

Sexual Harassment at Workplace – A Cross Jurisdictional Analysis

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Abstract

Sexual Harassment at the work place is commonly understood as demanding sexual favours in exchange for employment benefits. Employers, supervisors, colleagues and often non-employees such as customers or clients are the parties that are responsible for such harassment. Empirical data suggests that such harassment is global phenomenon that is faced overwhelmingly by women. While there are obvious costs of such harassment that these women face, research shows that, as a result of harassment companies also lose money as a result of a high staff turnover, low productivity, and absenteeism, all of which are direct consequences of sexual harassment. Most countries have regulations that create a mechanism to govern inappropriate behavior at workplaces, these regulations may be found in labour laws, equal opportunity regulations, law of torts, criminal law or special legislations are created specifically for this purpose. The focus of this paper is on the manner in which sexual harassment is regulated across jurisdictions. The key question when looking across jurisdictions was to examine the manner in which labour laws of the country regulate sexual harassment. Further, through the course of this paper, I have examined the costs of and consequences that arise out of sexual harassment to both the victims as well as the employers.

Keywords: Sexual Harassment; Women; Japan, India, USA

I. INTRODUCTION

Harassment is an issue that is faced by countries across the world,¹ sexual harassment at the workplace is argued to violate a woman's right to life and liberty as well as the

¹ R. Husbands, *Sexual Harrasment Law in Employment: An International Perspective*, International Labour Rev. (1992) 131 (6) 535.

right to equality that are guaranteed by the Constitution in India.² Recent studies indicate that with an increasing number of women becoming a part of the working population, there has been a positive correlation with the number of sexual harassment cases being reported at workplaces.³ While most countries have policies in place to combat sexual harassment in a work environment, there exist very few nations that have provided for a special law for such cases.⁴ In fact, in several countries including India, the judiciary has taken an active role in defining sexual harassment and creating guidelines for the same, in order to fill the lacuna that remain unaddressed by legislators.⁵ The Supreme Court of India in *Vishaka v. State of Rajasthan* ('Vishaka case') extensively examined Part III of the Indian Constitution as well as international treaties ratified by the Government of India to provide a formal definition for sexual harassment. The Court borrowed heavily from the definition provided by the Convention on the Elimination of all Forms of Discrimination Against Women ('CEDAW'),⁶ and defined harassment as "*unwelcome sexually determined behaviour (whether directly or by implication) as physical contact and advances, a demand or request for sexual favours, sexually-coloured remarks, showing pornography or any other unwelcome physical, verbal or non-verbal conduct of sexual nature.*"⁷ The framework laid down, in this case, was popularly known as the Vishaka Guidelines and form an integral part of harassment at workplace jurisprudence in India as it exists today. These guidelines will be discussed in greater detail in Part III while analyzing the current position of law on sexual harassment across jurisdictions.

In this paper, Part II highlights the costs and consequences of sexual harassment at workplace. After discussing the impact associated with sexual harassment at a workplace, in Part III, I examine whether the labour laws in different jurisdictions deal with harassment. This part also discusses the different types of regulations, resultant mechanisms, and existing remedies that are available in these jurisdictions to combat sexual harassment. Finally, Part IV discusses the benefits of workplace mediation especially for cases of sexual harassment.

II. COSTS AND CONSEQUENCES OF SEXUAL HARASSMENT AT WORKPLACE

Data from countries across the world indicates that sexual harassment at workplaces is not limited to cities but is all pervasive in the manner in which that it affects small as well as medium and large scale businesses in rural areas as well.⁸ Reported cases of

² *Vishaka v State of Rajasthan* (1997) 6 SCC 241, See also, M. Kishwar, *OFF THE BEATEN TRACK: RETHINKING GENDER JUSTICE FOR INDIAN WOMEN*, (OUP 2002).

³ *The Economic Times*, Sexual harassment Cases Rise by 26% in Nifty 50 Companies, available at http://economictimes.indiatimes.com/articleshow/54573926.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst (last viewed on August 18, 2018).

⁴ *Supra* note 1.

⁵ E. Maji, *Women's Rights at the Workplace- a Comparative Analysis*, *The World Journal on Juristic Polity* (February 2017).

⁶ *Vishaka v State of Rajasthan* (1997) 6 SCC 241 ¶ 10.

⁷ *Id* ¶ 9.

