

THE INEFFICIENCY OF INTERNAL COMPLAINT MECHANISMS IN RESOLVING SEXUAL HARASSMENT CLAIMS – A STUDY IN THE CONTEXT OF SEXUAL HARASSMENT LAW AND #METOO IN INDIA

*Megha Mehta**

The #MeToo movement in India suggests that in spite of the Vishaka guidelines, and the enactment of the Sexual Harassment of Women at Workplace Act, 2013, the Indian legal system has been ineffective in redressing sexual harassment claims. This paper argues, drawing on Professor Vicki Schultz's theory for reconceptualising sexual harassment, that the sexual harassment law in India has failed, as it is based on a 'desire-dominance' paradigm. Under this paradigm, sexual harassment is conceived as a problem of unwelcome sexual behaviour rather than an indicator of broader workplace gender discrimination. Hence, internal complaint mechanisms are usually ineffective in redressing harassment as they focus more on penalising individual sexual misconduct than holding employers responsible for remedying a hostile work environment. Moreover, these mechanisms are constituted of persons who may imbibe the same discriminatory attitudes as the respondent. Consequently, even though these mechanisms are meant to be a less onerous substitute to criminal trials, they end up replicating the costs of judicial proceedings for complainants. Hence this paper argues that the legal definition of sexual harassment ought to be changed to one that penalises all forms of behaviour which create a hostile work environment based on gender. Further, that internal complaint mechanisms should be substituted by external bodies which can regulate discriminatory employment practices. These bodies should be empowered to not only take action against employers but also provide an integrated range of remedial options to complainants.

* Megha Mehta is a graduate of the BA LLB (Hons.) program from National Law School of India University, Bangalore, and formerly worked as a law clerk at the chambers of (Late) Mr. Justice M.M. Shantanagoudar at the Supreme Court of India. She is currently pursuing her LL.M. at Harvard Law School. The author would like to thank Tasneem Deo, Akshat Agarwal and the Editors of the NUJS Law Review for their valuable comments and suggestions. This paper is dedicated to the memory of Mr. Justice Shantanagoudar, whose guidance and support was crucial in encouraging the author to pursue her scholarship.

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I. INTRODUCTION

It has been more than two decades since the Supreme Court of India (‘Supreme Court’) laid down the famous ‘Vishaka guidelines’ for the prevention of sexual harassment of women at the workplace and eight years since the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 (‘POSH’) came into force in India. However, the heralding of the #MeToo movement in India indicates that the institutional mechanisms provided by the law have failed to substantially resolve the issue of sexual harassment at the workplace. The Supreme Court itself is mired in controversy on account of the ad-hoc in-house procedure followed when a sexual harassment allegation was made against the former Chief Justice of India. In this context, this paper aims to study the effectiveness of ‘Internal Complaints Committees’ (ICCs), as constituted under the Vishaka guidelines and POSH, in inquiring into and resolving sexual harassment claims.

This paper argues that the ICC mechanism is grounded in the conventional ‘desire- dominance’ paradigm of sexual harassment (as conceptualised by Professor Vicki Schultz), which focuses only on punishing individual harassers who make ‘sexual’ advances. However, if sexual harassment is understood as arising out of the structural problem of gender discrimination at the workplace, the ICC mechanism is inherently flawed. This is because ICCs are constituted mostly of people who are governed by, and endorse the rules of the same discriminatory structure. This paper therefore recommends that there should be increased emphasis on making workplaces legally accountable under POSH for changing the discriminatory conditions which lead to sexual harassment. This paper further suggests that the law needs to move beyond internal complaint mechanisms to more independent bodies as a mode for resolving claims of sexual harassment at the workplace.

