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SEXUAL HARASSMENT IN THE WORKPLACE IN ASIA

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BACKGROUND

Women's participation in economic sector is crucial for their economic empowerment and their sustainability. However, problems such as sexual harassment in the workplace discourage women to continue working. Sexual harassment in the workplace though an age-old problem has emerged as a serious concern in Asia and the Pacific recently.¹ It is increasingly being recognized as a violation of human rights and human dignity, which undermines equality of opportunity and treatment between men and women. As women's participation is growing in employment sector, the problem of sexual harassment is a necessary problem to address to ensure safe and healthy working environment.

In Bangladesh, large scale of women's entry into paid labour force has increased incidences of sexual harassment. The 1996 figure shows that women's participation in labour force is 51 percent, women engaged in agriculture are 63 percent, women in service sector are 27 percent and women industrial activities are 10 percent.² Sexual harassment, work and mobility appear to be closely intertwined in Bangladesh. Women are forced to face double jeopardy when it comes to sexual harassment. They are vulnerable to physical, psychological and sexual abuse in the workplace; they are frequently subjected to harassment in the public domain of the street. According to a health survey on safety regulations in the garment industry, sexual harassment is likely to be the most dominant source of stress for garment workers.³

In Nepal a research on Sexual Harassment at the Workplace revealed that the problem of sexual harassment is highly prevalent in workplaces, as 53.84 percent of women employee/workers reported that they have faced the problem of sexual harassment in their workplaces, 57.14 percent of male and 23.08 percent women employee/workers were of the view that they were aware of sexual harassment at the workplace.⁴ However, the problem is not brought out in the open because the subject is taboo and Nepali women still do not share the problem among the friends also leave it bringing it to the authorities attention. Also, there is no mechanism to address the problem in the workplaces and also there is no specific law on sexual harassment and the other relevant laws are not useful in addressing the problem.⁵

¹ Action against Sexual Harassment at Work in Asia and the Pacific. Nelien Haspels, Zaitun Mohamed Kasim, Constance Thomas and Deirdre McCann, ILO, Bangkok Area Office and East Asia Multidisciplinary Advisory Team.

² Role of NGO in Effective Implementation of PFA and CEDAW in Bangladesh, Nari 2003, NGO Coalition on Beijing Plus Five Bangladesh (NCBP).

³ Role of NGO in Effective Implementation of PFA and CEDAW in Bangladesh, Nari 2003, NGO Coalition on Beijing Plus Five Bangladesh (NCBP).

⁴ Sexual Harassment at the Workplace in Nepal, International Labour Office and Forum for Women, Law and Development, 2004.

⁵ Sexual Harassment at the Workplace in Nepal, International Labour Office and Forum for Women, Law and Development, 2004.

In Japan, a study conducted by Ministry of Labour found that out of 2254 women respondent, two third were subject to sexually harassed, 11 % had experienced quid pro quo and 45 % had been subjected to hostile working environment⁶.

SEXUAL HARASSMENT AS A GENDER AND HUMAN RIGHTS CONCERN

Sexual harassment is a form of gender discrimination. Men may be subjected to sexual harassment but majority of the victims are women. In response to the growing awareness about the adverse impacts of sexual harassment, there have been increasing efforts around the world not only to break the silence on sexual harassment but also to take pro-active steps in addressing it. Many sexually harassed individuals put up with the damaging physical and psychological effects of sexual harassment because taking action can be daunting, especially in environments that do not provide moral and practical support. Most often, victims are ashamed and embarrassed, and worry that they will be labeled as loose women and therefore prefer to keep quiet about it. Sexual harassment is often described as harmless 'flirting' and an expression of men's appreciation for women', which clearly ignores the fact that flirting is mutually consensual behavior between two people whereas harassment is not.

INITIATIVES FOR LAW REFORM

Various initiatives have slowly begun to address sexual harassment in Asia. Also, specific legislation exists for example in Belize, Costa Rica, France, Luxembourg, and the Philippines. In most countries sexual harassment has been addressed by implication as an activity which is a violation of a statute covering a subject other than sexual harassment, such as human rights, non-discrimination, equal opportunity and treatment, unfair dismissal, contract law, tort law, or criminal law. Slowly, the trend of providing explicit recognition and protection against acts of sexual harassment is occurring in countries in Asia and the Pacific as well as in other regions of the world.⁷

In Bangladesh sexual harassment was made punishable by Section 10 (2) of the Nari O Shish Narjaton Domon Ain (2000) states that any man who, in order to satisfy his lust in an improper manner, outrages the modesty of a woman, or makes obscene gestures, will have engaged in sexual harassment and for this, the above mentioned

