



An overview of the genesis of Prevention of Sexual Harassment of Women at Workplace (Prevention, Prohibition, Redress) Act, 2013

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The paper is an attempt at understanding the concept of sexual harassment in detail along with the timeline of Vishakha Guidelines and its role in the enactment of the Sexual Harassment of Women at Workplace (Prevention, Prohibition, Redress) Act, 2013. The paper delves into the pre and post enactment phase of the Act. It also highlights the various relevant cases in which the provisions of the act have played a crucial role in attaining justice. The research paper also mentions in detail the provisions of the said act along with the penalties in case of non compliance.

Keywords - Sexual Harassment, Vishakha Guidelines, Gender Equality, Violence against women, Fundamental Right, Internal Complaint Committee

Introduction

Violence against women is underpinned by constant presence of patriarchal social norms passing on through inter and intra gender hierarchies. Women are discriminated against and subordinated not only on the basis of sex, but on other grounds too such as caste, class, sexual orientation etc. Discrimination exposes many women to a continuum of violence throughout the life cycle, commonly referred to as existing “from womb to tomb”. Violence against women is systematic and occurs in both public and private spheres. The structural aspect of patriarchy is manifested in the hierarchical organisation of social institutions and relations, while the ideological aspect reinforces and supports inequality and subordination (Dobash and Dobash 1979).

MacKinnon (1979) outlined the personal and professional impact of sexual harassment on women. She depicted the cost of enduring sexual harassment as both physical and psychological and outlined a range of responses that included humiliation, degradation, shame, embarrassment, guilt, intimidation, frustration, a sense of hopelessness and emotional breakdown.

Sexual harassment is not just a workplace problem rather it is manifestation of inequality that women face across societies. Sexual harassment has a long history, the term was coined and acknowledged in the early 1970s post which many industrialised countries passed laws that declared sexual harassment illegal within workplaces (Fitzgerald & Shullman, 1993; Luthar & Pastille, 2000; De Souza et al, 1998).

Methodology

In order to understand the concept of sexual harassment of women the researcher extensively studied data compiled by various researches, newspaper articles, data compiled by national and international agencies, both government and non government agencies. With the help of internet, access to secondary resources of data was feasible for a lucid explanation of the concept as well as a thorough understanding of the timeline of the

Vishakha Judgement and eventually the passing of the Prevention of Sexual Harassment of Women at Workplace (Prevention, Prohibition, Redress) Act, 2013.

THEORETICAL MODELS OF SEXUAL HARASSMENT

In order to understand sexual harassment as a phenomenon O'Hare and O'Donohue (1998) highlight five models of sexual harassment. These include the Natural or Biological model (Tangri and Hayes, 1997; Tangri et al. 1982) in which sexual harassment is demonstration of human sexuality and results out of natural sexual attraction between men and women. As per first version of this model sexual behaviour is not to be seen as offensive and discriminatory since it is a normal consequence of the stronger sex drive of men.

Next model is the Organisational model (Tangri et al. 1982). As per the organisational model explained by Tangri et al (1982) power wielded by a person within organisation has the key factor. Sexual harassment at workplace is triggered because of asymmetrical relations within the organisations between the seniors who are mostly men and juniors who are generally women.

Third type is the Socio-cultural model (Farley, 1978; MacKinnon, 1979) This model highlights gender of the people (involved) as a prominent factor in sexual harassment at workplace. It enlists the social context in which aggression and domineering behaviour is valued in men and passive acceptance in women. Tangri et al (1982) explains that men and women are socialised to maintain structure of domination by men and subordination of women which originates in difference of power and status of both the sex in the larger society.

Fourth one is the Sex Role Spill Over model (Gutek and Morasch, 1982; Tangri and Hayes, 1997). The Sex Role Spillover Model put forward by Gutek and Morasch (1982) appears to be a combination of the organisational and socio-cultural model. It states that workers bring gender based expectations for behaviour into the workplace. According to this model, sexual harassment is mostly likely to happen in work environments where the sex ratio is skewed. As gender identity is more salient than the worker identity, women and men fall back on these genders based expectations in their workplace which are irrelevant and inappropriate to a work setting.

