

Right to work in an environment free of harassment: Harassment at workplace in Myanmar

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Abstract

Sexual harassment must encompass two elements, 'sexual' conduct and 'sex-based' behavior, which are unwelcome to the recipient and has caused the person to feel violated, insulted, and being in an unbearable hostile environment. Harassment in the workplace is the unfortunate reality for many women. The issue of sexual harassment in the workplace has been addressed both as a manifestation of sex discrimination and as a form of violence against women within the United Nations. This paper seeks to consider safe, healthy and respectful work environments for all women without any fear of harassment, abuse or discrimination as women have a basic human right to work free from violence or the risk of violence. It also aims to examine setting standards of safe workplace behavior as an important part of corporate culture of all workplace in Myanmar. The analysis underscores how the national legal framework and policy to respond to sexual harassment in and around the workplace is provided in Myanmar. The results from this study indicate that in Myanmar entire responsibility for protection of women against harassment in work is totally weak as national legal commitment to align with international best practices. Finally the study recommends that statutory obligation of employers (enterprises) to prevention and control of harassment in their workplace by providing establishment of clear disciplinary policy consistency with the code of conduct indicating all employers to respond and monitor incidents of violence and harassment at work.

Key words: *Sexual harassment, Workplace, Employers, Safe Environment, Right to work, Policy, Code of conduct, Myanmar.*

Introduction and Background

Before moving on to examine how harassment at the workplace violates one's right to work, it is important to understand the term harassment itself. Despite both national and international efforts to eliminate sexual harassment, there is no single definition of what constitute prohibited behavior. Generally, international instruments define sexual harassment broadly as a form of violence against women and as discriminatory treatment, while national laws focus more closely on the illegal conduct. Sexual harassment involves sexualized forms of unwanted or unwelcome behaviour or conduct. It has the "purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment." Although anyone may be subject to sexual harassment, women are the overwhelming majority of reported victims.² At the International level, the United Nations General Recommendation 19 to the Convention on the Elimination of all Forms of Discrimination Against Women defines that "sexual harassment includes unwelcome sexually behaviour as physical contact and advances, sexually colored remarks, showing pornography and sexual demand, whether by words or actions". Such conduct can be humiliating and may constitute a healthy and safety problem; it is discriminatory when the woman has reasonable ground to believe that her objection would disadvantage her in connection with her employment, including recruitment or promotion, or when it creates a hostile working environment.³

In 1993, the United Nations Declaration on the Elimination of Violence against Women defined "violence against women as any act of gender-based violence that results in, or is

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² Parliament and Council Directive EU/2006/54 of 5 July 2006 Implementation of the principle of equal treatment of men and women in matters of employment and occupation (2006) OJ 204, p 23-36.

³ CEDAW Committee, General Recommendation No19: Violence against Women, 11th sess, UN Doc GA Res 45/155 (18 December 1990) para 18.

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 in private life”.⁴ The Equal Employment Opportunity Commission (EEOC)⁵ in the United States has developed a useful definition of sexual harassment in the following way, “Unwelcome sexual advances, requests for sexual favours and other verbal or physical conduct of sexual nature constitutes 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 reject of such conduct by an individual is used as the basis for employment decisions affecting such individual”. Harassment manifests itself in various forms of unethical and unwelcome behavior, ranging from stalking, gazing, unwanted jokes and intimidation to sexually demeaning attitudes.⁶ Therefore, it can be understood as an unethical act of coercion, or of gaining attention, though not necessarily sexual in nature.

Common causes of Harassment: Categories of harassment to identify the most common incidents under the Scholar, Samani are: 1) harassment based on a misuse or abuse of power; 2) harassment for a discriminatory reason; 3) harassment due to a personality clash; 4) harassment arising as a result of poor management practice in work; 5) harassment based on characteristics of the victim; 6) harassment borne out of an interaction between individual and situational factors, based on uncomfortable work environment.⁷ Violence and harassment against women in the workplace is often an expression of power and control (by co-workers, employers and supervisors, and third parties).

