

AN ANALYSIS OF THE PROTECTION OF WOMEN AGAINST SEXUAL HARASSMENT AT WORK PLACE BILL, 2007

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“They were helpless. We were helpless as we too stood by and watched as one by one they were dismissed. It was this sense of helplessness that made us pick up this issue of legislation for sexual harassment”.¹

I. INTRODUCTION

In the wake of changed socio-economic scenario, avalanche of gender based crime and apathy of the system towards the same have been the foremost constraints in the path of women's emancipation. Sexual harassment of women at workplace is one such crime that not only violates their sense of dignity and right to earn a living in healthy environment but also is against their fundamental rights as well as basic human rights. It may be attributed to conflicting ideologies and troubled social conditions in a country like India which may again be due to increased influx of women in almost every profession, till hitherto conventionally monopolized by men. This has brought about a sea change, both qualitative and quantitative, in workplace equations, generating and spreading thereby, virus of this malaise and to find or develop anti-virus to undo its presence continues to elude us. Constitutional commitments translated and implemented through various planning processes, legislations, policies and programs for more than six decades couldn't perhaps, significantly contribute to check the menace. Moreover, plethora of available age old provisions under various enactments and legislations also proved inadequate.

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¹ Technical report for discussion at ILO, Japan Regional Tripartite Seminar on ACTION AGAINST SEXUAL HARASSMENT AT WORK IN ASIA AND THE PACIFIC MALAYSIA 43 (2001).

II. VISHAKA: DAWN OF NEW ERA

In *Vishaka*² for the first time, in the realm of judicial interpretation, the Apex Court identified, defined and expressed serious concern over the issue while giving a whole new dimension and meaning to the serious issue. As has been pointed out, once it is accepted that for achieving justice adapting to change is imperative, the question that arises is as to how these changes may be effected. No doubt, one method is to incorporate such changes through legislation. However, in the absence of legislation, [S]uch changes are to be judicially recognized and taken note of the conceptual tinkering and use of equity are the accepted judicial methods. Sir Henry Maine propounded the classic thesis that what he called 'progressive societies' develop beyond the point at which 'static societies' stop through the use of fiction, equity and finally legislations. The judgment in the case of *Vishaka* itself is recognition of change through judicial method.³

The judgment was unique in more than one ways as for the first time the Hon'ble Supreme Court recognized sexual harassment as a gender based specific discrimination thereby, creatively expanding the scope and understanding of human rights, traversing the existing limited interpretations. For the first time, in the absence of enacted domestic law, Supreme Court interpreted that the International Conventions and norms are to be read as part of the fundamental rights. Supreme Court acknowledged and reiterated the factual position that the existing civil and penal laws in India do not adequately provide for protection of women from sexual harassment at workplace specifically and that enactment of such legislation may take considerable time, certain guidelines were evolved by the Apex Court as a 'stop-gap' arrangement which were to be of binding nature under Article 141⁴ of the Constitution. Instead of restricting the accountability to an individual offender, the Supreme court extended the responsibility to eliminate the discriminatory sexual conduct to institutions, in this case, the work place.

² *Vishaka v. State of Rajasthan*, AIR1997 SC 3011;(1997)6 SCC 241.

³ *Saurabh Kumar Mallick v. The Comptroller & Auditor General of India*, (2008) 151 DLT 261.

⁴ Article 141– Law declared by Supreme Court to be binding on all courts– The law declared by the Supreme Court shall be binding on all courts within the territory of India.

In the judgment, the Supreme Court relied to a great extent, upon CEDAW⁵. Ordinarily, mere adoption or ratification of an international treaty or convention by the Government does not automatically become part of the law of the land. A due procedure is to be complied with for it to acquire the status of law which along with various other requirements and formalities includes drafting and passing of the bill by the Parliament⁶. Till that time, that treaty or convention simply remains an international commitment of Government of India without necessarily having any national ramifications. These procedural formalities act as barricades in the path of direct absorption of such international conventions, even if ratified by India, in the local legal system. The Apex Court broke all these shackles, creating history thereby, when it held that if any such commitment is made by the Government at any international forum, it shall be binding on it even within the country and the same shall be treated as part of the national law unless there is a law, already in existence within the country, which is in direct conflict with such a law. In the later case, the international convention could not be treated as part of the Indian law till such law was either amended or replaced by the legislature.⁷

As far as guidelines in *Vishaka* are concerned, things went on smoothly since there were no local laws in existence dealing with the issue of sexual harassment at workplace. In the light of these facts and circumstances, the Supreme Court laid that the international commitment undertaken by the Indian Government by ratifying CEDAW shall be treated as an integral part of the law of the land.

The Supreme Court explained its position by stating that it was not an attempt by the Apex Court to encroach upon the legislative function by trying to create law. Rather, it was, by this judgment, simply declaring the existing law so as to fill up the void in the national juridical framework and the same shall be applicable or valid till the legislation embarks on the exercise of drafting a law on the issue⁸.

⁵ Convention on Elimination of All forms of Discrimination Against Women 1979.

⁶ Article 247, The Constitution of India.

⁷ *Supra* n.2.

⁸ *Ibid.*

III. POST –VISHAKA PERIOD

After 1997, the guidelines in *Vishaka* continued to be the law, on the issue, required to be followed throughout the nation. These guidelines appeared as silver lining in the clouds of national legal horizon, enabling the victims of sexual harassment, especially students from universities and colleges, to break the shroud of silence, raise their voice to bring private woes suffered by them into public arena and demand for appropriate action against the menace. By then, response of the employers including university authorities, in such cases, by and large used to be to sweep such cases under the carpet. In rare cases, if the victim dared to raise voice against the perpetrator, the authorities often victimized the complainant further, on false and frivolous allegations.

