

# **SEXUAL HARASSMENT TOWARDS WOMEN AT WORKPLACE: AN ANALYTICAL STUDY**



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## **SUPERVISOR'S CERTIFICATE**

It is to certify that PRIYA SINGH is pursuing Masters of Laws (LL.M) from National Law University and Judicial Academy, Assam and has completed her dissertation titled "SEXUAL HARASSMENT TOWARDS WOMEN AT WORKPLACE: AN ANALYTICAL STUDY" under my supervision. The research work is found to be original.




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## DECLARATION

I, PRIYA SINGH, pursuing Masters of Law (LLM) from National Law University and Judicial Academy, Assam do hereby declare that the present dissertation titled “SEXUAL HARASSMENT TOWARDS WOMEN AT WORKPLACE: AN ANALYTICAL STUDY” is an original research work and has not been submitted either in part or full anywhere else for any purpose, academic or otherwise, to the best of my knowledge.

A rectangular box containing a handwritten signature in black ink. The signature is cursive and appears to read 'Priya Singh'.

Date: August 24, 2020

Priya Singh

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Date: Aug. 18, 2020

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## **PREFACE**

The subject of 'SEXUAL HARASSMENT TOWARDS WOMEN AT WORKPLACE: AN ANALYTICAL STUDY' is an important constituent of the social environment in the country. Sexual harassment has pierced into our society, country and also in our cultural structure. It is a ubiquitous phenomenon with it extending across the span and length or both the developing and developed countries. Sexual Harassment at workplace is a violation of women's right to gender equality, life and liberty. It creates an insecure and hostile work environment, which discourages women's participation in work, thereby adversely affecting their economic empowerment and the goal of inclusive growth. Sexual harassment has a demoralizing effect on women and they feel objectified and stop asserting. Sexually harassed women suffer from simple irritation to headache, weight loss or gain, nausea, lowered self-esteem to deep rooted anxiety. Thus, Sexual harassment has a major impact on the mental and emotional well-being of women. Some of the psychologically damaging effects of sexual harassment at work include long term depression and post traumatic stress disorder which includes re-experiencing the trauma, and avoiding people or things that may remind the victim of the harassment. Research shows that sexually harassed women withdraw socially, and are not able to function in their day to day social setting. The feeling of shame, stigma and humiliation attached to the experiences make them socially very vulnerable. Sexual harassment is being linked to sleep disorders which may be due to the stress and anxiety of the event that affect the sleep habit. As indicated by some studies, in some extreme cases, women who have experienced frequent unwanted sexual harassment have attempted to commit suicide out of desperation for not being able to address voice or avoid the harassment.

The Protection of Women from Sexual Harassment at Workplace (Prevention, Prohibition and Redressal) Act, 2013 focuses on prevention of sexual harassment at workplace and provides a redressal mechanism. The Act has been highlighted over the last year due to the efforts of the government to ensure its enforcement. The Act upholds women's fundamental rights to equality, right to live with dignity and right to practice any profession or to carry on any occupation, trade or business which includes a right to a safe working environment, free from sexual harassment as provided under various Articles of the Indian Constitution as well

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- Human Rights Act, 1998
- Equality Act, 2010
- Criminal Amendment Act , 2013
- Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013
- Data Protection Act, 2018

## TABLE OF ABBREVIATION

ADGP	Additional Director General of Police
CEDAW	Convention on the Elimination of All Forms Discrimination Against Women
CESCR	Committee on Economic, Social and Cultural Rights
CPC	Civil Procedure Code
EEOC	Equal Employment Opportunity Commission
FIR	First Information Report
Govt.	Government
HC	High Court
HR	Human Rights
IAS	Indian Administrative Services
ICC	Internal Complaints Committee
ILO	International Labour Organisation
IPC	Indian Penal Code
NGOs	Non-Government Organisation
Ors	Others
PhD	Doctor of Philosophy
PMO	Prime Ministers Office
SC	Supreme Court
SH	Sexual Harassment
UN	United Nations



CAT	Committee Against Torture
CERD	Committee on the Elimination of Racial Discrimination .
CMW	Committee on Migrant Workers
CRC	Committee on the Rights of the Child
EEC	European Economic Community
GSCASH	Gender Sensitization Committee against Sexual Harassment
Hon.	Hon'ble
HRC	Human Rights Committee
JNU	Jawaharlal Nehru University
Retd	Retired

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# CHAPTER I

## 1.1 Introduction

Gender equality in all dimensions is a basic human right and the Indian Constitution guarantees all its citizens equality of status and opportunity. Sexual harassment is considered as a violation of a woman's fundamental right to equality, which right is guaranteed by constitution of India. Workplaces sexual harassment creates an insecure and hostile work environment, thereby discouraging women's participation in work and adversely affecting their social and economic growth. The Indian constitution also provides every citizen the right to practice or carry out any occupation, trade or business, which includes the right to a safe environment, free from all forms of harassment. Women are physically weak by nature which has resulted discrimination and crimes against women in their parental house matrimonial house and at workplace. Secondly from ancient times female has been considered an object of enjoyment and beauty. 'She has never been treated as an equal human being to man. Her importance is always greater than man because she brought him up at the cost of her self control that is why whenever addressed as Radha Krishan, Sita Ram etc., the female counterpart is called first and the male counterpart second.' But it had ever been the status of women in the spiritual sphere only and not in the real world. In the physical world the woman had been treated with contempt.

The news of an Additional District and Sessions Judge in Gwalior stepping down in order to protect her dignity came as shock. According to reports, in her complaint to the Chief Justice of India R.M Lodha and M.P. High Court Chief Justice, she has alleged that the administrative judge from Gwalior bench of the Madhya Pradesh High Court wanted her to visit his bungalow alone. The judge had apparently even sent her a message through the district registrar to perform dance on an item song at a function in his residence. While its not often that instances of intimidation and sexual harassment in the legal profession grab the spotlight, this by no means is a reflection of the reality on the ground. Women lawyers and judges, who are otherwise responsible for safeguarding the rights of ordinary people,

are just as unsafe and vulnerable in their workplace as their counterparts in other professions.<sup>1</sup>

As more and more women are going out to work, they face an increasing risk of being subjected to some sort of sexual harassment. Sexual harassment at the workplace is not a new thing. Sixty percent of working women have faced sexual harassment at some point of time in their working lives as per a survey done by the The Wire. For every woman who raises an outcry, there are hundreds of others who suffer in silence, quit their jobs or get transfers. For years, sexual harassment was considered an inescapable part of working women's life. Now awareness is slowly raising that no woman should meekly accept sexual harassment as part of her lot. Sexual harassment is described as harassment in subtle ways, which may include sexual innuendoes, inappropriate sexual gestures and propositions for dates or sexual favours. In more blatant forms, such harassment may include leering, grabbing, pinching, hugging, brushing, patting against the touching. The Supreme Court's guidelines describe physical contact or advances, demand or request for sexual favours, sexually coloured remarks and showing pornography as offensive conduct. Sexual harassment becomes even more serious when the granting of sexual favours is made a term or condition of the individual's employment, when it interferes with individual's work performance or it creates an intimidating or hostile work environment. The offensive conduct could be exhibited by a superior, a colleague, a subordinate or a client.

Generally, there are two types of sexual harassment that are legally recognized Quid pro quo sexual harassment and hostile environment sexual harassment. Quid pro quo sexual harassment occurs when an employee gets on the promotion track or even gets to keep his/her job is based on if the employee submitted to or rejected sexual advances or other types of inappropriate sexual comments. For example, if a supervisor were to tell an employee she would be more likely to be promoted if she dressed sexier, that would be considered Quid pro quo sexual harassment. And hostile environment harassment occurs when a co-worker or supervisor in the workplace makes sexual advances or comments to

<sup>1</sup>J. Venkatesan,*Sexual harassment charge against judge:CJI to seek report*,THE HINDU, 04-08-2014(15 May2020,12PM),<https://www.thehindu.com/news/sexual-harassment-case-cji-to-call-for-a-report-from-madhya-pradesh-hc-chief-justice/article6279349.ece>.



an employee that, while not affecting promotions or the future of the employee's job, makes the working environment of the employee offensive and hostile.<sup>2</sup>

Sexual Harassment of woman and rape are two sides of the same coin. Both show the power of man to dominate that of woman. 'Both have one victim, that is woman.' Both are barbaric in nature but many people extenuate sexual harassment to rape, just because the victims are not physically harmed, whereas, in rape the victim is ravished like an animal for the fulfillment of desire and lust of another man. Both have the same objectives as to undermine the integrity of the victim, physically as well as mentally. Here only a woman has undergone such brutality understands the pain, disgrace, dismay that it beholds. Sexual harassment or rape is indeed the most shameful facet of humanity. However this is not true that all cases of sexual harassment are such where the accused is guilty of concerning the intention of a sexual intercourse. But it also depends on each individual case and circumstances, because it may well be the case that women may also be at fault. The term sexual harassment in a legal sense seems to have been first coined in the in the United States of America and subsequently exported from there to other industrialized countries including Australia, Canada, New Zealand, Japan and number of countries in Western Europe.<sup>3</sup> These other countries had their first brush with the term sexual harassment in a formal legal sense only in the 1980's or at the beginning of the 1990's. The term sexual harassment as a legal concept gained meaningful application in the United States only in the mid 1970's when the United States courts held it to be a form of sex discrimination prohibited. In India the term sexual harassment was first defined in a formal legal sense in the year 1997 by the Supreme Court in *Vishaka v. State of Rajasthan* reports on the working conditions of women also refer to lie down or lay off. However, it is the term sexual harassment that has acquired the largest acceptance as it more fully denotes the

<sup>2</sup>Josh B. ,*What is quod pro quo sexual harassment v. hostile work environment sexual harassment?*, SEXUALHARASSMENTTRAINING.COM,28-01-2019 (16May2020,9AM)  
<https://www.sexualharassmenttraining.com/blog/detail/13/what-is-quid-pro-quo-and-hostile-work-environment-sexual-harassment>.

<sup>3</sup>Erin Blakemore, *Until 1975, 'Sexual Harassment' was the Menace with no Name*, HISTORY, 08-01-2018 (16May2020,9:30PM),[https://www-history-com.cdn.ampproject.org/v/s/www.history.com/.amp/news/until-1975-sexual-harassment-was-the-menace-with-no-name?amp\\_js\\_v=a3&amp\\_gsa=1&usqp=mq331AQFKAGwASA%3D#aoh=15979670161006&referrer=https%3A%2F%2Fwww.google.com&amp\\_tf=From%20%251%24s&ampshare=https%3A%2F%2Fwww.history.com%2Fnews%2Funtil-1975-sexual-harassment-was-the-menace-with-no-name](https://www-history-com.cdn.ampproject.org/v/s/www.history.com/.amp/news/until-1975-sexual-harassment-was-the-menace-with-no-name?amp_js_v=a3&amp_gsa=1&usqp=mq331AQFKAGwASA%3D#aoh=15979670161006&referrer=https%3A%2F%2Fwww.google.com&amp_tf=From%20%251%24s&ampshare=https%3A%2F%2Fwww.history.com%2Fnews%2Funtil-1975-sexual-harassment-was-the-menace-with-no-name).

malady than other terms. Sexual harassment in India is an issue rooted in societal norms and economic dependence.

Discriminatory practices are underlined by laws favouring men. Inadequate policing and judicial practices deny female victims proper protection and justice. Although female participation in public life is increasing and laws have been amended, India still has a long way to go to make Indian women equal citizens in their own country. The issues of violence against women in India were brought to the forefront after the brutal gang-rape of a 23 years old woman in Delhi on 16th Dec. 2012. The December incident led to a sudden outpouring of anger and frustration about the situation that allowed such attacks to take place. People took to the streets in large numbers calling for change. But the issues involved are complex and deeply rooted. The public life is increasing and laws have been amended, India still has a long way to go to make Indian women equal citizens in their own country. Then Justice Verma Committee was constituted to recommend amendments to the Criminal Law so as to provide for quicker trial and enhanced punishment for criminals accused of committing sexual assault against women. In response to Justice J.S. Verma, Committee Parliament passed the Criminal Amendment Act 2013, which provides for amendment in Indian Penal Code, Indian Evidence Act and Code of Criminal Procedure. It also enacted the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013.<sup>4</sup>

The Act uses a definition of sexual harassment which was laid down by ‘the Supreme Court in *Vishaka v. State of Rajasthan* (1997), Article 19 (1) (g) of the Indian Constitution affirms the right of all citizens to be employed in any profession of their choosing or to practice their own trade or business. *Vishaka*’s case established that actions resulting in a violation of one’s rights to Gender Equality and Life and Liberty are in fact a violation of the victim’s fundamental right under Article 19 (1) (g).’ This case ruling establishes that sexual harassment violates a woman’s rights in the workplace and is thus not just a matter of personal injury. Before passing the Criminal Amendment Act, 2013 cases related to

<sup>4</sup>Dona John, Omar Ahmad & Maria Schneider, *India: Violence Against women, Current Challenges and Future Trends*, THE WORDPRESS, 03-03-2014 (18May2020,11:00PM), <https://sexualviolenceissues.wordpress.com/india-violence-against-women-current-challenges-and-future-trends>.

sexual harassment were filed under Section 354 and 509 of Indian Penal Code 1860. There was no specific statutory provisions related to sexual harassment at workplace before passing the Criminal Amendment Act 2013, but now section 354 A IPC define sexual harassment and punishment for this and new statutory provisions has been made related to sexual harassment at workplace i.e. The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013.

## **1.2 Statement of the Problem**

The American Heritage Dictionary defines ‘harass’, as to disturb or irritate persistently and states further that ‘harass’ implies systematic persecution by besetting with annoyances, threats or demands.<sup>5</sup>

Thus, sexual conduct, such as words, physical contact or the display of sexually explicit materials, is used in a workplace or an educational institution, etc., to bully, intimidate or for other similar negative and aggressive purposes, the behaviour constitutes sexual harassment.

Our Constitution guarantees all the basic and fundamental human rights set out in the Universal Declaration of Human Rights, 1948 to its citizens and other persons. To protect the rights of the women and to give them equal rights in the society, the framers of the Constitution of India granted some special rights to the in the constitution in the forms of both fundamental rights and directive principles of the state policies, which were directed towards the state and they also realize the backwardness of woman and hence they provided for certain provisions of the constitution to fulfil these obligations regarding the labour standards, the quality of life and quantum of work as well. Thus, the constitution of India not only grant protection to women but also empowers the state to adopt measures of

<sup>5</sup>The American Heritage, *Dictionary of the English Language*, HOUGHTON MIFFLIN HARCOURT PUBLISHING COMPANY (18 May 2020, 12:00PM), <https://ahdictionary.com/word/search.html?q=harass>.

positive discrimination of woman for neutralizing cumulative socio-economic, education and political discrimination faced by him.

The Sexual Harassment Act has been legislated almost sixteen years after the Supreme Court, in its landmark judgment in Vishaka's<sup>6</sup> case, laid down guidelines making it mandatory for every employer to provide a mechanism, to redress grievances pertaining to sexual harassment at workplace and enforce the right to gender equality of working women.

The year 2013 may go down in India's history as a landmark year for the protection of women rights. The country witnessed the introduction of two prominent legislations pertaining to sexual harassment.

“The first was the sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 and other was Criminal Law Amendment Act, 2013. Both the legislations were introduced as an immediate to unfortunate and very serious incidents of sexual harassment that jolted the country in late 2012 and early 2013.”

The role of the Supreme Court is of propounded importance in the area of human rights because it is the final interpreter of fundamental rights. It is the paramount social duty of the judiciary to eliminate injustice and exploitation in our society. The judiciary is to innovate new procedures to meet the challenges of modern times, when the executive and legislature are apathetic and fail to discharge their constitutional obligation. The bureaucracy shows a total indifference and insensitivity to its mandatory duties. This in turn affects the basic rights of the people, when the law enforcing authorities show their brutality in the process of implementation of law and the judiciary should check the excesses and also direct the authorities to effectively implement the welfare legislation. Now sexual harassment, according to the section 354A, of Indian Penal Code and section 2(n) of the 2013 Act include unwelcome act or behaviour like physical contact and advances, a demand or request for sexual favours or making sexually coloured remarks or

<sup>6</sup>Vishakha and others v. State of Rajasthan,(1997) 6 S.S.C. 241(India).

showing pornography and any other unwelcome physical, verbal or nonverbal conduct of sexual nature.

The hon'ble Supreme Court in Vishaka case held that —one of the logical consequences of incidents of sexual harassment at work is the violation of the woman's human rights and fundamental right under article 19 (1) (g) to practice any profession or carry any occupation, trade or business. The fundamental rights to carry on any occupation, trade or profession depends on the availability of a safe, working environment. Sexual harassment of woman at their places of work exposes them to great risk and hazard and places them at an unfair position vis-à-vis other employees. The adversely affects their ability to realize their constitutionally guaranteed right under Article 19 (1) (g).

'In Apparel Export Promotion Council v. A.K. Chopra<sup>7</sup> The Apex Court referred to the International covenant on economic, cultural and social rights and the right of women to fair conditions of works. Accordingly, women should be subject to sexual harassment that places them in an in equitable position by vitiating the safety of their working environment.'

This case is the first case in which the Supreme Court applied the law laid down in Vishaka's case and upheld the dismissal of a superior officer of Delhi Apparel export promotion council who was found guilty of sexual harassment of a subordinate female employee at the place of work on the ground that it violate her fundamental rights guaranteed by article 21 of the Indian constitution. The guide lines and judgments have identified sexual harassment as a question of power exerted by the perpetrator on the victim. Therefore, the sexual harassment in addition to being a violation of the right to safe working condition is also a violation of the right to bodily integrity of the women. After the incident of Delhi Gang Rape in December 2012, there was a need to pass stringent law for the protection of women. After this, the Criminal Amendment Act, 2013 was passed.

Under the new Sexual Harassment Act, Section 9(1) covers that any aggrieved woman make in writing a complaint of sexual harassment at workplace to the internal committee or local committee within a period of three months from the date of incident and in case of

<sup>7</sup>Apparel Export Promotion Council v. A.K. Chopra,A.I.R 1999 S.C. 625 (India).

series of incidents with in a period of three months from the last incident.<sup>8</sup> The aggrieved woman under the Act 2013 means:

- (i) In relation to a workplace, a woman, of any age whether employed or not, who alleges to have been subjected to any act of sexual harassment by the respondent.
- (ii) In relation to a dwelling place or house, a woman of any age who is employed in such a dwelling place or house.<sup>9</sup>

The definition of aggrieved women, who will get protection under the act extremely cover all women, irrespective of her age or employment status, whether in the organized or unorganized sectors, public or private and covers clients, customers and domestic workers as well. The main features of the 2013 Act are as under:

- (i) The Act defines sexual harassment at the work place and creates a mechanism for redressal of complaints. It also provides safeguards against false or malicious charges.
- (ii) The committee is required to complete the inquiry with a period of ninety days on completion of inquiry, the report will be sent to the employer or the district officer, as the case may be, they are mandated to take action on the report within sixty days.
- (iii) The complaints committees have the powers of civil courts for gathering evidence.
- (iv) The complaints committees are required to provide for conciliation before initiating an inquiry, if requested by the complainant.

Various penalties have been prescribed for employers. Noncompliance with the provisions of the act shall be punishable with fine up to 50,000. But if there is repetition of the same offence then those repeated violations may lead to higher penalties and cancellation of

<sup>8</sup>The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013, No. 14. Acts of Parliament, 2013 (India).

<sup>9</sup>The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, Section 2 (a), 2013, No. 14 Acts of Parliament, 2013 (India).

license or registration to conduct business and those offenders who are guilty of those repeated offences are punishable.<sup>10</sup>

### **1.3 Scope & Limitation of the Study**

This research study covers the aspects related to Sexual Harassment of Women at Work place in India. To obtain inclusive observation an effort is made to study the Sexual Harassment of Women at workplace (Prevention, Prohibition and Redressal) Act,2013, its relevance to the present-day Indian society so it also covers the societal aspects as well. This research would cover all the area which states the provisions made by legislature and judicial approach for interpretation of these laws for the prevention of sexual harassment at work place. The scope of the study is limited, as very few studies have attempted to determine and analyse the issue of Sexual Harassment from a judicial, societal, economical, emotional and psychological point of view. So with the help of different case laws the researcher has analyzed the global issue of Sexual Harassment.

### **1.4 Aims & Objectives of Study**

The main objectives of the study are as under:

- i. To discuss the present situation and various reasons for increasing of sexual harassment activities.
- ii. To study the changing perspectives of the concept of relevant offences and how it has changed over the years.
- iii. To examine the role of judiciary in prevention and control of sexual harassment.

<sup>10</sup>The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, Section 26, 2013, No. 14 Acts of Parliament, 2013 (India).

- iv. To analyze the role of anti-sexual harassment committee established at workplace.
- v. To make provisions for giving effect to the conventions for the protection of women against sexual harassment at workplace.

### **1.5 Research Hypotheses**

The researcher has formulated the following hypothesis based on the research problems.

1. Lack of transparency and illiteracy regarding rights of women are chiefly responsible for sexual harassment.
2. Absence of effective laws and lack of political will to implement the sexual harassment laws with delayed justice are responsible for sexual harassment.
3. Sexual harassment is not only limited to work places but prevalent in almost all the other spheres of life as well.
4. There is no proper implementation of the present enacted laws.

### **1.6 Research Questions**

1. How the Sexual Harassment is affecting the life of women of our country?
2. What are the intention and policies of legislature for preventing sexual harassment in India?
3. What is the role played by the judiciary in preventing the problem of sexual harassment?
4. What are the trends in awarding sentence in cases of offence relating to sexual harassment?
5. What are the problems faced by judiciary in preventing the sexual harassment in India?



6. Whether laws relating to sexual harassment have served the purpose for which they were made?

7. What are the lacunae in existing laws relating to sexual harassment?

### **1.7 Research Methodology**

The present research work is doctrinal in nature. However, useful data has been supplied to make the dissertation more meaningful and realistic making it more practical in approach. This study is based on Doctrinal Research therefore, primary and secondary sources have been used to reach the definite conclusion by suggesting various measures. The present study is organized around legal propositions including to analysis the various legislative provisions with special reference to ‘The Sexual Harassment of Women at workplace (Prevention, Prohibition and Redressal) Act, 2013’. The present work also comprises descriptive research methods and interpretation by means of using different sources of material with the help of primary and secondary sources.

The primary sources like, resolutions, conventions, government orders,, reports from government officials including gazette notifications are the basis of the study.

### **1.8 Sources of Data**

The researcher has utilised both primary and secondary sources in writing the dissertation. The primary data include legislative enactments, committee reports, case laws, books. The secondary data comprises journals, articles and most of it is collected from the usage of the internet by visiting different websites with the help of various search engines for collecting relevant data from those websites of the world at large pertaining to the study of this topic. The study is doctrinal in nature hence the findings and conclusions would be based on qualitative analysis.

