

Study of Law against Sexual Harassment in Higher Educational Institutions in India and Its Limitations

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ABSTRACT

Sexual harassment at workplace continues to be a huge concern across countries and especially in educational institutions. It does not matter whether the workplace is a construction site having regular wage earners, a domestic help within the four walls of a house, professionals employed with MNCs or an educational institution where people come from highly skilled and academic backgrounds. Sexual harassment poses serious challenges that culminate into unhealthy and hostile workplace atmosphere, which hinders workers efficiency, productivity, learning atmosphere, motivation & morale, by adversely affecting their career progression, social, academic & economic development vis-à-vis organizational progress. Workers experience low job satisfaction due to a non-conducive work-environment owing to such challenges. Security & safety of people always remains a matter of serious concern of any civil society, and a lot has been written and spoken about it. Yet these discussions have continually been hushed up. The bulk of this harassment takes place because the predators enjoy it with impunity. The victim discouraged by the environment, past experiences of the colleagues, lack of trust in the system etc. decides not to file the complaint.

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Introduction

Sexual harassment in India has remained a matter of grave concern that has been attracting attention of the society increasingly for the past more than four decades. As a turning point, in 1997 the Indian Supreme Court eventually acknowledged that there exists a rampant sexual abuse of women at workplaces. The Supreme Court further recognized that any act of sexual harassment at workplace amounts to an infringement of human rights besides violation of the fundamental rights. Accordingly, considering the concept of "Human rights" as referred to under Article 2(d) of the Human Rights Act, 1993, the Supreme Court took notice of the fact that there was no sufficient protection available for women against sexual harassment under the then existing civil and penal legislations in India and that making of an appropriate legislation would take considerable time. However, in order to prevent increase in the number of cases of sexual harassment against women, the Court emphasized an urgent need of a strong legislation to comprehensively deal with the issue and complaints of such harassment [1]. Pursuant thereof a comprehensive Act on Prevention, Prohibition & Redressal of sexual harassment of Women at Workplace was put in place. The Act was published in the Gazette of April 23, 2013. However, in exercise of the powers conferred by sub-section (3) of the Act, the Central Government has appointed the 9th day of December 2013, as the date on which the provisions of the Act have come into force. In this regard, the Ministry of Women and Child Development, Government of India published an Extraordinary Gazette of India Notification No. 2733 on the said date. The new legislation endeavors to provide to the employers and employees a user-friendly constitutional instrument, creating healthier and safer workplaces and protecting the view of the Vishaka Guidelines[2], as reaffirmed by the Justice Verma Committee (2013). [3][4].

Importantly, in [5] Aja Okorie (2014), sexual harassment has been grouped in three ways in the universities, namely; sexual harassment of a student by another student, of a teacher/staff by a student, and of a student by a teacher/staff. Research carried out by another author [6] has reinforced this theory by showing that 98.8 percent of participants found that the cases of sexual harassment have risen from male lecturers to female students[7]. A study in India, [8] Reena and Saheab (2014), reveals that the Central Government has confirmed existence of incidents of sexual harassment of students in Kendriya Vidyalayas and Navodaya Vidyalayas. The then Central Minister Mr Shashi Tharoor, while speaking in Rajya Sabha said that there were 14 sexual harassment cases reported in Navodhaya vidhyalaya and 42 cases reported in Kendriya vidhyalaya, respectively. Out of the above, a total number of 24 accused were found guilty and the actions were taken against them. A cross-sectoral survey was carried out by [9] Aditi et al. (2016), whereby the survey of 408 out of 420 undergraduates of selected technical colleges of the Udupi district, Karnataka, India revealed that the perceptions of undergraduates regarding sexual harassment vary from their age, gender and course of learning. Their analysis, however, does not discuss the potential variation of the interpretation by form of institutions to be discussed in this review. A research of teenage schoolgirls in Tirunelveli, Tamil Nadu, India conducted by [10] Pavithra et al. (2018) has revealed the prevalence of multiple types of sexual harassment ranging from forceful genital exposures to physical contact [7][11].

