

Sexual Harassment at Workplace: An Overview of the Legal Framework in India

Divya Behl¹

Available online at: www.xournals.com

Received 15th January 2018 | Revised 1st February 2018 | Accepted 13th March 2018

Abstract:

The right to be protected from sexual harassment and sexual assault is one of the pillars on which the very construct of gender justice stands. In several countries, sexual harassment at workplace is not identified as a distinct category of a prohibited activity. In India, until the Vishaka case, like these several countries, there has been, for a long time, no specific provision but a plethora of legal provisions to identify, recognize and define this problem, may be under various distinct categories and without identical terminologies. The Indian Penal Code, 1860; The Code of Civil Procedure, 1908; The Code of Criminal Procedure, 1973; The Indian Evidence Act, 1872, along with many other special acts and welfare legislations deal with this issue in one way or the other and provide for protection of women from such aberration. The paper shall also discuss the international conventions to which India is a party and have thus become a source of law. The paper further draws an analysis of the 'Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013' drawn after 14 years of the Vishaka judgement and many bills drawn on the issue.

Finally, the paper concludes by enlightening the need for focussing on the need for preventive mechanisms which accompany the legislative measures.

Key Words: sexual harassment, sexual assault, work place

Authors:

1. Amity Law School, IP University, Delhi, INDIA

Introduction

‘The man who has in his power to hire and fire women from an interesting and lucrative position may profit by that factor to extort sexual favours that would not spontaneously be offered to him. A man who is famous or charismatic might exploit those advantages to humiliate women in ways that they would otherwise angrily resist What the men do not realize is that they are exploiting the oppressed and servile status of women.’¹

By analysis of the daily reports in the mass media, it becomes quite clear that from being ‘mere’ social issue, Sexual Harassment at workplace has metamorphosed into a social malaise. Its multiple devastating effects become visible on the whole weave of the social fabric in bold impressions, both as a cause and an effect. It not only violates their sense of dignity and right to earn a living in healthy work environment but also is against their fundamental rights as well as basic human rights.

The intensity of its bite is being felt gravely these days because of its new ‘avataar’ with bloody tentacles. Sexual Harassment at work place may be termed as coercive, exploitative, abusive or unprofessional behaviour but it remains a serious affront to human dignity. The issue has become ubiquitous across the world transgressing all limits and borders. It has registered its presence at every workplace across the world. The rise in such incidences may be attributed to increased participation and splendid achievements of women in almost every profession, till hitherto conventionally monopolized by men. The increased influx of women in jobs has also given rise to preoccupation with conflicting ideologies and troubled social conditions. All this has also brought a sea change, both qualitative and quantitative, in workplace equations, generating and spreading virus of Sexual Harassment at workplace.

Sexual Harassment- What it really means?

Sexual Harassment is a behaviour with a sexual connotation that is abusive, injurious and unwelcome. It places the victim in an atmosphere of intimidation, humiliation or hostility. It may be constituted by many

or a single act and the intention of the harasser has no relevance. There is a whole range of behaviour and activity, which may not fall squarely within the definition above but still it may constitute or may amount to Sexual Harassment.

Following can be a few of the illustrations of such behaviour and any of these may be perceived as Sexual Harassment:

- 1) A sexual comment or sexually determined behaviour such as.
- 2) Leering at another’s body and/or sexually suggestive gesturing.
- 3) Displaying sexually visual material such as pin ups, cartoons, graffiti, computer programs, and catalogues of a sexual nature.
- 4) Telling a woman employee about the ways she dresses up.
- 5) Calling her up late at night with a request to have dinner with her repeatedly with which she is not comfortable.
- 6) Making sweeping statements while delivering lecture on advertising, for example, women are the best models to sell a product; that body of the car should be sleek and sexy like a woman; soap has to be soft to touch and so on.
- 7) Any other verbal or non-verbal conduct sexual in nature

A popular misconception about Sexual Harassment is that it inevitably includes physical sexual contact at any time, place and in any context. Also, it may not be true as always that every kind of sexual violation should involve visible proof. The conduct constituting Sexual Harassment encompasses both physical as well as psychological behaviour.

Extent and Types of Sexual Harassment

To evaluate the problems, it is essential to identify its vivid forms and understand the extent to which these exists in the society; though, the statistics and the available data may not reveal the true picture.

The Vulnerables

Women, across the age groups and class, face this menace. Younger and new entrants into the profession

¹ Germaine Greer,” Seduction is a four-letter word”. In L.G. Shultz(ed.), Rape Victimology, Illinois, CC Thomas, 1975, p.385

especially in private sector are equally vulnerable as women on the age of their retirement. Even widows who get jobs on compassionate grounds or divorced women are not spread. The crux of the matter is that a major chunk of the population has to endure such sexual gestures and comments without any fault of theirs.

Admitting and assuming that not all men are potential rapists, batterers, molesters and tortures of women, all women are potential victims of Sexual Harassment crosses all professions, social strata and levels of income.