This paper is divided into four parts. The Part II traces the development of sexual harassment jurisprudence in India. The Part III illustrates the failure of workplaces in India to comply with the Vishaka Guidelines and POSH, and the ineffectiveness of the ICC mechanism in preventing and redressing sexual harassment claims in the context of #MeToo. In Part IV, the paper goes on to examine why ‘due process’ under POSH has failed. It argues that the constitution and procedural functioning of ICC’s is governed by the same discriminatory attitudes and power imbalances in the workplace which facilitate sexual harassment in the first place. Further, inquiries by the ICC assume the nature of quasi-criminal trials, which de-incentivises women from formally reporting sexual harassment. Finally, since there is no emphasis on employer liability under POSH, workplaces bear little legal responsibility for actively facilitating the conduct of ICC inquiries and for changing the structural conditions that lead to sexual harassment.

Part V of the paper draws on Professor Schultz’s theory to conclude that the definition of ‘sexual harassment’ under POSH ought to be modified from one penalising acts of a ‘sexual nature’ to any act based on gender discrimination which creates a hostile work environment. By this definition, employees should have the right to pursue civil remedies against their employers for failure to address gender discrimination at the workplace. This paper additionally suggests the constitution of an independent external body or bodies as an alternative to ICCs, for conducting inquiries into sexual harassment claims and monitoring discrimination at the workplace. This body would provide an integrated range of options to a complainant for resolving sexual harassment claims, instead of trapping the complainant in bright line boundaries between criminal, quasi-criminal and informal settlement/conciliation-based solutions.

II. THE DEVELOPMENT OF SEXUAL HARASSMENT LAW IN INDIA

In *Vishaka v. State of Rajasthan*,¹ ('Vishaka') the Supreme Court held for the first time that sexual harassment at the workplace violates working women's fundamental rights under the Constitution of India ('Constitution'). The genesis of Vishaka was the brutal gangrape of a lower-caste social worker, Bhanwari Devi, by upper-caste men in a village in Rajasthan. This was allegedly because the victim, as part of a scheme run by the State Government, was seeking to curb the practice of child marriage, prevalent amongst the dominant caste community in the village.² The incident spurred a group of social activists and NGO's to file a public interest litigation before the Supreme Court, contending that sexual harassment at the workplace violated working women's fundamental rights under Articles 14, 19(1)(g) and 21 of the Constitution.³ The Supreme Court not only upheld this contention, but also laid down a definition of sexual harassment as including unwelcome 'sexually determined'⁴ behaviour which results in the creation of a 'hostile work environment.'⁵ The Supreme Court relied on General Recommendation No. 19 of the Committee on the Elimination of Discrimination Against Women in this regard.⁶

Further, taking into account that there were no civil and penal remedies against sexual harassment under the law in India at that time, the Supreme Court laid down the famous 'Vishaka guidelines' directing employers to not only take steps for the prevention of sexual harassment at the workplace, but also provide procedures for the "resolution, settlement or prosecution of acts of sexual harassment." These guidelines included, inter alia, a direction for the creation of an internal complaint mechanism, including a 'Complaints Committee', as follows

¹ *Vishaka v. State of Rajasthan*, (1997) 6 SCC 241.

² Geeta Pandey, *Bhanwari Devi: The Rape that Led to India's Sexual Harassment Law*, BBC NEWS, March 17, 2017, available at <https://www.bbc.com/news/world-asia-india-39265653> (Last visited on June 11, 2021).

³ See *Vishaka v. State of Rajasthan*, (1997) 6 SCC 241, ¶3 (Art. 14 grants equality before the law and equal protection of the law to all persons within Indian Territory. Art. 19(1)(g) confers the right to freedom of profession whereas Art. 21 guarantees the right to life with dignity).

⁴ For implications of limiting the definition to 'sexually determined' behaviour, *infra*, Part III on "Why due process has failed".

⁵ *Vishaka v. State of Rajasthan*, (1997) 6 SCC 241, ¶16.1.

⁶ General Recommendation No. 19 recommends that State parties to the Convention on the Elimination of All Forms of Discrimination against Women should take positive measures to eliminate all forms of violence against women, including sexual harassment. The Supreme Court borrowed the definition of sexual harassment from Article 11 of the Recommendation, see United Nations Human Rights Commission, Committee on the Elimination of Discrimination Against Women ('CEDAW'), *General Recommendations adopted by the Committee on the Elimination of Discrimination Against Women, Eleventh Session, 1992 (adopted General Recommendations Nos. 19 and 20)*, U.N. Doc. A/47/38 (1992).