⁸ Government of Australia, Sexual Harassment Report available at https://www.humanrights.gov.au/sites/default/files/.../sex.../fact_costemployers.doc (last seen on October 18, 2018).

harassment at the work place has been found to have a deep and pervasive impact on the personal lives and well-being of employees.⁹ This negative impact is not limited solely to the personal sphere of the employee's life but also extends to their behavior at the workplace.¹⁰ A study in the European Union ('EU') found that more than fifty percent of harassed workers reported that their personal well-being had suffered as a result of the sexual harassment they had experienced at work.¹¹ Further, reports of sleep irregularities, stress reactions, and depression are not uncommon among victims of such crimes. Moreover, the survey indicates that more than one-third of the victims of harassment also describe a negative impact that harassment has had on their productivity at the workplace, this impact includes situations such as reduced performance on tasks, lower motivation to carry on, resignation etc.¹²

There exist several hidden costs of sexual harassment that are not limited to the victim. For instance, the cost in terms of disturbance to the work environment brings with it a whole host of problems such as absenteeism and high turnover rates in employees. Therefore employers spend more money hiring and training new employees. Further, in several countries, employers are held legally responsible for claims of sexual harassment against their employees.¹³ Therefore, in case employers are held responsible, the more direct cost are the litigation charges along with any compensation that may be payable to the victim. Compensation is often payable as a result of conciliation between the employer and the victim. However, on several occasions, employers pay compensation to the complainant to prevent any further action from taking place. In Australia, almost all cases that were resolved at the Human Rights and Equal Opportunity Commission resulted in the employer compensating the victim, along with or instead of the perpetrator. The compensation varied from a minimum amount of \$500 to the tune of \$200,000.¹⁴ Thus, to meet the potential liability of any legal action, employers must take reasonable steps to prevent any harassment from taking place at their workplace. As a result, sexual harassment has several consequences that are not only limited to the victim but also extend to the employer, the organization and industry at large.¹⁵

III. CROSS JURISDICTIONAL ANALYSIS OF WORKPLACE SEXUAL HARASSMENT LEGISLATIONS

In this part, we shall take a look at the position of law with respect to sexual harassment in India, Japan and the United States of America. The reason these three countries have been chosen is to contrast the equal opportunities legislation the latter two countries

⁹ European Commission Directorate-General for Employment, Industrial Relations and Social Affairs, *Sexual harassment in the workplace in the European Union* (1998) 29.

¹⁰ *Id.*

¹¹ *Id.* at 32.

¹² *Id.*

¹³ *Supra* note 9.

¹⁴ Government of Australia, Sexual Harassment Report available at https://www.humanrights.gov.au/sites/default/files/.../sex.../fact_costemployers.doc (last seen on October 22, 2018, 2017).

¹⁵ *Supra* note 5.

possess with the special sexual harassment legislations that India has passed. In India labour laws are almost entirely silent on harassment at a workplace, instead sexual harassment at the workplace is covered under a special legislation. In Japan and the United States, sexual harassment at the workplace is covered almost exclusively by labour laws.

A. INDIA

Sexual harassment in India is covered solely by three legislation. First, Industrial Employment (Standing Orders) Act, 1946 ('Standing Orders Act'), second, the Indian Penal Code ('IPC') and third by the Sexual Harassment at Workplace (Prevention, Prohibition and Redressal) Act, 2013 ('Sexual Harassment at Workplace Act').

While the Standing Orders Act does not exhaustively cover harassment at the workplace, it is the only labour law statute that deals with harassment at work places.¹⁶ As per the Standing Orders Act, an employer is required to lay down standing orders that all employees are required to follow, such orders include working hours, wage rates, shift timings etc. In case the employer does not prescribe these, the Industrial Employment (Standing Orders) Central Rules, 1996 ('Rules') lay down conditions. These Rules define sexual harassment in line with the Vishaka case and even delve into setting up a complaints commission.¹⁷ The Rules only protect women against sexual harassment and are silent with respect to the procedure in case there is a male victim.¹⁸ The Sexual Harassment at Workplace Act was passed by the Indian Parliament in late 2012 and was made enforceable from 2013. The preamble of the Sexual Harassment at Workplace Act states that the purpose behind this legislation is to protect women in their workplace.¹⁹ The Act aims to serve as a protection to women in the organized as well as unorganized sector trying to eradicate the harassment faced by women in public and private spheres of the work environment. By ensuring the safety of women the legislation's main focus is to achieve gender parity in the Indian workforce.²⁰ The Sexual Harassment at Workplace Act envisions inappropriate behavior as a civil wrong and not a criminal offense, this is evidenced from the fact that the remedies available include disciplinary action and compensation. While §354, §376 and § 509 of the IPC incorporate crimes of sexual harassment, it is unable to capture all situations that may arise in a working environment, especially those that are a result of institutional hierarchies.²¹