These unique guidelines had a steady impact as it coerced, to certain extent, government departments and few educational institutions to adopt and implement the same by setting up complaints committees. Moreover, these guidelines along with various concerned ministries, departments and NGOs became the fountain-head of awareness generation spearheading the movement for demand of a specific legislation on this sensitive issue.

Years after *Vishaka* judgment was pronounced, the government neither took any initiative to bring any legislation nor devised any regulatory mechanism, as such, for proper implementation of the guidelines. Supreme Court's extraordinary initiative of evolving those guidelines was not only being violated grossly but was being widely disregarded. Neither the employers, whether private or public, bothered to set up Complaints Committees nor any legislative body woke up to amend the existing service rules as desired by the Supreme Court in the said judgment. The scene was equally dismal and gloomy in those public sector organizations as well, where such committees, though set up, did not function properly and effectively.

IV. CONTRIBUTION OF NGO'S

The *status quo* might have continued for longer but for the prudence of few spirited souls and handful of women and civil society organizations, who having analyzed the situation and grasping the intensity and gravity of the matter, took up the cause with great concern and seriousness. These organizations not only publicized this social issue to create awareness

amongst the masses but also pushed hard for the creation and implementation of legislation on the subject at an early date. Increased fervour of protest towards the issue was vividly felt. Coverage and importance by media also brought the matter to limelight.

Meanwhile, another pronouncement by the Supreme Court came as a ray of hope in such depressing and gloomy scenario expanding the scope of these guidelines further. It not only added new dimensions to the movement but also helped it to scale newer heights⁹. The court in this case not only accepted the definition of 'sexual harassment' as laid down in *Vishaka* but went on to determine the content of the sexual harassment, holding that 'any action or gesture which, whether directly or by implication, aims at or has the tendency to outrage the modesty of a female employee, must fall under the general concept of the definition of sexual harassment'¹⁰.

It was almost at the same time when National Commission for Women took up the much-awaited task of formulating a comprehensive legislation to deal with the menace of sexual harassment at work place. The task of drafting a bill was handed over to a group of civil society activists and members of certain NGO's who finally in August 2001 drafted a bill that was submitted to the Ministry of Human Resource Development, Department of Women and Child Development, Government of India, that amended it further. Suggestions were also invited from the interested public-spirited organizations, individuals and the public at large. The draft was widely circulated and discussed by and amongst various women rights organizations. The National Commission for Women also conducted regional as well as national consultations with various groups so as to analyse the bill as precautionary measure. As a result, it instead of being a criminal bill moved to its current form of a bill with civil remedies¹¹.

A drafting committee comprising of lawyers, NGO members and activists from across the country was constituted by NCW to consider and review the alternate draft prepared by the women organizations. A final draft

⁹ *Apparel Export Promotion Council v. A.K. Chopra*, AIR 1999 SC 625.

¹⁰ Venkat Iyer, *DEMOCRACY, HUMAN RIGHTS AND THE RULE OF LAW* 142 (Butterworths, New Delhi, 2002).

¹¹ *The Protection of Women Against Sexual Harassment at Workplace Bill, 2007; Annexure A*

of the said Bill was prepared after incorporating relevant suggestions and recommendations and was submitted again to the Department of Women and Child development, Government of India, for final approval.

The Sexual Harassment of Women at their Work Place (Prevention) Bill, 2003 *prima facie* appeared to be a modified and improved version but was still inadequate on certain aspects. Many women organizations expressed serious reservations regarding many of its provisions and even anticipated backfires like employers refraining from hiring women at all. Taking note of the same, the bill was re-worked by a drafting committee convened by the NCW, with the membership of women's groups.¹²

V. THE TURNING POINT

In the meantime, an incident of sexual harassment proved to be a turning point in the entire episode when in MS University, Baroda, a girl student was sexually harassed by a Professor. The protests by the victim generated a lot of hue and cry and few women organizations, in her support, wrote condemnation letters to the Chief Justice of India. Treating one such letter by Dr. Medha Kotwal of 'Aalochana' as Writ Petition, the Supreme Court issued notices to the Central Government, all State Governments and the Union Territories to report to it, the steps and measures taken by them in furtherance and compliance of the *Vishaka* guidelines. Every government, in question, filed an affidavit stating various steps and measures taken by them to implement the guidelines. The court then asked the petitioners and other organizations to file a rejoinder stating the charges / additions, if any, to the said guidelines. A nation-wide process of discussion and debate was further initiated so as to enable the Governments to prepare rejoinders to be submitted in the said case. To ensure national participation in strengthening the guidelines, a series of consultations were organized afresh, which ultimately brought positive results. The Supreme Court, in this matter, passed very significant interim order in May 2004, declaring thereby, the Complaints Committee under *Vishaka* to be the disciplinary body in cases of sexual harassment and that the enquiry conducted by such Complaints Committee would be final. The Apex Court also held that an

¹² B.P.Singh, HUMAN RIGHTS IN INDIA; PROBLEMS AND PERSPECTIVE (Deep & Deep Publications Pvt. Ltd., 2004.)

employer can punish or acquit the accused based on reports of panels without any further inquiry. When *Medha Kotwal's* case came up before the Supreme Court for further directions, the Solicitor General of India made a statement on behalf of the Central Government that the Government was extremely serious in bringing and enacting a law on the subject and pleaded for grant of some time so that the organizations could study the draft Bill and make appropriate and suitable recommendations. This plea of the government was accepted and the case was adjourned.

