Research in Progress: Sexual Harassment in Indian Legal Profession: Reflections from the Field

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Source: Explorations, ISS e-journal, Vol. 5 (2), October 2021, pp. 240-251

Published by: Indian Sociological Society
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Abstract

This paper is based on forty-eight in-depth interviews with first generation Delhi-based lawyers, for over a period of sixteen months between 2017 and 2019, on questions around a wave of legislations against sexual violence against women in the last decade. The aim of the interviews was to understand, in the Indian context, the supposed disjuncture between theoretical postulates and the everyday application of laws around sexual violence against women. While attempting to conceptualise this disjuncture through questionnaire-responses and interviews with lawyers, the responses directed towards the presence of sexual harassment within the legal profession. This paper, thus, focuses on the empirical evidences of existence of sexism within and outside Delhi courts, the dismissal or denial of which results in a cold-shoulder treatment to cases of sexual harassment. For this purpose, public statements of two defence lawyers in the 2012 Nirbhaya gang rape case are considered alongside interview responses of the Delhi-based first-generation lawyers practicing in various courts in Delhi. The paper extends the argument to establish that persistent passive sexism and active discouragement in reporting sexual harassment has resulted in alternate grievance redressal modes for victims within the legal profession.

Key words: CLA 2013, Delhi Courts, Indian Legal Profession, PoSH Act, Sexual Harassment

Introduction

Amendments to laws concerning sexual violence against women gripped the country after the Nirbhaya gang rape case in 2012 (Agnes, 2014). Resulting from a nation-wide agitation against the brutal gang rape and eventual death of a physiotherapy student in the national capital, Indian rape laws were thoroughly overhauled in 2013, leading to the Criminal Law (Amendment) Act, 2013 (henceforth, CLA, 2013). The year 2013 holds a special place in India’s socio-
legal history. The first half of the year marked a significant milestone in the history and evolution of laws concerning sexual harassment in India. On February 26, 2013, the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 was passed by the Rajya Sabha after sixteen years of constitution of the Vishaka Guidelines by the Supreme Court. On March 21, 2013, Rajya Sabha passed the CLA 2013, which came with its share of criticism from the involved women’s groups, academicians as well as members of the legal community. On the same date, Asha Menon, Member Secretary of the National Legal Services Authority, submitted a report on the matter concerning a petition filed by advocates Binu Tamta and Vibha Dutta Makhija on the status of sexual harassment complaint committees at various district and High courts in India.

The report stated that the committees existed only on paper, and had neither the guidelines to look into matters of sexual harassment nor the power to deal with the complaints. Eventually, the Supreme Court formed a Gender Sensitisation and Internal Complaints Committee for women advocates who faced sexual harassment in terms of unwarranted physical, verbal or non-verbal sexual advances by their male counterparts within the court complex. This was a legally active start to the year when legislative and judiciary seemed to be working hand-in-glove to work towards, in however limited sense, protection of women from sexual violence.

The second half of 2013 also holds significance but only contrarily to the earlier developments. A law graduate from a reputed Indian law school levelled allegations of sexual harassment on a retired judge of the Supreme Court of India while she was his intern in 2012. Within a week, she issued a statement announcing that the Chief Justice of India (CJI) formed a committee to look into the allegation. A three-judge committee formed by the then CJI P.G. Sathasivam prima facie held the accused, former SC judge, guilty of sexual harassment and the police began preliminary inquiry into the matter, but the intern who had accused the former SC judge refused to pursue the case legally. Another intern accused the same judge for sexual harassment, but by then the SC had pulled out of taking up any such cases. Subsequently, two similar cases came to public notice: one in 2014 and the other in 2019. Both the cases were immediately dismissed by the court; the former with a prompt media gag and the latter with an outright rejection of the complaint.
While the country underwent an overwhelmingly crucial phase of jurisprudential churning in terms of anti-sexual assault laws (CLA and PoSH), the Indian legal community failed its own members who complained of sexual harassment at workplace. The paper is based on the premise that the problem lies not as much in the theory as in the application of the anti-sexual harassment laws. I argue in the paper that the legal community enables the re-affirmation and re-establishment of gender-based stereotypes into the everyday legal practice despite a wave of legislative amendments in the 21st century. The paper establishes through empirical research that the ‘harmless’ sexist remarks that are periodically dismissed by the court and majority members of the legal community in the everyday courtroom conversations pave way for more grave and regressive statements against women in general, and victims of aggravated sexual violence in particular. Secondly, the paper argues that the constitutional guarantee of ‘equality before law’ (Article 14), prohibition of discrimination based on sex (Article 15), and legislative promises of affirmative action for women [Article 15(3)] stand in contrast to the tradition of deeply patriarchal legal system, the functioning of which deters the lawyer-victims of sexual harassment to seek legal remedies. Lastly, I empirically argue that the lawyer-victims, in order to avoid hurdles in their career, either ignore the issue, drop out of the profession, or resort to extralegal mechanisms of grievance redressal.

