

Sexual Harassment at the Workplace: Emerging Problems and Debates

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Sexual Harassment at the Workplace

Emerging Problems and Debates

Sexual harassment is rooted in cultural practices and is exacerbated by power relations at the workplace. Unless there is enough emphasis on sensitisation at the workplace, legal changes are hardly likely to be successful. Workplaces need to frame their own comprehensive policies on how they will deal with sexual harassment. Instead of cobbling together committees at the court's intervention, a system and a route of redress should already be in place. The draft bill on sexual harassment attempts to address some of the complexities of this issue, but much more clarity and specificity is needed to avoid the creation of a law that might need another extended campaign of reform.

SHEBA TEJANI

It is seven years since the Supreme Court, in the absence of appropriate civil or penal laws, laid down the Vishaka guidelines to deal with sexual harassment at the workplace. It was a landmark event as sexual harassment was legally recognised, as such, for the first time, and employers and institutions were required to take specific steps for prevention and redressal. However, the guidelines, for most part, continue to languish on paper. Apart from public sector bodies, which have been forced by government resolutions to implement the guidelines, and some large private companies and educational institutions, Vishaka has been a non-starter. The reasons for this are many: first, entrenched patriarchal attitudes prevent sexual harassment from being seen as a serious offence; worse, they invert the stigma of harassment on women themselves. Second, the vagueness of the guidelines on the internal grievance mechanism has left organisations with a great deal of room to manipulate the process or bypass it altogether. Third, a partial result of the first and second, is the failure of organisations to treat sexual harassment as a policy matter and integrate it into their service rules.

The guidelines designate in-house complaints committees (CCs) as the primary

redressal forum for women who face sexual harassment. The committees are to be instituted by employers at the workplace and are to conduct preventive activities as well. This is an important development and, in many ways, sets the precedent for addressing the problem. For one, CCs can be an effective way to speedily resolve minor or major complaints of harassment, where women otherwise would have had to go to a court of law. They are also an acknowledgement of the fact that sexual harassment exists, and that it is unacceptable, thus making it possible for women to approach the appropriate fora when it happens. Also, by bringing the resolution of the matter within the ambit of the workplace, the site at which the problem occurs, it increases the accountability of workplaces in general. Under the guidelines, a woman can also, however, opt for criminal proceedings in a court of law, if she so desires.

This paper attempts to highlight some of the problems in the working of the present grievance mechanism, in the light of similar provisions that have been made in a draft sexual harassment bill submitted by the National Commission on Women (NCW) to the HRD ministry in September 2004. It discusses some of the areas in which debate and clarification are necessary to avoid some of the situations that are likely to come up when a woman files

a complaint of sexual harassment. Although the problems with the draft bill are not limited to these, we will not go into a full-blown critique here.

Problems with Grievance Mechanisms

The composition of CCs, prescribed by Vishaka, should be such that: a woman should be the chair, women must constitute no less than 50 per cent of its members and one representative from a non-governmental organisation (NGO), who is familiar with the issue, must be on board. Though this does not guarantee that an impartial enquiry will take place, it puts in place some safeguards that might have a bearing on how the complaint is handled. Most committees have not adhered to these guidelines and have in fact been used by management to threaten, intimidate and force women, who complain of sexual harassment, into silence or submission, particularly when the accused belongs to the top rung of the hierarchy. Where the accused is a workman, CCs might be a more effective route as sexual harassment could be treated as misconduct and disciplinary action can be taken according to the Industrial Disputes Act, 1947 (IDA), subsequent to a domestic enquiry. However, the IDA does not apply to management. Similarly, central and state workers can be covered under the relevant service laws, but for private sector employees the only recourse available for women would be to file a civil suit in a court of law if the CCs fail in their duty.

Several women's groups moved the apex court through a writ petition, 'Medha Kotwal and Others vs Union of India', in 1999, asserting that complaints committees were not being properly instituted, while also seeking expansion of the coverage and scope of Vishaka. The matter is still in the courts. Meanwhile, under pressure from the courts, the government has promised to deliver a sexual harassment legislation in six months. However, women groups are upset because members of the sexual harassment bill drafting committee, constituted in April 2003, were not consulted when NCW submitted its draft, which they believe is incomplete and inadequate.