Expressing grave concern over non-implementation of its judgment relating to sexual harassment at work place, the Supreme Court directed the chief secretaries of all the states to inform it whether they have set up Committees in all the departments and institutions, having over 50 staff members, to deal with such complaints¹³. The bench also pointed out that the number of complaints received and the steps taken by the respective government in these complaints were not mentioned. It was further held.

[w]omen have now to work under the most disadvantageous service conditions in certain establishments and cases of their sexual exploitation are also increasing day by day. Working women are very often sexually harassed at the work places by their male employers, bosses, colleagues and others but these cases are not reported by them quite often for fear of social ostracism, family pressure or reprisal through threats and discriminatory treatment. As a result, the working women often feel insecure at their work places. [T]hough the Supreme Court judgment is there, no law however, has been enacted to deal exclusively with this issue, which is of vital importance for the working women through out the country¹⁴.

¹³ *Medha Kotwal Lele v. Union of India*, WP(Cri.) No.173-177/1999 decided on 26.4.2004. A bench of Balakrishnan and Raveendran JJ. noted that all the states were parties to the proceedings in *Vishaka* Case. It was held that '[t]here must be a state level officer, that is, either the secretary of the Woman and Child Welfare Department or any other suitable officer who is in charge and concerned with the welfare of women and children in each state.

¹⁴ *Ibid.*

Meanwhile, attempts were on to prepare a bill on the subject and to have a general consensus about the same. Due to lack of zeal and vigour, or perhaps due to other vivid political or technical factors, these efforts could not bear fruit and aborted prematurely. After the lapse of previous bills, in March 2006, 'The Sexual Harassment of Women at Work Place (Prevention, Prohibition and Redressal) Bill, 2006' was proposed, which also could not see the light of day and met with the same fate as of its predecessors.

Finally 'The Protection of Women Against Sexual Harassment at Work Place Bill, 2007' was brought with further improvements, modifications and more lucid and effective objectives. Unlike the previous bills, this one defines 'sexual harassment' in a more wholesome and comprehensive manner. The definitions in the Act symbolizes how constant toil, relentless efforts and workouts by activist organizations, NGO's, Government departments and suggestions/ comments of public spirited persons along with the precedents of apex court cumulatively culminate in a more meaningful legislation being proposed at the end of the day.

This model draft appears to be more in tandem with the demands of the present day society. Moreover, the bill symbolizes India's commitments under the United Nations 'Convention for the Elimination of all forms of Discrimination Against Women' (CEDAW) and its acceptance, if made, of the recognition of women's basic rights as human rights that was included in the Vienna Accord 1994 and the Beijing Women's Conference 1995.

VI. ANALYSIS OF 'THE PROTECTION OF WOMEN AGAINST SEXUAL HARASSMENT AT WORK PLACE BILL, 2007'

This bill titled, 'The Protection of Women against Sexual Harassment at Work Place Bill, 2007', unlike its predecessors, is objective, comprehensive and precise. The bill is preventive and remedial in nature for the cases falling within the definition of sexual harassment as provided and connected or incidental matters. Hence, this is a unique welfare legislation dealing with the sensitive issue which is not dealt with by any previous legislation.

(i) Definitions

The definitions of various terms used in the Bill have been provided in the clauses (a) to (l) of section 2.

Section 2(a) defines an ‘aggrieved woman’ as any woman employee, facing sexual harassment of any sort at her workplace. More often than not, in common parlance, the term ‘victim’ is used for such woman just like in the case of any other form of gender-based violence.

It is pertinent to mention here that the criterion of an aggrieved woman under the pending bill is the existence of such a relationship between the victim and the perpetrator that should qualify to fit into ‘employer-employee’ relationship.

The use of the term ‘aggrieved woman’ itself makes it aptly clear that it is very much like any other woman specific legislation and that the contours of the bill do not aim at any other type of harassment except the most prevalent form of it where undoubtedly the female happens to be the aggrieved party. Moreover, such woman may be senior in status as well since, as such, no restriction has been imposed that aggrieved woman employee has to be inferior in status as compared to the perpetrator.¹⁵

If the intention of the makers would have been to broaden the horizons of the proposed bill so that it may also cover men facing sexual harassment or an altogether distinct but rare category, that is, the same sex harassment, then the appropriate term to define the victim would be the ‘aggrieved person’ or ‘aggrieved party’ in that situation.

Section 2(b) prescribes for the definition of ‘Appropriate Government’ and submits that it can be either the Central Government or the State Government. Definitions of Chairperson, Committee and District Officer has been provided in Clauses (c), (d), and (e) of Section 2 respectively.

Section 2(f) defines “employee” as any person who is employed at any workplace working on temporary, regular, ad-hoc or daily wage basis. Modes or forms of appointment find mention in the same sentence, which is, either directly or through some agent including a contractor, may be with or without the knowledge of the principal. The said definition further takes into consideration monetary implications, that is, the person so employed would be an employee even if the work done by him remains unpaid, is

¹⁵ *Saurabh Kumar Mallick v. The Comptroller & Auditor General of India*, (2008) 151 DLT261.

voluntary or involuntary type of initiative. The terms of employment may be either explicit or implicit. The definition also includes a domestic worker, a co-worker, a contract worker, probationer, trainee, and apprentice or by any other name called.

Thus, irrespective of the designation, terms of employment, financial implications, nature of work and mode of appointment, any person so employed shall be covered under the definition of employee.

