



Gujarat National Law University

A RESEARCH PAPER ON THE BRIEF CRITICAL ANALYSIS
OF SEXUAL HARASSMENT OF WOMEN AT WORKPLACE
(PREVENTION, PROHIBITION AND REDRESSAL) ACT, 2013

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MARCH, 2014

THE SEXUAL HARASSMENT ACT: A CRITICAL ANALYSIS*

BRIEF BACKGROUND

The entire purpose of this research paper stems back to the landmark judgement by the Supreme Court of India in *Vishaka v. State of Rajasthan*¹. It was in fact in this case for the very first time, that sexual harassment at the workplace was acknowledged to be a human rights violation, and elaborate guidelines were put into place. Sexual harassment at workplace was becoming an intolerable and uncontrollable menace². Amidst various other developments, controversies and delays, the Indian legislature finally enacted the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 (Act No. 14 of 2013)³, with an objective to protect women against sexual harassment at workplace and to put in place a redressal mechanism to handle complaints⁴.

The Act has effectively adopted and revised the guidelines laid down in the *Vishaka* judgement with added provisions of rigour and compliance. It is important to note certain loopholes in the provisions of the said legislation.

Various sections of society have raised their own concerns and objections towards the Act, which may or may not be justified from a particular point of view. Accordingly, some of the major concerns are as follows.

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¹AIR 1997 SC 3011 (AIR is All India Reporter).

²MOST WOMEN ARE ABUSED, HARASSED AND ASSAULTED AT WORK, SAYS SURVEY *available at* http://articles.economictimes.indiatimes.com/2013-12-08/news/44910785_1_online-survey-abuse-accusation (last visited February 15, 2014).

³Hereinafter referred to as “the Act” or “the Sexual Harassment Act”.

⁴KNOW YOUR RIGHTS: HOW LAW PROTECTS AGAINST SEXUAL HARASSMENT *available at* <http://www.hindustantimes.com/india-news/know-your-rights-how-law-protects-against-sexual-harassment/article1-1154664.aspx> (last visited February 8, 2014).

CONCERNS RAISED BY VARIOUS SECTORS OF THE SOCIETY

WOMEN RIGHTS' ACTIVISTS

The Act is being highly criticized by women rights' activists. Unfortunately, it leaves it up to the internal committee to decide a monetary fine to be paid by the perpetrator, depending on their income and financial status. Accordingly, a lower level executive has to pay a lower fine for harassment than a senior executive. This unjustified and unexplained discriminatory scheme leaves scope for inequality among different sections of society for an act equally heinous in nature, be it committed by anyone.

The Act does not cover in its scope and ambit a very important community, that are agricultural workers. The exclusion of armed forces too is an inexplicable gap. Women working in the armed forces suffer highly from sexual harassment which calls for their inclusion within the purview of the Act. What needs to be noted is that the Armed Forces sector is heavily male dominated and that the chain of command is in the lair of the males. Enquiries are held behind closed doors putting women in the Armed forces at a disadvantage to begin with. There is no need to exclude such women from the purview of the Act as no strategic or other interests are affected by protecting them against sexual harassment at the workplace.

DISCRIMINATION IN SCOPE AND AMBIT

In an era, where the force of the law thrives for creating equal opportunity and focuses on eliminating discrimination of every kind possible, this particular Act is not at all gender neutral. The Act provides protection against acts of sexual harassment only for women and not men.

On the other hand, interestingly, various recent studies and surveys over the last years or so have shown that very often, workplaces also involve

women initiating and engaging in acts of sexual harassment. The research concluded that with respect to this crime, cities in India are gender neutral and women are often on the dominating end just like men. There were 527 people queried in the survey across seven cities in the country. It was found that⁵:

Bangalore: The respondents said they had been harassed. Moreover, only 32% said that they were harassed by male colleagues.

Hyderabad: 29% of the respondents said they have been sexually harassed by their female bosses while 48% accused their male bosses.

Delhi: Numbers are even, with 43% pointing a finger at their female colleagues and an equal number accusing their male colleagues of sexual harassment. 38% of the respondents agreed that in today's workplaces, even men are as vulnerable to sexual harassment as women.

The numbers give us enough evidence to conclude that in practicality, circumstances are not totally so as they were envisaged by the legislators. On the other hand, the Act provides no mechanism to deal with the same.

