

Protection from Sexual Harassment at Workplace: A Comparative Legal Analysis of Indo-Lanka Legal System

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ABSTRACT: Sexual harassment at workplace is a form of illegal discrimination which directly affects a person's rights and dignity. In other words, sexual torment causes physical, emotional and sexual violations of one's rights. The prevailing patriarchal society has produced a large number of victims of women but that does not permit to label women as the sole victims of sexual harassment at workplace. This paper will critically evaluate the existing legal frameworks against sexual harassment at workplace from India and Sri Lanka. Eventhough the focus is on researching the Sri Lankan scenario; Indian context has also been studied and compared as it has progressive legal development in the South Asian region. The author has limited this research to the analysis of International Conventions and national laws from India and Sri Lanka. This research attempts to highlight that Sri Lanka has no direct legislation to combat sexual harassment at the workplace. And the legal remedy which India has against sexual harassment is restricted to women only. Legal mechanism against sexual harassment at workplace should not lead to any gender discrimination vis-à-vis men. Hence, both India and Sri Lanka should work towards gender-neutral law on sexual harassment at workplace with special consideration for women in to build a safe work environment.

Key Words: India, Gender neutral law, Sexual Harassment at workplace, Sri Lanka

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I. INTRODUCTION

In this world a lot of people are engaged in diverse economic activities. Not only men but also women are working toward empowering their economy and maintenance of their own sustainability. Greater participation of women in employment indicates level of economic development of a country. Internationally as well as nationally the legal enactments are trying to protect the gender equality and the protection of women. Yet, the sexual harassment at work place has become a significant threat to the working women. Sexual harassment is a kind of gender discrimination. Even though majority of the victims are women, men are also subjected to sexual harassment. Therefore, discussion on sexual harassment at workplace should not restrict to women only. Sexual harassment at work place is not only men towards women but also men towards men, women towards men and women towards women. However, sexual harassment of women by men is widespread. Be it illiterate work force or educated work force, organized or unorganized sector, the large number of women face sexual harassment therein. This causes less productivity, attendance and morale of staff. Eventually it affects the economy of country adversely. This article focuses not only on breaking the silence on sexual harassment but also on taking pro-active steps in addressing it.

The objectives of this research are:

1. To examine the legal commitment against sexual harassment at work place under International treaties.
2. To see whether the existing legal frameworks in India and Sri Lanka are adequate to address the Sexual harassment at workplace.
3. To recommend a gender neutral legislative framework on prevention on sexual harassment at workplace to India and Sri Lanka.

II. METHODOLOGY

This paper is an attempt to reaffirm the inadequacy of the law on sexual harassment and the fact that it has nothing to offer for the protection of men. This study is a normative research and analyzes the effectiveness of the international treaties, Indian legislations and Sri Lankan laws on this subject.

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The structure of this article is as follows; Part II is to understand what concept of Sexual Harassment at Work Place is; Part III discusses how protection from sexual harassment at work place has been recognized under various international treaties. Lastly, Sexual harassment at work place in India and Sri Lanka has been discussed in Part IV and V respectively. This examination would lead to a realization that the laws available against sexual harassment at workplace in India have no room for men and Sri Lanka has no specific legislation against sexual harassment.

III. CONCEPT OF SEXUAL HARASSMENT AT WORKPLACE

The term sexual harassment was not coined until 1970s² but today it is a topic of many academic literatures. But they mostly reflect the feminist perspective. And very few have written on legal perspective.

