tehelka, accused of sexual assault and rape by a junior colleague.

⁹ TERI Chief, booked for sexual assault by a junior colleague.

Visakhajudgment. The institutions were required to publicize the Visakha verdict and create awareness about it and this was never done. So, very few women were aware of the judgment. The few informed women had to take up cudgels for the constitution of the committee in the organizations. Invariably, the first battle for a woman complaining of sexual harassment was to get the institution to constitute a complaints committee as stipulated in the guidelines¹⁰.

In the aftermath of the Vishaka judgment, a letter written by Dr. MedhaKotwal of Aalochana (an NGO) to the Supreme Court highlighted a number of individual cases of sexual harassment stating that the Vishaka Guidelines were not being effectively implemented in the country. Converting the letter into a writ petition, the Supreme Court took cognizance and undertook monitoring of implementation of the Vishaka Guidelines across the country by directing the State Governments to emphasize on sufficient mechanisms to ensure its implementation and to make safe and secure environment available for women at workplace in every aspect so that women work with dignity, decency and due respect. The Supreme Court also asserted that in case of non-compliance or non-adherence of the Vishaka Guidelines, the aggrieved persons may approach the respective High Courts¹¹.

In 2007, the Union Cabinet of India had approved the Protection of Women against Sexual Harassment at Workplace Bill, 2007 (“Bill”). Three years later, in 2010, the Bill was introduced in the Lok Sabha, however in the course of three years, the Bill was amended and had undergone drastic changes because of the pressure from women groups and critical review by the parliamentary standing committee to cover “domestic workers” employed full-time, part-time or temporarily for household work, who were excluded from the purview of the original bill on the ground that it would be difficult to create a redressal mechanism for complaints of their sexual harassment. Another important amendment was to define sexual harassment, which was missing in the original bill brought in 2010¹². Thus, after undergoing the above amendments, the Bill was re-introduced in the Lok Sabha in 2012 and was passed by the Lok Sabha as the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Bill, 2012 on September 03rd, 2012.

¹⁰Harassment at Work, THE HINDU, (March 04, 2001), <http://www.thehindu.com/2001/03/04/stories/13040613.html>.

¹¹MedhaKotwalLele v. Union of India (2013) 1 S.C.C. 297 (India).

¹²DNA Correspondent, Lok Sabha passes bill to protect women at workplace, DN, (Sep 4, 2012, 09:00 AM), <http://www.dnaindia.com/india/report-lok-sabha-passes-bill-to-protect-women-at-workplace-1736333>.

On February 26th, 2013 the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Bill, 2012 was passed by the Rajya Sabha and after receiving the President's assent on April 23rd, 2013, it was published in the Gazette of India as Act No. 14 of 2013. The Indian Ministry of Women and Child Development notified December 09th, 2013 as the effective date of the POSH Act and the POSH Rules.

In many ways, the basis of Vishaka guidelines formed the basis of the present Act. The Act states its objectives as prevention of violation of fundamental rights of a woman employee under article 14 (equal protection under the laws), article 15 (prohibition of discrimination on race, caste, religion, sex, etc.) and article 21 (protection of life and personal liberty) of the Constitution of India.

Sexual harassment law in developed countries

The United Kingdom

In the United Kingdom, sexual harassment is not a criminal offence in itself. Sexual harassment is considered a form of unlawful discrimination under the Equality Act 2010. The Equality Act 2010¹³, which offers protection at work sets out a clear framework and covers sexual harassment at workplace. The Equality Act brings together over nine separate pieces of legislation¹⁴ into one single Act that provides a legal framework to protect the rights of individuals and advance equality of opportunity for all¹⁵.

The Equality Act 2010 defines it as sexual harassment if the behavior is either meant to, or has the effect of violating the victim's dignity, or creates an intimidating, hostile, degrading, humiliating or offensive environment at the workplace. Unlike what is defined as 'sexual harassment' in India, sexual harassment under the Equality Act 2010 includes:

- sexual comments or jokes;

¹³ The Equality Act came into force on 1 October 2010.

¹⁴ The Equal Pay Act 1970; Sex Discrimination Act 1975; Race Relations Act 1976; Disability Discrimination Act 1995; Employment Equality (Religion or Belief) Regulations 2003; Employment Equality (Sexual Orientation) Regulations 2003; Employment Equality (Age) Regulations 2006; Equality Act 2006, Part 2; and the Equality Act (Sexual Orientation) Regulations 2007.

¹⁵ *Equality Act 2010: Guidance*, Government Equalities Office and Equality and Human Rights Commission under Government of United Kingdom, (May 3, 2018, 9.10 AM), <https://www.gov.uk/guidance/equality-act-2010-guidance>.