The 'employer' is defined in Section 2(g) of the Bill. As per the definition, in relation to any department, organization, undertaking, establishment, enterprise, institution, office, branch or unit of the appropriate government or a local authority, the head of the department of such place would be considered as the employer for the purposes of this Bill. The focal point here is that the word used here is 'head' of the department or organization that may include supervisor; manager or any such officer as may be specified by the Government or local Competent Authority. The said officer should not only be responsible for the management of affairs of the company or organization but should head the organization/ department in the capacity of chairman, director, or chief executive of that unit.

The definition of employee under the proposed legislation is too vast and in an attempt to be exhaustive, it becomes vague and ambiguous and as such renders the same ineffective, exposing its weaknesses and grey areas. To establish the relationship between the employer and employee, although consideration plays an important role but even in the absence of consideration, as per this provision, there may exist such relationship of employer and employee between the harasser and the victim. The existence of such relationship of employer and employee may be an important factor but it should not be the sole criterion as there may be situations that sans few of the requisites mentioned above.

Hence, the real test should be the nature of the job and/ or terms governing their mutual relationship. Moreover, one party by virtue of its status or relationship with the other party is in such a dominant position so as to exercise undue influence over that other party, thereby, indulging in such a behavior that may fall within the definition of sexual harassment. Probationers, trainees, apprentices and students are few such examples who are the worst sufferers. Umpteen numbers of cases are being reported from the education

sector on daily basis about the victimization of the students by the teacher but no specific provision has been incorporated in the Bill in this regard.

The phrases 'Person working on a voluntary basis or otherwise', 'type of voluntary work' and 'the nature of job' need elaborations since the same have not been explained satisfactorily.

Section 2(l) defines 'work place' as any department, organisation, undertaking, establishment, enterprise, institution, office, branch or unit which is established, owned, controlled or wholly or substantially financed by funds provided directly or indirectly by the appropriate Government or the local authority or a Government company or a corporation or a co-operative society. Further, the definition also brings any private sector organisation or a private venture, undertaking, enterprise, institution, establishment, society, unit or service provider carrying on commercial, professional, vocational, educational, industrial or financial activities including production, supply, sale, distribution or service within its ambit.

No definition of 'work place' was provided either in the Conduct Rules devised by NCW or in the decision of the Apex Court in *Vishaka's* case. As per the Dictionary meaning, Workplace is a person's place of employment of work setting in general.¹⁶ Place of employment is further defined as the location at which work done in connection with a business is carried out; the place where some process or operation related to the business is conducted.¹⁷

The test laid down by the Tribunal in *Saurabh* case is that of proximity from the place of work and control of the management over such residence with further rider that such residence has to be an extension or a contiguous part of the working place to come within the ambit of workplace. The proximity from the place of work and the control of the management over such residence where working woman is residing is relevant and determining factor. Any incident of sexual harassment would *ipso facto* bring it within the definition as if the misconduct of sexual harassment has taken place in the workplace. The definition of workplace cannot be generalized to include all residences within the meaning and ambit of workplace, as it would lead

¹⁶ BLACK'S LAW DICTIONARY, 8th Edition, Thomson West, 2004, p.1638.

¹⁷ *Id.* at 1187.

to an absurdity and also an anomalous situation, which may be chaotic due to the fact that sometimes an employee resides in his own arranged accommodation far from the workplace. Another instance is of Government pool accommodation away from the workplace. In such an event, any sexual harassment of working women would not come within the ambit of a workplace.

The Tribunal was, thus, of the view that it was not necessary that a workplace would be only a place where actually office work is performed. Any extension of place of work or any institution whether a hostel or a mess where the employer has control over management would be treated as workplace by giving wider connotation of the expression. The precise test on the basis of the aforesaid discussion is formulated in the following words:-

.....The test of a workplace is that the place where sexual harassment has been alleged is a place in the proximity of working activity and under immediate control of the employer, relating to which affairs have been managed by the Government

Each incident of sexual harassment in the context of workplace has to be determined in its facts and circumstances. At the same time, definition of workplace cannot be generalized to include all residences within the meaning and ambit of workplace, as it may lead to absurdity. The Tribunal has itself observed that the notion of workplace would not extend to those accommodation, which may be even government pool accommodation but far away from the workplace. The test laid down to determine a particular place is workplace or not, as per the Tribunal, are the following:-

- (a) Proximity from the place of work;
- (b) Control of management over such place/residence where working woman is residing; and
- (c) Such a 'residence' has to be an extension or contiguous part of working place.

The aforesaid parameters laid down by the Tribunal would only provide general guidelines and would not be determinative factors. It is difficult to define the term 'workplace' in straight jacket and as mentioned above, in the facts and circumstances of each and every case one will have to determine as to whether a particular place where the alleged incident

happened can be treated as workplace or not.¹⁸

A dwelling house or any place visited by the employee arising out of or during and in the course of employment also amounts to a workplace as per the definition in section 2(l) of the Bill which is very much in consonance with the latest judgment of the Delhi High Court¹⁹.

Despite the fact that the ambit of the definition of workplace has been widened enormously so as to enable it to embrace every possible sector and place; yet there is enough scope that it can be enriched further.

Moreover, some of the major victims of sexual harassment are service beneficiaries (who do not fall within the definition of employees) such as students in educational and research institutions, patients in hospitals, customers in banks etc. The bill though includes these in a peripheral manner, does not focus on such victims. Thus, there is a scope to amend the definition further, so as to cover these crucial areas that do not find a mention in the present definition.

It may be pointed out that section 2(l)(iv) appears quite ambiguous as it includes the phrase 'any place' which is of wide amplitude and may bring market, third party's residence/ work place or corridors of metro, airport, bus stop or railway station in to its sweep²⁰. This renders it rather impossible to establish or measure the extent of relationship and confuses the distinction between the harassment by employer or by any visitor at work place or any other place visited by the employee in the course of employment. The same should be refined further by incorporating relevant words or phrases so as to restrict the possible numerous interpretations.