The paper is divided into two parts. The first presents the methodology for participant selection from among Delhi-based lawyers. The section envelops the process of data collection and difficulties overcome during the fieldwork. The second section establishes the existence of sexism within the Indian legal profession through the role of language within and outside courts complexes. The section proceeds to discuss how innate sexism within the Indian legal profession translates into a collective neglect (and sometimes covert affirmation) of incidents of sexual harassment within the legal community. Drawing from the experience of sexual harassment at workplace by women lawyers in Delhi, I argue that re-enforcement of gender stereotypes through everyday misogyny (ranging from sexism to sexual harassment) is not as much a jurisprudential debate as it is a question of practice of the law by the agents of law themselves. I discuss how the (mis)handling of reported cases of sexism and sexual harassment acted as deterrents for most participants into not seeking legal help and pushed victim-lawyers into opting for alternate means and modes of grievance redressal to continue their professional journey.
Overview of the Field and Selection of Participants

Between 2017 and 2019, I conducted fieldwork in Delhi courts – the six district courts and Delhi High Court, interviewing and observing first generation Delhi-based lawyers on their perception of rape as a crime, their understanding of the Indian rape laws and their opinions on the rape law amendments so far. This paper is a cumulative summary of the recorded behaviour, attitude and arguments of lawyers in sexual harassment cases before, during and after trial, inside and outside the courtroom through interviews, participant observation, group discussion and covert observation. The idea was to comprehend the perspective of Delhi-based lawyers on sexual violence on women and contrast it with the prevalent sexism within the courtrooms. Despite initial apprehensions and anticipations, I was welcomed at the courts complexes and was generously taken through the busy corridors of the district courts and the Delhi High Court.

In the initial phase there were focused group discussions within courts complexes and a questionnaire was prepared with open-ended questions that was sent to 359 lawyers based in Delhi, out of which 127 lawyers responded to the questionnaire in full. Of the 127 who responded to the questionnaire, forty-eight lawyers were shortlisted for interviews. Participants were selected if they were first generation lawyers practicing criminal law in Delhi with specialisation in handling cases of sexual violence against women and children. Another criterion was a practice of a minimum of seven years alongside an association with a senior. It was made sure that equal numbers of male and female participants were selected for interviews. Upon selection of the participants, rapport was built with each one of them in either courts complexes, or chambers/firms they are working at. After rapport formation, unstructured interviews were held at their respective courts of practice and open-ended in-depth interviews were conducted thereafter. All follow-ups were conducted either via telephone, or through Zoom/Skype/WhatsApp video call. Certain queries were raised and responded through e-mail.

By extending Bourdieu’s (1987, pp. 808-809) rationale of studying structured behaviours and customary procedures alongside the legal written record – briefs, commentaries, judicial decisions and legislation, I proceeded to understand laws for protection of women against sexual violence as a socio-cultural process that affects, impacts and shapes the behaviour of the agents of the Indian legal profession. Bourdieu (ibid) deploys an extended notion of ‘text’ that goes beyond the written record – legislation, judicial pronouncements, ordinances, acts and
commentaries – and encompasses ‘structured’ behaviours and customary procedures characteristic of the ‘juridical field’. These behaviours and customary procedures, Bourdieu explains, are subjects of the same interpretive competitions as the codified texts themselves. This contention is explored in this essay with focus on Delhi-based first generation lawyers.

One of the major themes that evolved from the group discussions and observation of the everyday of the lawyers inside and outside the court complexes was that of the prevalence of gender-based discrimination and exploitation of women lawyers, of which sexual harassment was a part. Such discrimination is categorised under five sub-themes that emerged during the interviews – re-establishment of gender-based stereotypes, verbal discrimination, physical breach of boundaries, professional intimidation and sexual harassment. These are discussed in detail in the next section.

From ‘Subtle’ Sexism to Sexual Harassment

In March 2015, a BBC Documentary was set to be released covering various aspects of the Nirbhaya case including interviews with the defence lawyers, the prime accused in the case, and the parents of the deceased victim. The documentary was banned by the Indian government a few days ahead of its worldwide release on International Women’s Day, citing the statements of the defence lawyers as ‘problematic’. The statements of the defence lawyers were found to be outrageous and sexist not just by the Indian government, but also by women’s organisations across the country, especially the Supreme Court Women Lawyers Association (henceforth, SCWLA). The SCWLA wrote a letter to the Bar Council of India to take strict action against the two defence lawyers. In response to this, the Bar Council of India issued a show-cause notice to both the lawyers to explain why disciplinary action should not be taken against them. The Lok Kalyan Sanstha came in support of the SCWLA in demanding harsh punishment for the two defence lawyers for ‘making unwarranted statements outside the court premises’. Despite the seriousness, the matter is still pending.