Sexual Harassment at Workplace Act lays down a framework for the creation of an Internal Complaints Committee ('ICC'), a complaint is filed by the victim before the

¹⁶ Nitesh Desai Associates, Sexual Harassment at Workplace, available at http://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research%20Papers/Prevention_of_Sexual_Harassment_at_Workplace.pdf (last seen on September 1, 2018).

¹⁷ Industrial Employment (Standing Orders) Central Rules, 1996

¹⁸ *Supra* note 16.

¹⁹ Government of India, 'Protection of Women against Sexual Harassment at Workplace Bill, 2010' (Press Information Bureau, 12 March 2012) <<http://pib.nic.in/newsite/erelease.aspx?relid=6678>> (last seen on September 1, 2018).

²⁰ *Id*

²¹ *Supra* note 5

ICC, while the ICC only has the power to initiate disciplinary proceedings,²² and criminal prosecution may be initiated if the victim expresses her desire for such prosecution.²³ The problem that arises as a result of this option is that on several occasions, the victim is not aware of the law itself, therefore even though she may not be satisfied with the disciplinary action, she will not approach the courts.²⁴ Further, the Sexual Harassment at Workplace Act protects only women and leaves the men vulnerable to harassment.²⁵

B. JAPAN

In 2016, the Japanese Government through the Health, Labour and Welfare Ministry took a survey of close to 9600 working women.²⁶ The report released by the government indicates that sexual harassment is a huge problem faced by Japanese women, more than 30% women have been harassed at work with close to 35% of all permanent employees complained of being harassed at some point in their career.²⁷

The law regulating harassment at work place is the *kintō hō* known as the Japanese Equal Employment Opportunity Law which was amended in 1999 to place an obligation on the employer to prevent harassment against women at the workplace.²⁸ This legislation was further revised by the Diet,²⁹ in 2007 to include male workers within the purview of the definition of victims for the purpose of this law. Subsequently, in 2014 *kintō hō* along with the enforcement rules were revised again to incorporate instances of same-sex sexual harassment.³⁰ From a labour law point of view, it is interesting to note that the Equal Employment Opportunity Law holds the employer directly responsible for all actions of the sexual harasser if the harasser is an employee, i.e. in situations when an employee is guilty of inappropriate behavior, the law holds the employer responsible for permitting such behavior to occur in the first place, without directly pinning any responsibility on the perpetrator. Thereby incentivizing the employer to prevent harassment and punish workers who are guilty of such behavior.³¹ An important ruling that indicates that the Japanese judiciary is taking a hardline stance on harassment was delivered in 2015 by the Japanese Supreme Court in the Osaka Aquarium case. In the instant case, the Osaka Aquarium is a government-owned corporation with a majority of its employees being female. Two middle managers were suspended by the employer for cracking lewd jokes directed at a young

²² *Id.*

²³ The Sexual Harassment at Workplace (Prevention, Prohibition and Redressal) Act 2013, §19.

²⁴ KK Geetha, “Bill on Sexual Harassment: Against Women’s Rights” (2012) XLVII (3) ECON. AND POL. WEEKLY 18.

²⁵ The Sexual Harassment at Workplace (Prevention, Prohibition and Redressal) Act 2013, §4.

²⁶ *The Guardian*, Nearly a third of Japan’s women ‘sexually harassed at work’ available at <https://www.theguardian.com/world/2016/mar/02/japan-women-sexually-harassed-at-work-report-finds> (last seen on September 1, 2018).

²⁷ *Id.*

²⁸ *Japan Times*, Japan Sees Progress on Sexual Harassment Legislations, available at <https://www.japantimes.co.jp/community/2015/03/25/issues/japan-sees-progress-sexual-harassment-still-dont-get/#.WakGvvkjG1s> (last seen on September 1, 2018).

