CRITIQUING DELEGATED LEGISLATION ON PREVENTING SEXUAL HARASSMENT OF WOMEN IN INDIAN HIGHER EDUCATION INSTITUTIONS

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Abstract

Sexual harassment of women in the workplace is a serious issue in India, affecting all social and professional sectors, including elite higher education institutions. This problem violates women's fundamental rights to equality and livelihood, breaches professional ethics, and hampers the productivity and potential of many academics. Although the Indian Parliament enacted a comprehensive law in 2013 to address sexual harassment at workplaces, the implementation, especially in educational institutions, is flawed due to bureaucratic inefficiencies. There is a lack of unbiased analysis on how delegated regulations by administrative authorities undermine the law's intent. This research article conducts a legal analysis of the law's implementation in higher educational institutions, using doctrinal research methodology. It identifies subjective and ultra vires provisions introduced by ideologically driven bureaucrats that compromise the law's validity and effectiveness. The study highlights deviations in delegated legislation from the original law and suggests corrective measures to address significant flaws in the regulations framed by the University Grants Commission.

Keywords: *Sexual Harassment; Women; Delegated Legislation; India; Higher Educational Institutions*

1. Introduction

The Republic of India, a State of subcontinental proportions, geographically located in South Asia is the world's most populous State with a population exceeding 1.2 billion.[1] India, a creation of British colonial imperialism, follows the Westminster model of government and the common law system. India is a rapidly developing economy, and an ever-increasing percentage of Indian women continue to requite themselves excellently as professionals in all areas of employment, especially after liberalisation and globalisation of the Indian economy. However, a very shameful reality is the high rate of sexual harassment that assails women at their workplaces in India.[2] Originating from the retrogressive patriarchal socialisation which is prevalent in the hyper-masculine traditional Indian society, sexual harassment of women at the workplace often manifests

[1] Jain, Abhishek, and Varinder Kaur. "Census Mapping in India and Role of GIS: A Look Ahead at Census 2021." *Indian Journal of Public Administration,* 67.4 (2021): 540-558.

[2] Aina, A.D., Kulshrestha, P. Sexual Harassment in Educational Institutions in Delhi' NCR (India): Level of Awareness, Perception and Experience. *Sexuality & Culture,* 22 (2018): 106–126.

itself as an aggressive expression of a retrogressive reaction against the elevation of very competent female colleagues.[3]

The effect of sexual harassment of women at their workplace, apart from its deleterious impact on the economy by affecting the productivity of the women employees, is personally offensive, psychologically traumatic, and an egregious violation of the basic human rights,[4] and the Constitutional fundamental legal rights of women to freedom of employment and education, only on account of their gender. While the law seeks to prevent sexual harassment of women at workplace in general through stringent penal provisions,[5] it also recognises the difficulty of establishing the offence in criminal courts due to the comparatively high standards of evidence required in criminal law proceedings,[6] which may not be readily available in most professional contexts. Moreover, women are generally reluctant to prosecute complains in open court, for fear of facing the often-graphic cross-examination by defence counsel, for personal, social, and economic reasons. Law, therefore, also provides for institutional level redressal and punitive mechanisms to address the issue sexual harassment of women at the workplace under Administrative Law,[7] which operate under delegated legislation and implemented by administrators and bureaucrats. These delegated legislations in the form of regulations framed by administrators under the authority of the Parliamentary statutes, upon closer analysis reveal substantial variance introduced by the bureaucrats which are contrary to the intention of the legislature.

The research problem that this paper seeks to address by adopting the doctrinal research methodology, and critical doctrinal analysis pertains to how legal incompetence and apparently ideologically motivated provisions introduced in delegated legislation by bureaucrats, which are, technically legally void, impede the implementation of laws related to sexual harassment of women at workplace in institutions of higher education despite the provision of stringent and effective institutional mechanisms prescribed by Indian parliamentary statutes.

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3 Wikström, Malin Christina. "Gendered Bodies and Power Dynamics: The Relation between Toxic Masculinity and Sexual Harassment." *Interdisciplinary Journal,* 3.2 (2019): 28-33.

4 Heather McLaughlin, Christopher Uggen, and Amy Blackstone, "The Economic and Career Effects of Sexual Harassment on Working Women," *Gender & Society* 31, no. 3 (June 1, 2017): 333–58, https://doi.org/10.1177/0891243217704631.