Impact on the workplace: Violence and harassment at work is a major psychosocial problem that can affect individual health and wellbeing.⁸ It substantially affects work and the working environment; it can have devastating effects on women's safety, health and ultimately, their participation in work, wellbeing of victims, as well as serious consequences for the employer and society at large.⁹ Surveys have repeatedly drawn out the negative effect of violence and harassment on women's health and wellbeing, resulting in increasing rates of sick leave or, eventually, resignation. This is particularly the case when violence and harassment is persistent or is not dealt with effectively when complaints are made. One of the survey provided by European survey of women transport workers reported high levels of physical and psychological ill-health as a result of sexual harassment and sexual assaults at work, with often

⁴ United Nations Declaration on the Elimination of Violence against Women, GA Res 48/104, UN GAOR 49/217 (20 December 1993) art 1.

⁵ The Equal Employment Opportunity Commission (EEOC) is the U.S government body that enforces the Civil Rights Act based on complaints and filed claims. The EEOC has defined workplace sexual harassment in its guidelines in 2006.

⁶ Maria Khan and Ayesha Ahmed, Protection against Harassment of Women at the Workplace Act 2010: A Legislative Review (2016) 3(1) LUMS Law Journal.

⁷ Samani, K. Embracing, New Directions in Workplace Bullying Research: A Paradigmatic Approach (2012) 22(16) Journal of Management Inquiry, p 26-36.

⁸ Eurofound and EU-OSHA, Psychosocial risks in Europe: Prevalence and strategies for prevention, (Joint report, 2014) and Mario Giaccone and Daniele Di Nunzio, Associazione Bruno Trentin, Eurofound, Violence and harassment in European workplaces: Causes, impacts and policies, Dublin(Report, 2015).

⁹ ILO and UN Women, Handbook: Addressing violence and harassment against women in the world of work (Report, 2018) and Intensification of efforts to prevent and eliminate all forms of violence against women and girls: sexual harassment, GA Res 73/148, UN Doc A/RES/73/148 (17 December 2018).

devastating effects on women workers' physical and mental health and wellbeing, their capacity to work, and their relationships with family, friends and work colleagues.¹⁰

Subsequently sexual Harassment hinders the job security of women and threatens their earning potential. In this sense, it is widely considered an emotionally impudent which creates an atmosphere of unhealthy and less productive outcome at the workplace for which it has been recognized globally as most frightening form of violence, harassment since very long.¹¹ Harassment at workplace has become one of the major contributing factors that impede women from joining the workforce in countries. Now, that a definition of harassment has been delineated, it violates the right to work as any form of harassment makes the working environment unsafe and unhealthy for a person, the right to just and favorable working conditions.

Right to work in safe environment: Everyone has the right to live and work free from violence and harassment. In spite of this right, violence and harassment against women in the world of work is present in all jobs, occupations and sectors of the economy in all countries across the world. Some women are disproportionately affected by violence and harassment because of their employment status, the type of work they carry out, or because of the conditions in the sector that they work in. Importantly, it is a gender issue and a human right issue; it violates the right of women to work in a safe and healthy environment and a major barrier to achieving equality of opportunity and access to decent and dignified work. It has a devastating impact on women workers' health, wellbeing and performance at work.¹² It is also deeply connected to social norms, values and stereotypes that foster gender inequalities, discrimination against women and unequal power, relations between men and women, including intersecting forms of discrimination, for example, based on gender and race, disability or social origin¹³. Regardless of income level or social status, violence affects women and girls of all ages and impacts their full and equal participation in society and the economy. Violence takes many forms, including not only physical, but also sexual, emotional, and economic, as well as harassment experienced in public and in places of work and education. Beyond the individual harm inflicted on women and their families, gender-based violence is a global problem with substantial economic costs¹⁴.

The composition of the workforce is also an important factor. Often influenced by social and cultural gender norms, there are occupations where women predominate such as shop assistants, bar and restaurant workers, teachers, nurses and social care workers and where they face significant exposure to violence and harassment. Unions representing workers in the public sector report that aggression from service users and patients has become commonplace and has even increased significantly in recent years (Public Services International, 2018). In this regard, a lack of resources, equipment, infrastructure and staffing can also contribute to violent and harassing behaviours, particularly where service users may have complex needs that are not being met. In the health sector, austerity measures have led to insufficient resources for staffing and for high-quality services, contributing to an increase in the incidence

¹⁰ European Transport Federation (ETF, Brussels), Violence against women transport workers: (Summary report 2017).