The last one is the Four Factor model (O'Hare and O'Donohue, 1998) The only existing multi-factor theory of sexual harassment was proposed by O'Hare and O'Donohue (1998), who assumed four basic factors that are required for sexual harassment to occur: (a) motivation to harass, (b) internal inhibitions that have to be overcome, as well as (c) external inhibitions, and (d) victims' resistance.

A brief History of Vishakha Guidelines

Pre-1997 the person facing sexual harassment at workplace had to lodge a complaint under Section 354 of the Indian Penal Code 1860 that deals with the 'criminal assault of women to outrage women's modesty', and Section 509 that punishes an individual/individuals for using a 'word, gesture or act intended to insult the modesty of a woman.

In 1985, Bhanwari Devi was selected and trained as Saathin (Woman Village Level Worker) under the Women Development Programme by the Government of Rajasthan. The project aimed at empowering women. In the course of seven years of her work she took up issues related to land, water, public distribution system, literacy, health and payment of minimum wages during famine relief works. Bhanwari started facing alienation in the Bhatner village specifically on the issue of stopping child marriage. In 1992, as part of the state government campaign against child marriage i.e. anti child marriage before Akha Teej, Bhanwari Devi attempted to stop the marriage of a one-year-old girl happening in a Gujjar family. Men from the community retaliated and punished her by intimidating her with sexual harassment, threats, imposing a socio-economic boycott on her family which finally resulted in five men raping her in September 1992 that too in the presence of her husband. She faced numerous obstacles when she made attempts to seek justice. Police were reluctant to record her statement or carry out an investigation, and doctors at two government health facilities refused to conduct a proper medical examination. Subsequently, the men were acquitted by Sessions court. The court mentioned that a man could not possibly have participated in a gang rape in the presence of his nephew, Bhanwari Devi could be lying that she was gang raped as her medical examination happened fifty two hours after the incident, the court even went to say that her husband could not possibly have watched passively his wife being gang

raped because he had taken marriage vows which bound him to protect her. The judgement of the district court led to campaign for justice for Bhanwari Devi by women's groups in Rajasthan and Delhi. Under the collective name Vishakha a public interest petition was filed in the year 1992 in the Supreme Court of India by women's organisations and groups namely Vishakha, Mahila Purnvas Samou, Rajasthan Voluntary Health Association, Kali for Women, and Jagori against the State of Rajasthan, its Women and Child Welfare Department, its Department of Social Welfare, and the Union of India. The Bhateri rape case was cited as an instance of sexual harassment in the context of work and it was said, in the absence of any legislation on sexual harassment at workplace, women were left vulnerable and their rights were unprotected. It was said that the court should give directions in this matter. The public interest legislation was premised on the fact that although Bhanwari Devi was exposed to exhibitionism and sexual harassment for months before the gang rape took place, which she reported to the local authorities, the State made no attempts to protect her. It was argued that the Bhanwari Devi's case brought to light utter disregard and failure by the state government as an employer to recognise sexual harassment experienced by women while performing duties in benefit and behalf of them. Jaising (2004) states that primary question in the Vishakha case was whether the State i.e. employer was responsible to protect its employees and workers. The writ petition therefore aimed at enforce fundamental rights of working women, to assist in finding suitable methods for realisation of gender equality, prevent sexual harassment and fill vacuum in existing legislation.

Vishakha Judgment

On 13th August, 1997 Supreme Court gave the judgement mentioning Vishakha Guidelines in order to protect working women from various forms of sexual harassment at workplace in lieu of a public interest petition. The apex court noted the fact that the civil and penal laws of the time did not adequately provide for specific protection of women from sexual harassment at workplaces. Unfortunately, till the Supreme Court in 1997 acknowledged sexual harassment at workplace as infringement of woman's fundamental Right to equality and the Right to Life and Liberty it was treated as personal problem Radhika (1999).