- physical behavior, including unwelcome sexual advances, touching and various forms of sexual assault;
- displaying pictures, photos or drawings of a sexual nature; and
- sending emails with a sexual content.

The united states of America

In the United States of America, sexual harassment at workplace is recognized under the Civil Rights Act, 1964 as part of employment discrimination based on race, sex, color, national origin or religion. It is a gender neutral law i.e. both harassment of men and women employees is recognized, however this act only applies to employers (organizations/ institutes) with 15 or more employees. The United States law recognizes two forms of sexual harassment:

- Quid pro quo sexual harassment is when an employee is required to tolerate sexual harassment in exchange for employment, a raise or job benefit, or promotion.
- Hostile work environment is when sexual harassment in the workplace results in an offensive work environment or unreasonably interferes an employee's work performance.

However, in the case of *Burlington Northern & Santa Fe Railway Co. v. White*¹⁶, the standard for retaliation against a sexual harassment complainant was revised to include any adverse employment decision or treatment that would be likely to dissuade a "reasonable worker" from making or supporting a charge of discrimination, which means that the complainant suffered 'retaliatory discrimination' when she was reassigned to less desirable duties or suspended without pay for complaining against sexual harassment at workplace¹⁷.

Also the Supreme Court of the United States of America in *Reeves v. C.H. Robinson Worldwide Inc.*¹⁸ ruled that a hostile work environment can be created in a workplace where sexually explicit language and pornography are present. A hostile workplace may exist based upon the treatment of employees as a group, even if it is not targeted at any

¹⁶548 U.S. 53 (2006).

¹⁷*Burlington Northern & Santa Fe Railway Co. v. White*, Oyez (May 7, 2018, 11.01 am), <https://www.oyez.org/cases/2005/05-259>.

¹⁸in *Reeves v. C.H. Robinson Worldwide Inc.*, 569 F.3d 1290 (2009).

particular employee¹⁹. In this case an only woman employee in an organization was subjected to sexual innuendoes/conversations and radio channels that all the male employees resorted to in a day. In this case, though the complainant was not the target, such sexual innuendoes/conversations and radio channels created a hostile environment at her workplace every day.

The people's republic of china

In China²⁰, it is found that even though sexual harassment is prevalent, the issue of sexual harassment has largely been neglected in public discourse. There are deep-rooted reasons for this negligence of strict sexual harassment law:

- i. **Traditional thinking about women:** In cases of sexual harassment particularly in China's patriarchal system, women are expected to know their place in society and the victim is judged for being harassed.
- ii. **Lack of a sound legal system regarding sexual harassment:** currently there are two laws including ambiguous terms about sexual harassment towards women such as Law of the People's Republic of China on the Guarantee of the Rights and Interests of Women, and Special Provisions for Labor Protection of Female Workers. Article 40 of the Law of the People's Republic of China on the Protection of Women's Rights and Interests prohibits sexual harassment of women in the workplace. This statute also provides the victim of such harassment the right to file internal complaints in their respective units or departments. Article 32 of the Regulations for the Implementation of Law of the People's Republic of China on the Protection of Women's Rights and Interests in Shanghai: further defines sexual harassment as possible through language, text, images, electronic message, and physical behavior and Article 237 of the Criminal Law of the People's Republic of China defines indecent assault as "coercively molest others or humiliate women by violence, threat or other means"²¹. However, there is neither any definite definition of sexual

¹⁹ Reeves v. C.H. Robinson Worldwide Inc., CASELAWFINDLAW (May 7, 2018, 11.11 am) <https://caselaw.findlaw.com/us-11th-circuit/1387323.html>.

²⁰ Quanbao Jiang, *Sexual Harassment in China*, CPIANALYSIS (January 29, 2018), <https://cpianalysis.org/2018/01/29/sexual-harassment-in-china/>.

²¹ RamyaBodupalli & Alexander ChipmanKoty, *Sexual Harassment in China: What Employers Need to Know*, CHINABRIEFING, (February 1, 2018), <http://www.china-briefing.com/news/2018/02/01/sexual-harassment-china-employers-need-know.html>.

harassment nor does the law specify any specific punishment for such acts. Thus, sexual harassment at workplace is usually treated as a labor dispute.

- iii. **No meaningful enforcement:** Workplace intimidation, vague definitions of what constitutes sexual harassment in China, high burdens of proof for the accuser, and lenient punishments even for those found guilty all contribute to a difficult environment for victims to come forward.
- iv. **Stay silent:** Victims are often advised to stay silent and feel immense pressure not only from society at large, but also from their families and friends, when trying to report harassment.

In 2015, the Zhongshan Intermediate People's Court in Guangdong Province summarized the constitutive requirements of sexual harassment in its judgment:

- The act shall be of sexual nature;
- The act is unwelcomed by the victim and is damaging to his or her dignity; and
- The act may result in the victim feeling threatened, hostile and shamed at the workplace.