5 Shakthi, S. "The Law, the Market, the Gendered Subject: Workplace Sexual Harassment in Chennai's Information Technology Industry." *Gender, Place & Culture: A Journal of Feminist Geography*, 27.1 (2020): 34-51.

6 Littlejohn, Clayton. "Truth, knowledge, and the standard of proof in Criminal Law." *Synthese*, 197.12 (2020): 5253-5286.

7 Megha Mehta, "The Inefficacy of Internal Complaint Mechanisms in Resolving Sexual Harassment Claims-Astudy in the Context of Sexual Harassment Law And# Metoo in India," *NUJS Law Review* 14, no. 3 (2021): 412–69.

2. Method

The methodology adopted is the doctrinal research methodology[8] for elucidating the opinion that the implementation of delegated legislation related to the prevention of sexual harassment of women at the workplace in Indian Universities is susceptible to be compromised by ideological *ultra vires* provisions introduced by academic bureaucrats with a vested interested. Since the research is doctrinal, rather than empirical, it relies upon legislative analysis based on principles of Common Law rather than any data, for the identification and criticism of the identified intrinsic illegitimacy of a specific provision of a subordinate legislation, namely Section 4 (1) (c) of the University Grants Commission (Prevention, Prohibition and Redressal of Sexual Harassment of women employees and students in higher educational institutions) Regulations, 2015. This research has been done through the normative positivist legal analysis[9] of the statute and references legal provisions and cites the case law relevant to the discussion, for greater clarity.

3. Results and Discussion

3.1. The Legal Foundation and Governance in the Constitution of India: Roles and Limitations of Authority

The Constitution of India is the "*Grundnorm*" and the Supreme Law of the Republic of India,[10] and all Legislative statutes, regulations, rules, conventions, policies, institutions, and procedures made by the State (Republic of India) must conform to the Constitution of India.[11] The State is defined in Article 12 of the Constitution of India which clearly specifies that it includes "*all local or other authorities within the territory of India or under the control of the Government of India*".[12]

However, the proliferation of institutions of Governance in a Socialist Welfare State like India has meant that administrative law has not only survived and sustained itself but has seen proliferation into all aspects of life. Administrative Law is uncodified in India and based on Common Law Legal principles, conventions, and maxims.[13] However, to address the paradox of

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8 T Hutchinson, 'Doctrinal Research' in *Research Methodology in Law*, (New York: Routledge, 2013)

9 Silvia Zorzetto, 'Normative Legal Positivism: From Metaphysics to Politics', *Isonomia*, 24.1 (2021), 139–66

10 Gaurav Pathak, "Legal Regime for the Protection of Cultural Heritage in India," *Gdańskie Studia Azji Wschodniej* 22 (2022): 169–82.

11 Keshvananda Bharti v. State of Kerala, Supreme Court Cases, (1973) Vol. 4, page 225.

12 O. Chinnappa Reddy, "The State, Its Instrumentalities and Agencies," in *The Court and the Constitution of India: Summit and Shallows*, ed. O. Chinnappa Reddy (Oxford University Press, 2010), 0, https://doi.org/10.1093/acprof:oso/9780198066286.003.0029.

13 JS Chandpuri and Vivek Kumar, "Emerging Trends in Law of Torts: An Overview," *International Journal of Law Management & Humanities* 5, no. 2 (2022): 1178–95, https://doi.org/10.10000/IJLMH.112919.

Executive Law-making through delegated legislation, administrative law has called upon the ancient Roman legal maxim of "*delegatus non potest delegare*" and to check the untrammelled power of the Executive has subscribed to the most important Doctrine of Administrative Law: The doctrine of *Ultra Vires*. The doctrine of "*ultra vires*" developed in the nineteenth century and pertains to the limitations on the power of non-elected bureaucratic officials in making subordinate rules for implementing Statutory mandates.[14] The doctrine of *ultra vires* as used in administrative law implies that discretionary powers must be exercised for the purpose for which they were granted.[15] Anything which is done by an authority which is beyond the powers vested in it constitutes an *ultra vires* act.[16] Delegated legislation cannot enlarge the scope or meaning of a parent statute, nor can it depart from the boundaries of what is contemplated by the provision of the parent Act. It must always and invariably yield to the statutory provision and any departure from it renders it illegal under the doctrine of *ultra vires*. Authorities acting beyond the jurisdiction conferred on them, or in excess of the limitations expressly or impliedly imposed on them or acting without jurisdiction or beyond the powers conferred on them by legislative statute, constitute substantive *ultra vires* and are absolutely null and void *ab initio.*[17]

