

IWRAW ASIA PACIFIC OCCASIONAL PAPERS SERIES  
NO. 7

**SEXUAL HARASSMENT  
IN THE WORKPLACE:  
Opportunities and challenges for legal redress  
in Asia and the Pacific**

International Women's Rights Action Watch Asia Pacific





**IWRAW ASIA PACIFIC OCCASIONAL PAPERS SERIES**

**NO. 7**

**SEXUAL HARASSMENT  
IN THE WORKPLACE:  
Opportunities and challenges for legal redress  
in Asia and the Pacific**

**International Women's Rights Action Watch Asia Pacific**



**International Women's Rights Action Watch Asia Pacific** (IWRAP Asia Pacific) is an independent, non-profit NGO in Special consultative status with the Economic and Social Council of the United Nations (registered as IWRAP).

The IWRAP Asia Pacific Occasional Papers Series makes available emerging discussions and debates related to the organisation's areas of work. The views presented here reflect those of the author(s) and do not necessarily always reflect the views of the organisation.

This publication has been made possible through the generous support of the Ford Foundation, New Delhi.

**IWRAP Asia Pacific Occasional Papers Series • No. 7**

This paper was written by Madhu Mehra (Partners for Law in Development, India) and S.K. Priya (India), and updated by Sapana Pradhan-Malla (Forum for Women, Law and Development, Nepal).

**© IWRAP Asia Pacific 2005**

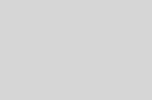
International Women's Rights Action Watch Asia Pacific  
2nd Floor, Block F, Anjung FELDA  
Jalan Maktab, 54000 Kuala Lumpur, MALAYSIA  
Tel: 60-3-2691 3292  
Fax: 60-3-2698 4203  
Email: [iwraw-ap@iwraw-ap.org](mailto:iwraw-ap@iwraw-ap.org)  
Website: [www.iwraw-ap.org](http://www.iwraw-ap.org)

ISBN 983-42400-6-6

Cover, Layout & Design by: Michael Voon <[amx@tm.net.my](mailto:amx@tm.net.my)>  
Printed by: TM Graphic

# CONTENTS

	Page
<b>I. Introduction</b>	1
<b>II. Definition, prevalence and impact</b>	2
Definition	2
Prevalence in Asia and the Pacific	4
Impact	5
<b>III. Legal scope</b>	7
<b>IV. Issues in fixing legal liability</b>	9
Unwelcome	10
Unreasonableness	11
Injury or detriment	14
<b>V. Mechanisms for redress</b>	16
Internal: Employers' obligations	16
External: Avenues within the law	18
<b>VI. International human rights standards</b>	25
Treaties	25
Declarations	29
Regional instruments	31
<b>VII. Conclusion</b>	33



## I. Introduction

Despite a large participation of women in the rural and agricultural workforce, and an increasing participation of women in the urban economy, sexual harassment in the workplace remains an underdeveloped area in the realm of law in Asia and the Pacific. For women, sexual harassment remains an impediment to equal opportunity, dignity, and security at the workplace. The absence of law or its inadequacy relegates gender-specific violations of women workers to a private problem that must be negotiated at individual risk and cost.

With a view to addressing this gap in the law in many countries, this paper presents a framework under civil law drawn from legal responses in different jurisdictions. In doing so, it aims to assist women's rights activists in this region with added knowledge for informed advocacy and initiatives on the issue.

Theoretically, the range of legal redress available for sexual harassment covers constitutional, criminal, tort, and civil law. In most countries, criminal law remedies on sexual assault and rape are the only available avenues of redress. However, criminal law covers only severe forms of sexual harassment involving rape or physical assault, and requires a high degree of proof. Tort law, on the other hand, offers an avenue for compensation based on proof of damage suffered but remains an undeveloped area of law in Asia and the Pacific. In some jurisdictions, it took years of women's rights activism to incorporate sexual harassment within the civil law regime on employment. Sexual harassment has also been incorporated into municipal law, representing a significant step in acknowledging gender-specific discrimination in the workplace.

Notwithstanding the above achievements, the focus on law in this paper is not intended to place centrality on legislation as provider of redress to the problem of sexual harassment. Legal recognition does not put an end to the problem, but its labelling as a legal injury does establish normative standards for acceptable workplace conduct and employer responsibility. The problem requires multi-sectoral interventions that help develop a culture of intolerance towards the problem rather than denial of the phenomena. Civil law offers scope for enabling such a culture as well as providing redress. Civil law can enable cross-sectoral participation in addressing sexual harassment, and provides non-punitive and non-adversarial responses. Further, since its potential remains largely unexplored in the region, it is the focus of this paper.

## II. Definition, prevalence and impact

### *Definition*

Sexual harassment is a form of gender-specific violence against women.<sup>1</sup> While sexual assault and rape are the more commonly recognised forms of violence against women, less extreme types of inappropriate sexual behaviour can be similarly intimidating and repressive. Thus, a woman victimised by sexual harassment is subjected to “pressure, degradation or hostility that her male co-workers don’t have to endure”.<sup>2</sup> At the most basic level, harassment or other sexually coercive behaviour constitutes violence against women because like all forms of violence, such behaviour undermines the inherent human dignity of its victims.

Sexual harassment speaks more to power relationships and victimisation than it does to sex itself. It “results from a misuse of power – not from sexual attraction”,<sup>3</sup> and reflects a disparity in power between the perpetrator and the victim, which more often than not, mirrors the power differentials between men and women in society.<sup>4</sup> Indeed, in the vast majority of cases, victims of sexual harassment are women while the perpetrators are men.<sup>5</sup> This observation does not reflect a biological proclivity in men to sexually harass women, but rather speaks to the unequal structuring of society along gender lines.<sup>6</sup> Additionally, especially in this part of the world, social and cultural norms may serve to validate or even encourage the behaviour of sexual harassers.<sup>7</sup>

---

<sup>1</sup> CEDAW Committee. General Recommendation No. 19 (1992). para. 17. See also Further Actions and Initiatives to Implement the Beijing Declaration and Platform for Action. A/RES/S-23/3. 2000. para. 59. Article 2(b) of the United Nations (UN) Declaration on the Elimination of Violence against Women has also interpreted violence against women “to encompass, but not be limited to: physical, sexual, and psychological violence occurring within the general community, including [...] sexual harassment and intimidation at work”.

<sup>2</sup> Petrocelli, William and Repa, Barbara Kate. 1992. *Sexual Harassment on the Job*, Nolo Press. p1/9.

<sup>3</sup> *ibid.*

<sup>4</sup> International Labour Organisation. Technical report for discussion. ILO-Japan Regional Tripartite Seminar on Action against Sexual Harassment at Work in Asia and the Pacific. 2001. p6. (From hereon referred to as the ILO Technical Report)

<sup>5</sup> See for example, Sexual Harassment at the Workplace in Nepal (ILO/FWLD Report. 2004. p1) and the ILO Technical Report, p29.

<sup>6</sup> ILO Technical Report. p6.

<sup>7</sup> *ibid.* For example, many men are socialised to believe that women exist solely for their enjoyment while women are socialised to accept this type of male behaviour. Similarly, men are more likely to sexually harass women because societies tolerate or even encourage their sexually aggressive behaviour.



At the same time, it is important to recognise sexual harassment as a form of discrimination against women. Due to unequal gender relations, it is a phenomenon that primarily affects them, and creates “distinction, exclusion or restriction” which has the effect of “impairing or nullifying” their human rights.<sup>8</sup> For example, in the context of work, women who are sexually harassed can be said to be deprived of their right to a safe and secure working environment. This may affect their productivity levels, and subsequently lead to their dismissal, thus denying them the right to employment and livelihood. Since all rights are interrelated, this situation will also result in other rights being similarly violated. In this way as well, sexual harassment perpetuates inequality between women and men.

It is not possible to exhaustively list the range of offending behaviour constituting sexual harassment or define the degree of severity or its frequency. Although there have been efforts in this direction, such lists are best treated as inclusive and not conclusive.<sup>9</sup> They encompass acts ranging from sexual assault, display or distribution of pornography, suggestive gestures, physical contact, repeated proposition for dates or sexual favours, comments on appearance or comments of sexual nature relating to the victim to a third party and so on, all of which are unwelcome by the victim. Similarly, a single act or a series of acts could constitute sexual harassment depending upon the facts and circumstances of the case.

Perpetrators of sexual harassment are traditionally employers, superiors or co-workers.<sup>10</sup> Women are largely the victims, even though there have also been reported cases of male victims sexually harassed by female or male colleagues. Given this, and the fact that a high percentage of all working women have had some experience of this phenomena, this paper will limit its reference on the subject to women.

---

<sup>8</sup> The full definition of discrimination as understood by the CEDAW Convention, is given in Section VI.