## **1.9 Literature Review**

**191 Chesfeeda Akhtar, Sexual harassment at workplace and in educational institutions: A case study of District Srinagar, Kashmir (Mar 2013)** - Women were sexually harassed long before there was a term for it. Women working in homes have long been targets of sexual abuse. Since industrialization, women working in factories and offices have had to endure sexual comments and demands by bosses and coworkers as the price for economic survival. As students, women and girls have been sexual prey to teachers for as long as they have been allowed to be educated. This paper provides an analysis of the magnitude and nature of sexual harassment in Kashmir. It also examines women's responses to this type of violence administering 300 structured and pre-tested interview schedules on women through stratified random sampling, the paper concludes that sexual harassment was rampant, and was happening across the board in educational institutions and offices. Moreover, women's responses to sexual harassment were more of endurance than of resistance for the fear of double victimisation.

**192 Varun Kapoor & Kanika Dhingra, Sexual Harassment Against Women in India (Feb 2014)**- Women across the world have tasted all flavors of life; from the glory and respect which she was ascribed in the Vedic period, to the denial and subordination in the post Vedic period and finally to the struggle for equality, recognition and survival in the contemporary world. But one thing that has been common throughout these phases is the disadvantaged status of the women. The concept like eve-teasing gained nationwide attention in the 1960's but today eve-teasing has evolved as a huge issue in many metropolitan cities of India. A large number of Indian women have faced or are facing this menace. Another form of violence against women is that of molestation, or what is commonly known as 'sexual abuse' or 'sexual assault'. It is the forcing of sexual behavior by a man over the women. Further, rape is one of the most extreme forms of sexual violence committed against women. It is an act of physical violence and assault which is expressed through sexual means. This study includes the various causes which lead to an increase in the number of sexual abuses and rape against women which include lack of awareness, illiteracy, upbringing of the abusers, their inability to appreciate the feminine

glory of women, etc. An emphasis has also been laid on the possible emotional, psychological and mental impacts which may be suffered by the women.

**193 Rouf Ahmad Bhat, An Overview of Sexual Harassment of Women at Workplace in India: An Analytical Study (Jul 2017)-** This Article talks about Sexual Harassment and how the violation of the basic fundamental rights of women especially right to equality under article 14 & 15 of the Indian constitution and her right to life and to live with dignity under article 21 of the constitution. The present study provides an intensive background of sexual harassment of women in India. The origin of the sexual harassment has been taken from Bhanwari Devi case and an account of Vishaka judgment is also mentioned in the current study. One of the prominent causes which are highlighted in the present research paper include the male dominated organizational setup i.e. much of the harassment which women face at the workplace isn't "sexual" in content or design but the motive behind this is to show the domination of male folk, inferior job position where women usually wield less hierarchical power in an organizations and men have more sexual harassment serves as one method of the powerful asserting control over the powerless, misperceptions about the friendly nature of a women in an organization by men colleagues and who began to harass those women who are quite friendly in nature. The results from this research however indicate that in India sexual harassment is still prevalent in the workplace despite attempts to eradicate it.

**194 A.D. Pelemo, M. Mehanathan & Pradeep Kulshrestha, Indian Legal Profession and the Sexual Harassment of Women at Workplace Act (Aug 2019)-** Sexual harassment in professional fields can hinder economic development globally. The epidemic of sexual harassment within the law profession has created a hidden barrier, predominantly for females. This study seeks to examine the effect of Sexual Harassment of Women at Workplace (Prevention, Prohibition, and Redressal) Act 2013 among the legal professionals in India to determine whether sexual harassment affects the profession and whether sexual harassment is gender-biased. Empirical and descriptive research methods were adopted by administering questionnaires to three hundred and forty-seven (347) legal professionals. The results revealed that 57.1% of the total respondents did not think that the POSH Act is significantly enforced, and 71.6% of 204 male and 83.2% of 143 female

respondents viewed sexual harassment as a hindrance to the growth of the Indian legal profession. Based on these, it was recommended that The Advocates Act 1961 be revamped to include sexual harassment in the list of professional misconduct.

**195 U. Arora, H. Sharma, M. Shreshtha, A Critical Analysis of Sexual Harassment of Women in India: Laws, Issues, and Preventive Measures (Feb 2018)** -India is facing the problem of increasing number of cases of sexual harassment at workplace despite the fact that there are numerous laws to curb the menace. Irrefutably, it hampers women's constitutional and fundamental rights to equality, justice and dignity. The paper begins with defining the concept of sexual harassment and then looks into the various aspects allied to this brutal issue. In addition, the problems with the measures taken are discussed to explain the status of sexual harassment in Indian context and how organizations can help in safeguarding the dignity of their women employees. The study indicates that the issue of sexual harassment at workplace is at an alarming stage and needs an immediate attention by the organizations as well as government. Further, few recommendations are also proposed to tackle the issue of sexual harassment of women in Indian organizations.

**196 Arjun P. Aggarwal & Madhu Gupta , Sexual Harassment in the Workplace (Buttersworth 2000)** - This book was first published in 1987, at a time when Canadian courts were still divided on the question of whether sexual harassment in the workplace was a practice of sex discrimination in employment. It remains the only scholarly Canadian text on this important aspect of sex equality rights in 1987 when this offence was not even properly addressed and penalised as it is being done now. As for recent developments in the law, this edition reflects the fact that there has been very little substantive development in Canadian sexual harassment law in the last ten years. The third edition of Sexual Harassment in the Workplace reflects these facts and the second edition of this book was out in 1992 and it got published in 2000. Subsequently, American lawyer Madhu Gupta has been added as a coauthor in the 3rd edition of this book and the materials on related U.S. law have been considerably expanded and the authors have added material on alternative fora for seeking a remedy for sexual harassment.

## **1.10 Chapterisation**

The present research work is divided into six chapters and those are listed below:

Chapter-I Introduction, it articulates the problem, aims and objectives of the study and this chapter is introductory in nature.

Chapter-II Meaning, definition and concept of sexual harassment of women at workplace, is based on meaning, definition, nature, concept and scope of sexual harassment at work place in India. In this chapter, an attempt is made to discuss the kinds and reasons for the growth of sexual harassment with special reference to Indian perspective.

Chapter-III Judicial approach towards the offence of Sexual Harassment of Women at Workplace, an attempt has been made to analyze the various provisions of the Constitutional framework and the chapter also includes a brief review of the facts of the Bajaj case and the Vishakha case which eventually led to the formation of The Sexual Harassment Act(Prevention, Prohibition and Redressal), 2013.

Chapter-IV Important Judgments after The Vishakha Guidelines, alongwith the some important cases in Supreme Court it also covers analysis of the Vishakha case and some shortcomings of The Sexual Harassment Act(Prevention, Prohibition and Redressal), 2013.

Chapter-V Sexual harassment at workplace: International Perspective, the main aim of the chapter is to inquire into the functioning of these global institutions.

Chapter-VI Conclusion and Suggestions, covers important conclusions drawn on the basis of the study, some important suggestions have also been made in this chapter at the end to make the study more useful.

## CHAPTER II

### 2.1 The Introduction

Sexual harassment is any kind of inappropriate sexually oriented and offending practice that jeopardizes and threatens an individual's continued employment service at their respective workplace, negatively affects their workplace performance, or negatively undermines their sense of personal self worth as well as dignity . "Sexual harassment is something that can manifest itself both physically and psychologically. In its subtle and passive forms it can include innuendo and inappropriate affectionate gesture that can be very uncomfortable and stressful." It can, however, exacerbate to extremely offensive acts which sometimes can amount to attempted rape. Physically the recipient may be the victim of uninvited gestures like touching or pressing one's body parts, grabbing, forcefully hug someone , leering and touching. " Psychological harassment can start from relentless proposal of physical intimacy, beginning with subtle and passive hints which may lead to inappropriate overtly requests and proposition for 'dates' , 'compromise' and sexual favours." Sexual Harassment at a workplace involves the abuse of authority by any individual in a senior managerial position or in charge of the management or any individual by it to exploit the sexual identity and sexuality of any subordinate employee to harass the women in any particular way which impairs , diminish or prevents the employee's full utilization and operations of employment opportunities or benefits. Thus, sexual harassment means any unwelcome sexual advance or misconduct in the workplace or a job that creates a hostile, antagonistic , intimidating or offensive workplace environment.<sup>11</sup> Any conduct or act which is of a sexual nature that makes an employee feel uncomfortable, unbearable and excruciating has the potential chances to be qualified as sexually harassment . As well as even the courts including the Human Rights Tribunal, worldwide have recognised and acknowledged a broad range or scope of conduct that may fall under the definition and meaning of sexual harassment depending on the particular

<sup>11</sup>ARJUN PRAKASH AGGARWAL & MADHU GUPTA,SEXUAL HARASSMENT IN THE WORKPLACE 20-24(3rd ed., Toronto Butterworths 2000) (1992).

circumstances. Such conduct or act may be verbally committed, non-verbally enacted or physically conveyed.

Some organisations like ILO have given some norms and have recognised some common forms of abuse and verbal torture at their places of work.<sup>12</sup>

(1) Verbal harassment includes

- (a) Comments of sexual nature about body figure, size, shape, body weight, unwelcome remarks and personal life jokes.
- (b) Graphic sexual description of any kind, chatting of sexual nature.
- (c) Telephone calls or emails with sexual undertones.

(2) Non-Verbal Harassment or Gestural harassment

Gestures are the movement of the body, head, arms, legs, face and eye that are expression of an idea, opinion, emotion, following may constitute sexual harassment:

- (a) Looking a woman in a promiscuous and lecherous manner for example looking upwards and downwards (sexual stares such as leering and contacting with sexual undertones).
- (b) Licking or biting lips or teeth, holding objects or eating food provocatively in a lascivious manner.

<sup>12</sup>Minda Zetlin, *Fifty Four percent of Women Report Workplace Harassment, how is your company responding!*, INC., Mar.2018 (18 May 2020, 3:00PM), <https://www.inc.com/magazine/201804/minda-zetlin/sexual-harassment-workplace-policy-metoo.html> .

### (3) Visual Sexual Harassment

It includes showing pornography, nude poster, sending unsolicited pictures which have exposed genitalia , inappropriate cartoon or caricature , sexually explicit pictures , dropping down trousers in front of a woman.<sup>13</sup>

### (4) Physical Sexual Harassment

It includes actual attempts of physical gestures that are inappropriate in a workplace environment like patting, kissing , touching or pinching in a sexual manner and other physical attempts to sexually harass at the workplace.<sup>14</sup>

### (5) Psychological Sexual Harassment

It may include calling every day for non-work based activities at inappropriate timings and retain her for excessive hours, and staring at her face, neck, breast, eye and other parts of the body for a prolonged period of time and repeated unwanted invitation for dinner, lunch , drinks and movies, proposal for sexual favours , to adopt suggestive hairstyles , lipstick etc. In the present situation, all working women of any social status, age group, physical appearances , post/position and economic status, may face sexual harassment.<sup>15</sup>

Most of the female subordinates are prone to face any of the above mentioned activities that may come under sexual harassment. If the female subordinates are juxtaposed along with the senior female employees , we often find that the junior employees or subordinates face more hindrances at the workplace.

<sup>13</sup>Dr. R.C. Srivastava, *Sexual harassment of women at workplace*, Vol.III, LABOUR LAW JOURNAL 34-35 Oct. (2004).

<sup>14</sup> Ibid at 36.

<sup>15</sup> Ibid at 38.



## 2.2 Causes and Reasons of Sexual Harassment

Our society is sadly as well as deeply entrenched in a patriarchal complex which puts women in the workplace at a unique and a vulnerable position. This position is not a real one, it's a virtual one that exists in our society and workplaces and no one even bats an eye. A woman is expected of certain things which often are associated with being in agreement with the man, complying with his requests and satisfying his ego. This really undermines their voice and opinions in the workplace. Our society is a patriarchal society. Indian people feel that they will achieve Moksha, through their sons only. This discriminative thought is responsible for crime against women, but today women step out of their homes and face many problems during this period i.e. at their workplace. The attitude of men towards their female colleagues at the workplace is very disappointing. The reasons for growing of the problems are:

### 2.2.1 Social and Cultural Factors

The most significant contributing aspect and factor that leads to sexual harassment are our primitive social norms. The subordinate position of women in a society is both maintained and determined by putting up a constricting set of impertinent values and customs that are far too outdated, which often work against their freedom and emancipation. In India women are perceived to be considered as inferior to men as well as their objectification is a contributing reason. Our society has a patriarchal complex and hierarchy. Our culture, social values, customs and institutionalised arrangements have direct repercussions on women. There is also a considerable amount of gender based bias and beliefs like men are wiser and stronger. Women are treated as show pieces with face value exclusively but not with respect. There is male dominance over the females. A woman who might not be physically at par with a man might be subjected to physical or sexual assault from a man. This inevitably evolving societal reality is nowhere more apparently

clear than in the workplace. A large number of women are joining the workforce<sup>16</sup>, women are also seeking jobs and employment in the stereotypical traditional male sphere of work. As a result of this new workforce ratio, both men as well as women have to adapt and learn new ways and management practices in order to relate to one another, as equal colleagues. This process of such dynamic changes creates friction and tension between the two sides that often can take the form of the hideous monstrosity that is sexual harassment. The men don't often react well with these changes. Being uncomfortable with their respective roles, men and women can slip back into old forms of their behaviour where one gender dominates and the other one submissions that clearly deny women the respect and dignity that they rightfully deserve.

Sexual harassment is not in any possible shape or form an expression or representation of sexuality. It is an assertion of power and toxic behaviour in circumstances where unequal power relations exist. Whether it starts or takes the form of Physical assault, molestation, verbal remarks, comments or jokes of a sexual kind, undermining her work ethic on the basis of her gender, disrespecting a women by discrimination or systematic discrimination, the results are the same; it undermines and deteriorates a women's professional integrity and their right to a respectful workplace environment.

Women are often considered 'fit' or 'more suitable' for household chores, household work, for producing and taking care of the children only. If they step out of their homes for work opportunities, the Indian men think of them as low because they think women are suitable for the household only and it creates a disappointing as well as shameful workplace environment for men<sup>17</sup>. There is a very strong need for social norms and behaviour in favour of the women, a movement for empowerment of women 'CEDAW and the Criminal Amendment Act, 2013' are good steps for favour of women.

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<sup>16</sup> LIN FARLEY, SEXUAL SHAKEDOWN: THE SEXUAL HARASSMENT OF WOMEN ON THE JOB 14-15 (McGraw Hill, 1978).

<sup>17</sup> ARJUN PRAKASH AGGARWAL & MADHU GUPTA, SEXUAL HARASSMENT IN THE WORKPLACE 30-32 (3rd ed., Toronto Butterworths 2000) (1992).

## 2.2.2 Types of Sexual Harassment

Sexual harassment can be classified in broadly into two categories namely:-

(i) Hostile Environment harassment

(ii) Quid-pro-quo

(i) Hostile Environment Harassment

Hostile Environment Harassment this phrase actually is found in the Article 2 of Vishaka guidelines. In Apparel Export Promotion Council v. A.K. Chopra said the Supreme Court relied on the guidelines to decipher the conclusion or to determine that the perpetrator's conduct had actually created 'an intimidating and hostile work environment'. The court in its proceeding cited the Vishaka guidelines reference to hostile working environment as one of the primary reasons for reversing the high court's stand on the same that there had been no sexual harassment. Although the phrase 'hostile work environment' has not been defined in either the decision of the supreme court but now it can be found as a reflection which is statutory in its nature under section 2(n)<sup>18</sup> read with section 3(2)<sup>19</sup> of the then 2013 Act.

Some words such as "unwelcome sexually determined behaviour"<sup>20</sup> have not been illustrated in the definitions of the given Sexual Harassment at Workplace defined in 2013 act they are identified by the phrase directly or by implication in the Article 2 of the Vishaka guidelines and it can also be found in section 2(n) of 2013 Act. So this means that even if the term sexual harassment comprises innocent acts or words in themselves they can have sexual overtones and examples of such experiences of a woman working in India may encounter in various forms like comments about her physical appearance, about her character, about her way of

<sup>18</sup>The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, Section 2(n), 2013, No. 14 Acts of Parliament, 2013 (India).

<sup>19</sup>The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, Section 3(2), 2013, No. 14 Acts of Parliament, 2013 (India).

<sup>20</sup>Ibid.

doing her work, about her personal life which actually shouldn't be a moral conduct for a judgement. If we talk about the disparities or the differentiation between the treatment of women and men in general in our society there is a very common practice that if a man smokes or he drinks he will not be judged as much as a woman will be just because of her gender.

In accordance with the Vishaka guidelines and the 2013 act and according to Article 2 of the guideline any attempted physical contact also constitutes sexual harassment and as a matter of fact it's not necessary that there should have been any actual physical contact this point is covered by the phrase physical contact and advances in the Vishaka guidelines and section 2(n) (i). The High Court in its decision in Apparel Export had established that there was no sexual harassment as the perpetrator or the offender had not made any physical contact with the complainant, he had 'tried to molest her' by sitting too close and making some suggestive comments. However the Supreme Court changed the position of this decision and going forward with reversing, it was held that even assuming that without any actual physical contact the conduct was still unlawful by the perpetrator as he had made and objectionable overture with some sexual overtones which is still unlawful and wrong and gave this judgement on 20th January 1999.<sup>21</sup>

In the case of R.B.S. Chauhan v. Reserve Bank of India & Others<sup>22</sup>, the complainant and the petitioner for a visit to Agra and Mathura for the inspection of currency chest during this inspection visit, they both stayed in the same hotel but had different rooms. At around 9 p.m. the petitioner pressed the bell of the complainants hotel room and when the room was opened by her she was told by the petitioner that he wanted to have a conversation with her urgently. After entering her room he said he wanted dinner and after finishing up with the dinner he refused to return back to his suite and said I am alone, you are alone, we can enjoy it. Justice M Katju stated that the remarks made by the petitioner was

<sup>21</sup>Casemine, *Apparel Export Council v. A.K. Chopra*, CASEMINE (20 May 2020, 12PM), <https://www.casemine.com/judgement/in/5609ad5de4b0149711411314>.

<sup>22</sup>Justice M. Katju, *R.B.S. Chauhan vs Reserve Bank Of India And Ors. on 10 February, 2003*, INDIAN KANOON(20 May 2020, 1PM) <https://indiankanoon.org/doc/1314471/>.

outrageous and preposterous and it contained some sexual overtones and the conduct of the petitioner should not be condoned and it is deplorable in its nature.

To identify and establish a prima facie case in its nature of sexual harassment based on a hostile work environment as defined by the Equal Employment Opportunity Commission (EEOC) also can show some signs and they must be shown by the plaintiff's side as well :-

- i. The plaintiff was subjected to any unexpected and unwelcoming sexual harassment.
- ii. If the employer had any knowledge regarding the same or he should have known the conduct was occurring then.
- iii. The harassment was based out of sexual overtones, comments or sex in general.
- iv. The plaintiff belonged to a unprivileged and a protected class in society.
- v. The privilege of employment or the terms and conditions have been affected by the Harassment.<sup>23</sup>

(ii) Quid-pro-quo

The term quid-pro-quo is actually a Latin in its nature which means something for something. This type of harassment has been identified and it has gotten acceptance as part of the law in our country since Vishaka guidelines and it also finds a reflections statutory in nature in section 3(2) of the 2013 act. In a broad sense Quid-pro-quo sexual harassment consists of roughly two basic elements which are :-

- i. An outright or a subtle demand for a sexual favour.

<sup>23</sup> Amy DeLuca, Esq., *What Is Hostile Work Environment Sexual Harassment?*, WICKENS HERZER PANZA (20 May 3PM) <https://wickenslaw.com/what-is-hostile-work-environment-sexual-harassment/>.

ii.If the above demand is not fulfilled or it is refuted then the threat of an adverse consequence leading in even loss of the job.

We can also join this situation as when an employer is in an authoritative position to create any consequence for the woman in terms of her job and because of that position of authority over the victim it can be said that the experience can be traumatic for the victim as well. For example the perpetrator saying, "Your work will be done, if you sleep with me". There is also occurrence of events casually like when an employees response to such unwelcoming sexual conduct becomes a deciding and an explicit condition of employment, or in the matters of promotion and transfers personal responses are determined and judged as an basis of an employee and based on that judgement the promotion is decided on the basis of response to such conducts.

If a complainant in a sexual harassment complaint is able to provide a list and establish each of the above given elements the burden of proof then shifts to the employer. If the employer is able to give a legitimatised reason to believe that the acts have justified the actions then the employee must establish that the reasons provided by the employer are not real causes for the employment for the promotion decisions they are merely a pretext for discrimination which is unlawful in nature.<sup>24</sup>

Some remedies for the victims of quid-pro-quo sexual harassment are given and they may include the recovery of compensatory damages such as loss of enjoyment of life and back pay, future financial losses and medical expenses. Some successful claimants can also be awarded punitive damages.

<sup>24</sup>Suzanne Hultin, *Discrimination and Harassment in the Workplace*, NATIONAL CONFERENCE OF STATE LEGISLATURES 18-03-2019 (21 May 2020, 12:30 PM), <https://www.ncsl.org/research/labor-and-employment/employment-discrimination.aspx>.

### 2.2.3 Religious Inequality

Every religious organization believes that all that the universe has is engendered by God and they're his creations . Every religion preaches for the humanity to progress on the grounds of love and mercy for every individual being. Notwithstanding the fact, religious manuscripts , holy books and scriptures of every single religion contain some sort of element that is regrettably degrading or discriminatory in its entirety and nature. People follow all these norms in the ideology and the name of religion. In our societal hierarchy the position of women varies from time to time. In the vedic period the position of the women was grand and glorious. They enjoyed the same freedom and equality as the men did. The man was not competent enough to perform religious duties without his wife. But in this post vedic era the position of women had obviously changed. The great Hindu law governing Manu mentions a lot about women and her status. According to him "Pithe Rakshthi Nowmare Bhartha Raskhthi Yowane Rakshaanthi Sthavire Puthra Nasthri Swathanthra Harhathi" which has the meaning that a woman is under the protection of her father in her childhood, by her husband in her youth i.e. after getting married and by her children in her old age.

### 2.2.4 Economic Inequality

A contributing aspect and factor of crimes against women in India is Economic Inequality between the men and the women.<sup>25</sup> Women often face challenges and are harassed by their superior at their work place. There is a reason and mentality behind this phenomenon , the majority of workforce is usually men at the work place and their thought process stated that they were superior to their female colleagues.

<sup>25</sup> Ananya Bhattacharya, *India's inequality crisis hurts girls and women the most*, QUARTZ INDIA 22-01-2019 (24 May 2020, 1:30 PM), <https://qz.com/india/1529154/indias-income-inequality-hurts-women-the-most-oxfam-says/>.