Sexual harassment is an unwelcome act of a sexual nature, using assault, criminal force, or words or actions, which causes annoyance or pain of mind to the person being harassed.³ Although to the recipient the act is unwelcome, humiliating, disgusting, revolting and repulsive, the perpetrator may view it as complimentary, harmless, funny, 'normal' and even flattering. It is nevertheless sexual harassment if the act is unwelcome.⁴ Sexual harassment can occur in private or public life, between family and friends or at the workplace, public places and transportation. Both men and women can be perpetrators.⁵

Unwelcome physical contact and advances, words or comments of a sexual nature that makes the person hearing it uncomfortable, dirty jokes and obscene gestures, showing pornographic material, demanding or requesting sexual favors, circulation of abusive personal and or obscene emails and visuals and any other unwelcome physical, verbal or non - verbal conduct of sexual nature can constitute sexual Harassment at the workplace.⁶ The harasser can be the victim-survivor's supervisor, an agent of the employer, a supervisor in another area, a co-worker, or a non-employee. Sexual harassment may take place without economic loss or dismissal of the victim-survivor from employment.⁷

IV. 'SEXUAL HARASSMENT AT WORKPLACE' UNDER INTERNATIONAL LEGAL FRAMEWORKS.

Gender equality includes protection from sexual harassment and the right to work with dignity, which is a universally recognized basic human right. The common minimum requirement of this right has received global acceptance. The International Conventions and norms are, therefore, of great significance in the formulation of the guidelines to achieve this purpose.

'All human beings are born free and equal in dignity and rights'⁸ and deserve the right to work with dignity is a fundamental human right.⁹ Also, the Convention for the Elimination of All Forms of Discrimination against Women (CEDAW) prohibits discrimination in employment and also guarantees the right to protection of health and safety in working conditions. In defining violence against women, the Declaration explicitly includes "sexual harassment and intimidation at work, in educational institutions or elsewhere." The Right to Gender Equality has been universally recognized as a human right in various UN Conventions such as, Convention on the Elimination of All Forms of Discrimination (CEDAW) in 1981, International Labour Organization (ILO) Convention No 111. But highest authority for International Labour, ILO has not yet incorporated prohibition of Sexual Harassment.

About sexual harassment at work place, the International Labour Organization (ILO) Conventions and recommendations of the ILO Committee of Experts on the Application of Conventions and Resolutions (CEACR) have addressed it as a form of discrimination in the workplace. Sexually harassing conduct may also be deemed a violation of the right to safe and healthy working conditions guaranteed under ILO

²Catherine A Mackinnon, 'Sexual harassment of working women', *Yale University Press, New Haven and London*, 1979.

³UN General Recommendation 19 to the Convention on the Elimination of all forms of Discrimination against women.

⁴ The American Association of University Women, <http://www.aauw.org/who-we-are/> , Accessed on 28th May 2017

⁵ Kathryn Abrams, 'The new jurisprudence of sexual harassment' , <http://www.lawschool.cornell.edu/research/cornell-law-review/upload/Abrams-final.pdf> , Accessed on 6th June 2017

⁶Act Now, <http://www.actnowsrilanka.org/en/vaw/sexual-harassment> , Accessed on 7th March 2017

⁷U.S Equal Employment Opportunity Commission, www.eeoc.gov , Accessed on 17th May 2017

⁸ Universal Declaration of Human Rights 1948, Article 1

⁹Universal Declaration of Human Rights, 1948, Article 23 (1)

Conventions.¹⁰ Sexual Harassment at work place is, any unwanted and unwelcome conduct of a sexual nature creates sexual harassment, when submission to or rejection explicitly or implicitly affects the individual's employment; when it unreasonably interferes with an individual's employment; and when it creates an intimidating, hostile or offensive work environment'.¹¹ Sexual Harassment at workplace can be classified in to two main types. They are quid pro quo harassment and hostile work environment harassment. Quid pro quo means this for that or something for something and hostile work environment harassment takes place when harassment makes a workplace intolerable for an employee because of the constant sexual conducts.¹²

In the CEDAW¹³, State Parties have to take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights in particular (a) The right to work as an inalienable right of all human beings, (f) The right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction. Also state Parties undertake to adopt all necessary measures at the national level aimed at achieving the full realization of the rights recognized in the present Convention.¹⁴