<sup>9</sup> ILO Technical Report. pp46-47: “[I]t is not necessary or even desirable in legislation to compile an exhaustive list of harassing conduct that should be prohibited. Most statutes have avoided doing so and instead adopt a more general approach. In this way the legal protection is not limited by the assumption that any unlisted conduct does not fall within th[e] scope of the law but offers more opportunity for taking into account relevant particular circumstances”.

<sup>10</sup> In some countries such as Malaysia, a study on sexual harassment at the workplace revealed a ‘new’ category of sexual harassers comprising those not in direct contract of service with a workplace, such as company vendors, factory bus drivers, and so on. Additionally, harassers could also be subordinates of victims. See Cecilia Ng, Zanariah Mohd Nor and Maria Chin Abdullah. 2003. *A Pioneering Step: Sexual harassment and the Code of Practice in Malaysia*. Women’s Development Collective and SIRD.

## *Prevalence in Asia and the Pacific*

[S]exual harassment is a relatively new area of action for many countries in Asia and the Pacific, due to traditional attitudes and perceptions on the roles of women and men, perceived cultural constraints[,] and persistent or emerging poverty among larger parts of the population, especially women.<sup>11</sup>

Over the last 20 years, increasing numbers of Asian women have entered the workforce. For example, from 1995 to 1997, well over 40 per cent of the labour force in East, Southeast and Central Asia comprised women, while the corresponding figure in South Asia was around one-third.<sup>12</sup> The importance of women's participation in the labour market cannot be underestimated since it "not only sustains the economic status of the family, [but] can also serve as a crucial means of strengthening the economy of the nation and play[s] a major role in nation building".<sup>13</sup>

Accurate numerical data on the prevalence of workplace sexual harassment in Asia and the Pacific is lacking, largely due to underreporting by victims. Even so, it is believed to be a widespread problem in the region.<sup>14</sup> Many women here, especially those with little or no education, do not understand that sexual harassment is unacceptable behaviour. Even among the educated and aware, there is a lack of recognition about comfort zones and bodily boundaries. Worse, social norms and cultural values often stigmatise victims, especially the few who dare to lodge formal complaints. Such complainants may be labelled either as 'loose' (i.e. women who invite harassment through provocative dress or behaviour) or 'frigid' (i.e. women who cannot take a joke). Other victims do not report incidents of sexual harassment precisely because they fear reprisals at work. They worry about losing their jobs or suspect that management and supervisors will not take their complaints seriously.<sup>15</sup>

Women are particularly vulnerable to victimisation through sexual harassment since the majority of them occupy "jobs with low security, low pay, low conditions of work, low status, and low bargaining power in a narrow range of

---

<sup>11</sup> ILO Technical Report. p1.

<sup>12</sup> *ibid.* p31.

<sup>13</sup> Sexual Harassment at the Workplace in Nepal. p3.

<sup>14</sup> *ibid.* p11.

<sup>15</sup> ILO Technical Report. pp21-22.

occupations”.<sup>16</sup> In situations where there is a large supply of young women and limited job opportunities, sexual harassment is said to be common during hiring and recruitment. The migration of women from rural to urban areas in search of employment also places them at greater risk of sexual violence, including sexual harassment.<sup>17</sup> Other particularly vulnerable populations of women include those working in educational and training institutions, domestic workers, migrant workers, workers with little job security, and workers in occupations “where large numbers of women are supervised by small numbers of men”.<sup>18</sup>

In the context of continuing feminisation of the labour force in Asia and the Pacific, together with the impoverished populations here, it is clear that sexual harassment will not simply go away on its own, but instead remain an issue that needs addressing.<sup>19</sup>

## ***Impact***

Sexual harassment produces a host of negative consequences. The various types of impact on individual workers (i.e. victims), business enterprises, and societies as a whole, are described in the ILO Technical Report arising out of the Seminar on Action against Sexual Harassment at Work in Asia and the Pacific (2001). Below is a summary of the report’s main findings.

### ***On victims***

#### **(a) Physiological effects**

Victims of sexual harassment suffer in a variety of ways, but common physiological effects include nausea, loss of appetite, headaches, and fatigue, which can lead to increased absenteeism. The trauma associated with sexual harassment can also cause miscarriage in pregnant women. Moreover, in the absence of

---

<sup>16</sup> *ibid.* p29.

<sup>17</sup> The CEDAW Committee, the expert body that monitors the implementation of the Convention on the Elimination of All Forms of Discrimination against Women (the CEDAW Convention), has acknowledged that “[g]irls from rural communities are at special risk of violence and sexual exploitation when they leave the rural community to seek employment in towns”. CEDAW. General Recommendation No. 19 (1992). para. 21.

<sup>18</sup> ILO Technical Report. pp36-40.

<sup>19</sup> *ibid.* pp15, 30-31. See also Madan Lamsal. “Breaking the Taboo”. In *Business Age*. Vol. 2. No. 9. August 2000. This article examines the increasing participation of women in the labour force and predicts that the incidence of sexual harassment would increase as a result.

adequate support systems, including psychological counselling and medical care, the physiological effects of harassment can result in chronic illness, which then further impairs both the victim's ability to work and her overall quality of life.<sup>20</sup>

#### (b) Psychological effects

Common psychological effects of sexual harassment include humiliation, shame, anger, fear, anxiety, depression, and decreased motivation. In extreme cases, the resulting trauma may lead victims to commit suicide. Without proper counselling, psychological suffering can lead to a total loss of interest in work, or to a debilitating fear of going outside or of being alone.

#### (c) Socio-economic effects

Victims of sexual harassment can also suffer economically as a result of the offending behaviour. A loss in concentration and hence productivity affects opportunities for advancement, which in turn lowers earning capacity, especially for those paid daily or on the basis of output produced. A victim who refuses the advances of a superior may be fired, or feel forced to resign if management is unsympathetic to her situation. Such loss of employment or a decrease in earning power may then force her into economic dependence on others, placing a victim in a precarious situation and exacerbating her risk of suffering other forms of gender-based violence.<sup>21</sup>

Perhaps worst of all is the social stigma attached to sexual harassment in conservative Asian societies. Once a woman is sexually harassed – but especially if she lodges a complaint – her character comes under question and this can jeopardise her other social relationships, for instance in her family, leading to “neglect, hatred, domestic violence, [or] divorce”.<sup>22</sup>

### ***On enterprises***

Although sexual harassment inflicts the most devastating effects on its victims, business enterprises also incur certain costs associated with the tolerance of

---

<sup>20</sup> Sexual Harassment at the Workplace in Nepal. p26.

<sup>21</sup> *ibid.* pp21-22, 26-27. The situation is particular dire for women from low-income families who cannot afford to lose the income needed for their family's survival. For many of them, it may mean being bound to jobs that regularly subject them to sexual violence. Such is the case with migrant domestic workers. On the other hand, there are others too who may relish the little economic freedom they have and not be willing to give up their jobs even if they are subjected to sexual harassment.

<sup>22</sup> *ibid.* p27.

this phenomena, and an absence or lack of existing and effective preventive, investigative, and remedial measures. For instance, sexual harassment “undermines equality at the workplace by calling into question individual integrity and the well-being of workers; it damages an enterprise by weakening the bases upon which work relationships are built and impairing productivity.” It also harms productivity by increasing “workplace tensions, which [...] may impede teamwork, collaboration and work performance”, before finally resulting in increased absenteeism and decreased productivity.<sup>23</sup>

If sexual harassment remains pervasive or unrecognised, victims may be so traumatised to the point of leaving their jobs. In such cases, a business enterprise potentially loses valuable employees who must be replaced, thus incurring unnecessary costs in re-hiring and training of new employees. As long as 25 years ago, the US Merit Systems Protection Board had determined that “decreased morale, absenteeism, and loss of concentration as a result of sexual harassment” carried an annual cost of USD90 million in lost productivity. Despite the paucity of more recent studies like this in Asia and the Pacific, it is safe to conclude that sexual harassment continues to be a cost to business enterprises.

### ***On societies***

Besides affecting victims and business enterprises, sexual harassment also produces negative outcomes for entire societies. Tolerance of such behaviour “impedes the achievement of equality between men and women, it condones sexual violence[,] and...[i]t is wasteful from economic, social and human resource development points of view to invest only in selected parts of the population [as a result of] discrimination based on sex...”.<sup>24</sup>

## **III. Legal scope**

In jurisdictions where special legislation on sexual harassment exists, the legal definition may differ but its common key features are:

- It is unwanted sexual attention;
- It is unwelcome regardless of the severity of harassment;
- It is an abuse of power by persons in authority towards those who can benefit from or be injured in an official capacity;

---

<sup>23</sup> General Surveys on Equality in Employment and Occupation Convention. International Labour Organisation. 1996. para. 40.

<sup>24</sup> ILO Technical Report. p20.

