
EVOLUTION, DESIGN AND PERSISTENT IMPLEMENTATION GAPS IN THE LEGAL FRAMEWORK ON SEXUAL HARASSMENT AT THE WORKPLACE IN INDIA

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ABSTRACT

By India, the evolution of the legal protection of workers against sexual harassment at the workplace has moved from a court based concept to the formal legislation. It started with Vishakha and Others vs. State of Rajasthan, which is a Supreme Court in 1997 that provided temporary solutions until the law was introduced. There has been the introduction by India of the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013, this was a significant step in protecting women in the workplace but not all is smooth sailing with the legislation there are still many issues with its implementation of the legislation. This essay will talk about the evolution of the legal system, structure of the legislation and the issues that surround the legislation.

Introduction

Sexual harassment in the workplace is a prevalent problem, mainly in the workplaces but also in organizations, across India. Until 1997 there was no such enactment against harassment of women in the workplace as no such act existed in India and the women had to face this problem. In the absence of an act the courts had to come to the aid of the women by framing temporary guidelines. Looking at the situation after 16 years the first legislation in the form of the POSH Act came into existence in 2013. There still exist certain problems in the implementation of the legislation which make it less effective.

This paper would aptly highlight the changes in the legal system from concepts of courts to legislation. It would be evident that there's no denying that the legislation came into effect as a great milestone but due to the large problems with implementation it is less effective.

Pre-Vishakha Legal Framework: The Legislative Void

Before the Vishakha Judgment, Indian law addressing sexual harassment, while present, was largely ineffective and not specifically tailored for organizational/ workplace contexts. The legal provisions under the Indian Penal Code, 1860 (“IPC”) were employed in respect to sexual harassment, then undocumented, and thus not designed to meet the context. The IPC lacked specific rules for conduct in the organizational atmosphere, guiding behavior in the specific setting of the workplace.¹ Sections 354 (outraging modesty) and 509 (words, gestures, or acts intended to insult modesty) of the IPC covered some conduct, but did not address it specifically in the context of the workplace.²

The use of the IPC for addressing sexual harassment had critical limitations. For example, the PBMs Prohibition is ineffective because the IPC presumes the existence of duty-bearers, and, to address the “farmer’s trouble” (the threat of enormous mobilization in force⁷) many of the SBMs and anti-propaganda prohibitions stem from a set of assumptions most relevant to urban industrial and minimum sector organizations, with their middle class clientele.”³ The requirement of criminal intent detailed in the IPC (among other aspects) created a high evidentiary threshold⁴ Criminal regimes defaulted to penal solutions instead of remedial/organizational effective program consultation. Lack of organizational-based redress solel/and women faced alienation, since reporting to internal channels was ignored and proceedings were subjected to protracted criminal process.⁵ Workplaces were left unreported and untreated, maintaining silence and impunity. Additional constitutional protection resulted from Articles 14, 15, 19 and 21 of the Indian Constitution, guaranteeing equality, non-discrimination, freedom of speech, and life with dignity: none were actively used with reference to workplace sexual harassment prior to the Vishakha judgment.

¹ Indian Penal Code, 1860, §§ 354, 509 (India).

² *Indra Sawhney v. Union of India*, (1993) 4 S.C.C. 746, 755

³ *State of Punjab v. Gurmit Singh**, (1996) 2 S.C.C. 384

⁴ *Id.* at 388

⁵ India Constitution arts. 14, 15, 19, 21

The Vishakha Guidelines: Judicial Activism and Interim Protection (1997)

A. The case and its context

Vishakha began as a reflection of the circumstances of Bhanwari Devi, a social worker in the state of Rajasthan, who was working for family planning.⁶ In 1992, Bhanwari Devi had been raped while working on family planning.⁷ Irregularities and objections prevented her in putting her complaint before the police and the authorities; she sued for redressal in the Supreme Court through a public interest Litigation proceedings for sexual harassment at work.⁸

B. The Judgment and Guidelines

The Court on August 13, 1997 held that sexual harassment at the work place violates the rights to equality, freedom, work and non discrimination inherent in Articles 14, 15, 19 and 21 of the Indian Constitution.⁹ This judgment was in fact the first such recognition given by the Indian Court that sexual harassment at the work place violated constitutional rights and not simply the right of individual dignity¹⁰, The Court recognized that the occupational sphere would have to be free from the indignities of sexual harassment, that the national guarantee of equal treatment demanded that employees be able to work in an environment free of harassment and that employees should be free from the humiliations of being asked for sexual favors and sexual advances.