Power Games

Sexual Harassment speaks more to power relationships and victimization than it does to sex itself.² It is the improper use of power to extort sexual gratification and consists of misperception or misunderstanding of a person's intentions. It reflects a power relationship, male over female that is exploitative.³

"It results from a misuse of power-not from sexual attraction"⁴ as it reflects a disparity in power between the perpetrator and the victim, which more often than no, mirrors the power differentials between men and women in society.⁵

A claim of Sexual Harassment at workplace may be predicated on either of the following two types:

*"Harassment that involves the conditioning of concrete employment benefits on sexual favours, and harassment that, while not affecting economic benefits, creates a hostile or offensive environment."*⁶

For the first time, the terms appeared in academic literature and subsequently found their way into decisions of the United States Courts of Appeals and in due course of time acquired their own significance.

Highlighting the importance of distinction, the US Supreme Court said,

*"The principal significance of the distinction (was) to instruct that Title VII is violated by either explicit or constructive alterations in the terms or conditions of employment and to explain the latter must be serve or pervasive."*⁷

A. Quid Pro Quo

When it is literally translated, it means "this for that". It refers to situations where an employer or superior at work makes tangible job-related consequences such as promises of promotion, higher pay, academic advancement etc. conditional upon obtaining sexual favours from an employee.⁸

This form of Sexual Harassment involves making conditions of employment (hiring, firing, promotion, retention etc.) contingent on the victim providing sexual favours.

This type of Sexual Harassment holds the woman to ransom as her refusal to comply with a request can be met with retaliatory action such an action must prove that

- The employee was subjected to unwelcome sexual advances or request for sexual favours; and
- The reaction to the harassment-rejection or submission as the case maybe -affected tangible aspects of the employees' compensation, terms, conditions, and promotion, access to training opportunities and/or any other privileges of employment. (ibid)

Adverse work consequences maybe of 2 types:

1. *Tangible*- this type of consequences are quite visible such as hiring, firing, failing to promote, re-assignment with significantly different responsibilities, a decision to cause a significant change in benefit, a demotion evidenced by a decrease

² *Sexual Harassment in the work place: Opportunities and Challenges for legal redress in Asia and the Pacific*; International Women's Right Action Watch (IWRAP) Asia Pacific, 2005.p.2

³ Rehana Sikri, *Women and Sexual Exploitation: Harassment at Work*, Kanishka Publishers, 1999 pp.130, 131

⁴ William Petrocelli and Barbara Kate Repa, *Sexual Harassment on the Job*, Nolo Press. 1992, p. 1-9

⁵ *ILO. Technical Report for Discussion*.ILO-Japan Regional; International Women's Right Action Watch (IWRAP) Asia Pacific 2005.p.2

⁶ *Meritor Savings Bank v. Vinson*, 477 US 57 (1986); *Henson v. Dundee*, 682 F.2d 897 (11th Cir.1982)

⁷ *Burlington v. Ellerth*, 524 US 742 (1998)

⁸ International Women's Rights Action Watch Asia Pacific (IWRAP) Occasional Papers Series No.7, *Sexual Harassment in the Workplace: Opportunities and the Challenges for the Legal Redress in Asia and the Pacific*, p.8

in wage or salary, a material loss of benefits and significantly diminished responsibilities.⁹

2. *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 or demeaning environment.¹⁰

Simply speaking, if boss docks her pay or fires her or otherwise punishes her for rebuffing and advance, he is flat-out guilty of this type of harassment.

B. Hostile Work Environment

The U.S. Supreme Court held that when the 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.'¹¹

Whether an environment is 'hostile' or 'abusive' can only be determined by looking into the totality of the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether its physically threatening or a mere offensive utterance; and whether it unreasonably interferes with an employee's work and performance."

The House of Lords in an English case¹² held that it was not necessary for the victim to demonstrate physical or economic consequences and that compensation for injury to feeling can be awarded where an employment is taken that results in a complaint's role and position being substantially undermined, or on her being increasingly marginalized at work.

In this case, the US Supreme court undertook a detailed analysis of what constitutes "hostile environment" Sexual Harassment¹³ and quoted with approval, the Federal Equal Employment Opportunity Commission (EEOC) Guidelines on Sexual Harassment.¹⁴ The court stated that employees have

"the right to work in an environment free from discriminatory intimidation, ridicule and insult" and that "a requirement that a man or a woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets."

Quid pro quo and hostile work environment, though two specific forms of Sexual Harassment, do not occur in isolation and one may lead to other. Moreover, it is not possible to devise a straightjacket formula to distinguish between both the types as the features and ingredient overlap very often.

The unified approach has been preferred by some instead of the dichotomy that has been very often downplayed by the courts. Chief Justice of Canada Supreme Court observed:

*"While the distinction may have been important to illustrate forcefully the range of behaviour that constitutes harassment at a time before Sexual Harassment was widely viewed as actionable, in my view there is no longer any need to characterize harassment as one of these forms. The main point in allegations of Sexual Harassment is that unwelcome sexual conduct has involved the workplace, irrespective of whether the consequences of the harassment included a denial of concrete employment rewards for refusing to participate in sexual activity."*¹⁵

What led to Vishaka v. UOI

In 1992, Bhanwari Devi, a rural level change agent was engaged by the State of Rajasthan to work towards prevention of the practice of child marriage. During her time, she prevented the marriage of a one-year old girl. This act of hers was resented and met with harassment from men.