- It is coercive and unprofessional conduct that undermines the integrity of an employment relationship, and creates a hostile and intimidating environment for the victim which in turn may interfere with her work performance and adversely affect her health; and
- It is a form of sex discrimination.

Studies on sexual harassment cases and experiences of women have shown two dominant categories: one where sexual favours are demanded for employment benefits (i.e. *quid pro quo* harassment), and the other which involves a constant abuse of power, unrelated to favours, to demean a victim and create hostile working conditions for her (i.e. hostile working environment harassment). The two categories have evolved over the years in western jurisprudence and are broadly descriptive of the trend of cases. It is important to reiterate that they are not conclusive or intended to limit the scope and nature of the problem.

#### (a) *Quid pro quo* harassment

This refers to situations where an employer or superior at work makes tangible job-related consequences conditional upon obtaining sexual favours from an employee. This form of sexual harassment involves making conditions of employment (hiring, firing, promotion, retention etc.) contingent on the victim providing sexual favours. Such an action must prove that:

- The employee was subjected to unwelcome sexual advances or requests for sexual favours; and
- The reaction to the harassment – rejection or submission as the case may be – affected tangible aspects of the employee's compensation, terms, conditions, promotion, access to training opportunities and/or any other privileges of employment.

In countries like India, there is regular large-scale *quid pro quo* harassment in the construction and garment industries. Jobs being scarce, the pressure of survival in a situation of scarcity added to their low status in society, keeps these women silent. Even the few who would protest lack avenues as there are no mechanisms for redress in such industries. Sexual harassment here thus becomes entrenched and structured.

#### (b) Hostile working environment harassment

Sexual harassment whether verbal, physical or visual, has been acknowledged as affecting and unreasonably interfering with an individual's work performance

or creating an intimidating, hostile or offensive working environment. Regardless of whether it actually results in psychological harm to the victim, which may well be the case, it is now known to constitute an environment of hostility or abuse towards one or more employees. The responsibility to correct and remedy this environment is placed on the employer.<sup>25</sup> Further, some courts have tended to look for the frequency and severity of the offending conduct, as well as the nature of the harassment – i.e. whether it was physically threatening or humiliating, or constituted of offensive utterances – when assessing the extent of ‘hostility’ created by the conduct.

From the above broad categories in which sexual harassment has come to be framed in law, arise issues of proof for determining the offence. The indicators necessary to establish the nature of the offence are largely, though not always, common. For instance, evidence supporting ‘unwelcome’ sexual attention coupled with the proof of job detriment or benefit if the case is one of *quid pro quo*. Where a clear *quid pro quo* situation cannot be established, sexual harassment can be proven if it can be demonstrated that the harassment ‘unreasonably’ interfered with the complainant’s work performance and created a hostile working environment. In both categories of harassment, any evidence of ‘psychological harm’ caused will impact on determining the extent of injury that results, although the absence of this would not nullify a finding on commission of sexual harassment.

#### **IV. Issues in fixing legal liability**

This section will examine the legal discourse on indicators for the offence of sexual harassment. The debates on each indicator reflect ways in which a particular perspective influences the outcome and its ability to deliver gender justice. The perspectives range from using male standards, to protectionist approaches which stereotype women. There is also a move towards taking into account the subjectivity of the victim rather than using stereotypes of any kind. This evolution in standards marks a shift towards a substantive application of equality, one that accommodates the subjective experience of the victim in a particular context rather than imposing a uniform standard.

---

<sup>25</sup> *Teresa Harris v. Forklift Systems Inc.* 510 US 17 (1993); 114 S.Ct. 367.

## *Unwelcome*

The unwelcome nature of a sexual advance is pivotal to establishing the commission of the offence. The law is intended to strike at offensive, unwanted, and unwelcome conduct of a sexual nature. It is not intended to erase consensual sexual interest within the workplace. This is a predictable entry point for gendered perspectives that bring in issues of the complainant's sexual conduct, attitude or dress, which shifts the burden on the complainant to dispel consent or provocation. It is a problematic terrain similar to rape cases, where the odds against the victim can get too loaded for her to consider redress.

For instance, the common rebuttal to unwelcome sexual attention is the introduction of evidence about the complainant's sexual conduct, to portray her as one who does not conform to a stereotypical victim. However, there is growing jurisprudence that rejects the usage of a complainant's morality or sexual conduct to rebut the charge of unwelcome sexual attention by the offender. In the case of *Wileman v. Minilec Engineering Ltd.*,<sup>26</sup> the defence relied on showing that the complainant wore provocative clothes at work, and the fact that she posed in scanty outfits in a newspaper to argue that in such a context the remarks were welcome and solicited. The Court rejected this defence. It held that her conduct had no bearing on determining the offence caused, on the ground that a person is entitled to accept remarks in a sexual context from A or B if she chooses to, but not from C.<sup>27</sup>

In a workplace situation, there are also cases where a complainant may have participated in sexual conduct with the offender for a period of time, before bringing a complaint against him. On the surface such a situation may seem like a consensual sexual relationship. However, given the nature of power differentials in a workplace – attached to which are issues of livelihood, promotion, benefits – the context requires a nuanced understanding, one that distinguishes 'unwelcome' from 'consensual'. 'Consensual' has been described to cover activities that are intrinsically desired, constituting of activity that a party engages in and for itself, and not for any further reason. 'Unwelcome' on the other hand, can include activity that is extrinsically desired. For example, a complainant's subjection or participation is extrinsically motivated or coerced when her submission or consent is rendered because of apprehension of dismissal, disfavour, or displeasure, as typical of a *quid pro quo* form of harassment.

---

<sup>26</sup> 1988. Industrial Relations Law Report (IRLR) 144 (UK).

<sup>27</sup> See also *Snowball v. Gardner Merchant Ltd.* 1987. IRLR 397 (UK).



In the *Meritor* case, the defence that the complainant voluntarily participated in sexual conduct was rejected. It was held that,

[T]he fact that the sex related conduct was 'voluntary', in the sense that the complainant was not forced to participate against her will, is not a defense to a sexual harassment suit [...] The gravamen of any sexual harassment claim is that the alleged sexual advances were 'unwelcome'. [...] The correct inquiry is whether [the] respondent by her conduct indicated that the alleged sexual advances were unwelcome, not whether her actual participation in sexual intercourse was voluntary.<sup>28</sup>

The indicators of an unwelcome relationship include a difference in institutional power between the parties and the threat of some substantial sanction or the promise of some substantial reward predicated upon entry into the relationship. Secondary evidence used in such cases have included factors that might distinguish the relationship from more mainstream relationships, such as a wide age difference, an adulterous nature, a homosexual relationship where one of the parties had previously been heterosexual and vice versa, the secret nature of a relationship and so on. Secondary indicators must be used in conjunction with primary indicators to establish the unwelcome nature of a relationship.

### ***Unreasonableness***

Sexual harassment can create a hostile work environment, for which the employer is liable, if "such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive work environment".<sup>29</sup> The standard to be applied in determining when such conduct amounts to 'unreasonable interference' is critical since on it depends employer liability and gender equality. Much of the legal discourse on the subject flows from the litigation that has been pursued under Title VII of the US Civil Rights Act of 1964, as explained below.

The debates on what constitutes 'objective' standards for evaluating when a conduct 'unreasonably interferes' with the performance of the employee, provides

---

<sup>28</sup> *Meritor Savings Bank v. Michelle Vinson et al.* 477 US 57 (1986), 106 S.Ct. 2399. See Section V for a more detailed account of this case.

<sup>29</sup> As per Section 1604.11 of the Guidelines on Sexual Harassment, defining it as a form of sex discrimination under Title VII of the US Civil Rights Act of 1964.

a perspective on the limitations of existing legal standards, and the need to create ones more appropriate to gender equality. The standard most widely used to determine what constitutes 'unreasonable interference' in the circumstances of a case has been the viewpoint of a 'reasonable man'. Studies have shown that gender differentiation in men and women, and the power inequality derived from it, distinguishes male standards of permissible sexual attention from that of women. As such, judging women's experiences against male standards would inevitably result in injustice.

Feminist critiques of the 'reasonable man' standard set the process of evolving a less male-centred 'reasonable person' standard. Nevertheless, the basic critique held since the courts could still adopt male standards in relation to what was deemed acceptable behaviour, and in all likelihood promote a sex- or gender-blind notion of what constituted an 'unreasonable interference' in the performance of a female employee. Alternatively, a 'reasonable woman' standard was suggested to incorporate a victim's perspective. This was justified on the grounds that since men view sexual conduct in the workplace differently from women, a woman-centred standard was necessary for achieving gender equality.

The 'reasonable woman' standard, however, has also been critiqued on its assumption that women are the only victims of sexual harassment, and that it tends to assume that all women regardless of their differences in age, class, race, culture or sexual orientation have a common standard. It is also feared that this standard may promote a notion of a stereotypical traditional woman which endorses protectionist policies and adjudication thereby impeding women's equality in employment.

