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Sexual Harassment in the Workplace: the Verma Committee and After

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The committee of inquiry headed by justice Verma is a landmark for the way in which it has inscribed into the very foundations of law, the equality and liberty of India's women citizens. To uphold the constitutional guarantees afforded to women, it is essential that the rights given to working women in the Vishaka judgment (also delivered by justice Verma) are not elided or compromised, either by the Government's Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Bill, 2012 or by the Criminal Law (Amendment) Ordinance 2013.

On 29 October 2012, the Supreme Court of India expressed its dismay that the Vishaka guidelines on sexual harassment in the workplace were "followed more in breach than in substance and spirit by State functionaries". Regretting the fact that the government has failed to finalise appropriate legislation in this regard, the Court gave employers a two-month deadline "to provide the procedures for the resolution, settlement or prosecution of acts of sexual harassment". The fate of that deadline is as yet unknown, but happily the intervening month has also seen the submission of justice Verma Committee's recommendations. Its report has also castigated the government's inaction on this regard and stringently criticised the Government's Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Bill, 2012.

In early January 2013, the Jawaharlal Nehru University's (JNU) Gender Sensitisation Committee Against Sexual Harassment (GSCASH), in consultation with JNU teachers and students, made detailed recommendations to the Verma Committee of Inquiry. On the issue of sexual harassment in the workplace, we protested many provisions of the existing Bill (see also http://www.pragoti.in/node/4762), and argued that the law must take on board the various experiences and suggestions of long-serving Vishaka-compliant committees like the JNU GSCASH. It is to the immense credit of the Committee that it has attended to most of our objections raised to the Bill, in sharp contrast to the government, whose Bill does not even expressly include universities as workplaces or afford women students much needed protection against sexual harassment.

The Verma Committee's report takes the Bill to task for its provisions for a procedure of conciliation in clause 10(1) on the mere receipt of a complaint of sexual harassment. JNU had protested that the clause creates hostility for women complainants by turning conciliation into a normative and foremost expectation of law. Pointing out that conciliation can be a real option only in contractual matters, the Report characterises the clause as an attempt to "muscle" women's attempts to get justice. Similarly, expanding the argument that the non-public nature and power dynamics inherent to sexual harassment may lead to genuine complaints being maliciously characterised as false, the report upbraids the government for the "abusive" and "red-rag" provisions in clause 14 that

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penalises false complaints as “intended to nullify the objective of the law”.

In addition to prescribing the deletion of both the above clauses, the report also addresses three of JNU’s other major concerns about the Bill. Acknowledging that the Bill denies large swathes of women workers the *Vishaka* guarantee, the report requires legislation to also cover the unorganised sector and agriculture, women in the armed forces and police, and women students and staff of all schools and educational institutions. Equally significantly, the report also accepts our argument that it is the employer rather than the perpetrator who must be held liable for claims of “compensation”, and it is the company that must pay the sum to the complainant. Finally, our suggestion that the Bill’s provision affording complainants the right of transfer or leave has the potential of being discriminatory has also been incorporated. The report notes that then no action ought to be taken against the complainant’s will in this regard, as this may lead her to “foster either a sense of bias or alienation merely on account of the fact that she exercised her rights under the proposed legislation”. In the event that the complainant does not explicitly ask for leave or transfer, the Report recommends that it is the respondent who must proceed on leave pending adjudication of the complaint.

The report also makes several positive references to the successes of the JNU GSCASH and recommends it as a model to be examined for all universities. Responding to the fact that the JNU GSCASH and the corresponding bodies in Delhi University have instituted popularly elected committees that are “more democratic and are better related to ensure prevention and prohibition of sexual harassment in educational institutions”, the report recommends that the Bill can be reworded to grant specific exemptions to all such Vishaka-compliant bodies in universities.

Gratifying as this endorsement is, the JNU model must not be restricted only to universities and other educational institutions. The relative success of JNU experience signifies that the *Vishaka* guidelines can only be meaningfully implemented if the composition of internal complaints committees (ICC) does not replicate the power inherent in workplace hierarchies. Our suggestion is therefore that ICCs must contain representation from all sections, particularly junior levels, of the workplace. Furthermore, such representation must not be directly nominated by the employer; while the JNU method of direct election may not be always suited to all workplaces, transparency and a principled basis for membership on the committee is the very least essential.

In another respect, the JNU approach to complaints of sexual harassment complaints and enquiries also merits serious consideration. It is a near-universal experience of ICCs that after the filing of a complaint, tremendous pressure is visited upon complainants to withdraw them. Such pressure often leads to victimisation when the accused person is either a hierarchical superior or has better access to senior levels in the workplace. legislation must include express procedures to address and redress such violations. The JNU GSCASH rules represent a serious effort to address this issue, not only by an express protection against victimisation, but also by the provision for an order of restraint to be issued to the accused as soon as the complaint is filed, prohibiting all direct or indirect contact with the complainant, her family or witnesses. Violations of the order of restraint are viewed as aggravating the offence committed. Inclusion of similar provisions in the Bill would surely be in keeping with the spirit of the Verma Committee’s recommendations.

Further Recommendations

Another aspect of the report’s recommendations need to be explored further is its provisions for an Employment Tribunal instead of the Bill’s provisions of local complaints committees in every district of the country. This tribunal is intended to comprise of two retired judges (one, a woman), two

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eminent “sociologists” and one social activist, “who has sufficient experience in the field of gender-based discrimination”. This tribunal will have the power to adjudicate all complaints of sexual harassment lodged with it, using whatever procedure it deems fit, and this will be the sole body empowered with the powers of a civil court and the power to award compensation. Complainants will have the right to approach the tribunal directly, without going through their institutional complaints committees (if they exist).