### 2.2.5 Low Literacy and Poverty

The major and proprietary reasons which are responsible and accountable for the lower status of women in our societal hierarchy: the low literacy rate, impoverished net worth of women because of financial reliance on men and discriminatory pay imbalance. Illiteracy and impoverishment among women makes them even more vulnerable to all types and sorts of discriminatory practices and social exploitation. In a democratic society like ours where all the citizens have to oblige and discharge their civil as well as social obligations, differences which often may lead to variations and differential treatment in the standards of intellectual development achieved by both the boys and girls cannot be foreseen.

### 2.2.6 Legal Obstacles and Lack of Awareness

The Indian Judicial System alone is not adequate enough to give protection and provide help to the suppressed women. Our preamble of the Indian constitution states Secularism, but on the ground level and the reality that we live in is not very secular. The personal laws and acts of Christians, Hindus and Muslims etc. directly influence and affect women's stature and position in the societal hierarchy. Even after the recent supreme court guideline of over Vishaka guidelines about the sexual harassment at workplace which got superseded into 'Sexual Harassment at Workplace (Prevention, Prohibition and Redressal) Act, 2013, some of respondents were not cognizant and aware of the Supreme Court guidelines and the law associated and relating to the sexual harassment at work place.' Several women said even argued that a complaints committee was most probably unlikely to be fair and impartial, that it would be merely act as a figurehead, the crux is that a range of variables and obstacles inhibits and discourages women from lodging or issuing a formal complaint.<sup>26</sup> Many of these aforementioned 'obstacles' reflect the society's actual tendencies, various of putting the blame on women for provoking the sexual harasser, but

<sup>26</sup>The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, Section 9, 2013, No. 14 Acts of Parliament, 2013 (India)



simultaneously far more reflection of an acknowledgement of their relatively powerless position or role with the workplace.

### 2.2.7 Impact of Media or Role of Media

In the inevitable battle of the equal status and fair as well as just treatment of women an significant role is generally attributed to the hands of mass media as well as the publicity sector and in particular television has become a constant and main part of life, in developed as well as developing countries.” But nowadays , the representation of women on television is quite contradictory versus the reality. Television is one of the most popular as well as an accessible medium of communication these days. Women are objectified as well treated as sex commodities , often viewed as not real people. Lyrics like, "Tu cheeze hai badi h mast mast' and 'kya cheeze hai tum tumko abhi malumn nahi hai" portrays women like "cheeze" being objectified . Therefore, most of the public think of women as a cheeze i.e. an object at the hands of other people for gratification and enjoyment. Provocative, lascivious and derogatorily suggestive projection of women's image by the mass media is a well defined and established contributing factor in increasing crimes against women.

### 2.2.8 Non-Reporting of Cases or Victim’s Silence

The victim's silence is also one of the reasons for pre-existing sexual harassment which goes unnoticed not only at home but also at the work place.<sup>27</sup>Women have been subliminally conditioned and forced to believe that they should be prepared mentally to suffer and face such kind of mistreatment and incidents,

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<sup>27</sup> ARJUN PRAKASH AGGARWAL & MADHU GUPTA,SEXUAL HARASSMENT IN THE WORKPLACE 42 (3rd ed., Toronto Butterworths 2000) (1992).

and not only silence themselves but also not to make a big kind of deal with it. For a very long time sexual harassment at the work place has been due to the work place structure and hierarchy, being subject to such scrutinization women are being in a difficult position and are reluctant to come out in the open and complain against sexual harassment for a large number of reasons. The following example perhaps explains the variety of reasons behind the silence and lack of any action on the part and behalf of the harassed women.

#### 2.2.9 The stigmatization

An overwhelming portion of women clearly identify what social stigma is and it is the major obstacle in lodging any type of complaints. For example, a lot of times when you don't respond to the man's inappropriate approaches, they spread rumours about you as well as that they were having an 'affair'. Then the woman is just humiliated, feels so depressed and that very humiliation is what which really further prevents her from going ahead with the complaint. Their thought process is that if they did complain against sexual harassment or raised their voice, the respect, poise and dignity of the women and their respective family are challenged.

#### 2.2.10 Fear of Reprisal

Many women cite and state the fear of their job security, promotion or the adverse / negative effect on career for reporting of sexual harassment cases. Very often, it is said to happen and often has happened that when a woman files a complaint of sexual harassment with the management, the woman is seen as the problem instead of looking into her problem, the management retaliates by maligning her as an inefficient as well as incompetent worker which is degrading and discouraging.<sup>28</sup>

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<sup>28</sup> Ibid at 34.

### 2.2.11 Lack of Support from Colleagues

The sense of solidarity at Workplace has visibly a very low bar and workplaces seem to be very poor in terms of having their colleagues back when it relates to anything remotely controversial let alone in adverse condition of sexual harassment of their women colleagues. The management often discourages and intimidates colleagues who even wish to support or help the harassed women. The dire threats can range from transfers to delayed sanctioning of home as well as education loans or clearance of retirement benefits or even a demotion and so on. Eventually we conclude and say that social behaviour, fear of losing job , getting demoted , lack of awareness and support , lack of official support, fear of stress , humiliation , embarrassment and strain, fear of being in the prying eyes of media , difficulties and complication in proving the authenticity and the nature of the crime and social pressure are the main reasons for the unnoticed incidents and non-reporting of the offences and harrassing employees. Women can save and help themselves by reporting any such type of sexual harassment/mistreatment/assault. Thus, the silence as well as the non-reporting of the victims causes more incidents like SH at their place of work because of lack of consequences or any condemnation towards the perpetrator.<sup>29</sup>

### 2.2.12 Other Factors

The cases and incidents of SH / mistreatment / assault against woman at the place of their work are increasing in large numbers day by day. Beside the above said and mentioned factors, several other contributing factors are also very responsible for the increment of incidents of SH at the place of their work which are:

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<sup>29</sup>Ibid 36-38.

- i. No strict enough punishment or consequences for such ghastly offences.
- ii. Political based belief system and family oriented pressure.
- iii. Lack of respect and dignified manner for women and women's integrity.
- iv. More number of working women in the workforce.
- v. Poor , toxic and polluted family atmosphere.
- vi. “ More focus and talks on feminism and masculinity than on humanism.”

### **2.3 Sexual Harassment – Effects**

Sexual harassment at the workplace is most likely to have a wide variety of consequences and ramifications, both on the individuals who are involved and it puts bad light on the organization as well. It is important and very significant to identify as well as acknowledge the negative effects of sexual harassment. The horrid effect and trauma of Sexual harassment on victims varies from one individual to another. Sexual harassment is highly exploitative and undignified unprofessional behaviour. It constitutes economic coercion and threatens women's economic livelihood by blackmailing her into a horrific experience. It also depends on the type and basis of sexual harassment and nature and emotional as well as the mental response of the victim. It promotes a discouraging ,intimidating, hostile or offensive work place environment and can damage and hurt the reputation of both the parties, the accused and the victim. It is the improper and wrong use of power to extort and get sexual gratification which is not only exploitative but disparaging as a employee in a workplace environment and consists of misperception or misunderstanding of a person's intentions. It reflects an unbalanced power relationship, male being over the female. People even do not let their

daughters do the jobs of stenographers, secretaries etc. Which are under the high risk of exploitation for the reason the boss might make a complimentary yet offensive sexual remark to a secretary and then sometimes asking her to 'stay late' to 'finish a report'.

If something like a major problem like of sexual harassment happens at a workplace it affects many people in form of sexual harassment at the workplace as well as source of humiliation, and it can have a cumulative effect on the organisation as a whole, as its impact on every individual woman is different yet efficient enough to roll into a major crisis and all adds up to the embarrassment and the losses of the organisation on a grand scale. Sexual harassment at the workplace not only exclusively affects the victims alone but also affects the employer as well, Now we are going to consider separately the effects on victims and effects on employer.<sup>30</sup>

### 2.3.1 Effects on victims

Effects on victims can be emotional trauma, psychological discomfort and physical injuries as well. It depends on the circumstances of the incidents.

At emotional level it includes repulsion, anger, revulsion, the feeling of being disgusted, fear, shame, guilt, confusion, lack of control, sometimes even identity crisis and powerlessness etc.

At a psychological level it includes: Reactions due to this experience stress can be easily induced in the victim, anxiety, depression, feelings of being judged, self-esteem issues etc.

At physical level sleeplessness, headaches, migraines, high blood pressure, hypertension, insomnia, fatigue etc.<sup>31</sup>

<sup>30</sup>Josh Young, *How Sexual Harassment Affects the Workplace*, EVERFI 22-05-2020 (25 May 2020, 12:30 PM), <https://everfi.com/blog/workplace-training/the-effects-of-sexual-harassment-in-the-workplace/>.

<sup>31</sup>Dr. Tambetta Ojong, *Sexual harassment and assault affects women's psychological and physical health later in life*, ABC NEWS 04-10-2020 (25 May 2020, 2:30 PM)

### 2.3.2 Other effects

Those who get ill or sick , or who avoid coming to work because of the repeated abuse and harassment , take time off, reducing their efficiency and imposing easily avoidable costs and damages on the employer through the medical relief funds and medical insurance payments. While in the work place, the victims usually are likely to be less productive and become less enthusiastic and less energetic and motivated because they simply don't even tolerate being at the work place let alone enjoy being there. Therefore the quality as well as quantity of their work substantially drops to a new low , having a depressing cumulative effect on the organisation and its efficiency as well as bottom-line.

The victim rightfully feels being trapped and stuck in an avoidable atmosphere. She fears facing or being called on the interoffice landline in the early morning or late nights , having her home watched and privacy being breached or being stalked and followed in a vehicle. Concentration, Focus, motivation, Enthusiasm work ethic , performance , effort and attendance are adversely affected and self esteem continues to decline.<sup>32</sup>

Resignation or fear of being dismissed , fear of losing her job or unwanted demotion or transfer. Missing out on the new training opportunities or promotions. Damaging budding career prospects, loss of service additional related benefits and privileges.

An extremely serious consequence of sexual harassment/assault is self harm and sometimes even suicide. Socio-Cultural norms that brand and establish women who are sexually harassed are seen as if they brought that adversity upon themselves, labelling the women victims as 'of loose character or

<https://abcnews.go.com/Health/sexual-harassment-assault-affects-womens-psychological-physical-health/story?id=58268509>.

<sup>32</sup>Dr. Tambetta Ojong, *Sexual harassment and assault affects women's psychological and physical health later in life*, ABC NEWS 04-10-2020 (25May 2020, 4:30 PM) <https://abcnews.go.com/Health/sexual-harassment-assault-affects-womens-psychological-physical-health/story?id=58268509>

tainted'. The shame and humiliation of having to live with the trauma and stigma is alone a big reason enough for some victims to commit suicide.

In short we can arrive at the conclusion and say that in most of the cases women feel raped and abused psychologically. They go through post rape trauma a huge drop in their self esteem and their self worth as well as in the confidence, increased nervousness, humiliation, and the guilt that they feel somehow are 'responsible'. Scandalous statements about the victim's character often misrepresent her as the wrong doer, this very character assassination is just the tip of the iceberg in terms of the humiliation that the women face , Where sexual harassment makes an employee's working life sufficiently horrid , unbearable and unpleasant, unless there is effective redress or grievance redressal her most obvious reaction will be to seek new employment somewhere else in order to escape such a toxic environment. Any inappropriate particular behaviour is harassment when it leads to negative and discouraging consequences for the employee or puts the members of that employees group in this specific case, women is at a disadvantage relative to all the other groups that in this case is men. As a whole, the sexual harassment at the work place serve as a hidden or secretive occupational danger as well as hazard and it also messes with the women's personal lives in the form of physical and emotional illness and disruption of their marriage or other relationships with men. A woman was reported to say that her powerlessness as well as lack of control in dealing and coping with harassment made her regret being born a woman.

### 2.3.3 Effects on Employer

More generally, it is often noticed and recognised that it is not a good management practice to permit and allow a toxic working environment which lets incidents like sexual harassment prevail. Good management staff know that it is in best as well as the long term interest of the particular enterprise to make sure that their staff and all employees are treated with basic respect and

dignity. For an employer, in addition to medical funds, medical insurance and other financial benefits as well as aids as pointed out earlier, consequences and the aftermath may also consist of reduced efficiency and increased operation costs. Lower rates of productivity and low morale and motivation of the affected women or victims will result in poor work performance. According to the commission of a lot of European communities therefore, in simple, pure and plain economic terms preventing incidents such as sexual harassment will not only save more money than the cost of permitting and enabling sexual harassment to continue as well as grow in some worst case scenarios due to the unprecedented and unnoticed cases that weren't registered.

#### 2.3.4 Underreporting of Incidents

It's quite often that when women usually suffer they are discouraged as well as restrained from reporting any events of harassment due to the following reasons<sup>33</sup>:-

(i) Any type of action taken against the harasser would most probably result in further forms of harassment or violence against either the person or to their family. Stalking, threatening phone calls are some of the examples.

(ii) Any harassed person or the victim may lose their position at the workplace or their job related experiences such as the base training or feels that the only possible solution is to get away and resign from their job. Few are subjected to very unfavourable conditions of work, mistreatment, psychological harassment and dismissals because of their stance as well as protest against their exploitation and harassment.

<sup>33</sup>Lin Gensing-Pophal, *Underreporting of Sexual Harassment—Steps to Take*, HR DAILY ADVISOR 27-03-2018 (26 May 2020, 2 PM), <https://hrdailyadvisor.blr.com/2018/03/27/underreporting-sexual-harassment-steps-take/>.



(iii) Long and complicated drawn-out expensive legal battles further would take a big economic and mental toll on the aggrieved who apart from dealing with the atrocities committed against her now also have to fight the justice system.

(iv) Lack of power and imbalanced control dynamic 'vis-a-vis the harasser.'

(v) Lack of awareness and knowledge about sexual harassment.

(vi) Lack of awareness about how to handle this, what to do about the events happening or the sexual harassment. A very major reason that really inhibits reporting of such types of cases that the evidence is very difficult to put together.

Remarks are generally given and made when two individuals are present. In such cases, legal advisors have to look at the past and present performance appraisals to determine a certain pattern of victims being harassed. Any memo or letter or handwritten notes and letters reflecting any attributes less than their professional approaches are also admissible in the court as evidence. Settlements that are offered by the management are often loaded to woo the perpetrator as well as in their favour.

## CHAPTER III

### 3.1 Constitutional Framework

As we have already established in the beginning there was no legal definition of sexual harassment the courts treated mostly it as a criminal offence or a civil wrong but after the Vishaka case the legal provisions to identify and recognise and solve this issue have changed. There is a huge shadow that falls between the reality and the promise of a stress free work environment where there is no fear of sexual harassment economic inequality social degradation and criminal wrongs and the actions which are morally wrong even so are commonly heard of even these days and the cases of molestation eve teasing sexual harassment and rape are rampant in our society.

In India the provisions for the safety of women are developed in various different legislative forms and it has been in an enactment like Indian Penal Code 1860, Criminal Procedure Code 1973, Indian Evidence Act 1872, Vishakha guidelines and the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) act 2013 and various other special laws which are related to the protection of women's integrity in India and India has been has also been ratified under various international conventions which has become a source of law.

Our Indian Constitution grants and guarantees certain basic fundamental rights to all the citizens of India and while guaranteeing all those basic and fundamental Human rights it has taken inspiration from the Universal Declaration of Human Rights, 1948 and CEDAW<sup>34</sup> to its citizens and other persons. Therefore it is safe to state that the Indian Constitution not only granted protection to women and some measures for their upliftment in the form of fundamental rights but also empowered the state to adopt measures of positive discrimination for women for neutralizing cumulative socio-economic and political discrimination

<sup>34</sup>Flinterman, *The Universal Declaration of Human Rights at 60 and the CEDAW Committee*, OHCHR 04-11-2008 (1 Jul 2020, 2:30PM), [https://www2.ohchr.org/english/bodies/cedaw/docs/statements/UDHR60\\_Mr.Flinterman.pdf](https://www2.ohchr.org/english/bodies/cedaw/docs/statements/UDHR60_Mr.Flinterman.pdf).

faced by the women in our society even today and help young girls to educate themselves with a little support from the government itself. Some major changes brought in 'Indian penal code, 1860 and Criminal Amendment Act, 2013' & Indian penal code has many provisions related to the issue of combating sexual conduct and these provisions work as a proof that this problem was even prevalent in 1860's as well. Numerous Sections in IPC cover such behaviour related to harassment in various forms but until recently there were no specific offences which were criminal in nature related to sexual harassment at workplace, the provisions under which such offences could be listed were section 509 and section 354 of IPC. 'The Criminal Amendment Act, 2013 as adopted on 02-04-2013'<sup>35</sup> added specific provision under the offence named as "sexual harassment" under the section 354A of Indian Penal Code which has drawn its inference almost completely from the Vishakha guidelines. Before this Amendment Act of 2013 the possibility of some other serious offences or manifestations of sexual harassment were not covered in details specifically to punish the perpetrators as it has been done so now.

The sections which have been added are 354A<sup>36</sup>, 354B<sup>37</sup>, 354C<sup>38</sup>, 354D<sup>39</sup> which are related to sexual harassment directly and it is the well known case of Vishaka vs state of Rajasthan in which there was a grave and serious concern expressed over the issue of sexual harassment by the Supreme Court. The court also stated that where any such conduct specified amounts to a criminal offence under Indian Penal Code or any other law the employer should in accordance with the law under the required and necessary legal obligations initiate proper investigative steps by making a complaint with the superior authority whatsoever.

<sup>35</sup>Sushil Kumar Shinde, *THE CRIMINAL LAW (AMENDMENT) BILL, 2013*, PRSINDIA.ORG 15-03-2013 (2 Jul 2020, 3:30PM), [https://www.prsindia.org/sites/default/files/bill\\_files/Criminal\\_Law\\_%28A%29%2C\\_2013.pdf](https://www.prsindia.org/sites/default/files/bill_files/Criminal_Law_%28A%29%2C_2013.pdf).

<sup>36</sup>Raman Devgan, *IPC Section 354A Indian Penal Code*, RAMAN DEVGAN 02-09-2018 (4 Jul 2020, 1PM), [http://devgan.in/ipc/chapter\\_16.php#s354A](http://devgan.in/ipc/chapter_16.php#s354A).

<sup>37</sup>Ibid.

<sup>38</sup>Ibid.

<sup>39</sup>Ibid.

An annoying act or an act of annoyance may be punishable in IPC under 294th section and it must have caused annoyance either to a specific person or people in general. Section 294 lays down whoever does any intentional annoyance towards anyone namely :-

- Any obscene kind of act done in a public area.
- A song sung in an obscene way or recitation or utterance of any obscene songs, words in a public area shall be punished with an imprisonment for a term which may extend up to 3 months or with fine or with both.

Thus some obscene acts illustrated above must have been performed or done in a public place and indecent exposure of one person must be done in an omnibus, in a public urinal, or a place where the general public goes, categorically falls under this Section. In the case of *Zafer Ahmed Khan v. The State of Uttar Pradesh*<sup>40</sup> there was a rickshaw wala who allegedly stopped his vehicle rickshaw near two young girls previously unknown to him and while addressing the girls to sit on his rickshaw he uttered the following words "*Ao meri jaan mere rickshey par baith jao, tumhe jahan bhi jana hai main pohuncha dunga, main tumhara intejar kar raha hun*" the following words were clearly offensive to the modesty and the chastity of those girls and were likely to impersonate the mind of a perpetrator passing lewd comments.

The term "Obscene" under this provision includes any offensive action or word of mouth which is is offensive to the modesty or chastity for the expression of something which is forbidden to be expressed in a decent atmosphere around a woman. A person who is annoyed by such obscene act intended for someone else can also file a complaint under the following section which brings us to another point that both men and women can file a complaint under this provision on behalf of someone else as well.

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<sup>40</sup>Zafar Ahmad Khan Vs. State of U.P , A.I.R. 1960 S.C. 866 (India).

### 3.1.1 Assault or Criminal Force to Women with intent to Outrage her Modesty

Section 354<sup>41</sup> of Indian penal code states that, Whoever assaults or uses criminal force on any woman, intending to outrage her modesty shall be punished with imprisonment of either description for a term which shall not be less than one year but which may extend to five years and shall also be liable to fine.

In furtherance of sections mentioned above if an offence was committed under the section 354 be punishable when :

- The use of criminal force on a woman has been done or an assault has taken place.
- Such assault or usage of criminal force made by the accused must have been with the intention to outrage her modesty or with knowledge that her modesty will be likely to be outraged.

### 3.1.2 Word or Gesture intended to insult the modesty of a woman

The Section 509<sup>42</sup> of the Indian Penal Code states that whoever intending to insult the modesty of any woman, utters any word in such a meaning that makes any sound or gesture or exhibits an object, intending and initiating that such word or sound shall be heard or that such gesture object shall be seen by such women, or in hindrance or cause of intrusion upon the the privacy of such women shall be punished with an improvement of upto three years and also with fine.

The offence under this section is mostly referred to as if teasing and for its implication and smooth application following conditions must be present:-

- (i) A malafide intention to cause an insult to the modesty of a woman.

<sup>41</sup> Section 354, Indian Penal Code, 1860.

<sup>42</sup> Section 509, Indian Penal Code, 1860.

(ii) Such an insult must be caused by

- Utterance of such words for making such a specific sound or creating a gesture or exhibiting any object with an intention that such words or sound shall be heard for that such an objectionable gesture object shall be seen by such women.
- By intruding upon the privacy of that particular woman.

### 3.1.3 The Ultimate test of Modesty

The supreme court in the case of R D Bajaj v. K.P.S. Gill<sup>43</sup> held that "The ultimate and the full proof test for a certain meaning whether modesty of a woman has been outraged is that the offenders actions could be perceived as one which is capable in itself of shocking the sense of decency of a woman. When this test is applied in the present case keeping in view the facts it cannot be held that the the alleged act of Mr. Gill in slapping Mrs. Bajaj on her posterior amounted to outrage her modesty for it was not only and our front to the normal sense of fame indecency but also are front to the the dignity dignity of women sexual over tone present or not.

So we can say that Bajaj is an advance over earlier judgements and it does not actually limit the perception and understanding of modesty on the basis of sex. In State of Punjab v. Major Singh<sup>44</sup>, Justice A.K. Sarkar observed the test of outraging modesty must therefore be based on whether a reasonable man will think that the act of the offender was intended to or it was known to be likely to rage the modesty of the women. And while deciding on such matters he must imagine a woman to be a reasonable woman keeping in view all the situation and

<sup>43</sup>Rupan Deol Bajaj v. K.P.S.Gill, 1996 A.I.R. 309, 1995 SCC (6) 194.

<sup>44</sup>State of Punjab v. Major Singh, A.I.R. 1967 SC 63.

circumstances concerning her such as her way of life her stature and the known notions of modesty of such a woman and in general as well.