Through this judgment, it was the first time in mainland China that sexual harassment was concretely defined for judicial practice.

In Italy²², the definition of sexual harassment in the workplace is covered in article 26, par. 2 of legislative decree no. 198/2006, known as the Code of Equal Opportunities. In line with the definition provided by the European Directive 2006/54/EC, it is an “unwanted conduct with a sexual connotation, expressed in physical, verbal or non-verbal ways, taking place with the purpose or effect of violating the dignity of a person and of creating a hostile, degrading, humiliating or offensive environment,” and it is legally equated to gender discrimination, under par. 1 of the same article. With regard to criminal law, a specific definition of sexual harassment does not exist, so criminal courts usually apply article 660 of the criminal code related to harassment or disturbance of people.

Singapore

²²StefaniaRadoccia, *Sexual Harassment in Italy*, Labor & Employment Law Strategic Global Topics, Sexual Harassment Law in the workplace around the World, 2018 1ed. (May 07, 2018), [http://www.ey.com/Publication/vwLUAssets/2018_Sexual_harassment_Law_in_the_workplace/\\$FILE/Sexual-harassment-Law-in-the-workplace-2018.pdf](http://www.ey.com/Publication/vwLUAssets/2018_Sexual_harassment_Law_in_the_workplace/$FILE/Sexual-harassment-Law-in-the-workplace-2018.pdf).

In Singapore²³, considering that it is a corporate hub, the offence of sexual harassment at workplace falls under the scope of the Protection from Harassment Act (PHA), which was introduced in Singapore in 2014 to provide a range of criminal sanctions and civil remedies to protect people from harassment, stalking and other antisocial behavior.

The short comings of sexual harassment of women at workplace (prevention, prohibition and redressal) act, 2013

In many ways, the Vishaka guidelines in 1997 formed the basis of the present Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 however; the processes that have come into being to check this kind of harassment are not entirely effective. Workplace is society in microcosm and given the high stakes in career and financial success, it has a more polished, public and agreeable interface of human interaction²⁴. The organization is a diverse, complex hotbed of prevalent aspirations, lifestyles and values with social, psychological and cultural tendencies. Fueling this further, next gen workforce is ushering in new concepts of work-life.

The Act is ill-equipped to deal with the new dynamics of power play between the egos of the boss-subordinate, exploitation and vulnerability of the true victim (either the cornered boss or the victimized subordinate employee) and the extent to which 'informality' at work the organization allows most employees to take cue from.

The constitution of the Internal Committee (IC) poses a big problem in itself. There is hardly any clarity in terms of the eligibility criteria of the Members of the IC, especially in the appointment of an external Member in Internal Committee (IC). This is because not only does it give an opportunity to the favored party in dispute, to take advantage of his position/ status in the organization to manipulate the appointment of this Member in the IC but the inclusion of an external member also poses a risk to the confidentiality of the institution. Further, the powers conferred upon the Chairperson of the Committee are not sufficient to deal with matters concerning the accused who is a senior, higher authority or even the owner of the organization. It is pertinent to mention that the eligibility of all such members is left open for interpretation in the Act by merely mentioning the minimal

²³ Jennifer Chih, *Sexual Harassment at Workplace (Singapore)*, Labor & Employment Law Strategic Global Topics, Sexual Harassment Law in the workplace around the world, 2018 1ed. (May 07 2018), [http://www.ey.com/Publication/vwLUAssets/2018_Sexual_harassment_Law_in_the_workplace/\\$FILE/Sexual-harassment-Law-in-the-workplace-2018.pdf](http://www.ey.com/Publication/vwLUAssets/2018_Sexual_harassment_Law_in_the_workplace/$FILE/Sexual-harassment-Law-in-the-workplace-2018.pdf).

²⁴ Nanda Majumdar, *Mars and Venus in the Boardroom*, XLIII No. 11, INDIATODAY, 66, 66 (2018).

eligible grounds such as social or legal background raising an overall concern on the credibility, efficiency and competency of such a Panel.

Another self-negating factor is that the employer is supposed to nominate members to the committee, i.e. the Internal Committee. This provision completely ignores the power dynamics that is generally prevalent in the workplace. Hence, such a provision gives an upper hand to the employer who might be the perpetrator himself, or to an employer who is in direct competition with the victim.

The Act also fails to recognize the 'geographical dimensions' of workplace and the geographical dimensions of workplace are rather restrictive, thereby rendering many situations out of the ambit of the Act. For example, in the famous case of *Roopan Deol Bajaj v. Kanwar Pal Singh Gill*²⁵, the sexual harassment took place at a dinner party between two top Indian bureaucrats where the accused Mr. K.P.S. Gill (the then Director General of Police, Punjab) misbehaved with Ms. Roopan Deol Bajaj, an IAS officer of Punjab Cadre. Though this was covered under the corresponding section for outraging the modesty of women under the Indian Penal Code, 1860, however, the present Act does not provide any recourse to any incident happening outside the purview of 'workplace', although arising out of the workplace relationship between the parties.

