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## SEXUAL HARASSMENT LAWS IN INDIA: AN ANALYTICAL STUDY\*

*The world is currently witnessing a massive awakening with the #Metoo movement with India being at the top-most rank, as per the report published by Google Trends. Sexual Harassment at Workplace is a rampant and deep-rooted patriarchy. With the larger influx of women in workforce, Sexual Harassment at Workplace has assumed greater dimensions. In the eyes of law, it is considered as a violation of a woman's fundamental human right to live with dignity and equality guaranteed under Article 14, 15, 19 & 21 of The Constitution of India. The enactment of Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act in 2013 post Bhanwari-Devi case, also known as Vishaka and Ors. v. Union of India case led to a landmark victory for the working women class. The POSH Act aims at preventing such Sexual Harassment at first place and in case such harassment has occurred, it provides for efficient Redressal of complaints by setting up of Internal Complaints Committee, providing compensation and rehabilitation to the victim. In the current research paper, the critical analysis of the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act and the legislative gaps in various provisions of the Act would be discussed. The research paper will also highlight the economic costs of such violence against women along with the legal implications of the #Metoo movement and initiatives of Government of India for combating Sexual Harassment. The research study adopted would be descriptive as well as quantitative research pattern for analysis of economic costs.*

**Key Words:** *Sexual Harassment, Gender Equality, Fundamental rights, POSH Act*

### **Introduction**

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Sexual Harassment Laws in India have a long history. Criminalizing of the offence of Sexual Harassment under Indian laws was done pursuant to 2013. The first reported case of Sexual Harassment in India was *Rupan Deol Bajaj v. KPS Gill*, also known as the The Butt-Slapping Case in which the appellant who was then a Senior IAS Officer alleged that the respondent (KPS Gill), DGP of Punjab molested her and outraged her modesty. In 1988, FIR was lodged under IPC 354 and 509 and in 2005, The Hon'ble Supreme Court upheld Gill's conviction while ordering compensation for the appellant.<sup>1</sup> The court's order acted as the catalyst for change in the legal history of India. The other notable Sexual Harassment cases in India are Tehelka-Tarun Tejpal case, TERI-Pachuri case and the most recent of all, MJ Akbar case. In 2013, Former Supreme Court Judge Ashok Kumar Ganguly was accused of Sexual Harassment charges by his legal intern. Supreme Court set up an internal inquiry to inquire the matter but refused to take legal action against Mr. Ganguly because he had already retired by the time the harassment charges came to light. In the leading case, *Vishakha v State of Rajasthan*<sup>2</sup> Bhanwari Devi, a social worker aimed to curb child marriages in Rajasthan. To seek vengeance, the accused along with 5 men gang raped her and the police too dissuaded on filing the complaint on one pretext or another. They were subjected to harsh cruelty for filing the complaint by the police itself. The trial court acquitted the accused but through her determination and support from social workers she filed a writ petition in the Supreme Court of India. The writ was filed under the name 'Vishakha'. The Hon'ble Court came up with guidelines known as 'Vishakha Guidelines' which formed the basis of The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013.

The Sexual Harassment at Workplace (Prevention, Prohibition and Redressal) Act, 2013 aims at safeguarding women from harassment at their place of work in an exceedingly abundant wider sense. The Bill was drafted by National Commission for Women under the aegis of Ministry of Women & Child Development and came into force in December 2013. The PoSH Act is the country's first comprehensive legislation specifically addressing the menace of Sexual Harassment at work aimed at providing a safe, secure and dignified working environment for women. The PoSH Act aims at preventing such Sexual Harassment at first place and in case such harassment

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<sup>1</sup>*Rupan Deol Bajaj v KPS Gill*, 1995 (6) SCC 194

<sup>2</sup>*Vishakha v State of Rajasthan* AIR 1997 SC 3011

has occurred, it provides for efficient Redressal of complaints by setting up of Internal Complaints Committee, providing compensation and rehabilitation to the victim.