The basis and the thrust of the judgement above remained on the point that ‘the essence of women's modesty is sex’ after the case of Bajaj and act capable of shocking the sense of decency of women may amount to insulting for outraging the modesty of a woman whether it has sexual overtones or not. Therefore in bajaj the concept of modesty and privacy have been illustrated and construed in an egalitarian manner so that any kind of inconvenience or harassment be it in a women's public life or private life mein amounts to an offence. So in a crux now even the subtle instances of outraging modesty and intruding upon a woman's privacy can be made an issue worthy enough to be addressed under this provision. The mere fact that a woman's path is so obstructed or she has been in such an inconvenience that her sense of decency is shocked and she is ultimately compelled to seek the protection of the law can now be sufficient to bring this act within the scope of penal provisions so that the perpetrators could be punished more easily.<sup>45</sup>

This is perhaps the very first cases of sexual harassment that the court recognised in such a manner and dealt it making an issue concerning the dignity of women in public spaces. The test to determine if the modesty of a woman has been violated has taken place in such a way that such an offender could be perceived as one capable of shocking the decency of a woman and the test not only encompasses and affront to the normal sense of feminine decency but also an affront to the dignity of a lady, notwithstanding the presence of sexual overtones only but also so the whole situation will be under the purview now.

<sup>45</sup>Chander Suta Dogra, *A Retired IAS Officer on How the #MeToo Movement Can Use Her Case Against K.P.S. Gill*, THE WIRE 15-10-2018 (6 Jul 2020, 4:30 PM), <https://thewire.in/women/rupan-deol-bajaj-kps-gill-case-me-too>.

The term "Sexual harassment" coined in the Indian Penal Code, when the Section 354A was introduced into the Indian Penal Code in 2013 this provision brought this offence of sexual harassment as:

A man committing any of the following act

(i) Any kind of physical contact and advances made involving unwelcoming and explicit sexual overtones; or

(ii) A request or a demand made for sexual favours; or

(iii) Showing any kind of pornographic images or videos against the consent and the will of a woman; or

(iv) Making any minor of sexually coloured remarks or comments shall be guilty of the offence of sexual harassment.

1. Any man who commits this offence specified in clause (i) or clause (ii) or clause (iii) of sub section (1) may be punished with a rigorous imprisonment which may last for a term of upto three years, or with fine or with both.
2. Any man committing the offence specified in clause(iv) of sub section (1) may be punished with an imprisonment which may extend upto one year or with fine or with both.<sup>46</sup>

There are some key elements which may act towards the contribution to such an offence namely:

- The offence must be committed by a man against a woman. This could lead to such a conclusion that this offence is gender biased and same sex

<sup>46</sup>Bharat Vasani, *The POSH Act, 2013 Is IC the Right Forum to implement the Act?*, LEGAL ERA 24-01-2018 (10 Jul 2020, 12:30PM), <https://www.legaleraonline.com/articles/the-posh-act-2013-is-ic-the-right-forum-to-implement-the-act>.



harassment may not fall within the protection and purview of this provision; and

- The behaviour must be unwelcoming to the complainant for the women concerned here with; and
- There must be a notable presence of sexual overtones or sexual content in the behaviour.

And it must be noted that the phrase 'at the workplace'<sup>47</sup> was not mentioned in this provision there for offences under this provision can occur anywhere and are not just be restricted or prohibited to the workplace only this generally broadens the scope of the operation of law and has a positive impact for a complainant.

Although the term 'unwelcome' has not actually been defined but it must be understood with the perception of whether a particular behaviour is objectionable or unwelcoming or inappropriate from the subjective point of view of the women concerned. The perspective and the point of view of the women has been serving as a guiding factor in this situation if it had not been done like that it will result in an enormous burden upon the women or the victim to establish that the action in question was actively repudiated by her which is not the intention of law, instead to encourage the victim of a sexual harassment to come forward and express verbally to the perpetrator that his conduct is unwelcoming in its nature and this may be implied by her behaviour or it can also be determined from the social and cultural context of the behaviour and the perpetrator can be punished under the law.

It must be duly noted that the Verma committee report in January 2013 had recommended that the phrase unwelcome be specially and specifically defined in the statute in order to ensure and confirm that the subjective as well as objective perceptions have been included in it. Although the proposed clause has not

<sup>47</sup>Section 2(o), The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013.

actually formed any part of the law whatsoever, but it is still important to find an interpretative tool and may be useful quoted as like the one given below-

*Explanation in determining whether the behaviour or act complained of is unwelcoming and it is one of the factors to be given due weight shall be subjective perception of the complainant.*

#### 3.1.4 Changes in Sections related to Rape

As we have already established some major changes have been brought to the provisions relating to rape in the Indian Penal Code, 1860 and they are gone undergone extensive revision in the year 2013. It is neither possible not relevant to examine all these changes in detail here as the topic of my research is Sexual Harassment. However it is very crucial to recognise that there could be situations where working women may end up in such circumstances when they may experience extreme forms of sexual harassment at workplace including rape. The key elements in this context of the law relating to rape are to be examined. For example if a woman is engaged in sexual intercourse by threatening her that if she resists the man trying to force himself upon her she will lose her job and a woman is threatened and placed under duress as a result she doesn't protest or submit to sexual intercourse which could either amount to rape if the perpetrator has malafide intention and no self control and has a Criminal mind otherwise most women just loose their job or face some kind of demotion in their job positions even when they are good at their work.

#### 3.1.5 Fastest way of Defaming a Woman

By now we can agree on the point that character assassination is the easiest way possible to humiliate any woman let alone a Working Women because they are out

in the world not just secured between four walls of their homes and some men just don't like the idea of a female working in the same office as them and they become prone to such demeaning practices that even women do this evil practice to other women just to stay in the good books of their male colleagues and if this is done repeatedly to a woman obviously it will leave a scar on her mind that she is facing defamation everywhere and her mind and heart will not stay together to make her strong and get her through this monstrosity. Mostly to achieve this these kind of evil results rumours are spread about her character the women being a loose charactered or immoral woman or she has illicit relationship with the fellow colleagues or boss or employees or she has a drinking or a smoking habit etc for which a man is never ever judged on the same pedestal as a woman but she would be subject to such judgemental observation.<sup>48</sup> These are just some pressure tactics or techniques in this era of information technology because most of the information about almost everyone is available on social media and that could be used against that individual as well. In some of the interrogation or complaints filed inside the office premises it is often observed that even after being harassed a woman is only the victim in the situation she is the one who gets interrogated by a committee or a panel which is obviously set up by the perpetrator himself as he is the boss or he has influence over the office etc.

### 3.1.6 Causation of Criminal Intimidation

This provision right here covers a variety of situations in which a woman who is being sexually harassed or is prone to to search harassment would not have to resist complaining or taking a step against the perpetrator. If a woman is threatened with harassment at the workplace this section will cover that situation and it will also cover the situation where a woman is threatened with even physical injury or her life is threatened or her family's life is endangered this section has a

<sup>48</sup>Chander Suta Dogra, *A Retired IAS Officer on How the #MeToo Movement Can Use Her Case Against K.P.S. Gill*, THE WIRE 15-10-2018 (10 Jul 2020, 3:30 PM), <https://thewire.in/women/rupan-deol-bajaj-kps-gill-case-me-too>.

wide scope. According to this section there are three situations in which this may be classified and brought into operation namely<sup>49</sup>:-

(1) In this situation the intended consequence that an alarm may be caused is implicit in the concept of threat in itself, meaning there cannot be a threat without any intention of causing alarm some kind of injury or negative consequence may before fall upon the victim of the sexual harassment and it may be caused as an implicit endangerment in the notion of threat the term in which it can be coined is "threat with intent to cause alarm" this term will cover sexual harassment at workplace where any superior never made for a demand for sexual favours but on every possible pre text did not ever failed to accomplish to call for an explanation for from the subordinate for any this owing any kind of favour or request from a superior.

(2) Threatening of women directly can land the perpetrator of the offender in a position to cause a person to do anything which he is not legally bound to do but when the motive is to cause that person to do anything then they can be cautious about that as well in the context of sexual harassment at workplace it is very obvious that any threat to a woman aimed at drawing any undue favours will definitely lie within this section and will be covered under this section only.

(3) If we talk about a threat then threatening is also prohibited when the motive is to cause that person to do anything which he is not legally bound to do so that means causing a person to do anything which is not legally bound to do is criminal as well and preventing such person from doing anything which is legally entitled not to it may land him in court for adequate and special reasons to be imposed by a judge drawing an inference from a prior judgement and announcing a sentence of imprisonment of either description for a term which may be five years or less than that but it shall not be less than two years in any case.

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<sup>49</sup>Section 12 and Section 15, The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013.

### 3.1.7 Attempt to commit offences

If we talk about the section 511 of Indian penal code<sup>50</sup> then it says the attempt to commit offence begins actually when “the attempt begins when the preparation actually ends so this section applies where no specific provision for attempting to commit offence has been provided in the code prior in itself.”

The first stage of any offence is the planning plotting and preparation of it obviously and attempt to commit such offence is an overt act and the next act which connects immediately with the commission of that offence and forming all actions performed in the context of that offence and put it together in a series which if not frustrated or abandoned or interrupted or caught by the authorities or police would result in the commission of the offence in its complete essence. ‘Even attempt to commit rape lies under indecent assault under section 354 in between a complete rape and attempt to rape vis-a-vis there lies a very thin grey area covered by section 354 which coins the terms assault or criminal force to outrage modesty or indecent assault.’

## **3.2 The Turf Between Judiciary and Sexual Harassment with the infamous Bajaj case**

In this case the victim and the offender both of them were government officers and they were present at the dinner party in another government officer’s residence. In the garden area ladies and all the men were sitting in separate semicircles and the accused KPS Gill crossed over to the ladies circle and called the victim saying he wanted to talk to her over some matter immediately. When she noticed that he was calling her she went to him and when she was about to sit on a chair the accused drew that chair close enough to touch his chair when she noticed that, she pulled the chair back to its place the chair was again pulled by the accused bringing it near himself. Realising that something was wrong and not felt right the victim

<sup>50</sup>Section 511 Indian penal code, 1860.

moved away and went back and sat at her original place between the ladies. The accused again reached her and stood so close to her that he was only 4 inches away from her knees and he asked her to get up and come along with him and on that when the victim objected stating, "Mr Gill how dare you, you are behaving in an obnoxious manner go away from here." The offender again commanded the victim in such a manner as if he owns the victim or something and he commanded that the victim should get up and accompany him and blocked her way in such a manner that she could not get up from the chair without touching him seeing this she immediately drew her chair back got up and tried to leave the place, after this the accused slapped her on her posterior in full view of all the ladies and all the men present there.

On 20th July 1988, she lodged a complaint alleging commission of offences under these sections namely as section 341, 342, 354 and 509 of Indian penal code against the director general of police of Punjab (KPS Gill) for sexually harassing her in a party in full view of her associates. Amongst many of those associates most of them brushed aside her humiliation by stating that he was drunk and it was a trivial incident the entire political and bureaucratic establishment through its wait to protest the police chief and awarded him the 'Padma shri' when the matter was subjudice. And the oblivious thing that was that that the establishment at the same time when all this these allegations were made and the so-called investigation was going on the tried to intimidate Bajaj by spreading slander against her and isolating her for daring to protest” even as I already mentioned and talked about this particular issue that the easiest way to discredit a woman or even a man the fastest way possible to do that is to spread slander against them and in a woman's case the most opted way of doing this is doing her character assassination in any way possible. In other words we can also say that even if a woman is at such a high ranking post as Miss Bajaj was an IAS officer she quoted, ‘when your prescription is different from all others because the elements due to which you are still suffering have unique features when you do not have a standard or any sort of established norms or set of rules or traditions to follow or any legislation or proceeding to bank upon you have to muster courage to fight against all odds and

create your own way out of the complex and peculiar situation' we can also gather from this statement that this incident was of 1988 back then let alone the issue of sexual harassment working women for only so less in number that it there was no specific norms talking about any kind of sexual harassment at any place in terms of of in the way it is done today so obviously she had to fight all against all odds and present a powerful and honest case against a mystreet mint and against an ill treatment done towards her in front of so many people who just prefer to stay quiet because of the the high influence influential order of some people in our society. "As her oppressor was a powerful Director General of Police in Punjab in 1988, who had a good sense of 'untrammelled power and arrogance' in the days when his force was battling terrorism."

Since so many years have passed by things changed a lot from 1988 when this complaint was originally filed and the victim had to face a lot many difficulties in her job like punishment postings, revengeful transfers and we should also remember the fact that this was all done in the era of 1990 of Punjab when there was no social media whatsoever and various people this appeared anonymously and it was a very usual incident back then it's even normal now sometimes in a very backward area but with people who are so much educated and at such dignified positions also it was it must it must have been really difficult for her as she was all too also threatened for her life her family's life was under danger as well and this was all done just because she spoke on the matter and in her case the word modesty was justified for the first time that it the man's for the offenders intention will not be tested rather his knowledge upon the same is sufficient that his behaviour was obnoxious and it was a form of harassment towards a woman and the modesty test is the one where the perpetrators actions are able to shock the senses of of the victim. Like today there was no social media back then to support her claim and Ms Rupan Bajaj was character assassinated by Mr Gill so that she would drop the case or be scared and succumbed to injustice and in order to do that she also faced a blighted career where she was questioned again and again on the basis of the rumours spread by Gill's supporters.

Back then it must have been really very difficult to raise voice against a so-called National hero, emotional and threatening for her dignity, family and even dangerous for her life as well. Mr. Gill was a Commissioner-cum-Secretary back then and Miss Bajaj stated that "the decision to lodge a complaint was really difficult, there are consequences of complaining and not complaining. But if I hadn't complained it would have appeared that I was willingly a participant of the act. the people sitting above him left no stone unturned to protect mister Gill and of obviously he would have continued doing this to other women as well and she had to put a stop to this aaj in an interview mis Bajaj also stated that there was a woman from England in the party as well with whom Mr Gill had misbehaved but she had left the party on that occasion and did not dead to raise voice against him. Mr Bajaj had also said that there were times when her life was threatened and endangered and we should remember that we are talking about the 1990 yet she remained determined because at first she just wanted the government to take executive action against him under conduct rules for moral turpitude. But everyone from the then Governor S.S. Ray to Chief Secretary R.S. Ojha brushed her allegations in a non relevant way by giving problematic statements like 'Rupan these things keep happening and you are not diminished. Consider yourself lucky, it could have been worse' by this statement she gathered that 'the Governor, S.S. Ray , very clearly told me to forget it and go home. He would not do anything.' She even went to Sarla Grewal, then secretary in the PMO, prior to this she didn't want any media coverage but the story splashed in the *Indian post*, just after the day she met with the PMO. She has endured 18years of fighting and it is not a short time period, it is like a lifetime. Here we should also remember the fact that back then there was no concept of speedy trial at all although today as well the speedy trials are not as speedy as they ought to be but still the situation is better from back then.<sup>51</sup> An FIR was registered finally when nobody was listening and complaint to the court of the chief judicial magistrate was made but the High Court back then quashed the complaint full stop the supreme court reversed the

<sup>51</sup>Chander Suta Dogra, *A Retired IAS Officer on How the #MeToo Movement Can Use Her Case Against K.P.S. Gill*, THE WIRE 15-10-2018 (10 Jul 2020, 4:30 PM), <https://thewire.in/women/rupan-deol-bajaj-kps-gill-case-me-too>.



judgement of the high court and held that such FIR disclosed an offence under section 354 which found favour with High Court was that in the view of section 95 of the Indian Penal Code, that the harm caused to Mrs Bajaj was not 'trivial' enough to let her make a complaint, The Supreme Court observed :

*'Viewed in the light of the above principles we have arrived at an opinion that section 95 of IPC has in no manner application to the allegations made in the FIR as it can be a subjective matter. On perusal of the FIR we have found that Mr Gill the topmost official of the state police of Punjab behaved in an indecent manner with Miss Bajaj, a senior lady IAS officer that too in the presence of a gentry comprising of men and women both and in spite of her raising objections continued with such behaviour. If we are to hold on the face of such dubious allegations the ignominious and the traumatic experience to which she was subjected as to no fault of on and being the victim herself she was in a slight perspective that Mrs Bajaj herself as a person of ordinary sense and temper would not complain of it sagacity will be the first casualty of it all.'*

After so much turmoil finally the hon'ble Supreme Court held that the allegations made by Rupan Deol Bajaj indeed in prima facie discloses that the offences under section 354 and 509 Indian penal code 1860 in this case the perpetrator was found guilty for repeatedly making inappropriate advances and finally slapping the the complainant on her posterior which was obnoxious behaviour on the offenders part. The court pronounced that the ultimate test for a certain whether modesty has been outraged under the Indian Penal Code is whether and when the action of the perpetrator could be perceived in such a light that if it is capable of shocking the census of decency of a woman or not. The court deferred to many substantial definitions of the term of modesty<sup>52</sup> which can be illustrated below as:

<sup>52</sup>Lawnn.com, *Judgement:Rupan Deol Bajaj v K. P. S Gill*, LAWNN.COM 18-01-2017 (12 Jul 2020, 7PM), <https://www.lawnn.com/rupan-deol-bajaj-vs-k-p-s-gill-2/>.

(i) Scrupulous chastity of speech, thought and its implementation i.e. , conduct and womanly propriety of behaviour(sometimes leading to even horrendous crimes like rape).

(ii) Freedom from indelicacy, coarseness and indecency and a regard for propriety in speech, dress and conduct.

(iii) Decorously threatening behaviour in manner and conduct not just forward and lewd.

(iv) Reserve or sense of shame proceeding from instinctive aversion to impure or querce suggestion leading to a toxic offence.

Although having an intention for a mens rea to insult and outrage the modesty of woman is an essential element under section 354 and section 509 of Indian penal code but in all the criminal offences intention has to be proved from the the act of the accused and facts of the case but in the situation where it was assessed that even the knowledge of the offender or the perpetrator is enough that a sexually coloured remarks has been made for some action has been taken from his side whether intended to or not.

## CHAPTER IV

### 4.1 The Judicial Approach to the Vishakha Case

It is not known to most of the people apart from lawyers, some journalists and activists, 'that the recent Sexual Harassment Act as published in the Gazette of India had originated from the ghastly rape of a community worker in rural Rajasthan.'

India before 1997 had no actual statutory definition of Sexual Harassment it was only in that year through to some of the few notable judgements that penned down and brought forward the existence of this problem before 1997 so many women facing sexual harassment at workplace had to lodge a complaint either under section 509 or section 354 of Indian penal code 1860. More over we can also state that till the Vishaka guidelines were submitted neither nor any penal laws in India imposed any kind of obligations on the employees or person in charge of any such work place to protect the female employees from sexual harassment and when such a complaint was made to a head of the department if women came forward with it because if there were no laws regarding this obviously women would have suffered quietly rather than facing unnecessary remarks and insult for speaking up to injustice. So this year for the first time in the Indian Judicial history, the court recognised Sexual Harassment at workplace as a recurring phenomena and a report repeated offence which left its offenders and perpetrators to roam around freely because there was no there were no penal charges on them to subject them to any kinds of of punishments they would have gotten if they would have done the same today. The Apex court through this case defined it in a formal and legal manner to be included in the Act in future. Also the given definition of sexual harassment at workplace was in close '*Pari materia*' with that of CEDAW.

The main purpose and aim of the apex court during the cause of of developing these guidelines was to ensure a secure fair comfortable and stress free work environment on one hand and completely eliminate possibilities or circumstances

or situations where The protector could easily abuse his position of trust and turn Predator on the victim and the possibility of this happening could be lessened that is that was the whole purpose of this cause.the employees or the people in charge of the of these work places in private sectors as well as in public sectors but directed to take appropriate steps to help prevent situations in which a complainant of an offence like sexual harassment would not be her asked anymore and would be given a safe and secure environment to work in until the enquiry is done and the investigation is ongoing the supreme court also justified that those guidelines would not just print produce prejudice any rights under the protection of Human Rights Act,1993 because many times even a fake complaint it is made to destroy the reputation of a man for achieving various benefits from that defamation of of a superior boss for example now a days if a complaint is made of Sexual Harassment against a man in a powerful or a dignified position in most of the circumstances if the man is innocent and the complaint is fake and frivolous the first thing which the enquiry committee demands is that the resignation of that male superior who is in a top position should be handed over to the enquiry committee and the the company as well.

This historic judgement of Vishaka vs State of Rajasthan was actually an outcome of a Writ Petition filed by certain social activists and NGOs after an incident of a brutal gang rape of a government development worker in a village named Rajasthan. The victim whose name was Bhanwari Devi was appointed as a "Saathin" meaning a female social worker at a village level of a development programme running and funded by the Government of Rajasthan, this project was initially started for in process in order to make the women more empowered and the main aim of this project was to fight against child and multiple marriages in the villages to protect those children from domestic abuse especially girls with the local administration's assistance and it was done for a good and noble cause because the work which this NGO was doing it should have been done by the police administration by the law making authority and by the state government but when they failed to do so and the endangerment of that local area was increasing day by day by marrying of young girls this was a step taken towards the

prohibition of such monstrous act of child marriages. As the people of Rajasthan rural area especially justify the tradition of marrying thousands of infants and children every year it was during the festival of a cat age that Bhanwari Devi tried to stop the marriage of an infant daughter in Bhatari, her village as she was just her job to do so.<sup>53</sup>

The daughter which was eventually married off belonged to a gujjar family and although she was an infant daughter nevertheless of that fact she was married of and in this entire exercise while bhanwari was just doing her duty she earned quite a lot of enemies in the village. As we can usually expect the retribution from the the gujjar family side came in quickly as they were an influential and a majority community and they resolved not to buy any other imports from her and refused to sell milk to her and even some of the shopkeepers word told to restrain her from buying household items from their shop and if those shopkeepers don't follow the order from the family and not boycott them socially they would have to face consequences. this was just the beginning as time passed by she was threatened with such dire consequences and even her arsd mentally and they even tried to torture her physically. On September 1992, five men belonging to an upper caste community 'who wanted to teach her a lesson' took the law in their own hands for trying to stop the matter the marriage of their infant daughter, in cities the discrimination like upper caste and lower caste community has been almost dead for many years but in villages even in today's date there is a substantial discrimination which can happen overnight and the powerful people I have always their way of doing certain things and making certain things happen for example the boycott of a person belonging to a minor community the boycott of a family standing up for their rights committing criminal offences like child rape child marriage rape of girls above 18 years old and killing them after so that no traces can be found back to them and they can repeat the same offence on the bend of their will. so to teach Bhanwari Devi a lesson these five men for challenging their

<sup>53</sup>Archana Nathan, *Dalit woman's rape in '92 led to India's first sexual harassment law – but justice still eludes her*, SCROLL.IN 22-10-2018 (14 Jul 2020, 8PM), <https://scroll.in/article/899044/dalit-womans-rape-in-92-led-to-indias-first-sexual-harassment-law-but-justice-still-eludes-her>.

authority including ram Karan gujjar gang raped her in front of her husband while they were both working in their fields.<sup>54</sup>

Thereafter in this case the only male doctor at a primary small health centre refused to do a medical examination of her and the doctors in the city Jaipur only confirmed her age without making any reference to rape in his medical report so as to make this a rape but not a child rape because the punishment of child rape is more than the committing of rape of a woman older than 18 years of age. Even at the police station she was also tortured by the policeman the policeman asked Bhanwari to leave her lehenga behind as an evidence and return to her village and she was left with only her husband's blood bloodstained dhoti to wear as when these men committed this monstrous gang rape on her they also beat his husband up and physically assaulted him as well even in small village police stations such monstrous treatment after just being gangraped is not expected from the police officers who are there to serve the public. She was even told to sleep in the police station along with her husband and all the the apathy of the system crossed innumerable amount of limits because within their plea that night they were turned down bluntly there were evidences all over of her being gangraped but the police did not do anything at first. After that she received no support whatsoever or any kind of help from her employers the Rajasthan government, or any other authorities despite repeated complaints she made to the authorities of the physical torture she and her husband was subjected to even after such a heinous crime being done and being gang raped which is a very serious crime so much neglecton was being seen on the government's part. instead even after this the police and the district administration having no shame at all not only tried to cover the whole thing up but also shifted the onus of proving her allegations holding her responsible for this unpleasant monstrosity of a gang rape that she had brought this upon her buy intervening in that child marriage.<sup>55</sup>

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<sup>54</sup> Ibid.