¹¹ M. P. J. Pereira, E. J. Rodrigues, Sexual Harassment at Work Place in India Medico Legal Aspects, J Indian Forensic Med, Vol.306, No. 4, (2014).

¹² ILO, Report of the Director-General: Fifth Supplementary Report: Outcome of the Meeting of Experts on Violence against Women and Men in the World of Work, GB.328/INS/17/5, Appendix I. (2016).

¹³ ILO and UN Women, Handbook : Addressing violence and harassment against women in the world of work (2018) p 10.

¹⁴ Tavares, P. and Wodon, Q. Global and regional trends in women's legal protection against domestic violence and sexual harassment, Washington DC, World, Revised (2018) p 1.

and the severity of violence in the workplace.¹⁵ It is important to note that underlying the right of an individual to work is also the right to dignity. If individuals are denied their protected rights to work, to just and favorable working conditions, or to be free from discrimination at the workplace, they cannot be said to have a well-maintained right to dignity. There is no doubt that the right to work is violated when an employee is subjected to harassment at the workplace.

The legislature's commitment to its international obligations: Under the international human rights legal framework, the right to work is multifaceted. Therefore, rather than being understood as a single right, it should be considered as a collection of rights.¹⁶ These include the rights to remuneration, human dignity, protection from forced labor, just and favorable conditions at the workplace, enjoyment of work, and free choice work, among various other basic benefits which are essential in pursuance of the "right to work". This right is protected under Article 23 of United Nations Declaration on Human Rights¹⁷ (UDHR). UDHR is a milestone document in the history of human rights and Myanmar had a chance to vote and voted in favor for UDHR in 1948 since Myanmar became the members of United Nations. Moreover, Article 6 of an individual's right to work and Article 7 of an individual's right to just and favorable conditions at the workplace of the International Covenant on Economic, Social and Cultural Rights¹⁸ (ICESCR) that has been ratified by Myanmar in July, 2015, and Article 11 of a woman's right to work provided by the United Nations Convention on the Elimination of all forms of Discrimination against Women¹⁹ (CEDAW) has been acceded by Myanmar since 1997. Similarly, the Discrimination (Employment and Occupation) Convention²⁰ so called as International Labour Organization Convention No 111 that Myanmar has not acceded by yet compels member states to take action by any appropriate means to ensure equality of opportunity and treatment in respect of employment and occupation.

In 1997, Myanmar acceded and ratified the United Nations Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), along with the guiding principles of the Fourth World Women Conference on Women (Beijing Declaration and Platform for Action of 1995). Since then, Myanmar has aimed to achieve gender equality and help women fully enjoy their rights and adopted the Anti-Trafficking in Persons Law in 2005.

As a member of the Association of Southeast Asian Nations (ASEAN), Myanmar is a signatory to a number of ASEAN regional commitments, including the Declaration on the Elimination of Violence against Women in the ASEAN region in 2004, and the Declaration on Elimination of Violence against Women and Elimination of Violence against Children in ASEAN in 2013. The Myanmar Ministry of Social Welfare, Relief and Resettlement launched its National Strategic Plan for the Advancement of Women (2013–2022), aligning it with the 12 areas of the Beijing Platform for Action. A year later, the ministry submitted the government's report to the Committee on the Elimination of Discrimination against Women in preparation for the review of progress (2016) made in relation to requirements as a signatory to the Convention on the Elimination of All Forms of Discrimination against Women, 1979

¹⁵ ILO, Care work and care jobs for the future of decent work, 1st published (Report 2018) p 180.

¹⁶ Maria Khan and Ayesha Ahmed, The Protection against Harassment of Women at the Workplace Act 2010: A Legislative Review, LUMS Law Journal (2016) 3(1).

¹⁷ Universal Declaration of Human Rights, GA Res 217 A (3), UN GAOR, UN Doc A/810 (10 December 1948).

¹⁸ International Covenant on Economic, Social and Cultural Rights, opened for signature 16 December 1966, 993 UNTS (entered into force 3 January 1976) art 6 and 7.

