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**GENDER NEUTRALIZING SEXUAL HARASSMENT LAWS IN INDIA –
NEED OF THE HOUR**- Sanjana Kulkarni & Shirang Ashtaputre¹**ABSTRACT:**

Since time immemorial, all forms of sexual harassment and tortures have been largely associated with women and their commission was often buried by the so called “learned” and the “wise” ancestors, for safeguarding the reputation of the family. However, with the rise of individualism and acceptance towards autonomy and individual identity of women, the Laws started imposing heavier punishments upon the infringement of the bodily integrity of women – in Democratic countries like India it was declared as a Constitutional mandate. Not only did the concerned authorities in India permit the development of laws for curbing sexual harassment at workplace and even in private life, but they saw to it, that people were effectively educated about the dire consequences of violating the right of women to work in a safe environment. It is amusing to note that in the quest of sheltering women against the commission of such offences, they overlooked the plight of men and transgenders who were capable of suffering the same trauma. Besides, these laws, so introduced vide the Criminal Law (Amendment) Act, 2013, declared women incapable of sexually harassing any person, contrary to the established international standards and precedents to that effect. Highlighting such arbitrary enforcement of stereotypes which is ideally against the values for which the Indian Constitution stands for, the Authors, through the medium of this Article shall entail a comparative analysis to showcase the need for gender-neutral sexual harassment laws in the country, thereby pointing out the need to uphold the fundamental rights of all citizens and ensuring equal treatment by Law.

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INTRODUCTION:

Every ancient scripture, be it the Manusmriti, the Bible or even the Quran have recognized that only a woman could be a victim of any forced sexual activity in the country. Contrary to the stance of several Western countries today, it was believed that only women could be raped and be victims of sexual harassment. The idea was that only men possessed unfettering lust and therefore, were capable of sexualizing women and unlike the latter, imposing its gratification. Naturally, several activities which amounted to a sexual offence were sought to be heavily punished to meet the changing needs of time and international mandates on human rights. Particularly, the latter was enforced in the form of *Vishakha Guidelines*² for preventing forms of sexual harassment against women at the workplace in India. However, it wasn't until 2013, that these guidelines were systematically framed as a Law, namely *The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013*³, which shelters protection to only females against acts by male employees or colleagues which could be in the form of seeking sexual favors, unwarranted romance or even physical or mental abuse, capable of impacting the well-being of the employee therein. It provides for conducting fair and impartial internal inquiry with regards to the said issue⁴, governed by the principals of natural justice⁵ - the accused may either be suspended or be transferred elsewhere during the course of the proceedings. As far as the said acts, either verbal or physical are unwelcomed and have manifested at a workplace, they are included within the aspects of sexual harassment. In Civic sense, it is defined as the commission of such harassment by a person having some position of power or authority over the other, which ends up negatively altering the working conditions of the employee⁶. Undoubtedly, such acts must be connected with allegations of promise, threat or

² [AIR 1997 SC 3011].

³ Hereafter referred to as POSH, 2013

⁴ *Tejinder Kaur v. Union of India* [2017 SCC Online DeL 12221]

⁵ *Sibu v. Air India Limited* [(2016) 2 KLJ 434].

⁶ *Janzen v. Platy Enterprises Ltd.* [[1989] 1 S.C.R. 1252].

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hostile work environment towards female employees⁷ - refusal to submit to sexual favors of the superior which leads to discriminatory and arbitrary behavior is captured as the essence of sexual harassment worldwide⁸. Unfortunately, this privilege has been conveniently bestowed only upon women for blackmailing males to their advantage – for instance, sexual harassment is considered to be gender discrimination only against women⁹ besides concluding it as an offence against their modesty and privacy¹⁰.

COMPARATIVE INSIGHT INTO GENDER NEUTRAL SEXUAL HARASSMENT LAWS:

The very essence of sexual harassment incepts when a person starts feeling uncomfortable due to direct or indirect sexual acts of the other – the U.S. Supreme Court, in *Ellison v. Brady*¹¹ held that:

“Men tend to view some forms of sexual harassment as “harmless social interactions to which only overly-sensitive women would object”. The characteristically male view depicts sexual harassment as comparatively harmless amusement.”