<sup>55</sup> Ibid.

She filed a case against the rapists in the trial court after gathering a lot of confidence and courage and putting her faith in the rule of law to achieve justice for herself. It was an enormous amount of pressure created from various other NGOs and women groups that the accused finally got arrested and it was also because of the complaint she filed. The trial court acquitted the criminals in 1995 stating a very weird statement, ' it is beyond comprehension that those who live in rural culture set the court would in this manner commit a rape particularly in collusion with someone who is 40 years of age and another who is 70 years of age and that too during broad daylight and while doing this he was crime they did it in the presence of other men. The court is of the opinion that Indian culture has not before falling to such low standard and depth that someone who is brought up in it and innocent rustic man will turn into a man of evil conduct who this regards cast and age different and becomes animal enough to assault a woman. The following judge also asserted on a fact that if there was a delay of 52 hours in the medical examination it could possibly mean that she was lying about the acquisition meaning it was a fake complaint and she was telling the truth.'

After this mockery of a judgement it was very but obvious that Bhanwari Devi was undeterred but she did not lose courage and she still had faith in the judicial system when some reporters met her and wanted to ask about her struggle and wanted to take a statement and a photograph she being as fearless as she could be as a survivor and a fighter said that, ' print my name I am not a criminal that I should be ashamed for it take my photograph print that I don't have anything to hide it is those men who should feel ashamed of their upbringing and it is their family you should be ashamed to come out in broad daylight and have their photographs taken they should be the ones who should feel ashamed.' However by the year 1995 meaning of incident it was already 15 years and there was only a single hearing of the case where the Rajasthan Court didn't reach any conclusion. Only one hearing for this case was done and two of the accused had already died. But as we know this is the problem of our system that it takes so much of time to deliver justice to the victim that the accused has had already lived his almost his complete life until he is sent to jail and he is found guilty until then only the

victim and the family of the victim and people related to her are the ones who suffer the consequences of even speaking up after such humiliation and such monstrous crime being done to them.

As we say the people who are honest and courageous do not lose their inimitable fighting spirit and in one worries case she also inspired fellow sartans and women groups worldwide countrywide and they organised and launched a justice campaign seeking justice for bhanvari and by now there was national outrage regarding this case. Everyone associated were putting in in efforts relentless in their own ways and by their own means and with the movement brought some result when the appeal was filed before it the high court held it is a case of gang rape which was committed to seek vengeance it was a serious lapse on the part of the employer which is the State government of Rajasthan in bhanwarilal ke Devi case and not to provide safe working environment to the saathins is also a serious fault at the employers part which he should take responsibility for, as an immediate and instant response to this judgement of High Court the remaining three accused who until now had been absconding and police were so lousy and relaxed regarding this case and the accusation had suddenly captured them and frame it in a better way they surrendered before the court. It is really disheartening and disappointing that even after suffering such dire consequences for just doing the right thing and her job those men took vengeance from her by raping her one by one in front of her husband in broad daylight humiliating them and even after this the all three accused were absconding only after the High Court decision were they captured and brought in police custody.

After this several women groups around the country filed a public interest litigation in the supreme court based on which the Vishaka judgement was finally delivered in 1997 and the rest is history this can be said to a significant legal victory of so many women organisations working relentlessly in the times when there was no social media support all media support even starting a new trend in the country which should have been done on its own but the credit goes to these



women groups and NGO workers who came forward and supported Bhanwari Devi.<sup>56</sup>

The writ petition which was filed in the supreme court had three aims :

- (i) To prevent and prohibit Sexual Harassment at workplace.
- (ii) To assist and help the authorities find suitable methods for the realization of gender equality and addressing the issue of Sexual Harassment.
- (iii) To fill the vacuum in the existing legislations and laws where they lack some details.

The Supreme Court just to widen the scope of this issue of sexual harassment observed that in the absence of any domestic law occupying the field to produce and formulate such effective methods that they would keep a check on the the offence like Sexual Harassment of Working Women at all Workplaces that the contents of International Conventions and norms(CEDAW)<sup>57</sup> may remain significant for the purpose of interpretation of guarantee of providing Gender Equality and the Right to Work with basic human dignity in Articles 14 and 15, 19 (1) (g) and 21<sup>58</sup> of the constitution and their in the safeguards against sexual harassment should be implicit in them only. Any international convention covering this issue not inconsistent with the fundamental rights just mentioned above and in harmony with its spirit must always be read with these articles are the provisions given above to enlarge the scope of this issue and the meaning and the content thereof to promote an objective of a constitutional guarantee and to achieve equality.

This is already implicit from Article 51(c) and the enabling power of the parliament in laws from implementing the international conventions and norms by

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<sup>56</sup> Ibid.

<sup>57</sup> Flinterman, *The Universal Declaration of Human Rights at 60 and the CEDAW Committee*, OHCHR 04-11-2008 (15 Jul 2020, 2:30PM), [https://www2.ohchr.org/english/bodies/cedaw/docs/statements/UDHR60\\_Mr.Flinterman.pdf](https://www2.ohchr.org/english/bodies/cedaw/docs/statements/UDHR60_Mr.Flinterman.pdf).

<sup>58</sup> INDIA CONST. art. 14, art. 15, art. 21, art. 19 cl. 1.

virtue of article 253 read with entry 14 of the union list in seventh schedule of the Constitution therein, Article 73 is relevant as well it provides that the executive power of the union shall extend to the matters with respect to which parliament has power to formulate laws and implement them. The executive power of the union is there for available till the parliament in a such legislations to provide expressed measures needed to cut this evil practice of sexual harassment.

#### **4.2 Some of the guidelines given in the Vishakha case**

If we talk about all the rules and the norms described in the Vishakha case we cannot study them in detail your in such specification that all of the rules are listed here but some of the norms are as follows<sup>59</sup>:

1. It shall be the duty of the employer on any other responsible person of that workplace to prevent or to deter the commission of an act like sexual harassment and to provide or or list the procedures where if such acts are committed then what would be the resort avittam could take and the procedure for a settlement, resolution for prosecution of the acts like sexual harassment should be given step by step.

2. The definition of sexual harassment for the purpose of this act includes any such an welcoming sexually determined behaviour directly or by implication if they fulfill such conditions given below :

- A demand for a sexual favour.
- A demeaning request for a sexual favour.

<sup>59</sup>Sanghamitra Mazumdar, *What are Vishaka guidelines? Know what constitutes sexual harassment at workplace*, THESTATESMAN.COM 10-10-2018 (17 Jul 2020, 7PM), <https://www.thestatesman.com/supplements/law/vishaka-guidelines-know-what-constitutes-sexual-harassment-at-workplace-1502694883.html>.

- Any kind of unwelcoming physical non verbal or verbal conduct of sexual nature.
- Physical contact or any kind of advancement.
- Showing pornographic material.

If this is established that any of the above-mentioned acts are committed in any given circumstance where the victim is under such duress or under such pressure that she has a reasonable apprehension in relation to the victims employment or work that whether she is drawing salary or honorarium or voluntary and whether she works in government public or private enterprise such kind of a conduct can be humiliating and it may hamper the physical and mental health as well apart from being tortured there is a significant threat to her job well being and in cases like the Bajaj threat to her life as well for speaking up about the issue. It is really a perfect discrimination for instances like these when the women has reasonable grounds to believe that her objection would create a disadvantage for her instead of creating awareness and seeking justice for her and employment and her work will be affected because of this including promotion demotion creating a hostile work environment for recruiting people who can undermine or domain them.

#### 4.2.1 Precautionary Steps

All of the employers all people in charge of that workplace whether in public or in a private sector they should take some appropriate steps to prevent a crying like sexual harassment in their establishment and without prejudice saying to the generality of this publication and transferring the onus of the burden of approving herself even after being harassed can be avoided and they should take the some steps<sup>60</sup> like:

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<sup>60</sup> Ibid.

- Private employers should take steps to include some provisions in the standing orders under the Industrial Employment (Standing Orders) Act, 1946.
- A rulebook or a book of rules and norms prohibiting sexual harassment at workplace should be notified published and circulated in such appropriate ways that everyone knows the consequences of such acts.
- Rules made for the perpetrators for acts like these should also consist of a set of rules and norms where they should outrightly express that how a committee would be formed after any such offence has taken place and how they would charge penalties in such cases against the offender or the perpetrator.<sup>61</sup>
- The working condition should be appropriate in such a respectable hue that the working as health hygiene leisure and all of these are in such a manner that the possibility of creation of a hostile environment towards women at these workplaces should not happen only and no employee women should be responsible to believe that she is disadvantaged or she is in a threatening or a dangerous position with her employment she should be comfortable enough to work in that environment.

### **4.3 The Vast and Expansive Scope of the landmark Vishaka Case**

The critical advance made by the Vishaka judgement is the expansive interpretation given to Article 19(1)(g) of the constitution of India, insofar as sexual harassment at the workplace has been held to be in violation of the fundamental freedom of all women, as citizens, to pursue the business, trade or profession of one's choice. It is within the framework of constitutional law that the judgment operates, holding that: Each such incident results in violation of the

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<sup>61</sup> Ibid.

fundamental *Rights of Gender Equality* and the *Right to Life and Liberty*. It is a clear violation of the rights under Articles 14, 15 and 21 of the constitution. One of the logical consequences of such an incident is also the violation of the victim's fundamental right under Article 19(1)(g) *to practice any profession or to carry out any occupation, trade or business*. The other major advance is the emphasis on international law as a source of law in India in the absence of any other governing statute which prevents such violation of a fundamental freedom. The judgment, while recognizing the need for legislation on the subject, puts in place a declaration of law that sexual harassment at the workplace is a constitutional wrong and a crime. Having said this, the judgment recognizes the need for, and puts in place, an internal complaints procedure for entertaining complaints of sexual harassment in an attempt to achieve equality and gender justice at all workplaces. The court observed that rights without remedies are meaningless and therefore puts in place guidelines for prevention and Redressal of sexual harassment. The significance of the internal committees lies in their role as aiding prevention of sexual harassment, and therefore these committees are vested with the responsibility of sensitization as part of their mandate and function. It is important to emphasise that this declaration of law is not confined to the employment relationship as traditionally understood between employer and employees, but instead widens its focus to the workplace as broadly understood, and all relationships that occur between those who inhabit a common workplace and interact with each other. As a result, the intention and purpose of Vishaka has always been to provide as wide a coverage as possible to the fundamental rights of women, and therefore applies equally to conventional workplaces as well as to other professional spaces such as Universities (and the students therein), professional and technical bodies, and a variety of other spaces where sexual harassment could infringe upon such fundamental rights of women.

#### **4.4 Post the Vishaka Case Changes in the Judiciary**

The judgment, however, can only be considered inchoate, and although the law developed further in a number of judicial precedents, there was uncertainty in the

public sector on the role of the internal complaints committees, and resistance to its application in the private sector. Slowly, but surely, the law relating to sexual harassment at the workplace advanced subsequent to Vishaka. Women employees and workers began to actively repudiate the egregious and oppressive conditions of work, till then considered commonplace. These advances were made in the ordinances and policies of educational institutions and universities, in the service rules of the central and state governments, and even in the model standing orders applicable to industrial establishments. Each positive change represented the courage and perspicacity of women who asserted the rights Vishaka had underscored, whether through complaints, petitions, negotiations with managements and employers, or long drawn out court proceedings. Some advances were in specific areas of legal interpretation, such as the definition of workplace or the method of constitution of the complaints committee. Other advances were overarching, addressing core jurisprudential issues. The Vishaka judgment had not stated what the expected outcome of an enquiry would be, nor did it speak of any sanction against the person who was responsible for the sexual harassment. This has led to a situation within the organized workforce, and particularly in government employment, resulting in a multiplicity of enquiries, one held by what has come to be known by the Vishakha Committee and the other under the Civil Service Rules, Service Rules for Central Government employees are contained in the Central Civil Services(Conduct) Rules, 1964, and the Central Civil Services (Classification, Control and Appeal) Rules, 1965. State governments often have separate or additional rules, as do other wings of the State, such as the armed forces. The situation was obviously undesirable for the woman who had to go through two sets of enquiry.

An interim order in 2004 in *Medha Kotwal Lele*<sup>62</sup> which made detailed directions and thereby changed the entire dynamic of the Vishaka guidelines and the internal complaints committee set up under it. From being a preventive mechanism, this committee was recognised as an enquiry committee for the purposes of taking disciplinary action against an employee. As can be seen from the proceedings in

<sup>62</sup>*Medha Kotwal Lele v. Union of India*, (A.I.R. 2013) 1 SCC 297(India).

this litigation, the emphasis was on the civil services, with little or no discussion regarding employees in the private sector or in technical institutions. On 9th of October, 2012 the Supreme Court rendered the final judgment in Medha Kotwal Lele where it said that the findings and the report of the complaints committee shall not be treated as a mere preliminary investigation or inquiry leading to a disciplinary action but shall be treated as a finding/report in an inquiry into the misconduct of the delinquent. It is fortunate that the service rules had already been amended and brought in conformity with Vishaka, and subsequently with the directions of the Supreme Court in Medha Kotwal Lele, and these amended rules remain in full force and effect.

Additionally, at the time of writing, the Department of Personnel and Training, Government of India, is further amending the service rules to incorporate some of the beneficial provisions of the sexual harassment of women at workplace (Prevention, Prohibition and Redressal) Act, 2013 (2013 Act), without in any manner detracting from the full impact of the judicial precedents which make the report of the internal complaints committee binding on the disciplinary authority.

#### 4.4.1 Gopal Kanda Case

In 2012, Mr. Gopal Kanda (the former minister of Haryana) and his aide, Ms. Aruna Chedda have been accused of harassing, conspiring, intimidating and creating an atmosphere of terror and continuous pursuit in the mind of 23 years old Air Hostess, Geetika Sharma who committed suicide on August 5, 2012. She alleged that he sexually harassed her also. The latest development in this case<sup>63</sup> is that, both said, the accused have now been charged under Sections 306, 467, 201 of Indian Penal Code along with Section 66 of the Information Technology Act. The status of this case is that it is being tried in the Delhi High Court.

<sup>63</sup>State (Nct Of Delhi) v. Gopal & Ors CRL.L.P. 771/2018 (India).

#### 4.4.2 Tarun Tejpal Tehelka case

In *Tarun Jit Tejpal vs The State Of Goa AIR 2019*, Tarun has been allegedly accused of sexually assaulting a female journalist more than once at a function in Goa and the story thereof came into limelight because of certain emails that got leaked somehow. The irony stands in the point that the respondent in this case happens to be the father of the complainant's friend and he was seen as a paternal figure who had worked with the father of the complainant. The respondent is accused of having violated his position of trust in relation to the complainant and what is more unfortunate is that the respondent journalist himself had launched crusades against the sexual harassment of women by way of his hold over the *Art of Journalism*. It was an occasion for the host of *Telhaka's* think festival with an intellectual gathering where the alleged most un intellectual cause of action took birth and culminated in the slapping of serious charges upon the Tejpal which do find mention in Sections 341, 342, 354A and 375 of the Indian Penal Code. The alleged sexual harassment of the lady by the respondent, if proved true, is definitely no case to be treated with any sort of lenient action but here the slapping of charges of rape' and the same being upheld by a Goa Court demanded an introspection of the over enthusiastic Legislature which has very actively modified the basic structure of the definition of rape earlier to be found in Section 375 of the Indian Penal Code, 1860. Tejpal spent six months in jail before the Supreme Court granted bail. The trial in this case is yet to begin.<sup>64</sup>

#### 4.4.3 Case of the Retired Judge AK Ganguly

66-year-old former judge AK Ganguly was accused of sexually harassing a former intern. Last year in January 2014, the Supreme Court also dismissed a plea seeking to quash the complaint of sexual harassment against the retired judge Ganguly.

<sup>64</sup>The Economic Times, *Sexual assault case: SC dismisses Tarun Tejpal's plea seeking quashing of charges*, THE ECONOMIC TIMES 30-12-2019 (18 Jul 2020, 3:30PM), <https://economictimes.indiatimes.com/news/politics-and-nation/sexual-assault-case-sc-dismisses-tarun-tejpal-s-plea-seeking-quashing-of-charges/articleshow/70735352.cms>.



With intense political pressure, Ganguly had to eventually step down as the West Bengal Human Rights Commission. However, Ganguly had denied the allegations, and challenged the committee's findings in a letter to the then Chief Justice of India, P Sathasivam.<sup>65</sup>

#### 4.4.4 Madhya Pradesh High Court case

The Supreme Court, in a landmark judgment on December 18, 2014, *Additional District and Sessions Judge X v. Registrar General, High Court of Madhya Pradesh* pronounced how sexual harassment cases involving a higher judiciary judge should be handled. The judgment, contrary to the law of the land, is a clear case of judicial overreach.<sup>66</sup> The Supreme Court has the power to provide what is known as equitable relief, when a mere legal remedy is inadequate. But that cannot be against the express provision of an Act, especially when that remedy bestows upon the judiciary immunity from the law of the land.

The victim in the case was a district and sessions judge since August 2011. In July 2014, she was transferred to a remote location. As her daughter had board examinations that year, she sought an extension. Her request was rejected and she resigned on July 15, 2014. On August 1, she sent a representation to, among others, the Chief Justice of India, levelling allegations of sexual harassment against a male judge of the Madhya Pradesh high court who had administrative control over her court. The sexual harassment charges alleged were indeed jaw-dropping. It was imputed that, in December 2013, the accused judge asked her to do an item number at a function, which she refused. Another allegation was that at a function in February 2014, the accused judge made sexist remarks and put his

<sup>65</sup> J. Venkatesan, *Judges' panel finds evidence against Ganguly*, THE HINDU 05-12-2013 (18 Jul 2020, 8PM), [https://www.thehindu.com/news/national/judges-panel-finds-evidence-against-ganguly/article5425993.ece#:~:text=A%20three%2Djudge%20committee%20investigating,an%20act%20of%20unwelcome%20behaviour.&text=Justice%20\(retd.\)-,A.K.,assist%20him%20in%20his%20work](https://www.thehindu.com/news/national/judges-panel-finds-evidence-against-ganguly/article5425993.ece#:~:text=A%20three%2Djudge%20committee%20investigating,an%20act%20of%20unwelcome%20behaviour.&text=Justice%20(retd.)-,A.K.,assist%20him%20in%20his%20work).

<sup>66</sup> The Leaflet, *Ms. X's reinstatement as Additional District Judge: Supreme Court bench judges recuse themselves, allow mentioning before CJI tomorrow*, THE LEAFLET 21-02-2019 (20 Jul 2020, 10:30PM), <https://theleaflet.in/ms-xs-reinstatement-as-additional-district-judge-supreme-court-bench-recuses-itself-allow-mentioning-before-cji-tomorrow/#>.

hand on her back. According to the accused judge, the allegations were fabricated. He asserted that the functions were video graphed and her demeanour in those videos does not indicate distress.

The victim alleged that the accused judge abused his administrative powers to harass her. She was allegedly subjected to unwarranted inspections by her superiors. Her official comforts were stripped wherever possible and, she alleges, her transfer was the culmination of this victimisation. The high court and the accused judge denied all the allegations. It is their version that her transfer was made by a group of judges and approved by the chief justice of the high court.

Upon receiving her complaint, the chief justice of the Madhya Pradesh High court appointed a two-judge inquiry committee. The petitioner challenged this committee, claiming it to be against the in-house procedure prescribed by the Supreme Court to investigate and address all allegations against judges of higher judiciary. Her argument was upheld by the Supreme Court on December 18. In the judgment, it was held that the in-house procedure was binding even for inquiring sexual harassment allegations against a high court or Supreme Court judge. Such an inquiry, if against a high court judge, may have up to seven steps. First, the chief justice of the appropriate high court shall personally look into the complaint. It is discarded if he feels it to be frivolous. If not, the response of the accused judge is sought as step two. If the chief justice of the high court does not find the allegation baseless, he shall forward it to the Chief Justice of India, as step three. If the Chief Justice of India finds it necessary to go ahead, he shall constitute a three- member committee comprising two high court chief justices from other jurisdictions, as step four. The report of the committee is step five, if found guilty, the accused judge shall be advised by the Chief Justice of India to voluntarily retire. If that judge is unrelenting, the Chief Justice of India shall advise the chief justice of the high court not to allot any judicial work to that judge in step six. In step seven, against that unrelenting judge, the Chief Justice of India recommends impeachment. On plain reading, the approach of the Supreme Court in entertaining allegations against a member of the higher judiciary is bold and laudable. But this

seemingly bold approach is laden with a deeper agenda. The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013, came into force in December 2013. Before that, the Vishaka Guidelines 1997 a judge-made law to fill the legislative vacuum occupied that field. The complaint of this victim is a textbook case of sexual harassment under the 2013 Act. Then why did the Supreme Court ignore the 2013 Act, and instead opt for the in-house procedure? Why didn't the victim file her complaint under the 2013 Act? A complaint under the 2013 Act has to be made within three months of the incident. In exceptional cases, the Act speaks of extending the time limit by another three months. Her first sexual allegation, pertaining to the item number, was of December 2013. But she made the allegation in August 2014. She was, thus, terribly late. As an additional district and session judge and the president of the Vishaka Committee for those courts, she was not a commoner. Perhaps, her motive in raising the allegation was not mere justice under the 2013 Act. She wanted reinstatement. That was her second prayer before the Supreme Court. Failure of the Supreme Court and the respondent high court to usher her to the 2013 Act is of greater importance. By this they insulated the higher judiciary from the 2013 Act. Had the Supreme Court judgment discussed the 2013 Act and held it not applicable to the judiciary, there would have been hue and cry. To avoid that, perhaps, they talked only about the in-house procedure. The in-house procedure was adopted by the Supreme Court only in their administrative capacity. Does it override a valid enactment made by Parliament! If yes, why was the 2013 Act invoked against a former judge of the Supreme Court last year, when a former intern levelled sexual harassment allegations! Paragraph 33 of the judgment concerning the victim district judge specifically notes that the procedure adopted by chief justice of the Madhya Pradesh high court was wrong as it was not opted for any inadequacy noted in the in-house procedure. If the same reasoning is used to choose between the 2013 Act and the in-house procedure, which shall survive. Through this litigation, the judiciary as well as the victim have managed to attain indirectly what they could never have accomplished directly. A litigant taking a road less travelled by is not something new. But for the Supreme Court, which has all the power to declare the law of the land, this self-serving departure is not a

matter to be proud of. Even if there is a conflict between the law and the so-called equity, it is the law which has to prevail. Equity can only supplement the law; it cannot supplant or override. In July 2015, the in-house committee submitted its report to the CJI, concluding that the sexual harassment charges were not proved against Justice Gangele and the case was closed, due to the lack of satisfactory explanations and evidence.

