

**SEXUAL HARASSMENT OF WORKING WOMEN: THE LEGAL APPROACH****Dr. Tabassum Sheikh**

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**Introduction:**

Women and their problems have acquired growing importance both in developed and under developed countries and it is widely recognized that they have been victims of discrimination everywhere.

The beginning of the modern industrial era, consequent of industrial revolution witnessed a tremendous change in the character of work outside the household in order to augment the family income. In the early stages of industrial development, women workers were victims of long hours, physical and mental torture, sexual abuse etc. Humiliation, harassment and exploitation of women is as old as the history of family life but it has become more widespread with industrialization.

**Concept of Sexual Harassment**

Sexual harassment is harassment of a sexual nature, typically in the workplace or other setting where raising objections or refusing may have negative consequences. Sexual harassment is a complex problem in the world of work that defies precise meaning. The harassers may not know that they are harassing. Sometimes, well intended gestures or remarks of friendship and affection may also be received as harassment. Sexual harassment comes in a multitude of forms. It can occur by physical contact or mere words. It can be in the form of a threat, an offer or a promise. It may take place away from the immediate work setting or during business trips, work-oriented social events as well as on the job. It can occur in environment completely separate from any organizationally affiliated activity. Our Apex court has defined sexual harassment to include "such unwelcome sexually determined behavior (whether directly or by implication) as:

- a) Physical contact and advances
- b) Demand or request for sexual favours
- c) Sexually – coloured remarks
- d) Showing pornography
- e) Any other unwelcome physical, verbal, non-verbal contact of sexual nature.

The proposed sexual harassment of women at the workplace (prevention and redressal) bill, 2004 defines sexual harassment to mean “any unwelcome sexually determined conduct whether physical, verbal or non-verbal, including but not limited to sexual advances, demand or requests for sexual favours, molestation sexually nuances gestures, comments, remarks or jokes either verbal, textual, graphic or electronic”

#### **International Instruments or Sexual Harassment.**

The Universal Declaration of Human Rights adopted on 10 December 1948 set out the general ban on discrimination of any kind, including on the basis of sex. It was followed by two international covenants adopted on 16 December 1966 likewise prohibiting discrimination on that basis in general terms.

But the most important step that the General Assembly of UN took was the adoption of convention on the Elimination of All Forms of Discrimination against Women (CEDAW) on December 18, 1979, laying down the broad definition of discrimination specifically against women that gained world wide acceptance.

- Article II of the Convention requires states “to take appropriate measure to eliminate discrimination against women in the field of employment”

- Followed by Article 22 which states, “equality in employment can be seriously impaired when working women are subjected to gender specific violence such as sexual harassment at the work place”

- Article 24 further requires that “states should include in their reports, information about sexual harassment and on measures to protect women from sexual harassment and on measures to protect women from sexual harassment and other forms of violence or coercion in the workplace”

- Followed by General Recommendation No. 19 on violence against women which was adopted by the committee on the elimination of Discrimination against women in January 1992.

The ILO’s concern is also manifested in a number of non-binding instruments;

- the 1985 International Labour Conference resolution on equal opportunity & equal treatment for men and women in employment.

- 1989 – ILO meeting on experts on special protective measures for women and equality of opportunity and treatment.

- 1991 – International Labour Conference resolution concerning ILO action for women working requesting International Labour Office to develop guidelines, Training and information materials on issues of specific and major importance to women workers, such as sexual harassment in the work place.

All these Conventions, Recommendations and Resolutions make it clear that they have been fully conscious of the growing problem of sexual harassment.

## **Indian Position**

### **Constitutional Provision**

The constitution of India is one of the most progressive constitutions in the world, ensures gender equality by making it a fundamental right.

- Art. 14 ensures equality before law and equal protection of law to every person. It not only prohibits discrimination but also makes various provisions for the protection of women.
- Art. 15(1) provides that the state shall not discriminate against any citizen on ground only of religion, race, caste, sex, place of birth or any of them. Art. 15(3) empowers the state to make

special provision for women namely, “nothing in Art. 15 shall prevent the state from making any special provision for women and children.”