Substantive *ultra vires* is said to be inherent where the authorities act without any jurisdiction or in excess of jurisdiction vested in them by the parent Statute.[18] At times there may be procedural *ultra vires*. When a certain power is conferred on a statutory authority under an enabling statute which also spells out the manner in which it is to be exercised, power should be exercised strictly in accordance with the laid down procedure given in the statute and any departure from the laid down procedure at any stage renders the entire process liable to be null and void on account of procedural *ultra vires* not in conformity with procedure established by law.[19] When an authority is authorised to do an act subject to certain conditions, it must be deemed to have been prohibited to do the said Act except in accordance with the provisions of that Act which confers the authority on it. And whenever an authority is empowered by a parent Act to take a certain action under

[14] Aziz Z Huq and Jon D Michaels, "The Cycles of Separation-of-Powers Jurisprudence," *The Yale Law Journal* 126, no. 2 (2016): 346–437.

[15] Paul Craig, "Ultra Vires and the Foundations of Judicial Review," *The Cambridge Law Journal* 57, no. 1 (1998): 63–90, https://doi.org/10.1017/S0008197300134397.

[16] Ching Chuan Gan, "The Ultra Vires Doctrine In Administrative Law: A Malaysian Perspective," *Journal of Malaysian and Comparative Law* 19 (1992): 125–60.

[17] M.A.Fazal, *Judicial Control of Administrative Action in India and Pakistan: A Comparative Study Of Principles And Remedies* (Oxford: Clarendon Press, 1969).

[18] Mark Elliott, "The Ultra Vires Doctrine in a Constitutional Setting: Still the Central Principle of Administrative Law," *The Cambridge Law Journal* 58, no. 1 (1999): 129–58, https://doi.org/10.1017/S0008197399001075.

[19] Karnakar v. State of Mysore, All India Reporter (1966) Mysore 317.

certain conditions, it must be deemed to be prohibited to undertake the action in the absence of the aforementioned conditions and in any violation of such conditions.[20] It implies that discretionary powers exercised through subordinate or delegated legislative authority conferred by the parent statute must be exercised expressly for the purpose, and within the limits, for which they were granted, and their exercise must be consistent with the provisions of the parent Act. If the delegated legislation is directly or indirectly in conflict with provisions of the parent Act, it is invalid *ab initio* and therefore void.[21] This invalidity of delegated legislation in conflict with parent Statutes is not confined only to substantive provisions but extends to the procedure prescribed by the parent Act. Where the parent Act prescribes a certain mandatory procedure, the delegated legislation is bound to adhere strictly to the prescribed procedure and any departure in compliance with the parent Act renders the delegated legislation invalid on grounds of procedural *ultra vires*.[22]

The Constitution of India has a mechanism whereby laws which violate Fundamental Rights,[23] but are essential for Security and Integrity of the State or for Social Justice are placed outside the purview of Judicial Review by placing such laws in the Schedule IX of the Constitution of India under Article 31 B.[24] The doctrine of *ultra vires*, however, is pervasive and while those Statutes placed in Schedule IX of the Constitution which protects them from Judicial Review for infringement of Fundamental Rights are afforded the protection of Article 31 B, any delegated legislation made under these statutes, still cannot violate the doctrine of *ultra vires*. All *ultra vires* acts of administrative authorities are null and void since they violate the limitations conferred by Law.[25] Sometimes, the parent statute, may expressly provide that delegated legislation made under its authority to be immune from Judicial Review (or in other words permit it to infringe Fundamental Rights without Judicial Recourse). Still, even in the case such exclusion clause exists, it cannot necessarily legalise *ultra vires* delegated legislation, which can be reviewed by courts if the delegated legislation exceeds the mandate or jurisdiction of the parent Act protected under Schedule IX of the Constitution. The importance of the doctrine of *ultra vires* can be appreciated from the fact that it is an established principle in Common Law that even if the parent statute is

[20] R. Wilson, B. Galpin, and P. B Maxwell, *Maxwell on The Interpretation of Statutes* (London: Sweet & Maxwell, 1962).

[21] Delhi Transport Undertaking v. B.B.L Hajelay, Supreme Court Reporter (1973) Vol.2, p.114.

[22] Aron Degol and Abdulatif Kedir, "Administrative Rulemaking in Ethiopia: Normative and Institutional Framework," *Mizan Law Review* 7, no. 1 (February 4, 2014): 1–28, https://doi.org/10.4314/mlr.v7i1.1.