¹⁹ Convention on the Elimination of All Forms of Discrimination against Women, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981) art 11.

²⁰ Discrimination (Employment and Occupation) Convention, opened for signature 25 June 1958, 363 UNTS 31 (entered into force 15 June 1960).

(CEDAW). These are important demonstrations of government accountability to women. Both CEDAW and the Beijing Platform for Action are the global standard setters for the achievement of gender equality and women's rights in Myanmar.

The Ministry of Social Welfare, Relief and Resettlement, the leading ministry for implementing women's advancement and empowerment, adopted the National Strategic Plan for the Advancement of Women (2013–2022) which includes 12 critical areas aligned with the Beijing Platform for Action including women against women.

Currently, the drafting of a national law to prevent violence against women is a step toward carrying out commitments to end violence against women in Myanmar. The establishment of a specific violence against women law will fill the gaps in the existing legislation, particularly sexual and domestic violence, and clarify issues of conflict between laws by superseding inadequate, inappropriate, or discriminatory measures. This will transcend the outdated Penal Code of 1860, which narrowly addresses only a few forms of violence against women. However, much more is needed to address the different forms of violence including broad definition of harassment against women and girls and effective protection in Myanmar.

The definition of harassment used by the legislature of Myanmar is not similar to the definition of sexual harassment provided by the CEDAW Committee.

In 2008, the CEDAW Committee expressed concern that domestic and sexual violence in Myanmar were widespread, including sexual violence and rape in conflict, and accompanied by a culture of silence and impunity. Such cases are often underreported, and women are reluctant to seek justice in court.²¹ In its *Concluding Observations* in 2008, the CEDAW Committee expressed concern for the absence of data and information on violence against women, disaggregated by age and ethnic group, as well as studies and/or surveys on the extent of such violence and its root causes. The committee also urged Myanmar to strengthen its legal complaints and investigation system and increase prosecutions and convictions so that women have effective access to justice.²²

By virtue of having ratified the aforementioned treaties and observations from CEDAW, Myanmar is bound to protect importantly an individual's right to work in safe and healthy environment free of violence, harassment for which effective regulatory framework is necessary.

Research Methodology

The research method adopted to the study is both doctrinal research and systematic review of the literature. It is constituted on statutory materials, subordinate legal materials (here in code of conduct/practice adopted by employers of workplace) as primary resource conducting doctrinal research. So far as secondary sources are involved as literature review that are accumulated from number of published and unpublished legal articles, conference proceedings, different governments' reports, hand books of United Nations, UNICEF, ILO, ADB. The actual practice and attitudes of work actors who implement the law is also taken into consideration as systematic review of the literature.

Result and Discussion

Considerably, 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,

²¹ Gender Equality and Women Rights in Myanmar: A situation analysis, <https://opencess.adb.org>.

²² Ibid.

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.²³

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. 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, importantly, the problem of sexual harassment is a serious problem to address to ensure safe and healthy working environment.

Importantly, it is a gender issue and a human right issue; 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.

The government of Myanmar supports a zero-tolerance policy regarding violence against women²⁴ and, by designating the issue as one of the priority areas of its draft of Myanmar National Strategic Plan (2013- 2030) for the advancement of women, has indicated its commitment to develop and strengthen laws, policies, and practices to eliminate violence against women.

Drafting of a national law to prevent violence against women (2020) is a step toward carrying out commitments to end violence against women in Myanmar though specific or dedicated legislation against sexual harassment to women has not been adopted yet. No comprehensive definition of harassment is included in the Draft legislation, however it is in keeping with the CEDAW recommendation to ensure prohibitions on violence are directed at violence at home, violence in the community (including both stranger violence and violence in places women work and go to school), and violence from state actors. This part is adapted from various International Labour Organization (ILO) conventions summarized in Gender Equality and Decent Work: ILO Conventions and Recommendations that promote gender equality as of 2012. But, Section 18 of this draft Law (2020) creates a new provision for violence which imposed an obligation on employers to prevent and protect by adopting appropriate plan, policy and procedure in all workplace.²⁵ Therefore, various initiatives issues such as sexual harassment should be deemed high priority and be combated through adopting effective policies and the enforcement of policies regarding harassment or inappropriate sexual behavior among staff.