- Calling out sexism within the legal profession

In March 2019, Senior Advocate Indira Jaising wrote an open letter to the then Chief Justice of India baring the presence of deep-rooted sexism within the courtrooms and the subsequent plight of woman lawyers and judges. In her letter she contended, ‘… there have been multiple incidents where sexist remarks being
made by lawyers, go unnoticed by the Bench. Such tacit acceptance of sexist language in the courtroom and brushing it aside as didn’t mean any harm, gives it a level of legitimacy, and a judge fails in their duty in protecting the fundamental right enshrined under Article 15 if they don’t disapprove of and call out sexist language, remarks or comments made in their courtroom.’ (first emphasis mine; second author’s). She further wrote, ‘Judgments of courts across the country enjoy the status of being the law of the land, but unfortunately judicial language continues to use words and phrases which perpetuate patriarchy, endorse stereotypes of women’s perceived roles and behaviour and entrench biases that are detrimental to the status of women in our society.’ (emphasis mine).

Iterating on the importance of language, Ms. Jaising pointed out at the prevalence of sexism in the courtrooms, and the inaction of judges to reprimand such usage. This inaction of the judges in not actively curbing the use of sexist language by lawyers and judges against their own counterparts reflects on the attitude of the judiciary towards ensuring and maintaining a healthy work environment for its women lawyers and judges. Taking this into consideration, I conducted intensive in-depth interviews with forty-eight Delhi-based lawyers to understand sexism and sexual harassment from the insider’s vantage point.

**Sexual harassment at workplace: accounts of lawyer-victims in Delhi**

During the course of the fieldwork, I came across an ‘internal practice’ of a law firm in Delhi that did not hire female interns or lawyers. Upon inquiry from a participant who was a former intern at that law firm, it was found that the said firm considered the presence of women as a ‘distraction’. The participant said that his former employee believed that ‘women cannot take jokes, and men bear the brunt of the sexual harassment policy’. This is not a standalone case of gender-based professional discrimination where misogynistic comments are pushed as jokes and function as office banter among colleagues. Another participant shared that her senior had asked for her ‘nude/semi-nude pictures after a brief discussion at his chamber in a Delhi court’. When she denied and said it was inappropriate, he said he could ‘help her professionally and even recommend her to the Supreme Court’ if she complied.

In another interview, a participant stated that she was asked to lead the orientation session of a new intern. While she was speaking, the lawyer ‘shut his chamber’s door at the courts complex and held the participant by waist’. She immediately
withdrew herself but the lawyer ‘insisted on holding her and asked the new intern to leave’. The participant immediately left the chamber and reported the matter to her brother who is also a lawyer, but he suggested that ‘she remained quiet about it’. So she moved to another court to work with another lawyer, a female senior this time.

In other cases, the participants shared that they were asked by their seniors to wear more make-up and ‘look pretty’, or were called by their employers at wee hours of the night and asked questions about their personal lives (if they had a boyfriend, etc.). A few participants also mentioned that they were told to wear attire that will ‘accentuate the figure’. The common thread that binds these experiences is the fact that none of the sixteen lawyer-victims of sexual harassment filed any official complaint. This can be explained by the dismissal of aforementioned reported cases of sexual harassment by the legal community.

- Bargaining with misogyny

As ‘agents of law’ in the Indian ‘juridical social field’, lawyers are responsible for professionally defined patterned activity (Bourdieu, 1987). During the course of my fieldwork, a sense of collective was observed among male participants in the form of sexist ‘banter’ about their female counterparts. The response of women lawyers to the everyday misogyny within legal community was recorded in terms of their coping mechanisms or alternate modes of grievance redressal to survive in a male-dominated profession. During the interviews, most female participants seemed either disturbed or embarrassed, and some blamed themselves for being ‘too polite’ or ‘cordial’ or ‘agreeable’. While none of them lodged any formal police complaint or filed a complaint at Internal Complaints Committee, they all had paved their way out. They either switched from litigation to arbitration with less interaction with seniors, or joined another senior (mostly female), or practiced independently. There were indirect mentions of fellow female lawyers dropping out of the profession because of sexual harassment.

