

Revisiting the offense of sexual harassment at workplace in India in the light of gender neutrality across the world

Prof Souvik Chatterji¹, Diyasha Kundu²

¹*HOD, Law, JIS University*

²*LLM in Criminal Law, JIS University*

According to Oxford Dictionary; the term 'Gender Neutrality' is an appropriate, applicable or common adjective for men and women. It explains the legal principles that policies, language and other cultural institutions should avoid the division of labor based on sex or gender and promote labor equality and non-discrimination between men and women.

NATIONAL AND INTERNATIONAL PERSPECTIVE ON GENDER NEUTRALITY

Women's special savors are at the core of our way of thinking. And it is justified. Women are stronger than men in many ways, but sometimes they need extra care, protection and consideration from society and institutions. But when this positive attitude of favoring the positive exclusion of men on issues that also require their concentration and attention becomes reluctant, it degenerates into 'prejudice'. Focusing on the legal protection debate, it was found that while all systems generally covered women well, most legal systems lacked it for men. While it is an undeniable fact that women are the primary victims of most sexual crimes, the same is true for men, because there is no door for men in the legal system where to go or who complain too. Talking about the Sexual Harassment at Workplace, there is not too much but sufficient data that substantiates the fact that though women are harassed the most, but even men too suffer the same but could not raise voice against it either inside the workplace because they would be mocked for it or outside it to legal institutions because they do not

accommodate the same. Drawn at the United Declaration on the Elimination of Violence against Women, 1993 was one of the prominent international steps towards women safety and also to eradicate violence committed against women including workplace offences such Sexual Harassment at Workplace. Another instrument for protection of females is the United Nations Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), 1979. As per its Article 11, States must eradicate discrimination touching women in various fields including employment.^[1] While till date, the issue of Sexual Harassment has not yet been dealt by a precise international instrument, the committee of CEDAW, under its General Recommendation No. 19 of 1992 has fitted it as one of the form of discrimination based on sex and also as a method of violence committed against females.^[2] The aforesaid have been mentioned to give information about the legal framework available for protection and safeguards of women from all sorts of discrimination as well as sexual harassment either generally or at workplace. The Universal Declaration of Human Rights (UDHR), 1948 advocates equality in dignity, liberties and rights and equivalent safeguard against any sort of discrimination.

ILO Discrimination to protect against employment and occupation discrimination on parameters of race, sex, religion, colour, nationality or political opinion, it

^[1] Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), 1979, Article 11.

^[2] UN Committee on the Elimination of Discrimination Against Women (CEDAW), CEDAW General Recommendation No. 19: Violence against women, 1992

should be seriously taken into consideration as per the necessities of Convention No. 111.^[3]

Now, what is noteworthy in the above mentioned international instruments are gender neutral and equally address the issues both for men and women, with zero prejudice or preference for anyone. But despite having both sorts of legal protection, one exclusively for females and other equally for both, the former is given more preference and mostly widely forms the part of domestic legislation worldwide. All of this is due to very strong belief that only females can be victims of sexual crimes. If bring the aforesaid debate of legal protection to India, the similar dissatisfactory results follow here too, despite availability of empowered laws. The fundamental goal of the Constitution of India is to secure to all its citizens “Justice, Liberty, Equality, Fraternity and Dignity” as enshrined in the Preamble to the Constitution of India. Talking about the Fundamental rights guaranteed by the Constitution, Articles 14, 15, 19(1)(g), 21, in all the aforesaid provisions, equality, generally and in matters of occupation are implied. Article 15 (3) reserves the right of states to make special provisions for women, but if men face similar problems such as sexual harassment, where can man go for help, as the law does not yet recognize this? The question of whether The Constitution is intended to serve both sexes equally. Sections 354, 354A, 354B, 354C, 354D, 509 Under Indian Penal Code, 1860 all these are the protection only women from sexual harassment. There are no provisions for men. International instruments on gender equality are detailed in the above mentioned. However, while states are bound to make relevant legislation on the same, till date there is no such legislation dealing with this issue.

Another one of the most notable manifestations of Gender inequality in Indian Penal Code, 1860 According to Section 354 Whoever assaults or uses criminal force to any woman, intending to outrage or knowing it to be likely that he will thereby outrage her modesty, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.^[4]

^[3] C111- Discrimination (Employment and occupation) Convention ,1958 (No-111)

This offence can be committed by any man or woman. Woman can assault or use criminal force over other woman as equally and effectively as any man. The pronoun ‘he’ used in the expression “that he will thereby outrage her modesty” be taken under Section 8 of the Indian Penal Code 1860 as importing a male or female.

After Criminal Law Amendment Act,2013 the various provisions added or amended in Indian Penal Code 1860, another of Section 354A defines Sexual Harassment Punishment for Sexual Harassment^[5]--(1) A man committing any of the following acts-- (i) physical contact and advances involving unwelcome and explicit sexual overtures; or (ii) a demand or request for sexual favours; or(iii) showing pornography against the will of a woman; or (iv) making sexually coloured remarks, shall be guilty of the offence of sexual harassment.