Although, this Act is a great step forward in protection for women, it however leaves a wide scope for false allegations. Individuals not involved in law making but who would rather be governed by this law feel, that its effect must be viewed not just on the individual in question but in totality including his family. This not only becomes a source of nuisance to the man so falsely accused and his family, it also tarnishes their reputation⁶. This in turn becomes a great threat that a household may face.

⁵EVEN MEN AREN'T SAFE FROM SEXUAL HARASSMENT AT WORKPLACE: SURVEY *available at* <http://economictimes.indiatimes.com/features/special-report/even-men-arent-safe-from-sexual-harassment-at-workplace-survey/articleshow/6389438.cms?flstry=1> (last visited February 20, 2014).

⁶ARE SEXUAL HARASSMENT LAWS ENOUGH? *available at* <http://www.mid-day.com/articles/are-sexual-harassment-laws-enough/15077056> (last visited February 22, 2014).

EMPLOYER'S AND EMPLOYEE'S PERSPECTIVE

Another question that has been raised on numerous occasions is with regard to the definition of the word 'employee'.

The ambit of this definition is very wide. It can roughly be interpreted to include almost any male worker. This is evident by use of words like, 'any work', 'regular', 'ad hoc', 'temporary', 'with contract', 'through agent', 'without agent', 'voluntary basis' etc. Therefore, this raises a greater possibility of untrue allegations for malafide reasons and gives a lot of scope for frivolous and unnecessary litigation.

The employer's perspective holds equal importance as well. It has been pointed out, that in light of the increased number of complaints since the passing of this Act, the employers feel discouraged from hiring women all together. More and more employers shall not prefer the unnecessary risk of any such allegations and would in fact hire a male employee. This could result a great step backward in providing equal opportunity to women⁷, ultimately hurting them in a perverse manner.

The employer is further burdened by the fact that the definition of workplace includes terms like, 'anyplace', 'transportation', 'arising out of', 'due course' etc. This adds to the burden of responsibility on the employer to protect their female employees. It is also quite unreasonable in essence. The employer cannot be humanly expected to prevent any sort of harassment at any give place at any point of time. This is coupled with the fact that in majority of the cases, the employer shall not be responsible and will not govern circumstances for the act to take place even remotely and thus, places extraordinary burden on him.

The increased burden of employers has also raised questions, such as, whether employers have a positive obligation to report even minor acts of

⁷WORKPLACE ACT COULD END UP HURTING WOMEN *available at* <http://blogs.economicstimes.indiatimes.com/SilkStalkings/entry/workplace-act-could-end-up-hurting-women> (Last visited February 23, 2014).

sexual harassment to the police, as it is an offence now punishable under the Indian Penal Code⁸. Additionally, should a situation arise where a victim is unwilling to complain and an employer is aware of the situation. In such cases, is there an obligation under this Act to report against the victim's wishes? The aforementioned problematic provisions and unanswered questions present a conundrum for application of the Act, and remain to be clarified.

FREEDOM AT WORKPLACE

The existence of free and unmonitored work environment along with co-existence of liberties to be frank and humorous with each other at workplace is in fact the need of the hour. This when exercised in limits, leads to improved understandings and work efficiency. Few examples can be mild sexual humour, unhindered personal level interactions. All these help in building up ambient relations and allow the opposite sexes to break the ice and come to terms and understandings which they need to do, both as matured individuals and professionals.

With the reducing trend of gender exclusiveness at various workplaces, more and more men and women are interacting with each other at workplaces. This trend has led to an indispensable need to create a freer and friendly environment for both genders to freely interact and communicate. Humour within limits, can sometimes be stress reliever. However with the strict provisions of the new law, it appears as though this easy interaction will get curbed. With employees being much more careful with their jokes, it will ultimately create a hostile environment at workplace.

But the Act takes away this free environment. Circumstances where casual relations are encouraged between men and women will be curbed due to fear of it being misconceived.

⁸The Indian Penal Code, 1872 (Act No. 45 of 1860), Section 354A.

The research now focuses on a provision based analysis of the Act whereby most of the provisions which have raised questions are:

CHARACTER OF LEGISLATION - ABSENCE OF GENDER NEUTRALITY

The first and most glaring flaw of this legislation is the complete absence of gender neutrality. The Act is all about sexual harassment of women and does not cater to the opposite gender. While efforts to protect women in the workplace are commendable, there appears to be no such recourse to legislative action for sexually harassed men. According to the law in place, no complaint may be filed by a male employee. There is a rising phenomenon of sexual harassment of males, which, though considerably lower than females, cannot be ignored.