“6. Complaint Mechanism:

Whether or not such conduct constitutes an offence under law or a breach of the service rules, an appropriate complaint mechanism should be created in the employer’s organization for redress of the complaint made by the victim. Such complaint mechanism should ensure time bound treatment of complaints.

7. Complaints Committee:

The complaint mechanism, referred to in (6) above, should be adequate to provide, where necessary, a Complaints Committee, a special counselor or other support service, including the maintenance of confidentiality.

The Complaints Committee should be headed by a woman and not less than half of its member should be women. Further, to prevent the possibility of any undue pressure or influence from senior levels, such Complaints Committee should involve a third party, either NGO or other body who is familiar with the issue of sexual harassment.”

Though Vishaka does not make reference to this, the definition of sexual harassment as creating a ‘hostile working environment’ can be traced to the United States Code of Federal Regulations,⁷ and the case of *Meritor Savings Bank v. Vinson* (‘Meritor’).⁸ In Meritor, the US Supreme Court held that an employer can be held liable under Title VII of the Civil Rights Act of 1964 if a person employed in a supervisory capacity creates a hostile work environment, and the employer lacks a specific sexual harassment policy to address such instances. Further, in response to the petitioner employer’s claim that the respondent’s failure to report sexual harassment insulated the former from liability, the Court observed that such an argument would have been more persuasive if the employer’s internal procedures “were better calculated to encourage victims of harassment to come forward.”⁹ Thus, it may be said that the origin of workplace liability for providing an internal complaints procedure for sexual harassment claims lies in Meritor.

Though Vishaka had enjoined the Central and State Governments to consider adopting suitable legislation for addressing sexual harassment at the workplace, it would take nearly two decades for the same to be enacted, which indicates the lack of priority given to the issue by the State. POSH is substantially similar to the Vishaka guidelines in many respects. It may be said that the impetus

⁷ See Code of Federal Regulations, 1980, Title 29, §1604.11 (USA).

⁸ *Meritor Savings Bank FSB v. Vinson*, 1986 SCC OnLine US SC 139 (Supreme Court of the United States).

⁹ *Id.*, 73.

for finally enacting POSH was similar to the circumstances which led to Vishaka. The enactment accompanied a series of other legislative reforms introduced in response to the public outcry against sexual violence in India,¹⁰ following the brutal gangrape of a young woman (referred to as ‘Nirbhaya’ by the media) on December 16, 2012 in New Delhi.

Like the Vishaka guidelines, POSH defines sexual harassment as inclusive of unwelcome physical, verbal or non-verbal conduct of a *sexual* nature.¹¹ It is assumed that only women can be at the receiving end of such conduct since only women can be complainants under POSH,¹² though curiously, the respondent can be any *person*.¹³ POSH provides for the mandatory constitution of ICCs, consisting of a female Presiding Officer, and an external member from NGO’s associated with the cause of sexual harassment. At least one-half of the ICC members are required to be women.¹⁴

The definition of ‘workplace’ is inclusive, extending to the unorganised sector, domestic labour and educational institutions.¹⁵ The ICC may settle the matter by conciliation on the complainant’s request prior to the inquiry.¹⁶ If the respondent is found guilty, the ICC can recommend that the employer take action in accordance with the service rules of the workplace and direct payment of compensation, by way of deduction from the respondent’s salary, to the victim.¹⁷ However POSH also mandates that employers should *suo moto* initiate criminal action where necessary, and assist complainants in filing criminal complaints if they so desire.¹⁸ It is pertinent to note in this regard that post the ‘Nirbhaya’ case, sexual harassment was codified as a separate criminal offense under the Indian Penal Code, 1860 by the Criminal Law Amendment Act of 2013.¹⁹