In this paper, the authors have also considered a relevant aspect emerging out of 'Me Too' movement. The 'Me Too' movement and the ensuing debate have given a boost to awareness of the problem of workplace sexual harassment. However, the silence on academic sexual harassment was shortly broken with a Google sheet created by a student in Indian law. The list included the names of people accused of sexual harassment in both Indian and foreign universities.

The debate in the academic institutions was stormy. Many condemned the list because the declarations had not been verified. The student who floated the list justified her act. She decided to warn women of the perpetrators because while the allegations were raised many times, nothing happened.[12][13][14].

In 2013 the Law on the prevention, prohibition and redressal of sexual harassment of women at workplace came into force. During 2014-15, as many as 75 sexual assault complaints were filed in the Indian universities. This data was collected from a UGC study on sexual assault allegations against female lecturers, professors and research scholars from 84 universities. When considering this issue, we must not forget that there are many unreported cases and that the subject of sexual harassment carries a stigma [15] [14].

149 university complaints were registered in 2016-2017. The most recent UGC study (April 2018-March 2019) reported 171 sexual assault incidents in only 188 universities. The total number of universities including private universities, according to UGC data, were 945 during the period. In response to a question as to whether the Internal Committee had been established in accordance with the Act, a number of 29 universities out of the total 188 universities which had submitted the report, had provided 'NIL' information, even though the Internal Committee was to be formed mandatorily after that law was passed. Contrary to this the Law's mandate for awareness generation, in these 188 universities there were only 417 awareness/sensitization sessions conducted. Taking into account the average group size of 40 participants, it would estimate that the coverage for 188 universities would be around 16,680. As per Sixth Report on All India Survey on Higher Education (AISHE) for the year 2015-16, the total enrolment in higher education has been estimated to be 34.6 million with 18.6 million boys and 16 million girls [14]. Therefore, the number of awareness program conducted by the above mentioned 188 universities reflects an eloquent testimony of 'the seriousness and poor state of the outreach efforts' of the universities concerned in respect of implementation of the Act, 2013. [14].

In addition, numerous concerns surrounding the interpretation of the law and the investigation & inquiry process have been raised in the media. A major problem is no response or insufficient response from the management / administration to the problems presented. The student behind the 'name and shame list' justified her actions citing the same reason. Several students have said that the authorities are protecting the accused and turning a deaf ear to their concerns. Complaints were not recorded many times, and when they tried to document their complaints, the complainants were asked offending questions, such as "What did you wear?" "Who was with you?" "Why did you get there?" These are our culture's usual reactions in cases of sexual harassment and abuse. But the 'responsible' individuals at the universities represented the same mischievous mindset in these circumstances[14].

In the investigation process, several students share their experience of victimization. Some members of the committee recommend not to pursue the case because the accused has a brilliant career or a higher standing; the institute as well as university would be defamed, and so on.

Students also had to contact the police rather than the Internal Complaints committee in some situations. This suggests that on the part of the aggrieved, there may have been a lack of trust in the committee for (obvious) reasons such as the accused being a member of the committee, the perception that the members of the committee would support the accused, the suspected fear of impact on the job, and sometimes the ignorance of the students about the internal redressal mechanism being in place. Needless to say that for any such lack of trust, adverse perception about fairness of the Committee members, fear of impact on job and ignorance of appropriate redressal mechanism being in place, it is the appropriate Government who is responsible, because it is their duty to generate requisite awareness, trust and confidence among those who should be concerned about it. [16] [13].

Some key Sections under the Act, 2013

Section 2(n): "Sexual harassment includes any of the following improper actions or activities (whether directly or by implication): physical interaction and advancement; sexual favour or request; sexually flavoured remarks; pornographic display; any other sexually unwelcome physical, verbal or non-verbal conduct.

Section 3(2): Sexual harassment may constitute, inter alia, the following situations in which sexual harassment occurs or is present in connection with or in connection with any act or behaviour of sexual harassment: an implicit or explicit promise of preferential treatment in her employment; an implicit or explicit threat of adverse treatment in her employment; an implicit or explicit threat to her current or future employment;

Section 2, (p): 'Unorganized industry' means an enterprise run by individuals or self-employed workers engaged in the manufacture or sale of products or any service of any kind in relation to the workplace, and where the enterprise employs workers, the number of such employees is less than ten.

