

# WORKPLACE SEXUAL HARASSMENT: A CASE OF GENDER DISCRIMINATION

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**Abstract:** This paper deliberates sexual harassment issue against ladies and the laws that Indian Government passed like Sexual Harassment against Women and transgender people in Workplace (Prevention, Prohibition and Redressal) Act, 2013. To break down the adequacy of Sexual Harassment of Women at workplace Act, 2013 in controlling sexual harassment and abuse in working atmosphere in India. The research uses sources that are collected from on Internet, articles, other research journals, books and exposed acts in light of subject. The utmost life-threatening sexual harassment issue happens in working sectors. Recently planned legislation that targets to safeguard the good fortune of transgender people in India proposals hope of better acknowledgement of human rights and better admittance to use to entitlements for these diminished groups. Still, health associations and communal welfare have far away to go in interpreting offered legislation into policies that can specifically talk the communal misery of both women and transgender community. This article explore an important necessities of the Bill and its legal impact relating to transgender person's right to life with dignity as well as employ chances.

**Index Terms - Sexual Harassment, Women, Workplace, Transgender, Act, Changes**

## I. INTRODUCTION

Sexual harassment at workplace is an act or pattern of attitude that compromises physical, emotional or financial security and safety of a lady worker. Legally speaking, it comprises such undesirable sexually unwavering attitude as1.

- Stirring or brass rubbing oneself sexually around other person
- Showing pornography
- Corporeal interaction and advances
- Hissing at somebody
- Smooching sounds, howling and smacking lips
- Some other undesirable corporeal verbal or non-verbal behaviour of sexual nature
- A request for sexual favours
- Stirring worker's dress, body or hair
- Sexually coloured remarks

Sexual harassment is also understood to have taken place if a victim has sensible fear of facing humiliation, and safety and health issue at the place of work. If the boss or the employers by any words or gesture or action create a hostile situation for a woman worker, it extents to SH2. Under the law, corporeal dealings between aggressor and victim is not mandatory for the occurrence of SH. Verbal abuses, lewd jokes, sexual gestures, sharing of pornographic material, spreading rumours to tarnish reputation or any other act that creates a hostile work atmosphere creates SH.

Gutek B.A's book titled "Sex and the Workplace" (1985) discussed the multiple consequences of SH in the Workplace and effects of such acts on the wellbeing of employees and efficiency of organizations3. According to him, SH is a serious issue at the workplaces which directly affects the harmonious relations between employer and employee.

The issue of SH emerged for discussion in India as late in the 80's and gaining force only in 90's. This fact is confirmed by a report of Forum against Oppression of Women (1991). It is evident that at that time the issue of SH at workplace did not receive much attention and importance from the society4.

In April 2014, the Supreme Court of India stated that the social liberties of an individual must be protected irrespective of their gender identity, self-expression and judgement to undergo surgical intervention also known as sex-reassignment. This landmark ruling, aimed at granting transgender communities fuller citizenship rights, was taken up by numerous Indian states including Karnataka, which initiated communal safety arrangements for transgender community. More recently, the proposed Transgender People (Protection of Rights) Bill5 in India aims to further address the widespread violence and social discrimination transgender people encounter. However, programmes emanating from this new legislation have been confined to problematic incentive schemes that offer meagre pensions and only small stipends for microfinancing (i.e. credits to transgender people to set up their own businesses). Such financial compensations do little to lineate the cause of structural realities that underpin the marginality and social status of transgender people. Furthermore, as evidenced by protests over the definition of transgender and the requirement for mandatory medical verification in the Bill social welfare and health institutions6 have a long way to go towards interpreting the proposed legislation into policies and interventions that can efficiently address the everyday struggles of Indian transgender people.

Although transgender people occupy an important focus in recent parliamentary arenas, popular news media and public health discourse throughout South Asia7 "Khawaja Sara, Hijra, and the Struggle for Rights in Pakistan "Stigma, Violence and HIV Vulnerability amongst Transgender in Sex Work in Maharashtra, India." Culture, Health & Sexual scholars have long attempted to represent the lived realities of transgender people in this region, especially 'male bodied' hijra as 'one of the most iconic and popular examples of this so-called third gender'7,8 This rich body of scholarship raises important questions about how the 'third gender' has been reified in modern political and legal discourse7. Although strongly contested in scholarly literature the very notion of third gender has been construed narrowly in emergent political discourses as a 'progressive legal achievement', one that ties the citizenship legitimacy of transgender people to notions of disability and anatomical defect9 (i.e. genital excision). This

portrayal of transgender people in new legislation inadvertently denies credit of wider gender fluidity, ambiguity and diversity that exists within transgender communities across South Asia, especially ignoring those who neither classify by hijra communities nor undergo anatomical modifications<sup>9</sup>.