III. CHECKING THE EFFECTIVENESS OF ICC MECHANISMS

This paper has relied on three sources of data to gauge the effectiveness of ICC mechanisms as constituted under the Vishaka Guidelines and POSH:

¹⁰ See Rohan Mahajan, *Nirbhaya Case: A Stir for Legal Reforms and Cry for Women’s Rights and Autonomy*, NEWS18, July 9, 2018, available at <https://www.news18.com/news/india/opinion-nirbhaya-case-a-stir-for-legal-reforms-and-cry-for-womens-rights-and-autonomy-1805617.html> (Last visited on June 11, 2021); See also, The Criminal Law (Amendment) Act, 2013.

¹¹ Sexual Harassment of Women at the Workplace (Prevention, Prohibition and Redressal) Act, 2013 §2(n).

¹² *Id.*, §2(a).

¹³ *Id.*, §2(m).

¹⁴ *Id.*, §4(2).

¹⁵ *Id.*, §2(o).

¹⁶ *Id.*, §10.

¹⁷ *Id.*, §13.

¹⁸ *Id.*, §§19(g), (h); See also *Vishaka v. State of Rajasthan*, (1997) 6 SCC 241, ¶16.4.

¹⁹ See Indian Penal Code, 1860, §354A (Prior to this amendment, §354 of the Code only penalized ‘assault or criminal force with intent to outrage modesty’).

first, external surveys on the functioning of ICCs across workplaces in India, second, an internal survey conducted by me in the academic year 2018-19 amongst students of the National Law School of India University, Bangalore, and interviews with victims of sexual harassment from NLSIU [‘NLSIU Study’], and third, reports on #MeToo in India.²⁰

A. EXTERNAL SURVEYS

Just prior to the enactment of POSH, the Supreme Court had taken judicial notice of the fact that most States and Union Territories had not taken steps towards the implementation of the Vishaka guidelines in government institutions, and there was no proper mechanism to address sexual harassment complaints in private institutions either.²¹ Regional surveys corroborate this. In a survey of government institutions in West Bengal conducted in 2002-2003, it was found that the majority of departments were yet to form a complaints committee, and those who had, had not followed the Vishaka guidelines. It was further found that such committees were usually constituted only after intervention by an external organisation.²² In another study conducted by the NGO Sanhita in 2006 amongst 25 workplaces (‘Sanhita Study’), it was found that none of the respondent organisations had a separate sexual harassment policy in place, though they had formed ICCs. Rather, a majority felt that mere changes to their ‘code of conduct’ would suffice in lieu of such a policy.²³

The scenario has not improved substantially after the enactment of POSH. In a 2015 survey conducted by Ernst & Young amongst corporate executives, thirty-one percent of the respondents admitted to not having constituted ICCs, and thirty-five percent were unaware of the penal consequences of the same. Twenty-five percent of the respondents reported not having trained their ICC members.²⁴ Therefore even two years post the coming into force of POSH, private institutions were yet to be fully sensitised and held accountable for taking steps to set up effective sexual harassment resolution procedures.

²⁰ I have chosen to rely on an internal self-conducted study and reports on #MeToo, in addition to data collected by external organisations, as she was of the opinion that the latter may be too depersonalized to understand the factors which influence the reporting and resolution (or lack thereof) of sexual harassment cases in India. I additionally found it necessary to refer to additional sources because, as noted subsequently, there is no official country-wide data available on the implementation of the Vishaka Guidelines and POSH.

²¹ *Medha Kotwal Lele v. Union of India*, (2013) 1 SCC 297.

²² Paramita Chaudhuri, *Sexual Harassment at the Workplace: Experiences with Complaints Committees*, Vol. 43(17), EPW, 100 (2008).

²³ *Id.* at., 102.

²⁴ The original survey is no longer available on the EY website. However, a summary of findings can be found in the following document, *See* Fraud Investigation & Dispute Service, *Fostering Safe Workplaces: Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013*, FICCLIN 5 (2015), available at <http://ficci.in/spdocument/20672/Fostering-safe.pdf> (Last visited on June 11, 2021).