Such modes of bargaining with misogyny were explained as ‘careful steps to move forward in the male-dominated profession’. One participant (male) remarked that legal profession is competitive and only ‘thick-skinned’ survive. This statement was made in a group discussion and most participants agreed to it. It was observed that being silent is considered better than being called a ‘troublemaker who calls out on reputed and sought-after’ seniors.
Conclusion

The 2013 PoSH Act defines sexual harassment as ‘unwelcome acts or behaviours’ including ‘physical contact and advances, a demand or request for sexual favours, making sexually coloured remarks, showing pornography, or any other unwelcome physical, verbal or non-verbal conduct of sexual nature’ [Section 2(n)]. Sexual harassment at workplace also holds ‘implied or explicit promise of preferential treatment in employment, threat of detrimental treatment in employment, threat about present or future state of employment, interference with the work, and humiliating treatment affecting health and safety of a female employee at her workplace’ under the ambit of sexual harassment. In this context, the paper presented empirical evidences of breach of sections of the PoSH Act by the employers within the legal profession.

Sexual harassment within the Indian legal community is not a new phenomenon (Sathe, 1992). It is also not peculiar to India (French, 2010). However, the Indian legal community has been considered ‘predatory’ (Raju, 2020, p. 2) and innately reliant on gendered notions of female sexual passivity and victimisation (Basu, 2011, p. 194) by members of the Bar themselves. This was concretised during the interviews since women participants considered some seniors in the profession as ‘voyeuristic’. They said that seniors either ‘stood too close’, or ‘hold inappropriately while clicking pictures’, or ‘hold by the waist’ during court briefings, or ‘tell us to behave around men and not chatter much’. MacKinnon’s (1979, p. 48) postulation that such cases go unreported because women tend to ignore harassment in a hope that the harasser will stop holds ground in this context.

We have seen that although all victim-lawyers knew they were being sexually harassed, they either found themselves guilty, or took refuge in either quitting or enduring as against being labelled ‘loud-mouth’. We have also seen that all lawyer-victims underwent experiences that both, the PoSH Act, and the IPC recognise as sexual harassment, but none of them reported the abuser. This paper is indicative of re-victimisation of lawyer-victims not based only on theoretical flaws in legislation on sexual harassment as contended by Raju (2020) but also on the application of the legislations by the legal community itself.

Notes:
Police begin inquiry into charges against former judge.

Criminal Law (Amendment) Act, 2013 was the first rape law amendment since 1983, when the Indian rape law was modified for the first time since its inception.

The Supreme Court intern posted her ordeal on November 06, 2013 in a blogpost. The blog was accessed on 14.02.2016 on https://jilsblognujs.wordpress.com/2013/11/06/through-my-looking-glass/

In less than a week of posting details of the issue on her personal blog, Stella Jones, the victim, issued a statement confirming that the CJI had formed a committee to look into the matter, and that she would shortly depose before the court. Full statement can be accessed at https://jils.co.in/statement-of-stella-james/

The second intern alleged that she gained courage to speak out about her experience owing to the action taken by the Supreme Court in the allegations by the first intern. Information accessed on https://www.legallyindia.com/201311144114/Bar-Bench-Litigation/sc-intern-sex-harassment-another-interns-social-media-account-on-14.02.2016

The allegations were dismissed as soon as the news came out, even before the committee was constituted or the evidence provided by the complainant were evaluated. Details on https://theprint.in/judiciary/bar-council-of-india-national-green-tribunal-condemn-allegations-against-cji-ranjan-gogoi/224288/ accessed on 02.01.2021. (Most members of the Bar Council of India not only condemned the allegations of sexual harassment against the accused, they also came in full support of the way the case was handled by the Supreme Court. Demands were also made to book the complainant for ‘false accusation’. For details, see https://theprint.in/talk-point/is-supreme-court-handling-sexual-harassment-allegation-against-cji-ranjan-gogoi-correctly/225002/ accessed on 02.01.2021).

A discussion on judgements in rape cases and their application as precedents suggests that despite amendments to rape laws, precedents continue to shape and affect judgements.


Tis Hazari courts, Karkardooma courts complex, Patiala House, Dwarka complex, Rohini courts complex and Saket courts complex.

Despite the ban, the documentary was released on various internet sites. The ban was opposed by women’s organisations while the Director of the documentary fled the country despite notices issued to her to stay in India for enquiry on the script and the way the documentary was shot. The documentary was a source of various other controversies that are beyond the scope of this paper.

The statements of the two lawyers, one claiming that ‘there is no place for women in Indian culture’, and that if men see women roaming on the streets at night, ‘it will immediately put sex in his mind’, and the other stating that ‘he will burn his daughter and sister if they roam at night’ led to a nation-wide demand for revocation of their licences to practice at the Bar and an urge to the Supreme Court of India to put a ban on their entry on the court premises alongside strict punishment for their moral and professional misconduct, punishable under Section 35 of the Advocates Act, 1961.


Read the full letter at https://thewire.in/law/open-letter-indira-jaising-to-cji-womens-day

A participant shared that her law college friend left litigation and went abroad to pursue LLM because she was not ‘as thick-skinned’ and ‘succumbed to pressure’.
REFERENCES:


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