For example, in observing that "the entire episode reveals that the respondent has harassed, pestered and tested and subjected Ms X by a conduct which is against moral sanction and which did not withstand the test of decency and modesty and which projected unwelcome sexual advances",<sup>30</sup> the Indian Supreme Court showed a protectionist view that is likely promote an examination of the morality and decency of the parties involved, rather than the right to personal integrity and safety of the individual. This approach tends to stereotype circumstances and women into categories that may fall within the protection of the law, and those who may not. In countries such as India, chastity and morality continue to be the prime concerns of the judiciary, and this is the likely standard to be pursued in other cultural contexts of Asia and the Pacific.

---

<sup>30</sup> *Apparel Export Promotion Council v. A.K. Chopra*. All India Reporter (AIR). 1999. Supreme Court (SC) 625.

To circumvent this situation, it has been proposed that an androgynous 'reasonable person' standard be adopted. This would incorporate the perspective of the 'victim' – male and female – rather than that of the harasser. In fact, European Community resolution is clear in its emphasis on the viewpoint of the 'recipient' in assessing whether the conduct complained of is 'unreasonable'. Similarly, in the US each claim is viewed from the point of a 'reasonable person' based on the perspective of the victim in her particular context and not that of a stereotypical female.<sup>31</sup>

In the US case of *Rabidue v. Osceola Refining Company*,<sup>32</sup> the plaintiff Rabidue was fired for job-related reasons. Her boss repeatedly referred to women in derogatory and abusive terms. Some of these epithets were directed at Rabidue. The Court of Appeals focused on Rabidue's personality while minimising the impact of her boss's action. The court held that use of epithets was routine in American culture and it would not offend a 'reasonable person'. Hence the court's sexist application of the 'reasonable person' standard perpetuates the kind of culturally entrenched stereotyping that the US Title VII was meant to root out.<sup>33</sup> Nevertheless, it is important to note that one of the Rabidue judges, Judge Keith, dissented from the majority taking the view that the perspective of a 'reasonable man' might differ from that of a 'reasonable woman' due to sociological differences. Following Judge Keith's dissent, several courts in the US have subsequently adopted a 'reasonable woman' standard for hostile environment claims.

In *Ellison v. Brady*, the court adopted the 'reasonable woman' standard and emphasised that the victim's perspective must be considered in such cases because women perceive sexual conduct in the workplace differently from men. The court stated that it adopted "the perspective of a reasonable woman primarily because we believe that a sex blind reasonable person standard tends to be male biased and tends to ignore the experiences of women in the workplace".<sup>34</sup> In *Ellison*, the court compared the 'reasonable woman' and the 'reasonable person' standards to illustrate how the two can obtain different results on application. In this case, the plaintiff was harassed by a co-worker who stalked her and wrote her lengthy love letters. The court could have treated the matter as just another case of unrequited love, but chose instead to view it from the victim's perspective as a frightening chain of incidents.

---

<sup>31</sup> As recommended by the Equal Employment Opportunity Commission, the federal agency in the US assigned to investigate and enforce rulings of sex discrimination or sexual harassment cases in the workplace.

<sup>32</sup> 805 F.2d 611. 6th Cir. 1986.

<sup>33</sup> Title VII of the US Civil Rights Act of 1964 covers sex discrimination, among others.

<sup>34</sup> 924 F.2d 872. 9th Cir. 1991.

In *Robinson v. Jacksonville Shipyards* the court also emphasised sex-based differences in perception of sexual conduct in the workplace. Dr Susan Fiske, a professor of psychology testifying for the plaintiff, pointed to research that revealed wide differences in standards of a 'reasonable woman' and emphasised the need for subjectivity to protect the plaintiff, and concomitant objectivity to protect the employer.

### ***Injury or detriment***

In evaluating the injury or detriment suffered in a case, psychological harm has been considered a relevant factor but not the sole or a necessary factor. To determine what constitutes a sufficiently hostile environment, there have been efforts in US jurisprudence towards setting standards that enable assessment of the validity of a claim.

Expert evidence of psychologists has been successfully used and is strongly recommended by women's rights activists to support a claim for compensation based on injury. Such testimonies used in case law shows how 'sexual spill-over' in the workplace has the effect of damaging a woman's self esteem, confidence and efficiency. It can manifest in psychosomatic tumours, ill health, clinical depression, and result in absenteeism, breakdown of relationships, and resignation. Studies on the subject provide an evidentiary basis for concluding that a sexualised work environment is abusive and harmful to women because of their sex, as opposed to men to whom it may at most be distasteful. When sex comes into the workplace, it potentially has a profound effect on a woman's ability to do her job without being bothered by it.

The remedy commonly offered in sexual harassment cases is a declaration of the offence, penalty for the harasser, and compensation to remedy the injury caused to the victim. Psychological harm is not the only basis for assessing injury. If the actions complained of are offensive and unwelcome, they implicitly constitute injury to the victim. The nature of the harassment – whether 'quid pro quo' or 'hostile environment' – could also have bearings on the compensation since it allows taking into account tangible job consequences attached to that form of harassment.<sup>35</sup>

The process of assessing the degree of injury, and therefore the quantum of compensation, has also, unfortunately, been influenced by the woman's personality.

---

<sup>35</sup> *Burlington Industries, Inc. v. Kimberly B. Ellerth*. 118 S.Ct. 2257.

In *Snowball v Gardner Merchant Ltd.*<sup>36</sup> the complainant's conversations at the workplace describing her sex life was admitted to reduce the degree of injury caused to her feelings as a result of the sexual harassment she suffered. Similarly, in the *Wileman* case mentioned previously, the provocative and scanty clothes worn by the complainant during work were deemed reason enough to minimise the quantum of injury and reduce the compensation awarded to a nominal sum.<sup>37</sup> Fortunately, however, there have been some exceptions.<sup>38</sup>

Such a trend reinforces the myth that women victims of sexual harassment fall into one of two categories. One, that they are 'provocative', 'flirtatious' and 'easy', and therefore assumed to have implicitly invited the harassment, or two, that they have been sexually harassed through 'no fault of their own'. The alternative to this is placing emphasis on the offensive and unwelcome nature of a conduct as the key determinant of an offence and resultant injury. In light of the gender-biased nature of defence likely to be raised, stress must be placed on the offensive conduct and the degree of its offensiveness rather than interrogating the personality of the victim.

Sometimes also, an approach that recognises multiple forms of discrimination has been used to decide detriment<sup>39</sup>. Thus, actual sexual intercourse or

---

<sup>36</sup> 1987. IRLR 397 (UK).

<sup>37</sup> Similarly in *Reed v. Shepard* (939 F.2d. 484. 1991), the 7th circuit court found that a victim of gender-based insults and physical attacks who used offensive language and engaged in sexually suggestive behaviour had welcomed the harassment. In *Highlander v. KFC National Management Co.* the 6th circuit court held that the plaintiff who suggested having a "business drink if you want to call it that" to her supervisor in the context of discussing a promotion had no claim for *quid pro quo* sexual harassment when later the supervisor said, "there is a motel across the street". Also the plaintiff was deemed as having no claim for hostile work environment sexual harassment when she indicated that the co-worker touching her legs, buttocks and breasts was "not that big of a deal", and she had waited three months to report *quid pro quo* harassment by her supervisor (805 F.2d. 644. 1986).

<sup>38</sup> For example, in *Swentek v. US Air Inc.* (830 F.2d 552. 1987), the 4th circuit court held that the plaintiff's use of foul language or sexual innuendo in a consensual setting did not deprive her of protection against unwelcome harassment; and in *Burns v McGregor Electronic Industries Inc.* (989 F.2d 959. 1992), the 8th circuit court held that a sexual harassment victim's posing for a nude magazine outside work hours was immaterial to whether or not her employer's sexual comments were welcomed.

<sup>39</sup> In *Jefferies v. Harris County Community Action Association* (615 F.2d 1025. 5th Cir. 1980), the court noted that depriving black women of a remedy would be particularly unjust since each characteristic alone, race or sex, was protected under Title VII. The court drew on the "sex plus" theory finding that discrimination had occurred against the subclass of women on the basis of their sex plus another characteristic.

contact is not considered necessary to establish injury. Even a single attempt would do.<sup>40</sup>

## V. Mechanisms for redress

There is a range of legal entry points to address sexual harassment. This enables placing legal responsibility on the employer to ensure a discrimination-free work culture through effective internal mechanisms to handle grievances. It also places liability upon the employer for failure to fulfil such obligations. Trends across the world show such developments in law through both legislation and judicial expansion of the scope of existing constitutional or civil laws on equality, non-discrimination and labour. This section will look at internal and external mechanisms necessary to secure redress for sexual harassment claims.