A later survey conducted in 2018 amongst HR heads and ICC members of 160 companies reveals only a slight improvement with time: seventy-seven percent reported being in compliance with the POSH. However, thirty-seven percent acknowledged that employees were hesitant to report instances of sexual harassment out of fear of retaliation and victim shaming.²⁵ In a 2016 survey of victims of sexual harassment across various sectors ('Garima Survey'), sixty-eight percent reported not having complained on account of reasons such as fear of retaliation, and 'sympathy' for the offender due to the previous workplace relations with them. Out of those who had approached ICCs, sixty-five percent reported that their workplaces did not follow the procedure prescribed under POSH and sixty-six percent felt that the ICCs had not dealt fairly with their complaint. Significantly, forty-two percent also felt that they had not been supported by their peers during the inquiry process.²⁶

In another survey conducted amongst female managers employed in organisations across India ('Women Managers Study'), it was found that forty-two percent of the respondents had heard of instances of sexual harassment even though eighty-two percent had reported having an ICC in their organisation. A majority of the respondents reported underplaying incidents of harassment on account of organisational hierarchies, and stated that they found dealing with the internal complaints mechanism more 'nerve-wracking' than the incident itself. Only 47.5% of the respondents had attended gender-sensitisation training.²⁷

Admittedly, the above-mentioned surveys cannot be taken as exhaustive data about the compliance status of workplaces in India with the Vishaka guidelines and POSH. There is no official pan-India data available in this regard,²⁸ and it is beyond the scope of this paper to conduct such an inquiry. However, it can be generally inferred from the information available on hand that even in institutions where ICCs have been set up, the standard of "procedures calculated to encourage women to come forward", as set out in Meritor, is not being met. Further, that existing procedures are ineffective in preventing and redressing sexual harassment.

²⁵ EFFECTIVENESS OF SEXUAL HARASSMENT OF WOMEN AT WORKPLACE (PREVENTION, PROHIBITION AND REDRESSAL) ACT, 2013: INDUSTRY REPORT 2018, KELPHR, December 9, 2013, available at <https://www.kelphr.com/pdf/Effectiveness%20of%20Sexual%20Harassment%20of%20Women%20at%20Workplac%20e.pdf> (Last visited on June 11, 2021).

²⁶ Prabhat Prakashan, GARIMA: SEXUAL HARASSMENT AT THE WORKPLACE, 14-16 (Indian National Bar Association & Netrika Consulting, 2017), available at <https://www.indianbarassociation.org/wp-content/uploads/2017/07/Garima-IINBAs-Book.pdf> (Last visited on June 11, 2021).

²⁷ Punam Sahgal & Aastha Dang, *Sexual Harassment at Workplace Experiences of Women Managers and Organisations*, Vol. 50(22), EPW 49, 51-52, 54 (2017).

²⁸ Sexual Harassment of Women at the Workplace (Prevention, Prohibition and Redressal) Act, 2013, §23 (Mandates that the appropriate government shall monitor the implementation of the Act and maintain data in respect of the number of workplace sexual harassment cases filed and disposed of. However, to the best of my knowledge, neither the Union nor State Government has published any comprehensive data in this regard).

B. NLSIU STUDY

The NLSIU Study was conducted amongst students of NLSIU, consisting of undergraduate students in the five-year B.A., LL.B. (Hons.) course and post-graduate students from the one-year Master of Laws course and the two-year Master of Public Policy Course. The study was conducted as part of the coursework for a seminar on ‘Crime Commission and Prevention’, when I was a final-year undergraduate student at NLSIU. The study consisted of two components — first, a survey conducted amongst the student body (appended in the Annexure, *infra*), and second, unstructured interviews with sexual harassment survivors who agreed to speak to me for the purpose of the study. The objective of the study was to collect data on attitudes towards campus sexual harassment and the functioning of ICCs in NLSIU.