Let us examine a few recent incidents of sexual harassment, where women have

made complaints, and the processes that ensued thereafter. Writing about MS University, Chandra (1999) had noted the readiness of the complaints committee, convened to investigate a PhD student's complaint of sexual harassment by her supervisor, "to accept the 'collapse' of any possible evidence on behalf of the complainant" (p 1490). This seems to be the 'sine qua non' of women's attempts to obtain some semblance of redress for sexual harassment grievances. A woman employee of NALCO, who accused its chairperson and managing director of molestation, was put through a harrowing investigation at the hands of the CC ('HC Stays 'Vulgar' NALCO Probe into Sexual Harassment', *The Indian Express*, April 23, 2004). The committee insisted on a 'physical demonstration' of the molestation and asked her prejudicial questions such as whether she had consumed liquor on the night of the incident. The high court finally threw out the findings of the committee saying they were 'vulgar', 'totally biased', and intent on proving that the petitioner was a 'liar' ('HC Slams Probe into NALCO Molestation Case', *The Times of India*, April 23, 2004).

At Lala Lajpat Rai college, Mumbai, a teacher suffered something like a public

shaming when she complained to the women's cell of Mumbai University that the principal was sexually harassing her. The non-teaching staff and students council were up in arms against her and they declared an indefinite strike in support of the principal on September 1, even when no enquiry into the allegation had been made. The groups raised slogans against the complainant during the strike and put up posters saying that she had shamed the college and that they backed the principal. The management had done nothing to allow willing students and teachers access to classrooms and it became evident that they tacitly supported these activities [Gokhale et al 2004]. The Mumbai High Court had to intervene and ask the college to reconstitute the CCs that had been formed earlier, as it was heavily biased against the complainant and she had refused to appear before it.

An employee of Sahara Manoranjan herself became the target of a 'fact-finding' mission when she lodged a complaint with the police about a colleague's misdemeanour. This incident came at the back of repeated harassments by top management, which had offered her 'quid pro quo' benefits for favours of a sexual nature, and then threatened her

with dire consequences when she did not comply. This team found her "guilty of misconduct and of making baseless allegations against the company" ('Woman Alleges Abuse at Work, Gets the Sack', *Telegraph*, April 29, 2004). She was transferred to Lucknow and, when she went to the press with the story, her services were terminated. In spite of intervention by the Maharashtra State Commission for Women (SCW), the complaints committee that was subsequently formed blatantly flouted the Vishaka guidelines and was not acceptable to the complainant.

It is clear that women are and will be raising complaints of sexual harassment in an extremely hostile environment with the risk of backlash, humiliation, injury – mental and physical – and a complete loss of confidentiality. The reaction of most institutions is to bury the matter, vilify and target the woman or hurriedly convene a committee to conduct a token, slipshod or completely adverse investigation. This acts as a severe deterrent for women to report the matter, not to mention the professional and pecuniary consequences of revelation. This is exacerbated when the accused is the owner or part of management, as consequences can be harsher and the

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possibilities of impartial inquiries much curtailed. How these complaints are handled also have a lot to do with how male privilege is institutionalised within the workplace, and patriarchal attitudes that regard women as provocateurs or manipulators for private/professional gains.

Debates around Draft Bill

Although the draft bill is more comprehensive than Vishaka, it contains ambiguities and omissions that need to be addressed to ensure that the system works for a variety of women workers, and that women's rights are protected at all times. This is especially so in terms of the lack of specificity of procedures of complaint for different workers and the neglect of the process of inquiry. The Vishaka guidelines had left informal workers, who make up the bulk of the workforce, outside its purview. The present bill has included a variety of formal and informal workplaces within its scope, but it is much more difficult to institute rules in occupations where there is no clearly identifiable employer, even workplace at times, and where the nature of work itself might be seasonal. Considerable time has been spent by women's groups in coming up with solutions to expand the notion of the workplace, and to create structures of redress for different categories of workers.