Section.3,(m): "respondent" means a person against whom a complaint under section 9 has been lodged by the aggrieved woman.

Section 26: – Penalty for noncompliance with provisions of Act

(1).Where the employer fails to—

- (a) Constitute an Internal Committee pursuant to sub-section (1) of section 4;
- (b) take action pursuant to sections 13, 14 and 22;
- (c) breach or threaten to breach any other provision of this Act or any provision thereunder; and be punishable by a fine of up to 50,000 rupees.

2). If an employer subsequently committing and is convicted of the same crime after being previously convicted of a punishable offence under the present Act shall be liable for twice the penalty that may firstly be levied, subject to the maximum punishment provided for in the same offence; provided that that the Court is properly informed of that fact in the event of higher punishment,

Issues in filing complaints in Universities and Higher Educational Institutions

As regards the provisions of section 26, there is uncertainty & silence under the provisions of the Act, 2013. A question arises that if the employer has not formed the Internal Committee, who should be held accountable for such failure? Who would initiate measures against the employer for his failure to constitute the Internal Committee? Therefore, there is a need for a more defined structure where the duty to monitor the constitution of such a committee is established. The act is also silent about the women who were institutional workers at the time of abuse, but have been dismissed for one reason or another before they could lodge a complaint. Therefore, there is a strong need that an accountability & responsibility structure duly providing for its effective enforcement should be in place. [16] [13].

Important points in UGC/AICTE Regulations for dealing with harassment cases

In the case of allegations of sexual persecution, the UGC/AICTE Regulation is quite comprehensive. The UGC (Prevention, prohibition and solution of sexual harassment of women employees and students of higher schools), 2015 or AICTE (Gender Sensitization, Prevention and Prohibition of Sexual Harassment of Women employees or students and Resolution of complaints in Technical education universities) regulations are compulsory for the universities and the institutions under these laws; as the case may be; along with relevant provisions of the Act, 2013 read with rules made thereunder. The HEIs/TIs have to ensure: Firstly, the Internal Complaints Committees should be formed as mandated by UGC Regulations. Secondly, to arrange training programs for the Committee Members on regular intervals to equip them in a better way to handle the grievances. Thirdly, to arrange classes on awareness-raising among the students, faculty and staff. Fourthly, the HEI/TI has to treat sexual assault as a violation of the laws and consequent penalty should be considered for such misconduct. Fifthly, research ethics should be driven, since research students are more prone to sexual harassment [14].

Drawbacks in handling of harassment cases in University and higher educational institutions

a) Preventing violation of the Act

The possibility of filing of false cases may not be ruled out. There also happens a situation in which people file sexual harassment allegations that sound like a respondent's way of taking revenge because they have a sweet friendship with their mates. The Act is already equipped to deal with the cases of false or malicious complaint and false evidence and provides for punishment under Section 14. On the same lines UGC and AICTE Regulations are also already equipped to deal with the cases of false or malicious complaint and false evidence and provides for punishment under their respective clause 11 under both the Regulations. However, there is a need to put in place an appropriate mechanism to detect false complaints. It is important to prevent abuse of the act and also to penalize the false allegations.

b) Internal Complaints Committee (ICC) issue

- The Act includes the creation of an internal committee for each place of work in all administrative units or divisions. The two are workers from the organization who can ideally work for the cause of women, or who have social or legal awareness expertise. There are at least four committee members. The third person i.e. a woman employed at a senior level at workplace from amongst the employees, shall be the Presiding Officer. The fourth person shall be from outside, a non-employee. Half of the members of the Committee must be women. From the above said composition of Internal Committee under the Act, it can be well appreciated that such a composition of a committee may not serve the desired objective in respect of educational institutions where the population consist of faculty, non-faculty, and students of various levels up to the research scholars' levels. Therefore, keeping this in view the UGC and AICTE, respectively, as per their extant regulations have further enlarged the composition, while calling the committee as 'Internal Complaints Committee' instead of 'Internal Committee' as provided under the Act, 2013. The enlarged scope requires representation of two faculty and two non-faculty members and three students, if the matter involves students, who shall be enrolled at the undergraduate, master's and research scholar levels respectively, elected through transparent democratic procedure. Notwithstanding, certain employers would not have the employees who are preferably committed to the cause of woman or who had experience in social work or have legal knowledge, has not been taken due care in the Act, 2013. Not only that, the honesty and competence of the members of the Committee shall be of paramount consideration to give justice to the purpose. There was no discussion on these issues under the Act and how to address them.