### ***Definition of Sexual Harassment***

In India, there is lack of any generalized definition of Sexual Harassment but the issue has been circumscribed through criminal as well as special legislations. At global level, for the first time in November 2018, United Nations adopted a resolution on Sexual Harassment at the Workplace. The resolution is a normative framework on steps taken against Sexual Harassment and is binding upon the UN member states in order to formulate a uniform policy of eliminating violence and creating gender parity in workforce. It reiterates that the Member States mustn't invoke any custom or usage to avoid their obligations with respect to the elimination of violence against women. Furthermore, it urges States to devise women friendly policies aimed at the promotion and protection of the human rights of women.<sup>3</sup>

***Sexual Harassment as defined by Australian Human Rights Commission (AHRC)-*** “*An unwelcome sexual advance, request for sexual favors or other unwelcome conduct of a sexual nature which a reasonable person would anticipate would cause a person to feel offended, humiliated or intimidated constitutes Sexual Harassment.*”

***Sexual Harassment as defined by Equal Employment Opportunity Commission (EEOC)*** in its guidelines is: “*Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when: · Submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, or · Submission to or rejection of such conduct by an individual is used as a basis for employment decisions affecting such individual, or · Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.*”<sup>4</sup>

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<sup>3</sup> United Nations, Resolution A/C.3/73/L.21/Rev.1

<sup>4</sup> Preventing Sexual Harassment (BNA Communications, Inc.) SDC IP .73 1992 Manual

***Sexual Harassment as defined by*** the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 means and includes “*any one or more unwelcome acts or behavior whether directly or by implication: physical contact and advances; a demand or request for sexual favors; making sexually colored remarks; showing pornography; or any other unwelcome physical, verbal or non-verbal conduct of sexual nature. Sexual Harassment can take the form of humiliation, intimidation or abuse from a superior or co-workers towards a female employee.*”<sup>5</sup>

***Sexual Harassment as defined by the*** Indian Penal Code, 1860 means “*acts which are unwelcome and sexual in nature, directed towards a woman. It includes act like physical contact, unwelcome hints towards something sexual in nature, showing pornography against such woman’s will, making remarks which make a woman cringe or uncomfortable due to their sexual nature.*”<sup>6</sup>

### **Constitutional Framework**

The Constitution of India guarantees fundamental rights (Articles 14 to 35) to every citizen of India. These rights form the basic structure of the constitution and no person shall be deprived of any right. In case of violation of any fundamental right, the person can directly approach the Supreme Court under Article 32 and High Court under Article 226. The act of Sexual Harassment violates the basic human right of women.

**Article 14 under the Constitution of India** states – “*No person shall be denied equality before law or there must be equal protection of laws for every citizen.*” Hence, every citizen irrespective of gender, caste, religion, language and social status must be treated at par with each other. Therefore, all the women have the right to equality with those of men.

**Article 15** guarantees to every citizen of India that “*State cannot discriminate any citizen on the basis of religion, race, caste, sex or place of birth*”. Under 15(3), there vests expressed power in the State to make special provisions for the benefit of women. The purpose behind the article is to

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<sup>5</sup> Section 2(n) of the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013

<sup>6</sup>Section 354A of the Indian Penal Code, 1860

eliminate the socio-economic backwardness and empower women in general and also at the workplace.

Under **Article 19(1)(g)**, all the citizens have the freedom to practice any trade or profession. The act of sexually harassing a woman curtails her freedom of work and is violative of this article. No person can deprive a woman of the right on the basis of her sex or gender.

**Article 21** of the Constitution ensures that “*no person shall be deprived of life or personal liberty except according to the law.*” It assures the right to live with human dignity free from exploitation which includes Sexual Harassment. Hence, the state is under obligation to protect the fundamental right of every woman. In the case of *Bodhisattwa Gautam v Subhra Chakraborty*<sup>7</sup> the Right to live with dignity and not to be sexually harassed at workplace was held to be a part of Right to life under Article 21.

Part IV of the Constitution, Directive Principles of State Policy help in governance of the country and provide for welfare of the people in the country including women.

