

# **NUJS LAW REVIEW**



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PROF. DR. MAHENDRA P. SINGH

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# NUJS LAW REVIEW

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# EDITORIAL NOTE

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## I. INTRODUCTION

Soon after the Delhi rape case that took place in December 2012, the issue of sexual harassment gained prominence from its hitherto silence. A series of complaints of sexual harassment against retired Supreme Court Judges<sup>1</sup> and an Editor of a magazine involved in investigative journalism<sup>2</sup> evoked our legal and social consciousness towards sexual harassment.

Sexual harassment is a form of gender discrimination that undermines dignity, equality of opportunity and treatment between women and men.<sup>3</sup> Patriarchal excesses and fear of stigmatization hinder women in articulating their concerns and redressing sexual harassment.<sup>4</sup> The Indian Penal Code, 1860 ('IPC') provides punishment for offenses such as rape, assault, molestation and eve-teasing.<sup>5</sup> However, terms like 'molestation' and 'eve-teasing' are not explicitly used and remain undefined.<sup>6</sup> Moreover, such a classification of offenses is insufficient to cover acts of sexual harassment.

The need for a separate legislation dealing with the unique characteristics of this offense is well illustrated by the *Apparel Export Promotion Council v. A.K.Chopra* ('Apparel Export Promotion Council case').<sup>7</sup> The case related to a female employee who was sexually harassed by a male senior through unwelcomed sexual conduct that was offensive to her modesty and decency, without actual physical contact. Though it was clear that the employee

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<sup>1</sup> *Law Intern Sexual Harassment Case: Justice AK Ganguly Quits NUJS Faculty, But Denies Allegations*, DNA January 3, 2014, available at <http://www.dnaindia.com/india/report-law-intern-sexual-harassment-case-justice-ak-ganguly-quits-nujs-faculty-but-denies-allegations-1944815> (Last visited on May 8, 2014); *Supreme Court to Hear Case against Ex-Judge*, THE HINDU January 13, 2014, available at <http://www.thehindu.com/news/national/supreme-court-to-hear-case-against-exjudge/article5573065.ece> (Last visited on May 8, 2014).

<sup>2</sup> *Teהלka Case: Tarun Tejpal Charged with Rape, Sexual Harassment*, BUSINESS LINE February 17, 2014, available at <http://www.thehindubusinessline.com/news/tehelka-case-tarun-tejpal-charged-with-rape-sexual-harassment/article5698614.ece> (Last visited on May 8, 2014).

<sup>3</sup> Vishaka v. State of Rajasthan, (1997) 6 SCC 241.

<sup>4</sup> Sheba Tejani, *Sexual Harassment at the Workplace Emerging Problems and Debates*, XXXIX (40) EPW 4491 (2004).

<sup>5</sup> Indian Penal Code, 1860, §§ 376, 351, 509, 294, 354.

<sup>6</sup> See generally Varun Kapoor, Kanika Dhingra, *Sexual Harassment Against Women in India*, 6(10) OIDA INTERNATIONAL JOURNAL OF SUSTAINABLE DEVELOPMENT, 85-92 (2013).

<sup>7</sup> (1999) 1 SCC 759.

had been sexually harassed, the High Court was unable to compartmentalize the act under any of the IPC offenses, leaving the victim remediless. As observed:

“The Division Bench agreed with the findings recorded by the learned Single Judge that the respondent had tried to molest and that he had not actually molested Miss X and that he had not managed to make the slightest physical contact with the lady and went on to hold that such an act of the respondent was not a sufficient ground for his dismissal from service”<sup>8</sup>

In 1999, it was the Supreme Court that stepped in and held the respondent guilty of sexual harassment, thereby reversing the High Court’s decision.<sup>9</sup>

However, sexual harassment was condemned even before the judgment in the Apparel Export Promotion Council case was rendered. Sensitization of the Indian community with respect to the concept of ‘gender justice’ at the workplace resulted in their collective condemnation of sexual harassment. This led to the filing of a Writ Petition, in 1997, before the Supreme Court for the enforcement of fundamental rights of working women under Articles 14, 19 and 21 of the Constitution of India (‘Vishaka judgment’).<sup>10</sup>

The immediate cause for the Writ Petition was a brutal gang rape of a social worker in a village of Rajasthan.<sup>11</sup> There were no legislative safeguards to ensure a safe working environment for women.<sup>12</sup> In order to fill this legal vacuum, the Court set out the famous ‘Vishaka Guidelines’. The basis for these guidelines was found in International Conventions that had been ratified by the Indian Government.<sup>13</sup> Relying on the principles laid down in these Conventions, especially, the Committee on the Elimination of Discrimination against Women (‘CEDAW’), the Court created *sui generis* guidelines for the prevention, prohibition and redressal of sexual harassment at the workplace.

