

**SEXUAL HARASSMENT AT THE WORKPLACE: STUDY FROM THE LAW AND SOCIOLOGY
PERSPECTIVE**

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Sexual harassment is a complex issue involving women, their perceptions and behaviour, and the social norms of the society. Of all the forms that violence against women can assume, sexual harassment is the most ubiquitous and insidious; all the more so because it is deemed 'normal' behaviour and not an assault on the female entity.¹ More often than not it expresses itself in the garb of power or desire or both. We cannot understand the issue of sexual harassment at work place unless we pay attention to prevalent socio-cultural issues, of gender and sexuality, and how it impacts upon the status of women.²

SOCIAL ASPECT:

In today's era, the number of women who have entered the formal labour workforce in India is unprecedented. With the current global economic condition more and more women are entering the workforce. In light of this development, there is, more than ever before, a pressing need for the rights of women to be respected, protected and fulfilled, particularly at the workplace. The 'right to work' encompasses the right to work free from any form of sexual harassment.³ Women's rights at the workplace are of course, important for many reasons. The obvious reasons that come to mind are the right of women to be free from unwanted sexual comments, advances, touching and more. It is important to note, however, that the issue of sexual harassment at the workplace extends far beyond individual women and their happiness. It also extends to workforce productivity and economic development.

Harassment should not be treated as a joke. It creates feelings of uneasiness, humiliation, and discomfort.⁴ Any such behaviour is unacceptable and intolerable regardless of the perpetrator. It is a coercive, cruel, and destructive behaviour against others that can have devastating effects on their work efficiency. Harassment, by co-workers in particular, is contrary to basic union principles of solidarity and equality.

Women are the most likely victims of this problem of sexual harassment at workplace though there are cases where men face harassment. "Harm caused by sexual harassment is often extreme, including humiliation, loss of dignity, psychological (and sometimes physical) injury,

¹ http://www.womenstudies.in/elib/others/ot_sexual_harassment.pdf, Last visited on: 2nd September, 2011.

² <http://www.egyankosh.ac.in/bitstream/123456789/36042/1/Unit%2027.pdf>, p. 2, Last visited on: 2nd September, 2011.

³ http://128.226.6.231/documentation/ciri_variables_short_descriptions.pdf, Last visited on: 2nd September, 2011.

⁴ Supra no. 3, p. 3.

and damage to professional reputation and career. Inevitably, the victims face a choice between their work and their self-esteem. Sometimes, they face a choice between their jobs and their own safety.”⁵ Sexual harassment at workplace is discriminatory, for instance, when the woman has reasonable grounds to believe that her objection would disadvantage her in connection with her employment or work (including recruiting or promotion), or when it creates hostile work environment. Adverse consequences might be visited if the victim does not consent to the conduct in question or raises any objection thereto. Mostly such cases go unreported because of societal factors which has become a growing concern.⁶

LEGAL ASPECT:

Looking from the law perspective, sexual harassment is a legal term created for the purpose of fending harassment and discrimination against women at the workplace. The term is constantly being redefined and extended in legislation and court decisions. The phrase ‘sexual harassment at workplace’ has neither been defined in the Indian Penal Code nor is there any legislation to curb sexual harassment at the workplace. On-the-job sexual harassment is not a recent problem, although legal liability for it is. The Indian court system did not decide the first sexual harassment at workplace case until 1997.⁷ India still lacks a substantive legislation dealing with sexual harassment at workplace.

The Constitution of India gave to women, the Fundamental Right to Equality and the Right to not be discriminated against on the grounds of religion, race, caste, sex or place of birth.⁸ It was realising the secondary status of women and to undo the injustice done to them over centuries that the Constitution included a special provision in Article 15(3)⁹, permitting the State to positively discriminate in favour of women by enacting laws/ provisions so as to ameliorate their social, economic and political condition and to accord them parity.¹⁰ Sexual harassment of

⁵ Barry S. Roberts and Richard A. Mann, “Sexual Harassment In The Workplace: A Primer”, <http://www.uakron.edu/law/lawreview/v29/docs/roberts.pdf>, Last visited on: 2nd September, 2011.

⁶ <http://www.sexualharassmentatworkplace.org/why-cases-sexual-harassment-go-unreported>, Last visited on: 2nd September, 2011.

⁷ Vishaka v. State of Rajasthan & Ors., AIR 1997 SCC 3011.

⁸ Article 14 and 15, The Constitution of India.

⁹ Article 15 (3) Nothing in this article shall prevent the State from making any special provision for women and children.

¹⁰ “Social Justice: The Legal Instruments”, <http://www.ambedkar.org/NHRCReport/3.pdf> ; See also: Savitri W. E. Goonesekere , “The Concept of Substantive Equality and Gender Justice in South Asia”, <http://www.unifem.org.in/PDF/The%20Concept%20of%20Substantive%20Equality%20-final%20-%2031-12-07.pdf>, Last visited on: 2nd September, 2011.

women at workplace violates their sense of dignity and right to earn a living with dignity and is against their fundamental rights and their basic human rights.¹¹

Hence, it is obligatory on the Court, under Article 32 of the Constitution, to enforce these fundamental rights, in the light of the role of the judiciary as envisaged in the Beijing statement of principles of the independence of the judiciary. In the absence of the enacted law to provide for effective enforcement of the basic human right of gender equality and guarantee against sexual harassment and abuse, more particularly against sexual harassment at the workplace, the Supreme Court has laid down the guidelines and norms in the *Vishaka* judgment¹² for compliance at all workplaces/ institutions. These guidelines and norms of the Supreme Court are required to be treated as “The Law of the Land”.¹³

The Prohibition of Sexual Harassment of Women at Workplace Bill, 2010 (hereinafter Prohibition of SHW Bill)¹⁴ which was initially drafted back in 2007 by National Commission on Women and came after the former Protection against Sexual Harassment of Women Bill 2005 was scrapped after being deemed too wide in scope and thus difficult to implement. Instead the new Bill focuses specifically on sexual harassment at the workplace. Although the Cabinet cleared it in November last year, it is still pending before the parliament.