[23] Nirmalendu Bikash Rakshit, "Right to Constitutional Remedy: Significance of Article 32," *Economic and Political Weekly* 34, no. 34/35 (1999): 32.

[24] Karishma D. Dodeja, "Belling the Cat: The Curious Case of the Ninth Schedule in the Indian Constitution," *National Law School of India Review* 28, no. 1 (2016): 1–17.

[25] P. Janardhan v. Union of India All India Reporter (1970) Mysore, Page 171.

protected from Judicial Review, the delegated legislation made under its authority enjoys no such immunity.[26]

The Doctrine of *Ultra Vires* in practice means that the regulations and rules made by the Executive must supplement but not go against the Parliamentary Act.[27] They are circumscribed by and must be in total conformity with the Act. Any Ordinance, Regulation, Rule, Notification or Circular or any such Order made under the exercise of the power of delegated legislation which is not in conformity with the parent Act is invalid, absolutely null and void, *ab initio*, and as if they never existed. Moreover, in Constitutional democracies, it is imperative, that not only the enabling or parent Act made by the Legislature but all subordinate rules and regulations made under delegated legislation must abide by the Constitutional principles, as enunciated by the Judiciary in its role as Interpreter of the Constitution. The two most important fundamental rights in India are Article 21 and Article 14. These are rights available to all persons, and not just citizens. Furthermore, there is an express prohibition of discrimination on grounds of religion, race, caste, sex, or place of birth while applying Article 14. Equality before the Law and Equal Protection of Law is guaranteed to every person irrespective of whether he is a citizen or alien. The phrase "life and liberty" has been given expansive interpretational meaning by the Indian Judiciary to include freedom from any unauthorised State proceeding that harasses a citizen. Also, presumption of innocence of an accused is a cornerstone of the Indian legal system. In fact, the legal maxim "*ei incumbit probatio qui dicit, non qui negat*" has been interpreted to mean that "A person shall be presumed innocent until convicted by a court of competent jurisdiction after a fair unbiased trial based on law and evidence and being given all the opportunity to defend himself".[28] Presumption of the innocence of the accused is a part of the life and liberty and "procedure established by law" is the minimum bulwark against the Government turning authoritarian and arbitrarily jailing its opponents.

In the Indian polity, the doctrine of Separation of Powers is very important. In fact, it is so critical that India is the only country where judges appoint judges through the collegium system in order to minimise the political influence on the judiciary. In India Judges are appointed and

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[26] Minister of Health v. King. Ex Parte Yaffe. [1931] AC 494.

[27] Bernard Schwartz, "Administrative Finality in Britain," *The Canadian Bar Review* 26, no. 7 (1948), https://cbr.cba.org/index.php/cbr/article/view/1534.

[28] M Aránzazu Calzada González, "El Principio Ei Incumbit Probatio Qui Dicit, Non Qui Negat Y Su Recepción En Les Furs De Valencia Y En Les Costums De Tortosa" (La prueba y medios de prueba. De Roma al derecho moderno: actas del VI Congreso Iberoamericano y III Congreso Internacional de Derecho Romano, Servicio de Publicaciones, 2000), 109–20, https://dialnet.unirioja.es/servlet/articulo?codigo=303908.

never elected. Election, which implies a political element, is seen as undermining the independence and impartiality of the person. Persons exercising judicial or quasi-judicial authority wherein one has to appreciate the evidence and pass a judgment which can have penal consequences on the accused, is never politically or electorally chosen or vested with an office in India. They can be chosen through an impartial selection process and thereafter nominated, recommended, and appointed to adjudicatory office (as happens in case of Advocates who are elevated to the Bench), but can never be elected. The political appointment of judges would mitigate against the established rule against bias succinctly states as "*Judges like Caesar's wife must be above suspicion.*"[29] The Judiciary is the impartial and independent guardian of the Constitution of India and ensures that all laws made by the Parliament conform to it. Whenever there is an issue which comes up before the court, it either tries to judge it according to the law as contained in the legislated statutes, by interpreting them, if necessary, free from political or any other extraneous influences.