To ensure that this obligation was defined by the Court, the Court drew upon existing legislation and instituted a set of Interim guidelines, which were also called the ‘Vishakha

⁶ Vishakha, 6 S.C.C. at 241-42

⁷ Id. at 242

⁸ Id

⁹ Id. at 245

¹⁰ Id. at 246

Guidelines' for implementation with all organizations until a comprehensive Bill on sexual harassment was possible.¹¹ These guidelines were an exceptional example of the overriding creativity of the Court in fixing a new set of applicable law for 16 years.

C. Nature of the Vishakha Guidelines

The Guidelines were perhaps the most complicated guidelines issued by the Court in the sense that they leaned in six directions of conceptualization and solution. First, they provided definitions to expel conservative thought and to encompass all woman hostile acts-the guidelines defined sexual harassment in terms of physical contact and advances, in terms of demand for sexual favors, in terms of sexually colored remarks, in terms of display of pornography and in terms of any unwelcome verbal or non-verbal conduct of a sexual nature¹². Quite unlike definitions of criminal law sexual harassment, the Guidelines conceptualized harassment very broadly.

Second, the Guidelines made the definition obligatory on all employers and managers and drew out five levels of prevention:-the policy had to take a proactive stance to the impact of harassment and promote awareness, every workplace would need a code of conduct against sexual harassment, every workplace would have to inform its employees about the consequences of sexual harassment, every workplace would have to develop a brochure to promote awareness in the wider community, and every workplace would have to set up training programs for managers to prevent harassment.¹³ Third, they envisioned an internal redressal mechanism constituted by a Complaints Committee comprising a woman member as chairperson, workers rep, and both sides were to be represented by third party civil society organizations.¹⁴ Fourth, a right not to be victimized was established, and it was to be specifically included by employers in the model policy.¹⁵ Fifth, the issues of the due procedure of investigation had to follow natural justice principles; and six, maintenance of confidentiality.

¹¹ Id. at 247

¹² Id. at 247-48

¹³ Id. at 248

¹⁴ Id

¹⁵ Id

It was then expected that firms would instate a Complaints Committee¹⁶ contractually holding the Committee to the principles of natural justice.¹⁷

The Sixteen-Year Interim Period: Limitations and Evolution (1997-2013)

A. Strengths of the Vishakha Framework

Although not mandated by legislation, the Vishakha Guidelines met several hurdles. They drew organizational focus on sexual harassment within workplaces and mandated complaints mechanisms.¹⁸ They also enabled civil society groups to intervene within institutional management.¹⁹ Finally, many women in their complaints-based on the guidelines, received remedies, proving judicial activism can translate into positive concrete results even in the absence of legislation.²⁰

B. Structural obstacles

However, the non-statutory nature of the Guidelines resulted in obstacles that persisted. Organizations could simply disregard guidelines they found to be politically or otherwise inconvenient because there were no sanctions for non-compliance.²¹ they had no impetus for enforcement outside judicial misconduct proceedings, which was a measure usually reserved for specific behaviors.²² they did not specify the time-frame by which organizations must implement them or who was responsible for ensuring implementation, allowing compliance with the guidelines to vary across industries.

Ambiguity existed about whether the transposition process applies to informal unorganized sectors and consequently some groups of workers domestic workers and casual laborers were left unprotected.²³ Moreover, because there were no statutory penalties apart from possibly

¹⁶ Id. at 249

¹⁷ Id

¹⁸ Farah Naqvi & Shreya Malik, *Implementing Gender Justice in India*, 12 Socio-Legal Rev. 45, 52 (2019).