⁶ Action against Sexual Harassment at Work in Asia and the Pacific. Nelien Haspels, Zaitun Mohamed Kasim, Constance Thomas and Deirdre McCann, ILO, Bangkok Area Office and East Asia Multidisciplinary Advisory Team, page 54

⁷ Action against Sexual Harassment at Work in Asia and the Pacific. Nelien Haspels, Zaitun Mohamed Kasim, Constance Thomas and Deirdre McCann, ILO, Bangkok Area Office and East Asia Multidisciplinary Advisory Team.

male will be sentenced to rigorous imprisonment of not more than seven years and not less than two years and beyond this will be subjected to monetary fines as well.⁸

Also, advocates and court's creativity are commendable, for example, in Sri Lanka, prior to the amendment of the Penal Code in 1995 to recognize 'unwelcome sexual advances,' a case filed by an employee against a superior officer who allegedly demanded sexual favours in exchange for a promotion was recognized by the court as an act of soliciting 'bribery.'⁹

Some of the initiatives established statutory obligation, in Japan, the 1997 amendment to the Equal Employment Opportunity Law created a new provision for sexual harassment, which imposed an obligation on employers to prevent both quid pro quo and hostile environment.¹⁰

Calls for legislative protection is increasing in countries where no specific legislation is in place. In Pakistan, a report of the Commission on Inquiry for Women in Pakistan recognized that sexual harassment in the workplace and elsewhere is widespread in the country and it recommends the enactment of legislation making it mandatory for all employers to respond and monitor incidents of violence and harassment at work.

Awareness programmes have been conducted in South Asia. Also, business associations have started initiatives of providing awareness on the growing problem of sexual harassment in the workplaces. Both in Nepal and India, training programmes on Sexual Harassment in the Workplace have been provided in organizations. Such trainings have been developed in a way to promote understanding of the problem of sexual harassment as a violation of right to work in a safe environment and a problem that affects a woman's dignity and health. The training provides understanding as how to respond to the problems in a situation where mechanism may or may not be available. In Nepal, the training has been well received among the women as many feel they are able to respond to the problem in a personal level by confronting the harasser and in worse situation complain to the authority.

GOOD PRACTICES

Judicial Activism

⁸ Role of NGO in Effective Implementation of PFA and CEDAW in Bangladesh, Nari 2003, NGO Coalition on Beijing Plus Five Bangladesh (NCBP).

⁹ Action against Sexual Harassment at Work in Asia and the Pacific. Nelien Haspels, Zaitun Mohamed Kasim, Constance Thomas and Deirdre McCann, ILO, Bangkok Area Office and East Asia Multidisciplinary Advisory Team, page 159

¹⁰ Ibid

In India, Supreme Court guideline came about due to the gang rape of Bhanwari Devi by a group of Thakurs, as punishment for having stopped a child marriage in their family. Trial court acquitted the accused. She said that she had nothing to be ashamed of and that the men should be ashamed for what they have done. With the concrete campaign for justice for Bhawani, in December 1993, the High Court established gang rape committed out of vengeance. Her fighting spirit provoked women's groups and NGO's to file a class action by certain social activists to bring the attention towards the societal aberration, and assisting in finding suitable methods for realization of the true concept of gender equality and prevent sexual harassment of working women in all work places through judicial process, to fill the vacuum in existing legislation. The result is the Supreme Court judgment, which came on 13th August 1997 and gave Vishakha Guideline.

According to the guideline the duty of the employer shall be to prevent the acts of sexual harassment and to provide for resolution, settlement or prosecution of acts of sexual harassment by taking all steps required taking appropriate disciplinary action.

The definition of sexual harassment includes unwelcome sexually determined behaviour as (a) physical contact and advances; (b) a demand or request for sexual favours; (c) sexually coloured remarks; (d) showing pornography; (e) any other unwelcome physical, verbal or non-verbal conduct of sexual nature.

The guideline also provides for a complain mechanism in the employer's organization for redress of the complaint made by the victim. Such complaint mechanism should ensure time bound treatment of complaints. A Complaint Committee should be headed by a woman and not less than half of its members should be women. Complaints Committee should involve a third party, either NGO or other body who is familiar with the issue of sexual harassment.

Also the guideline ensures that employees should be allowed to raise issues of sexual harassment at workers' meeting and in other appropriate forum and it should be affirmatively discussed in Employer-Employee Meetings. Awareness of the rights of female employees in this regard should be created in particular by prominently notifying the guidelines (and appropriate legislation when enacted on the subject) in a suitable manner.