The general recommendations of CEDAW in this context in respect of Article 11 are: Violence and Equality in employment, Equality in employment can be seriously impaired when women are subjected to gender specific violence, such as sexual harassment in the work place. Sexual harassment includes such as unwelcome sexually determined behavior as physical contact and advances, sexually coloured remarks, showing pornography and sexual demands, 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 recruiting or promotion, or when it creates a hostile working environment.¹⁵ Effective complaints procedures and remedies, including compensation, should be provided.¹⁶ States should include in their reports information about sexual harassment, and on measures to protect women from sexual harassment and other forms of violence of coercion in the work place.¹⁷

The 2030 Agenda for Sustainable Development is an alert to address existing gender inequalities at work including sexual harassment at workplace. Even though marginal improvements have been achieved in the past¹⁸, major gaps to be covered in the implementation of this agenda. Sustainable development goals 5 and 8 ensure gender equality and decent work and economic growth respectively.

V. LEGAL DEVELOPMENTS ON SEXUAL HARASSMENT AT WORKPLACE IN INDIA

As per Indian Census 2011, the workforce participation rate of females is 25.51% as against 53.26% for males. Rural sector has a better female workforce participation rate of 30.02% compared with 53.03% for males. Whereas in Urban sector, it is lower at 14.7% for females and 54.6% for males. We can see that workforce participation is more or less equal for rural and urban males, while there is a large gap in rural and urban females' workforce participation.¹⁹ Constitution of India guarantees the gender equality.²⁰ Unfortunately, since the majority of women work in unorganized sector they are not able to seek relief which Constitution provides. Earlier, in India, there was no separate legislation on Sexual harassment at work place. Supreme Court in the landmark case of Vishaka and Others Vs State of Rajasthan²¹ delivered guidelines that the duty of

¹⁰For more information please visit the ILO website at

http://stopvaw.org/International_Labor_Organization2.html, Accessed on 29th April 2017

¹¹Equal Employment Opportunity Commission (1990)

¹²Recognizing and responding to sexual harassment in the workplace : Information for employees', Human Rights Commission of Australia, <http://www.humanrights.gov.au>, Accessed on 7th June 2017

¹³Article 11 of the Convention

¹⁴Article 24 of the Convention

¹⁵Article 18 of Convention

¹⁶Article 24 (i) of Convention

¹⁷24(j) of the Convention

¹⁸4th World Conference on women in Beijing, 1995

¹⁹ Participation in Economy Ministry of Statics and programmes implementation of India, Page 1,2 in Chapter 4 http://www.mospi.gov.in/sites/default/files/reports_and_publication/statistical_publication/social_statistics/Chapter_4.pdf, Accessed on 14th May 2017

²⁰ Article 14,15 and 16 of Indian Constitution

²¹Vishaka and Others Vs State of Rajasthan (1997) 6 SCC 241, AIR 1997 SC 3011. Definition of Sexual harassment includes such unwelcome sexually determined behavior (whether directly or by implication) as: physical contact and advances, a demand or request for sexual favours, sexually coloured remarks, showing pornography and any other unwelcome physical, verbal or non-verbal conduct of sexual nature.

the employer shall be to prevent the acts of sexual harassment and to provide for resolution, settlement or prosecution of acts of sexual harassment by taking all steps required taking appropriate disciplinary action. This case later led to passing of The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013. This act requires creating an environment which is free from sexual harassment and provides a complaint procedure for women who have suffered sexual harassment at the work place. The Act and complaint process under this Act ensure that this is a long awaited development of India regarding protection against sexual harassment at work place. Supreme Court of India in *Apparel Export Promotion Council v. A. K. Chopra*²² upheld removal of an employee, in departmental proceeding, for sexual harassment of a fellow employee. This case relied on earlier *Vishaka Case* to say that sexual harassment at work place causes violation of fundamental right to gender equalities and right to life and personal liberty.

It is to be noted that there is no law to protect males from the acts of sexual harassment and rape except Indian Penal Code 1860.²³ Except this section, all other laws and sections are meant only for females. The 2013 Sexual Harassment Act in this regard also exclusively deals with women and therefore leaves out men.