### *Internal: Employers' obligations*

The most essential requirement that law and policy can ensure is to mandate the setting-up of internal grievance mechanisms to handle sexual harassment complaints within the workplace. Research has shown that this results in significant payoffs to the employer as it explicitly sets standards for workplace conduct and assures a secure and healthy work environment that directly relates to higher productivity. Equally significant is the effective, sensitive, and confidential operation of such a grievance mechanism.

An internal mechanism is the most efficient and sustainable way of regulating sexual harassment at the workplace. It is a part of the employer's responsibility under law, to censure sex discrimination and guarantee security and dignity to employees in the workplace. Some of the essential features of an internal regulatory mechanism require employers to undertake the following:

- Publicise a Code of Conduct for the workplace. This could be a part of the employment contract entered into with each employee. It can also be made known through posters and notices, which should

---

<sup>40</sup> *Apparel Export Council of India v. AK Chopra*. 1990. 1 Supreme Court Case (SCC) 759. In *Bracebridge Engineering v. Darby*, the Employment Appeal Tribunal held that while sexual harassment usually involves repeated incidents, one incident, if it involves conduct sufficiently grave, is enough to establish sexual harassment. 1990. IRLR 3 (UK).

contain clear information on what constitutes sexual harassment. This is essential to create a work culture that ensures and promotes dignity and bodily security in a gendered context. The creation of such a culture would have to include information on redress mechanisms, and assurance of accessible, confidential, non-partisan and effective complaints procedures;

- Introduce sexual harassment as a form of employment misconduct that constitutes grounds for dismissal in employment contracts;
- Set-up an accessible and confidential complaints and redress mechanism for sexual harassment and publicise this widely; and
- Treat cases that arise promptly, strictly and efficiently with the objective of addressing the problem rather than keeping the case quiet. Comparative studies have shown that such acknowledgement of the problem and prompt action enhances the reputation of a workplace, and boosts employee confidence and productivity. Conversely, refusal to acknowledge the phenomena leads to undermining the dignity of employees, absenteeism, a high turnover, and even law suits that can damage the employer, in terms of reputation and financial implications.

Legal obligation placed on the employer to set in place mechanisms and systems to check sexual harassment must translate into imposition of liability and damages for failure to fulfil the same. Employer liability has been imposed in cases where the harasser played a supervisory role in his formal or informal capacity,<sup>41</sup> or where adequate efforts to disseminate a company's sexual harassment policy were not made, nor were efforts to keep track of the conduct of supervisors.<sup>42</sup> In many jurisdictions, the state is the largest employer, so in such situations it has been held 'doubly liable'; meaning, accountability rests on the state in its capacity as the employer, and as the 'state' which bears the constitutional obligation to ensure protection, enforcement and implementation of human rights.<sup>43</sup> In other cases, liability has also been imposed where the harasser was a third party, not

---

<sup>41</sup> *Dianna Janzen and Tracy Govereau v. Platy Enterprises Ltd. and Women's Legal Education and Action Fund (LEAF), Intervenor*. 1989. 1 Supreme Court Report (SCR) 1252.

<sup>42</sup> *Beth Ann Faragher v. City of Boca Raton*. 118 S.Ct. 2275.

<sup>43</sup> See Faragher above as well as the discussion on state liability for tortious actions on its employees and officials in *D.K. Basu v. State of West Bengal* (1997. SCC 416). The case relates to torture but establishes important principles of accountability and transparency.

a co-worker.<sup>44</sup> Conversely, evidence of adequate steps taken has been accepted as a valid defence.<sup>45</sup>

In Canada, the basis for employer liability in sexual harassment cases has been held to be different from that in criminal, quasi criminal or tort law, where liability flows from activities done within the confines of a job. The Canadian Human Rights Act is concerned with the removal of discrimination for redressing socially undesirable conditions, regardless of the reasons for their existence. The basis of liability stems from the effects of discrimination (e.g. undesirable work conditions) rather than its causes or motivations.<sup>46</sup>

### ***External: Avenues within the law***

With increasing visibility and attention drawn to it, different jurisdictions have responded to sexual harassment in different ways. In some cases there have been special legislation expressly enacted on the subject. In others, it has been incorporated into the Constitution or equal opportunities or anti-discrimination law. There have also been instances where strategies expanding employer liability under labour laws, to ensure a safe and healthy work environment, have succeeded.

This section attempts to surface the different avenues or options that women's rights activists can explore in countries where the law provides no remedy. Each of these entry points provide strategic avenues for introducing sexual harassment laws in different cultural, social and political contexts.

#### **(a) Constitutional, legislative and administrative regulations**

Most states have Constitutions that assure equality and prohibit sex-based discrimination. Some jurisdictions in the region have also enhanced this commitment through the creation of special Human Rights Commissions that investigate and monitor discrimination cases and public policy.<sup>47</sup> Although both

---

<sup>44</sup> See *Karlenzig v. Thessaloniki Hldgs. Ltd.* (1991. Canadian Labour Law Cases 17,015) and *Bouvier v. Metro Express.* (1992. 17 Canadian Human Rights Reporter. D/313 (Canadian Human Rights Tribunal)).

<sup>45</sup> *Balgobin Francis v. London Borough of Tower Hamlets.* 1987. IRLR 401 (UK).

<sup>46</sup> *Bonnie Robichaud and the Canadian Human Rights Commission v. Her Majesty The Queen, as represented by the Treasury Board.* 1987. 2 SCR 84. For similar position in UK law, see *Strathclyde Regional Council v. Porcelli.* 1986. IRLR 134 (UK).

<sup>47</sup> Section 39 of the Canadian Human Rights Act provides for the appointment of a Human Rights Tribunal to inquire into a sexual harassment complaint.



these overlap conceptually, they offer separate arenas that can encompass sexual harassment within the workplace, in jurisdictions where legal recognition is yet to be granted.

The US Civil Rights Act of 1964 (Title VII), as currently amended, is a piece of federal law which prohibits employment discrimination on the basis of sex, race, nationality, or religion, whether by a state actor or by a private enterprise.<sup>48</sup> Although Title VII does not explicitly mention sexual harassment, the Equal Employment Opportunity Commission, the federal agency charged with regulating employment discrimination, has defined sexual harassment in the Code of Federal Regulations, which has the same force as statutory law:

Harassment on the basis of sex is a violation of Section 703 of Title VII. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when:

1. Submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment,
2. Submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or
3. 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>49</sup>

In addition, the Equal Employment Opportunity Commission has emphasised that sexual harassment claims must be evaluated by looking at the “totality of the circumstances” rather than relying on a strictly textual, legal or technical definition.<sup>50</sup> A significant aspect of US sexual harassment regulation is the fact that employers may be held vicariously liable for sexual harassment perpetrated

---

<sup>48</sup> 42 US Code. Section 2000e.

<sup>49</sup> 29 CFR 1604.11(a).

<sup>50</sup> 29 CFR 1604.11(b): “In determining whether alleged conduct constitutes sexual harassment, the [Equal Employment Opportunity Commission] will look at the record as a whole and at the totality of the circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred. The determination of the legality of a particular action will be made from the facts, on a case-by-case basis.”

by co-workers<sup>51</sup> and clients,<sup>52</sup> not just by supervisors or managers. The Equal Employment Opportunity Commission also imposes an affirmative duty on employers to educate their employees regarding sexual harassment and to take proactive steps toward the prevention of such conduct in the workplace.<sup>53</sup>

In this region, several countries have adopted legislation to address sexual harassment as well. For example, Sri Lanka amended its Penal Code in 1995 to include sexual harassment, defined according to an 'unwelcome' standard.<sup>54</sup> The law provides that "[w]hoever, by assault or use of criminal force, sexually harasses another person, or by the use of words or actions, causes sexual annoyance or harassment to such other person commits the offence of sexual harassment."<sup>55</sup> It further states that "[u]nwelcome sexual advances by words or action used by a person in authority, in a working place or any other place, shall constitute the offence of sexual harassment."<sup>56</sup>

Elsewhere, Bangladesh enacted the Suppression of Violence Against Women and Children Act in the year 2000. This law states that "[i]f any male, trying to illegally satisfy his carnal desires, abuses [the] modesty of any woman or makes any indecent gesture, his act shall be deemed to be sexual harassment...".<sup>57</sup> The Act further provides for punishment by both a monetary fine and a "rigorous" prison term of between two and seven years.<sup>58</sup>

---

<sup>51</sup> 29 CFR 1604.11(c): "With respect to conduct between fellow employees, an employer is responsible for acts of sexual harassment in the workplace where the employer (or its agents or supervisory employees) knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action".