#### 4.4.5 R.K. Pachauri Case

TERI Nobel Laureate and former environment minister RK Pachauri's involvement into a sexual harassment is one of the most shocking cases in Dr.

R.K. Pachauri vs State (Nct Of Delhi). On May 29, 2015, an internal probe by The Energy and Resource Institute (TERI) found that its Director General, RK Pachauri was guilty in the sexual harassment case filed against him by a woman colleague. The TERI committee also recommended disciplinary action against Pachauri. The committee found that Pachauri's repeated attempts to build a personal relationship with the woman had amounted to 'sexual harassment.' The report filed by the committee stated that Pachauri 'took away work from her after she resisted his advances.' The complainant had told Delhi High Court that 'Pachauri was trying to influence witnesses.'

In March 2016, the Delhi Police charged the scientist with sexual harassment, assault or use of criminal force on a woman with intent to disrobe, stalking and gesturing, or acting with the intention of insulting the modesty of woman. TERI first appointed Pachauri as executive vice-chairman despite the allegations, but eventually dismissed him from the institution.<sup>67</sup>

<sup>67</sup>Raghav Ohri, *Sexual harassment case: Complainant testifies against RK Pachauri*, *THE ECONOMIC TIMES* 13-07-2019 (21 Jul 2020, 6:30 PM), <https://economictimes.indiatimes.com/news/politics-and-nation/sexual-harassment-case-complainant-testifies-against-rk-pachauri/articleshow/70200540.cms>.

#### 4.4.6 Case of Assistant Director General of AIR

In March 2015, a production assistant in Doordarshan had alleged that the Assistant Director General of the channel was harassing her sexually for over a year. He was accused of making physical advances, subjecting her to obscene comments and calling her to his chambers at odd hours. The complainant also alleged that a hostile environment was created for her instead. Ironically, herself is a part of the organization's in house sexual harassment committee. However, instead of helping her out, she was transferred from DD's Mandi House to the Central Production Centre (CPC) office in Hauz Khas. While the DG did not respond to calls, the ADG said that the charges were fabricated. He had said, "This is a malicious attempt to malign my reputation and that of my family. The complainant was upset because we did not recommend a documentary she had contributed to (on the Muzaffarnagar riots) for the national film awards. She complained to the internal complaints committee and was given a fair hearing."

#### 4.4.7 GreenPeace Case

In June 2015, Environment rights NGO Greenpeace India came in trouble, as an ex-staffer went public with allegations of rape and sexual harassment by her colleagues. The complainant alleged that she had to leave her job in 2013 after being sexually harassed and raped by her colleagues. Narrating her ordeal, she said that it started a year after she had joined the NGO at their Bengaluru office. The first incident happened during an official trip in October 2012. 'I got a call from a senior colleague at 11 pm, asking me to vacate my room and insisting that I sleep in his suite.' In another incident, he approached me physically despite my discomfort, insisted on force-feeding me a birthday cake, she told a news agency. Though she registered a written complaint with the HR manager, she did not receive any verbal or written communication from the Internal Complaints Committee (ICC) of the organisation, which looks into sexual harassment cases. To her shock, she learnt that the person was a serial offender and no action had been taken against him despite his misbehaviour with two other female employees.

However, she said, she was blamed for registering the complaint. Once in an official meeting, in my absence, two senior employees indulged in character assassination against me. Even some female colleagues, part of the ICC, made me feel that I was at fault, that I didn't know how to set boundaries, she said. However, matters came to a head in 2013. It was after a party, when a male colleague whom I knew quite well found me unconscious and raped me. You cannot imagine the pain and fear I went through. I was terrified to speak and I knew even if I had, no one in this organisation would come to my aid. I did not have the strength to report my rape, neither to the police, nor to my employers. How could I, when the processes had failed me once already! she asked. Traumatized, she left the NGO after a few months. She said it took her long to overcome the incident, and finally, she decided to tell her story through a Face book post in February this year. Immediately after her post, Greenpeace issued an apology on their website and promised her to re-investigate the case in an adequate manner.

#### 4.4.8 St Stephen college case

In June 2015, an FIR was registered against Satish Kumar, an assistant professor in St Stephen's chemistry department, after a PhD student filed a complaint alleging sexual harassment by him. The student, who is doing her PhD under Kumar's supervision, has also alleged that college principal Valson Thampu tried to protect him when the matter was reported to the college authorities. The girl has also claimed in her complaint that when her parents tried to approach the accused before the matter was reported to college authorities, 'he had profusely apologised to them and assured of not repeating the act in future.' Thampu confirmed that the victim had raised the complaint with him but denied allegations of trying to protect Kumar. On June 21, the research scholar had withdrawn her complaint from the ICC, claiming that she had lost faith in the committee's proceedings.

#### **4.5 The Conclusion of landmark Vishaka case**

Vishaka is, indeed, unique in many ways. Such judicial articulation paves the path not only by bringing SH within the framework of human rights but also by shifting the focus of gender violence from a criminal wrong to a discriminatory conduct that violates a woman's basic human rights. The court not only acted as the active guardian of fundamental rights but also provided temporary respite to working women. The guideline extended the responsibility to eliminate discriminatory sexual conduct to a larger society, in this case, the workplace and obligated the employer to ensure a safe and healthy environment for women employees. The main aim of the court, while evolving these guidelines, was to ensure a fair, secure and comfortable work environment to the extent possible, and also, to eliminate situations where the protector could abuse his position and turn predator.

Vishakha's case was a quantum leap in expanding the principle of fairness in procedure after Maneka Gandhi<sup>68</sup> where the court, for the first time, has 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 Principle of fair and just procedure was expanded further to include a gender justice procedure in furtherance of the constitutional goals of equality."

#### **4.6 The Post Vishaka Scenario**

The drive to fill the existing gaps in the judicial framework gains momentum with every fresh verdict by the Apex Court generating a whole new range of remedial measures under varying circumstances creating a sense of security in the other aggrieved parties placed similarly. Moreover, the strenuous attitude of the court is anti fungal in nature and helps to curb the mushrooming growth of such incidents in future. The Apex Court went a step ahead and held that, an attempt to molest would amount to sexual harassment. Outrageous behaviour of the employee is sufficient to constitute sexual harassment and actual assault or touch is not

<sup>68</sup>Maneka Gandhi v. Union of India, AIR 1978 SC 597(India).

necessary to prove it. In this case AK Chopra, an Employee of Apparel Export Promotion Council was charged with sexually harassing a woman employee working as a clerk cum typist. The clerk had complained that the accused had tried to physically molest her in the office and also tried to sit too close to her and advertently. Despite her repeated protests, he continued to repeat his offensive and unwelcome overtures. The harassed employee complained to her employers about the demeaning behaviour of her superior. Following her complaint, the company suspended the alleged harasser and initiated disciplinary proceedings against him as per the guidelines laid down by the Supreme Court. The Disciplinary committee held him guilty of sexual harassment and removed him from service.

The parties aggrieved by the above order, he appealed to the Staff Committee but before it could take any decision, he managed to obtain the unconfirmed minutes of the staff committee, few of which purportedly favoured him on certain grounds. He, then, approached the high court without any delay with prayer that company be directed to implement those minutes. The High Court arrived at a conclusion the accused only made an attempt to molest the clerk without actually doing so and therefore, he could not be removed from the service. Deciding in his favour while allowing the petition, the high court directed the company to implement the decision of the staff committee as per its unconfirmed minutes. The company filed an appeal with the Supreme Court. Criticizing the judgment of the high court, the Supreme Court held that the high court erred while deciding in favour of the alleged harasser and the court should not ordinarily interfere in the findings of the disciplinary proceedings unless: (a) the finding were based on evidence or (b) the finding were legally tenable. In this case, as the findings were based on evidence and were legally tenable, therefore, the High Court should not have interfered.

The Apex Court of India applied the law laid down in Vishaka's case for the first time in this case and upheld the dismissal of a superior officer of the Delhi based Apparel Export Promotion Council who was found guilty of sexual harassment of a subordinate female employee at the work place on the ground that it violated the fundamental rights guaranteed under Article 21 of the constitution of India. The



Supreme Court made it clear that sexual harassment is gender discrimination and any act or attempt of molestation by a superior would constitute sexual harassment.

The Supreme Court in this case held that, any action or gesture, whether directly or by implication, aims at or has the tendency to outrage the modesty of a female employee, must fall under the general concept of definition of sexual harassment. Each incident of sexual harassment, at the place of work, results in violation of Fundamental Right to Gender Equality and the Right to Life and Liberty the most two precious Fundamental Rights Guaranteed by the constitution of India. As early as in 1993 at the ILO Seminar held at Manila, it was recognized that sexual harassment at workplace was a form of gender discrimination against women.

#### 4.6.1 Awarding of Compensation to Victims

In *Radha Bai v Union Territory of Pondicherry*<sup>69</sup>, Ms. Radha Bai was Assistant Director of Social Welfare Department, Pondicherry. A protective and shelter home for women who are setted under suppression of immoral traffic act was started at Reddiarpalayam by the social welfare Directorate. Radha Bai received a report that the above institution was being misused by the minister for social welfare with the connivance of the superintendent for illegal and immoral purposes. She reprimanded the Superintendent which infuriated the minister. She was transferred from Pondicherry to Karaikal. Subsequently the minister for social welfare became the Home Minister and continued to use women institutions for his immoral activities with the help of some officials.

Ms. Radha Bai made representation to the Government of Pondicherry alleging attempt to molest her by some officials in connivance with Home Minister, Pondicherry. Then she was levelled as a lunatic and false criminal cases were started against her. She was suspended from service. She made a representation to the Governor of Pondicherry with a request to make an enquiry into her allegations

<sup>69</sup>Miss Radha Bai vs The Union Territory of Pondicherry(1995) AIR 1476, 1995 SCC (4) 141.

contained in the complaint filed by her. No action was taken on her representation. She moved to Madras High Court, but her application was dismissed. Then, she moved to the Supreme Court which directed the Governor to take necessary action. Then the Governor ordered an enquiry by a judicial officer of the rank of district judge to inquire into the allegations made by Radha Bai. The order of the Governor was not given effect by the administration again Ms. Radha Bai moved Madras High Court for an appropriate order under writ jurisdiction. The petition was dismissed by the Madras High Court. Then she preferred a special leave petition before the Supreme Court. On the basis of instruction of the Supreme Court, the chief Secretary of Pondicherry issued the necessary order of inquiry by the district judge of Pondicherry. Unfortunately, a superfluous and evasive inquiry into the allegation made by Ms. Radha Bai, the Supreme Court discussed the materials placed before the district judge, and came to the conclusion that Ms. Radha Bai was unnecessarily harassed by the administration and the minister-in-charge of home affairs.<sup>70</sup>

It is held by the Supreme Court that there was inaction and attempt to cover up the entire episode by the Govt. Of Pondicherry and that Ms. Radha Bai was removed from service 17 years ago for no laches on her part and she was driven from pillar to post to seek redress for the wrong done to her. Considering the totality of the circumstances and non-excusable lapses of the administration, and in doing complete justice in the matter, the Supreme Court declared that Ms. Radha Bai would be entitled to full pension and other retirement benefits. The apex court awarded a lump sum compensation of Rs. 3 lakhs for the loss of reputation and honour of Ms. Radha Bai and for the agony she had to suffer in the long battle against the Government of Pondicherry and the then Home Minister of Pondicherry within one month from the date of the order. Thus we can draw an inference that the Supreme Court is taking these matters seriously. In this case, at last, Ms. Radha Bai had a pyrrhic victory for making allegations against the Home Minister, Pondicherry.

<sup>70</sup>Casemine, *Radha Bai(Smt. N.) v. Union of India (By Chief Secretary, Union Territory of Pondicherry)*, CASEMINE (22 Jul 2020, 3:30PM), <https://www.casemine.com/judgement/in/5ac5e2b24a932619d901d559>.

#### 4.6.2 The Iron women : Nalini and Prakriti

Nalini Netto, a senior IAS officer in Kerala<sup>71</sup> was assaulted by the then Minister for Transport, Neelalohitadasan Nadar in his office in the Legislative Assembly premises in the course of an official meeting on December 21, 1999. She extricated herself and informed her husband, also an IAS officer and some colleagues. But she did not lodge a formal complaint as she felt that such an action may tarnish the image of the government as a whole. Her colleagues were unanimous in advising her on the similar lines of maintaining silence.

When, after one month, the stress and mental agony became virtually unbearable, she sought the intervention of the Chief Minister. However, she did not request for the prosecution of the Minister but simply asked for a different working environment and that some action might be taken to protect the modesty of woman officers.

Immediately after this Netto's case came to light, Prakriti Srivastava, the Divisional Forest Officer, Nilmbur, Kerala lodged a complaint on 11th April, 2001, alleging sexual harassment by the same minister in February 1998. Instead of lodging a formal complaint, she simply reported the incident to the city police commissioner, a woman herself, and the chairperson of the Women's commission. She felt too insecure to file a written complaint as she was not well versed with the social ethos of the state.

Moreover, she got to know of the ignominy suffered by few other women in certain previous instances of sexual harassment through media reports. In the course of the investigations of the case, Srivastava was summoned to depose before the Additional Director General of Police (ADGP). After her deposition, however, she started receiving constant threats of grave nature from that minister which

<sup>71</sup>P.G.Viswamohanlal v. Smt.Nalini Netto,1380 of 2014 (S) IN WP(C).1713/2007 (India).

ultimately became unbearable and intolerable. She was left with no option but to file a written complaint only under Section 354 Indian Penal Code demanding legal remedy for the offence of sexual harassment so committed. The government appointed Justice Sashidharan committee without having any legitimacy as the police enquiry was already going on and it amounted to a parallel enquiry in the same matter. All norms were violated grossly while constituting the committee as a sitting male judge, Justice Sashidharan, was appointed as its chairman.

This committee victimized Nalini consistently on one pretext or the other and insisted on holding a public trial, though as per Vishaka judgement it is to have an in-camera hearing. Further, even the instruction of the Vanitha commission that a public trial should not be held in such cases, was completely ignored by the committee. The then Chief Justice went to the extent of comparing her case with that of Monica Lewinsky and suggested that, like her, she should face a public trial. The crime branch in an inquiry relating to Nalini Netto summoned Parkariti for evidence. Her case was, suo motu, taken up by the human rights commission. Though the former minister quit his ministerial post in the wake of the charges of sexual harassment, he continued to be a member of the legislative assembly. Despite his tarnished reputation, his party fielded him as a candidate in elections, proving that political parties have a callous indifference to the candidates' morality or reputation or even criminality. The first class magistrate sentenced Nadar to three months imprisonment and a fine of 50,000 rupees. However, the additional sessions court (Fast Track) in 2008 acquitted him of charges of harassment and sexual assault. In Prakriti's case Nadar was sentenced to one-year jail by the trial court and the appellate court at Kozhikode upheld the conviction. The case is before the High Court now.<sup>72</sup>

<sup>72</sup>Shaju Philip, *Harassment of IAS officer: former Kerala minister acquitted*, THE INDIAN EXPRESS 23-07-2008 (25 Jul 2020, 4PM), <http://archive.indianexpress.com/news/harassment-of-ias-officer-former-kerala-minister-acquitted/339055/>.

#### 4.6.3 The case of PE Usha

In the case of Usha PE v. State of Kerala, a woman activist at Calicut University, suffered harassment at the hands of a bus passenger in December 1999. Though she succeeded in taking the bus to a police station and getting the criminal arrested, police action was tardy. At her workplace, one of the male colleagues, created a hostile work environment by spreading word that she was a consenting party to a public sexual act and not a victim of assault.

Despite an enquiry report by the Kerala State Women's Commission establishing his guilt, university committee concluded that there was no evidence, on record, of sexual harassment by the accused as it did not fit in stereotypical forms of sexual harassment as per Vishaka's judgement. The most interesting aspect of the whole episode was that the head of the department, in which her tormentor worked, headed that university committee. From April 18, 2002, Usha launched an indefinite fast in front of the university. Her oppressor also launched a counter stir. It has been a decade long struggle of a feminist against sexual harassment.<sup>73</sup>

#### **4.7 Shortcomings in the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act 2013**

According to this Act, only women and not men can file a complaint of sexual harassment. This Act only addresses the issue of protection of women employees and is not gender neutral. Male employees, if subjected to sexual harassment, cannot claim protection or relief under the law.

Though this Act deals with protection of women from sexual harassment at the workplace and providing a safe environment, it has been criticised by some jurists

<sup>73</sup>Siddharth Suresh, *Sexual harassment: In Kerala, victim and victimiser fight a rights battle*, THE INDIAN EXPRESS 02-05-2001 (28 Jul 2020, 6:30PM), <http://archive.indianexpress.com/res/web/pIe/ie20010502/op3.html#:~:text=Usha%27s%20case%20is%20a%20familiar,had%20turned%20hostile%20towards%20her.>

on many grounds. The 2013 Act is weighed down by several provisions which are becoming its downfall. These are following lacuna under the Act.<sup>74</sup>

1. The term 'Committed to the Cause of Women' is not explained- The committees which will look at all sexual harassment cases, should consist of minimum two employees as members who are 'committed to the cause of women'. But the term 'committed to the cause of women' has not been explained. Further a member has to be from amongst NGO committed to the cause of women and a majority of the members of the committee must be women. By defining the constitution of the committee in such a way, at the very first step itself bias has been introduced. The committee which is specially formed to promote women specific causes seems to be arbitrary.

3. Areas outside the control of the employer included in the workplace -The definition of the workplace under section 2(o), includes any place visited by the employee arising out of or during the course of employment including transportation provided by the employer for undertaking such journey. Therefore, during an official tour the place of stay, travel mode and office of customers/clients are all included as a workplace and the employer is liable if any incident happens with the woman employee. In the view of the employer, this is an unjust and unreasonable extension of the liability of the employer.

4. Limitation Period for Filing Complaint-The statutory period of limitation for filing the complaint is three months, which can be extended by a further three months for reasons to be recorded in writing. Neither Vishaka nor any of the judicial precedent which followed have ever discussed laying down any period of limitation for filing complaints of sexual harassment at workplace, leave alone a period as restrictive as three months extendable to a maximum of six months.

5. Process of Conciliation-The 2013 Act also provides for a process of conciliation, to be conducted by the ICC at the request of the aggrieved woman prior to initiating an inquiry. The provision of conciliation is completely

<sup>74</sup>Section 2, Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013.

incongruous in a law which purports to provide a Redressal mechanism for women aggrieved by behaviour which the statute itself prohibits. Apart from that important approach to conciliation which is provided in the Civil Procedure Code, where the conciliation/mediation procedure is handled by a body quite separate from the adjudicating the dispute.

6. Penalty for Filing False and Malicious Complaints are Inadequate-The provision for punishment for filing false or malicious complaints, leading false evidence or producing false documents has been criticized by the Verma Committee Report as a red-tag provision, and its existence on the statute book is most unfortunate indeed.

7. Improper Method of Determination of Compensation-The statute also appears to lose steam when it comes to the issue of providing compensation to women who have been sexually harassed at the workplace. The statute first lays down the key guiding factors for the calculation of compensation. It appears to fall short of holding the employer himself liable to compensate a woman employee who has been harassed.

Section 15 determines the level of compensation to be paid to the women which depends on the mental trauma, pain, suffering, loss in the career opportunity due to the incident of sexual harassment, medical expenses, income and financial status of the respondent etc. It means that if the harasser is a wealthy person, then the compensation level will be higher and in other words, the compensation level is determined by the income level of the accused. Something does not seem right. It will give an incentive to accused wealthy/senior level employees for sexual harassment also.

8. The 2013 Act Focus only on Employment Relationship-The 2013 Act, is focused on employment relationships rather than on the whole universe of the working world. This creates confusion among professional, technical and educational institutions, particularly in relation to students, who are not employed, even while legitimately forming part of the rubric of such institutions while

pursuing their education. Technical institutions and professions such as medicine and law are all governed by their own statute, and continue to be so governed. Universities have their own law. It is clear here that universities have their plenary law making power, and ordinances dealing with sexual harassment have the status of law, and hence are complete code of legislation, not made subject to the 2013 Act.

9. Non Cognizable Offences-Another lacuna in the Act is that the offences under the Act are non cognizable offences. If the aggrieved woman chooses not to file a criminal case neither the police nor the court cannot take action suo motu. This is what happened in the former Supreme Court Judge A.K. Ganguly case. The former law intern who alleges to have been sexually harassed by A.K.Ganguly did not show willingness to lodge a police complaint. In this case both the Supreme Court and Ganguly have much relied on the technicalities rather overlooking the ethical and moral dimensions. He feels secure in the belief that the victim has shown no desire to take up the issue with the police and is willing to let the matter die a natural death.

Thus, a fundamental critique of the 2013 Act is that resting power in a non judicial body to compute and direct compensation is questionable in law. The fact is that committee is an internal committee, hence a disciplinary enquiry body to entertain complaints. Determination and awarding of compensation for a legal harm, on the other hand, is in its essence a judicial function. Beyond the bare statements under section 15, no further guidance is provided as to how the ICC/LCC is to arrive at the compensation and what are the methods of computation to be used. This is a serious lacuna in the law.