Under **Article 39(a)**, The State is under obligation to “*make policy towards securing the citizens, both men and women who have equal right of adequate means of livelihood*” and under **Article 39(d)**, State has “*to secure equal pay for equal work to men and women.*” For implementation, the state passed Equal Remuneration Act, 1976. The act also ensures that there is no discrimination against recruitment of women.

Further under **Article 42**, State should make provisions “*for securing just and humane conditions of work and for maternity relief*”. The state has implemented this DPSP by incorporating provisions like Factories Act, PoSH Act, Maternity Benefit Act, etc.

## **Critical Analysis of the Act**

### ***Applicability***

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<sup>7</sup>*Bodhisattwa Gautam v Subhra Chakraborty* AIR 1996 SC 922



The PoSH Act extends to the ‘whole of India’ including the state of Jammu & Kashmir and only safeguards women from Sexual Harassment at Workplace. It is applicable to organized as well as unorganized sector. As per the Act, ‘workplace’ includes *“any place visited by the employee arising out of or during the course of employment, including transportation provided by the employer for the purpose of commuting to and from the place of employment”*.<sup>8</sup> As per the PoSH Act, an ‘aggrieved woman’ in relation to a workplace, *“is a woman of any age, whether employed or not, who alleges to have been subjected to any act of Sexual Harassment; in relation to a dwelling place or house, a woman of any age who is employed in such a dwelling place or house”*.<sup>9</sup> The aggrieved women may be working with or without remuneration or voluntarily. Hence, a contract worker, intern, trainee, apprentice, baby sitter, cook, domestic helper could be an aggrieved woman for the purpose of this Act. The Act however is not a gender-neutral act like POCSO and only covers offences committed against women. Further, it fails to legislate on the Sexual Harassment Cases of police and armed forces in India which is the major drawback of the Act.

### ***Complaint mechanism***

The Act provides for two kinds of complaints mechanism committee namely Internal Complaints Committee (ICC) under Section-4 of the Act and Local Complaints Committee (LCC) under Section-6 of the Act. ICC is constituted in every organization in public as well as private sector to address receive the complaints of Sexual Harassment within the organization whereas LCC is constituted in every district for unorganized sector or small establishments to receive complaints from domestic workers or organizations having less than 10 employees. The aggrieved woman must file a complaint in writing to either the ICC or LCC, as the case may be within three months from the date of offence. This limitation period of three months is a drawback in the legislation and detrimental to the interest of the aggrieved women. However, if the ICC/LCC is of the opinion that the aggrieved woman was prevented by sufficient cause, the period of limitation may be extended. There is no specific format for filing complaint to the ICC/LCC but it must include the details of the exact incident, date, time, place along with supporting evidences and relief sought. On receiving the complaint, ICC/LCC should send a copy to the respondent and take interim

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<sup>8</sup> Section 2(o) of the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013

<sup>9</sup> Section 2(a) of the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013

measures if required. During the inquiry, there must be at least 3 ICC members including the Chairperson and the parties are prohibited from bringing in their legal practitioner. Where the allegations against the accused amount to a specific offence under the Indian Penal Code (for example Sec 354 - Outraging a woman's modesty) or under any other law, the ICC/ LCC shall forward the complaint to the police within a reasonable time period. The legislation lacks coverage of women who were harassed and terminated for some or the other reason before granting of any chance to file a complaint.

### ***Interim relief, Punishment & Compensation to Complainant***

Upon the request of the complainant, the ICC/LCC may take interim measures like transferring the complainant to another department/office or granting her leave.<sup>10</sup> During the conclusion of inquiry proceedings if the allegation against the accused are proved, ICC/LCC shall recommend punishment prescribed under service rules of the company, warning, reprimand, demotion, censure or other necessary measures. In order to compensate the complainant, a deduction may be made from salary of respondent however the Act expressly prohibits settlement by way of monetary compensation between the parties.