As per the Act, the Internal or Local Committee can take steps for conciliation between the perpetrator and the victim, if the victim so desires. Moreover, it has been stated that after conciliation is arrived at, no further inquiry would take place. Although meant to ensure that cases that can be solved through an accommodative approach do not get entangled in litigation, many believe that this provision is highly insensitive, as it provides a mechanism of compromise for an act of sexual violence against women that undermines their dignity.

While the US Supreme Court has recognized the standard for retaliation against a sexual harassment complainant to include any adverse employment decision or treatment that would be likely to dissuade a "reasonable worker" from making or supporting a charge of discrimination²⁶, the Indian legislature on sexual harassment at workplace has failed to do so, thereby subjecting the complainant to social boycott as well as emotional harassment at workplace.

²⁵ Gill, *Supra* Note 6.

²⁶ Burlington Northern & Santa Fe Railway Co. v. White, *Supra* Note 6.

Used or misused?

The organization is a diverse, complex hotbed of prevalent aspirations, lifestyles and values with social, psychological and cultural tendencies. Fueling this further, next gen workforce is ushering in new concepts of work-life. The lines between 'professional' and the 'personal' are blurring to bring the 'whole person' to the workplace. The persistent use of social media such as Facebook, Snapchat and Instagram has further accelerated the blurring of the line between private lives and professionalism where co-workers often comment/ interact at a very personal level at these platforms.

While the Act was legislated keeping in mind the safeguards of the victim/ complainant, however, due to the loopholes, the perpetrator often benefits. Usually, the victim is kept in the dark about the nature of evidence collected by the IC to establish the case and instead of being given legal, psychological and other assistance at every stage and to be informed and allowed to participate at every stage of the enquiry, she is treated as a witness and hardly apprised of the progress/ course taken by the IC. More often than not, in Government organizations, the victim has to get her copy of the IC Report under the Right to Information Act, 2005. The National Commission for Women, New Delhi receives many complaints from complainants (especially working in the private sector) who request the intervention of the Commission in ensuring a just and impartial inquiry under the Sexual Harassment at Workplace Act.

This Act has become another tool of inflicting the victim with social boycott and emotional harassment at workplace. The presumptive notion in the minds of the people that the complaint could be filed for ulterior motives also, thereby perpetuating the hatred against women and diminishing the cause of woman, rather than promoting it. Already faced with the burden of power politics in the workplace, this provision adds to the woes of a victim who plans to file a complaint. For example, in an intriguing case the military court ordered Indian Air Force Flying Officer Anjali Gupta's dismissal from service when her complaint of sexual harassment against three senior officers was proved false and mala fide in the Military Court. On the contrary she was accused of indiscipline, misappropriating funds, insubordination and failure to report for duty, which finally led to her death as she committed suicide.

Sexual harassment is not about sexual attraction, at its core, it's about power and dominance²⁷. It is an offence in which the perpetrator holds all the cards and has the power to smash the victim's credibility to pieces. A man in a senior position is not used to the word 'no' especially if the power dynamics is unequal. It becomes an ego issue for them when a subordinate woman colleague says 'no'.

Conclusion

Thus, there is a need to restructure the current Act and ensure that all the stakeholders are on-board with it. There is a need to safeguard the innocent party and one of the ways to put a stop to sexual harassment at workplace is through education.

However, organizations invariably fail to match intent with behavior. 'Official' policy or codes of conduct are belied by actual attitudes on the ground. What the 'informal' organization allows is what most employees take cues from. On the other hand, trying to over-regulate, over police or exert intrusive control too is counter-productive²⁸.

It entails taking on board, the majority (male) and minority (female) attitudes, conducts and habits. It will take much contrarian effort to create 'safe, balanced and gender intelligent' workplaces where both men and women can be equally authentic. In order to maintain a work environment conducive to healthy balance between personal and professional spaces, there is a need to be aware of one's own sexual boundaries as well as of the other individual's. Sexual harassment cannot be addressed through straitjacket formula, the organization must bring together all its organs and people to understand and respect the role each gender has to play at the workplace.

Sexual harassment can only be checked if the youth in schools and other educational institutes are cultivated and nurtured to respect the genders differences and understand that a 'no' means a 'no'. The organizations too need to understand the urgency of taking the complaints received seriously and nip the harassment in the bud.

²⁷SaireeChahal, *Getting to a Safe Place*, XLIII No. 11, INDIATODAY, 68, (2018).

²⁸Majumdar, *Supra Note 24*.