The present draft bill incorporates a two-tiered grievance mechanism for sexual harassment: an internal complaints committee (ICC), akin to CCs; and another district level body called the local complaints committee (LCC). It is not clear how the CCs will be constituted in this case and how their working can be free from interference or manipulation as they are to be constituted by the owners. Women's groups have suggested that standing committees, which do preventive and awareness raising work, can be formed at the workplace and that complaints committees of fixed tenures can be constituted from them. The important point is that the committee should already be formed when a woman makes a complaint, rather than commencing the whole process at that point, and thus risking bias or delay. Of course, this should come with the option of appeal, if the complainant feels that a particular member might be biased against her. The role of the NGO representative on the committee is also crucial as he or she will be the only 'external' member and is thus expected to act most independently. But simply being 'non-government' does not

ensure that the organisation does not have some association with the employer, or that it even has some expertise in dealing with issue. Further, many organisations, including charitable and religious ones, could qualify as an 'NGO'. Does that mean they could be placed on the committee? It is also important that women have the choice to bypass the ICC, if they feel it will be ineffective, and go directly to the LCC; but this option is not available in the draft bill.

According to the proposed mechanism, informal sector workers can go directly to the district level LCC, which will be chosen from a group of experts. The group of experts itself will be constituted by a special district officer, no less than the rank of assistant labour commissioner, who will also receive complaints.

An LCC committee at the district level might still be too remote, inaccessible and intimidating for a variety of rural and informal workers. An arrangement at the block level could also therefore be considered. To cover informal workers comprehensively, different grievance mechanisms and related procedures for each 'workplace' will need to be defined separately. The idea of designating existing tripartite occupational boards, such as those for 'mathaadi' workers and security guards as forums for receiving complaints has been suggested. This is to ensure that familiar occupational structures that are already in place are used, and that there is no ambiguity or duplication in functions.

Third parties or service users in the case of hospitals, restaurants, banks, etc, which got only a passing mention in Vishaka, are also neglected in the draft bill. The complainant could, for instance, take recourse in a consumer court, under the Consumer Protection Act, on grounds of deficiency of service and the relevant provisions need to be made. But when one service user is harassed by another on the same premises, a way of holding the service provider accountable needs to be worked out. Women's groups have also mooted the idea of designating an ombudsperson for sexual harassment in custodial situations, such as in police stations, court premises, remand homes, etc, as the nature of crimes there tend to be very serious and need to be dealt with separately. However, these find no mention in the draft bill.

Even when such platforms are created they will fail to become effective, and thus credible, without due attention to the process of inquiry and without express guidelines to make them as fair and painless as possible. In the absence of this, there

is every chance that the first recourse available to women who face sexual harassment will be reduced to a meaningless or injurious exercise, as described in the previous section. The draft bill has tried to prevent this to some extent: it has made it the duty of the employer to ensure that the complainant, supporter or witness is not victimised, harassed or discriminated against in the proceedings, and that the conditions of service do not change for any of the above, prior to or during the complaint procedure.

However, this still does not amount to positive and specific guidelines for conducting an inquiry, including what kind of questions can be posed to the complainant and how, and the permissible grounds for invalidating a complaint. For instance, the Kotwal petition has asked that questions of a delicate nature be routed through the NGO representative or special officer of the department, with the option of presenting them in writing. Women's groups have suggested that the special officer should vet questions that the accused might want to ask the complainant. Again, the lack of an eyewitness should not be grounds for throwing out a complaint, for obvious reasons. There is every likelihood that a woman's personal and/or sexual history might be used to prove that she is of 'immoral' character and to thus dispose of her complaint. This has been a familiar tactic in the prosecution of rape and it is only after decades of campaigning that Section 155(4) of the Indian Evidence Act, which permitted the use of such evidence, was deleted in 2002. How will the new bill take such precedents into account?

The rights of a woman during the inquiry, as also of the defendant, need to be spelled out. The bill provides for separate proceedings for the accused and the complainant, and allows the complainant to be accompanied by one representative. But it is not clear if that representative will be one of the complainant's choice, or whether it can be an external party or even a lawyer. One way to avert the re-victimisation of the complainant is to shift the burden of proof to the accused, once it is shown that the alleged act took place.

Conclusion

The upshot is that sexual harassment is rooted in cultural practices and is only exacerbated by power relations at the workplace. Unless there is enough emphasis on sensitisation, awareness and prevention at the workplace, legal changes are hardly

likely to be successful. This cannot happen unless workplaces, howsoever they are defined, frame their own comprehensive policies on how they will deal with sexual harassment. Instead of cobbling together committees at the court's intervention, a system and a route of redress should already be in place. Similarly, the people who will be dealing with complaints, from committee members to district special officers, need to be trained and sensitised to handle the matter. The draft bill on sexual harassment attempts to address some of the complexities of this issue but much more clarity and specificity is needed to avoid the creation of a law that might need another extended campaign of reform. Still, some of the inherent contradictions in

constituting grievance mechanisms within workplaces, that are ultimately hierarchical, are likely to remain, although this does not mean we should dispense with them. [EW]

[Many thanks to Chayanika and Sandhya Gokhale for valuable insights, discussions and feedback.]