²⁹ Japanese Parliament

³⁰ *Supra* note 28

³¹ *Id.*

female temporary employee.³² The Supreme Court upheld the punishment of suspension and demotion and for the first time recognized a purely verbal form of sexual harassment as a punishable crime.³³

C. UNITED STATES OF AMERICA

Instances of sexual harassment in the United States are covered under Title VII of the Civil Rights Act, 1964- which provides legal protection against all forms of discrimination, including on the basis of race, sex and colour. The nodal agency responsible for enforcing the Civil Rights Act of 1964 was the Equal Employment Opportunity Commission (EEOC) in 1965.³⁴ Until 1991, the only remedy available was ‘injunctive relief’, in the form of a stricture against the workplace directing them to take efforts to stop discrimination, or ordering the payment of back-wages as some form of compensatory relief for being denied promotion or being dismissed unjustly.³⁵ The modern Civil Rights Act was signed into law by President George H.W. Bush in November 1991 and brought in its wake certain key changes- for the first time, concrete compensation mechanisms were provided for, which included damages for mental and physical harassment that results from discrimination in the workplace.³⁶

United States federal courts, however, were traditionally reluctant to consider discrimination in the workplace as a form of sexual harassment, and to thus enforce the anti-discrimination provisions of the Civil Rights Act, 1964.³⁷ A notable exception is *Barnes v. Costle*³⁸ in 1977, where it was held that solicitations and sexually coloured remarks along with threats of dismissal fell within the definition of discrimination. The Equal Employment Opportunity Commission (EEOC) came up with “Guidelines on Discrimination Because of Sex” in 1980, which recognized sexual harassment as discrimination under Title VII of the Civil Rights Act. These guidelines laid down certain ‘red lines’ as to what constituted discriminatory behavior in the workplace.³⁹ These guidelines categorized sexual harassment into (1) *Quid pro quo* harassment⁴⁰ and (2) Hostile environment harassment.⁴¹ The former is harassment which involves denial of sexual favours leading to unfair dismissal from work, unpaid wages and blocked promotion, while the latter involves inappropriate physical or sexual gestures, including demand for sexual favours and other kinds of sexual conducts that severely affects the

³² *The National Law Review*, Japanese Court Upholds Penalties for Sexual Harassment, available at <https://www.natlawreview.com/article/japanese-court-upholds-penalties-sexual-harassment> (last seen on September 1, 2018).

³³ *Id.*

³⁴ B. Mengert, “Employer Liability for Sexual Harassment under Title VII”, available at http://readingroom.law.gsu.edu/cgi/viewcontent.cgi?article=1072&context=lib_student (last seen on September 1, 2018).

³⁵ L. Feld, “Along the Spectrum of Women's Rights Advocacy: A Cross-Cultural Comparison of Sexual Harassment Law in the United States and India” 25 (5) (2002) *Fordham Intl. L. Journal* 1205.

³⁶ *Id.*

³⁷ *Id.*

³⁸ 561 F2d 983 [DC Cir 1977].

³⁹ *Supra* note 35.

⁴⁰ The US Equal Employment Opportunity Commission, “Policy Guidance on Current Issues of Sexual Harassment” available at <https://www.eeoc.gov/policy/docs/currentissues.html> (last seen on October 1, 2018).

⁴¹ J.M Slauter, “Sexual harassment in the Workplace: Examining Title VII and the Elliot-Larsen Civil Rights Act” *Women's Legal Forum and Gender Rev.* (2003) 1 14.

employee's working ability. In *Vinson v. Meritor Bank*, hostile environment harassment was identified and recognized as a category of workplace discrimination under the Civil Rights Act of 1964.⁴²

IV. CONCLUSION

Through the course of this paper, I have tried to highlight the need to combat sexual harassment in countries across the world. Not only does sexual harassment serve as a cost to the employer in terms of all the costs highlighted in Part II, but it also violates an individual's right to life and liberty. It is the State's duty to protect such rights of citizens and therefore it must endeavor to employ the best method available to do so. While there does exist legal backing in India to prohibit and punish inappropriate behavior with the IPC and the Criminal Amendment Act 2013, without concurring amendments to the existing labour laws –as in Japan and USA- we cannot create a robust framework to fight this systemic evil.

⁴² 477 U.S. 57 (1986).