### ***Repercussions in ICC provisions***

The act mandates establishment of Internal Complaints Committee in all workplaces. The composition of the committee includes three members who are employees and one non-employee member. Out of this, fifty percent members shall be women and it has to be headed by a senior level woman employee from that workplace.<sup>11</sup> The act fails to specify the exact qualification and expertise of ICC members. The Act remains silent on the constitution of ICC in case of absence or vacancy of senior level woman employee in the organization. Further, it is unrealistic to have distinct ICC in case geographically diverse company having different branches or departments. Another repercussion in the Act is lack of provisions pertaining to allocation of resources to ICC and their utilization. Under the PoSH Act, ICC are vested with powers as that of the civil court but

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<sup>10</sup>Section 12 of the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013

<sup>11</sup> Section 4(2) (a) of the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013

the ICC members being non-legal persons, cannot be a competent authority to pass orders that require high degree of legal acumen.

### ***Obligations of the Employer***

Section 4 of the Act lays down that every company with 10 or more employees must constitute an Internal Committee (IC). In the case of *Ruchika Singh Chhabra v. Air France India and Anr*<sup>12</sup>, Delhi High Court has opined that the appointment of external member of the IC should be in strict compliance with the POSH Act and the rules there under. Accordingly, enquiry proceedings conducted by an IC that is not properly constituted as per the law, may be treated as invalid. This Committee must include a Presiding Officer appointed from Senior Management (must be a woman), one external member from amongst non-governmental organizations or a lawyer and at least two members representing the employees of the organization. Complaints made to this body must be resolved impartially and without any bias. On the other hand for the employees, the act provide that they must undergo sensitization training each year, as the entire emphasis of the law is on prevention of Sexual Harassment. Irrespective of the intention of the accused or the level of impact, every incident has to be taken seriously and investigated by the Internal Committee. Even an act of making indecent joke or uploading picture on social media platforms can trigger a complaint. In the case of *Shital Prasad Sharma v. State of Rajasthan and Ors.*<sup>13</sup>, the Rajasthan High Court held that the aggrieved woman can file a complaint with the IC without having to submit the complaint in person. The complaint could be sent to the IC through another person or by any other media, the main point being that it should be received by the IC.

Further, the Act requires employers to conduct education and sensitization programs and develop policies against Sexual Harassment, among other obligations. This could be done by way of workshops or by providing a handbook on Sexual Harassment to employees. It is important to note that failure to comply with the above-mentioned provisions could lead to hefty penalties. For instance, some of the provisions under the PoSH Law include:

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<sup>12</sup>*Ruchika Singh Chhabra v. Air France India and Anr*, 2018 SCC Del 9340

<sup>13</sup>*Shital Prasad Sharma v. State of Rajasthan and Ors.*, 2018 SCC Raj 1676



1. When the company fails to constitute an Internal Committee or breaches provisions of this Act or any rules made thereunder, they shall be punishable with fine of Rs 50,000;
2. If any employer, after having been previously convicted of an offence punishable under this Act, continues to commit that offence, he shall be liable to twice the punishment;

The reason behind making it mandatory to have a third-party member on the panel of Internal Complaints Committee is to prevent the undue influence of people having higher authority in the company. It is important that every such committee constituted in an organization should function in compliance to the guidelines of the 2013 Act. According to the research conducted by the Indian National Bar Association, surrounding the issues of Sexual Harassment at Workplace, it concluded “68.9 percent of victims did not complain to the company’s Internal Complaints Committee (ICC) or to the management due to fears of retaliation, repercussions and a sense that sympathy will remain with the offender.<sup>14</sup>” To overcome this fear, ICC should conduct training programs on regular intervals for the employees. Private companies like Nestle, Godrej have codified their Sexual Harassment Policy for better implementation of the Act. Government organizations like FICCI have also come up with security reforms and recommendations for Businesses which aims at maintaining the personal security and well-being of women employees.