There is as much to be said in favour of this proposal as there is against it. While it solves the problem of ensuring that all women workers are protected against sexual harassment in the workplace, it eliminates the mandatory institution of ICCs proposed by Vishaka. Similarly, while it may assuage the legitimate apprehension “that the in-house dealing of all grievances would dissuade women from filing complaints and may promote a culture of suppression of legitimate complaints in order to avoid the concerned establishment falling into disrepute”, the fact is also that an ICC at the workplace may be more accessible. There can be no gainsaying the fact that to women workers may be inhibited from filing complaints to an external body, both in terms of the extra effort that is required, as well as the apprehension that such a body may be less disposed to believe them.

Matters are only made more complicated by the report’s suggestions that it should not be read as restricting employers from setting up an internal complaints committee. Rather, what is intended is that “a complainant cannot be compelled to approach such an internal committee prior to approaching the proposed Employment Tribunal”. Does this entail that the findings and recommendations of an ICC will be binding on the tribunal, and that it will act as an appellate authority in such cases? Or will the tribunal have the power re-appraise evidence? Should not the tribunal itself be made Vishaka- compliant? These and many other issues need to be discussed before being included in any legislation.

Another important area that must be also explored is to be found in the Supreme Court’s notice of 29 October 2012, where it has laid an emphasis on the government’s duty to provide procedures for the prosecution of acts of sexual harassment. This is an area that the Verma committee report touches upon slightly, even though it is the absence of clear rules that hobbles the most sincere and committed of ICCs and vexes the courts addressing the decisions of such Committees. Even within government departments, a plethora of procedures is to be found, and it is imperative that legislation, or the rules framed on the basis of such legislation, resolves these issues.

In the JNU submission to the Verma Committee, we had raised one such issue, with regard to the examination and cross-examination of witnesses. We had argued that a simple-minded extension of the departmental inquiry model to sexual harassment enquiries is unwarranted, as in such enquiries the principles of natural justice are effectively affirmed only in terms of the rights of the accused. Such a model is insensitive to both the fact that these enquiries are initiated on the basis of an individual grievance and that the enquiry procedure has to be one that guarantees equal rights to both parties, such as the right to examine and cross-examine witnesses for presenting her/his case, and the right to having prosecution/defence assistants.

These rights however have to be modulated by an awareness of the hierarchical power inherent to a workplace that is implicated in a complaint of sexual harassment. One way to mitigate the adverse effects or the threat of a hostile working environment being created for complainants and their witnesses is not to disclose the identity of witnesses to the accused, and to bar the examination and cross-examination of prosecution witnesses in the presence of the accused. Although this last suggestion has been explicitly endorsed by the report, a number of other thorny issues remain, and have been repeatedly raised in litigations across the country. Legislation on the subject must arrive

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at a principled set of guidelines for enquiry procedures on complaints of sexual harassment.

That the government will not take any of the necessary steps on amending its Bill on sexual harassment in the absence of sustained protest and lobbying is already unfortunately evident, if the Criminal Law (Amendment) Ordinance 2013 is anything to go by. The new Section 354A of the Indian Penal Code defines sexual harassment in exactly the same terms as the Vishaka judgement punishable up to five years rigorous imprisonment with/without fine or both. While at first blush, this definition of sexual harassment as a criminal offence may seem to be evidence of a will to address such violations, this might not turn out to be the case at all.

The issue really pertains to the enforceability of the Section 354A, given that criminal offences summon up the provisions of the Indian Evidence Act. By that Act, the offence must be provable "beyond all reasonable doubt", as compared to a domestic enquiry that requires a standard of proof that conforms to a "preponderance of possibility". The Vishaka definition is actually tailored to meet the latter criterion, given its use of the term "unwelcome" in defining sexual harassment. How can the subjective perception of an act as unwelcome be proven beyond all reasonable doubt? Furthermore, as any woman who has protested at the man rubbing against her in a bus will confirm, it will also be near impossible to get the accused to admit that he was making an unwelcome sexual advance. Thus, in the worst case, the ordinance's 354A will put the complainant in the dock; in the best, the Section will never be used. A comparison with the Verma Committee's formulation of IPC 354 is instructive which explicitly invokes non-consent the criterion for cases that involve touching, and defines the acts as *resulting* in unwelcome threats or advances of a sexual nature.

The Vishaka judgement delivered by justice Verma was significant for the manner in which it "outed" the human rights violation of sexual harassment in the workplace, and made employers liable for its redressal; the committee of inquiry headed by justice Verma is even more landmark for the way in which it has inscribed into the very foundations of law, the equality and liberty of India's women citizens. To uphold the Constitutional guarantees afforded to women, it is essential that the rights given to working women in Vishaka are not elided or compromised, either by the Government's Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Bill, 2012 or by the Criminal Law (Amendment) Ordinance 2013. Those provisions in the ordinance that obstruct a civil redress of sexual harassment must be struck down by Parliament. The Rajya Sabha must come to the aid of working women in this country by referring the Bill to a Select Committee which, in consultation with existing Vishaka-compliant ICCs, women's groups and other experts, will work towards a substantial redrafting of the Bill.