The judgment of Vishakha's case was conveyed by Chief Justice J.S Verma and sitting judges Justice Sujata Manihar and Justice B.N Kripal. One of the most important aspect of the Supreme Court judgment was that it recognised the structural and systemic nature of sexual harassment at workplace. Vishakha judgment defined sexual harassment as unwelcome sexually determined behaviour (whether directly or by implication) and interpreted sexual harassment as that behaviour with sexual overtones imposed on women. It was also made clear that sexual harassment was determined not by the perpetrator but by the women who faced it and thus it was about subjective perception. Under the guidelines the onus for protection against sexual harassment at the workplace was placed on the employer. The court made it clear that sexual harassment makes the person feel humiliated, offended and insulted. The judgment clearly stated that it is the duty of the employer to take all the necessary steps to prevent and deter sexual harassment at the workplace and, in events in which harassment occurs, to make provisions to resolve, settle or prosecute the violation. It is important to note that by entrusting employers with the responsibility of protecting against sexual harassment, Vishakha Guidelines emphasised the importance of prevention in addressing issues of sexual harassment. Rather than creating the provisions to prosecute a crime that has already been committed, the guidelines sought to stop that crime before it happened, by insisting on a safe working environment and promoting awareness on the issue of sexual harassment.

According to Sood et. al (2006) Vishakha judgment filled a gap in domestic laws related to violence against women in India and upheld constitutional rights of women by directly applying the provisions of Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) to enact guidelines against sexual harassment in the workplace. The judgement saw integration of Indian Constitution and CEDAW. The Supreme Court emphasised legal obligations on part of India to uphold women's rights pursuant to its ratification of CEDAW, and also to the official commitments it made at the UN Beijing Conference and the constitutional provisions directing the State to enforce the treaties it has signed. CEDAW was adopted by the UN General Assembly in 1979 and ratified by India in 1993. CEDAW defines discrimination against women as any distinction, exclusion or restriction made on the basis of sex and sets up an agenda for action by the member states to end such discrimination through a series of measures including enacting legislations prohibiting all discrimination against women. General Recommendation Number 19 of CEDAW defines sexual harassment and explicitly talks about sexual harassment at workplace saying that equality in employment can be seriously impaired when women are subjected to gender specific violence in the form of sexual harassment at the workplace. The Judgment recognised that sexual harassment violated the constitutional guarantee of gender equality, women's fundamental rights to life with dignity, to personal

liberty, and to carry on any occupation. Along with the Fundamental Rights, Directive Principles of the State Policy, the Constitution mentions securing just and humane conditions of work and maternity relief, and the Fundamental Duty imposed on all Indian citizens to renounce practices derogatory to the dignity of women were mentioned by the Court.

The early developments in the Statute. Before the introduction of the POSH Act, there was no statutory remedy that directly addressed workplace sexual harassment except the Indian Penal Code, 1860. The only sections under the Indian Penal Code that could be used for sexual harassment are under:

- Section 354 (Outraging the modesty of a woman) and
- Section 509 (Insulting the modesty of a woman).

Women who were sexually harassed at the workplace had to go to the police and file a complaint. The application of the Indian Penal Code can be seen in the case of *Rupan Deol Bajaj vs. K.P.S. Gill* (1995), where a senior IAS officer was sexually harassed by a superior officer and the recourse to the limited provisions of the IPC under Section 354 and Section 509 was not found sufficient by the High Court. This gap in the law was very apparent and the need for further reforms on sexual harassment was obvious. It was in the light of instances such as these that the Supreme Court set aside the judgement in the *Rupan* case. The unfortunate circumstances in the *Vishaka* case finally addressed workplace sexual harassment, its prevention, and redressal mechanisms.

What comprises of sexual harassment ?

The *Vishaka* Guidelines called for the need to define sexual harassment. The guidelines took definition verbatim from the General Recommendation 19 to the CEDAW Convention. 'Sexual Harassment' includes such unwelcome sexually-determined behaviour (whether direct or indirect) as:

- Physical contact and advances
- A demand or request for sexual favours
- Sexually-coloured remarks
- Showing pornography
- Any other unwelcome physical, verbal or nonverbal conduct of sexual nature.
- Any sexual acts carried out that are directly related to the victim's employment or work
- Conduct that can be humiliating for the woman
- Any sexual conduct that affects the health and safety of a woman.