The International Convention on the Elimination of all forms of Discrimination against Women (CEDAW) adopted in 1979 at Beijing, which has been ratified by India, also recognised the right of women to equality at the workplace and it states that women shall not be subjected to sexual harassment at the workplace as such harassment vitiates the working environment.¹⁵

Whatever the case, the issue has undeniably become more prominent in the last decade, thanks to the efforts of civil society groups and the media, and pressure from international organizations. It is recognized as abusive behaviour, and measures are being taken by countries across the globe to punish and prevent it.

¹¹ Maya Majumdar, “Encyclopaedia of Gender Equality Through Women Empowerment”, p. 1

¹² *Vishaka v. State of Rajasthan & Ors.*, AIR 1997 SCC 3011.

¹³ Article 141, The Constitution of India.

¹⁴ Accessible at: http://ncw.nic.in/PDFFiles/sexualharassmentatworkplacebill2005_Revised.pdf, last visited on 10th October, 2011.

¹⁵ Sally Engle Merry, “Constructing a Global Law-Violence against Women and the Human Rights System”, <https://www.utexas.edu/law/centers/humanrights/events/adjudicating/papers/LawSocialInquiryArticle.pdf>, Last visited on: 2nd September, 2011.

Sexual harassment at work place has always been one of the primary focuses of gender studies. The study on sex crimes against women would be incomplete if sexual harassment at work place is not studied. Yet, academic literature and information relating to sexual harassment reveals that only the tip of the iceberg is currently known. It is possible that much of the sexual harassment is unreported in the workplace, as studies suggest that only a small minority of people who are sexually harassed make a formal complaint.¹⁷ In this section, attempt has been made to give a comprehensive review of the main academic literature and relevant information in relation to sexual harassment in the workplace. It firstly outlines the different definitions of sexual harassment. Following this, have been discussed the individual and organisational effects of sexual harassment. Then relationship between sexual harassment and bullying, forms of sexual harassment, the scale of sexual harassment in the workplace and individual factors including the victim and the perpetrator has been outlined.

A study of literature in this field by Manchester Business School shows that what is already known is a plethora of sexual harassment definitions, organisational violation, the strong link between power and sexuality, forms of sexual harassment, groups at risk of sexual harassment, antecedents of sexual harassment (individual/ organisational/ societal), short and long term effects on the individual and organisation, difficulties facing individuals who wish to file a complaint, legal responses and examples of best practice procedures.¹⁸

DEFINITION OF SEXUAL HARASSMENT

The emergence of the term ‘sexual harassment’ can be traced back to the mid 1970s in North America.¹⁹ Sexual harassment at work is an unwelcome or uninvited behavior of sexual natures, which is offensive, embarrassing, intimidating or humiliating and may affect an

¹⁶ <http://research.mbs.ac.uk/equality-diversity/Portals/0/docs/WPS59Sexualharassment.pdf>

¹⁷ “Black, Asian and Minority Ethnic (BAME) women’s experiences of sexual harassment in the workplace in the North West of England”, <http://research.mbs.ac.uk/equality-diversity/Portals/0/docs/ESFreport18.06.08.pdf>

¹⁸ Carrie Hunt, Marilyn Davidson, Sandra Fielden and Helge Hoel, “Sexual harassment in the workplace: A Literature Review”, The Centre for Equality and Diversity at Work, Manchester Business School, University of Manchester, p. x, <http://research.mbs.ac.uk/equality-diversity/Portals/0/docs/WPS59Sexualharassment.pdf>.

¹⁹ Carrie N. Baker, “The women’s Movement against Sexual Harassment”, p. 1, Cambridge University Press, 2008

employee's work performance, health, career or livelihood.²⁰ CEDAW described sexual harassment in 1992, which is the generally accepted definition, as including:

“Such unwelcome sexually determined behavior as physical contact and advances, sexually colored remarks, showing pornography and sexual demand, whether by words or actions. Such conduct can be humiliating and may constitute a health and safety problem; it is discriminatory when the woman has reasonable grounds to believe that her objection would disadvantage her in connection with her employment, including recruitment or promotion, or when it creates a hostile working environment.”²¹

Precise quantification of sexual harassment in the workplace is problematic. When we examine the behaviours and the circumstances in which sexual harassment occurs there exists a lack of consensus regarding the definition of sexual harassment.²² “Victims of Sexual Harassment in Modern Work Places in India” by P. Madhava Soma Sundaram, K. Jaishankar & Megha Desai is a good piece of literature in this regard.²³

Vishaka was a landmark judgement by Supreme Court of India. Not because it was attack on working women's fundamental right to work without fear and prejudice. Not because it is a saga of immense torture of a naïve working woman. Not because a woman showed exemplary courage to fight against the male ego our immoral society. It is a landmark case because first time ever it was officially recognized at such a high level of need for laws for sexual harassment and laying down of guidelines of sexual harassment of working woman. Till 1997 even after India's independence of 50 years there was hardly any law to safeguard sexual harassment of working women.