When she reported the same, no action was taken. This omission by the authorities came at a great cost. Bhanwari was subsequently gang raped by those men.

⁹ Burlington v Ellerth, (524) US 742 (1998)

¹⁰ Read v. Mitchell, (2000) 1 NZ LR 470

¹¹ Harris v. Forklift Systems Sys., 510 US 17 (1993)

¹² Shamoon v. Chief Constable of the Royal Ulster Constabulary, [2003] UKHL 11.

¹³ Meritor saving Bank v. Winson, 477 US .57 (1986)

¹⁴ The Guidelines stated that sex related misconduct which "has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment," whether or not it was directly linked to an economic quid pro quo, constituted Sexual Harassment

¹⁵ Janzen v. Platy Enterprises Ltd., [1989] ISCR 1252.

Based on this, a PIL was filed by Vishaka and other women groups against the State of Rajasthan and the Union of India before the Supreme Court. It proposed that sexual harassment be recognised as a violation of women's fundamental right to equality and that all workplace/establishments be made accountable and responsible to uphold these rights.

After 16 years of this landmark judgement, the country finally has a law to ensure a safe working environment for women, which laid down the preventive measures and a mechanism for redressal.

Vishaka Guidelines: The Beginning of an Era

In India, there was no statutory definition of Sexual Harassment till 1997 though there had been quite a few notable judgements.¹⁶

The following preventive steps were prescribed for the employers "without prejudice to the generality of the obligations.":

- a. Express prohibition of Sexual Harassment at workplace should be circulated in proper ways.
- b. Public sector bodies relating to discipline should include rules and penalties should be given to the offender.
- c. As regards private employers, steps should be taken to prohibit aforesaid under the Industrial Employment (Standing Orders) Act, 1946.
- d. Proper work conditions should be provided to women as there is no hostile environment towards them.
- e. *Criminal Proceedings*: Under any law, the employer shall initiate action according to the law by making complaint with the appropriate authority. The victims of Sexual Harassment should have the option to seek transfer of their own transfer.

Other guidelines relate to:

- Disciplinary Action
- Complain committee
- Complaint mechanism
- Workers initiative
- Awareness

¹⁶ *Radha Bai v. Union Territory of Pondicherry*, AIR 1995 SC 1476; [1995] 4 SCC 141; *Rupan Deol Bajaj v. KPS Gill* (1995) 6 SCC 194; AIR 1996 SC 309.

¹⁷ *Maneka Gandhi v. Union of India*, AIR 1978 SC 597

- Third party harassment

Principle of Fairness in Procedure

Vishaka was a quantum leap in expanding the 'Principal of Fairness in Procedure' by the Court after *Maneka Gandhi's* case¹⁷ where the Court, for the first time, had observed that the right to equality would also include the right not to be treated in an arbitrary manner. After 1978 probably it was for the first time in 1997, in *Vishaka*, the 'Principal of Fair and Just Procedure' was expanded further to include a 'gender just' procedure in furtherance of the constitutional goals for equality.

Even 'an attempt to molest' is included

Keeping pace with the changed work culture and in its quest to provide safe and protective work environment to the women of society, the Supreme Court held that even an attempt to molest would amount to Sexual Harassment and that outrageous behaviour of the employee is sufficient enough to constitute Sexual Harassment and actual assault or touch is not necessary to prove it.¹⁸

Safe Work Place: Responsibility of the Employer

In *Vishaka*, the Supreme Court delineated the duty of the employers to take all possible steps to combat this menace at work place. Verma J (CJI later) mandated as follows:

"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 procedure for the resolution, settlements or prosecution of acts of Sexual Harassment by taking all steps require."

The Supreme Court apprehended that the legislature would take considerable time to bring legislation on this issue. Since Supreme Court has the power to lay down binding norm like any other law of the land¹⁹, it thought it necessary and expedient to formulate certain guidelines as a stop-gap arrangement till enactment of such legislation.

¹⁸ *Apparel Export Promotion Council v. A.K Chopra*, AIR 1999 SC 625; 1999 [1] SCC 759

¹⁹ Article 141 of the Constitution

The court did not leave any scope for non-compliance when it declared:

“[T] his would be treated as the law declared by this court under Art.141 of the Constitution.”

Legal Framework: In Support- The Constitution and Other Laws

▪ **The Constitution of India**

“The meaning and content of the fundamental rights guaranteed in the Constitution of India are sufficient amplitudes to encompass all facets of gender equality...”²⁰

Part III and Part IV, though constitute two entirely separate units of our constitution, carry the common theme of human rights²¹ and rights included therein are equally fundamental. It is beyond any cavil of doubt that they are complementary to each other because together they constitute the human rights regime including respectively the civil and political rights and the social and economic rights. Thus, it can be made out that the tone for reformation of the society had already been set out in our country through its Constitution.