### **Economic Impact of Sexual Harassment at Workplace**

The economic costs and the negative world public opinion that violence against women attracts, is imperative that we take the steps ensuring that the violence inflicted against women dwindles down and eventually stops and consequently, the economy grows to its full potential. The notable case of *Mahmood farooqui*, the renowned writer, artist and co-director of Oscar-nominated film *Peepli Live*, was convicted of raping a 35-year-old American Fulbright scholar from Columbia University while she was in India for her doctoral research. That woman was here for research but an Indian man, violated her, that is an indelible image that she carried back home. Farooqui was sentenced to 7 years imprisonment by a trial court. But the damage, the most that could have done, was done- India, yet again, gained bad world public opinion. When we talk about the violence

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<sup>14</sup>Garima, available at <https://www.indianbarassociation.org/wp-content/uploads/2017/01/Garima-1INBAs-Book.pdf> (visited on Jan 05, 2018)

against women affected the economy, the question arises as to where exactly is this effect seen or felt? What sector of economy bears the brunt of the whole fiasco?

Tourism is one such sector, which bears a heavy burden due to fall in tourists due to increase in violence inflicted against women. Tourism represents 6% of India's GDP and 10% of its formal employment. Hence, it is not surprising that In the first quarter post Nirbhaya case, the number of female travelers to India dropped 30% compared to the same period in 2012—a clear response to the horrific gang rape called world attention once again to India's cavalier attitude toward violence against women.<sup>15</sup>

The World Travel & Tourism Council, India Initiative (WTTICII) report — that was submitted to the tourism ministry — said, "India tourism is facing immense negative publicity from the international media on reoccurring incidents of incidents of rape/molestation cases against women foreign tourists."<sup>16</sup>The report has suggested a two-pronged strategy in order to counter safety and security threats and negative publicity to be implemented by both government of India and by tourism ministry. "The strategy should be developed by the tourism ministry in conjunction with the ministries of home affairs, external affairs and I&B. This includes ensuring speedy trials, sensitization of stakeholders especially state government and law and order apparatus and evolving a strategy to tackle the negative publicity," report stated.<sup>17</sup>It is at the same time important that societal costs are not ignored at the cost of economic costs. With regard to societal costs there are two forms that costs can take: the first reflects aggregate economic changes while the second demonstrates social consequences. India could increase its GDP by \$770 billion by 2025 by getting more women to work and increasing equality, according to McKinsey Global Institute. Yet, only 27 percent of Indian women are in employment. The economic form indicates that some costs of violence impact not only individuals or businesses but also the economy as a whole. *Violence against women prevents an economy from attaining its full economic potential.*

## **Legal Implications of #MeToo Movement**

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<sup>15</sup>Richi Verma, "Nirbhaya effect? Delhi sees 30% drop in foreign tourists", THE TIMES OF INDIA, Delhi, Aug 8, 2014, <https://timesofindia.indiatimes.com/city/delhi/Nirbhaya-effect-Delhi-sees-30-drop-in-foreign-tourists/articleshow/39834389.cms>(visited on Dec 30,2018]

<sup>16</sup>WTTIC, Summary of findings, November 2013

<sup>17</sup>WTTIC, Summary of findings, November 2013

From Government to Media, the #MeToo Movement in India is on the rise in all sectors employing women workforce. Regarding the admissibility of social media evidences in Indian courts, it is noteworthy that post the enactment of The Information Technology Act, 2000, Social Media evidences are also considered to be substantive evidences and admissible in the Court of law. However, it requires the attestation of the person legally producing them as permissible evidences.

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Another issue related to #MeToo in legal parlance is the Limitation Period. Under the Code of Criminal Procedure, 1973 the period of limitation commences from the date of offence or the day on which such offence comes to the knowledge of the victim or where the perpetrator of crime is unknown, the day on which the identity of the offender is known. The Act also empowers the Court to extend the limitation period, *“if it is satisfied on the facts and in the circumstances of the case that the delay has been properly explained or that it is necessary so to do in the interests of justice.”*<sup>19</sup>