- Art. 16 guarantees equality of opportunity for all citizens in matters relating to employment or opportunity to any office under the state and forbids discrimination on the grounds only of inter alia sex.
- Art. 19 ensures two basic freedoms (1) freedom of speech and expression of Art. 19(1)(a), (2) freedom of practice any profession or to carry out any occupation, trade or business, Art. 19(1)(g).
- Art 21 says, “no person shall be deprived of his life or personal liberty except according to procedure established by law.” Women workers have a right to lead a dignified and honourable life with liberty.
- Art. 23 guarantees the right against exploitation. It prohibits traffic in human beings and other similar forms of forced labour and makes contravention of this provision to be an offence punishable under law.

In addition to these fundamental rights, Part IV of the Constitution which incorporates Directive Principles of State Policy, also ensures dignified life to working women. The important provisions are:

- Art. 39(a) ensures that the citizens, men and women equally have the right to adequate means of livelihood.
- Art. 39(d) states that there will be equal pay for equal work for both men and women.
- Art. 39(e) states that the health and strength of workers, men and women . . . are not abused.
- Art. 42 ensures that the state shall make provision for securing just and humane conditions of work and for maternity relief.

- Art. 51A(e) makes it a fundamental duty of every citizen to renounce practice derogatory to the dignity of women.

These are the guidelines to be followed by all three organs of the state: legislative, executive and judiciary that are committed to make, interpret and enforce law.

### **Legal Provisions**

There is no specific law on this particular issue but there are other laws criminal, social, civil and labour touching sexual harassment indirectly. The most important among them is the Indian Penal Code, 1860 that prescribes punishment for the offence of assault or use of force on women with intent to outrage her modesty as well as for words, gestures or acts intended to insult the modesty of a woman. Likewise under the different labour legislations, rights of women workers have been protected to ensure equality in employment and to lead a dignified life. But none of the those provisions mention sexual harassment directly.

### **Judicial Activism**

The Honorable Supreme Court in Vishaka state of Rajasthan and others has laid down guidelines and norms that should be observed at all workplaces or other institutions until a legislation is enacted in this regard. In the absence of any enacted law the contents of international conventions or norms are significant for the purpose of interpretations of the guarantee of gender equality, right to work with human dignity in Article 14, 15, 19(1) (g) and 21 of the constitution and the safeguards against sexual harassment implicit therein.

- Article 51© and the enabling power of Parliament to enact law to implement international convention
- In virtue of article 253 with entry 14
- Therein list in seventh schedule of the constitution Article 73 is also relevant.

The Apex court has emphasized that the following guidelines and norms be treated as the law under Article 141 of the constitution:

1. **Duty of the employer or other responsible persons in workplaces and other institutions to prevent deter the commission of acts of sexual harassment by norms of resolution, settlement or prosecution.**

2. **Definition**

3. **Preventive Steps**

All employer or persons in charge of workplace whether in public or private should take appropriate steps to prevent sexual harassment

4. **Criminal Proceedings**

The employer shall initiate appropriate action by complaining to the appropriate authority. That victims or witness are not victimized or discriminated while dealing with complaints of sexual harassment. The victim should have two option to seek transfer of the perpetrators or their own transfer.

5. **Disciplinary Action**

If found misconduct in employment appropriate disciplinary action should be initiated.

6. **Complaint Mechanism**

An appropriate complaint mechanism should be created in the employer's organization for redressal and it should give time bound treatment.

7. **Complaint Committee**

Should include a special counsellor or other support services, maintaining confidentiality.

This committee should be headed by a woman and not less than half of its members should be women. To check that no outside pressure is received a third party NGO or another body who is familiar with the issue of sexual harassment.

**8. Workers initiative**

Employers should be allowed to raise issues of sexual harassment in employer employee meetings.

**9. Awareness**

Awareness of the rights of female employees by prominently notifying the guidelines.

**10. Third Party Harassment**

The employer will take all necessary steps to assist the affected person in terms of harassment from anybody by preventing and supporting the victim.