<sup>52</sup> 29 CFR 1604.11(d): "An employer may also be responsible for the acts of non-employees, with respect to sexual harassment of employees in the workplace, where the employer (or its agents or supervisory employees) knows or should have known of the conduct and fails to take immediate and appropriate corrective action. In reviewing these cases, the Commission will consider the extent of the employer's control and any other legal responsibility which the employer may have with respect to the conduct of such non-employees".

<sup>53</sup> 29 CFR 1604.11(e): "Prevention is the best tool for the elimination of sexual harassment. An employer should take all steps necessary to prevent sexual harassment from occurring, such as affirmatively raising the subject, expressing strong disapproval, developing appropriate sanctions, informing employees of their right to raise and how to raise the issue of harassment under Title VII, and developing methods to sensitise all concerned".

<sup>54</sup> ILO Technical Report. p46.

<sup>55</sup> Sri Lanka Penal Code. Section 345. Amendment Act. 1995.

<sup>56</sup> *ibid.*

<sup>57</sup> Nari o Shishu Nirjaton Daman Act (Suppression of Violence Against Women and Children Act). Section 10(2). Bangladesh. 2000.

<sup>58</sup> *ibid.*

The Philippines also has an Anti-Sexual Harassment Act, introduced in 1995, to prohibit sexual harassment by anyone “having authority, influence, or moral ascendancy over another”.<sup>59</sup> However, the law speaks only to *quid pro quo* harassment as it defines sexual harassment to occur when a superior “demands, requests, or otherwise requires any sexual favor from the other, regardless of whether the demand, request, or requirement for submission is accepted by the object of said act”.<sup>60</sup> In addition, even though the Act acknowledges that *quid pro quo* demands may create a hostile working environment, it excludes inappropriate sexual behaviour by superiors that create a hostile working environment, as well as all types of harassment perpetrated by co-workers, subordinate staff, or clients. Thus, even though the prohibition of sexual harassment is codified by statute, this law contains several critical weaknesses in terms of providing adequate protections to female workers.

Despite its shortcomings, this Act provides for three types of remedial action to address incidents of sexual harassment: (a) Filing a criminal complaint under the rules of criminal procedure; (b) Filing an administrative complaint with a committee on decorum and investigation; and (c) Filing a civil case for monetary damages under a theory of vicarious liability against the employer or supervisor, where appropriate.<sup>61</sup> Furthermore, it does not “preclude the victim [...] from instituting a separate and independent action for damages and other affirmative relief”.<sup>62</sup>

Specific incorporation into labour codes such as in Canada,<sup>63</sup> or in sex discrimination legislation as in Australia,<sup>64</sup> reflect the range of other options

---

<sup>59</sup> Anti-Sexual Harassment Act (Republic Act No. 7877). Section 3. Philippines. 1995.

<sup>60</sup> *ibid.*

<sup>61</sup> *ibid.* Sections 4 to 7.

<sup>62</sup> *ibid.* Section 6.

<sup>63</sup> Division XV.1 of Part III of the Canada Labour Code defines sexual harassment as “any conduct, comment, gesture, or contact of a sexual nature that is likely to cause offence or humiliation to any employee or that might, on reasonable grounds, be perceived by that employee as placing a condition of a sexual nature on employment or on any opportunity for training or promotion”.

<sup>64</sup> Section 28A of the Australian Sex Discrimination Act, 1984, states:

“(1) For the purposes of this Division, a person sexually harasses another person (the “person harassed”) if:

(a) the person makes an unwelcome sexual advance, or an unwelcome request for sexual favours, to the person harassed; or

(b) engages in other unwelcome conduct of a sexual nature in relation to the person harassed; in the circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that the person harassed would be offended, humiliated or intimidated”.

used to bring sexual harassment within legal purview. There is also evidence of incorporation through policy to set standards and give state recognition to the problem thereby paving the way for legislative and judicial interventions. For instance, in Malaysia, in the absence of a specific law, the Ministry of Labour passed a Code of Conduct for the Workplace to censure sexual harassment.<sup>65</sup>

**Arguments to support the incorporation of sexual harassment within existing constitutional or human rights frameworks on equality**

- Sexual harassment is an act of sex discrimination which predominantly affects women's safety, security, dignity in the workplace and equal opportunity in employment;
- Absence of sexual harassment laws in labour regulation excludes women's security concerns and thereby undermines their gender-specific violations and discrimination in the workplace;
- Absence of sexual harassment laws also invisibilises this problem that may disproportionately affect women in the workplace. In leaving no clear avenue for redress, women experiencing this problem are left with no choice but to leave their jobs, give up promotion opportunities or avoid 'male' dominated areas of employment since challenging the situation would put them at great risk. It thereby violates equal opportunities and equality of women in employment; and
- The absence of a specific law in itself violates equal rights for women and amounts to sex discrimination inasmuch as it excludes concerns relating to women while placing primacy on issues that affect male workers.

---

<sup>65</sup> The Code of Practice on the Prevention and Eradication of Sexual Harassment in the Workplace (para. 4) defines sexual harassment as:

“Any unwanted conduct of a sexual nature having the effect of verbal, non-verbal, visual, psychological or physical harassment:

(i) that might, on reasonable grounds, be perceived by the recipient as placing a condition of a sexual nature on her/ his employment [or employment-related benefits]; or

(ii) that might, on reasonable grounds, be perceived by the recipient as an offence or humiliation, or a threat to her/ his well-being, but has no direct link to her/ his employment [or employment-related benefits]”.

## (b) Court decisions

Even in the absence of domestic legislation prohibiting sexual harassment, many nations have confronted the issue through their judicial systems. This has been possible “by way of judicial interpretation of the prohibition of sex discrimination or equal rights requirements or even criminal and Constitutional provisions”.<sup>66</sup> For instance, despite not having a specific national sexual harassment statute, US federal courts, by applying Title VII, “established the scope and foundation of *quid pro quo* and hostile environment causes of action under [existing] sex discrimination legislation”.<sup>67</sup>

Other court decisions relating to sexual harassment include the following:

- The case of *Meritor Savings Bank v. Vinson*, in 1986, was the first sexual harassment case to reach the US Supreme Court. The plaintiff, Michelle Vinson, testified that her supervisor invited her to dinner where he asked her for sex in a motel. She initially refused his advances but eventually complied under pressure. Thereafter, he made frequent sexual demands of her both during and after business hours. He also fondled her in front of her co-workers, and often followed her into the women’s bathroom. The lower courts held that the supervisor’s behaviour did not constitute sexual harassment because the sexual relationship was “a voluntary one”. The Supreme Court, however, disagreed stating that the supervisor’s behaviour was a clear example of sexual harassment. It also reiterated that sexual harassment was a form of illegal sex-based discrimination.<sup>68</sup>
- In *McKinney v. Dole*, a Federal Appeals Court ruled that a supervisor committed sexual harassment when he blocked a doorway and forcibly twisted a female employee’s arm. The employee conceded that her supervisor had not asked for any sexual favours, but the court held his behaviour constituted harassment based on sex because he would not have treated a male employee in that manner.<sup>69</sup>
- In *Bell v. Crackin Good Bakers, Inc.* a supervisor at a bakery plant said he did not think that a woman plant ‘foreman’ should hold such a

---

<sup>66</sup> ILO Technical Report. p44.

<sup>67</sup> *ibid.* p45.

<sup>68</sup> 477 US 57. 1986.

<sup>69</sup> 765 F.2d 1129. DC Cir. 1985.

post, and that he would make her life “rough enough for her to leave”. The supervisor yelled at the woman, belittled her, and assigned her impossible tasks. Even though he never demanded sexual favours, the court held that “threatening, bellicose, demeaning, hostile, or offensive conduct by a supervisor in the workplace because of the sex of the victim” constituted sufficient grounds to establish a sexual harassment claim.<sup>70</sup>

- A New York Federal District Court in 1987 held that an excess of pornographic pictures and magazines in the office, frequent sexual jokes, sexual pictures in a company-sponsored film, and offensive sexual commentary during the film’s presentation together constituted sexual harassment. The court held that such circumstances create “an atmosphere in which women are viewed as men’s sexual playthings rather than as their equal co-workers”.<sup>71</sup>

In South Asia, several inroads have also been made. For example, in 1997, the Supreme Court of India confronted the issue of sexual harassment in the workplace in the landmark case of *Vishaka v. State of Rajasthan*. It held that sexual harassment was a “social problem of considerable magnitude”, and laid down explicit guidelines prohibiting such conduct in order “to fill the legislative vacuum”.<sup>72</sup> The court relied on India’s ratification of the Convention on the Elimination of All Forms of Discrimination against Women (the CEDAW Convention) and CEDAW General Recommendation No. 19 to interpret the Indian Constitution’s prohibition of sex discrimination to include sexual harassment. The *Vishaka* guidelines adopted by the court bind public and private employers to a programme of prevention, investigation, and remediation of sexual harassment in the workplace. Indeed, they impose an affirmative duty on employers to prevent sexual harassment in their work environments.

