



**LAW AGAINST SEXUAL HARASSMENT AT WORKPLACE: A COMPARATIVE STUDY
BETWEEN INDIA AND UNITED STATES**

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ABSTRACT

Sexual harassment at the workplace is an international problem. The problem has become quite worrisome in recent years with an increasing number of women joining the workforce and needs to be tackled urgently and effectively. Although India has seen major developments with respect to tackling sexual harassment at the workplace in recent years with the both the courts and the government recognizing that sexual harassment in the workplace is a grave violation of a woman's rights ever since the Vishaka case in 1997, the Protection of Women Against Sexual Harassment Bill could only be presented in the Parliament in 2010 which highlights the need for more concerted and prompt effort in this regard. In contrast the problem was recognized at a much earlier stage in the United States of America and a strong law has been framed there to deal with this menace. While it is true that sexual harassment laws in India have come a long way and that the Sexual Harassment at Workplace (Prevention, Prohibition and Redressal) Act 2013 is a step in the right direction, there is still room for improvement.

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INTRODUCTION

Sexual harassment is considered as a violation of a woman's right under Articles 14 & 15 of the Constitution, along with a provision for every citizen the 'right to practice or carry out any occupation, trade or business' which is inclusive of the right to a safe environment, free from all forms of harassment. Apparel Export Council v Chopra and Grewal v Vimmi Joshi were cases that re-emphasized the need for a law on sexual harassment at workplace. In the light of this, Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, (hereinafter referred to 'Act'), 2013 was passed in the Lok Sabha in September, 2012, and became an Act in December, 2013. (<http://www.iitbbs.ac.in/notice/sexual-harrasment-of-women-act-and-rules-2013.pdf>) Ministry of Women and Child Development, along with Prevention of Workplace Sexual Harassment Act titled the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Rules, 2013.

Background of the Act

Bhanwari Devi was a social worker at a rural level in the State of Rajasthan, where she aimed to curb child marriages in villages. As a part of her work, she tried to stop such a marriage, however, marriage took place but Bhanwari Devi

was not forgiven for her efforts to stop marriage. She was subjected to social boycott, ridicule and eventually gang-raped. She was not provided any requisite medical assistance either. As a result, the facts having irked the NGOs, led to a public interest litigation filed in the Supreme Court, which paved the way for a scheme of guidelines to prevent sexual harassment at workplace.

As a part of the guidelines, and relying on Convention on Elimination of All Forms of Discrimination against Women, adopted by the General Assembly of the United Nations, in 1979, which has been ratified and signed by India, *inter alia*, a definition was provided for unwelcome sexually determined behaviour, [Rule 3(1)(iii) CCS Rules, 1964] along with several guidelines, them being as follows-

1. Duty of the employer or other responsible persons in work places to ensure that sexual harassment does not occur.
2. Preventive Steps, like express prohibition in appropriately notified ways, 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.
3. Criminal Proceedings, Disciplinary action etc, are aspects which the guidelines sought to deal with.
4. Awareness, Worker's Initiative and Third Party harassment are the other aspects that the guidelines sought to deal with.

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The guidelines imported by the Vishakha Case were something of prominence and the fountainhead of the current regime of law against sexual harassment of women, however, a need was felt by the Centre, that the guidelines and norms are not sufficient to deal with all possible incidents of sexual harassment of women at workplaces and a strong piece of legislation was the need of the hour and accordingly the Act was enacted in the year 2013.