In doing so, it showcased disregard towards the instances of sexual harassment of males at the workplace, which, as of today, in India practically goes unreported in India due to the absence of any concrete law to that effect, exposing the failure of the Legislature to protect their Constitutional Right to work in a safe environment. And while the same Court rectified its mistake in *Onacle v. Sundowner Offshore Services*¹², whereby it recognized the possibility of man-to-man sexual harassment at workplace in 1998 itself, India yet, continues to be ignorant of such integral facets of human rights laws, adding to the misery of the people.

This menace is further supplemented by *Section 354-A* of the Indian Penal Code, 1860 which criminalizes the following forms of sexual harassment, only if committed by a man:

⁷ *K.P. Anil Rajagopal v. State of Kerela* [(2018) 1 KLJ 106].

⁸ Discrimination Act, 1975 [United Kingdom].

⁹ *Apparel Export Promotion Council v. A.K. Chopra And Ors.* [1997 (42) DRJ 526].

¹⁰ *Mrs. Rupan Deol Bajaj And Anr v. Kanwar Pal Singh Gill And Anr.* [1995 SCC (6) 194].

¹¹ [U.S. Court of Appeals, Ninth Circuit 924 F. 2d 872 (1991)].

¹² [523 U.S. 75 (1998)].

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- a. *Physical contact or advances including unwelcome and explicit sexual overtures*
- b. *Demands for sexual favors*
- c. *Showing Pornography to women against their will*
- d. *Making sexual colored remarks*

The secondary aspects of sexual harassment such as voyeurism and stalking are criminal offences as well, though, punishable only if committed against a woman or one recognizing herself as a woman. Impliedly, if a woman were to commit any of the aforesaid acts against another woman or even a man or a person of any other gender she would not be guilty in the eyes of the Law – it deems the other half of the society incapable of committing such crimes, contrary to the claims made by men in the West of being the victims of such form of harassment from their female superiors¹³. In fact, Chipotle Mexican Grill paid \$ 95,000 in settlement to a male employee, after he complained of being sexual harassed by his female superior¹⁴, highlighting that the global superpowers have acknowledged sexual harassment to not be gender-specific, as against its Indian interpretation.

The aforesaid data compels the Author to plead the dire need for accepting the gender-neutral nature and impact of sexual harassment in India is a must for preventing the violation of rights of men and trans-genders in India. For dispensing the prevailing ambiguity, it is prayed that the concerned authorities must amend the definition of *Section 354-A* of the Indian Penal Code, 1860 for replacing “man” with “any person”, in pursuance of equity and good conscience. Likewise, the scope of the Prevention of Sexual Harassment at Workplace Act, 2013 needs to be widened to include redressal for males and those not recognizing themselves as women, against all forms of sexual harassments from males, females or even transgender superiors, including instances where even a female or a transgender could sexual harass others. The refusal to implement the

¹³ ***Two Young Men Report Sexual Harassment at New Jersey Grocery Store*** U.S. Equal Employment Opportunity Commission Case Law on sexual harassment of men at workplace As retrieved from: (<https://www.eeoc.gov/youth/two-young-men-report-sexual-harassment-new-jersey-grocery-store>) (Accessed Jul 21 2020 15:01 IST).

¹⁴ Andrew Keshner ***Chipotle pays \$95K to settle with male employee who says female boss sexually harassed him*** MarketWatch Dec 4 2019 2:19 PM ET. As retrieved from: (<https://www.marketwatch.com/story/chipotle-paying-95000-to-end-sexual-harassment-case-where-male-employee-said-his-female-boss-made-life-miserable-2019-12-04>) (Accessed Jul 21 2020 15:11 IST).

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aforesaid recommendations imply massive contradiction with the revolutionary judgment conveyed by the Apex Court *National Legal Services Authority v. Union of India*¹⁵, whereby the legal definition of the term “person” was deemed gender-neutral for ensuring protection against criminal acts to every individual. The wordings of the specific provisions of these Laws can be molded as per the definition of sexual harassment under the *Human Rights Act, 1993* (of New Zealand), which recognizes it as an act against all persons¹⁶, which would then allow male victims of sexual harassment to be consoled by the Legal system, as witnessed in Australia¹⁷.