THE RELATIONSHIP BETWEEN SEXUAL HARASSMENT AND BULLYING

The majority of the literature on sexual harassment appears to have been published in the 1990s, and in more recent years, the emphasis in the research has shifted to the broader issue of

²⁰ Sabitha, M., “Sexual Harassment Awareness Training at Workplace: Can it effect Administrators' Perception?”, JOAAG, Vol. 3. No.2, (2008), p. 2.

²¹ General Recommendation No. 19, <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm>; See also: S. 2 (m), (n) of The Protection of Women Against Sexual Harassment at Work Place Bill, 2010, <http://www.sexualharassmentatworkplace.org/sites/default/files/sexual-harassment-bill-2010.pdf>, Last visited on: 2nd September, 2011.

²² Bimrose, J, “Sexual harassment in the workplace: An ethical dilemma for career guidance practice?”, British Journal of Guidance and Counselling, Vol. 32 (1), 2004, pp. 109-121.

²³ Natti Ronel, K. Jaishankar, Moshe Bensimon, “Trends and Issues in Victimology”, K. Jaishankar Publications, 2008.

bullying. Bullying is a globally recognised problem reflected in the recent agendas of international organisations such as the International Labour Office (ILO) and the World Health Organization (WHO).²⁴

Historically, research centered on sexual harassment has tended to focus on the person being harassed and the perpetrators' behaviour, including the psychological profile of a harasser.²⁵ It is however, worth noting that the boundaries between the concepts are somewhat unclear, with unwanted sexual attention, used with the intention of excluding or punishing targets, likely to fit the term bullying. Essentially, sexual harassment is seen as representing an abuse of power.²⁶ It is argued that harassment is "not about sex, [but] about power...it supports and perpetuates a system in which one class of persons is systematically disempowered".²⁷

Jeff Hearn and Wendy Parkin have written extensively on this theme in their "Sex at Work: The Power and Paradox of Organisation Sexuality"²⁸, "Gender Sexuality and Violence"²⁹ and "Recognition processes in sexual harassment, bullying and violence at work: the move to organizational violations"³⁰. For them, "*organisations and sexuality simultaneously construct each other*". Their studies reveal that as men remain in positions of power and tend to dominate management structures, they have increased opportunities to exercise their power in a negative manner when compared with women. This may mean that sexual harassment comes within the wider ambit of bullying.

²⁴ Di Martino, V., Hoel, H. and Cooper, C. L. , "Preventing violence and harassment in the workplace", European Foundation for the Improvement of Living and Working Conditions, 2003, <http://www.workplacebullying.org/res/articles/F6.pdf>, Last visited on: 2nd September, 2011.

²⁵ Jansma, L. L., "Sexual harassment research: integration, reformulation, and implications for mitigation efforts" in M. E. Roloff (ed.), Communication yearbook 23, Sage Publications, Thousand Oaks, CA, Cited in D. S. Dougherty and M. J. Smythe, "Sensemaking, organizational culture, and sexual harassment", Journal of Applied Communication Research, Vol. 32 (4), 2004, pp. 293-317.

²⁶ Brewis, J., "Foucault, politics and organizations: (re)-constructing sexual harassment", Gender, Work and Organisation, Vol. 8 (1), 2001, pp. 37-60.

²⁷ <http://research.mbs.ac.uk/equality-diversity/Portals/0/docs/ESFreport18.06.08.pdf>, p.14, Last visited on: 2nd September, 2011.

²⁸ St. Martin's Press, New York, 1987.

²⁹ In Fitzgerald, L. F. and Ormerod, A. J., "Perceptions of Sexual Harassment: The influence of Gender and Academic Context", Psychology of Women Quarterly, Vol. 15, 1991, pp. 281-294. (Sage Publications, London)

³⁰ In J. E. Gruber and P. Morgan (eds.), "In the Company of Men: Male Dominance and Sexual Harassment", Northeastern University Press, Boston, 2005.

FORMS OF SEXUAL HARASSMENT

There are six different categories of sexual harassment as can be identified from the available literature:

1. Quid Pro Quo³¹: In these cases, a supervisor or mentor makes unwelcome advances of a sexual nature and either states or implies that the woman must submit, if she wants to keep her job, receive a raise and receive a promotion or a specific job assignment.
2. Hostile Environment³²: Unwelcome sexual conduct can make the working environment 'hostile' to women in general. An environment is considered 'hostile' when unwelcome sexual conduct has the effect of poisoning the work environment. The central enquiry is whether the conduct 'unreasonably interferes with an individual's work performance' or 'creates an intimidating, hostile or offensive working environment.'³³
3. Sexual Favouritism³⁴: This kind of harassment occurs when employees who provide sexual favours to their employer receive benefits in the form of raises, promotions etc., which one is denied because one refused those sexual advances.
4. Harassment by Non-Employees
5. Same Sex Harassment
6. Constructive Discharge
7. "Not wanted in the inbox! Evaluations of unsolicited and harassing emails"³⁵ by Ne Khoo Pek and Charlene Y. Senn, brings on a new form of sexual harassment via electronic means which they claim has increased as the level of internet and email usage has grown.