(2) Any man who commits the offence specified in clause (i) or clause (ii) or clause (iii) of sub-section (1) shall be punished with rigorous imprisonment for a term which may extend to three years, or with fine, or with both.

(3) Any man who commits the offence specified in clause (iv) of sub-section (1) shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

So, it is clear that only man commit sexually harassment of any woman and only woman offer protection.

It is clear view that Section 354 under Indian Penal Code, 1860 is gender neutral in nature but Section 354A is not a gender neutral.

In 1860, not being a developed society at that time, Section 354 under Indian Penal Code made it gender neutral. But, even in *Criminal Law Amendment Act, 2013* with the development of the society it was not kept gender neutral in Section 354A under Indian Penal Code. The Criminal Laws to ensure that the words “any man” and “any woman” in the sections relating to Sexual Offences in the laws are changed to read as “any person.”

^[4] Indian Penal Code 1860, Section 354

^[5] Indian Penal Code 1860, Section 354 A

In this case *Dr. Malabika Bhattacharjee v Internal Complaint committee, Vivekananda College & Ors*^[6] a woman can sue another woman for sexual harassment, so why cannot a man complain about sexual harassment against a woman at workplace?

To stop abuse and achieve true equality, laws must be gender neutral.

The Indian Penal Code contains only one Section 377 dedicated to ‘Sodomy’^[7], the bloodthirsty act of Sexual Harassment and Rape of women. There are no Laws no statutes to protect males against the bloodthirsty act of harassment and rape. Except this section, all other laws and sections are meant only for females.

According to this section 377 divided in two parts that are followed:-

i) Same Gender Harassment: If any woman sexually harassed to another woman then victim of woman can’t complaint under *Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 (POSH Act)*.

In the case of *Dr. Malabika Bhattacharjee vs Internal Complaint committee, Vivekananda College & Ors*^[8] It was held that there is nothing in Section 9 of the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 that excludes same-gender complaints. The High Court made a critical statement about how though a same-gender sexual harassment complaint may sound odd, it is not an impossible occurrence. Therefore, it must be given just as much importance as an opposite-gender complaint would receive. The Court pointed out important sections of the Act that explicitly mention that the perpetrator and victim can be of the same gender, for example- Section 3(2) of the said act, the Court held that ‘Sexual Harassment’ as inferred in the Act must “pertain to the dignity of the person” and therefore, it does not mean that the same-gender cannot bruise the dignity of the other person.

ii) Cross Gender Harassment: If any woman sexually harassed by male person in workplace then victim can complain under *Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal)*

Act, 2013 (POSH Act). In relating to man sexually harassed by any woman the victim of male person can’t complaint under any act. In India it can say that there is unfair access to justice. When discuss the rights of people, it highlight how much importance is given to rights, but why violation of the right of equality of male person, when it look at the Indian Judiciary, society and legislations all talks about equal rights and equal treatment of men and women. But, dolefully these sorts of loopholes and misfiring to make any laws for Sexual Harassment, Sexual Assault or Rape shows uncut violation of ‘Right to equality’.

THE WAY AHEAD IN RESPECT OF INDIA’S STAND IN THE LIGHT OF INTERNATIONAL DEVELOPMENTS

The Constitution of India Guarantees the Right to Privacy and Security to all People Liberty, Equal Protection of the Law, and no Discrimination on the basis of Sex. Laws are made to protect people and bring justice. But gender legislation violates the ideals of equality and equal legal protection. When it comes to Sexual Harassment in the Workplace, it is not only the employer's duty to ensure that appropriate working conditions, rules, regulations, etc. are provided to employees. Employees also have a duty to ensure that cases of sexual harassment are handled in a gender-neutral manner wherever they work. Also, if any undesirable behavior is noticed, it must be ensured that management or the person responsible for the organization is notified so that the organization can take appropriate action at the appropriate time. The Sexual Harassment at Workplace Bill of 2010 focuses on women's right to be protected from sexual harassment in the workplace. Passage of this law will give women the opportunity to take more aggressive and forceful action against wrongdoer, but what about male employees? Why are they stripped of this protection? If we are heading towards an era where men and women are treated equally, why not protect them with equal rights? If men can be prosecuted by law, why can't women is prosecuted for the same

either description for a term which may extend to ten years, and shall also be liable to fine. Under Indian Penal Code, 1860

^[8]2021(1) SCT 431(Calcutta)

^[6]2021(1) SCT 431(Calcutta)

^[7] Section 377- Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life or with imprisonment of

crimes by the same law? In countries such as the United States, Canada, and the United Kingdom, if this issue is recognized as a criminal offense and there is relevant legislation in this regard, the organization recognizes this criminal offense, covers all genders including men without prejudice, and has a clear policy on sexual harassment that expresses all tolerance must be adopted. Complaints require assurance of investigation after receipt of complaints, warnings of the most severe retaliation against those who make complaints of sexual harassment, and policies should be regularly monitored and improved.