In Nepal, recognising the inadequacy of national laws to control sexual harassment – which in turn affects a woman’s right to equality and freedom guaranteed by the Constitution and the CEDAW Convention – the Supreme Court took the initiative to issue a directive order to implement provisions of international treaties in order to come up with appropriate laws dealing with sexual harassment.<sup>73</sup>

---

<sup>70</sup> 777 F.2d 1497. 11th Cir. 1985.

<sup>71</sup> *Barbetta v. Chemlawn Services Corp.* 669 F.Supp. 569. Western District NY. 1987.

<sup>72</sup> *Vishaka and Ors. v. State of Rajasthan and Ors.* 1997. 6 SCC 241.

<sup>73</sup> Writ No: 3434. 2002.

Before concluding this section, it is worth noting that existing avenues for redress of unfair labour practices such as civil law mechanisms, labour courts and tribunals, may also be accessed with sexual harassment as a cause of action. Where the problem is large-scale and structural within certain industrial systems, class action litigation, or where there is recognition of such actions, public interest litigation, may also be attempted.<sup>74</sup>

## VI. International human rights standards

All UN member states have a responsibility to uphold constitutional guarantees of basic human rights that are compatible with international law. Apart from this, the UN Charter which expresses “faith in fundamental human rights and in the dignity and worth of the human person and the equal rights of men and women”,<sup>75</sup> imposes a duty on member states to promote “universal respect for and observance of human rights and fundamental freedoms for all, without distinction as to race, sex, language, or religion”.<sup>76</sup>

More specific international standards in relation to sexual harassment at the workplace are embodied in the CEDAW Convention. The issue has also been dealt in several other UN treaties, declarations and various regional instruments as explained below.

### *Treaties*

#### **The CEDAW Convention**

Article 1 of the CEDAW Convention defines discrimination as:

[A]ny distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition,

---

<sup>74</sup> Public interest litigation is a form of litigation where actions based on constitutional law are pursued either by an individual representing a group or a group with a common cause. The remedies under this form are wide-ranging from striking down of statutes to damage claims and mandatory directions to the Executive to redress grievances under civil or criminal jurisdictions. The Supreme Court of India has been credited with pioneering this mechanism which broadens access to justice for the underprivileged. See *D.K. Basu v. State of West Bengal* where compensation for torture was ruled permissible under the public law jurisdiction of the constitutional courts.

<sup>75</sup> UN Charter. Article 1(3).

<sup>76</sup> *ibid.* Article 55. para. (c).

enjoyment or exercise by women [...] on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

Further, under Article 2(e), States parties are obliged to “take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise”.

Put simply, the CEDAW Convention imposes an obligation on states to eliminate all types of discrimination against women, and then applies this general principle to the employment context as well. This way the treaty represents an unambiguous mandate for states to take affirmative steps that are necessary to ensure the substantive equality of women at the workplace, both in treatment and opportunity. To be sure, substantive equality of women in the employment context cannot be achieved without the elimination of sexual harassment as this represents a barrier to their ability to seek employment, enjoy safe and healthy working environments, and achieve advancement within the workplace through promotions.

Furthermore, Article 15 of the convention affirms the general principle that states “shall accord to women equality with men before the law”.<sup>77</sup> This means that not only does a state have an obligation to protect women against the violation of sexual harassment but also must provide adequate recourse in the event that this right is violated.

More specifically, Article 11 of the convention contains a principal substantive provision on sexual harassment in international law. It reads:

1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular:
  - (a) The right to work as an inalienable right of all human beings;  
[...]
  - (f) The right to protection of health and to safety in working conditions...

In 1992, the CEDAW Committee went one step further by formulating and adopting General Recommendation No. 19,<sup>78</sup> which expressly recognises

---

<sup>77</sup> CEDAW Article 15.

<sup>78</sup> General recommendations are authoritative interpretations by the CEDAW Committee, of the provisions in the convention with regards to the rights of women and obligations of States parties.



sexual harassment as a form of violence against women.<sup>79</sup> This defines sexual harassment as “unwelcome sexually determined behavior [such] as physical contact and advances, sexually coloured remarks, showing pornography and sexual demands, whether by words or actions.”<sup>80</sup> It further elaborates that “[s]uch conduct can be humiliating and may constitute a health and safety problem; it is discriminatory when the woman has reasonable grounds to believe that her objection would disadvantage her in connection with her employment, including recruiting or promotion, or when it creates a hostile working environment.”<sup>81</sup>

Also important is how General Recommendation No. 19 spells out how States parties should bear responsibility for acts of gender-specific violence perpetrated by private actors.

[D]iscrimination under the Convention is not restricted to action by or on behalf of Governments [...] Under general international law and specific human rights covenants, States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation.<sup>82</sup>

### **International Covenant on Economic, Social and Cultural Rights**

The International Covenant on Economic, Social, and Cultural Rights obligates States parties “to ensure the equal right of men and women to the enjoyment of all economic, social, and cultural rights set forth in the [...] Covenant.”<sup>83</sup> It recognises “the right to work, which includes the right of everyone to the opportunity to gain his [or her] living by work which he [or she] freely chooses or accepts”, and requires States parties to “take appropriate steps to safeguard this right.”<sup>84</sup>

---

<sup>79</sup> Para. 6 broadly defines gender-based violence as: “[...] violence that is directed against a woman because she is a woman or that affects women disproportionately. It includes acts that inflict physical, mental or sexual harm or suffering, threats or such acts, coercion or other deprivations of liberty. Gender-based violence may breach specific provisions of the Convention, regardless of whether those provisions expressly mention violence”.

<sup>80</sup> CEDAW. General Recommendation No. 19 (1992). para. 18.

<sup>81</sup> *ibid.*

<sup>82</sup> *ibid.* para. 9.

<sup>83</sup> ICESCR. Article 3.

<sup>84</sup> *ibid.* Article 6(1).

The covenant also guarantees basic rights regarding employment conditions and remuneration. For example, its Article 7 acknowledges the right to “[f]air wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work”,<sup>85</sup> as well as equal opportunity for promotion and the right to “safe and healthy working conditions”.<sup>86</sup>

### **The International Covenant on Civil and Political Rights**

Article 17 of the International Covenant on Civil and Political Rights (ICCPR) recognises the right to privacy and to personal integrity. Article 26, on the other hand, recognises the equality of all people before the law and acknowledges the right to equal protection. Sexual harassment invokes all of these rights since victims have their right to privacy and personal integrity violated, and the state has an obligation to protect all its citizens, both men and women, from having their rights violated. Therefore, it follows that under the law, the state has an obligation to provide protection to victims of sexual harassment.

### **International Labour Organisation Discrimination (Employment and Occupation) Convention**

Adopted in 1958, this convention defines discrimination as “any distinction, exclusion or preference made on the basis of [...] sex [...] which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation”.<sup>87</sup> It requires States parties to implement a national policy to eliminate all forms of employment discrimination. Even though the convention does not specifically address the issue of sexual harassment, the fact that women are disproportionately affected by such behaviour brings it within the convention’s definition of employment discrimination. Thus, states that are party to this treaty are obligated to declare and implement a national policy to combat sex discrimination, including harassment, by employing measures that are appropriate to the local context.<sup>88</sup>

In 1996, the International Labour Organisation went on to adopt the General Surveys on Equality in Employment and Occupation Convention that interpreted

---

<sup>85</sup> *ibid.* Article 7(a)(i).

<sup>86</sup> *ibid.* Articles 7(b) and 7(c).

<sup>87</sup> Discrimination (Employment and Occupation) Convention. C111 (ILO, 1958). Article 1.

<sup>88</sup> *ibid.* Articles 2 and 3.

the Discrimination Convention to include sexual harassment in its definition of prohibited forms of employment discrimination.<sup>89</sup> This also defines sexual harassment, gives examples of prohibited conduct,<sup>90</sup> and warns of the ramifications if left unattended.<sup>91</sup>

## ***Declarations***

### **Universal Declaration of Human Rights**

In 1948, the UN adopted the Universal Declaration of Human Rights which affirms that “[a]ll human beings are born free and equal in dignity and rights.”<sup>92</sup> Article 2 establishes that all people are entitled to the Declaration’s enumerated rights and freedoms without distinction, including that based on sex, while Article 3 provides for a universal “right to life, liberty and security of person”. As well, all people are entitled to equal protection under the law,<sup>93</sup> and “[e]veryone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted [...] by the constitution or by law”.<sup>94</sup> In addition to these overarching provisions, the Declaration’s Article 23(1) carries significant weight in the context of sexual harassment, as it establishes “the right to work, to free choice of employment, to just and favorable conditions of work, and to protection against unemployment”. Although this Declaration is only a morally-binding document, it is still important because it establishes clear international norms that human rights violations are unacceptable and must be remediable by law.