THE SCALE OF SEXUAL HARASSMENT

In India, every 53 minutes, a woman is reported to be sexually harassed and every 26 minutes a woman is sexually molested.³⁶ Several studies indicate that the magnitude of unreported cases is several times over the estimate.³⁷ Most studies focus on sexual harassment in general. A recent survey in India has found that 68% women have suffered mental harassment

³¹ http://www.dikseo.teimes.gr/spoudastirio/E-NOTES/S/Sexual_Harassment_Viewpoints.pdf, Last visited on: 2nd September, 2011.

³² Ibid.; Note that the above two categories have evolved in US juridical discourse to become legally recognized harassment.

³³ The standard for evaluating a hostile environment is from the perspective of a 'reasonable person'.

³⁴ <http://www.utc.edu/Outreach/TransformationProject/typesofsh.php>, Last visited on: 2nd September, 2011.

³⁵ Psychology of Women Quarterly, Vol. 28, 2004, pp. 204-214.

³⁶ National Crime Records Bureau's (NCRB) 2005 Crime Clock.

³⁷ Srinivasan, A., "Sexual Harassment", Indian Journal of Gender Studies, Vol. 5(1), Jan-June 1998, pp.115-125, p. 115.

and 26% have been physically molested at their workplace.³⁸ One study to be noted in this regard is Lawyers Collective Women's Rights Initiative's in 2008- "Law relating to sexual harassment at the workplace"³⁹. It highlights the fact that sexual harassment of women is rampant in India and most of it is unreported. There is a lack of literature giving the scale and extent of the problem of sexual harassment at workplace.

INDIVIDUAL FACTORS

The Victim:

A study by Kohlman (2004)⁴⁰ reported that 'women are not reporting sexual harassment based upon any one overriding factor integrally related to their gender'. A survey conducted by the Department for Trade and Industry (DTI) in 2005 in Britain⁴¹ showed that women and disabled people or people suffering from long-term illness were more likely to suffer sexual harassment at workplace than men which goes on to prove that profiles of victims do matter.

The Perpetrator:

It cannot be said with certainty how far the perpetrator's mindset is relevant in the dominance of sexual harassment at workplace but individuals who are competitive, hard driving, or have low self monitoring for example, are more likely to exhibit negative behaviours as per a study.⁴² Another study by Done substantiates this point that men who have low levels of self-control are more likely to sexually harass than men with high levels of self-control.⁴³ Also typically, the perpetrator of sexual harassment will be in a position of power and the victim will be comparatively powerless is a point which Wilson and Thompson bring out in their study.⁴⁴

³⁸ Oishik Sircar and Nalini Bhanot, "Violence Against Women", <http://infochangeindia.org/women/backgrounder/violence-against-women.html>, Last visited on: 2nd September, 2011.

³⁹ Edited by Indira Jaising

⁴⁰ Kohlman, M. H. (2004) 'Person or position? The demographics of sexual harassment in the workplace'. Equal Opportunities International. 23 (3-5): 143-162.

⁴¹ Grainger, H. and Fitzner, G. (2006) Fair treatment at work survey 2005. Employment Relations Research Series No.63. Department of Trade and Industry: London.

⁴² Anderson, C. A., Anderson K. B. and Deuser, W. E. (1996) 'Examining an affective aggression framework: weapon and temperature effects on aggressive thoughts, affects and attitudes'. Personality and Social Psychology Bulletin. 22: 366-76.

⁴³ Done, R. S., "Just Men Out Of Control? Criminology And The Likelihood To Sexually Harass", in J. E. Gruber and P. Morgan (eds.), "In the company of Men: Male dominance and Sexual harassment", Northeastern University Press, Boston, 2005.

⁴⁴ Wilson, F. and Thompson, P. (2001) 'Sexual harassment as an exercise of power'. Gender Work and Organization. 8,(1): 61-83.

The review of literature also focussed on various studies and reports made by women organisations⁴⁵ and international forums like UN and its organs, International Labour Organisation, World Bank etc. which are working towards this cause.⁴⁶ The Status of Workplace Sexual Harassment in IT/ ITES Industry, 2010 by Centre for Transforming India, is one of the only surveys done in this field in India.⁴⁷ The study gave startling and horrifying figures and showed that 88 per cent of 600 women employees, age 19 to 45, reported sexual harassment (any form of sexually directed verbal, visual or physical attention that is unwanted and unwelcome) across IT and ITES sectors across NCR, Bangalore, Pune, Mumbai, Chennai and Hyderabad. But we need more such studies to be able to assess the actual magnitude of the problem. But one thing is for sure that sexual harassment at workplace is much more prevalent than we think.