**11. Central / State Government should adopt legislation to ensure that the guidelines laid down are also observed in private sector.**

**12. These guidelines will not prejudice or infringe upon any rights available under the protection of Human Rights Act, 1993.**

- Section 66 (1) (b) of factories Act 1948 prohibited the employment of women in night shifts. Women forums became vociferous regarding this section that women should be permitted to work in the night shifts.

The Union Cabinet lifted the ban ratifying the Protocol of 1990 to the ILO Night work (women) Convention and amending the Factories Act 1948. The amendment allowed women to work between 10 pm to 6 am as it will benefit those working in special economic zones, textile and IT sector (specially call centre) only if the employer ensures safety. The flexible timings shall be allowed “provided adequate safeguards in the factory as occupational safety and their transportation from the factory premises to the nearest point of their residence are made.”

**Legislative Efforts: The proposed bills on sexual Harassment.**

There is no central or state legislation to curb the evil of Sexual Harassment in India. The National Commission for women (NCW) a statutory body constituted under the National

Commission for Women Act 1990 has become quite active in highlighting the issue of Sexual harassment and creating awareness among the general public.

- In 1998 the Commission formulated a Code of Conduct for workplace in simple terms understood by the common people which is circulated to all Ministries of the Central and State Governments, State Commission, NGO's and Apex bodies of the corporate sector and to the media.
- Various attempts had been made in the form of the Sexual Harassment of Women at their workplace (Prevention) Bill, 2000.
- Prevention of Sexual Abuse and harassment of women and girls at workplace bill 2002.
- Sexual Harassment at their workplace (preventive) Bill 2003.
- Sexual Harassment of Women at the workplace (prevention and redressal) Bill, 2004.
- The major loop holes in all the bills introduced so far.
  1. One of the major drawbacks of the bill is that the definition of workplace as given in 2(I)(P) includes public place ignoring women who are self employed unorganized sector eg women selling different items in public places.
  2. The Bill provides that all instances from employee to employee, employer to employee and third party whether related to work or not whether in official premises or outside shall be covered under this act. Offence can occur in non-working hour and space. It needs reconsideration.
  3. The bill was silent so far on the issue of third party harassment extent of control of the employer on such harassment eg educational institution and universities eg in case of college and universities where there are different cadres of third party members ie supervisors and examiners like visiting staff, external supervisor and examiners..
  4. No specific NGO has been selected in redressal mechanism.



5. The counselling part has been ignored. Many cases can be sorted out at the preliminary stage by counselling.

The Ruchika Girhotra molestation case has given a fresh lease of life to a draft bill drawn up to protect working women at the workplace. So far the loop holes which I have mentioned in the earlier Bills will be covered by this new Bill which the union ministry of women and child development (WCD) has set upon inter-ministerial committee to fine tune the Bill before sending it for cabinet approval.

The ministry is likely to place the Bill before the cabinet by the end of the month and in Parliament during the budget session.

The Bill aims to protect women against harassment by colleges, bosses, subordinates, visitors and guests on office premises. It also covers students, research scholars and unorganised sector workers.

What the Bill prescribes:

1. The protection of women against sexual harassment at workplace Bill \*\*\* leaves open the quantum of punishment for the guilty.
2. While it is clear that an offender cannot be sent to jail, the bill provides for monetary compensation to the victim.
3. The employer or 'authorities' can demote the offender or withdraw his increments.
4. False complaints will be dealt with sternly, with the complainant liable for punishment.

The Bill was prepared two years ago in 2007 but, was not cleared as some ministries, cabinet ministers and organization pointed at possible misuses.

The ministry then reworked the Bill and inserted a clause with provision for actions against person making a false complaint. Though the quantum of punishment for misuse has not been mentioned in the draft, it has been indicated that the complainant can face action as per their service rules which could be a fine, transfer or even termination of services. Upset over the new clause women activists argued it would deter women from using the law. The women MP's

agreed that the clause against misuse should stay. The inter-ministerial committee has been asked to examine the debatable clause of the draft Bill by January 20.