---

<sup>89</sup> para. 25.

<sup>90</sup> *ibid.* para. 39: Sexual harassment is defined to include “any insult or inappropriate remark, joke, insinuation and comment on a person’s dress, physique, age, family situation, etc; a condescending or paternalistic attitude with sexual implications undermining dignity; any unwelcome invitation or request, implicit or explicit, whether or not accompanied by threats; any lascivious look or other gesture associated with sexuality; and any unnecessary physical contact such as touching, caresses, pinching or assault”.

<sup>91</sup> *ibid.* para. 40. “Sexual harassment undermines equality at the workplace by calling into question individual integrity and the well-being of workers; it damages an enterprise by weakening the bases upon which work relationships are built and impairing productivity”.

<sup>92</sup> UN Universal Declaration of Human Rights (1948). Article 1.

<sup>93</sup> *ibid.* Article 7.

<sup>94</sup> *ibid.* Article 8.

## Declaration on Violence against Women

The 1993 UN Declaration on Violence against Women states, “violence against women shall be understood to encompass, but is not limited to, the following: physical, sexual and psychological violence occurring in the general community, including [...] sexual harassment and intimidation at work.”<sup>95</sup> As such, it creates an obligation for states to exercise all due diligence in eliminating such forms of unacceptable behaviour.

## The Beijing Declaration and the Beijing Platform for Action

The UN Fourth World Conference on Women in 1995 produced two important documents: the Beijing Declaration and the Beijing Platform for Action. The former reaffirms an international commitment to the principles of human rights and dignity enshrined in the UN Charter, the Universal Declaration of Human Rights, the Declaration on Violence against Women, and the CEDAW Convention.<sup>96</sup> It professes a determination by member states to “take all necessary measures to eliminate all forms of discrimination against women [...] and remove all obstacles to gender equality and the advancement and empowerment of women”<sup>97</sup> to “[p]revent and eliminate all forms of violence against women and girls”,<sup>98</sup> and to “[e]nsure women’s equal access to economic resources...”.<sup>99</sup>

The Beijing Platform for Action (BPFA), on the other hand, includes in its list of critical areas of concern “violence against women” and “inequality in economic structures and policies, in all forms of productive activities...”.<sup>100</sup> It also outlines specific measures that States parties should undertake to achieve the objectives set forth in the Beijing Declaration.

The BPFA includes sexual harassment and intimidation in its definition of violence against women.<sup>101</sup> It further states that “[t]he experience of sexual harassment is

---

<sup>95</sup> Article 2.

<sup>96</sup> UN Beijing Declaration (1995). para. 8.

<sup>97</sup> *ibid.* para. 24.

<sup>98</sup> *ibid.* para. 29.

<sup>99</sup> *ibid.* para. 35.

<sup>100</sup> UN Beijing Declaration and Platform for Action (1995). Chapter 3. para. 44.

<sup>101</sup> *ibid.* Chapter 4. para. 113 defines violence against women as “any act of gender-based violence that results in, or is likely to result in, physical, sexual, or psychological harm or suffering to women, including threats of such acts, coercion, or arbitrary deprivation of liberty, whether occurring in public or private life”.

an affront to a worker's dignity and prevents women from making a contribution commensurate with their abilities".<sup>102</sup> Accordingly, the BPFA recommends that states "[e]nact and enforce laws and develop workplace policies against gender discrimination in the labor market, especially [...] regarding discriminatory working conditions and sexual harassment".<sup>103</sup>

In 2000, UN member states reinforced their support for the Beijing Declaration and the BPFA by endorsing an outcome document on future actions and initiatives. In outlining the obstacles to the implementation of the BPFA, the document noted among other things, that "sexual harassment [is] incompatible with the dignity and worth of the human person and must be combated and eliminated".<sup>104</sup> It also highlighted the persistence of discriminatory legislation and the continuing existence of legislative and regulatory gaps that failed to provide women with adequate protection from gender-based violence as one of the obstacles to achieving gender equality.<sup>105</sup>

In the context of sexual harassment, this referred to the failure of states to fully implement all measures necessary to secure for women, safe, healthy and equitable working environments. Prosecuting offenders, breaking cycles of gender-based violence and providing adequate redress for victims of such violence are simply not possible in the absence of legislation authorising such actions to be taken. Sexual harassment must be addressed at the national level if its prevention and eradication are to ever become meaningful and attainable goals.

## ***Regional instruments***

### **European Community**

The European Community adopted a comprehensive policy prohibiting sexual harassment in the workplace when the Council of Ministers passed a resolution in 1990 on "the protection of the dignity of women and men at work".<sup>106</sup> The resolution reads:

---

<sup>102</sup> *ibid.* para. 161.

<sup>103</sup> *ibid.* para. 165(c).

<sup>104</sup> UN General Assembly. Resolution A/RES/S-23/3. 16 November 2000.

<sup>105</sup> BPFA Outcome Document. para. 27.

<sup>106</sup> European Council Resolution on the Protection of the Dignity of Women and Men at Work (90/C157/02) 1990.

Affirms that conduct of a sexual nature, or other conduct based on sex affecting the dignity of women and men at work, including conduct of superiors and colleagues, constitutes an intolerable violation of the dignity of workers or trainees and is unacceptable if:

- (a) such conduct is unwanted, unreasonable, and offensive to the recipient;
- (b) a person's rejection of, or submission to, such conduct on the part of employers or workers (including superiors or colleagues) is used explicitly or implicitly as a basis for a decision which affects that person's access to vocational training, access to employment, continued employment, promotion, salary or any other employment decisions;  
and/or
- (c) such conduct creates an intimidating, hostile, or humiliating working environment.<sup>107</sup>

### **Organization of American States**

In 1996, the Organization of American States adopted the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women (Convention of Belem Do Para). This convention, which prohibits both *quid pro quo* and hostile environment harassment, contains provisions similar to those found in CEDAW General Recommendation No. 19.<sup>108</sup>

### **Caribbean Economic Community**

In 1989, at a meeting of Ministers of Women's Affairs, the Caribbean Economic Community (CARICOM) adopted a bill called the Model Legislation on Sexual Harassment. The scope of the law, however, was limited to *quid pro quo* sexual harassment. In 1996, at a meeting of Ministers of Labour, however, CARICOM adopted a model law on Equality of Opportunity and Treatment in Employment and Occupation, which expanded the coverage of the earlier model law to include hostile working environment harassment as well.<sup>109</sup>

---

<sup>107</sup> *ibid.*

<sup>108</sup> See Article 2(b).

<sup>109</sup> ILO Technical Report. p43.

## VII. Conclusion

Sexual harassment is an offence that contains numerous intersecting issues of human rights, gender equality, dignity, health, work conditions, productivity, freedom to practice and choose one's profession, right to livelihood, to name a few, since it impacts on all these areas. As explained, if workplaces are not made free of discrimination for women, then a community is set-back. More importantly, it personalises, silences and makes invisible, a systemic pattern of violations in the workplace and puts women at risk. In that sense, the importance of naming and censuring the problem in law cannot be understated.

Civil law goes a step further in distributing legal obligations among stakeholders in the workplace to build consciousness against sexual harassment as well as to protect and provide redress to victims. In casting the focus of this paper on civil law, the intention has not been to downplay criminal and tort actions, since all applicable courses of actions are simultaneously available and offer different opportunities for redress. For example, sexual harassment amounting to a criminal offence would be open to criminal action in addition to civil action and damages.

Legal recourse, however, comes with risks and limitations. Its outreach and enforcement in the context of poverty, illiteracy and unorganised labour in many parts of the region is a challenge for postcolonial legal systems that are distant and inaccessible to the poor generally, and women in particular. In the case of women's issues, the law more often than not, reproduces and reinforces dominant gender stereotypes of the 'good' and 'bad' woman, shifting scrutiny upon the victim, her behaviour, morality, dress, and so on, rather than the harasser, the workplace code of conduct, and employer responsibility.

In Asian and Pacific contexts too, gender notions can combine with cultural particularities and further complicate resistance to the problem. For instance, issues surrounding sexuality are largely taboo and result in denial of the problem and silencing victims. Often cultural pride contributes to the dismissal of sexual harassment as a phenomenon particular to westernised and urban work environments, and by implication, alien to Asian and Pacific countries. All these misconceptions explicitly or implicitly influence the recognition of the wrong, and the way it is addressed.

These contested issues and barriers highlight the limited nature of relief that law provides. The crafting of a comprehensive law in and of itself would offer a normative respite but one must remain mindful of public education and training inputs that would help challenge the gendered interpretation and implementation

of the law. It serves to emphasise that law cannot play a central role in addressing women's discrimination issues and that other interventions through policy, programmes and public education at the family, community, and institutional levels are equally important, as is the participation of all these sectors in such initiatives.