## CHAPTER V

### 5.1 Introduction

Sexual harassment is really a big cause of concern not only due to its sensitive nature but also due to its normalised universalization that no one seems to be questioning and the undesired outcomes of the unfavourable conditions at the work place. The Workplace atmosphere is the very basic as well as fundamental tool in order to progress in career prospects as well as attain the achievements and goals. In the fast paced developing economies of the world there is much more increased participation as well as involvement of the women in almost each and every major profession . Thus there is a huge and tremendous hike in the number of cases of sexual harassment cases all over the world in every single field . Sexual harassment at the Work place environment is a toxic behaviour of the sexual instinct which is inhumane , of derogatory nature and defames/diminishes the dignity, abilities and self esteem as well as the respect of the victims. Most of the working Women have had faced or have to face this situation as men have long thought of women in a undignified portrait of an object for sexualisation. The President Donald Trump of the United States of America, has multiple times also been accused of sexual misconduct and harassment allegations by a lot of female co-workers or employees over the years as well as during the election time but to an mind blowing unfair irony or gender dignity , he emerged victorious anyhow, this shows the reality and the true face of our society who will enable such people to the extent that they can hold the most important and highly coveted political positions in the country under reasons like ‘men will be men ‘. The term "Sexual Harassment" is relatively of a very recent origin and but dates back to the old times , though the behaviour it reflects and describes is thousands of centuries old. The term is believed to have Benn coined and emerged in the middle of the 1970's in North America, in the united kingdom around 1980's and after a few years subsequently absorbed and adopted in the Indian work place lingo in the 1990's. The fundamental right to protection from any disgusting act which is inappropriate like sexual harassment and the basic right to be able to work with dignity and

respect which is one of the essential component and element of the gender justice reform which is a universally accepted and recognised fundamental human right. The International community altogether has not only shown and exhibited serious dedication and concern about the issue, but has also been dealt in the several United Nations (UN) treaties as well as declaration and conventions apart from various regional and subregional instruments of the states, where in most of these cases which had and contained statements of principle against any discrimination on the grounds and base of sex.<sup>75</sup> The recognition of abuse and violence against the women as a human rights violation and the final implementation of the legal framework and policy measures to make this recognition and acknowledgement a part of our today's reality, have been one of the most crucial and pivotal goals of the international movement and efforts for women's basic human's rights.

The international poster child for fundamental human rights United Nations and a lot of other international organizations have recognized and acknowledged that women's rights are basic human rights, and violence or abuse against women is a violation of fundamental human rights of women. These conglomerate of the international organisations have specifically condemned as well as chastised any sexual harassment in a list of international instruments as a prohibited form of any violence including sexual assault against women.<sup>76</sup> The mere fact that sexual harassment violates the fundamental rights to the just and basic favourable conditions of work has been recognized and acknowledged by the United nations in the official universal declaration of fundamental human rights. There are major milestones in the international legal history towards the protection , preservation and empowerment of women which can be discussed as below.

<sup>75</sup>Manoj Kumar Sadual, *Sexual Harassment of Women at Workplace: A Critique*, Criminal Law Journal, Vol.01, No.3., 71-78 March (2006).

<sup>76</sup>Ibid.

## 5.2 The Charter of United Nations

The United Nations reaffirms and re-establishes its faith and trust in securing and defending the fundamental as well as the basic human rights, in the respect, dignity and virtue of the human being, in the equal rights of men and women and of the nations big and small, and to establish and maintain conditions under which the justice, equality and respect for the said or aforementioned obligations that keep arising from the treaties, agreements and other various sources of the "international law" can be maintained and upheld to their dignity, and to promote social harmony as well as progress and better standards of life or vale of life in a large of degree freedom and space.

All United Nations assembly member states have the great responsibility to uphold the constitutional guarantees of the fundamental human rights that are compatible with the "international law". The United Nations charter, which mentions and expresses the faith as well as belief in the fundamental human rights and in the dignity, respect and value of the human beings and the equal opportunities and rights of the women and men<sup>77</sup>, imposes a static duty on all of the member states to promote and stand up for the universal respect for and observances of the fundamental human rights and fundamental as well as freedom for all people, without distinction or in association to their sex, race, language, or religion.

## 5.3 Universal Declaration of Human Rights 1948

In just less than the three years of its existence<sup>78</sup> as well as functioning the United Nations General assembly had made and placed one of the most important aspect of an international peace oriented organization that is the "Universal Declaration of Human Rights" (UDHR) on the day of December 10th in the year of 1948, since that moment and the day of establishment and adaptation of the landmark set

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<sup>77</sup>Ibid.

<sup>78</sup>United Nations, *Universal Declaration-The Drafters of the Universal Declaration of Human Rights*, UNITED NATIONS (1 Aug 2020, 11:30PM), <https://www.un.org/en/sections/universal-declaration/index.html>.

of principles for the rights of individuals is celebrated worldwide as "human rights day" . The declaration consists of "30" Articles, which spells and states out the rudimentary socio-economic, civil, economic , cultural , political and social rights that all human beings across the globe should have access to and be able to enjoy. The landmark milestone deal has not only served as the inspiration but also the base framework for adopting and affirming more than eighty number of the conventions and declarations on a big variety of and wide range of predicaments and issues but also invigorated and stimulated the national governments in the incorporation as well as adaptation of these rudimentary principles under their own respective constitution and among other laws. The Indian constitution, which came into force on the eve of 26th January in the year of 1950, borrowed and was inspired by 28 other similar kinds of provisions from the Universal Declaration of Human Rights.

These specific articles dealt with the equality issues and human rights violation not only in our nation but also the global and world wide the universal declaration of human rights, together with the two most significant international covenants and their tight knit protocols, comprising and consisting of the "International Bill of Human Rights".

In the ‘Chairman, Railway Board v. Chandrima Das<sup>79</sup>’ the honorable Supreme Court (SC) observed that the "human rights jurisprudence" based on the Universal Declaration of Human Rights (UDHR) has become acknowledged and acquired recognition as the moral compass and code of conduct having been adopted and accepted by the general assembly of the United Nations(UN) .

Article 2 of UDHR establishes that all individuals are entitled and should have access as well as knowledge about the declaration’s various enumerated rudimentary rights and freedoms without distinction of any kind , including that based on the sex or gender.

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<sup>79</sup>Chairman, Railway Board v. Chandrima Das AIR 2000 SC 988, (2000) 2 SCC 465.

Article 3 provides for a 'Universal Declaration', "right to the freedom of life, their liberty and security". "All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination"<sup>80</sup>. "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law"<sup>81</sup> In addition to these specific overarching regulations and provisions, the declaration's 'Article 23(1)<sup>82</sup>' carries a significant amount of weight in the context as well as relation of sexual harassment, as it concludes and establishes the freedom and "right to work", to "free choice of employment", to "just and favourable conditions of work", and "to protection against unemployment". Albeit this very milestone declaration is just a morally binding and enforceable document, it is still very momentous because it establishes and some major clear internationally recognised norms that states 'human rights violations' are absolutely unacceptable and must be at all times remediable by the law.

#### **5.4 Declaration on Elimination of Violence against Women**

The preamble to the declaration states that violence against women constitutes a violation of the rights and fundamental freedoms of women. The Preamble to the Declaration states that:

*"Violence against women constitutes a violation of the rights and fundamental freedoms of women."*

It further states *"Any act of gender-based violence that results in, or is likely to result in physical, sexual or psychological harm or suffering to women, including*

<sup>80</sup> Article 7, Universal Declaration of Human Rights, 1948.

<sup>81</sup> Article 8, Universal Declaration of Human Rights, 1948.

<sup>82</sup> Article 23, Universal Declaration of Human Rights, 1948.

*threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.”*

*“Violence against women shall be understood to encompass, but is not limited to, the following: physical, sexual and psychological violence occurring in the general community, including Sexual harassment and intimidation at work. As such, it creates an obligation for states to exercise all due diligence in eliminating such forms of unacceptable behaviour.”<sup>83</sup>*

### **5.5 Human Rights Treaty Bodies**

One of the most outstanding developments in the monitoring and implementation of human rights in general and women’s rights in particular is the setting up of specific bodies such as<sup>84</sup>:

- Human Rights Committee (HRC).
- Committee on Economic, Social and Cultural Rights(CESCR).
- Committee on the Elimination of Racial Discrimination (CERD).
- Committee on the Elimination of Discrimination Against Women (CEDAW).
- Committee on the Rights of the Child(CRC).
- Committee Against Torture (CAT).
- Committee on Migrant Workers (CMW).

Besides, the commission on human rights, which operates through special rapporteurs, and working groups also monitors states compliance to international human rights law and investigates their alleged rights violations. It also deputes fact-finding missions across the world. There is, for example, a special rapporteur

<sup>83</sup>United Nations, *Universal Declaration of Human Rights- Preamble*, UNITED NATIONS (3 Jul 2020, 10:30PM), <https://www.un.org/en/universal-declaration-human-rights/>.

<sup>84</sup>UNFPA, *Core International Human Rights Instruments*, UNITED NATIONS POPULATION FUND (5 Jul 2020, 12PM), <https://www.unfpa.org/resources/core-international-human-rights-instruments>.

on the issue 'violence against women'. Further, the ILO also formulates the guidelines and prepares convention-prescribing conditions for employment of children and for the protection of their tender age from exploitation.

Quite apart from these the new international criminal court is also vested with the powers to attend to complaints of violations of international humanitarian law, which include, among others, extermination, murder, the enforced disappearance of persons, the crimes of apartheid and most importantly the crimes of sexual violence, such as rape, sexual slavery, enforced prostitution and forced pregnancy.

These above mention bodies and many other organisations are working for the upliftment of women and making their life safe. They closely monitor and watch such cases where there is violation of women's dignity. Such cases include sexual abuse, gang rape, SH at workplaces etc. Human rights treaty bodies are formulated to ensure progress on this concerned issue in a joint manner.

### **5.6 Steps Taken By Various Countries To Combat Sexual Harassment**

Awareness-raising activities usually take the form of information campaigns, sometimes conducted with the help of the mass media and targeting particular groups such as employees, workers and women. Dissemination of information by means of brochures and leaflets is a common means of action by trade unions to sensitize their members to the issues. Government agencies and women's organizations also publish information for the general public. The production and use of videos on sexual harassment is increasing. A central aim of much of this material is to bring the issue of sexual harassment out in the open and talked about. There is a growing concern to convince victims or potential victims of sexual harassment to know that they can do something about it.

There are four types of laws that can apply to sexual harassment in the workplace: equal employment opportunity, labour, tort and criminal. Australia, Canada,

France, New Zealand, Spain, Sweden and the United States and other industrialised countries cover sexual harassment under laws on wrongful dismissal, tort law and criminal law.

In countries where sexual harassment is seen as a general phenomenon, the legal remedy is situated in this framework of criminal laws and in other countries where it is seen as a workplace phenomenon, civil and or labour laws framework is applied.

Although many countries have a law on equal employment opportunity, labour and tort only two countries i.e. the United States of America and France have passed a criminal law related to sexual harassment. Sexual Harassment, as a criminal offence, first began to be recognised by the courts in US in the late 1970's. In 1980, the first prohibitory statute was drafted by their equal employment opportunities commission, which issued guidelines for the prevention of sexual harassment in the workplace. Other countries followed, though many of them have only been introduced in the 1990's.

At the national level, since 1995, legislation to protect people against sexual harassment has been adopted in Australia, Bangladesh, Japan, Philippines, Sri Lanka and China. In some countries including Japan and India, the judiciary has taken the lead in checking incidents of sexual harassment. Another relatively new development is the legislation that provides for an affirmative duty to prevent sexual harassment, now included in laws in Australia, the Republic of Korea and in the form of Supreme Court's decision in India.<sup>85</sup>

#### 5.6.1 Position in United States of America

<sup>85</sup> Beverley H. Earle & Gerald A. Madek, *An International Perspective on Sexual Harassment Law*, 12 LAW & INEQ. 43 (2017).



Title VII of Civil Rights Act of 1964<sup>86</sup>, forbids sex discrimination in employment in hiring, firing, promotion and working conditions. It was amended in 1972 so as to cover public employers and small private employers to enlarge the powers of the equal employment opportunity commission.

Besides, there are certain provisions under the state laws which prohibit sexual harassment which is a sort of exploitation of women and the law tries to stop it. The decision of the US court reveals that in order to establish Sexual Harassment in a case it should be proved that:

- i. The conduct in question was unwelcome,
- ii. The harassment was based on the Sex,
- iii. The harassment was sufficiently pervasive or severe so as to create an abusive working environment and
- iv. That some basis existed for putting liability to employers.

In *Joseph Oncale v. Sundowner Offshore Services*<sup>87</sup>,<sup>431</sup> the US Supreme court accepted the argument of the American civil liberties union, the appellant that the same sex sexual harassment is equally covered under the Title VII of Civil Rights Act of 1964 and that move of harassment is no relevance.

The first account of sexual harassment were journalistic reports and case studies while first large scale systematic analysis of the problem was Farley's sexual Shakedown which was followed closely by Mackinnon's sexual harassment of the working women, the author, an attorney, was in favour of publicizing the existence

<sup>86</sup>Find Law,*Title VII of the Civil Rights Act of 1964: Equal Employment Opportunity*, FINDLAW 05-12-2018 (6Jul 2020, 5:30PM), <https://employment.findlaw.com/employment-discrimination/title-vii-of-the-civil-rights-act-of-1964-equal-employment.html>.

<sup>87</sup>*Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 118 S. Ct. 998 (1998).

of this issue and for legal action to combat this evil.<sup>88</sup> In the past few years, the EEOC, the agency of the Federal Government concerned with ensuring equality of opportunity has established guidelines consistent with Mackinnon's position. Sexual harassment is often not an attempt to initiate sexual relations, but rather a use of power by men against women. Such bullying takes place, particularly, where women are working in non-traditional jobs or where they are seen as especially vulnerable.

Recognizing this, the resolution on the protection of the dignity of women and men at work, adopted in May 1990 by the Council of Ministers of European Communities, and the subsequent EEC instruments adopted in its wake went a step ahead than the American EEOC guidelines by explicitly defining sexual harassment as unwanted conduct of a sexual nature, or other conduct based on sex affecting the dignity of women and men at work.<sup>89</sup> This definition is intended to refer to conduct that denigrates or ridicules or is intimidating or physically abusive of an employee because of his or her sex, such as derogatory or degrading abuse or insults which are gender-related and offensive comments about appearance or dress. Such conduct can create an offensive working environment for the recipient.

Tangible adverse work experiences result in a significant change in employment status. The United States of America (U.S.) Supreme Court provided examples of tangible consequences in *Burlington v. Ellerth*<sup>90</sup>, (Burlington) like hiring, firing, failing to promote, reassignment with significantly different responsibilities, a decision causing a significant change in benefits, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, or significantly diminished material responsibilities. Generally, a tangible employment action inflicts direct economic harm upon the victim.

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<sup>88</sup>LIN FARLEY, *SEXUAL SHAKEDOWN: THE SEXUAL HARASSMENT OF WOMEN ON THE JOB* 14-15 (McGraw Hill, 1978).

<sup>89</sup>Manoj Kumar Sadual, *Sexual Harassment of Women at Workplace: A Critique*, *Criminal Law Journal*, Vol.01, No.3., 71-78 March (2006).

<sup>90</sup>Justia US Supreme Court, *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), JUSTIA US SUPREME COURT (9 Jul 2020, 4PM), <https://supreme.justia.com/cases/federal/us/524/742/>.

It is important to stress that in quid pro quo harassment cases, it is not necessary for the threat of adverse employment action to actually have been carried out. It is sufficient for the complainant to simply prove that such a threat was made. This was illustrated by the situation in Burlington, where the complainant's supervisor was found to have made repeated boorish and offensive remarks, some of which were accompanied by threats. One offensive incident took place on a business trip when the complainant's supervisor invited the complainant to join him in the hotel lounge. The complainant felt compelled to accept because he was her boss. The supervisor then made remarks about her breasts. When she declined to encourage these remarks, he told her to loosen up and warned her that he could make her life very hard or very easy at the company. Several months later when the woman was being considered for promotion, the supervisor expressed reservations during the promotion interview that she was not loose enough, then reached over and rubbed her knee.

Although the woman did receive the promotion, when the supervisor called to inform her of this, he said you're gonna be out there with men who work in factories and they certainly like women with pretty butts/legs.

On a third occasion, the complainant in Burlington called her supervisor to ask permission for some work-related business. 'He responded, I don't have time for you now, unless you want to tell me what you're wearing. The woman told him she had to go and ended the call. A few days later, she called him to ask for permission again.' This time he denied her request asking, 'Are you wearing shorter skirts yet, because it would make your job a whole heck of a lot easier.'

Burlington established that veiled threats and demeaning comments can constitute sexual harassment even when the threats are not carried out. Furthermore, sexual harassment at the workplace can exist even when the victim receives a promotion through the decision of the perpetrator. This case also established that when a supervisor places obstacles in the way of the performance of an employee's duties, or denies or delays reasonable requests made by the employee in the course of

carrying out her duties, in addition to making sexual comments, it amount to sexual harassment.<sup>91</sup>

The U.S. Supreme Court expanded liability in *Harris v. Forklift Systems*<sup>92</sup>, (Harris) by holding that sexual harassment need not seriously affect an employee's psychological well-being or lead her to suffer injury to be actionable. The court held that it is not necessary to show that the behaviour impaired the work of the victim, stating that unlawful conduct may lie between being merely offensive || and causing a tangible psychological injury. The court emphasised an intention to strike at the entire spectrum of disparate treatment of men and women in employment.

According to the court: "A discriminatorily abusive work environment, even one that does not seriously affect employee's psychological well-being, can and often will detract from employee's job performance, discourage employees from remaining on the job or keep them from advancing in their careers. Moreover, even without regard to these tangible effects, the very fact that the discriminatory conduct was so severe or pervasive that it created a work environment abusive to employees because of their gender, offends Title VII's broad rule of workplace equality."

#### 5.6.2 Position in United Kingdom

The law in the U.K. is divided into the law of England and Wales, of Scotland and of Northern Ireland. Broadly speaking, similar legislation protects against sexual discrimination all over the U.K.<sup>93</sup>

Until recently, there were several pieces of legislation in the U.K. prohibiting discrimination of various kinds. These statutes have now been subsumed under the

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<sup>91</sup>Ibid.

<sup>92</sup>Justia US Supreme Court, *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993), JUSTIA US SUPREME COURT (9 Jul 2020, 10 PM), <https://supreme.justia.com/cases/federal/us/510/17/>.

<sup>93</sup>Equality and Human Rights Commission, *Sex Discrimination*, EQUALITY AND HUMAN RIGHTS COMMISSION (9 Jul 2020, 12AM), <https://www.equalityhumanrights.com/en/advice-and-guidance/sex-discrimination>.

newly enacted Equality Act, 2010 (Equality Act), which is a dedicated legislation for the prohibition of all forms of discrimination. Under this law, sexual harassment in the workplace is recognised as form of prohibited discriminatory conduct, which is therefore subject to compensation and damages.

Section 26 of the Equality Act prohibits harassment on certain prohibited grounds, specifically including both quid pro quo sexual harassment and the creation of a hostile work environment. Importantly, it requires that the perception of the person subjected to harassment must be taken into account, along with other circumstances of the case.<sup>94</sup>

It is important that the perception of the victim be considered in order to achieve a fair test which includes the subjective and objective elements necessary in a determination of this kind.

A sexual harassment claimant can bring his or her case to an employment tribunal. Claims under the Equality Act must be brought within three months (less one day) from the commission of the act of discrimination. The employment tribunal may make an order protecting the rights of the complainant and mandating actions by the respondent, under the remedies provision contained in section 124. The Tribunal may award the complainant compensation in an amount equivalent to the potential damages she would have received in a county court.<sup>95</sup> The Tribunal must assess the percentage possibility of the complainant's success if the claim is based on respondent's denial of the complainant's application for a benefit.

There is no upper limit on damages in sex discrimination cases. However, it is essential that the compensation should be based on damage suffered. Compensation can be granted even where the injury is not reasonably foreseeable. Reasonable foreseeability is not a criterion to determine damages where the statutory tort is committed intentionally with a view to hurt the feelings of the victim. Any damage, however remote, which arises out of the tortious action is

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<sup>94</sup>Ibid.

<sup>95</sup>Section 124(6), Equality Act 2010 (U K) .

liable to be compensated. Employers are liable for damages under principles of vicarious liability, and tribunals are vested with the authority to order compensation payments from harassers as well.

There are various types of compensation available to victims of sexual harassment<sup>96</sup>:-

(1) For injury to feelings.

(2) Compensation for pecuniary loss is available to victims, allowing the victim to be put in the position she would have been in had the act of discrimination not occurred.

(3) For personal injury (where injury to feelings results in the onset of psychiatric illness).

(4) Aggravated damages, where the victim can show causal link between exceptional or contumelious conduct or motive || by the employer and the victim's injury to feelings.

(5) For awards of interest.

“Lastly, the Tribunal may make a recommendation that the respondent, within a specified period of time, take action that will mitigate the adverse impact of the discrimination on the complainant.”

In England and Wales, lawyers use civil sexual abuse law to process compensation claims. Depending on the circumstances, claimants and defendants rely on:

1. tort law (a civil wrong), which enables claims for
  - trespass to the person (e.g. for false imprisonment, physical assault & battery),

<sup>96</sup>Donoghue Solicitors ,*How UK Sexual Abuse Law Applies to Compensation Claims*, DONOGHUE SOLICITORS (10 Jul 2020, 2:30PM).

- negligence (e.g. for failure to safeguard).
  - misfeasance in public office (particularly relevant to police officer abuse cases).
2. other areas of law including
    - employment law
    - contract law
  3. Various statutes (e.g. the Protection from Harassment Act 1997, Human Rights Act 1998, Data Protection Act 2018, Equality Act 2010 etc.).

In practice, lawyers frequently base claims in personal injury law procedures and principles because sexual abuse compensation claims include an element of physical and/or psychological injury.<sup>97</sup>

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<sup>97</sup>Ibid.

## CHAPTER VI

### 6.1 CONCLUSION AND SUGGESTIONS

However much it may be denied, it is clear that sexual harassment does prevail in the workplace. The present work is taken to visualise the extent and the magnitude of the problem in India and Legislative and Judicial study on this issue. This work deals with what is no doubt the most burning issue faced by Today's woman i.e. sexual harassment at the workplace. In Today's changing social and economic environment, women have become more independent and are increasingly being exposed to non traditional tasks. Sexual harassment has been a problem in the Indian society and the Indian women have undoubtedly been quite vulnerable to the same. The awareness on this issue, as well as the law pertaining to it, is very minimal and such ignorance is no longer bliss. The social reality is that women are blatantly exploited and discriminated against by society. There was definitely a need of having a strong legislative measure to curb this evil and the adoption of the Sexual Harassment of Women at Workplace (Prevention, Prohibition & Redressal) Act, 2013 is a welcome step.<sup>98</sup> The legislature has to strike a proper balance between the compelling need of having a strong law with a vigilant eye on women safety and dignity in the society. This chapter deals with conclusions and various suggestions arrived as a result of discussions in the previous chapters. In conclusion, an appraisal of the whole study is given.