⁴⁵ Prajnya Trust- <http://www.prajnya.in/gvr10.pdf>; http://cividep.org/wp-content/uploads/Sexual-Harassment-Report-MahooLyimo-_Oct-2010.pdf; HRLN- <http://hrln.org/admin/Newsroom/subpdf/article%20sex-harass3.pdf>; <http://www.iwraw-ap.org/resources/pdf/India%20Shadow%20report.pdf>

⁴⁶ The reports can be found at:

ILO- <http://www.ilo.org/dyn/gender/docs/RES/429/F1845214041/Sexual%20harasement%20at%20work.pdf>;
World Bank- <http://www.worldbank.org/html/cgiar/publications/gender/gender13.pdf>; UNHCR-
[http://www.un.org/womenwatch/osagi/UN_system_policies/\(UNHCR\)policy_on_harassment.pdf](http://www.un.org/womenwatch/osagi/UN_system_policies/(UNHCR)policy_on_harassment.pdf); UNDP-
<http://www.undp.org/about/transparencypdocs/WPHarassment.pdf>; International Trade Union Confederation-
http://www.ituc-csi.org/IMG/pdf/Harcelement_ENG_12pgs_BR.pdf

⁴⁷ <http://indiatoday.intoday.in/story/a+bill+for+bullies/1/124505.html>

CHAPTER THREE: RESEARCH METHODOLOGY

3.1 THE RESEARCH PROBLEM AND OBJECTIVES OF THE STUDY

My research began with the question that how the legal enforcement of rules regarding sexual harassment at workplace does takes place in the real world. Is it really as simple as it seems? Is having a set of guidelines in terms of Vishaka rules sufficient to tackle and combat this serious issue? Do we need a substantive law to deal with it? Why is it that everything has to be evaluated on terms of law? Can't we have a sociological way of bringing about change in the society? Why is it that we need to depend on a legal framework to bring about a change? Is a correct mindset not enough? Will awareness not be able to bring about change? What does it take to change the mentality of people? These were the plethora of questions which popped up in my mind before I went on to work. But obviously one project is not enough to tackle all these questions.

The *main research question* was to examine the sufficiency or otherwise of the existing laws to provide safety and protection to women at work place. The research would obliquely cover the impact of sexual harassment of women on the work environment and the perceptions about it. But above all the research is aimed at suggesting measures to prevent, control and minimize the incidence of sexual harassment of women at work place.

The next step was reviewing the literature available on the issue so that our above queries get answers. Literature review is integral part of entire research process and makes valuable contribution to every operational step. It served to broaden my knowledge and contextualize my findings of the doctrinal research. It showed me the deficiency and the gaps in the current literary discourse which further fuelled my interest to delve deeper into the central research question i.e. finding out how the handling of sexual harassment cases has changed after Visakha and how does the lack of a substantive law affect the issue.

3.2 SOURCES OF DATA

The whole idea behind research is “*re- search*” implying that it is a structured enquiry that utilizes acceptable scientific methodology to solve problems and create new knowledge that is generally applicable. It is not that we do not engage in such process in our daily life, the difference between our casual day-to-day generalisation and the conclusions usually recognized as scientific method lies in the degree of formality, rigorousness, verifiability and general validity of latter.

A *doctrinal study* was employed wherein evidence was gathered from information collected from secondary sources. The host of sources referred to, ranged from browsing newspaper archives to research articles to reports of NGO's on Sexual Harassment at Workplace, apart from books, journals, internet sources etc. Supreme Court cases and High Court cases were the most important source of data collection and provided the starting point on which the other secondary sources were studied.

3.3 METHODS OF DATA ANALYSIS

The data has been analysed in context of the legal rules and guidelines which exist in the India and what ideally should have been the situation. This has been done on the basic knowledge stemming from the limited review of literature done in this field. The central research question has been kept in mind while analyzing the secondary data sources mentioned above.

The research findings constitute the law perspective insofar it involves the trend that emerges upon studying decided cases and the other cases of sexual harassment at workplace reported in newspaper or which gain prominence. Very slightly the topic of how sexual harassment at workplace is perceived has been dealt.

4.1 A BRIEF LOOK AT THE LANDMARK CASES: BREAKING THE SHACKLES WITH VISHAKA¹ AND CONTINUING THE LEGACY WITH A.K. CHOPRA²

Harassment at workplace by the Males is the reality of the working woman's life. It was in August 1997, in the case of *Vishaka v. State of Rajasthan & Ors.*³, that for the first time, sexual harassment was explicitly or legally defined as an unwelcome sexual gesture or behaviour, whether directly or indirectly as sexually coloured remarks, physical contact and advances, showing pornography, a demand or request for sexual favours, any other unwelcome physical, verbal/ non-verbal conduct being sexual in nature.

The primary question in the Vishaka case was whether the State had the responsibility to protect its employees and workers. A writ petition was filed in the Supreme Court with a three-fold aim:

- i. Firstly, to assist in finding suitable methods for the realization of gender equality,
- ii. Secondly, to prevent sexual harassment, and
- iii. Thirdly, to fill the vacuum in the existing legislation.

Sexual harassment was identified as a separate illegal behaviour. The critical factor in sexual harassment is the un-welcomeness of the behaviour, thereby making the impact of such actions on the recipient more relevant than the intent of the perpetrator, which is to be considered also. Where any of these acts are committed in circumstances under which the victim's employment or work (whether she is drawing salary, or honorarium or voluntary service, whether in government, public or private enterprise), such conduct can be humiliating and may constitute a health and safety problem, it amounts to sexual harassment at the workplace.

Also, the duty of the employer or other responsible persons in workplaces and other institutions was clearly defined:

¹ Vishaka v. State of Rajasthan & Ors, AIR 1997 SCC 3011.

² Apparel Export Promotion Council v. A.K. Chopra, AIR 1999 SC 625.

³ *Supra* n. 48.

“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.”