These guidelines recognized the peculiar characteristics of the offense of sexual harassment and provided a broad definition that would encompass any unwelcomed sexual behavior, whether physical or not, that created a hostile work environment.<sup>14</sup> They unequivocally obligated the employer to prevent acts of sexual harassment, to provide procedures for redressal, to prevent victimization of witnesses and victims, to prevent and redress third party

<sup>8</sup> *Id.*, ¶ 9.

<sup>9</sup> *Id.*, ¶¶ 28-30.

<sup>10</sup> *Vishaka v. State of Rajasthan*, (1997) 6 SCC 241.

<sup>11</sup> *Id.*, ¶ 2.

<sup>12</sup> *Id.*, ¶ 1.

<sup>13</sup> *Id.*, ¶ 7.

<sup>14</sup> *Id.*, ¶ 16 (point 2).

sexual harassment and to spread awareness of the rights of female employees.<sup>15</sup> These guidelines were visionary as they emphasized the creation of an internal complaints mechanism within the workplace.<sup>16</sup> Such a mechanism would facilitate women to speak out, make and resolve complaints without having to engage with state machinery and criminal proceedings. Thus, these guidelines set the stage for a legislation which was the need of the hour. However, India would have to wait sixteen long years before this judicial pronouncement could be concretized into a legislation.

Prior to the enactment of such legislation, the issue of non-implementation of the Vishaka Guidelines and its flagrant violation at workplaces was recognized by the Supreme Court in the case of *Medha Kotwal Lele v. Union of India*.<sup>17</sup> The Court reiterated and ordered the implementation of the guidelines in both form and substance.

The legislative vacuum was finally filled in 2013 with the passage of the “The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013” (‘Act’), which has been discussed in depth below.<sup>18</sup> With an enactment in place, it is hoped that offenses of sexual harassment at the workplace will be tackled more efficiently.

## II. SALIENT FEATURES OF THE ACT

### A. SCOPE OF APPLICATION

The Act is broad-based and applies to workplaces both in the organized as well as the unorganized sector.<sup>19</sup> The definition of ‘workplace’ is wide and includes a variety of places including a ‘dwelling house’.<sup>20</sup> Though this definition has remained largely uncontroversial, some have argued that instead of an itemized definition, the Act should have left the definition at “any place a woman is present by virtue of her work” for widest possible coverage.<sup>21</sup>

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<sup>15</sup> *Id.*, ¶ 16 (point 1,3,10).

<sup>16</sup> *Id.*, ¶ 16 (point 6&7).

<sup>17</sup> (2013) 1 SCC 297 (The Court also directed and urged the states to amend their respective Civil Services Conduct Rules to provide that the Report of the Complaint Committee would be deemed to be an Inquiry Report in a disciplinary action against the accused under the said Rules).

<sup>18</sup> TNN, *Parliament Passes Sexual Harassment at Workplace Bill*, TIMES OF INDIA February 27, 2013, available at <http://timesofindia.indiatimes.com/india/Parliament-passes-sexual-harassment-at-workplace-Bill/articleshow/18703412.cms> (Last visited on May 8, 2014).

<sup>19</sup> The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013, §§ 2(p), 2(o), 2(g).

<sup>20</sup> *Id.*, § 2(o).

<sup>21</sup> See Naina Kapur, *Workplace Sexual Harassment*, XLVIII (24) EPW 27, 28 (2013).

More controversial, however, is the application of the Act to the unorganized sector. All the provisions of the Act, including the primary obligations and duties of the employer, as enumerated in § 19; constitution of an Internal Complaints Committee ('ICC'); remedies during and after investigation, apply equally to both sectors. Though well intentioned, the Act fails to recognize the peculiarities and specificities of the unorganized sector.