This constitutional mandate is followed by ‘the legislative intent being expressed in the form of various enactments from time to time. The ‘Equality Code’ of the Constitution comprises of Article 14, Articles 15-18 of Part III and Articles 38, 39, 39A, 41 and 46 of Part IV.

As far as **Article 19** is concerned, gender discrimination in employment adversely affects a woman’s freedom to carry out her occupation. The Supreme Court has struck down gender discrimination in employment on several occasions. In *CB Muthamma, I.F.S v. Union of India*²², service rules that placed unfair burden on women were labelled as discriminatory. In *Mackinnon Mackenzie and Co. v. Audrey D’ Costa*²³, the Court held that gender-based

discrimination in employment arises when men and women are paid differently for the same work.

For the first time, the SC in *Vishaka* held that one of the logical consequences of incidents of sexual harassment at work place is the violation of the woman’s fundamental right under Article 19(1)(g) “to business”.

Further, the SC in its interpretation of the “right to life” under **Article 21**²⁴ has on many occasions stressed that the right to life could not be equated to living out an animal existence.²⁵ Gender discrimination has been recognised as an obstacle to the full realization of the right to life under Article 21. In yet another case²⁶, the court held that equality, dignity of person and the right to development are inherent rights of every human being.

In *Vishaka*, the Apex Court held that each incident of sexual harassment of women at the workplace is a violation of the right to life under Article 21, which implies the right to dignity. According to the court, the principle of gender equality includes protection from sexual harassment and the right to work with dignity, which had been reflected in international conventions and norms. The court went on to hold that it is the primary responsibility for ensuring such safety and dignity of women through suitable legislation, and executive.

The Supreme Court in *A.K Chopra’s case* re-iterated that the Indian State had an obligation under CEDAW and the Beijing Declaration to prevent sexual harassment and held it to be beyond the scope of debate that sexual harassment of a female at the place of work is incompatible with the dignity and honour of female.²⁷

An act of Sexual Harassment is a violation of the right to privacy of a woman, and therefore of the right to personal liberty and life under Article 21. In another case,²⁸ which dealt with the issue of reduction in the

²⁰ Late Chief Justice J.S. Verma, Supreme Court of India, *Vishaka v. State of Rajasthan*

²¹ V.N. Shukla, *Constitution of India*, Revised by M.P. Singh, 10th edn., Eastern Book Co., 2004

²² *CB Muthamma, I.F.S v. Union of India* (1985) 3 SCC 545, pp. 572-573, para 33

²³ *Mackinnon Mackenzie and Co. v. Audrey D’ Costa*, (1987) 2 SCC 469

²⁴ No person shall be deprived of his life or personal liberty except according to procedure established by law

²⁵ *Francis Coralie Mullin v. Administrator, Union Territory of Delhi*, 1981, 1 SCC 608; *Olga Tellis v. Bombay Municipal Corporation*, (1985) 3 SCC 545

²⁶ *Madhu Kishwar v. State of Bihar*, (1996) 5 SCC 125; *C. Mudaliar v. Idol of Sri Swaminathaswami Thirukoil* (1996) 8 SCC 525

²⁷ *Apparel Export Promotion Council v. A.K Chopra*, AIR 1999 SC 625; 1999 [1] SCC 759

²⁸ *State of Karnataka v. Krishnappa* [2000] 4 SCC 75, p.83 para 14

sentence awarded in the case of rape of a girl of tender years, the Court observed that sexual violence, apart from being an act of physical violence is an unlawful intrusion of the right to privacy and personal integrity. The Apex Court held that “[e]ven a woman of easy virtues is entitled to privacy and no one can invade her privacy as and when he wishes. She is entitled to protect her person if there is any attempt to violate it against her wish. She is equally entitled to the protection of law.”²⁹

The right to privacy includes the “right to be let alone”.³⁰

Even so, the Supreme Court has attempted to define the right to privacy to include personal intimacies of the home, family, marriage, procreation, motherhood and child rearing.³¹ Elaborating on the right, any questions to a female candidate regarding personal problems such as pregnancy, menstruation etc., which modesty and self-respect may preclude the disclosure of, should be deleted from enquiry by the employer.

Article 32: The Right to Move the Supreme Court through Appropriate Writ Petitions

The power of the Supreme Court in clause (2) is not confined only to the issuance of writs. It extends to issuing of any directions or orders that may be appropriate for the enforcement of any of the fundamental rights. The power of the court is not only injunctive in ambit, that is, preventing the infringement of a fundamental right but is also remedial in scope and provides relief against breach of a fundamental right already committed.