However, a report of the Lawyers Collective, 2001 suggests that both a new law to deal specifically with sexual harassment and another to outlaw discrimination on the basis of sex is necessary. The new law is needed for

further clarity to the Indian Supreme Court decision on sexual harassment to ensure procedural safeguards in legislations. ¹¹

In Nepal, even in the absence of law, the labour court recognized sexual harassment as misconduct in the workplace. Also the labour court used the finding of research conducted by FWLD/ILO and stated that sexual harassment would discourage women's participation in the economic sector and also acknowledged need to enact a law inline with GR 19 of CEDAW. Similarly in Nepal, Public Interest Litigation was filed¹² at the Supreme Court on behalf of the victim. In response to the PIL the Supreme Court issued a directive order to the concerned Ministries to develop a Bill on sexual harassment in the workplace.

Following the court order initiatives have been started in India and Nepal, to draft a specific legislation-making employer accountable to guarantee safe and healthy workplace and recognize sexual harassment as misconduct. Indian Bill provides provision for the formation of special complains committee for effective investigation and protection of privacy and dignity of victim with compensation provision¹³. An alternate Bill is being also prepared by civil societies specially to include service beneficiaries such as students in educational institutions, patients in hospitals, customers in banks and also proposed to bring unorganized sector within it's framework. In Nepal Civil Societies has already drafted a Bill ¹⁴ and Government is also on the process of it. However there is no parliament since last three years in Nepal due to this law making process has been affected.

Enterprises policy against Sexual harassment

Good practices have begun in enterprises where the employment policies have included the provisions to address sexual harassment in the workplace in response to continuous advocacy and judicial decisions in some of the countries in South Asia. In Nepal, some of the hotels and industries have adopted policy to address the problem through formation of committee to listen to complains and take actions. Whereas in India such practices is initiated by larger number of enterprises especially after the Vishakha guideline. Many organizations have formed grievances committee and also invited women organization as a member of such committees to ensure fair and sensitive hearing.

Research

Prof. Savitri Goonshakhere form Sri Lanka said that study conducted by ILO on sexual harassment at plantation sector 2000 highlighted the issue largely and

¹¹ Action against Sexual Harassment at Work in Asia and the Pacific. Neliën Haspels, Zaitun Mohamed Kasim, Constance Thomas and Deirdre McCann, ILO, Bangkok Area Office and East Asia Multidisciplinary Advisory Team.

¹² Sarmila Parajuli and others vs. HMG/N and others, Writ No. 3434, of Vikram Sambat 2060 (2002).

¹³ Sexual Harassment of women at the workplace (Prevention and redressal) Act 2004 India

¹⁴ Forum for Women, Law and Development have drafted the Bill on Sexual Harassment in the Workplace and this can be seen in the website: www.fwld.org.

facilitated to call for the legal provision¹⁵. In Nepal a research conducted by Forum for Women Law and Development (FWLD) for ILO revealed that the problem is highly prevalent however, women suffer in silence in absence of formal and informal mechanisms. In India, a survey conducted by a an NGO called Saheli, amongst others concluded that job security, strong unions, strict enforcement of rules and transferable jobs were the main reasons for the non-occurrences of sexual harassment in some sectors. The researches have been an effective resource guide to follow up on actions against sexual harassment.

The Basis of the Initiatives

In *Vishaka vs. State of Rajasthan*, Indian Supreme Court considered General Recommendation no 19 of CEDAW as a guideline and recognised equality in employment can be seriously impaired when women are subjected to gender specific violence, such as sexual harassment at work place. Such 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.

The significance of the Supreme Court ruling was that CEDAW, though not directly part of domestic law, could be used by the Indian courts to shape national laws. Till this happened the treaty merely remained as an international commitment. Constitution of India also provided right to equality, right to work with the dignity and right against exploitation as a fundamental rights. And Article 51(c) of the Constitution enables Parliament to enact laws for the implementation the International Convention. Power of the Courts also includes power to meet the challenges to protect the workingwomen from sexual harassment and to make their fundamental rights meaningful.

In Nepal the Constitution of the Kingdom of Nepal, 1990 upholds the basic principle of equality, i.e. equality before law and equal protection of law¹⁶, the principle of non-discrimination in the application of general laws on the basis of religion, race, sex, caste, tribe or ideological conviction ¹⁷ and states that citizens shall not be discriminated amongst one another on the basis of religion, race, sex, caste, tribe or ideological conviction¹⁸. The Preamble to the Constitution aims to achieve social and economic justice guaranteeing basic human rights to all the citizens and establishment

¹⁵ Wijayatilake, kamilini and Zackariya, Faizun , Sri Lanka Study, ILO 2000

¹⁶ Ibid., Article 11(1).

¹⁷ Ibid., Article 11(2).