The creation of a hostile working environment and unconsensual advances or requests of a sexual nature both amount to sexual harassment.

Genesis of the Prevention of Sexual Harassment of Women at Workplace (Prevention, Prohibition, Redress) Act, 2013

Justice Verma Committee Report was behind the coming up of the Sexual Harassment of Women at Workplace (Prohibition, Prevention and Redressal) Act, 2013. The report gave major focus on sexual assault and on sexual offences against women. The committee also dealt a certain extent to the idea of gender justice and sexual harassment. The Verma panel had recommended a tribunal of experts and non-attached persons, to decide on the disputes of sexual harassment at workplace and also recommended that the Tribunal should be set up at the State level too.

The Sexual Harassment at Workplace (Prevention, Prohibition and Redressal) Act, 2013 seeks to guard women from harassment at their place of work. The Draft Bill "Protection of Women against Sexual Harassment at Workplace Bill, 2007" was approved by the Union Cabinet. In the year 2010 the Bill was introduced in the Lok Sabha by Women and Child Development Minister Mrs. Krishna Tirath and approved by the Cabinet. The tabled bill in the Lok Sabha was to be studied thoroughly by the Parliamentary commission on Human Resources Development. The committee's report was printed in November 2011. In 2012, the Cabinet Union approved the changes to incorporate domestic employees. The bill was passed by the Lok Sabha (lower house of the Indian Parliament) on 3rd September 2012. It was passed by the Rajya Sabha (upper house of the Indian Parliament) on 26th February 2013. It got the assent of the President on 23rd April 2013. Hence, the bill finally came into force as The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013, a legislative act in India that seeks to protect women from sexual harassment at their place of work. This particular statute superseded the Vishakha Guidelines for Prevention

Of Sexual Harassment (POSH) introduced by the Supreme Court of India. More so, with the advent of Section 2(n) of the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013, India finally had an explanation for what constituted sexual harassment. Only women are protected from sexual harassment at the workplace. Any working woman is protected from being subjected to sexual harassment at the workplace.

Salient Features of the Act

The Vishakha Guidelines were a set of procedural recommendations for use in India in cases of sexual harassment promulgated by the Supreme Court in 1997 and were superseded in 2013 by the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act also known as POSH Act in short. The Act has established regulations that organisations must adhere to address complaints promptly. As part of these provisions, the Act requires organisations to establish an internal complaints committee (IC) as a legal requirement. The Act also covers concepts of 'quid pro quo harassment' and 'hostile work environment' as forms of sexual harassment if it occurs in connection with an act or behaviour of sexual harassment.

- The definition of "aggrieved woman", who will get protection under the Act is extremely wide to cover all women, irrespective of her age or employment status, whether in the organised or unorganised sectors, public or private and covers clients, customers and domestic workers as well.
- Every employer is required to constitute an Internal Complaints Committee at each office or branch with 10 or more employees. The District Officer is required to constitute a Local Complaints Committee at each district, and if required at the block level.
- The Complaints Committees have the powers of civil courts for gathering evidence.

The Act requires employers to conduct education and sensitisation programmes and develop policies against sexual harassment, among other obligations. The objective of awareness Building can be achieved through banners and posters displayed in the premises, eLearning courses for the employees, managers and Internal Committee members, Classroom training sessions, Communication of Organizational Sexual Harassment Policy through emails, eLearning or Classroom Training. It is recommended that the eLearning or Classroom Training be delivered in the primary communication language of the employee.

Penalties have been prescribed for employers in case of non-compliance of the provisions of the Act. Employers shall be punishable with a fine of up to ₹ 50,000. Repeated violations may lead to higher penalties and cancellation of licence or deregistration to conduct business

The Act includes several provisions of the Vishakha Guidelines which required formulation of "a code of conduct for work place". Further, building on the Vishakha Guidelines, the Act implies formation of an Internal Complaints Committee and a Local Complaints Committee at the district level which has been discussed above.