Under Article 141 the Judiciary is given extraordinary powers since its decisions whether in accordance with the law, interpreting the law or supplanting the law, have the force of law.[30] This is a peculiar situation in Common law countries clearly enunciated by British Jurist Charles Evans Hughes who said "We are under a Constitution, but the Constitution is what the judges say it is."[31] But sometimes a case may come up, on which the Parliament has not made any law. In such cases, the court decision functions as the interim law. But since in democracies, law-making is the domain of the legislature, the Court decision in cases where it is addressing a gap in legislation is given in the form of interim guidelines. These legal gap-filling decisions of the court in the form of guidelines clearly specify that the guidelines will be valid only until the Parliament makes a law in this regard. Such guidelines are in legal terms "eclipsed" once a law is made by Parliament and notified.[32]

[29] RC Chandel v. High Court of Madhya Pradesh, Supreme Court Cases (2012) Vol.8, p.58.
[30] Shubhankar Dam, "Lawmaking Beyond Lawmakers: The Little Right and the Great Wrong," *Tulane Journal of International and Comparative Law* 13, no. 1 (2005): 109–40.
[31] Samuel Hendel, *Charles Evans Hughes and the Supreme Court* (Columbia University Press, 1951), https://doi.org/10.7312/hend90602.
[32] Nandani Sundar and Others v State of Chhatisgarh, All India Reporter (2011) Supreme Court, p.2389.

3.2. From Guidelines to Legislation: The Path to the Sexual Harassment of Women at Workplace Act, 2013

Sexual harassment of women at the workplace is an issue on which there was no statutory law legislated before 2013.[33] In 1996 a lady lawyer in Rajasthan had filed a case to highlight the issue of sexual harassment of women at workplace and the Supreme Court of India,[34] by a very novel, reformist and progressive interpretative adjudication, citing India's commitment under International Law and its obligations under Article 14 and Article 21 of the Constitution of India, laid down certain guidelines (hereinafter referred to as the Vishakha Guidelines) in the case of Vishakha and Others vs State of Rajasthan and Others,[35] on 13 August 1997, to address the pernicious issue of the sexual harassment of women at workplace. The Vishakha Guidelines were intended by the Supreme Court of India to be an interim measure till the Parliament legislated on the subject as is clearly evident from the operative part of the decision in the case Vishakha and Others vs State of Rajasthan and Others, which explicitly states:[36]

> "*In view of the above, and the absence of enacted law to provide for the effective enforcement of the basic human right of gender equality and guarantee against sexual harassment and abuse, more particularly against sexual harassment at work places, we lay down the guidelines and norms specified hereinafter for due observance at all work places or other institutions, until a legislation is enacted for the purpose. This is done in exercise of the power available under Article 32 of the Constitution for enforcement of the fundamental rights and it is further emphasised that this would be treated as the law declared by this Court under Article 141 of the Constitution*".

The Parliament of India therefore enacted a special legislation called the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 (hereinafter referred to as Act 14 of 2013) and notified it on 09 December 2013 under the authority of the Ministry of Women and Child Development, Government of India vide The Gazette of India No 2733 dated 09 December 2013 from which date the Act 14 of 2013 became the sole legislated Civil "Law of the Land" in force to address the issue of the sexual harassment of women at workplace including

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[33] Indira Jaising, "Eliminating Sexual Harassment at the Workplace: Broadening the Discourse on Gender Equality," *Commonwealth Law Bulletin* 40, no. 2 (April 3, 2014): 375–97, https://doi.org/10.1080/03050718.2014.909127.

[34] Vibhuti Patel, "Sexual Harassment at the Workplace," *Urban Women in Contemporary India: A Reader. Los Angeles, London, New Delhi and Singapore: Sage*, 2007, 109–17.

[35] Vishakha and Others v State of Rajasthan and Others, Supreme Court Cases (1997) Vol.6, p.241.

[36] Radhika Chopra, "Three Texts, One Issue Vishaka and Others vs State of Rajasthan and Others, Judgement Dated 13 August 1997. Scale, Vol. 5, 1997. Benokraitis, Nijole, V. (Ed.), Subtle Sexism: Current Practice and Prospects for Change, Thousand Oaks, California: Sage Publications, 1997. Sexual Harassment in Delhi University: A Report. Gender Study Group, Delhi, 1996," *Indian Journal of Gender Studies* 5, no. 1 (March 1, 1998): 116–21, https://doi.org/10.1177/097152159800500109.

at the institutions of higher education, eclipsing the interim Vishakha Guidelines which had been under Article 141. Act 14 of 2013 is landmark legislation which provides the structural framework for addressing the issue of sexual harassment of women at the workplace within the institutions of higher education under Administrative Law. It has simplified the process and exempted the Institution level bodies from the requirements of adhering to the straitjacketing standards of the Indian Evidence Act, 1872. Therefore, it trusts the members of the investigative and adjudicatory authority to exercise their reason and prevailing professional ethics to address issues of sexual harassment of women at workplace. While providing channels of administrative appeal against the decisions made, Act 14 of 2013 vide Section 11 (3) confers the powers of a Civil Court under the Code of Civil Procedure, 1908 upon the institution-level Internal Complaints Committee (ICC).