Scheme of the Act

The Statute applies to the whole of India and specifically provides that a woman shall not be subject to sexual harassment, and provides for a definition in relation to the same. Bodies covered under the Act are organized and unorganized, governmental, non-governmental, private, public-sector, non-governmental organizations. [Includes various organizations] Definition of sexual harassment is a convoluted one, similar to that of the Vishakha Judgment, includes 'unwelcome', sexually tinted behaviour, along with a presence or occurrence of circumstances implied or explicit promise of preferential treatment in employment which have been referred to the provision. [Section 2(n), Section 3(2), Sexual Harassment Act, 2013] The definition of employee is fairly wide and includes almost all categories. There is a provision of setting up an Internal Works Committee at each office or branch, of an organization that employes 10 or more employees, whose term shall not exceed 3 years and consist of a Presiding Member, an External Member and a minimum of 2 members from within the organization. [Section 4 of the Sexual Harassment Act, 2013] Similarly, Government is required to set up a 'local complaints committee' ("LCC") whose function is to investigate and redress the grievance of the unorganized sector. Both of the above Committees have powers in the nature of a Civil Court under the Code of Civil Procedure, 1908. A limitation of 3 months from the date of the incident has been provided for filing a complaint, which may be extended only on reasons to the satisfaction of the Court. The ICC and LCC have powers to issue certain interim reliefs, some of them being as follows transfer of the aggrieved woman or the respondent to any other workplace, granting leave to the aggrieved woman, restrain the respondent from reporting on the work performance of the aggrieved woman etc. By way of S.15 of the Act, it is stated as to what magnitude of compensation ought to be payable to the aggrieved woman and the basis of deciding such magnitude, for instance, the amount of mental trauma, loss in career opportunity, income status etc. Since sensitivity is attached to matters pertaining to sexual harassment, the Act provides significant importance to ensuring that the complaint and connected information are kept confidential. The statute prohibits the dissemination of any amount of personal data, be it identity cards, address and the matter is not subject to fall under the Right to Information Act, 2005. [Section 16 of the Sexual Harassment Act, 2013]

A breach of such confidentiality is punishable under the Act. However, in a scenario where justice is secured for a particular party it is the aim that such justice is brought to public knowledge, such that benefit of the Act is received by all. [Section 17 of the Sexual Harassment Act, 2013] Simultaneously, the Act also deters women from filing frivolous complaints, such that the spirit of the statute is understood in good faith. Furthermore, a non-compliance penalty is imposed on an employer who fails to set up an ICC

at his workplace. General Duties that have been cast upon an employer by means of the Act are as follows [Gopalakrishnan and Shroff, 2014]:

Provision of a safe working environment, formulation of a rigorous policy, display conspicuously at the workplace the penal consequences as regards the non-compliance of sexual harassment laws, timely submission of the ICC reports, formulation of annual reports, declaration of the names of all the members of ICC.

Other laws on sexual harassment at workplace

Industrial Employment (Standing Orders) Act, 1946 - The Industrial Employment (Standing Orders) Act, 1946 ("Standing Orders Act") is an Act requires an employer to define and publish uniform conditions of employment in the form of standing orders, and amongst them, the Model Standing Orders under Industrial Employment Central Rules, 1996, 'sexual harassment' is a ground for misconduct. These Model Standing Orders define 'sexual harassment' in line with the definition under the Vishaka Judgment, and provide for the requirement to set up a complaints committee for redressal of grievances to such sexual harassment. Interestingly, sexual harassment is not limited to women under this Act, which is a peculiar feature for an Indian enactment.

Indian Penal Code, 1860 - Some acts which constitute an offence under the Sexual Harassment Act, also constitute offences under the IPC, such as the following, 'outraging the modesty of a woman' [Section 354, IPC, 1908], 'sexual harassment by a man' [Section 354-A, IPC, 1908], Voyeurism, stalking etc.