SECTION 2(n) - "SEXUAL HARASSMENT"

The provision narrows the scope of what may be construed as sexual harassment for application of this Act. Acknowledgement of technological advancements could have also been noted, so as to include all possible electronic means of sexual harassment. Interpretation concerns are enhanced with the use of the phrase "unwelcome" in clause (v). Legislators have failed to note that the definition of "unwelcome" will be construed in a vastly different manner from each woman's perspective. The subjective perception of different women ought to have been included in determination of whether the act is "unwelcome" or not. The definition of "sexual harassment" has also neglected to grant protection against potential victimization of the complainant by an employer. The timeline between making of complaint till a decision is made can be effectively misused by the employer to exert undue pressure on the employee of any nature whatsoever. Alternatively, the definition of "aggrieved woman" may have included the same.

SECTION 2(o) - “WORKPLACE”

The definition includes “any place which arises within the course of employment”, thereby including clients’ offices, taxis, hotels, etc. Hence for the purpose of this Act, the areas over which the employer has no access or control are deemed to be a workplace, and the liability of occurrence of any untoward incident of sexual harassment is directly attributed to the employer. This provision seems to be extending the scope of the Act more than required, i.e. the ‘workplace’ is being used to incorporate exceedingly unnecessary venues thus putting the employer in a position where in his liability continues irrespective of his presence or control over the situation.

This law is framed mainly keeping in mind workplaces like offices, organisation, other institutions and enterprises, where complaints can be referred to committees. But the problem arises as a majority of Indian women do not work in institutions or enterprises, or in developed cities. They work in the informal sector such as fields, on the roads, or as self-employed producers or vendors. Their workplaces are everywhere, and there is no mechanism to prevent the everyday forms of sexual harassment that they may undergo⁹.

SECTION 3 – PREVENTION OF SEXUAL HARASSMENT

The provision deals with threats and detriments given by the employer to the employee and their co-relation with acts of sexual harassment. The phrases, such as “*implied or explicit threat about her present or future employment status*” and “*interferes with her work or creating an intimidating or offensive or hostile work environment for her*¹⁰” will not be conducive for speedy redressal of complaints, because in a professional work environment the

⁹BLURRED LINES *available at* <http://indianexpress.com/article/opinion/columns/blurred-lines-2/> (last visited February 18, 2014).

¹⁰UNDERSTANDING THE SEXUAL HARASSMENT OF WOMEN AT WORKPLACE (PREVENTION, PROHIBITION AND REDRESSAL) ACT, 2013 *available at* www.livelaw.in/understanding-the-sexual-harassment-of-women-at-workplace-prevention-prohibition-and-redressal-act-2013 (last visited February 10, 2014).

employees including female employees are bound to receive certain remarks or feedback with regard to quality of work and the improvements required thereof which might not always be positive. Such genuine and honest feedback, if not well received will become a reason of misusing this provision, i.e. owing to the phraseology of this provision, women might file frivolous complaints on the ground that such feedback was creating an unhealthy work environment.

SECTION 4 – CONSTITUTION OF INTERNAL COMPLAINTS COMMITTEE

The criticism of the constitution of this committee has been dealt with in a three-pronged manner. Primarily, it should be noted that in-house management of complaints may act as a deterrent to victims. It is therefore suggested that the complainant need not forcibly file a complaint with the Internal Complaints Committee. A more adequate forum would be an independent employment tribunal to handle complaints in a more efficient manner, which would simultaneously be preferable to a victim¹¹.

Secondly, the composition of the committee members should have compulsorily been an odd number to enable the committee to reach a majority-based decision. Thirdly, *Section 3(c)* mandates the appointment of a member from a non-governmental organization (NGO) or association “committed to the cause of women”. There is no threshold for this qualification and it has been left open to interpretation. Further, including third-parties such as NGOs as members of the committee will also raise concerns of confidentiality due to the sensitive nature of such internal matters.

¹¹Justice J. S. Verma, Justice Leila Seth, Gopal Subramaniam, *Report of the Committee on Amendments to Criminal Law*, January 23, 2013 available at, <http://www.prsindia.org/uploads/media/Justice%20verma%20committee/js%20verma%20committe%20report.pdf> (last visited February 11, 2014).