Structurally, the unorganized sector is largely built on either kinship ties/familial relations or contract/home based labour.<sup>22</sup> In addition to this, systemically, given the power dynamics of this sector, victims may never articulate their concerns or file complaints against perpetrators.<sup>23</sup> Given these structural and systemic limitations, it is unclear how the duties imposed on an employer (who is often a family member) such as the duty to spread awareness etc., will be effectively executed in the unorganized sector.<sup>24</sup>

Structural limitations also impede implementation of some of the core provisions of the Act. For example, even if the inquiry process on a complaint of sexual harassment is initiated, interim remedies such as transfer of the employee may not be effective since the unorganized sector is usually close knit.<sup>25</sup> Additionally, monitoring the implementation of the Act is difficult given the scattered and invisible nature of this sector. This in turn reduces the possibility of punishing an errant employer.

Due to its systemic and structural limitations, the unorganized sector requires a more nuanced strategy to tackle sexual harassment at the workplace.

## B. DEFINITION OF SEXUAL HARASSMENT

Before 1997, sexual harassment was not recognized as a separate offense. India saddled along with the Victorian characterization of sexual harassment, which was limited to “outraging or insulting a women’s modesty”.<sup>26</sup> Not only did the 1997 Vishaka judgment recognize and define sexual harassment as an offense in itself, but also viewed this offense as a constitutional concern.<sup>27</sup> Sexual harassment adversely impacts work performance, women’s work

<sup>22</sup> See Naila Kabeer, *Gender and Trends in the Global Labour Force* in MAINSTREAMING GENDER FOR IN SOCIAL PROTECTION FOR THE INFORMAL ECONOMY 27 (2008); PARLIAMENTARY STANDING COMMITTEE ON HUMAN RESOURCE DEVELOPMENT, *Report on the Protection of Women Against Sexual Harassment At Workplace Bill, 2010*, Two Hundred and Thirty Ninth Report, ¶¶ 3.11 and 6.13, December 8, 2011.

<sup>23</sup> See generally General Conference of the International Labour Organization, *Resolution Concerning Decent Work and the Informal Economy*, 90th Session (2002).

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> Kapur, *supra* note 21, 27.

<sup>27</sup> (1997) 6 SCC 241, ¶¶ 3, 16 (point 2).

progress, work environment and hence hinders fulfillment of the constitutional ideal of equality of opportunity and treatment.

Moreover, the Act signifies a shift in emphasis from criminal to civil law. Given that most criminal offenses have to be proved beyond reasonable doubt, the evidentiary burden was often too high for victims of sexual harassment to discharge. With civil remedies under the Act,<sup>28</sup> the burden of proving sexual harassment is lower.

The Supreme Court defined sexual harassment as:

“For this purpose, sexual harassment includes such unwelcome sexually determined behaviour (whether directly or by implication) as: a) physical contact and advances; b) a demand or request for sexual favours; c) sexually coloured remarks; d) showing pornography; e) any other unwelcome physical verbal or non-verbal conduct of sexual nature.

Where any of these acts is committed in circumstances where the victim of such conduct has a reasonable apprehension that in relation to the victim’s employment or work whether she is drawing salary, or honorarium or voluntary, whether in government, public or private enterprise such conduct can be humiliating and may constitute a health and safety problem. It is discriminatory for instance when the woman has reasonable grounds to believe that her objection would disadvantage her in connection with her employment or work including recruiting or promotion or when it creates a hostile work environment. Adverse consequences might be visited if the victim does not consent to the conduct in question or raises any objection thereto.”<sup>29</sup>

The Act under § 2(n) defines sexual harassment which mirrors the first part of the definition provided by the Supreme Court.<sup>30</sup> Interestingly, however, § 3(2) of the Act begins with the following words: “The following circumstances, among other circumstances, if it occurs or is present in relation to or connected with any act or behaviour of sexual harassment may amount to sexual harassment [...]”<sup>31</sup>

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<sup>28</sup> The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013, § 13.

<sup>29</sup> (1997) 6 SCC 241, ¶ 17 (point 2).

<sup>30</sup> The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013, § 2(n).

<sup>31</sup> *Id.*, § 3(2).

This seems to suggest that the definition of sexual harassment under § 2(n) is restricted to circumstances enumerated under § 3(2). The Standing Committee Report, however, suggests that this section is an addition to § 2(n) and not a restriction.<sup>32</sup> It is hoped that courts will expansively read this section in order to further the objectives of the Act.

Interestingly, in the US, claims of sexual harassment can either be “quid pro quo” or “hostile working environment” wherein the former requires a tangible effect on employment opportunities of the complainant upon her refusal to sexual advances, though the claim of “hostile working environment” is much wider in its ambit.<sup>33</sup> In the Indian context, a plain reading of § 2(n) and §3(2) shows that both claims (quid pro quo and hostile working environment) would be covered under the ambit of the definition.