At this juncture, it may be noted that NLSIU’s anti-sexual harassment policy consists of the ‘Code to Combat Sexual Harassment’ (‘SHARIC Code’), as it is colloquially referred to amongst NLSIU students, which was framed in the year 2002.²⁹ The SHARIC Code provides for the constitution of a ‘Sexual Harassment Inquiry Committee’ for taking corrective action against sexual harassment of any member of the NLSIU Community.³⁰ The Committee is to consist of three members, including a female faculty member and an independent female member who is not a member of the NLSIU Community, and who is trained in the issue of sexual harassment.³¹ The SHARIC Code also provides for the appointment of a faculty member as the Sexual Harassment Policy Advisor (‘SHPA’) who is to *inter alia*, ensure the proper implementation of the Code. Further, it mandates the appointment of ‘Facilitators’ from various constituencies, including the student body, for providing counselling and mediation services to aggrieved persons under the Code. Though the Code is gender-neutral, the definition of sexual harassment thereunder is confined to unwelcome *sexual* conduct as is the case under the Vishaka guidelines and POSH.

²⁹ It is important to note that the SHARIC Code was amended subsequent to the conduct of the NLSIU Study. These amendments were notified in the academic year 2019-2020, subsequent to a change in the administration of the University and the heralding of the #MeToo movement on campus. The NLSIU Study pertains to the enforcement of the Code and the working of the ICC mechanism as it existed prior to the amendments, and all references to the SHARIC Code in this paper are to be construed accordingly. Given that the amendments have been in force for a short period of time, this paper does not propose to comment on whether these have brought about a change in the scenario as revealed in the Study.

³⁰ The ‘NLSIU Community’ under the SHARIC Code is broadly defined to include any person who by virtue of their relationship to NLSIU, may be considered as a part of NLSIU, such as students, faculty members, administrative staff, visiting faculty, service personnel, etc.

³¹ It is pertinent to note that neither the Vishaka guidelines nor POSH stipulate that the external member of an ICC should be a woman. However, this may end up happening by default as the law mandates that at least half of the members of an ICC should be women.

1. Survey Methodology and Sample Details

I sent out a digital survey,³² through the public e-mail database of the college, to all the undergraduate and post-graduate students studying in the University in the academic year 2018-19, out of which 103 students volunteered to respond. All responses were recorded anonymously. The survey covered persons of all genders. Fifty-nine respondents (fifty-eight percent)³³ identified as women, forty-three as men, and one person identified themselves as non- binary. A substantial majority of eighty-four percent identified themselves as heterosexual.³⁴ The majority of the survey sample was also upper-caste, though twenty-eight percent of the respondents reported coming from a Scheduled Caste/Scheduled Tribe/ Other Backward Classes ('SC/ST/OBC') background. Additionally, while sixty-four percent of the respondents reported that their personal/family income was above Rs 10,00,000 per annum, fifteen percent reported a family income of less than Rs 5,00,000 per annum. In this respect, it is relevant to note that the student demographic at NLSIU generally consists of upper-caste, heterosexual students hailing from a family income bracket of more than Rs. 10,00,000 per annum. This could explain why these identities were more represented in the survey sample than others.³⁵

2. Interview Methodology

I conducted unstructured interviews with NLSIU students who claimed to have experienced sexual harassment while at law school, and had availed of remedial mechanisms under the SHARIC, or outside thereof, for the purpose of this paper. The methodology of selecting the interview sample and conducting the interviews was as follows: while sending the aforementioned digital survey, I had (in the same e-mail) requested survivors who were comfortable sharing their experiences in person to reach out to me. Subsequently, four students volunteered to share their experiences anonymously. The four interviewees can be divided into two categories — first, two persons who had pursued a formal claim under the SHARIC Code, and second, two persons who had experienced sexual harassment, but had chosen to resolve it through a #MeToo calling out mechanism, or an informal 'mediation' or 'settlement' with the alleged perpetrator. Such 'settlements' usually involved the perpetrator issuing a public apology on social media, resigning from positions of responsibility on student-run journals

³² See *infra* Annexure.