VI. STATUTORY PROVISIONS FOR SEXUAL HARASSMENT AT WORK PLACE IN SRI LANKA

The 2016 national census of Sri Lanka estimated that 75.1 percent men and 35.9 percent constitute the workforce in Sri Lanka.²⁴ About 63.8 percent of economically active populations are males and 36.2 percent is of females. Participation of women at work place in Sri Lanka can be seen, as women at domestic work, women as migrant workers, women working at free trade zone, as labourers at plantation sector and state sponsored programmes for women in non-traditional employment.

Right to equality²⁵ and freedom to engage in any lawful occupation, profession, trade, business or enterprise²⁶ are guaranteed under the Constitution. Therefore act of sexual harassment is a form of violation of above mentioned rights. Under these grounds a victim of sexual harassment can file fundamental rights case if the harasser is an executive or administrative officer.²⁷ Further, at times of sexual harassment leading physical injury and mental trauma, the victim can seek relief under Article 11 of Constitution. Besides, a victim can also go to Human Rights Commission in need as Sri Lanka is a state party to the first Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR).

The Women's Charter of Sri Lanka²⁸ states that women should have equal opportunities in the sphere of employment and wages along with men. It also reiterates women's right to work. In Sri Lanka national level legislation on Sexual harassment Penal Code is the main piece of legal work²⁹. According to Penal Code Sexual harassment has been defined as 'unwelcome sexual advances by words or action used by a person in authority, in a working place or any other place'.³⁰

Before that, cases on sexual harassment were addressed in courts under the Bribery Act.³¹ According to

²² AIR 1999 SC 625

²³ It outlaws sexual activities "against the order of nature" and implicitly covers sexual intercourse against men such as sodomy.

²⁴ Department of Labor, Annual employment survey of Sri Lanka Labor Department.

http://www.statistics.gov.lk/samplesurvey/LFS_Annual%20Bulletin_2016.pdf , Accessed on 23rd June 2017

²⁵ Article 12 (2) of the Constitution

²⁶ Article 14 I G

²⁷ Article 17 and 126 of Constitution

²⁸ 1993

²⁹ (Amendment) Act No 22 of 1995

³⁰ Penal Code of Sri Lanka, Sec 345, explanation 1 - sexual harassment as follows, Whoever, by assault or use of criminal force, sexually harasses another person, or by the use of words or actions, causes sexual annoyance or harassment to such other person commits the offence of sexual harassment and shall on conviction be punished with imprisonment of either description for a term which may extend to five years or with fine or with both and may also be ordered to pay compensation of an amount determined by court to the person in respect of whom the offence was committed for the injuries caused to such person. Unwelcome sexual advances by words or action used by a person in authority, to a working place or any other place, shall constitute the offence of sexual harassment. For the purposes of this section an assault it may include any act that does not amount to rape under section, 363."

³¹ No 11 of 1954, Section 19(c)

the Bribery Act, it is illegal for public servants to take bribes, sexual favors can be illegal sort of bribery.

Besides, Industrial Dispute Act of 1950 also takes action on sexual harassment though it does not directly deal with this issue. Under this, an employee can appeal to labour tribunals in case of unjustifiable termination of services arising out of sexual harassment cases. And also particular employee can make a complaint to the Labour Commissioner to settle the matter. It was evident that the legislative enactments to the sexual harassment at work place have been subject to other legal restrictions and there is no special legal framework on this.