There are however levels of contention on what are the ways in which the policy should be created and the elements within the policy that involves the definition of sexual harassment. A definition for sexual harassment should not be too restricting or rigid and lends itself to some interpretation within the policy. It is vital to the effectiveness of the policy by making

²³Nelien Haspels, Zaitun Mohamed Kasim, Constance Thomas and Deirdre McCann, Action against Sexual Harassment at Work in Asia and the Pacific, ILO publication, Bangkok Area Office and East Asia Multidisciplinary Advisory Team, 1st published (2001) p 54.

²⁴ GA Res/12050 (13 September 2018).

The United Nations (UN) has warned violence against women and girls is a "silent emergency" in the country, with incidents spanning groping on public transport to trafficking, and has called for a zero-tolerance approach in communities, police, and the justice system.

²⁵ Protection of Women against Violence Law, 2020 (Draft by Legislature of Myanmar) s 18.

employees as a part of the process.²⁶ Moreover, changing social norms and behaviour in the workplace is also crucial to preventing violence and harassment against women in the work and in society more broadly. For example, when practical workplace policies and procedures are in place, work actors begin to understand what constitutes acceptable and unacceptable behaviour at work and are an important starting point for changing organizational culture that values and respects women and men equally.

This research looks at the adopting national commitment for addressing harassment against women at workplace in Myanmar and services that guarantee their safety provided by government, state actors and work actors. Even though a regulatory framework is necessary, it is insufficient for achieving practical, lasting change. What is also needed are measures that transform gender relations and lead to real change in women workers lives. The active participation of state-actors, business associations, employers, trade unions and workers themselves, as well as NGOs and women's organizations, is therefore, critically important.

Conclusion

In light of above analysis, some conclusions can be drawn and recommendations are made. Important role of state actors is to ensure the full implementation, monitoring and enforcement of specific legislation addressed to protection of women against harassment. However, law alone is insufficient. Government of Myanmar has a role in promoting societal change and legislation needs to be complemented by comprehensive policies and practical measures that tackle the root causes of violence and harassment through social norms change, including within institutions and in the work. The entire responsibility has been laid on their management of an organization, indicating that an employer is responsible for implementing the legal provisions successfully in their workplace. They should provide clear policies in relation to harassment and violence, detailing their own responsibilities, as well as those of their workforce, to raise awareness of related issues among the workforce, and set standards for workplace behaviour. In larger organisations, these policies should be normally be formalized to ensure consistency and fairness of application. In smaller employers, these policies may be less formalized, but in any case, workers should still be aware of the behaviour expected of them and the options available to them should they feel they have been victim of violence and/or harassment. To stress the seriousness of the issue, the followings are some of the recommendations which will help in prevention of sexual harassment incidents at workplace:

Firstly, Government is the primary subjects of international law and, therefore, the key actors entrusted with the implementation of international law obligations concerning with violence and harassment against women in the work. Therefore, the role of government of Myanmar and state actors is crucial to recognize of the rights of women to work in an environment that is free from violence and harassment so as to emerge good practice approach in national legislation.

Secondly, awareness-raising campaigns need to be conducted with the help of media and non-profit organizations so that more women are aware of their rights.

Thirdly, Comprehensive domestic legislation is needed in Myanmar by interpretation of the legislators to the term sexual harassment at workplace based on available legislation. Enactment of domestic legislation with clearly explained procedures for prevention and management of sexual harassment, coupled with the delegation of responsibilities to the employers and employees to ensure that a workplace free from sexual harassment is more

²⁶ R. Peters and P.A. Bourne, Sexual Harassment and Sexual Harassment Policy in Jamaica: The Absence of a National Sexual Harassment Policy, and the Way Forward, Asian Journal of Business Management, ISSN: 2041-8752, 2012.

likely to create consciousness and give the society increased safety from harassment in workplaces.

Finally, it should be compulsory for organizations to adopt code of conduct/practice and regular assessments with respect to incidents of harassment in their workplace as enterprises are in the best position to prevent sexual harassment in the workplace. In these terms, the legislature of Myanmar shall develop guidance for employers to enable them to create their own sexual harassment policies.

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