¹⁹ Vishakha, 6 S.C.C. at 250

²⁰ Amnesty Int'l, Justice for Women: A Study on Implementation of the Vishakha Guidelines 34-38 (2008)

²¹ Human Rights Watch, The Failure to Act: Workplace Sexual Harassment in India 15-16 (2017).

²² Vishakha Judgement Implementation, (2013) 1 S.C.C. 641

²³ Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, § 2 (2013)

bringing organizations under contempt proceedings and thus risking order for their behavior, non-compliance did not entail any sanctions.²⁴

The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013: Statutory Consolidation

A. Context and Enactment through law

The statutory framework was enacted by Parliament in 2013, through the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013- the “POSH Act” converting the Vishakha Guidelines from judicial guidelines into statutory law.²⁵ This was a sequitur of strict on ground action by women’s groups and civil society and through that gradually by progressive decisions of the courts, generating strong judicial recognition of sexual harassment at the workplace as a violation of fundamental rights requiring statutory response.

B. Scope of application and Definition

The POSH Act, 2013, covers every workplace whether organized unorganized, public or private and educational spaces.²⁶ All those employed in those spaces irrespective of being a casual, temporary, contracted employee etc. Are considered covered and even domestic workers are distinctly covered.²⁷ Section 2 of the Act defines “sexual harassment” as including unwelcome acts, requests for sexual favors, sexually colored remarks, physical contacts and advances and unwelcome physical, verbal or non-verbal conduct of sexual nature.²⁸ The Act recognizes harassment in forms of different verbal, non-verbal and physical conduct, beyond just physical acts.²⁹

²⁴ Human Rights Watch, The Failure to Act, supra note 26, at 18-19

²⁵ Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, No. 14, Acts of Parliament, 2013

²⁶ Sexual Harassment of Women at Workplace Act, § 2(d) (2013).

²⁷ Id. § 2(e).

²⁸ Id. § 2(n).

²⁹ Id. § 4(1).

C. Institutional mechanisms for redressal:

The Act frames the institutions necessary for redressal of such complaints. It establishes Internal Complaints Committee (“ICC”) at places of work consisting of a woman member as the chairperson and members of the various sectors including CSR representatives.³⁰ For smaller workplaces of less than 10 employees it makes a Local Complaints Committee (“LCC”) empowered to hear the complaints. The relationship of these institutions to the Vishakha guidelines is of statutory frameworks with greater authority than the former, but they retain them as origins of their legislative framing.³¹

D. Provisions for adverse sanctions in case of non-compliance:

The Act enforces potentially penal sanctions in case of flouting by employers to enforce compliance. It authorizes a fine to be levied of up to 50,000 on employers who come in violation with the provisions of the Act with enhanced penalties in cases of subsequent violations.³² This represented a step ahead from the absence of consequence analysis in case of non-compliance of the Vishakha guidelines.³³

Implementation Gaps and Persistent Challenges***A. Institutional capacity and awareness gaps:***

Despite the breadth of the statutory mechanism, its implementation mechanisms are significantly limited by other systemic issues. First, a large number of organizations sit on Committees in law but fail to carry out any capacity-building, orientation, or training sessions for Committee members.³⁴ A necessary result of this failure is that Committee members are often not familiar with the detailed provisions of the Act, guidelines on

³⁰ Id. § 4(2)

³¹ Sexual Harassment of Women at Workplace Act, § 4(2)(b)-(d) (2013)

³² Id. § 8

³³ Id. § 25

³⁴ Indian Institute of Management-Ahmedabad, POSH Compliance Study in Indian Workplaces 78-82 (2018)

objectively investigating a complaint, or how to deal with victims in a trauma-sensitive manner.³⁵

Secondly, many entities are not aware of their own obligations to provide ICCs or of the complainants' own rights under the POSH Act, leading to its invisibilization among persons who need its protections; studies have verified that many workers face limited awareness about their rights under the POSH Act, including the procedure for lodging of complaints or the provision of ICCs.³⁶