These provisions of the Act 14 of 2013 show that the Parliament was serious about addressing the issue of sexual harassment of women at workplace under liberal Civil Law in addition to stringent Criminal law and therefor mandated an empowered Institution level Administrative "Court" at all workplaces while at the same time providing for an accessible and simplified mechanism for adjudication of complaints of sexual harassment of women at their workplace at the most appropriate level by respected peers who understand the situation, institutional practises and prevailing professional ethics better. In the interest of Justice, it provided for administrative appeal and concurrent criminal proceedings if the adjudicatory authority discovered that a case for the criminal offence was made out. It contains provisions for protecting the identity of the victim as well as the accused harasser during the proceedings to protect them from embarrassment and also has a provision for penalising false and frivolous complainants who seek to misuse the law pertaining to sexual harassment of women at the workplace to settle personal scores.

In consonance with the norm of appointing, rather than electing and thereby rendering the courts liable to accusations of politicization, the Act 14 of 2013 vide Section 4 (2) directs that the ICC (civil court) to be constituted by the members to be nominated by the employer. Although it is not expressly stated in the subsection, applying the ejusdem generis principle of statutory interpretation it can be asserted that even in Section 4 (2) (b) the mode of appointment of members to the ICC as envisaged by the Act 14 of 2013 is by nomination rather than election. This directive to constitute the ICC with nominated members is in consonance of the basic legal principle that adjudicatory authorities must not be politically or electorally chosen. Thereafter in pursuance of the Act 14 of 2013 the University Grants Commission (UGC) as the Government Authority

responsible for the regulation of all institutions of higher education within India, enacted delegated legislative regulations called the University Grants Commission (Prevention, prohibition and redressal of Sexual Harassment of women employees and students in higher educational institutions) Regulations, 2015 on 2 May 2016 (hereinafter referred to as the UGC SH Regulations) under authority of the Ministry of Human Resource Development, Government of India vide The Gazette of India: Extraordinary Notification No. 171 dated 02 May 2016, ostensibly in the interest of uniformity of procedures and to apparently enforce compliance with the Act 14 of 2013.

Whereas the Act 13 of 2014 which is the parent Act prescribes appointment of members to the ICC by nomination, the UGC SH Regulations, in flagrant violation of the mandate of the parent Act provides in Section 4 (c), direct that every Executive Authority (ostensibly the Employer in Act 14 of 2013) to constitute an ICC in which it recommends, among other things that "Three Students, if the matter involves students, who shall be enrolled at the undergraduate, master's and research scholar levels respectively, elected through transparent democratic procedure;…" .In the light of the above referred clear deviance and difference in the prescribed procedure for the process for membership of the ICC as prescribed in the provisions of the Section 4 (c) of UGC SH Regulations enacted by the subordinate delegated legislative institution of UGC, under authority of the Ministry of Human Resource Development, as compared to the Legislative mandate of provisions of the Section 4 (2) of the Act 14 of 2013 enacted by the Parliament of India, there have emerged some critical legal issues which warrant immediate attention and resolution. The present study seeks to address this singular issue pertaining to this single provision of Section 4 (1) (c) of the UGC SH Regulations to highlight how the incompetence/ politicisation of the bureaucracy has led to a legally explosive situation wherein due to the utter ineptitude/ political co-option of the Legal Officers of the UGC and the incompetent and mechanical mindset of the mandarins at the Ministry of Human Resource Development, Government of India has led to a situation due to which thousands of cases being decided by the various ICC in different institutions of higher education stand vitiated due to improper constitution of the ICC.