Article 226: Power of High Courts to Issue Certain Wits

Article 226 provides for the right to move the appropriate High Courts for the enforcement of fundamental rights and other legal rights.³² The judiciary has also been liberal while interpreting the contents of fundamental rights.³³ The High Courts are

also enabled to mould the relieves to meet peculiar and complicated requirements of this country.³⁴

In granting the appropriate relief, the Court is not bound by the adversary procedure envisaged in the Civil Procedure code and the Evidence Act and can devise inquisitorial or other suitable procedure to achieve the object and purpose of Article 226³⁵ Such an approach to Article 226 is more in consonance to our social reality where a vast majority of people cannot properly fight out their claims due to poverty, ignorance and other similar factors.

Directive Principles of State Policy

Part IV the Constitution contains Directive Principles which may not be enforced by the Courts as such but they must interpret laws as to further and not hinder the goals set out therein.³⁶ Few of these can be made applicable to the cases of sexual Harassment at workplace.

Article 39 provides for certain principles of policy to be followed by the state. (“The state shall, in particular, direct its policy towards securing-

- a) That the citizens, men and women equally, have the right to an adequate means of livelihood;
- b) That there is equal pay for equal work for both men and women.
- c) That the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by the economic necessity to enter avocations unsuited to their age or strength;)

The more important provision is **Article 39-A** which enjoins the state to secure that the operation of the legal system promotes justice, on a basis of equal opportunity and to provide free legal aid, in particular, by suitable legislation or schemes or in any other way, to ensure that the opportunities for securing justice are not denied to any citizen, by reason of economic or other disabilities. It implies that justice should be so administered that it is available to all equally, irrespective of ignorance, poverty or any other cause despite plethora of legal and constitutional guarantees,

²⁹ *State of Maharashtra v. Madhukar* [1991] 1 SCC 57

³⁰ *R. Rajgopal v. State of Tamil Nadu* 1994 6 SCC 632

³¹ *Govind v. State of MP* [1975] 2 SCC 148, p.156, para 24. See also *R. Rajgopal v. State of T.N.* [1994], 6 SCC 632

³² *Bodhisattwa Gautam v. Subhra Chakraborty*, [1996] 1 SCC 490

³³ *Vineet Narain v. Union of India*, [1998] 4 SCC 226, AIR 1988 SC 2211

³⁴ *Bandhua Mukti Morcha v. Union of India*, [1984] 3 SCC 161, 188-189, AIR 1984 SC 802, 815

³⁵ *Ibid*

³⁶ *UPSC Board v. Hari Shankar*, AIR 1979 SC 65; *Municipal Corporation of Delhi v. Female Workers [Muster Role]*, AIR 2000 SC 1274

the equality of sexes would remain a pious wish unless the principles contained in Article 39-A are implemented not only in letter but also in spirit.³⁷

Article 42 provides for securing just and humane conditions of work and maternity relief. The Maternity Relief Act and other similar rules and regulations and certain labour laws are in consonance with this article. This article exhibits the concern of the framers of the constitution for the welfare of workers.

The state shall endeavour to secure, by suitable legislation or economic organization or in any other way..., [c]onditions of work ensuring a decent standard of life and full enjoyment of leisure and social and cultural opportunities...

...as prescribed under Article 43.

It has been provided in the constitution vide Article 51-A that it shall be the duty of every citizen of India:

- a) *To abide by the Constitution and respect its ideals and institutions.*
- b) *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.* (The Indecent Representation of Women 'Prevention' Act, 1986 is one such act passed in pursuance of this Article.)
- c) *to develop the scientific temper, humanism and the spirit of enquiry and reform.*
- d) *To safeguard public property and to abjure violence.*

The State shall work towards fostering respect for its obligations under international law and treaties in the dealings of organized people with one another as provided in Article 51

Article 253: Legislation for Giving Effect to International Agreements

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." Entry 14 of the Union List confers on the Parliament exclusive power to make laws with respect to entering and implementing of treaties and conventions etc.³⁸

▪ **The Indian Penal Code, 1860³⁹**

In Indian criminal law, there is no chapter specifically dealing with 'violence against women' and available provisions to tackle such problems lie scattered under various chapters. Moreover, as far as Sexual Harassment is concerned neither there is any offence identified, described or listed as such nor it has ever been enunciated as juridical category of crime.⁴⁰ From these propositions, this can and should not be inferred that the Indian Penal Code, 1860 does not recognize sexual Harassment even informally, or that there are no existing laws as such that can be invoked in case such issue arises.