CONCLUSION:

Interestingly, Section 354 of the Indian Penal Code, 1860¹⁸ has been interpreted by the Indian Judiciary to conclude that even a woman is capable of outraging the modesty of another woman¹⁹. Likewise, the Delhi High undertook similar exegesis for declaring a transgender, recognizing herself as a woman to be a victim of sexual harassment within the meaning of Section 354A of the Indian Penal Code, 1860²⁰. This is indeed in line with the judgment propounded in *Navtej Singh Johar v. Union of India*²¹, which after recognizing and legalizing homosexuality has opened the scenarios of holding men guilty for sexually harassing another man or a transgender recognizing himself as a man. Irrespective of these transformative verdicts, it is clear that making lewd comments against men, as witnessed in the incidences above, which ideally amounts to sexual harassment but is in-actionable before the Indian Court of Law. Specifically, sexual harassment is perceived as a violation of right to livelihood under Article 21 of the Constitution²², restricting only women, which is *ultra vires* of the principles of equality. In Sexual Harassment could indeed be perceived as a violation of the privacy and the self-autonomy of a person so enshrined under the aforesaid constitutional provision since it abridges the bodily

¹⁵ [AIR 2014 SC 1863].

¹⁶ Human Rights Act, 1993 Section 62. (New Zealand)

¹⁷ *Green v. State of Queensland* [[2017] QCAT 008].

¹⁸ Assault or criminal force to woman with intent to outrage her modesty.

¹⁹ *State of Madhya Pradesh v. Sheodayal* [1956 Cr LJ 83].

²⁰ *Anamika Gupta v. The State (Nct Of Delhi)* [CRL.M.C. 3269/2015 & CrI.M.As.11602-03/2015].

²¹ [AIR 2018 SC 4321].

²² *Narendra Kumar v. State of Haryana, JT* [(1994) 2 SCC 94].

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integrity of the victim, irrespective of how they recognize themselves²³. While special laws for women can indeed be designed by the Parliament, it is injustice protection is accorded to women and not men when they are vulnerable to a particular evil in a given situation – in doing so, it would appear that the State is enforcing the stereotype that only women can be sexually harassed²⁴, which is unacceptable in a Constitutional Democracy like India. Where the leading nations of the world are considering making sexual harassment against women within their defense units as a “crime”²⁵, it is unfortunate that none of them have showcased any inclination towards extending this facility towards soldiers, which form a greater populace of nearly every armed force. It is amusing to note, that even the Military World has recognized all forms of sexual violence as “War Crimes”, irrespective of the gender of the person against whom the same has been committed, and yet, the civil societies of the world ponder, debate and deliberate up on the implementation of its gender-neutrality, leading to a major violation of the rights of the citizens due to the absence of stringent and requisite measures. Although it is true that women and girls cannot be left to fall prey to “*lecherous kind in a civilized society*”²⁶, the authorities cannot ignore the plight of those humans, who too are equally capable of suffering similar trauma and hence, the violation of their fundamental rights if not more. This judicial contradiction needs to be removed by the Legislature at the earliest for ensuring that the civil rights of men and even trans-genders are protected and equality exists in its truest sense in the country.

²³ *Justice K. S. Puttaswamy (Retd.) and Anr. v. Union Of India And Ors.* [(2017) 10 SCC 1].

²⁴ *President of Republic of South Africa And Anr. v. Hugo* [1997] ZACC 4; *Joseph Shine V. Union of India* [2018 SCC OnLine SC 1676].

²⁵ Leo Shane III *Defense Department to make sexual harassment a crime* MilitaryTimes_May 2nd, 2019. As retrieved from: (<https://www.militarytimes.com/news/pentagon-congress/2019/05/02/defense-department-to-make-sexual-harassment-a-crime/>).

²⁶ *Roshan Lal v. State (NCT of Delhi)* [2018 SCC OnLine Del 10704].

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