The maxim of "*delegatus non potest delegare*" asserts that an authority exercising delegated law-making powers, as an agent or instrumentality of the State and cannot further delegate powers assigned to it by statute, but is bound to exercise them in strict accordance with the prescription of the Statute.[37] The statutory power to appoint the members of the ICC is vested solely in the

[37] Patrick W Duff and Horace E Whiteside, "Delegata Potestas Non Potest Delegari A Maxim of American Constitutional Law," *Cornell Law Review* 14, no. 2 (1929): 168–96.

employer. Therefore, as the employer is a delegate of the Parliament for the exercise of the duty of appointing the members of the ICC, any further delegation of this responsibility to appoint, through democratic elections, onto other constituents, is a violation of the law and *ultra vires* sub delegation which is an established principle of administrative law.[38]

Moreover, since the ICC has the powers of a Civil Court, the accusation of politicisation of a Quasi-Judicial Authority undermining its legitimacy is possible. It is a basic requirement that "Not only must Justice be done, but clearly and manifestly seen to be done"[39] and the political election of persons with adjudicatory functions in a civil court destroys this confidence. Further, while Article 21 of the Constitution of India guarantees that no person shall be deprived of his life or liberty except according to procedure established by law.

It is clear that any infirmity in the constitution of the ICC especially due to a mistake of law, will render the forum illegitimate to address its mandate of preventing and redressing sexual harassment in the higher educational institutions. The insistence of the UGC SH Regulations on constituting ICC with "elected members" can lead not only to convicted harassers escaping justice by challenging the very factum of the powers of a politically elected member to adjudicate and prescribe punishment leading to protracted litigations, but also erode the confidence of victims in the ICC as a legitimate forum since it is doubtful whether such forum with politically elected student members will fulfil the mandatory requirements for selection as a member of the ICC in Section 4 (b) of Act 14 of 2013 which mandates "not less than two members from amongst the employees preferably committed to the cause of women or who have had experience in social work or have legal knowledge;" How an undergraduate student can fulfil these qualifications is doubtful. Similarly, postgraduate, or even doctoral candidates in Science or Agricultural Universities may have difficulty in fulfilling the preferred conditions of eligibility of experience in social work or legal knowledge. To appoint unqualified individuals would be a violation of the legislative Act since it would violate the rights of the fulfilment of legitimate expectations of accord with the law, both, of the victim, as well as the accused.

[38] Queen v. Burah, Indian Law Reporter (1878) Privy Council, Calcutta, Vol.4, 172.
[39] R v Sussex Justices, *ex parte* McCarthy (1923) All ER Rep 233.

3.3. Pre-2013: The Legal Vacuum on Workplace Sexual Harassment

Act 14 of 2013 is not a law in the Schedule IX of the Constitution. Therefore, all delegated legislation made under its authority must be within and not beyond the powers conferred. As explained by Satish Chandra J.

> "*The essence of the doctrine of ultra vires is that the act is done in excess of powers possessed by the person in law. This doctrine proceeds on the basis that the person has limited powers. If a person exists for a limited purpose alone and that purpose is defined by law whether expressly and, or by implications, the doctrine of ultra vires governs him and confines him to that purpose, the person can act within the four corners of its contesting instrument. The doctrine prevents him from acting beyond the conferred powers.*"[40]

Moreover, the procedure for the constitution of the "Civil Court" of ICC must be strictly adhered to else it becomes constitutively extra-legal with no authority to summon or investigate cases of Sexual Harassment at the institutions of higher education in India. Sadly, most of the ICC in institutions of higher education in India are such extra-legal bodies due to the oversight of the institutions themselves and the incompetence of the bureaucrats of UGC who drafted the *ultra vires* UGC SH Regulations. It cannot be stressed enough that by exceeding the statutory mandate, the UGC SH Regulations have created arbitrary illegal bodies with pretensions of Government authority and the ICC constituted under the *ultra vires* delegated legislation which presumes and assumes powers, in the absence of, or violating the jurisdiction or competence conferred by the parent Act.[41] By constituting *ultra vires* illegal bodies that are without any legal validity or any legal authority to summon or investigate cases of Sexual Harassment, the UGC SH Regulations have endangered the Constitution.[42] Any argument that "democratic" elections for appointment of the members of the Civil Court of ICC are essential indispensable for the effectiveness of the ICC in the institutions of higher education in India is specious since effectiveness of a policy or procedure cannot be used to override Constitutional legality and "*modern constitutionalism posits that no wielder of power should be allowed to claim the right to perpetrate state's violence against anyone, much less its own citizens, unchecked by law. ... The effectiveness of the force ought not to be, and cannot be, the sole yardstick to judge constitutional permissibility.*"[43]

There is another aspect to the *ultra vires* ICC being constituted in the institutions of higher learning in India. Since the ICC suffer from a constitutive defect due to *ultra vires* mandate of the

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[40] Anand Prakash & Others v. Asst. Registrar, All India Reporter (1968) Allahabad, p. 22.
[41] Madhvan Pillai V State of Kerala, All India Reporter (1966) Kerala, p. 214.
[42] Lord Shaw in R. v Halliday *ex parte* Zadig, 1917 AC 260.
[43] Nandini Sundar & Others vs State of Chhattisgarh, Supreme Court Cases (2011) Vol.7, pp.547.