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Need for Long-term, Fixed-Income Provident Fund Deposits

While it is necessary to align returns on small savings with other interest rates in the economy, a simplistic focus on lowering savings rates overlooks fundamental weaknesses in provident fund schemes. The option of long-term, fixed-income PF deposits, which are necessary for small investors planning for retirement, is not available.

VIVEK MOORTHY

The reductions in the interest rates on the Public Provident Fund (PPF) and associated schemes (in particular, the Employees Provident Fund) since 2000 have been heartily welcomed by most economic analysts over the years. After all, interest rates on these deposits need to be aligned with other interest rates in the economy that, until this year, have been falling for several years. Not doing so would fiscally weaken the government of India, and bankrupt the Employee Provident Fund Organisation (EPFO) in which deposits of workers have been placed. From this realistic market-oriented perspective, the ability of the finance minister to push through a reduction in the Employee Provident Fund (EPF) rate from 9.5 per cent to 8.5 per cent in August 2004, despite the opposition from its Left coalition members, is long overdue and welcome.

This author shares the market perspective regarding the needed, continuing alignment of relevant small savings (SS) and provident fund (PF) rates to avoid fiscal bankruptcy.¹ But a simplistic focus only on lowering rates obscures a fundamental weakness in the PF schemes which needs to be highlighted. One can strongly insist that PF rates should be determined by economic fundamentals, and that depositors cannot be arbitrarily given 'adequate' and 'fair' (euphemisms for high) returns. Nevertheless one can be critical of the manner in which interest rates and payments on these PF deposits, and more so, compulsory EPF deposits have been made, and are still being made. Such a criticism, and the rationale for fixed rate PF deposits is outlined below.

Our Peculiar 15-year Floating Rate Deposit

The world over, retirement schemes are structured to provide fixed income so that for the term of any given deposit, the

interest rate does not change. In addition, there may be a floating rate, a combination of fixed and floating rates, and equity linked deposits. Nevertheless fixed rate deposits are the bedrock upon which retirement saving schemes are generally founded. It is primarily through fixed rate schemes and annuities that depositors are able to (i) ensure stable interest income to meet expenses during retirement or (ii) build up a certain accumulated amount (principal plus interest) and thus adequately plan for retirement, based on steady compounding.² However, various PF deposits – meant to be the primary source of retirement income in India – are not fixed rate deposits. The interest rate is periodically reset, by the government. But this was not generally known, until the PPF rate was lowered from 2000 onwards, following a long period from 1989 to 2000, during which the PPF scheme paid 12 per cent interest.

Misperceptions about the PPF scheme have been widespread not just among lay people, but even among the financially knowledgeable. To cite a well known personal finance expert, who has explained how PPF deposits, after five years, can be fully 'recycled' solely for tax benefits, "This is an annuity of a term of 15 years, requiring 16 contributions" [Shanbhag 1996:137]. Subsequent break-even calculations by this author comparing the pay-off on PPF, versus the fixed rate National Saving Certificate indicate that he is assuming the PPF pays a fixed rate. Another eminent financial management author and personal finance writer states, "PPF deposits earn a compound rate of interest of 12 per cent pa [Chandra 1997:115], instead of stating that PPF deposits earn compound interest, currently at 12 per cent pa.

Even after the PPF rate was lowered, many depositors, based on my casual enquiries, continue to think that the scheme pays a lower interest rate on new balances, but 12 per cent on balances invested prior to 2000. In the *RBI Handbook of Statistics on the Indian Economy* (2004), in Table 124, titled 'Small Savings Schemes in Force', the way the information is presented does nothing to dispel the view that PPF is a fixed rate instrument. For 10 instruments, Table 124 lists the prevailing interest rate, the term of deposit, tax status and other features, but does not specify which are fixed and which are floating. Of these, only the post office savings bank account and the PPF pay floating rates (see the table, last row added by author).