In Sri Lanka, even though there are nearly 35 legislations on labour matters, we have no specific legislation on sexual harassment at workplace. Sexual harassment is an offence under Penal Code of Sri Lanka.³² In addition to this Anti Ragging Legislation³³ also declares sexual harassment at educational institutions as an offence. Further Prevention of Domestic Violence Act³⁴ also recognizes abuse against women. For instance, under the prohibition of Ragging and other forms of violence in Educational Institutions Act 20 of 1998, if a person commits sexual harassment while ragging any student or a member of the staff of an educational institution he or she will be given a minimum punishment of 10 years and may also be ordered to pay compensation of an amount determined by court. But unfortunately there is no single piece of legislation on protection in sexual harassment at workplace in Sri Lanka. Sexual gratification at work place is punishable under the Bribery Act of 1980. In *Republic of Sri Lanka v. Abdul Rashak Kuthubdeen*,³⁵ the demand for sexual favours in consideration of job promotion was interpreted as a 'bribe'. The harasser can be the victim-survivor's supervisor, an agent of the employer, a supervisor in another area, a co-worker, or a non-employee. Sexual harassment may take place without economic damage to or dismissal of the victim-survivor from employment.

The dispute resolution mechanism enshrined in the Collective Agreements, can be used in incidents involving sexual harassment. For instance, both Section 18 on Disciplinary Inquiries contained in the Staff Collective Agreement of 1997 (applicable to all clerical staff) and Section 18 on Disciplinary Action in the Labour Collective Agreement of 1998 (applicable to all estate workers), could be interpreted to provide space to address sexual harassment.

VII. DISCUSSION

Regarding the treaty obligations of India under International Law³⁶, in *Vishaka* case Indian judiciary by referring the judgments of *Ethnic Affairs V Teoh*³⁷ and *Nilabati Behera V State of Orissa*³⁸ decided to fulfill the treaty obligations of fulfilling women rights provisions under CEDAW. Judiciary plays role in interpreting international instruments and legislative enactments. Thus it makes provisions alive.

As a state Sri Lanka has ratified Discrimination (Employment and Occupation) Convention of 1958 (No 111) and the Convention on Elimination of all forms of Discrimination against women (CEDAW) 1979. Under these, Sri Lanka is bound to eliminate all forms of discrimination³⁹ and take steps to combat sexual violence in the workplace to protect the right to free choice of employment, promotion, social and job security and all benefits and conditions of service and the right to receive vocational training and retraining⁴⁰ in this regard. Even though Sri Lanka has ratified conventions related to equality and protection of women and the provisions of Constitution talk about international relations and treaty obligation⁴¹, it has failed to fulfill its obligations in special case laws⁴² due to the dualism policy⁴³. Also, Sri Lanka needs judicial interpretation for the specific incorporation.

Increasing number of Sri Lankan women are going out to work outside home and problems such as sexual harassment in the work place discourage women to continue working. Problems are not brought out in the open because the subject is taboo and there is no mechanism to address the problem in the workplace and also there is no specific law on sexual harassment. Sri Lanka should enact legislation making mandatory for all employers to respond and monitor incidents of violence and harassment at work. It is important that stake

³²Section 345 (1995 Amendment)

³³1998

³⁴Domestic Violence Act, No 34 of 2005

³⁵*Republic of Sri Lanka Vs Abdul Rashak Kuthubdeen / B 839/93*

³⁶Articles 51, 253 and entry 14 in list one of seventh schedule of Constitution of India

³⁷*Minister of State for Immigration and Ethnic Affairs V Teoh* (1995) 128 ALR 353; 69 ALJR 423; 183 CLR 273; Below (p 33)

³⁸*Nilabati Behera V State of Orissa* (1993) 2 SCC 746; (1993) 2 SCR 581; (1993) AJR SC 1960

³⁹Article 2 of CEDAW

⁴⁰Article 11 (1)(c) (e) and (f) of CEDAW

⁴¹Articles 154 and 157 of Constitution of Sri Lanka

⁴²*Nallarathnam Singarasa vs. Attorney General, S.C. SpL(LA) No. 182/99, DECIDED ON: 15.09.2006*

⁴³Articles 3, 4 and 33(f) of Constitution of Sri Lanka

holders give the problem its due attention and contribute in ensuring a secure and safe environment for working women. Although sexual harassment at the workplace has become a common phenomenon in Sri Lanka there is still no direct legislation that renders such workplace harassment a crime. Existing provisions in the Constitution such as Industrial Disputes Act, Trade Unions Ordinance or Workman's Compensations Ordinance can be inventively used to combat such harassment. Yet the need for effective legislation is not only to ensure the vibrancy of our democracy post-war, but more importantly to ensure that the fundamental rights of such workers are no longer breached.