B. Underreporting, primarily due to culture:

Despite statutes designed to protect complainants through ICC confidentiality mechanisms and unavailability of ICC proceedings to the parties, workers fear reporting of complaints because of retaliation, career consequences, and inquiry or victim injuries. A pervasive issue of workplace culture that tolerates or even accepts harassment in the workplace discourages implementation of the Act. Even women who suffer heinous legal violations are often reluctant to raise their concerns, anticipating retaliation from the perpetrator/witness list, and failing to believe that the ICC or other procedures would remedy those violations.³⁷

Although confidentiality mechanisms are codified in the Act, these are often ineffective in practice, with resulting violations of complainant privacy potentially resulting in retaliation since in small organizations it may be seen as impossible for staff to conceal who is the complainant.³⁸

C. Failures in investigation quality and procedure:

The investigation processes of the ICC often fail to conform to the standards of investigation profession, and the good practice that promotes natural justice and peace of mind of the complainant.³⁹ The Committee members lack the training to undertake a thorough

³⁵ Rashmi Dey & Ananya Chatterjee, Implementation Challenges of the POSH Act in India, 14 Gender & Dev. Rev. 112, 119-22 (2020).

³⁶ Id. at 124-27

³⁷ Nazneen Shaikh, *Workplace Sexual Harassment: Underreporting and Barriers to Justice*, 18 Harv. J. Gender & L. 235, 242-48 (2015).

³⁸ Rashmi Dey & Ananya Chatterjee, supra note 43, at 128-30

³⁹ Centre for Policy Research, supra note 45, at 78-84

investigation, resulting in an informal process that generates loose ends and a lack of documentary documentation.⁴⁰ Their investigation produces an inconclusive finding, lacking support or accountability for complaint issues with a serious impact on complainant identity, as the investigation can always take place without revealing identities even where the complainant files the complaint.⁴¹ An absence of the availability of appeal procedures also results in a systemic fairness deficiency.⁴²

D. Gaps for unorganized or informal sector workers:

While the POSH Act extends to the informal sector, complainant investigation mechanisms are significantly limited here.⁴³ For instance, domestic workers, contract workers, casual laborers may not have access to well-developed ICC mechanisms, forcing them to rely on the marginal remedies provided by LCC mechanisms, which are often unable to investigate the complaints thoroughly due to limits in knowledge about the individual workplaces.⁴⁴

E. Remedy regimes and victim assistance:

The POSH Act is limited in terms of remedy regimes to either counseling or disciplinary action against the perpetrator, as a recommended outcome.⁴⁵ There is a stark absence of mechanisms to assist victims during the investigation process itself, through things such as healthcare, psychological support, or economic relief.⁴⁶

⁴⁰ Id. at 85-91.

⁴¹ Sexual Harassment of Women at Workplace Act, § 11 (2013)

⁴² Human Rights Watch, *The Failure to Act*, supra note 26, at 25-28

⁴³ Bina Fernandez, *Destitution and Diversity: Economic Security for Informal Sector Workers in India* 156-58 (2014)

⁴⁴ Id. at 159-64

⁴⁵ Sexual Harassment of Women at Workplace Act, § 9 (2013)

⁴⁶ Centre for Policy Research, supra note 45, at 104-08.

Conclusion

The evolution of law from Vishakha Guidelines to POSH Act, 2013 has been important progress in the direction of independent recognition of workplace sexual harassment as a violation of fundamental rights and around developing statutory mechanisms for enforcement, prevention and redressal. Shift from judicial directions and guidelines to statutory law was necessary to empower law enforcement mechanisms and affirms occupational anti-sexual harassment obligations of employers, encompassing broader scope of worker categories than any of the guidelines.

Yet, the persistently poor implementation raises important concerns around adequacy of laws and statutory regulatory framework itself. Organizational level implementation remains uneven; awareness among duty bearers continue to be worrisome and abuses continue to be underreported; while unorganized sector workers, continue to remain excluded; remedies framework remains less than comprehensive. Further, it is apparent that while developing mechanisms was necessary, the statutory framework without investments in organizational awareness-building, capacity building initiatives for investigations, effective and user-friendly complaint registration, accessible remedial structures falls short of substantiating legal protections for workplace victims at a systemic level.