The Act ambitiously creates an obligation for the employer to establish a complaints committee for each of its branches (which employs 10 or more people), even if the branches are in the same city. This provision must be rectified.

Apprehension has been expressed with respect to the disposition of the committee as a whole. The reason for it is the feminist biasness of the committee itself as it comprises of stakeholders strongly prejudiced in favour of the female sex. The most conspicuous shortcoming, however, is that the internal committee is composed of persons without any legal qualifications. This absence of training specifications for the internal complaints committee will result in an ill-equipped team and obstruct justice.

Another important point to be noted is that while under this Act the power to discharge the functions including that of constitution of Local Complaints Committee are to be conferred on a District Officer who can be the District Magistrate or Additional District Magistrate or the Collector or Deputy Collector as notified by the appropriate Government¹². But, nowhere it is clarified as to who is going to be 'second in line' i.e. in absence of the District Officer who shall be authorized to exercise the functions under this Act. In such a scenario, it is possible that LCC would not be constituted in various districts, just because the presiding authority is unavailable or absent.¹³

SECTION 10(1) – CONCILIATION

This provides for the Committee to make an attempt to resolve the complaint through conciliation proceedings undertaken at the victim's request and proceed to make inquiry only if a settlement is not reached. However, this provision misleads attempts to achieve justice, in eroding the dignity of

¹²The Sexual Harassment Act, Section 5.

¹³THE PROTECTION OF WOMEN AGAINST SEXUAL HARASSMENT AT WORK PLACE BILL, 2010 *available at* <http://www.prsindia.org/billtrack/the-protection-of-women-against-sexual-harassment-at-work-place-bill-2010-1402/> (last visited February 20, 2014).

women by compromising on women's harassment. It is inconceivable and illogical why a sexually harassed woman would like to reconcile with her offender.

SECTION 11(3) – INQUIRY INTO COMPLAINT; POWERS OF CIVIL COURT

This provision vests the Committees with powers of a civil court hence making it a quasi-judicial entity. It is to be noted that the members to be appointed as a part of the Committee are not required to have any legal background nor is it necessary for them to belong to the legal fraternity. Hence, vesting the powers of a civil court in authorities having no legal knowledge seems inappropriate. Also, this may be interpreted as an instance of colourable legislation, as powers of courts cannot arbitrarily be conferred on domestic committees.

SECTION 12 – ACTION DURING THE PENDENCY OF A COMPLAINT

On request of the complainant and recommendation of the Internal/Local Committee, the employer must grant paid leave (On completion of the said leave, she can be granted *privilege leave* by the organization.¹⁴ or transfer of workplace to the complainant). It is to be noted that the mere pendency of complaint is sufficient reason for the woman to avail the above reliefs. Once the complaint has been made, this provision might be misused to leave the workplace even if it is ensured that the workplace remains safe.

SECTION 13(3) – INQUIRY REPORT; POWER TO DEDUCT SUMS FROM SALARY/WAGES

The committee has been awarded vast discretionary powers. If the alleged sexual harassment is proved, the committee is empowered to take action against sexual harassment in accordance with the prescribed service rules, or to deduct adequate compensation from the salary of the employee, or to recover the compensation from the accused employee as land revenue.

¹⁴Section 12 provides for granting leave to the aggrieved female employee up till a period of three months in addition to the regular leave which she is allowed to avail on the basis of the employment contract.

Sexual harassment is considered to be a violation of basic human rights. Hence, instead of taking drastic action, such as dismissing the accused from employment or suspending him for a considerable time period without any pay, penalizing such an act by compelling payment of compensation seems to undermine¹⁵ the gravity of the offence and equates it to offences wherein the harm or damage can be undone by monetary means. Also, in order to carry out the deductions from the salary of the accused employee, corresponding changes need to be made in the Payment of Wages Act, 1936¹⁶ which provides for certain restrictions when it comes to deductions in the salary of an employee.

SECTION 14 – PUNISHMENT FOR FALSE OR MALICIOUS COMPLAINTS AND FALSE EVIDENCE

It states that if there is a false complaint duly backed by forged documents submitted by the complainant or if it is proven that the complaint has been made with malicious intent, then strict action will be taken in accordance with the service rules of the concerned establishment. However, it categorically mentions that if the complaint cannot be substantiated, then it will not attract any repercussions under this provision.¹⁷

This red-rag provision goes against the very purpose of this legislation by penalizing women for false or malicious complaints. The criteria of falsity here is evidence of forged documents or proof of malicious intent. It has not been able to consider that there may be a case wherein the complaint is filed and later not sufficiently proved, would possibly be a frivolous complaint.