Comparison of Indo- Sri Lanka on sexual harassment at workplace shows that India is in a better position to combat the problem. Judicial activism and legal enactment on this subject are ideal to Sri Lanka. Meanwhile there is something more that Sri Lanka could grasp from the loopholes of the Indian Sexual harassment of women at workplace Act 2013. Discussing the scope of this Act, it has excluded workforce of Agriculture and Armed forces but it is to be noted that these are the sectors where majority of people work and both men and women encounter sexual harassment. Also, it seems this law had been drafted to fit workplaces such as offices, institutions and enterprises. But majority of men and women, do not work in organized workplaces as mentioned in the Act. Further the mechanism of inquiring sexual harassment complaint starts with the constitution of committee. The idea of having internal staffs those who have no legal training and leaving rooms to go for monetary fine depending on their income and financial status question whether the Act has means to combat and reduce sexual harassment at workplace in society. In doing so, both the countries should compare and contrast the legal developments from developed countries⁴⁴ and other south Asian countries.⁴⁵

VIII. CONCLUSION

Today right to work is an essential right of every man and woman. Depriving of and discriminating against their rights are simply violation of international obligations of states. Moreover, it is a threat to a developing country as it will eventually collapse the economy of country. Mere signing and ratifying international conventions by states are not sufficient. States should enact laws and enforce these laws too.

There is right to equality in both India and Sri Lanka, hence, there must be 'equal access to justice' in case of both men and women. It is not that men cannot be sexually harassed at work place. Therefore both the countries should consider gender neutral laws while at the same time giving special consideration to women wherever necessary.

Meanwhile, it should be noted that women are the most vulnerable group of victims under sexual harassment at work. And more weight should be given to the protection of women. According to the Report of International Labour Organization on Women at work trends 2016, South Asia has witnessed a decrease in labor force participation rates for both men and women in the last 20 years. Women were the most affected and gaps in participation rates has widened by 2.3 percent.

Legal protection from sexual harassment at work place to Sri Lankan women does not have any meaning unless there is a clear legislation on this¹⁹. A law on Sexual harassment at work place will set out the extent of nature of offence and mechanism to conduct inquiry in between parties. Sri Lanka should enact legislation where duty of the employer or other responsible persons in work places and 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 talking all steps required.

Legislation with the provisions of preventive steps, criminal proceedings, disciplinary action, complaint mechanism, complaint committee, workers' initiative and awareness should be enacted in Sri Lanka. Criminal proceedings should, particularly ensure that victims, or witnesses are not victimized or discriminated against while dealing with complaints of sexual harassment. The victims of sexual harassment should have the option to seek transfer of the perpetrator or their own transfer. And misconduct in employment should be defined by the relevant service rules and appropriate disciplinary action should be initiated by the employer in accordance with those rules.

The development in India has proved that introducing the law on this issue enables the victims to get justice and remedy. Due to the Vishakha Judgment⁴⁶, many civil societies became aware of the issue, started publicizing it and pushed for the implementation. Media has also started giving attention and many have started breaking the silence.

Furthermore, legal provisions against sexual harassment cannot be a remedy limited to women. Considering men also as victims under legal frameworks will create awareness in a society where women are

⁴⁴ For instance Discrimination Act of 1975, UK and Sex Discrimination Act 1984

⁴⁵ Protection against harassment of women at the workplace Act 2010, Pakistan and The Sexual harassment at work place prevention Act 2015, Nepal

⁴⁶ AIR 1997 SC 3011

considered as sole victims. Gender inequality at work and at home will lead to gender barriers in access to social protection. Thus, India and Sri Lanka can continue being pride brothers of Indian Ocean by creating and assuring safe environment of workplace for workforce, who builds and sustains the nation.

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