- The budget allocations of the committee have to be laid down in the Law. It should be considered what money should be allocated to this committee, where the committee will get its finance from, how it is used, etc. There is a need that the position of the ICC in criminal investigations should be specifically defined in the Act itself as being whether a simultaneous civil and criminal trial is being conducted. This is necessary to clear doubts that may be existing in the minds of the people and generate awareness.

- Section 11(3) of the Act, which allows the Internal Complaints Committee to exercise the powers of a civil court to apply to the discovery and production of documents [16]. In the eye of law these powers as conferred upon Internal Committee are the prerogatives of a judge. The Act and the UGC/AICTE regulations do not provide for any legal background or training requirements for the Committee members, which should be made mandatory for future.

- It should also be noted that with regard to the documents and paperwork, the investigation and Complaints Committee process is very translucent.

- With respect to sections 19 (g) and 19 (h) stated in the act, there is a lot of uncertainty and confusion. Section 19 (g) requires the employer to provide assistance to the woman if she so chooses to file a complaint under IPC or any other law for the time being in force.

Whereas, section 19 (h) requires the employer to initiate action under IPC or any other law for the time being in force, against the perpetrator. The clarity of these actions, therefore, is something that needs to be improved upon.

- In some cases, it might be difficult to file a complaint within the stipulated time frame. Section 9(1) specifies the restriction of three months for the complaint to be made. Section 9 mandates that, at the discretion of the Complaints Committee, the duration of 3 months can be prolonged by another 3 months. However, time extension beyond six months is not admissible. It is felt that this period of six months being inadequate in some of the genuine cases, may be extended by further six months, with justifications to be duly recorded by the Committee.

Conclusion:

Most people often face sexual harassment at work, but not many speak out. In general, they are afraid of losing their jobs, of facing humiliation in the hands of society, of being trapped in never-ending legal cases or of other unsaid reasons. It is worth mention that still there is inadequacy of legal remedies being available to the victims and a number of lacunas are still existing, which still need to be addressed. The Act, 2013 was primarily enacted to deal with sexual harassment cases of women at workplace and thus did not include men and educational institutions with a fair detail in the framework of the act, as such, does not adequately address the challenges faced by the HEIs. Therefore, necessary steps must be taken to address this gap. The institutionalization of the Act, addressing the grey areas and aligning the same to the needs of HEIs, no longer entails a taboo subject for sexual assaults at workplace. The Act primarily ought to give the women in the country a key to justice. Through the adoption of proposals and continuing further initiatives over time, we trust that this act will further improve our educational environment and conditions of our society.

Recommendations as per analysis.

A High-Power Oversight Committee at the apex level in each HEI should be made accountable to meet, at least twice a year, in order to discuss compliance of the provisions of the Act, other relevant issues and the proceedings under the Act. Section 10(1) of the Act (and also Regulation 8 (7) of the UGC/AICTE Regulations) providing for Conciliation, contradicts the nature and meaning of the Vishaka Guidelines. Although Regulations 2(j) of the UGC/AICTE Regulations do contain respective provisions covering Protected Activity, yet the mandate under these regulations is restricted to any opposition to violation of sexual harassment laws; any participation in sexual harassment proceedings; any cooperation with an internal investigation or acting as a witness. There is nothing that provides adequate protection against any retaliatory action. Therefore, the complainant and the witnesses should be provided with an effective protection against any retaliatory action against them, to ensure that the witnesses are able to provide their testimony in the matter without any fear, judiciously[17].

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