It has been clearly mentioned in *Vishaka* that the definition given therein is not exhaustive one and that it does not preclude the possibility of other serious manifestations of sexual Harassment being covered under offences that are already defined in the penal code.⁴¹

Following provisions of the Indian Penal Code may be evoked in case, act or incident of sexual Harassment at workplace:

S. N o.	Sections Indian Penal Code	Details
1	292 to 294	Obscenity
2	339 to 348	Wrongful Restraint and Wrongful Confinement

³⁷ Equal justice and free legal aid Inserted by the constitution 'forty second Amendment' Act, 1976, Sec.8 [w.e.f 3-1-1997], V.N Shukla's *Constitution of India*, Eastern Book Co., p. 304

³⁸ Seventh Schedule: List 1 - [Union List], Entry 14- Entering into treaties and agreements with foreign countries and implementing of treaties, agreements and conventions with foreign countries

³⁹ As amended by the Criminal Law Amendment, 2013 w.e.f 03.02.2013

⁴⁰ Pratiksha Baxi, *Sexual Harassment*, available at <http://www.india-seminar.com/2001/505/505%20pratiksha%20baxi.htm>

⁴¹ Section 294-obscene acts and songs- "whoever, to the annoyance of others

a) Does any obscene act in public place, or
b) Sings, recites or utters any obscene songs, ballad or words, in or near any Public place, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine, or with both

3	354, 354A to 354D	Outraging the modesty of a woman
4	375 to 376, 376A to 376E	Rape
5	499 to 500	Defamation
6	503	Criminal Intimidation
7	509	Word, gesture or act intended to insult the modesty of a woman
8	511	Attempt to commit offences

Section 503: Criminal Intimidation

A variety of incidents falling under the category of sexual harassment may be covered under this section if the woman or her family is threatened for the fear of injury. (Section 503: Criminal Intimidation: Section 503 describes the kinds of threat that may trigger this section, such as a threat either to his person, reputation or property. This includes a person's physical and mental space, a threat to a person or to the property of another person in whom the threatened person has an interest. Thus, this section has a very wide scope.

According to the section, there are three situations in which the section may be brought into operation:

- Threat with intent to cause alarm*
- Causing a person to do anything which he is not legally bound to do.*
- Prevent a person from doing anything which he is legally entitled to do.*

▪ **The Indian Evidence Act ⁴²**

There are various provisions of Evidence Act which may be helpful in establishing the offence of sexual harassment at workplace, for that matter just like the cases of sexual assault or rape.

Section 114-A: Evidence of Prosecutrix

In the Indian setting, refusal to act only on the testimony of a victim of a sexual assault, in the absence

of corroboration, as a rule, is nothing less than adding spice of insult to the injury. Like the evidence of any other injured witness, the evidence of a girl or woman raped or molested should bear enough weight since a female bound by traditional conservative and non-permissive society of India would be extremely reluctant even to admit that any incident which is likely to reflect her chastity had ever occurred.⁴³

Criminal Procedure Code⁴⁴

In all cases of offences committed against women it is left to the discretion of the women injured or her relations to take her first to the Police or Hospital. The doctors should not insist on police report as a prerequisite for giving first aid or medical examination. Police officials are attached with majority of the Government hospitals to attend Medico-legal cases (MLC).

Relevant CrPC sections in this regard are sections 39, 47(2), 51(2), 53(2), 54, 53A, 54A, 98, 100 (3), 154, 160, 164, 197.

▪ **Women Specific Economic Legislations**

- The Factories Act, 1948
- The Industrial Disputes Act, 1947

▪ **Social Legislations**

- The Scheduled Castes and Tribes (Prevention of Atrocities) Act, 1989
- The Immoral Traffic (Prevention) Act, 1956
- The Indecent Representation of Women (Prohibition) Act, 1986

▪ **Sexual Harassment of Women at Work Place (Prevention, Prohibition and Redressal) Act, 2013**

After 14 years of the *Vishaka* judgement and man draft bills on the issue, finally 'Sexual Harassment of Women at Work Place (Prevention, Prohibition and Redressal) Act, 2013' received the President's assent on 22nd April, 2013. It was notified in the Gazette of India on 23rd April, 2013.

⁴² As amended by the Criminal Law Amendment Act, 2013 w.e.f 03.02.2013

⁴³ *Bhuginbhai Hizinbhai v. State of Gujrat*, AIR 1938 SC 753; *Krishan Lal v. State of Haryana* AIR 1980, SC 1252

⁴⁴ As amended by the Criminal Law Amendment Act, 2013 w.e.f 03.02.2013

The Act not only symbolizes India's commitments under CEDAW but also reflects culmination of the Apex Court's initiative, towards a meaningful legislation and safer work place environments for women.

Salient features of the act are as follows:

- The Act proposes a definition of Sexual Harassment, which is as laid down by the SC in *Vishaka v. State of Rajasthan*. Additionally, it recognises the promise or threat to a women's employment, prospects or creation of a hostile work environment as a 'Sexual Harassment' at Work place and expressly seeks to prohibit such acts.
- The Act is applicable both in Government and Private Sector, and brings in its ambit even domestic workers and agriculture labour, both organised and unorganised sectors. Students, research scholars in colleges/ university and patients in hospitals have also been covered.
- The Act provides protection not only to women who are employed but also to any women who enters the workplace as a client, customer, apprentice and daily wager or in ad-hoc capacity.
- Under the Act, every employer requires to constitute an **Internal Complaints Committee (ICC)**. Since a large number of the establishments (41.2 million out of 41.83 million as per economic census, 2005) in our country have less than 10 workers for whom it may not be feasible to set up an ICC, the Act provides for setting up of Local Complaints Committee (LCC) to be constituted by the designated District Officer at the District or the Sub-District levels, depending upon the need. This twin-mechanism would ensure that women in any workplace irrespective of its size pr nature, have access to a redressal mechanism. The LCCs will enquire into the complaints of sexual harassment and recommend action to the employer or the District Officer.
- Employers who fail to comply with the provisions of the Act will be punishable with a fine which may extend to Rs. 50,000.