Under PoSH Act, an aggrieved woman has to file a written complaint for Sexual Harassment at Workplace within three months from the date of such incident. The limitation period of three months may be extended by the Internal Complaints Committee *“if it is satisfied that the circumstances were such which prevented the woman from filing a complaint within the said period.”*<sup>20</sup> Coming to the remedies available to the victims, the cases of Sexual Harassment differ from each other in terms of damage and intensity, the legal remedy for the victims must also be case-specific and just. Under Indian legal system, the Sexual Harassment complainant may evoke civil or criminal or civil and criminal remedy simultaneously. Sexual Harassment under IPC is a cognizable offence and to take recourse under criminal law, the victim has to file an FIR under Section- 154 of CrPC in the nearest police station, residence of the victim or at any convenient place of her choice. FIR sets the process of criminal law in motion and can be filed by the victim or any person acquainted with the facts of the case. Alternatively, a private complaint can be filed before a Judicial Magistrate or Metropolitan Magistrate under Section 156(3) read with Section 190 of CrPC, who may direct the police to register a FIR. The criminal law requires a high threshold of burden of proof beyond reasonable doubt on the prosecution and stringent punishment. The victim can also file complaint to the nearest State Women Commission or National Women

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<sup>18</sup>Section-65B, The Evidence Act 1872

<sup>19</sup>Section-468, The Code of Criminal Procedure, 1973

<sup>20</sup>Section-9, The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act

Commission directly by visiting the office. Every woman victim of any crime is entitled to free legal aid as per Section-12 of the Legal Services Authority Act, 1987 and Article 39A of the Constitution of India. To seek legal advice or free legal aid, any woman can visit the nearest District Legal Service Authority and consult a legal person for their case. To evoke civil remedy, complaint has to be filed with the Internal Complaints Committee of the organization. In the light of the prevailing practice, people argue that the #MeToo movement ignores the legal framework which binds the status quo of registering the online complaints. While the accusations have been made largely on social media, the real battle will be fought in the courtrooms.

### **Government Initiatives for combating Sexual Harassment**

The National Commission for Women chaired by Smt Rekha Sharma is working tirelessly for ending such violence against women by conducting awareness programmes and providing adequate training to all stakeholders. The Ministry of Women & Child Development in 2018 has launched The SHe-Box which stands for Sexual Harassment Electronics Box, an online platform for reporting complaints of Sexual Harassment. This can be used by government as well as private sector employees and the progress of investigation can be monitored online by the ministry as well as the complainant. #MeToo complaints may also be sent to the National Commission for Women via email at [ncw.metoo@gmail.com](mailto:ncw.metoo@gmail.com)

### **Conclusion**

With increased access to education and better employment opportunities, millions of women are entering their country's workforce. Globally, many working women face Sexual Harassment, discrimination, and inequality in the work place. In order to eliminate work place Sexual Harassment, the Indian Parliament came up with Sexual Harassment of Women at Work place (Prevention, Prohibition and Redressal) Act 2013 which guarantees protection against Sexual Harassment and the right to work with dignity which are universally recognised human rights by International Conventions such as Convention on the Elimination of all forms of Discrimination against Women. The Act has led India into the league of few select nations that have outlawed workplace Sexual Harassment through national legislation. It is this Act that along with the Rules is collectively referred to as the POSH Act. Thus the act prevents any form of inappropriate behavior by an employer towards any women employee. It also provides for an effective grievance redressal mechanism for the prevention and redressal of complaints of Sexual Harassment along

with matters connected therewith or incidental thereto. In order to address the issue, a plan of action is required. Besides the setting up of a grievance system as has been already discussed in the previous sections of the paper, It is important to increase the awareness of both male and female employers and employees on the existence of forms of Sexual Harassment at the workplace as well as the steps that can be taken by them at their individual level to curb it. Further it is important that companies hiring more than 10 employees make efforts on providing training and workshops to its employees on the background of Sexual Harassment, legal framework for redressal and self-defense techniques for them. Experts from legal background having experience on dealing with issues related to Sexual Harassment at Workplace can be asked for providing guidance for designing the handbook on the same which should be given to each and every employee before their start of work in that company. Besides these efforts, the companies should have a counsellor on board who can advise and help those who are in distress or are suffering from harassment but are too afraid to raise their voice against it. Such a counsellor should be third party so as to prevent any undue influence from a higher authority in the company.