Analysis of the law

While the Act aimed to cover those cases of sexual harassment which apparently were neither taken up by the guidelines of Vishakha or the Centre, it has been felt that there is a lot more that has to be done as far as the Act is concerned. Implementation of the Act would occur with perfection only if the Act itself is sound to deal with a variety of instances. Act aims to do away with unnecessary litigation, give a variety of solutions that are accommodating in nature. A collaborative understanding between the parties is a permissible practice under the Act, so long as no payment of money is being made. Furthermore, by envisaging the concept of 'extended workplace', a woman attending an event organized by her own Employer outside the working hours is also entitled to bring a claim under this Act. [<http://www.nishithdesai.com>] Furthermore, there is a clear link of this Act with the Labour Law regime present in India, and specifically has been extended to all types of organizational sectors, ones which may not have service rules, or are not covered under the provisions of criminal law. Additionally, findings of the ICC/LCC are merely recommendatory in nature, similar to disciplinary committee under labour law, since it is the duty of the employer to take a particular decision or not so as to decide whether the matter has to be taken up at all or not.

Some lacunae have been pointed out as presented below

Definitions

The definition of an aggrieved woman, has been quite wide and in my opinion there is no harm as regards the same. However, there have been contentions that, this leaves ambiguity as to whether such women would be 'working', in

terms of employment at some other place. The Act has been criticized on the grounds that the excessively wide definition of a woman does not restrict it to safe working conditions at workplace, thereby affecting the main objective of the Act. Furthermore, contract workers have not been specifically dealt with by the Act. It does not give any specific mechanism for dealing with contract workers, and it is only by implication that the same procedure be applied to them as well. The decision to take whether action is to be taken or not lies with the employer, or whether service rules are to be applied. Lastly, the definition of sexual harassment, though definitely aimed to be kept wide as much as possible, it does not include that by means of electronic media which in my opinion is a need of the hour. Similarly the interpretation of the word 'unwelcome' is subjective enough to deny a woman necessary remedy under the Act. The Act does not extend to armed forces (a sector heavily dominated by women) and agricultural workers, which makes the act slightly problematic to be largely inclusive. [<http://www.legalservicesindia.com>]

Time Frame

There are two immediate concerns that arise here, first, the time limit of 3 months, which in my opinion is not sufficient to act as a limitation period, for in a country like India, there are enough reasons to stop a woman from filing a complaint and the provision of 'false and malicious' complaint which may even make the complaint filed by a woman as frivolous. As a result defeats the object entailed in the Act is defeated.

Procedural Infirmities

The formation of committees, their composition and the rights of the employer to nominate members are aspects that may take unnecessary political turns, considering if at a workplace the employer is lax about the implementation of the Act, he/she would only nominate those persons who would not act as a hindrance in the peaceful functioning of the organization. Therefore, in a scenario where the employer is the perpetrator with the power of the ICC having been entrusted in his hands will head towards a direct competition between the employer and victim. Besides this, the qualifications of the external member are way too ambiguous for a perfect composition.

Monetary Lacuna

In my opinion, the duties that have been cast on the employer by way of the Act are merely obligatory in nature, and there is no provision for a strict implementation of those duties. A mere sum of 50,000/- is not enough to if the ICC has not been formed.

Implementation of the Act

The question that the author seeks to answer here is that, in what manner and terms is the current act in place. In 2013, a need was felt as to whether the Act is sound enough to be implemented, for there existed a void in the time frame as regards the conciliation provisions, which would lead to nothing but an ineffectiveness of the Act. Clarity was sought to be achieved in a situation where a second conviction was to occur, since the act does not cover a similar issue.

In 2014, a directive was issued to all the ministries to ensure the effective implementation of the Act, and the bodies like ASSOCHAM, FICCI etc were specifically directed to implement the Act in their respective private sectors. Since the State Government is vested with the duty to implement the Act

[Section 24 of the Sexual Harassment Act] and a training module was developed for the purpose of imparting skills to the ICC with the assistance of Inter-Ministerial Committee. [<http://www.business-standard.com>]