Another important aspect of the definition of 'workplace' is that unorganized sector has also been included. It simply means that all private unincorporated enterprises including own account enterprises engaged in any agriculture, industry, trade and/or business sectors are covered so as to widen the scope of the Bill and extend the security provided by these provisions to a large number of employees working in private sector. All

¹⁸ *Supra* n. 15.

¹⁹ *Ibid.*

²⁰ Section 2 (l) (iv) includes any place visited by the employee arising out of, or during and in the course of, employment.

possible sectors have been illustrated in the Schedule²¹ appended at the end of the proposed Bill.

Section 2 (l) (v) lays down the definition of 'unorganized sector' and again the definition is too exhaustive to cover every possible enterprise like agriculture; construction; handloom; fish, poultry and animal husbandry; tea, coffee, rubber, cashew plantation, processing, horticulture and sericulture; forest and allied activities, tree climbing, coir, home based work; vendors; handicrafts, services (traditional & modern); shops and establishments; transport & allied; salt pans; small scale and cottage industries; domestic; loading unloading goods sheds, yards, markets and tailoring etc.²² Though the framers have tried to rectify the lacunae from the previous bills on this subject by bringing every possible unorganized sector in to its sweep but this exercise has rendered it complicated and bulky. Hence the definition should be made more simplified and aptly clear by earmarking those areas which may fall within the definition of workplace.

(ii) Prevention of sexual harassment at work place

Section 3 provides for prevention of sexual harassment at work place²³. The bill has more or less, adopted the definition given in *Vishaka* that was initially taken from CEDAW, which is rather an inclusive definition and does not claim to be exhaustive one. It not only covers preferential and detrimental treatment in employment but also covers implied or overt threat about the present or future employment status, *quid pro quo* and hostile work environment and every kind of humiliating conduct causing

²¹ Schedule of the Bill.

²² *Ibid.*

²³ Sec.3. No woman employee at a work place shall be subjected to sexual harassment including unwelcome sexually determined behavior, physical contact, advances, sexually coloured remarks, showing pornography, sexual demand, request for sexual favours or any other unwelcome conduct of sexual nature whether verbal, textual, physical, graphic or electronic or by any other actions, which may include, -

- (i) implied or overt promise of preferential treatment in employment; or
- (ii) implied or overt threat of detrimental treatment in employment; or
- (iii) implied or overt threat about the present or future employment status;
- (iv) conduct which interferes with work or creates an intimidating or offensive or hostile work environment; or
- (iv) humiliating conduct constituting health and safety problems.

health and safety problems. This section aims at preventing any kind of such behaviour which violates the dignity of working woman.

(iii) Constitution of internal complaints committee

Chapter II of the Bill contains sections 4 to 6 where the constitution of internal complaints committee and local complaints committee has been dealt with.

Section 4 talks about the constitution of the Internal Complaints Committee. Use of word 'shall' makes it mandatory and obligatory for the employer to form such a committee. The proviso to clause (1) of Section 4 explains it further that if the offices or administrative units of the workplace are located at different places or divisional or sub-divisional level, the Committee shall be constituted at all administrative units or offices.

Such committee should comprise of a Chairperson, from amongst employees, who shall be a senior level woman, committed to the cause of women. In case a senior level woman employee is not available, the Chairperson shall be appointed from a sister organization or a non-governmental organization, not less than two members from amongst employees committed to the cause of women or who have had experience in social work; one member from amongst such non-governmental organisations or associations or other interests committed to the cause of women, as may be specified.

The proviso to the said clause makes it clear that at least fifty per cent of the members so nominated shall be women.

Clause 3 of the said Section specifies the tenure of the Chairperson and every member of the Committee that shall not exceed in any case three years from the date of their nomination as may be specified.

Clause 4 of the Section provides for allowances or remuneration of the Chairperson and members of the Committee that they shall be entitled to such allowances or remuneration as may be prescribed.

The last clause 5 of Section 4 provides that in situations where the Chairperson or any member of the Committee contravenes the provisions of section 14, such Chairperson or member, as the case may be, shall be removed from the Committee and the vacancy so created or any casual

vacancy shall be filled by fresh appointment in accordance with the provisions of this section.

(iv) Appointment of district officer

Section 5 provides that the appropriate Government may appoint a District Magistrate or Additional District Magistrate or the Collector or Deputy Collector as a District Officer for every District. This provision talks about appointment of a District Officer, as explained, in every district so as to carry out the functions of the bill. No fresh appointments are to be made as far as the district officer under the bill is concerned. Those who are already serving the government on the prescribed posts are to be designated as district officers. It is not specified whether such officers are to be given additional charge or called on deputation and the same may be decided as per the directions of the competent authority in this regard.

The complaints committee under *Vishaka* was the disciplinary body in cases of sexual harassment and the enquiry as conducted by this committee would be final. Internal complaints committee has been held to be the competent enquiry authority by the Apex Court.²⁴

(v) Constitution of local complaints committee

Section 6 deals with the constitution of local complaints committee in every block in those situations where constitution of the Committee under sections 4 and 5 is not possible or practicable or where the complaint is against the employer himself. Section 6(2) of the Bill provides for the Constitution of such committees that shall have four members including Chairperson and three members in the manner as detailed hereunder:

One Chairperson, mandatory to be a female, nominated by the Government dedicated to the cause of women. One member, nominated by appropriate Government from registered trade unions or workers associations functioning in that block. Two other members, of whom at least one should be a female, to be appointed from some NGO's or associations or other interests, committed to the cause of women, as may be specified.