UGC SH Regulations, they also lack the competence to proceed against citizens of India. The ICC constituted under the *ultra vires* UGC SH Regulations are Kangaroo Courts and any person, either victim or accused, can sue the institution of higher education for subjecting them to harassment, or for false pretensions of being empowered to do Justice, under Tort law. While a government authority (like the UGC, ICC or the institution of higher education) may be an artificial person distinct in law from its members, it is not capable of acting in propria persona, but acts only through its agents or servants[44] if it is negligent in the manner of performance of any act authorised by the statute, it will be liable for any damage caused by it[45] and may not avail of the immunity under Article 300 of the Constitution of India for torts committed by its officers.[46] The number of cases of illegal proceedings at institutions of higher education in India by the illegally constituted ICC under UGC SH Regulations can give rise to large number of Tort cases and burden the public exchequer in legal compensation, just because of the incompetence of some bureaucrats at UGC who inserted an *ultra vires* provision in the UGC SH Regulations.

Sexual harassment of women at workplace is disguised misogyny which seeks to perpetuate a power relationship in which the woman is commodified and seen as an object rather than as a person and reduced to a means of the fulfilment of male lust.[47] Objectification of women is directly influenced by the social environment of the workplace which may impede or amplify instances of sexual harassment of women at workplace.[48] Sexual harassment of women at workplace may be said to be individualised and relativist, and what one woman perceives as Sexual Harassment may be discounted by another as acceptable flirting.[49] Socialisation and cultural factors play an important role in perceptions of what constitutes sexual harassment of women at workplace and what does not. There can be no universal absolutist morality-based judgment of a good or bad work environment and the level of comfort felt by a woman is the parameter to judge whether sexual harassment exists or not. This subjectivity-based approach empowers the woman to decide whether or not a certain behaviour is acceptable. Instead of seeking sterile work environments,

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44 T Pillai v. Municipal Council. Shencottah, All India Reporter (1961) Madras p.230.

45 Municipal Board, Mathura v. Gopi Nath, All India Reporter (1962) Allahabad p. 211.

46 M.P.Jain and S.N.Jain, *Principles of Administrative Law* (Bombay: N.M.Tripathi, 1970).

47 Sandra Lee Bartky, *Femininity and Domination: Studies in the Phenomenology of Oppression* (New York: Routledge, 1990).

48 Shekinah Hoffman, "The Impact of Sexual Harassment on Women's Health and Well-Being: A Case for Studying the Casino Gaming Industry," *Sociology Compass* 18, no. 1 (January 1, 2024): e13163, https://doi.org/10.1111/soc4.13163.

49 Joann Keyton and Steven C. Rhodes, "Sexual Harassment: A Matter of Individual Ethics, Legal Definitions, or Organizational Policy?," *Journal of Business Ethics* 16, no. 2 (February 1, 1997): 129–46, https://doi.org/10.1023/A:1017905100869.

healthy interactions based on mutual respect between men and should be fostered. But once a woman feels uncomfortable by an overture, it must be conveyed politely but firmly. If the behaviour persists it constitutes sexual harassment of women at workplace. Sexual Harassment is unethical and an irritant in professional contexts. It reduces productivity and causes personal distress.[50] The appropriate way to deal with it is through impartial and sensitive legally valid fora. It is necessary that the complainant feels secure when approaching the authorities and confident that justice will be served. Similarly, the accused must feel that he will get a fair chance to defend himself against the charge. This can be achieved when the adjudicatory authority is honest and unbiased. To introduce potentially politically biased persons creates a situation where extraneous factors assume importance and influence rather than truth is the determinant of the outcome of the proceedings.

4. Conclusion

To address issues in implementing sexual harassment laws at higher education institutions, the UGC should reconsider how ICCs are formed and amend the UGC SH Regulations. Specifically, Section 4(1)(c) of the UGC SH Regulations conflicts with the parent statute, making ICCs formed under it invalid and procedurally flawed. This invalidity means that proceedings by these ICCs are void, denying justice to victims and violating the Fundamental Rights of the accused under Articles 14 and 21 of the Indian Constitution. The existence of these invalid ICCs increases injustice and government liability. Therefore, an executive or judicial review of the UGC SH Regulations is urgently needed.

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