Judgement is not mysterious in India when it comes to addition of transgender people in society, particularly in respect of employ chances. Reliable hard work by activists throughout the years, has resulted in the passing of landmark order by Hon'ble Supreme Court, in 2014 in case of National Legal Services Authority vs. Union of India. The Court spotlighted that discrimination and ill-treatment of transgender civic is common in India, mainly in sectors like learning and employ. Thus, the Court noticed the rights of 3rd gender to life with self-respect that is protected under Article 21 of Constitution. In an attempt to offer legislative backing to the recommendations enunciated by National Legal Services Authority of India, the Transgender Persons (Protection of Rights) Bill, 2016 (the Bill) has been recruited, and presently awaits Parliamentary authorization to become law.

## II. IPC ON SEXUAL HARASSMENT AGAINST WOMAN

In 2013, considerable modifications were made in the way SH was observed within Indian legal justice scheme. The Criminal Law Amendment Act of 2013 that was initiated on April 3, 2013 includes Section 354A of IPC, 1860 that has precisely stated about SH. The India Penal Code, 1860 has also defined the term SH and related offences and put forth punishments for the same:

Section 354A: SH is: undesirable corporeal dealings and advances, comprising unwelcome and clear sexual approaches, call for sexual favouritisms or a call, showing somebody sexual pictures (pornography) without their agreement, and creating unwelcome sexual comments— Punishment: Up to 3 years in jail, and a fine.

Section 354B: Compelling a female to undress. —Punishment: From 3 to 7 years in prison, and a fine.

Section 354C: Watching or capturing images of a lady without her consent (voyeurism). —Punishment: First conviction - 1 to 3 years in jail and a fine. More than conviction - 3 to 7 years in jail and a fine.

### The Act: Complications and Lacunae

The SH of Women at Workplace<sup>11</sup> (Prevention, Prohibition and Redressal) Act 2013 was aimed at protecting women against SH at the office and complaints redressal for issues associated with SH. The Vishaka verdict is long trial which is dealing with the problem of SH and henceforth one will presume an Act short of any lacunae, particularly if the Act tends to come after 16 years of a greatly elaborate decision. However on a critical analysis of the Act, there are certain areas where more clarity is required and it becomes important to understand the problematic connotations related to them.

### Monetary Loopholes

A major fault in the Act is that there is no responsibility that has been put on the employer with respect to maintaining a safe environment in the workplace. Although the Act stipulates certain duties for the employer, there is no provision to ensure mandatory compliance of such duties, i.e. no punishment in case of denial. No specification occurs for compensation from the employer, which could highly contribute in the reluctance of the employer in taking the responsibilities earnestly. A small sum of Rs 50,000 is set as fine if the employer fails to constitute an ICC, take action under sections 13, 14 etc. The remarkable part is that though there is no punishment for not following the obligations, a criminal offence is set on part of the employer when he does not take action against fabricated and spiteful complains. Therefore these requirements necessitate fixing and alteration regarding the objective and purpose of the act. Privacy likewise holds great importance in matters such as SH. The Act discourages this aspect by stating that privacy requires to be maintained in terms of non-revelation of the self of the distressed woman, defendant etc. Though the penalty that has been forced is a small sum of Rs 5000 that would certainly not have any preventive outcome, thus making the provision futile

## III. PREVENTING SEXUAL HARASSMENT

In India, the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act 2013 considers it the responsibility of the employer, in addition to other responsible persons in work places to “offer protection against SH of women at workplace and for the prevention and redressal of complaints of SH and matters connected therewith or incidental thereto”. This suggests that these people are accountable to stop or dissuade the order of acts of sexual harassment within the workplace arranges for the procedures, for the purpose, defrayal or prosecution of acts of SH by taking all mandatory steps. The responsibilities of an employer and/or the suitable government on the way to the deterrence of SH in the workplace have been openly laid down in the Act as follows:

- Offer a better working environment at the workplace that will include safety from third party (outsiders) coming into the contact at the workplace
- show severe magnitudes and outcomes of SH
- display information about the complaint handling mechanisms as well as about the
- Internal Committee Organize workshops and awareness programmes at consistent
- Intervals for alerting the Employees with the provisions of the Act
- Establish orientation programmes for the Internal Committee members
- Treat sexual harassment as misbehaviour and wrongdoing under the service rules and initiate steps and action for such misconduct.
- Furthermore, the Act discusses that Government offices might likewise be accountable for the following:
- Enhance the public understanding of the provisions of the Act
- The state and central Governments are instructed to improve applicable IEC and training materials and
- Arrange for awareness programmes to enhance the public understanding on the provisions of the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act 2013.
- Formulate co-ordination and training programmes for the Local

- Complaints Committee member.12

For the implementation of the Act, it is vital that businesses and establishments take essential steps to avert and talk about SH at workplace with steady commitment from managers

### Notions and Policies

This study is based on the notion of structural violence, a term coined by Johan Galtung to accentuate on how numerous policies and organisations possibly will prevent people and communities from attaining their potential. As additionally defined and simplified by Farmer, structural violence denotes to ‘a horde of assaults against human dignity: too much poverty, social disparities fluctuating from discrimination to gender disparity and the more remarkable violence forms. These ‘offensives’ that hurt individuals are frequently fixed in ancient social structures, institutions and practices that make them seem usual and frequently invisible notes, ‘Personal violence expresses ... structural violence is silent ... [and] might be seen as about as natural as the air around us’.

This idea of indirect, ordinary violence could aid us to have a well understanding of how countless discriminations and inequalities take form in the everyday lives of transgender people as they try to access social and health services. Akhil Gupta tells how organizational systems aiding India’s meagre enact forms of structural violence through the apparently ordinary route of authenticating practices that stabilise their oppression. Likewise, transgender groups frequently face debarments and exclusions as citizens in organised contexts at moments when their gender cannot be easily identified and placed in administrative documents. Though administrative businesses in India, at the time of our research, let transgender people to choose whether to label them as a man, woman or transgender, transgender people remain to endure fall-out from the very administrative necessity that citizens be allotted a gender to get vital facilities. This ‘ordinary’ form of violence epitomises what Das et al13 denote to as ‘the slow erosion of societies through the soft knife of guidelines that severely disrupt the life worlds of people’.

However, illuminating the various forms of structural violence faced by kothis (feminine-acting men who have sex with men), presenting how unfair practices might happen beyond the awareness of persons, developing at the level of social institutions like the family, the community and the health and legal system.

### Who is the transgender subject in law?

In August 2016, the Indian Government sanctioned the Transgender Persons (Protection of Rights) Bill, 2016 to protect the rights of transgender people in India, once passed in the Parliament. The Bill had integrated none of the feedback given from the Nation-wide transgender community-led sessions when a draft version of the Bill was distributed at the beginning of 2016 for community feedback (Government of India 2015)14. In fact, the Bill was a much- diluted version of the draft that was distributed in January, 2016. The Bill defined “transgender” as:

- (A) Neither entirely female nor entirely male; or
- (B) A blend of female or male; or
- (C) Neither female nor male; and

Whose sense of gender does not match with the gender consigned to that individual during birth and comprises of trans-men and trans-women, persons with intersex differences and gender-queers. (Government of India 2016:2)

Therefore, the State’s description of gender was established in the binary in which “transgender” as a group is merely a lack that requires to be pathologized. Similarly, by outlining “transgender” as mixtures of both or being neither, the State declined the recognition to those Trans individuals who recognise themselves as basically “male” or “female.” In simple, the State declined to disconnect one’s gender identity from the gender allotted at birth, an explanation that is, biologically deterministic. A Standing Committee was founded later in 2016 that requested for community feedback on the Bill and this body integrated community feedback and encouraged for a change in the definition. On December 17, 2018, Lok Sabha passed the Transgender Persons’ (Protection of Rights) Bill, 2018 and the present version of the Bill has modified the transgender definition:

“transgender person” means a person whose gender does not match with the gender assigned to that person at birth and includes trans-man or trans-woman (whether or not such person has undergone Sex Reassignment Surgery or hormone therapy or laser therapy or such other therapy), person with intersex variations, genderqueer and person having such socio-cultural identities as kinner, hijra, aravani and jogta. (Government of India 2018:2)

Even if the present version of the Bill makes a development on the definition of “transgender,” it has not taken into account, community feedback on the mechanisms of gender acknowledgement. It does not remark on the self-assertion of gender that openly opposes the 2014 judgement of the Supreme Court of India that defended the right of all citizens to the self determination of their gender. One could ascertain themselves as “male,” “female” or “third gender” irrespective of the sex assigned at birth. For this, gender confirmation surgery will not be a criterion

While the establishment of the screening committee was stated in the 2016 version of the Bill, the 2018 version makes it even more difficult. However those who identify as “transgender” will have to be accepted by this committee, those who ascertain as “male” or “female” will have to produce evidence of gender confirmation surgery. The Bill states,

“Such person may make an application, along with a certificate issued to that effect by the Medical Superintendent or Chief Medical Officer of the medical institution in which that person has undergone surgery...”