Clause (3) provides for the term of appointment which should not exceed a period of three years from the date of appointment.

²⁴ *Medha Kotwal Lele v. Union of India*, Writ Petition (Cri.) No. 173-177/ 1999.

Remuneration of the respective members of the committee, as prescribed, is dealt with in clause (4) while jurisdiction of the committee is provided in clause 5. Clause 6 of the section 6 provides that a fresh appointment shall be made, in case, if any of the members including the chairperson of the committee contravenes provisions of section 14 of the bill.

(vi) Mechanism of filing a complaint

The *locus standi* of filing complaint in such cases has been relaxed and the aggrieved woman can herself make a complaint or if not feasible due to some reason, can lodge complaint through her legal heir or such 'other person as may be prescribed'. The phrase 'such other person' in this provision leads to absurdity and ambiguity, as the same requires some explanation to enable one to understand the intention of the legislature in this regard²⁵.

(vii) Conciliation.

The bill proposes to empower the committee to take steps to settle the issues through conciliation²⁶. It is a welcome move so as to avoid unnecessary litigation specifically in those cases where misunderstanding or clash of egos or lack of communication and other related but unresolved issues are the real causes behind such complaints. Sometimes talking sternly to the perpetrator or a warning may sort out the cases. At the same time, it should be ensured that it would be resorted to only at the request of victim otherwise that warning may prove fatal or a death blow for that relationship, thereby, adding to the woes.

In those cases, where conciliation as per section 8 is not arrived at or any term or condition of the conciliation arrived at has not been complied with by the respondent, as per the information provided by the aggrieved woman, the Committee or the Local Committee shall proceed to make inquiry into the complaint²⁷. The said Committee is empowered in this regard. Such enquiry should be completed within a period of 90 days and if, due to any reason could not be completed within the specified period, the District Officer or the employer may take such actions as may be prescribed.²⁸

²⁵ Section 7.

²⁶ Section 8.

²⁷ Section 9.

(viii) Recommendations of the committee

On a written request made by the aggrieved woman, the Committee, while the enquiry is pending, may recommend for the transfer of either the aggrieved woman or the respondent or grant leave or any other relief to her as may be prescribed.²⁹ On the recommendation of the committee, the employer or the district officer may take such necessary action as deemed proper. Again, the phrase 'such necessary action' is not supplemented by any explanation. It needs to be pondered over yet again.

(ix) Submission of enquiry report

The Committee shall submit a report of its findings, on the completion of enquiry, to the employer or the District Officer. It shall recommend not to take any action if the allegation against the respondent is not proved. Where such allegations are found to be true, the Committee may make following recommendations to the employer or the District Officer:

- (i) Action for misconduct as provided by the service rules and if such rules not applicable, in the prescribed manner;
- (ii) Compensation to be paid to the aggrieved woman or her legal heirs by the respondent directly or by deducting prescribed amount from his salary.

The employer or the District Officer shall act upon the recommendations within a period of 90 days. He may alter the recommendation, in consultation with the Committee and the concerned parties. The time period is again 90 days, for the executant authority, to act upon those recommendations.³⁰

(x) Malicious or false complaint

If the complaint or any evidence produced by any witness proves to be false, action is to be initiated by the employer or the District Officer, against the complainant or the witness, as per the service rules applicable or in such manner as prescribed³¹. Provisions for punishment for false or malicious complaint or false evidence have been incorporated in section 12

²⁸ *Ibid.*

²⁹ Section 10.

³⁰ Section 11.

³¹ Section 12.

which would not only deter frivolous complaints but at the same time may have deterrent effect for the genuine witnesses or/ and on the complainants who may not gather enough evidence to prove her case.

(xi) Compensation for the victim

Section 13 of the Bill prescribes the factors to be considered by the committee while determining the amount of compensation for the victim³². The committee would be required to consider the mental trauma, pain, suffering and emotional distress suffered by the victim as well as the loss in the career opportunity due to the incident of sexual harassment. Medical expenses, if any, incurred by the victim for physical or psychiatric treatment need to be considered. The Bill further provides for taking in to consideration the income and financial status of the perpetrator and feasibility of such payment either in lump sum or in installments.

All the factors mentioned above are material and relevant so as to determine the extent of loss and enable the Committee to decide a reasonable amount as compensation.

(xii) Maintenance of confidentiality and privacy of the victim

The identity and addresses of the aggrieved woman, respondent and witnesses, any information relating to conciliation and enquiry proceedings, recommendations of the Committee or the Local Committee, as the case may be, and the action taken by the employer under the provisions of this proposed Act shall be kept confidential. Only the information regarding the justice secured to any victim of sexual harassment may be disseminated without disclosing the identity and address of the aggrieved woman, respondent and witnesses³³. The provisions of Right to Information Act remain inapplicable to such proceedings.

(xiii) Penalty for violation of section 14

If the confidential information is disseminated or made public, as prohibited under section 14, the responsible person shall be liable for penalty, in accordance with the provisions of the service rules applicable to the said person or where no such service rules have been made, in the prescribed manner³⁴.

³² Section 13.

³³ Section 14.

³⁴ Section 15.

(xiv) Appeal

The provision for appeal for the aggrieved by any order passed under any of the above provisions find place in section 16 of the said bill, 2007. This is in consonance with the provisions of the service rules applicable to the said person or where no such rules exists, in such a manner as may be prescribed³⁵.