In 2015, all the ministries were directed to ensure that they possessed data necessary and actions required for the purpose of implementation of sexual harassment laws. In fact, the DoPT sent forms to all ministries to collect data of the progress and statistics as regards implementation of the Act. [<http://www.dnaindia.com>] In October, 2016, Maneka Gandhi stated that the Ministry of Women and Child will continue to regularly hold consultations on pertinent issues related to the act, and in the light of the same, some guidelines were issued, [<http://pib.nic.in/newsite/PrintRelease.aspx?relid=155918>)] *inter alia*, details of the implementation of the Sexual Harassment of Women at Workplace Act including the number of cases received and disposed to form part of the Annual Report, Enquiry of cases be completed in 30 days, submission of monthly progress of cases registered etc. In December, again last year the above directives were reiterated by the Ministry. [<http://pib.nic.in/newsite/PrintRelease.aspx?relid=155202>]

However, even today 70% of such cases continue to stay unreported. Though such directives have been found to exist, there is not enough data tabulation available on the implementation of this act at the unorganized sector level, which is where the prime type of crime occurs. Though the act does not aim to avoid unorganized sector, it is the problem in implementation that is a larger concern.

Sexual Harassment At The International Front

International Labour Rights Fund Report on sexual harassment at workplace provides that no country in the world is saved from the impact of such incidents. Examples- 28/32 of Israel's Parliament Members have experienced Sexual Harassment, More than 80% of Working women in China, 6/10 Nurses in Australia, in Hong Kong, 90% of the complaints received by the Equal Opportunities Commission were of sexual harassment, United States 50% of employed women have experienced sexual harassment etc.

In the United States

Recent data has explicitly provided that, women in ages 18-34 have been the worst victims of sexual harassment at workplaces in all parts of the Federation. [<http://www.huffingtonpost.in>] Even in 2016, women employed in hospitals have confirmed to the fact that in their entire career experiences, at some point or the other unwelcome sexually tinted behaviour was always found to occur. [<http://abcnews.go.com>]

The Law

The US Equal Opportunities Commission provides for a definition for sexual harassment, which has been defined as 'unwelcome' sexual advances, a definition that has been widely used across India too. [<https://www.eeoc.gov>] Furthermore, a deterrence against sexual harassment at workplace has also been found in US Department of State, wherein the Policy stands firmly against it. [<https://www.state.gov>] Furthermore, even in the year 2016, it has been widely accepted that the regulatory compliance mechanism has no

teeth and it is compulsory for the upcoming governments to tighten their policy on sexual harassment at workplace. [https://www.usatoday.com] In fact, instances have been found where Supreme Court Judges, CEOs of American Apparel, to have made sexually unacceptable statements. There is another act, called, Civil Rights Act, 1964, which provides defences against sexual harassment under Title 7. In order to file a suit, a complaint has to be sent to the EEOC, and no settlement is forthcoming then a suit may be filed under Title 7. Different agencies may have different policies. So there is an availability of protection three enactments, however, the state of affairs as far as the implementation of sexual harassment laws is concerned is not too appreciable, for the consonance between the numbers of instance vis-à-vis remedies is not too high. Statistics- 6822 cases were filed with the EEOC in 2015, about 17.1% were filed by males. [http://abcnews.go.com] More than half the claims made to the EEOC result in no change. This observation was made in 2015 by way of analysis that took into consideration past years. Even in the U.S, 75% of the claims are not reported, which only is indicative of a poor implementation of the Act. Furthermore, different industries have been assessed and it has been concluded that different levels of sexual harassment have been found in different ones. [https://www.theguardian.com] Furthermore, women working in the US military face a different level of sexual harassment and the same needs to be rectified.

CONCLUSION

A close analysis of the facts in hand leads me to the conclusion that a presence of laws on sexual harassment is not enough. Instances of such harassment are found both in India and US, the reporting statistics is the same etc. Surprisingly, a place like United States which claims to be on the trajectory of development still faces an acute problem of sexual harassment despite laws prevalent against the same. India, can do much better, if several changes as discussed/proposed above are brought into place, for that would only lead to a more objective regime in relation to protection of women at their workplace.

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