³³ All percentage figures as a proportion of the total respondent size have been rounded off for convenience.

³⁴ Nine respondents identified as bisexual, two as homosexual, two as asexual, and one as gray asexual. One respondent stated that they were bicurious, and one stated they were confused about their sexuality.

³⁵ For more details see Chirayu Jain et al., *The Elusive Island of Excellence – A Study on Student Demographics, Accessibility and Inclusivity at National Law School 2015-16*, SSRN, June 6, 2016, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2788311 (Last visited on June 12, 2021).

and committees, etc. The interviews took place parallelly in time to the survey process. They were conducted through a combination of in-person conversations and conversations over the phone, depending on the parties' convenience. Prior to conducting the interviews, I disclosed to the interviewees that their statements may be used as a basis for formulating my research conclusions, and obtained their consent for the same.

The purpose of conducting the interviews with the student interviewees was to obtain a qualitative understanding of campus sexual harassment issues and the factors which incentivise (or de-incentivise) students to pursue sexual harassment claims under the SHARIC Code. Further, I attempt to highlight in the paper, if these are linked to the broader theoretical issues with POSH and ICC inquiries. Accordingly, I asked the interviewees about their reasons for pursuing a sexual harassment claim and their satisfaction with the remedial mechanism they had opted for. With respect to the interviewees in the first category, I asked them if the SHARIC proceedings were procedurally fair, if they received adequate institutional support and if they wished that they had opted for an alternate remedial mechanism. With respect to the interviewees in the second category, I asked the interviewees if they wished they had opted for an inquiry in lieu of informal proceedings based on Questions 21 and 22 of the Annexure. I also asked additional follow-up questions about the impact of sexual harassment and internal institutional proceedings on the interviewee's mental health and academic prospects, where they indicated their willingness to speak about the same.

I additionally interviewed a faculty member, 'Z', who had previously served as a member on the NLSIU ICC, for an alternate perspective on the issue. The interview with Z was conducted in person, and their consent was obtained in the same manner as for the student interviewees, subject to condition of anonymity. The purpose of interviewing Z was to understand if ICC members' perception of SHARIC proceedings aligned with or diverged from that of the student interviewees. I also aimed to clarify the procedural standards which the ICC members were following, and if they had faced any barriers in discharging their role and functions. Accordingly, I asked Z if they felt that the SHARIC was an effective and procedurally fair policy for all parties, the burden and standard of proof they applied during inquiries, if they felt satisfied in their role as a faculty member-cum-ICC member, if they had faced any institutional barriers or in terms of conduct of the inquiry and implementation of ICC recommendations, and if there were any issues or changes required in the inquiry process.

3. Limitations of The NLSIU Study

Admittedly, this study cannot be said to capture a holistic picture of the working of the ICC mechanism in NLSIU insofar as it does not include faculty members, staff members, visiting researchers and other relevant stakeholders. I excluded these from the survey on account of considerations of power dynamics

and propriety (as far as faculty members were concerned), language barriers (with respect to staff workers) and lack of accessibility to the details of all those who may have visited the campus for occupational purposes. Even with respect to students, the study may not be representative of the views of all students on campus, or all sexual harassment survivors, as I primarily relied on the responses of those who volunteered to answer the survey and be interviewed for the purpose of this paper. My internal bias and the Code's confidentiality requirement in respect of on-going ICC proceedings may have also affected my survey data and interview response analysis; though she has attempted to account for the same through anonymising the survey responses. Lastly, it may be argued that since NLSIU is an educational institution, the findings of this study are not entirely applicable to other 'workplaces' with different power dynamics.

On the other hand, the primary reason for choosing NLSIU for the study was because I have served as a Student Facilitator and counselled sexual harassment survivors under the SHARIC. I was also a member of the panel headed by the then-SHPA that had worked on drafting amendments to the Code. Thus, I was better placed to collect and analyse the data from respondents in NLSIU than another institution. It is my belief that the experiences collated from the NLSIU study, particularly the interview responses, are important for a deeper understanding of similar institutional failures reported in external surveys and #MeToo cases.