### C. INTERNAL COMPLAINT COMMITTEE

The mechanism of an ICC was put in place by the Vishaka guidelines.<sup>34</sup> The internal complaints mechanism enhances a woman’s sense of agency and enables her to make and resolve complaints within the workplace itself.<sup>35</sup> This saves her from long and harrowing criminal proceedings.<sup>36</sup> An ICC is seen as a more effective remedy since employers and employees understand the dynamics of a workplace and can better resolve such issues. Further, an inclusive complaints mechanism not only ensures better resolution of disputes but also ensures fair treatment and enhancement of knowledge and experience around workplace sexual harassment.<sup>37</sup>

Under the Act, the ICC is a tripartite body consisting of a minimum of four members including representatives from the employers, the employees and an independent third party member.<sup>38</sup> The third party member was included to bring knowledge, skill and neutrality to the ICC to ensure processes are professionally informed and unbiased.<sup>39</sup> However, with the enactment of the Rules under the Act, the quorum for the ICC is three members.<sup>40</sup> This means an employer may be able to proceed with a complaint even in the absence of a

<sup>32</sup> PARLIAMENTARY STANDING COMMITTEE ON HUMAN RESOURCE DEVELOPMENT, *supra* note 22, ¶ 7.2.

<sup>33</sup> Jenni M. Slaughter, *Sexual Harassment in the Workplace: Examining Title VII and the Elliott-Larsen Civil Rights Act*, available at [https://www.msu.edu/~wlfgr/slaughter\\_j.pdf](https://www.msu.edu/~wlfgr/slaughter_j.pdf) (Last visited on May 8, 2014).

<sup>34</sup> (1997) 6 SCC 241, ¶ 17 (point 7).

<sup>35</sup> Editorial, *Crime by Another Name*, XLVIII(48) EPW 7 (2013).

<sup>36</sup> *Id.*

<sup>37</sup> Kapur, *supra* note 21, 29.

<sup>38</sup> The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013, §4.

<sup>39</sup> Kapur, *supra* note 21, 29.

<sup>40</sup> Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Rules, 2013, Rule 7(7).

third party member. Such disconnect between the Act and the Rules seriously compromises the intention and fair implementation of the Act.

Further, § 6(1) provides for the establishment of a “Local Complaint Committee” (‘LCC’) in cases where the establishment employs less than ten workers or if the complaint is against the employer himself. The composition of the LCC includes a woman Chairperson involved in social work or issues relating to women; one woman member working in the block or municipality of the particular district and two more members, at least one of whom should be a woman, who should also be associated with an NGO or organisations involved in social work.<sup>41</sup>

As seen in the past, though the Supreme Court mandated the setting up of ICCs in public and private workplaces, the implementation and enforcement of these guidelines have been poor.<sup>42</sup> Therefore, merely mandating an ICC may not suffice. Studies have documented five ‘mental blocks’ that managements face in implementing policies against sexual harassment – denial, dismissal, double up, delegation, and danger.<sup>43</sup> There is, therefore, a need to train and sensitize management and members of the ICC to implement and handle cases of workplace sexual harassment.<sup>44</sup> Moreover, internal power dynamics of the workplace will determine the effectiveness of its functioning and it remains to be seen whether the ICC will be able to delineate internal politics from issues of sexual harassment

#### D. PROCEDURE

§ 9 states that a complaint needs to be made by the “aggrieved woman” to the concerned ICC or the LCC as the case maybe, within three months from the date of incident. In case of a series of incidents of sexual harassment, the period of three months shall be calculated from the date of the last incident. The determination of these dates may be problematic as the behavior of the accused may be in various *recurring* forms, ranging from asking for sexual favours to the creation of a hostile environment for the complainant. While the subsequent hostile acts of the accused may still qualify as an ‘incident’ for the complainant, the accused may claim otherwise.<sup>45</sup> This may render

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<sup>41</sup> The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013, §7(1).

<sup>42</sup> See Paramita Choudhari, *Sexual Harassment at the Workplace: Experiences with Complaints Committees*, XLIII (17) EPW 99- 106 (2008).

<sup>43</sup> Anagha Sarpotdar, *Sexual Harassment of Women*, XLVIII (40) EPW 18, 19 (2013).

<sup>44</sup> See Pankaj Sharma, *India’s First Workplace Sexual Harassment Survey Reveals Startling Revelations*, 2010, available at <http://www.release-news.com/> (Last visited on May 2, 2014).