¹⁸ Ibid., Article 11(3).

of an independent and competent system of justice with a view to transforming the concept of rule of law into a living reality.¹⁹

Also, Nepal has ratified 16 international human rights instrument including Convention on the Elimination of All Forms of Discrimination Against Women, (CEDAW) 1979. Also, the General Recommendation No. 19 (Eleventh session, 1992) recommends governments to take effective measures including strong penal sanctions, civil remedies and compensatory provisions to protect women against sexual harassment in the workplace.

The Beijing Platform for Action highlights violence against women as a physical, sexual, psychological violence occurring within general community, including rape, sexual abuse, sexual harassment and intimidation at work, in educational institute etc, giving primary responsibility to the government to protect women from such violence.

Trade unions have also played a role in addressing the problem of sexual harassment. In organizations where policies have not been introduced, trade unions have sometimes taken ad hoc action on receiving a complaint, and managed to achieve recognition for the problem and redress for the victim, especially in countries where sexual harassment policies are not widespread. There are reports from Bangladesh, for example of a manager being suspended after a trade union complained of harassment, while in Sri Lanka, trade unions have pursued harassment complaints which are reported to their district or head offices, although they have proved less likely to take up cases reported in field level. In Nepal, in some cases where complaints have been made to trade unions, the latter have managed to secure compensation for the victims.²⁰

EVALUATION OF SUCCESS/EFFECTIVENESS OF THE PRACTICE

Concern with sexual harassment is relatively recent in South Asia, but increasingly it is being recognized as a violation of human rights and an affront to the dignity of persons, which seriously undermines equality of opportunity and treatment between men and women. In response to continuous advocacy of women's organization and judicial activism etc, the problem of sexual harassment has been recognized well. Research conducted by ILO in Nepal and Sri Lanka has really helped to bring the statistics and evidences of nature, extend and legal measures available in the country. The research conducted in Nepal helped not only to do

¹⁹ Preamble to the Constitution of the Kingdom of Nepal, 1990.

²⁰ Action against Sexual Harassment at Work in Asia and the Pacific. Nelien Haspels, Zaitun Mohamed Kasim, Constance Thomas and Deirdre McCann, ILO, Bangkok Area Office and East Asia Multidisciplinary Advisory Team.

advocacy with employer's association and trade unions but also to courtrooms. Awareness programmes facilitated by UN system, NGOs and trade unions, have motivated women to fight for the equality and dignity at workplace. Progresses can be measured through the steps taken against sexual harassment, complaints filed in employer organizations or cases filed in courts.

IEC materials are developed to be used as tools for advocacy and generating awareness. These documents have helped in bringing the issue in highlight and helped in drawing attention from different parts of the society.

Due to the Vishakaha Judgment, many civil societies became aware of the issue, started publicize it and pushed for the implementation. Many have started breaking the silence. In fact cases have increased from the numbers of universities and college. Media has also started giving attention. In one of the university where a student was sexually harassed by professor in Baroda, women organization wrote a petition to the court where court started supervising implementation of Vishakha guideline any service rule are being changed..

CHALLENGES

Increasing number of Asian women is going out to work outside home. Many women are forced to deal with harassment and unwanted attention –because they are women. Inequalities in the position of men and women exist in nearly all societies and sexual harassment at work is a clear manifestation of unequal power relations. Women are vulnerable to the harassment because they lack similar power, lack self-confidence and are socialized that they are to suffer in silence. Sexual harassment is also used as a tool to discourage women who may be seen to be competing for power.²¹ Discussions of sexual harassment in the international feminist and legal scholarship have been focusing overwhelmingly on the workplace, however adequate attention is yet to be given in harassment in universities and in public places.

Though women in workplace suffer the problem many times both the employees and employers deny the existence of the problem. The scarce employment opportunity and the fear of losing job future silence the victims. Sexual harassment is still considered as a flirt, or office romance in workplaces. Myths exist blaming women for enticing men for harassment.

The number of reported cases of sexual harassment is only the tip of the iceberg, because very few women take action, unless it concerns physical assault and rape.

Actions need to be urgent and effective. Governments, employers and workers organizations and NGOs in Asia and the Pacific and around the world are increasingly acting against sexual harassment at work by adopting workplace policies

²¹ Ibid.

and implementing them through practical action at the workplace. Legal protection is necessary but adopting a law is not sufficient to resolve sexual harassment abuses in workplace. In addition to law, workplace polices are necessary to protect workers form sexual harassment and enterprises from expensive measures for redress. Preventive action is key, large-scale awareness raising and training is needed in workplaces.

Training programmes would prove fruitful and will work to empower women to response to the problem. Trade union can play a role in initiating cases of the women and help them receive adequate compensation and punishment to the perpetrator in absence of the law. Sexual harassment is a gender issue and a human right issue, importantly; it violates the right of women to work in a safe and healthy environment. It is imperative that stakeholders give the problem its due attention and contribute in promoting a secure and safe environment for working women.