(xv) Duties of the employer

The employer is entrusted with certain duties under Section 17. It is duty of the employer under this Act to provide a safe working environment at the workplace. The office order as regards to the constitution of sexual harassment Complaint committee should be displayed at any conspicuous place. Workshops and training programs to sensitize the members should be conducted from time to time. He should not only provide necessary facilities to the Committee or the Local Committee, as the case may be, to deal with the complaint and conduct enquiry; but also ensure the attendance of respondent and witnesses before that Committee. He should make available complete information, with regard to the complaint, to the Committee.

Sections 18 to 22 contain miscellaneous provisions on various other related issues.

(xvi) Preparation of annual report

The Complaint Committee shall prepare an annual report, as prescribed, and submit it to the employer³⁶.

(xvii) Record of cases

Every year, whatever cases on the subject were filed or judgments were delivered under this Act, shall be mentioned in the annual report by the employer³⁷.

(xviii) Furnishing information to the government

In the interest of the public or the women employees at a work place, the government may ask the employer or district officer to furnish in writing the relevant information about sexual harassment and authorize any officer

³⁵ Section 16.

³⁶ Section 18.

³⁷ Section 19.

to inspect the records in this regard. Such authorised officer shall submit a report on the completion of inspection within the prescribed period. It is the duty of employer and district officer to make available all relevant information, records and other documents in their possession which may be needed to carry out such inspection.³⁸

(xix) Punishment

Section 21 of the proposed bill provides for the penalty clause and prescribe punishment for the employer or the district officer in case of their failure to constitute the committee as per the requirement of section 4 (1) or to take action under section 11, 12 or 19. This section also prescribes punishment for the contravention and attempt or abetment to contravene the other provisions of the Act or the rules made there under. In such cases the employer or the district officer shall be punished with fine which may extend to Rupees ten thousand.

(xx) Rules making power

Section 22 of the proposed bill is an enabling provision that gives rule making power to the central government. The central government may by notifications in the official gazette make rules to carry out the provisions of the bill. However the power of the central government is restricted by clause 2 of section 22 whereby the area of making rules by way of notifications is specified. The central government has been empowered to make rules with respect to the allowances, remuneration to be paid to the chairperson or the members of the committee. The central government, further, would be empowered to make the rules with respect to the making of complaint, the enquiry thereof, the action to be taken by the employer or the District officer, the relief to be recommended or the manner of action to be taken under various provisions of the Act, for filing of appeal and rules with respect to the annual report to be prepared by the committee.

Sub section 3 of section 22 of the Act provides that the rules made by the central government would be tabled for at least 30 days before both the houses of the Parliament when the same is in session or for two or more consecutive sessions taken together and as such, the rule making power given to the central government is not absolute but subject to the scrutiny

³⁸ At least 15 such complaints were reported in various newspapers in 2007 from various educational institutions and universities through out the country.

by the both houses of the parliament and approval or modifications therefrom without prejudice to the validity of anything previously carried out under such rule.

Sub Section 4 of section 22 in the similar fashion provides for placing the rules made under this Act by the State Government before both houses of the legislature or where there is only one house before such house for the scrutiny or modifications, if any.³⁹ However it is ironical that while the enabling provision under section 22 of the proposed bill vests the rule making power only in the Central Government, at the same time, sub section 4 of the same section speaks about the rules made by the State Government. As such there is no provision in the proposed legislation delegating such power or authority in the State Governments. Thus, the provisions of the Bill are ambiguous and would raise questions with regard to the constitutional validity of the rules so made by any such state government.

VII. ISSUES TO BE ADDRESSED BEFORE ENACTMENT

The bill contains many ambiguities and omissions that need rectifications and improvements to avoid any controversies that may crop up later after its enactment such as:

- There is widespread sexual harassment indulged in by professionals such as doctors, lawyers and others which not necessarily be at work place but at any other place where inter or intra professional relationship may exist. For instance, a lawyer may be harassed by an entirely unrelated lawyer in the court premises. It may be the situation faced by a young doctor or nurse or chartered accountant or a manager. Provisions addressing such issues are needed to be incorporated with the idea that at least statutory bodies, for example, Bar Council of India, Medical Council of India or All India Council for Technical Education (AICTE) etc. start treating it as professional misconduct. Since professionals do not fall within the definition of either employer or employee, they cannot be removed, suspended or dismissed. Moreover, they are governed by their respective Codes of Conduct. Hence necessary amendments may be made in their

³⁹ J. S. Verma, J., in second annual convention of Women Power Connect, A national organization of women's group. Available at www.indianexpress.com, Posted Online, Aug. 18, 2007.

respective legislations. Myopic vision in this regard may prove to be fatal.

- It is trite to say most women who are subjected to sexual harassment or molestation have to undergo a harrowing time while being cross examined when irrelevant questions pertaining to their past sexual history are asked. The present bill does not extensively deal with the protection of such victims during interrogation or cross-examination.
- Educational Institutions have, so far, not been included under its ambit where from the maximum numbers of complaints have been reported in the recent past.⁴⁰
- In case of unorganized sectors, appropriate bodies have not been identified to judge employer – employee relationship or to determine who will be the person carrying out these duties for women employed in such sectors.
- Armed and Para military forces have not been brought under the ambit of this law.

Justice J. S. Verma, who penned the *Vishaka* judgment, severally criticized the bill for its vague and loose definitions⁴¹. He said, “it’s been exactly a decade since the judgment was passed on August 13, 1997, but the present Bill does not seem to have improved upon it any way,” adding that the bill of this nature should stress on prevention rather than punishment. Displeased with the lack of implementation of the mechanisms for sexual harassment, Justice Verma said that it was imperative that any new legislation should also include a “monitoring mechanism” to check on the constitution and functioning of the complaints committees. It is evident that more than half the complaints submitted to the committees were rejected by the ‘preliminary enquiry’. The new legislation has to ensure that such means can not be adopted to deny women justice.⁴² With the bill in its present form, most women will not have the confidence of raising their voice against

⁴⁰ Soma Sen Gupta of SANHITA in second annual convention of Women Power Connect, A national organization of women’s group. Available at www.indianexpress.com, Posted Online, Aug. 18, 2007.