#### 6.1.1 Conclusion

The problem of sexual harassment is not new. In fact generations of women have suffered unwanted sexual attention. But it is only in the last 20 years that this conduct has been given a name. This is a sex discrimination issue since a person is targeted for harassment because of her sex. There is a popular myth that any kind of sexual violence should involve visible proof and thus we have neglected some

<sup>98</sup> ARJUN PRAKASH AGGARWAL & MADHU GUPTA, SEXUAL HARASSMENT IN THE WORKPLACE 20-24(3rd ed., Toronto Butterworths 2000) (1992).



other non visual forms of sexual violence such as sexual innuendo remarks etc. Sexuality at the workplace is an unseen menace. Sexuality has probably always been present at work, although it has been practically invisible. Presumably, in the past, people thought such activities were relatively infrequent and, when they did occur, had only minor repercussions both for individuals involved and for the organisation where they worked. In the male dominated world of work, the woman is viewed as sexual.

Her presence elicits the expression of sexuality. The issue of sexuality in the workplace became visible and was brought to public attention in the form of sexual harassment.

Sexual harassment at the workplace is a severe and pervasive problem that takes an enormous toll on the physical and mental well-being of victims. Not only does such harassment have a direct effect on the working conditions and emotional health of the victim, it also undermines work performance. Thus, conduct that constitutes sexual harassment may create a health and safety problem.

Sexual harassment can be said to be an unwanted conduct of a sexual nature, which can take form of either quid pro quo harassment (something for something or something in return) or hostile working environment. In quid pro quo harassment generally, a job related condition like promotion, transfer, confirmation etc is made conditional on the assent of the concerned women for fulfilment of a sexual favour. Unlike this direct kind of harassment, creation of a hostile working environment is more prevalent form of harassment, it relates to a situation where no direct sexual favour is asked or hinted but hostile work environment is created by various things like, display of obscene graffiti or passing of sexual innuendos, jokes or comments or physical touches etc.

The constitution of India guarantees a dignified status to every woman. Fundamental rights are of sufficient amplitude to encompass guarantees against any kind of abuse, including sexual harassment of women at workplace.

Article 14<sup>99</sup> guarantees equal status to women Article 15(3)<sup>100</sup> empowers the State to make special provisions for the protection of women. It lays down the concept of protective discrimination. Article 16(3) provides for equality of opportunity in the matter of employment. Thus Article 14,15, and 16 talk about equality is seriously prejudiced when working women are subjected to acts of sexual harassment. Further Article 19(1)(g) provides for freedom of profession. Such freedom can only be exercised properly when a working women gets an environment free of harassment.

The Supreme Court of India in a landmark judgment *Vishaka v. State of Rajasthan* has defined the term sexual harassment. The Supreme Court relied on International Convention, particularly General Recommendation No. 23 of CEDAW Committee under Article 11<sup>101</sup> and formulated the following definition:

(i) Sexual Harassment includes such unwelcome sexually determined behaviour, whether directly or by implication, as under:

- Physical contact and advances.
- A demand or request of sexual favours.
- Showing pornography.
- Sexually coloured remarks.
- Any other unwelcome physical, verbal or non-verbal conduct of sexual nature.

The Indian court first time defined the term sexual harassment in formal legal sense by the Supreme Court in *Vishaka v. State of Rajasthan* in 1997. Before this case the Supreme Court in *Rupen deol Bajaj v. Kanwar Pal Singh Gill* recognised sexual harassment as a crime falling under section 354 of Indian Penal Code, 1860. The term outraging the modesty of a woman is interpreted by the Supreme

<sup>99</sup>INDIA CONST. art. 14.

<sup>100</sup>INDIA CONST. art. 15 cl. 3.

<sup>101</sup> OHCHR, *Committee on the Elimination of Discrimination Against Women*, UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER (18 Aug 2020, 4PM), <https://www.ohchr.org/en/hrbodies/cedaw/pages/recommendations.aspx>.

Court and held that it includes outraging the dignity of women. In *Saudi Arabian Airlines v. Shehnaz*, the Bombay High Court recognised that dismissal of a woman worker following a complaint of sexual harassment was an unfair labour practice and illegal, and reinstated the woman who had been dismissed. The Supreme Court after analysing the many number of outrages regarding sexual harassment of working women and the appalling paucity of legislative responses to such acts and after relying upon the ratification by India of the United Nations convention on Elimination of All Forms of Discrimination Against Women, took a long awaited step and created a binding and enforceable set of guidelines designed to eradicate sexual harassment of women at workplace. This is the court did on the premise that is the event of a vacuum in domestic law and where there is no conflict between international law and domestic law, international law can be invoked as the law of land. This comes to be known as Vishaka's guidelines. The Supreme Court held that until the legislature passed a particular law on sexual harassment at workplace, the Vishaka guideline should be followed. The guidelines of Vishaka's case first laid down in the *Apparel Export Promotion Council v. A.K. Chopra*.

Between 1997 to 2013, many Bill laid down before parliament for working women's rights. There have been numerous campaigns and legal decision against sexual harassment, most recommending reform of the law. The Vishaka judgment has been an important legal event, making judicial activism in the arena of gender justice.

Finally in 2013, the parliament passed an enactment. This is known as 'The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013. This enactment unambiguously applies to the private sector in employment. The definition given under the 2013 Act, is same as given by Supreme Court in Vishaka Case. For the first time an enforceable remedy has been created against private sector employees under the 2013 Act, which places an obligation on every employer of a workplace, to constitute a committee to be known as the Internal Complaints Committee. Failure to do is an offence. The 2013 Act, therefore, has

the potential to provide a redressal mechanism to working women across the economic and social divide, including those who were previously unprotected by Vishaka guidelines, such as agricultural workers and women in rural areas. Neither Vishaka nor any of the judicial precedents which followed have ever discussed laying down any period of limitation for filing complaints of sexual harassment at the workplace, but the 2013 Act, laid down three months period of limitation which is extendable to a maximum of six months.

Until such time, the 2013 Act must be construed to being limited to women in employment relationships, thereby leaving intact all other regulatory regimes in place where the Vishaka judgment must be held to have full force and effect.

## **6.2 Suggestions**

The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013, alone is not sufficient to curb the evil of sexual harassment at workplace. Along with this Act, there should be some other implementation of other related issues and the passing of the bill should not take as much time as was taken in the pass of POSH Act. Because law alone is not sufficient, rather the thought of the society is also relevant and most important is the implementation process of that law. Though the 2013 Act deals with protection of women from sexual harassment at the workplace and providing a safe environment, it has been criticised by some jurists on many grounds. 'The 2013 Act is weighed down by several provisions which are becoming its downfall. In view of the above findings, the study forwards the followings suggestions for the consideration for prevention and redressal of sexual harassment of women at workplace.' For more transparent, effective prevention and redressal related offences suggestions are as under:

(1) Wider Application of 2013 Act

The definition of the workplace under section 2(o)<sup>102</sup>, includes any place visited by the employee arising out of or during the course of employment including transportation provided by the employer for undertaking such journey. Therefore, during an official tour the place of stay, travel mode and office of customers/clients are all included as a workplace and the employer is liable if any incident happens with the woman employee. In the view of the employer, this is an unjust and unreasonable extension of the liability of the employer.

Section 15<sup>103</sup> determines the level of compensation to be paid to the women which depends on the mental trauma, pain, suffering, loss in the career opportunity due to the incident of sexual harassment, medical expenses, income and financial status of the respondent etc. It means that if the harasser is a wealthy person, then the compensation level will be higher and in other words, the compensation level is determined by the income level of the accused. Something does not seem right. It will give an incentive to accused wealthy/senior level employees for sexual harassment also. The manner to pay compensation should be changed.

Another lacuna in the Act is that the offences under the Act are non cognizable offences. If the aggrieved woman chooses not to file a criminal case neither the police nor the court cannot take action suo motu. Thus, the offences, under the Act, should be cognizable so that police or court can take action suo motu.

## (2) Need of a Code to Eliminate Gender Discrimination

Legislation is an instrument of economic and social change in all democratic societies. Economic and social statute is particularly meant for the betterment of the deprived. International Labour Organisation and CEDAW cast an obligation on the Indian state to gender-sensitize the law and to take appropriate measures to prevent all forms of discrimination against women. The lack of implementation

<sup>102</sup> Section 2(o), The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013.

<sup>103</sup> Section 15, The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013.

merely reduces them to paper tags. Hence, there are some provisions needs the attention to prevent gender discrimination:

- Daughters do not provide the rightful share of parental property.
- Carrying of surname by the sons and not by daughters.
- Inadequate institutional mechanisms for the advancement of women.
- Declaring husband's or father's name by women while opening a bank account or for the application of personal or house loan etc.
- Gender biased social norms and customs.

### (3) Need for regulation of pornographic material

The cyber morality crisis is going on in the present time. Latest technology is piercing privacy rights, especially for women. Hence there is an urgent need to regulate this problem.

### (4) Freedom of the Press

The fundamental right of the freedom of the press is implicit in the freedom of speech and expression under article 19 (1) (a). But the publisher's must utilise this freedom subject to the article 19 (2)<sup>104</sup>. The grounds of reasonable restrictions of Decency or morality contained in Article 19 (2)<sup>105</sup> must be followed strictly.

### (6) Women's Cells/Police Stations

In many areas and cities in the country, women cells under different names such as crime against women cell in Delhi and Mahila Police Station in Haryana or all-women police station have been set up as a special mechanism to cope with violence against women. There is an urgent need to set up such cells or police stations in all the urban areas to curb sexual harassment violence. The number of

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<sup>104</sup>INDIA CONST. art.19 cl.1.

<sup>105</sup>INDIA CONST. art.19 cl.2.

cells or police stations should be increased and should be given adequate powers, funds and staff.

#### (7) Gender Sensitization

Even today, the police, the prosecutors, medico-legal fraternity and even judiciary usually treat violence against women as a marginal issue. Sensitization of judicial officers, police officers and other stakeholders on following issues is important to prevent sexual harassment at work place. Gender sensitization is necessary to develop a humanistic approach to the women who are victims of crime. These may include rethinking of organisational procedures of courts, police, rescue homes etc.

The Supreme Court, also, underlined the need for employers to take all necessary steps to combat this problem when it held that 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 procedures for the resolution, settlement or prosecution of acts of sexual harassment by taking all steps required.

Thus, the employers should protect the employee to the extent possible against aggression and violence and their detrimental effects; aggression and violence being acts by which the employee is psychologically or physically harassed, threatened or attacked, in circumstances that are directly related to employment. Also, as sexual harassment is often a function of women's status in the employment hierarchy, policies to deal with sexual harassment are likely to be most effective where they are linked to a broader policy to promote equal opportunities and to improve the position of women.

Especially, in jurisdictions, where laws have not so far been enacted, workplace policies are the only channel available to those seeking redress. It is not out of place to mention here that an absence of complaints about sexual harassment in any organization, by no means, can a criterion to judge that sexual harassment does not exist. Rather, it may be that the victim is either not sure of any policy

relating to the problem or if it is in place, she is not convinced of the procedure or transparency of the whole system to deal with her complaint. She may be afraid of being subjected to ridicule or reprisal or further victimization by the satire, embarrassed or opt to suffer in silence. Also she may not wish to be seen as trouble maker or may be due to compelling circumstances and may not afford to lose her job.

#### (9) Restoring confidence of the victim

The victim may lose self confidence, feel undervalued, suffer stress and become demoralized/negligent at the workplace. In extreme cases, she may lose her job which is not simply a loss to the company/institution/organisation or to her person rather it's a loss to the whole society and ultimately to humanity.<sup>106</sup> 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 range of different measure, since this approach has been shown to result in aggrieved individuals being more confident that their employer will respond to their plight.

Following are specific objectives for the employer to introduce sexual harassment policy in their organisation:

- To implement and enhance equal employment opportunities and highlight their
- commitment in this regard.
- To support business interests as they cannot afford to lose staff.
- To horn their reputation in the market with this stamp of good employment
- practice.
- To safeguard them against future expensive, stressful and time consuming legal actions that may arise from such suits.

<sup>106</sup>Chander Suta Dogra, *A Retired IAS Officer on How the #MeToo Movement Can Use Her Case Against K.P.S. Gill*, THE WIRE 15-10-2018 (18 Jul 2020, 10:30 PM), <https://thewire.in/women/rupan-deol-bajaj-kps-gill-case-me-too>.



#### (10) Tripartite Cooperation 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.

While formulating a policy, the psychology of stress management should also be taken care of the problem solving model for empowerment can be formulated based on the kind of reaction women in distress express. Since different people react to the problems in different ways, broadly such women can be grouped into four types:

- Unaware and unwilling: such women tolerate any and all types of suffering without complaint or without any hue and cry taking it as a necessary and genuine evil of being modern working women. She does not have a clue as to what she could do to alleviate the suffering and solve the problems confronting her. In fact, she does not even realize that she has the potential to do something about it. Rather, she is too overwhelmed to bring herself to take the necessary steps to resolve the issue. Confused and disillusioned, she does not want to resort to the fight and has submitted herself to the state of affairs and resigned completely.
- Aware and unwilling: women facing sexual harassment can be put into this category depending upon their behaviour which is mainly characterized by fear. She has a rough idea about the steps she is taking to deal with this problem but she lacks the requisite confidence and courage to make an attempt towards the same.

- Unaware and willing: victims of this category are ready to fight up to any extent but they lack appropriate information about how to go about it, what to do and where should she forward to redress the issue.
- Aware and willing: this is the most dynamic category which lays the foundation of a stormy, revolutionary movement. Neither her strategies are that refined, nor she is able to locate suitable solutions. However, she is yet ready to take initiatives and bring about the desired change with great confidence. What she needs is appropriate guidance and help. The policy should cover all of these categories.
- In situation (1) The policy of the institution should be to assure her so as to enable her to come out of this sense of despondency and helplessness.
- Women in category (2) need maximal encourage to enable them to garner enough courage to take positive steps.
- In category (3), appropriate guidance, knowledge and information should be imparted upon her.
- For women in category (4), constant guidance, encouragement, support and monitoring at all steps would be a great help. Modification of the strategy in the light of new developments and experiences would go a long way in the path of empowering her. To enable her to blossom to full potential and to enjoy seal quality and to achieve freedom from exploitation, empowering the mind is the correct path. Positive atmosphere and political will are the other prerequisites.<sup>107</sup>

All policies should contain a policy statement representing the organization position on sexual harassment.

(a) A policy statement is a statement of intent and gives the clear message that in the organization this is not appropriate workplace behaviour.

(b)The organization/institution should formulate policy statements expressly declaring that particular workplace as Zero Tolerance Zone meaning thereby that

<sup>107</sup> Rouf Ahmad Bhat ,*An Overview of Sexual Harassment of Women at Workplace in India: An Analytical Study*, Vol.06, Issue 07., 14361, 14364-143647 (2017).

sexual harassment shall not be tolerated or condoned under any circumstance by the employer.

(c) The language used for that policy statement should be simple, unambiguous and unequivocal.

(d) Sexual harassment should be defined and explained with illustrations so as to make it clear beyond doubt that what is 'and what is not' sexual harassment.

(e) The policy statement should expressly declare that any/every act of sexual harassment at workplaces may amount to misconduct for which the delinquent employee would be liable to be punished.

(f) The policy should also require victims of sexual harassment to report such incident/behaviour to their immediate supervisor or boss.

(h) The Equal Employment Opportunity Commission (EEOC), emphasizes that prevention is the best tool for the elimination of sexual harassment, has stipulated clearly in its guidelines thus: An employer should take all steps necessary to prevent sexual harassment from occurring, such as affirmatively raising the subject, expressing strong disapproval, developing appropriate sanctions, informing employees of their right to raise and how to raise the issue of harassment under Title VII, and developing methods to sensitise all concerned.<sup>108</sup>

#### 6.2.1 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

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<sup>108</sup> Ibid.

and should cover the advice for both, who are being harassed and alleged harassers.

These are certain recommendations to employers in this regards, which (equally relevant for employers in India) are as follows:

- (a). The policy statement should make it clear what is considered inappropriate behaviour at work and that sexual harassment a disciplinary offence. It should also outline the legal situation and explain that such behaviour, in certain circumstances, might be unlawful.
- (b). The policy statement should place a positive duty on managers and supervisors to implement the policy and to take corrective action to ensure compliance with it.<sup>109</sup>
- (c). The policy statement should also place a positive duty on all employees to comply with the policy and to ensure that their colleagues are treated with respect and dignity.
- (d). The policy statement should also explain the procedure that employees subjected to sexual harassment at work should follow so as to obtain assistance. It should also specify the persons to whom they should complain.
- (e). The policy statement should contain an undertaking that allegations of sexual harassment will be dealt with seriously, expeditiously, sympathetically and confidentially, and that employees will be protected against victimization or retaliation for bringing a complaint of sexual harassment.
- (f). The policy statement should also specify that appropriate disciplinary measures would be taken against delinquent employees.<sup>110</sup>

<sup>109</sup> A.D. Pelemo, M. Mehanathan & Pradeep Kulshrestha, Indian Legal Profession and the Sexual Harassment of Women at Workplace Act, Vol. 24, No. 01., 249-250 (2019).

<sup>110</sup> Ibid.

(g). The policy should also provide an alternate complaint route in cases where reporting to the immediate supervisor or manager would be futile as he himself is the perpetrator. The policy statement should be able to stand on its own separately from the policy itself. The policy itself will contain a definition of sexual harassment together with illustrative example as to illumine the grey areas where there could be genuine doubts whether certain acts would fall within the mischief of sexual harassment and outline the procedures for dealing with sexual harassment.

Some policies give the different definitions for different forms of harassment (sex, age, race, disability etc.). The definition should also stress that the recipient's perception of the behaviour as offensive is key as it is not merely a behaviour that intends to offend rather a behaviour that indeed offend the recipient.

#### 6.2.2 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. If dissemination of information is not there, the potential perpetrators may not realize, one, the inappropriateness of their conduct and two, the possible consequences of the said behaviour.

Therefore, the courts, jurist, academicians, legal commentators and various bodies worldwide have laid great stress on the requirement of effective dissemination of the sexual harassment policy as merely having a policy on sexual harassment is not sufficient. It would also make the employees aware of their rights and duties in case of commission of sexual harassment.

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. The Supreme Court of India also underscored this requirement when it said in Vishaka case, Express prohibition of sexual harassment at the workplaces 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.

Once the policy has been developed, it is important to ensure that it is communicated effectively to all employees, so that they are aware that they have a right to complain and to whom they should complain; that their complaint will be dealt with promptly and fairly; and that employees are made aware of the likely consequences of engaging in sexual harassment. Such communication will highlight management's commitment to eliminate sexual harassment, thus enhancing a climate in which it will not occur.

Such communication will not only highlight management's commitment to eliminate sexual harassment but also promote an atmosphere free of any kind of duress or harassment. An orientation programme to the objective of sexual harassment may go a long way by various methods of disseminating the policy. It can be done by:

- Publishing in hand books/posters/notices.
- Making it available on the organization's web site T.V. channel or intranet
- Department circulars/newsletters/periodicals/memos
- Discussions/staff meeting

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

### 6.2.3 Protection from any Retaliation

Every organization should view complaints 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 judged the complainant to be at fault even if the complaint could not be upheld due to inconclusive evidence. In another situation, if the complaint is upheld and it is determined after enquiry that either of the parties needs to be relocated, the complainant should be given a choice to remain in her post and office or be transferred to another branch. The work of one of the concerned employees can be rescheduled, if both the parties are unwilling to shift to another place or branch, so as to avoid any kind of embarrassment or victimization.

The victims of the sexual harassment should have the option to seek transfer of the perpetrator or their own transfer. The victim, by reporting the incidence, has performed her duty under the policy and the action taken should not view the complainant to be a bundle of problems herself.

A social audit should be conducted regularly which may start with the report form 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.

In Jawaharlal Nehru University (New Delhi), the EC adopted a policy against sexual harassment in 1998. The policy underlines a commitment to make the university a place of work and study free of sexual harassment, intimidation and exploitation. Subsequently, in 1999 the Gender Sensitization Committee against Sexual Harassment (GSCASH) was set up. The JNU model has been long appreciated. The then NHRC Chairman, Justice J. S. Verma had suggested in 2001

that UGC should procure a copy of the JNU policy and look at ways to replicate it elsewhere. The late Chief Justice Verma's Committee Report on Amendments in Criminal Law was also submitted in January 2013 leading to the formation of The Criminal Amendment Act,2013 (POSH).

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

The above said, suggestions if considered while enacting the specific laws relating to prevent and curb the sexual harassment and necessary modifications in the existing legal framework, will go a long way in improving the lot of women who face all pervasive sexual harassment day in and day out. No fundamental change in favour of women is possible without massive change in male attitude. Men and women must work together to stop sexual harassment and discrimination against women.

#### 6.2.4 Role of Administrators

To ensure that such incidents are not treated as a trivial offence or dismissed as a joke or the exercise of poor judgment by the perpetrator, the policies must ensure that suitable deterrent sanctions are in place. Penalties may range from verbal warnings, memos and adverse performance evaluations to suspension, transfer or demotion and ultimately to dismissal. Of course, the sanction applied will depend upon the nature and degree of the harassment. It may be specifically mentioned that the most extreme kinds of harassment (including physical violence) would automatically result in dismissal. In case of third party harassment, exercise of such measures is limited but other methods, for example, raising objections in correspondence or refusal to conduct business with the offending party may prove effective. Furthermore, innovative approaches may be developed depending on the



nature of the offence and the circumstances. Public apology may be one such method.

#### 6.2.5 Complaint should be Substantiated

The complainant cannot shirk from her duty to substantiate her allegations. Merely because a female employee has made allegation of sexual harassment against a male co-employee or officer, there does not arise any presumption for the complainant or against the respondent. Therefore, when in view of complaints of sexual harassment made by a female employee, the employer constitutes a complaint committee to enquire into the allegations, the complainant cannot be permitted to seek any relief of directions in her favour without participating in the enquiry and substantiating her allegations. Justifying the safeguards provided to women, “the Madras Division Bench said, Women work at workplaces with more strain.” Our laws, therefore, including our constitution and the Supreme Court’s decisions, provide various safeguards to women, particularly to the women at workplaces, so as to enable them to work with human dignity.

While there can be no two opinion, therefore, that wrongdoers should not be allowed to go scot free, but at the same time, the employer, who is supposed to keep a vigilant eye on the victim and the delinquent, is not expected to allow the women to use the shield so presented by the Supreme Court as a weapon to wreak vengeance. It is true we are bound by the directions of the Apex Court but that does not mean that they can be allowed to be interpreted to suit the convenience of the woman like petitioner, for personal gain.

#### 6.2.6 Speedy Judgement

There should be ample amount of Courts and Tribunals separately to deal with the speedy judgement of cases related to sexual harassment so that other women would not have to face the same consequences as the victim for many years to come.

### 6.2.7 Gender Neutral Laws

We know that IPC has most of these laws laid out in such a manner that women can get the most benefit out of it but to maintain the fear of law some punishments in detail should be laid down so that no fake complains would be done because even if a man is innocent law is biased towards women due to reasonable justification so provision for men complaining about sexual harassment at workplace should also be laid down alongwith the punishments for fake complains in terms of imprisonment as well as money.

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