Therefore, even if the state has made a concession on the characterisation of transgender, basically, its beginning of gender is still engrained in the medical set up.

### Labour and the transgender citizen

Most of the media illustrations of transgender narratives until now depends on the promise of decorum. The Yathartha video depicts transgender females as engineers, doctors, police officers and beauticians, therefore isolating the transgender identity from the stigma of sex work and begging at traffic signals. While an increase in livelihood options is an anticipated goal, transgender community should be able to pick their own dream jobs and occupations, but in fact, there are very limited openings available for transgender communities. The state takes all the possible efforts for the Trans people by various rights allocation, when it comes to

the question of labour, the state remains silent. For instance, the Transgender Bill describes that there must be no discernment against transgender persons at the workplace. To implement this, the 2016 version of Bill defined the workplace as:

Every institution containing 100 or more people will elect an individual to be a grievance officer to manage the complaints related to abuse of the provisions of this Act. (Government of India 2016:4)

Key provisions of the Bill with regard to employment opportunities are set out below:

Section 19 (d): offers for punishments and penalties in the event any person harms, injures or threatens the life, security, health or well-being of a transgender person or tends to do any act that causes abuse of any nature whether physical, sexual, verbal, emotional and economic abuse

Be it small factories, domestic work, non-brothel-based sex work, these are all part of the easy economy where countless transgender individuals are hired and sexually abused.

The everyday harassment faced by them at these work spaces, extending from low pay, no relaxation to SH be therefore considered invisible as they do not count as discrimination, the workplace where such discernment takes place is not even a workplace under Indian law. However, these are also spaces that provide them income options in a severely constrained field as most institutions turn them away on account of their gender non-conformity. For instance, one of the most important options of income generation for transgender women is sex work, together with other forms of labour. Shah's (2014)15 multi-sited ethnographic exploration of sex work in Mumbai city demonstrates that it is "one of many livelihood approaches that underprivileged migrants involve in" and is fixed in a

"Complex discursive matrix that includes life and livelihood histories, the production of urban space, the mutually constituted discourses of caste and gender, and the ways in which economically impoverished migrants navigate the idiosyncrasies of state institutions, from the police to systems of health care"

However Shah led her research with female sex workers, such a context is likewise applicable for transgender sex workers. Left with practically no option in the economy, frequently turned out of their birth homes, sex work comes to be one of the very rare modes of revenue generation available to them, one that pays for their gender affirmation surgery in the absenteeism of health benefits, pays for housing rent in cities where property prices are soaring and likewise attends to other basic needs

#### Analysis of recent cases

##### Vishakha V State of Rajasthan, guidelines issues by Supreme Court

In the case of Vishakha & others v/s the state of Rajasthan, the Supreme Court precisely point out the meaning of Sexual Harassment, which means some unwelcome or undesirable corporeal conduct or touch or displaying of pornography or some definable sensual commentaries or texts should arise below an influence of Sexual Harassment. This judgment is one of the most remarkable parts of law the court has ever passed in its olden times since its origin. It ought to turn into a very essential issue to act upon for the prevention of sexual harassment females at place of work. Even if private concerns the severe rules concerning the punishment of sexual harassment will be included. If sexual harassment is conducted by the outcasts, the person-in charge of that organization should take severe action for the behaviour of such delinquency. The judgment along with its significance similarly contains the rationality in the sense that it does not over-pressurize the employer in constructing redressal mechanism. The Vishakha judgment has only directed what look like suitable for boss with the purpose of keep up the legal values of equality and liberty.

##### MeToo movement in India

There are 4 results that I've attained at later understanding about Indian #MeToo movement.

1. Women endure to be harassed at place of work, despite 5 years legislation of Sexual Harassment of Females at Workstation (Prevention, Prohibition and Redressal) Act, 2013.

2. As per this law, an 'Internal Complaints Committee' has to be recognized in all government and private organisation, which will be authorised to deal with grievances of sexual harassment.