The immediate cause for filing the petition was the alleged brutal gang rape of Bhanwari Devi, a social worker in Rajasthan. The Supreme Court, in the absence of any enacted law to provide for effective enforcement of basic human rights of gender equality and guarantee against sexual harassment, laid down certain guidelines which continue to be followed till date. These guidelines apply to both organized and unorganized work sectors and to all women whether working part time, on contract or in voluntary/honorary capacity.

The guidelines are a broad framework which put a lot of emphasis on prevention and within which all appropriate preventive measures can be adapted. One very important preventive measure is to adopt a sexual harassment policy, which expressly prohibits sexual harassment at work place and provides effective grievance procedure, which has provisions clearly laid down for prevention and for training the personnel at all levels of employment.

In the *Apparel Export Promotion Council v. A.K. Chopra*⁴ case the SC upheld the removal of an employee from the services on charges of sexual harassment. He repeatedly used to touch a clerk cum typist in his organization and was clearly sexually harassing her. Dr. Anand observed that “sexual harassment of a female at the place of work is incompatible with the dignity and honour of a female and needs to be eliminated and that there can be no compromise with such violations, admits of no debate.”⁵

Citing the message of international instruments such as the Convention on the Elimination of All Forms of Discrimination Against Women, 1979 “CEDAW” and the Beijing Declaration which direct all State parties to take appropriate measures to prevent discrimination of all forms against women besides taking loud and clear steps to protect the honour and dignity of women, the court said that these international instruments cast an obligation on the Indian State to gender sensitize its laws. This puts the Courts under an obligation to see that the message of the international instruments is not allowed to be drowned.

Apart from redressing a ten year old wrong, the SC has also done well to rule that sexual harassment is violative of two fundamental rights guaranteed by the constitution- the right to

⁴ AIR 1999 SC 625.

⁵ *Apparel Export Promotion Council v. A.K. Chopra*, AIR 1999 SC 625, ¶27.

gender equality and the right to life and liberty. With this declaration, the court has put in perspective the indignity suffered by women across the country at their place of work, compounded by judicial delays and adverse verdicts in most cases.⁶

This case thus continued the legacy of *Vishaka*. Unfortunately, we do not find many court cases filed to remedy this issue.⁷

4.2 A FEW SEXUAL HARASSMENT CASES REPORTED IN NEWS

As pointed out in the earlier chapters the sexual harassment cases are seldom reported. A very few cases actually captured media attention. Cases that have made international headlines in the past few years include the allegations of sexual harassment against the US-based head of sales at Infosys, Phaneesh Murthy, and more recently against the Canada-based CEO of Penguin International, David Davidar, both of whom were forced to resign.⁸ In both cases, the men in question were working abroad and in both cases, the women were white, leading to speculation that action might not have been as quick and as severe had the victim been Indian and the setting an Indian office. Both cases were settled out of court.

- Closer home, in 2005-06, an Indian Air Force pilot Anjali Gupta was court martialled and dismissed from service for misconduct after she accused three superiors of sexually harassing her. The sexual harassment charges were referred to a court of enquiry which said she failed to prove her case. A year later, three trainees were suspended when they levelled similar charges against an instructor.⁹
- But Shehnaz Mudbhalkar case is one of the oldest cases in which sexual harassment at the workplace, as an issue, captured the collective consciousness of working women back in 90's. This brave woman worked as an air hostess for Saudi Arabian airlines. Her services with Saudi Arabian airlines were terminated because she refused to surrender to the sexual demands made by her superior. She did not give in rather filed a suit which she fought for 11 years. In 1997, she was awarded full wages and continuity of services with effect from 1985.¹⁰

⁶ Anjali Kant, "Women and the Law", APH Publishing, New Delhi, 2008, pp. 181-182.

⁷ Till date there are just eight cases (both SC and all HC's) dealing with sexual harassment at workplace. Courtesy: Manupatra search.

⁸ <http://www.prajnya.in/gvr10.pdf>, last visited on: 10th October, 2011.

⁹ "Now, Anjali loses sexual harassment case", <http://www.indianexpress.com/oldStory/83677/>, last visited on: 10th October, 2011.

¹⁰ M/S. Saudi Arabian Airlines v. Mrs. Shehnaz Mudbhalkar & Another, (1999) 1 BOMLR 687; See also: <http://www.hindustantimes.com/news/specials/couch/cases.htm>, last visited on: 10th October, 2011.

- In another case of 1994, Doordarshan (Hyderabad) producer Sailaja Suman took director P L Chawla to court on charges of defamation, criminal intimidation and trying to outrage her modesty. She filed two separate cases in the metropolitan magistrate's court. She met with zero support from her colleagues. And rather unfortunately, Suman was transferred to Lucknow.¹¹
- Yet another case where grave injustice was done, where Nutan Sharma, a steno in the Union Ministry of Railways, was transferred, following her complaint that R P Sharma, secretary to the Chief Operating Manager, molested her.
- Even Alisha Chinai's suit against music composer Anu Malik, demanding Rs. 26,60,000 as damages for sexual harassment, met with a similar fate. And since he wasn't convicted, Malik in turn, filed a Rs. 2 crore defamation suit.
- A very well-known instance of a woman who faced sexual harassment at workplace taking the help of the law to teach the harasser a lesson is that of Rupan Deol Bajaj. She was slapped on the bottom by the then DGP of Punjab, K P S Gill. Accusing him of indecent behaviour, Bajaj fought an 8-year legal battle. The hard work paid off. Gill was convicted and sentenced to three months Rigorous Imprisonment.¹²
- A recent case which again has brought the debate on sexual harassment at workplace in focus is the death of the woman CEO of a tea company in Jaipur on 11th June, 2011. She committed suicide leaving behind a suicide note that on June 8th, 2011 the M.D. of her company G. K. Dalmia and his friend Sunil Jain raped her after having drugged her in the flat. She mentioned that the accused (G. K. Dalmia) wanted her to clear some company documents with financial irregularities which she refused. To teach her a lesson she was raped.¹³