<sup>45</sup> *Sexual Harassment at Workplace: Digging Deeper into the Law*, April 1, 2014, available at <http://indiatgether.org/interpreting-the-sexual-harassment-at-workplace-bill-women> (Last visited on May 8, 2014) (“At the first instance, the woman may not be sure about the unwelcome nature of the behaviour and either ignore it or respond courteously out of compulsion,

it difficult to determine the date or last date of incident and the subsequent calculation of a period of three months. While the ICC or the LCC may extend the time period subject to a period of three months, it may do so based on a subjective evaluation of “circumstances which would have prevented the women from filing a complaint”.<sup>46</sup> However, it is doubtful whether the above mentioned instance would fall under such circumstances. It is pertinent to mention that Justice Verma Committee (rightly) recommended the insertion of “reasonable period of time” rather than a fixed duration of three months for the purposes of fixing the limitation period.<sup>47</sup>

Before the initiation of the inquiry, the concerned Committee can initiate conciliation between the complainant and respondent at the request of the former.<sup>48</sup> This provision has been severely criticized as “it is felt that it undermines the dignity of women”.<sup>49</sup> The Verma Committee observed that the mandate for conciliation is in violation of the Vishaka Guidelines which provides that the state shall ensure “a safe workplace / educational institution for women”.<sup>50</sup> Interestingly the Standing Committee recommended a distinction between ‘minor’ and ‘major offences’ and to provide for conciliation only with respect to ‘minor offences’.<sup>51</sup> While the Act doesn’t incorporate this suggestion, it states that monetary conciliation shall not be the basis for conciliation,<sup>52</sup> which perhaps alleviates the concerns highlighted by the Verma Committee.

Next, §11 makes a distinction for the process of inquiry in cases of domestic workers, wherein the complaint would be forwarded by the LCC to the police for purposes of registering the case under the provisions of the IPC. This is a departure from the internal complaint mechanism envisaged under the Act.<sup>53</sup> Further, this provision may disincentivise domestic workers to

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only to complain at a later date. It is indeed a complex journey influenced by various factors for women to reach a point where they are able to acknowledge and report sexual harassment”).

<sup>46</sup> The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013, § 9(1), Proviso.

<sup>47</sup> JUSTICE J.S.VERMA, *Report of Committee on Amendments to Criminal Law*, 134-135, January 23, 2013.

<sup>48</sup> The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013, § 10(1).

<sup>49</sup> JUSTICE VERMA COMMITTEE, *supra* note 47, 135.

<sup>50</sup> *Id.*, 127.

<sup>51</sup> PRS Legislative Research, *Standing Committee Report Summary: The Protection of Women against Sexual Harassment in Workplace Bill, 2010*, available at <http://www.prsindia.org/uploads/media/Sexual%20Harassment/SCR%20summary%20Sexual%20harassment%20Bill.pdf> (Last visited on May 8, 2014).

<sup>52</sup> The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013, Proviso to §10(1).

<sup>53</sup> *European Commission Justice, Harassment related to Sex and Sexual Harassment Law in 33 European Countries: Discrimination versus Dignity*, available at [http://ec.europa.eu/justice/gender-equality/files/your\\_rights/final\\_harassment\\_en.pdf](http://ec.europa.eu/justice/gender-equality/files/your_rights/final_harassment_en.pdf) (Last visited on May 8, 2014) (It is, of course, only normal that a situation concerning discriminatory harassment –including sex-related and/or sexual harassment – is first dealt with internally at the workplace before any external action whatsoever is taken).

report complaints as they may fear “ridicule and harassment” on complaining to the police.<sup>54</sup> However, such an exception in cases of domestic workers maybe understandable since the place of employment is the domestic sphere, though it is still unclear why the Local Committee itself cannot proceed with the inquiry. In this context, the recommendations of the Verma Committee for the establishment of an “employment tribunal” may be helpful.<sup>55</sup> Though the recommendations radically propose the predominance of such a tribunal over the Internal Complaint Committee (which is a departure from the Vishaka Guidelines itself), such a specialized Tribunal may prove instructive in cases of sexual harassment against domestic workers and other cases which may require the complaint to be registered with the police. Pertinently, §19(h) of the Act provides that it shall be the employer’s duty to “initiate action under IPC” in cases of sexual harassment. As discussed below, it is unclear whether this is a mandatory provision and the manner in which it would be implemented, in light of a specific internal mechanism envisaged under the Act.