- The Complaint Committees are required to complete the enquiry within 90 days and a period of 60 days has been given to the employer/ DO for implementation of the recommendations of the committee.

- The Act provides for safeguards in case of false or malicious complaints of sexual harassment. However, mere inability to substantiate the complaint or to provide for adequate proof would not make the complainant liable for punishment (Section 14 (1))

- The Act covers members of the armed forces.

- An "aggrieved woman" includes only 2 categories- a woman in relation to either the workplace or a 'dwelling place or a house'. "Students" are covered under educational institutions.

Conclusion and Suggestions – What needs to be done

*"Legislation may not be the best means to control a problem which is one of society: [w]hat is important is to bring about a change in mentality, as many women trade unionists have often pointed out... efforts should be made to identify measures that would help to change behaviour and attitude, and thus prevent Sexual Harassment."*⁴⁵

It has become increasingly apparent over recent decades that legislative measures for combating Sexual Harassment needs to be accompanied by preventive mechanisms introduced at the work place level.⁴⁶ Throughout the world, Governments, employers'/workers' organizations and NGOs' are increasingly advocating that Sexual Harassment be addressed through work place policies and complaints procedures. This trend reflects the recognition that workplace policies can be the most effective tool for

⁴⁵ Federation of Austrian Industry; Conditions of Work Digest, Vol. 11, 1/1992, "Combating Sexual Harassment at Work," ILO, Geneva, p.238

⁴⁶ Technical Report for Discussion at the ILO/Japan Regional Tripartite Seminar on Action against Sexual Harassment at Work in Asia and the Pacific, Malaysia, 2001, p. 65

preventing the Sexual Harassment, their main role is to ensure that it does not take place.⁴⁷

Formulating a Multi-Pronged Strategy

Just like any other professional, occupational or workplace hazard, the employees should strive strategically to protect their employers against the hazards entailed by this multifaceted workplace syndrome. The European Trade Union Confederation (ETUC) in its resolution has stated as under:

“A strategy aimed at improving health and safety at work means that all improvement in this field should be based in first instance, on preventive policies. The aim of prevention is to create optional conditions that will reduce the occurrence of Sexual Harassment to a minimum. Sexual Harassment can be prevented by giving special attention to the organization of work, the working conditions and the working environment including the design of the workplace. It should be anticipated to what risks people are potentially exposed, just like this is done with other safety and health risks. Harassing women can be a part of a (matter-of-course) culture in the workplace. This culture may manifest itself in sex-related remarks, pornographic pictures on the wall, etc. Preventive policies should include these aspects of the working environment.”

The SC, also, underlined the need for employers to take all necessary steps to combat this program when it held that It shall be the duty of the employer or other responsible persons in workplaces or other responsible persons in workplaces or other institutions to prevent or deter the commission of acts of Sexual Harassment by taking all steps required.”⁴⁸ The SC directed further,

“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 woman employee should have reasonable grounds to believe that she is disadvantaged in connection with her employment.”

Restoring Confidence of the Victim

The victim may lose self-confidence, feel undervalued, suffer stress, and become demotivated/negligent at work. In extreme cases, she may lose her job which is not simply a loss to the company or to her person rather it's a loss to the whole society and ultimately to humanity. Having a clear policy to deal with the problem can be an effective preventive measure as it enables women to complain. The most effective way to encourage reporting of incidents of Sexual Harassment is to introduce a range of different measures, since this approach has been shown to result in aggrieved individuals being more confident that their employer will respond to their plight.⁴⁹

Delineation of Responsibilities

Under the guidance and supervision of the senior most administrator, any senior manager, who is a specialized and trained officer should be assigned overall responsibility. He may act as a champion and catalyst or change agent who himself is not easily deflected by problems or by the need to compromise the approach in view of other competing priorities. It should be his responsibility to 'own' the policy, to take it seriously, to oversee its implementation and to push it through the whole organization.

Consultation Sessions

Involving the staff or its representatives/trade unions throughout the development of the policy not only provides a strong foundation and a better basis on which rather stronger edifice can be raised, but it also ensures their participation and co-operation so that they become aware of the rubric of the policy and have an intimate feel of various provisions prior to its implementation. Once it is implemented, such sessions should continue whenever review or amendment of such a policy is to be carried out.