A big question which was raised in media was that in this clear case of sexual harassment at workplace for women, if she had not committed suicide and then reported the matter to police or government authorities, would the police still have written a rape complaint and would the authenticity of a rape charge been believed? Just to make a working woman's voice heard in our society, if we need to commit suicide for no offence of ours then what

¹¹ Subhashree Panda, "Working Woes", <http://www.orissa.gov.in/e-magazine/Orissareview/2009/Feb-Mar/engpdf/20-23.pdf>, last visited on: 10th October, 2011.

¹² Mrs. Rupan Deol Bajaj & Anr v. Kanwar Pal Singh Gill & Anr, 1995 SCC (6) 194.

¹³ <http://www.sexualharassmentatworkplace.org/sexual-harassment-again-working-woman-executive-ends-her-life>, last visited on: 10th October, 2011.

no justice exists for them in India. Another question that comes up is such incidents have a very bad affect on a woman's self-respect and dignity. Is there any safety against the persecution that might lay ahead for her if she does not leave or is not in position of resigning her present job?

A look at the above instances tells us how the trend of these judicial decisions is not too favourable towards the victims of sexual harassment at workplace. Both the sides of coin are equally heavy and we have some positive judgements on one hand and some highly negative judgements.

4.5 Is the bill prohibiting sexual harassment at workplace a step in the right direction?

The salient features of the Prohibition of Sexual Harassment of Women at Workplace Bill, 2010 are:

- The Bill proposes a definition of sexual harassment as laid down in *Vishaka* and additionally recognises the promise or threat to a woman's employment prospects or creation of hostile work environment as 'sexual harassment' at workplace and expressly seeks to prohibit such acts.
- The section 2 clause 1 of the bill provides protection not only to women who are employed but also to any woman who enters the workplace as a client, customer, apprentice, and daily wage worker or in ad-hoc capacity. Students, research scholars in colleges/university and patients in hospitals have also been covered. Further, the Bill seeks to cover workplaces in the unorganised sectors.
- The Bill provides for an effective complaints and redressal mechanism.¹⁴
- Failure of the employers to comply with the provisions of the proposed Bill will attract a punishment of a fine which may extend to Rs. 50,000 under S. 27(1).
- Since there is a possibility that during the pendency of the enquiry the woman may be subject to threat and aggression, she has been given the option to seek interim relief in the

¹⁴ See: **Chapter II, III and IV of the proposed Bill.** Herein, every employer is required to constitute an Internal Complaints Committee. Since a large number of the establishments (41.2 million out of 41.83 million as per Economic Census, 2005) in our country have less than 10 workers for whom it may not be feasible to set up an Internal Complaints Committee (ICC), the Bill provides for setting up of Local Complaints Committee (LCC) to be constituted by the designated District Officer at the district or sub-district levels, depending upon the need. This twin mechanism would ensure that women in any workplace, irrespective of its size or nature, have access to a redressal mechanism. The LCCs will enquire into the complaints of sexual harassment and recommend action to the employer or District Officer.

form of transfer either of her own or the respondent or seek leave from work under S. 10(1)(c).

- The Complaint Committees are required to complete the enquiry within 90 days and a period of 60 days has been given to the employer/District Officer for implementation of the recommendations of the Committee under S. 9(3).
- Section 16 of the bill provides for safeguards in case of false or malicious complaint of sexual harassment. However, mere inability to substantiate the complaint or provide adequate proof would not make the complainant liable for punishment.

But the bill suffers from a few drawbacks which can obstruct its effective functioning:

- The provision which penalizes the complainant if the committee concludes that the allegation made is false or malicious creates the opportunity for employers to manipulate the committee and may also dissuade women from making complaints due to the fear that they will be penalized.
- There is also some doubt whether the Bill is applicable to minors in the workplace as the term 'aggrieved woman' is not defined such that it can be said with certainty whether this is applicable to child workers. Even domestic workers have been excluded from its purview.
- Although unorganized sector finds mention, the Bill seems to be still largely couched in terms of the organized sector establishments.
- The provision that deals with the confidentiality of the identity of the woman may actually work against her. This is because no provision has been included to inform the woman about the progress of the enquiry. It must be ensured that a copy of the of the complaint enquiry report and the recommendations of the committee are made available to the victim upon her request on completion of proceedings.

Though this bill is a laudable attempt at addressing the problem of sexual harassment at workplace, it remains to be seen that if the bill is passed, it would be able to tackle the issue at hand.