Next, §13 provides that after the completion of inquiry within 90 days, the ICC or the LCC as the case maybe, must prepare a Report stating its findings within 10 days from the completion of the inquiry. In cases where the Respondent is found guilty, the act of sexual harassment would be treated as misconduct in accordance with the service rules or the rules prescribed.<sup>56</sup> Further, the Report may also provide for a deduction of an appropriate sum of money from the salary of the respondent.<sup>57</sup> § 15 enlists the factors that need to be considered for the determination of the compensation amount. Interestingly, income and financial status of the respondent is also to be considered, which may defeat the object of the provision relating to compensation in cases wherein the respondent’s financial status is weak.<sup>58</sup> In case the employer acts in violation of the above mentioned provisions, he shall be liable to a fine of Rupees fifty thousand<sup>59</sup>- a sum which may not act as a deterrent, with imprisonment and cancellation of licence in cases of subsequent violation of the provisions.<sup>60</sup>

§19 of the Act also emphasizes upon preventive measures that the employer needs to undertake. It states that the employer “must provide a safe working environment in the workplace”; “organize workshops and awareness programmes” to sensitize the employees etc. However, it is unclear whether

<sup>54</sup> *Domestic Workers in State Exploited, Short-Changed*, TIMES OF INDIA January 24, 2014, available at <http://timesofindia.indiatimes.com/city/hyderabad/Domestic-workers-in-state-exploited-short-changed/articleshow/29272853.cms> (Last visited on May 8, 2014).

<sup>55</sup> JUSTICE VERMA COMMITTEE, *supra* note 47, 130-131.

<sup>56</sup> The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013, §13(3)(i).

<sup>57</sup> *Id.*, §13(3)(ii).

<sup>58</sup> Khushita Vasant, *New Workplace Sexual Harassment Law ‘Already Out Of Date’*, THE WALL STREET JOURNAL, April 29, 2013.

<sup>59</sup> The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013, § 26(1).

<sup>60</sup> *Id.*, § 26(2).

these duties are ‘recommendatory’ or ‘binding’ in nature which in effect would determine the liability of the employer under §26(1)(c) for contravening any provision of the Act.

Further, §14 provides for penalty in cases of “false or malicious” complaints made by the concerned woman. Many fear this provision will be misused against the complainant which, resultantly, would deter them from filing complaints.<sup>61</sup> However, the proviso to § 14 provides a safeguard as “lack of proof” in itself would not amount to ‘false’ or ‘malicious’ complaint. Further, the element of *mens rea* involved in establishing malice or falsity of the claim can act as an inherent safeguard against the misuse of this provision against the complainant.

Despite its shortcomings, it is hoped that the legislation will play an instrumental role in preventing and tackling issues of sexual harassment. Many have advocated for viewing sexual harassment not just as a gender rights violation but also a labour rights violation. Such a characterization will enable trade unions and employee associations to ensure that complaints are made and pressurize employers to constitute effective complaints mechanisms.<sup>62</sup> Instances have shown the *ad hoc* and hurried fashion in which investigations are undertaken by employers.<sup>63</sup> Moreover, the lack of a transparent mechanism of appointing members to the ICC enhances concerns about bias.<sup>64</sup> Including sexual harassment within the dialogue of labour rights with participation of labour unions may result in better implementation of the Act since sexual harassment is intrinsically connected to working conditions and power dynamics. At the same time, the role of unions is limited and their active participation with respect to issues of sexual harassment would require an institutional overhaul. This process could also be hindered since the Act itself bifurcates gender and labour issues. Furthermore, given that female representation in the labour unions is dismal, the effectiveness of this solution remains to be seen.

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<sup>61</sup> Veena Gopalakrishnan & Vikram Shroff, *India's New Law on Prohibition of Sexual Harassment at Workplace*, available at [http://www.nishithdesai.com/fileadmin/user\\_upload/pdfs/Research%20Articles/India\\_s\\_New\\_Law\\_on\\_Prohibition\\_of\\_sexual\\_harassment\\_at\\_the\\_work\\_place.pdf](http://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research%20Articles/India_s_New_Law_on_Prohibition_of_sexual_harassment_at_the_work_place.pdf) (Last visited on May 8, 2014).

<sup>62</sup> See generally Maya John, *Fears and Furies of Sexual Harassment: Time to Go beyond Vishaka*, XLIX (15) EPW (2014).

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

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