Policy Statements

Policy statements by themselves appear to be the most useful in preventing forms of Sexual Harassment

⁴⁷ Michael Rubinstein, *Dealing with Sexual Harassment at Work: The experience of industrialized countries in ILO, Conditions of Work Digest: Combating Sexual Harassment at Work*, Geneva

⁴⁸ *Vishaka v. UOI*, AIR 1997 SC 3011

⁴⁹ Rowe, in M.S Stockdale, *Sexual Harassment in the Work Place*, Thousand Oaks, Sage Publications, California, Ed.1996 and DuBois Cathy Lz, etal, Perceptions of Organisational Responses to formal Sexual Harassment complaints, in *Journal of Managerial Issues* 11, Pittsburgh, USA

which involve behaviour that is not aimed at specific individuals such as offensive comments about women in general, or the display of sexually suggestive or explicit material. All policies should contain a policy statement representing the organization position on Sexual Harassment.

- A policy statement is a statement of intent and gives the clear message that in the organization this is not appropriate workplace behaviour.
- The organization\institution should formulate policy statements expressly declaring that particular workplace as “Zero Tolerance Zone” meaning thereby that Sexual Harassment shall not be tolerated or condoned under any circumstance by the employer.
- The policy should also require victims of Sexual Harassment to report such incident/behaviour to their immediate supervisor or boss.
- The Equal Employment opportunity commission, EEOC, emphasizes that prevention is the best tool for elimination of Sexual Harassment, has stipulated clearly in its guideline., etc.

Areas to be covered in A Sexual Harassment Policy

A policy should start by giving the policy statement. With such a policy, it is always useful to draw up a code for managers and another for employees, outlining the procedure each would need to follow in cases of Sexual Harassment and should cover the advice for both, who are being harassed and alleged harassers.

Dissemination of the Policy

The policy only on paper neither serves the purpose nor proves to be instrumental in preventing the problem unless circulated and disseminated amongst the employees. The employees or the potential victims would not even know of its existence until it is communicated effectively. Victims might not even know whom they should approach for help, how to complain and have their grievances redressed.

Therefore, the courts, jurists, academics, legal commentators and various bodies worldwide have laid

great stress on the requirement of effective dissemination of the Sexual Harassment is not sufficient.

However, the issuance of a policy statement does not deter more personalized forms of Sexual Harassment, directed at individuals. “...Combating Sexual Harassment involves tackling sensitive issues associated with well-worn patterns of human relationships. It involves changing attitudes with respect to the role of women at work, and how they are treated and valued as workers. To effectively prevent all forms of harassment... organizations must make visible efforts by taking steps to ensure that workers are aware of policies and procedures in place.”⁵⁰ The Supreme Court of India also underscored this requirement when it is said in *Vishaka* case, “Express prohibition of Sexual Harassment... at the workplace should be notified, published and circulated in appropriate ways, “The court also said, “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.”⁵¹

A written acknowledgement from each employee confirming receipt of copy of the policy would help the employee in reviewing the effectiveness of *modus operandi* of communication used.

Role of Administrators

Primarily, it is duty of the key administrators (employees, managers and supervisor) in any organization to maintain a workplace free from all kinds of harassment taking due care of the respect and dignity of its employees. All requisite steps should be taken implement promote the policy.

Training Programs

Training is among the most important of the proactive measures contours of a Sexual Harassment policy be effectively implemented in practice.⁵² Awareness generation is, indeed, one of the most important tools for countering the menace of Sexual Harassment at work place and imparting practical training to them can do wonders to spread the same. It

⁵⁰ ILO, *Action against Sexual Harassment at Work in Asia and the Pacific*, “2001,p.138.

⁵¹ Guideline 9 as laid down by the SC in *Vishaka v. State of Rajasthan* AIR 1997 SC 3011

⁵² Deirdre McCann, *Sexual Harassment at Work: National and International Responses*, ILO, 2005, p. 59

not only renders great help to those who actually seek assistance but also sparks a chain reaction to spread the knowledge so generated to million others who silently tolerate this type of violence only due to lack of information.

Disciplinary Proceedings

The goal of a Sexual Harassment policy is to achieve a healthy workplace. Therefore, the sooner action is taken to eliminate harassing conduct, the less likely it is that any such conduct will become detrimental to the work environment.⁵³

The employer should take appropriate disciplinary action against the harasser if held guilty of Sexual Harassment in the investigation. The punishment however, should commensurate with the gravity of the misconduct.

Protection from Retaliation

Every organization should view complaint in a positive light and nothing should be on record to reflect a wrong message that it was the victim who caused the problem or that the management has adjudged the complainant to be at fault every if the complaint could not be upheld due to inconclusive evidence.

The victims of the Sexual Harassment should have the option to seek transfer of the perpetrator or their own transfer.⁵⁴

A ***Social Audit*** should be conducted regularly which may start with the report from complaints committee on the issue of Sexual Harassment. The management may scan through and distribute the audit report to keep everyone aware of what is happening in this area. Keeping up to date may also act as a precautionary step.

⁵³ *Canada Human Rights Commission v. Canada Armed Forces [1993]* 3 FC 653, dated 28-4-1999, Docket: T-1200-98

⁵⁴ *Vishaka v. State of Rajasthan*, AIR 1997 SC 311