4.4 Perceptions of Sexual Harassment at Workplace

The topic of sexual harassment is generally met with discomfort, denial and fear of reprisals and some judgmental attitudes about women provoking the incident. And women often perceive

sexual harassment as normal behaviour, an occupational hazard, and even harmless.¹⁵ Most women tend to dismiss the sexual harassment incidents as normal and harmless. In fact it leads to a blame game and women interpret the behaviour as “normal” and do not react. They start interpreting their own feelings of shame, embarrassment or unease with the situation as deviations from the normal. Avoidance of the harasser or harassing situation is a widespread form of adaptation. The pressure on women, especially in male-dominated working environments, not to show feelings that would be perceived as weakness leads women to hide their feelings of offence and hurt. In addition, women identify with the aggressors and try to think and feel “like men”, and thus not be vulnerable to behaviour and remarks that devalue women. Especially verbal harassment is not even counted as sexual harassment.¹⁶

They do not even know what all would constitute harassment. There are so many fears which are impediments in the women’s raising their voice against the harassers. The fear of not being understood, the fear of the reaction of colleagues, feelings of helplessness, or feelings of dependency keep women from reacting on the spot and from confronting harassers. In addition, to be dependent on supervisors who are harassing them is an even greater problem if women have the impression that sexual harassment is tolerated within the organisation.¹⁷ Women just chose to turn a blind eye to this menace.

¹⁵ Paramita Chaudhuri, “Sexual Harassment in the Workplace”, Available at:

http://www.popcouncil.org/pdfs/wp/India_HPIF/001.pdf, last visited on 2nd October, 2011.

¹⁶ <http://www.un.org/womenwatch/osagi/pdf/shworkpl.pdf>, p. 86, last visited on: 1st October, 2011.

¹⁷ Ibid.

The experience of harassment can be overwhelming for the victim. People often react with shock, humiliation, and intense anger. Therefore, the victim of harassment may not always feel comfortable going through the normal channels for resolving such a problem. It is the brave few who gather the guts to come up and talk about this problem openly in front of rest of the world. But as seen from the research findings more often than not their courage is slammed and suppressed. There are women organisations working in this area but their contribution can be just to bring out women in the open and encourage them to narrate their experiences but the judicial lacuna remains still. We do not have a substantive law to deal with the problem and this will continue to affect the problem at hand.

The study aimed at exploring what is known about sexual harassment taking a multi-disciplinary approach and identifying, amongst other things, the workplace culture in which it occurs, the characteristics of those who suffer harassment and the harasser, and policy measures designed to prevent and deal with harassment by means of review of literature and also identified gaps in knowledge.

But research findings mainly dealt with finding out how the problem plays itself out in the real world and whether the ineffective legal safeguards have been effective enough. Clearly, the “law” has failed to redress the problem. A general review of literature showed that most women in India, especially when we look at the rural and semi-urban class or the lower uneducated strata, are not even aware of their rights available against this menace of sexual harassment in the workplace. Findings also suggest that attitudes to sexual harassment in the workplace mirror society’s norms about sexuality and masculinity more generally- that it is normal and harmless behaviour, that it is women who provoke this behaviour and that it is an occupational hazard for women in the workplace. It often gets dismissed for being harmless or is simply ignored.

The only way to solve this is to bring about a huge attitudinal change in the women in the country. When they have broken the shackles enough so as to be accepting work challenges they should garner courage to speak against these wrongdoings too.

To conclude, I see a variety of reasons responsible for the current endorsement of a culture of silence and denial which in effect renders the legal machinery ineffective. Most

women are not aware of the Supreme Court guidelines and complaints mechanisms/formal institutions of redress. The societal attitude that would blame them for provoking an incident or the loss of their reputation as a result of complaining is another thing which sounds a plausible reason which women might be afraid of. This is a harsh reality but most women who undergo the trauma of sexual harassment at workplace are in powerless positions and might fear job-related discrimination, including dismissal, and withholding of promotions and income. Also the fact that perpetrators are individuals who are in positions of authority further dampens their will to initiate action against them, which is bound to fail.

The Supreme Court guidelines in *Vishaka* might have opened up the discourse on sexual harassment at the workplace, but it is clear that much remains to be done to address gender stereotyping and harassment in the working environment and to ensure that women have recourse to effective resolution of complaints. There needs to be awareness of the inappropriateness of sexual harassment and the rights of women workers is created and worked into the conduct rules for employees at all levels, irrespective of their positions. The prohibition of SHW bill needs to be pushed further with the rectifications of the flaws pointed in the previous chapter. I believe that the need of the hour is a broader canvassing of the issue, for people to be aware of the Guidelines and the Bill, and for employers to draft policies and create systems to check sexual harassment at work. There seems to be a consensus among the drafters on the following points: greater need of decentralization of punitive power; more and easily accessible complaints committees; arming the committee with more teeth; instituting a time-bound and clearly defined punitive process; and rendering the employer liable for inaction.¹⁸

Non Governmental Organisations and women organisation are doing their share, but in order to make sure that the message reaches a larger audience we need to have every organisation taking up these cudgels. Confidence building is another area which needs to be worked upon so that coming out of the cocoon and filing a complaint is an easier process for the women. All in all, what may be concluded is that Law and sociology have a rather complex relation and legal developments precede sociological and attitudinal changes. Hence a fair mix of both sociological changes and legal advancement is required to solve the problem of sexual harassment at workplace.

¹⁸ http://articles.timesofindia.indiatimes.com/2011-08-26/mumbai/29930749_1_workplace-bill-women-against-sexual-harassment-complaints-committees, last visited on: 10th October, 2011.

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