While the "workplace" in the Vishakha Guidelines is confined to the traditional office set-up where there is a clear employer-employee relationship, this Act goes much further to include organisations, department, office, branch unit etc. in the public and private sector, organized and unorganized, hospitals, nursing homes, educational institutions, sports institutes, stadiums, sports complex and any place visited by the employee during the course of employment including the transportation. Even non-traditional workplaces which involve tele-commuting will get covered under this law

The IC consists of:

1. The IC is required to designate a female Presiding Officer who occupies a high-ranking position within the organisation. In the absence of a senior-level employee, the ICC has the authority to choose a female employee from other departments or divisions within the workplace. If a qualified candidate cannot be discovered within the organisation, another senior-level female employee from a different workplace under the same employer or organisation may be selected instead.
2. Moreover, it is vital to incorporate two more members who are employees, namely persons who are committed to promoting women's rights or possess proficiency in social work or legal affairs.
3. The IC should include a representative from an NGO or association specialising in the promotion of women's rights or possessing expertise in the field of sexual harassment.

Gender Equality is and must be perceived as a fundamental human right. The court observed that the fundamental rights under Article 14[2], 19[3](1)(g) and 21[4] of Constitution of India that, every profession, trade or occupation should provide safe working environment to the employees. Sexual harassment hampered the right to life and the right to live a dignified life. Gender equality has been mentioned in the Constitution of India in its preamble under Article 14, 15 and 16. Article 21 of the Constitution guarantees the dignity of women. The directive principles of the state policy of part IV of the Constitution under Articles 38 and 39 guides the state to give equal rights and status for people to adequate means of livelihood opportunities. Article 42 of the Constitution states that the state will make arrangement for security and improve conditions of work.

Cases viz - a - viz sexual harassment at workplace

Before the Vishakha Guidelines were ordered by the Supreme Court one of the most infamous KPS Gill case took place where in Senior IAS officer Rupan Deol Bajaj complained in 1988 that former Punjab director general of police, KPS Gill, touched her inappropriately at a party. The Trial court convicted Gill in 1996. Supreme Court upheld the decision in 2005 but the former top cop didn't serve any jail time.

After the Vishaka guidelines came there were many cases which strengthened the legal framework for workplace sexual harassment. Some of them are mentioned below.

First, In the *Apparel Export Promotion Council v. A.K. Chopra* (1999), the Supreme Court upheld the dismissal of a superior officer of the Delhi-based Apparel Export Promotion Council for sexual harassment. The court enlarged the definition of sexual harassment to state that "physical contact is not always essential for an act amounting to workplace sexual harassment." Sexual harassment is seen as any 'unwelcome' act.

Later, in the *Medha Kotwal Lele & Ors v. Union of India & Ors* (2013), the Supreme Court placed emphasis on States to follow the Vishaka Guidelines and to ensure its effective implementation. Further, the court asserted that if the guidelines are not complied with, then the aggrieved persons or the victim could approach the High Courts.

In **Poornima Advani vs. Union of India 2018**: This case held that the POSH Act applies to government organizations, and that the government must ensure that all its offices and workplaces have Internal Complaints Committees in place to address complaints of sexual harassment.

In **Madhu vs. State of Kerala** case, the Supreme Court held that sexual harassment need not be proved beyond reasonable doubt and can be established on the basis of a preponderance of probabilities.

In **Kamaljeet Kaur vs. Punjab and Sind Bank, 2018** case, the Delhi High Court held that the employer must ensure that the Internal Complaints Committee is constituted and functions effectively, failing which it may be held liable for negligence.

Conclusion

Implementing the general recommendations of the CEDAW, Vishakha Guidelines established a strong precedent for the direct application of international conventions in future cases. This public interest litigation which arose from personal experience of a woman worker was targeted towards empowering other working women. The public interest petition used her life experience as a concrete illustration of systemic rights violations. The judgement was instrumental in carving out a path which created multiple stakes for various groups and went on to become the foundation of the POSH act. It was subsequently used in various relating to the issues of violation of human rights at work thus leaving a powerful legacy. This judgment definitely upheld the idea that concept of equality was not just restricted to treating all persons in the same way. It pronounced that equality between men and women in the true sense of the term could be realised by making concentrated efforts towards rectification of already existing power imbalances in the society. This broader view of equality is the core principle and the goal in the struggle for recognition and acceptance of the human rights of women.

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