¹⁵THE SEXUAL HARASSMENT BILL UNDERMINES THE INNOVATIVE SPIRIT OF VISHAKA- NAINA KAPUR, LAWYER AND EQUALITY CONSULTANT *available at* <http://barandbench.com/content/sexual-harassment-bill-undermines-innovative-spirit-vishaka-naina-kapur-lawyer-and-equalit-0#.UwYVU9IW2vN> (last visited February 18, 2014).

¹⁶ Act No. 4 of 1936.

¹⁷ LAW TO TACKLE SEXUAL HARASSMENT OF WOMEN AT THE WORKPLACE BROUGHT INTO FORCE *available at* <http://almtlegal.com/articlespdf/ALMT%20Newsflash%20Sexual%20Harassment%20Act.pdf> (last visited February 18, 2014).

Further, specific penalty is not prescribed by the provision for such complaints; it is merely stated that action has to be taken according to the service rules.

SECTION 15(d) – DETERMINATION OF COMPENSATION, INCOME AND FINANCIAL STATUS OF RESPONDENT

The committee also has the power to prescribe monetary penalties payable to the complainant based on the income and financial status of the perpetrator. Aside from the discretion bestowed upon the committee, this provision itself is irrational, as it implies that sexual harassment by a lower executive, for example, would not warrant as high a penalty as a high-level manager. While undermining the entire concept of sexual harassment itself, this provision could possibly give more incentive to female employees to only report unwelcome acts of senior-level employees.

SECTION 16 – PROHIBITION OF PUBLICATION OR MAKING KNOWN CONTENTS OF COMPLAINT AND INQUIRY PROCEEDINGS

While it is laudable that this provision endeavours to contain such delicate matters within the purview of the organizations in which they occur, the same information should also be made available on demand to an interested party. Express exclusion from the Right to Information (RTI) Act, 2005¹⁸, will impede the interest of the public at large. This doesn't seem to be just and fair as such an exclusion from the purview of RTI would mean that information on false/ fabricated cases would not be available to a person with vested interest.

SECTION 26 – PENALTIES FOR NON-COMPLIANCE

Chapter VI lays down the duties of employers. *Section 26* prescribes penalties for non-compliance with the provisions of the Act, which includes a monetary fine upto Rs. 50,000, and on repetition of the same offence,

¹⁸Act No. 22 of 2005.

could result in punishment being doubled and/or cancellation of registration of the entity or revocation of any statutory business licenses. Herein, a fine should be prescribed, as revocation of license will inflict injury on unrelated and innocent parties associated with the business of the employer as well.

CONCLUSION

It is certain that many victims will shy away from the publicity, the procedures, the delay and the harshness in the criminal justice system, this alternative structure and process is welcome, but needs much alteration. Helping the victims to make informed choices about the different resolution avenues, providing trained conciliators, settlement options by way of monetary compensation, an inquisitorial approach by the Committee, naming the victim by use of words like complainant etc. and not using her actual name and in-camera trials are some areas of improvement. Apart from this, we need something else which the legislation cannot provide- the mindset to understand the fears, compulsions, and pressures on women victims. The legal concept and test of a “reasonable man” should give right of gender to that of a “reasonable woman” as well.¹⁹

The critical analysis made in this research paper presents the quandaries posed by the Sexual Harassment Act, such as various sections of the community will be grossly affected by the over-imposing nature of the Act, primarily the vast increase in the burden of employers, as outlined. The legislation appears to be further excessive in the redressal mechanisms which it has established by leaving short-comings in the powers and functions of these non-judicially equipped bodies. Moreover, some provisions could have been more leaning to the female victim, such as the provisions for conciliation and punishment for false or malicious complaints.

The loopholes in the particular provisions have been already identified in this research paper alongwith suggestions as to what could have been done more properly. The overall impression provided by the Act is that it is not well drafted, with sufficient reasonable foresight of the harsh effects of its implementation. These problematic provisions and unanswered questions present a conundrum for application of the Act, and remains to be clarified.

¹⁹PROTECTING WOMEN AT WORK PLACES *available at* <http://www.thehindu.com/opinion/op-ed/protting-women-at-workplaces/article5483861.ece> (last visited February 20, 2014).