3. But there might be a few administrations which haven't yet constituted ICC. Even in the administrations where ICC be present prey's grievance is not properly addressed, particularly the ones that take in a high profile individual.

4. Women who are sufferers of sexual harassment are anxious of complaining to ICC about their experience. The Sexual Harassment of Women at Workplace Act, 2013, provides the prey 3 months to submit their complaint. On the other hand, several females make sure of record complaint be afraid victim-shaming and employ prospects.

An additional task is about a few persons who are VIPs and grasp powerful and significant portfolios. For them to be chastised, an enormous movement will be required. Media will be essential to perform a serious part in this. It will not be easy, but as India is a social equality, no administration could disregard the resident's difficulties for a long time. And gradually, the rule will take its course.

##### Navtej Singh Jauhar V Union of India

The 5-judge bench of Indian Supreme Court unanimously held that Section 377 of Indian Penal Code, 1860 (Section 377), insofar as it applied to consensual sexual conduct between grown-ups in private, was unconstitutional. With this, the Court overruled its decision in Suresh Koushal v. Naz Foundation that had upheld the constitutionality of Section 377.

The Court depend on its judgement in National Legal Services Authority v. Union of India (( National Legal Services Authority v. Union of India, (2014) 5 SCC 438 )) to repeat that sex characteristics is essential to one's character and rejecting similar would be violative of one's dignity. The Court depend on its judgement in K.S. Puttaswamy v. Union of India and held that denying the LGBT public its right to privacy on the ground that they form a minority of population would be violative of their major rights. It held that Section 377 amounts to an unreasoning limit on the right to freedom to expression since consensual carnal intercourse in private "does not in some method harm community decency or morality" and if it continues to be on statute books, it would cause a frightening result that would "violate the privacy right under Art. 19(1) (a)". The Court affirmed that that "intimacy among agreeable grownups of similar sex is away from the genuine interests of state" and sodomy laws violate the right to equal opportunity under Art. 14 and Art. 15 of Constitution by targeting a segment of population for their sexual orientation. Further, Court similarly depend on its decisions in Shafin Jahan v. Asokan K.M. and Shakti Vahini v. Union of India to reaffirm that an adult's right to "choose a life partner of his/her choice" is a facet of individual liberty.

### Republic V Non-Governmental Organisations coordination board (Kenya)

Article 36 of Kenyan Constitution assures the right to liberty of association for all peoples. This includes members of LGBTI public. By not permitting an NGO absorbed on guarding the rights of LGBTI communal, the Non-Governmental Organizations Coordination Board dishonoured that organization's legitimate right to connotation. So, Board's conclusion was upturned, and they were directed to allow the NGO to record.

The High Court of Kenya at Nairobi concentrated its analysis on 2 chief subjects: 1) whether bisexual, transgender, lesbian, gay and intersex individuals have the right to bring together below Kenya's Constitution, and 2) if they do have that right, whether Board's choice to decline the NGO's request violated that right.

Article 27 assures that all persons are equivalent before the law. Not permitting NGO to record for its opinions was a desecration of non-discrimination doctrine. In view of that, Court held that Board's ban violated Constitution and ordered the Board to allow NGO to record with its selected name.

## IV. CONCLUSION

The 2013 even with its own loopholes, has brought about a paradigm shift in the work culture. Yet, the incidences of SH are still happening. It is evident from here that before implementing the SHW Act, 2013, a lot of socio-cultural ground work for women equality needs to be done. A vigorous legal mechanism to protect transgender welfares is essential and huge punishments should be levied on offenders. Additionally, appropriate amendments under legislation like the Equal Remuneration Act, 1976, and the Maternity Act, 2013, might need to be appropriately revised to include a transgender person in their realm for rigorous implementation of the provisions of the Bill and to defend a transgender person against discrimination in the workplace. The Act that must have been extremely victim friendly, poses difficulties for the victim at each and every step. Law must be descriptive of the social changes, particularly in areas like sexual violence and abuse. The catastrophe in linking legal development with social progress in these cases articulates a lot about how much obliviousness is there towards extremely demeaning activities like SH. The legislature requires to revisit the Act and handle the anomalies that diffuse the Act. A firm and concerned effort is essential on part of the legislature to cope with this problem and remove it in a greatly plagued society like India. The legal regime, as examined above, leaves much more to be desired. Empowering the transgender community by building workplaces more transgender-inclusive will go a long way to reduce discrimination against them besides giving them a chance to be a part of India's financial growth.

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