⁴¹ Priyea Narula, in second annual convention of Women Power Connect, A national organization of women’s group. Available at www.indianexpress.com, Posted Online, Aug. 18, 2007.

⁴² *Supra* n.1, at 106-107.

harassment at the work place. The bill has to incorporate these suggestions before it is passed and takes final shape.⁴³

Cynics and analysts apprehend that like other women oriented legislations, this one would also remain mere paper tiger and would not be useful as victimized woman may not like to make their private wounds public and would continue to suffer in silence due to inadequate safety measures for them. Moreover section 12 of the Bill may deter them from filing any case as the victim may not be in a position to prove her allegations. Also, they feel that the Act may be misused and instead of being a tool, it may become a weapon in the hands of the women to victimize their male bosses and colleagues.

As per an ILO publication, while drafting legislation, to provide explicit legal protection against sexual harassment, following elements should be addressed –

“Development and adoption of a nationally accepted explicit definition of sexual harassment”;

“Delineate clearly the liability of the employer and the alleged harasser; provide affirmative duties to act towards the prevention of sexual harassment;

ensure fair, clear and suitable procedures of due process for both accused and claimant covering filing and hearing of complaints, investigations, evidence, burden of proof, protection of confidentiality and privacy;

protection against victimization; provide for wide range of damages, remedies and sanctions that both punish and deter harassing conduct; supplement legislation with guidelines;

[and] establish an administrative body or mechanism with resources and competence to handle complaints and promote application of the law.⁴⁴

⁴³ This is part of the recommendations made by the taskforce on Judicial Impact Assessment (JIA) set up in 2007 as per the Supreme Court Order in the Salem Advocate Case. The taskforce was headed by Justice M. Jagannadha Rao, retired Supreme Court Judge and former Chairperson. Law Commission. The report, given to the law ministry is to be presented to Supreme Court in July 2008. India will be the second country after USA to implement this concept.

⁴⁴ N. R. Madhava Menon, Member, Judicial Impact Assessment, THE TIMES OF INDIA, June 19, 2008.

Few of these important elements remain unaddressed in the proposed legislation such as burden of proof, protection against victimization or retaliation, deterrent provisions and supplemental guidelines.

The increase in work load of courts in implementing new legislation and providing financial support to the judiciary is also to be taken in to consideration.⁴⁵ Further before enacting a new law, three things should be considered i.e. the requirement of additional money, creation of more courts and appointment of additional judges to implement the law.

VIII. CONCLUSION

In the absence of a comprehensive legislation, it had been very difficult for victims of sexual harassment at work place to define her sufferings. Moreover, provisions of none of the existing statutes define and cover it in its real soul and spirit so as to address the issue in a desired manner. Notwithstanding the above, the present bill, unlike the previous bills, is neither incomplete nor hypocritical. It appears to touch this social aberration in a correct manner and approach. Undoubtedly, it looks at the issue of sexual harassment as a human rights issue and right of a woman to work in an environment free of any kind of harassment, discrimination and violence of any kind. The proposed legislation recognizes a social wrong that has for long been socially ignored and indirectly endorsed by not handling such sensitive issue properly or considering it to be a trivial matter.

The bill, if passed with the necessary amendments, would be an apt illustration of a comprehensive legislation which should be welcomed for its progressive spirit and content. It may also act as a weapon in the hands of aggrieved women if implemented with all precautionary measures. It is a sort of social welfare legislation which should be enacted not only for the sake of women but for the progress of the society as a whole. Moreover, it would also help the Government in fulfilling its international commitments under CEDAW.

No society can claim to be developed and civilized which breeds the collective culture of silence and tolerance to such discriminatory conduct.

⁴⁵ Aditi Choudhary, *Protection of Women from Domestic Violence Act, 2005: Balancing Gender Equations*; XXVII DELHI LAW REVIEW 2005, p.115.

If implemented with true spirit and force, it can be said without any reservations that it will be able to attain its objectives and will have positive and wider impacts for the positive growth of the country, society and humankind as a whole. Such a law will at least be a starting point for a long-term battle against sexual harassment.

The bill outlawing the sexual harassment in the work place has been making rounds in various interactions for years, buoyed by the 1997 landmark case but it has failed to catch Parliament's eye yet again this past year. There has been no further indication by the Parliament as yet whether the bill would be tabled in the current session of the Parliament. The country must wake up from the deep slumber and enact legislation in this area with a strong and effective implementation mechanism so that avalanche of crime against women could be curbed. Moreover, adaptability is truly a condition *sine qua non* of the continued existence of a legal system.⁴⁶ When the behaviour of people has moved away from the law, with a sufficient degree of permanence, tensions arise with varying results. In such cases, the law itself may be stretched to take account of the development... [I]n these ways, *evolution gives direction to future developments because the purpose of law is to secure justice and not merely to grapple with semantics.*⁴⁷

⁴⁶ R.M.W. Dias, JURISPRUDENCE 305 (4th edition, Butterworths, 1994).

⁴⁷ J.S. Verma, Former CJI, Supreme Court, in Foreword to Markandey Katju, LAW IN THE SCIENTIFIC ERA: THEORY OF DYNAMIC POSITIVISM, (Universal Law Publishing Co., 2000).