4. Survey Results

Thirty-nine percent of the respondents reported having experienced sexual harassment in NLSIU (including law school events held outside of campus) and thirty-six percent of the respondents reported that they had witnessed it happening to other persons. The gendered dimension of sexual harassment is apparent inasmuch as 77.5% of the respondents who reported having faced sexual harassment inside the community were women/non-binary. Further, 32.5% of the respondents who reported facing harassment inside law school/law school events, were students from SC/ST/OBC backgrounds (though they constituted twenty-eight percent of the survey sample). The majority of these were also women. This indicates that the intersectionality of caste and gender may play a significant role in increasing vulnerability towards sexual harassment.³⁶ Interestingly, seventy-nine percent of the respondents stated that though they did not believe only women could be sexually harassed, women faced a far greater impact of sexual harassment than men.

The findings as to the nature of sexual harassment faced by the respondents will be further discussed in Part IV. However, it should be noted that out

³⁶ It is further interesting to note that out of the SC/ST/OBC students who reported having faced harassment, eighty-five percent came from an income bracket of more than Rs 5,00,000 per annum. This suggests that it is reductive to assume that a person from a marginalized caste background is less vulnerable to sexual harassment if they belong to a higher income bracket.

of the forty persons who reported having experienced sexual harassment at NLSIU, only three stated that they had availed of the mechanism under the SHARIC. The remaining mostly stated that they had kept quiet so as to avoid embarrassment or confided only in close family and friends. Further, a majority of these stated that the immediate reaction of those to whom they confided consisted of attitudes such as “It’s not a big deal, let it be”, “The offender is popular/influential, so there is no point in pursuing it”, “The offender was drunk and did not know better” and “You were drunk and therefore confused/cannot remember the incident properly”.

A majority of the respondents also agreed that there was a victim-blaming complex in the campus culture, particularly if the victim was intoxicated, or perceived as being too ‘forward’ or ‘slutty’. Further, fifty-eight percent of the respondents felt that the perpetrator’s social capital or lack thereof played an important role in sexual harassment claims, under both informal and formal resolution mechanisms. On the other hand, sixty-six percent of the respondents felt that there was a tendency to falsify sexual harassment claims. It can be inferred from these responses that the socio-cultural attitude towards sexual harassment amongst the campus community may act as a significant factor in influencing a victim’s decision to avail (or rather not avail) of formal remedies, including internal complaint mechanisms.

The overall prevailing sentiment amongst the respondents was that the SHARIC Code was only ‘somewhat’ of a deterrent to sexual harassment in NLSIU. Eighty-five percent of the respondents agreed that there was a need for more gender sensitisation/prevention of sexual harassment workshops. At the time the survey was conducted, only one such workshop was conducted at the beginning of the year, that too only for the incoming batch of students in every course.

5. Analysis of Interview Responses

These interview responses will be referred to in further detail as and when relevant in the paper.³⁷ However, the general sentiment amongst the persons in the first category was that while the ICC was usually fair, the procedure involved was rigorous and involved too much opportunity cost and emotional labour

³⁷ See *infra* Part IV.C. on “Inquiry as a Quasi-Criminal Trial” and IV.D. on “Absence of Employer Liability” (It must be clarified at the outset that the experiences recounted in this paper are the subjective opinions of the students surveyed and interviewed for the Study. It is obvious that these cannot be regarded as conveying the absolute truth, and it is not my intent to defame any institution or person or comment upon the verity of the claims made before the NLSIU ICC. The identities of all persons involved, the details of the instances of harassment alleged, and the details of the inquiry, have been censored as far as possible keeping in mind the confidentiality requirements under POSH and the SHARIC. However, I firmly believe that the subjective experiences of complainants are important to report and study if we are to acquire some understanding of the working of internal complaint mechanisms, particularly in educational institutions. It is also my belief that the confidentiality requirements which are presumably meant to protect complainants from stigma cannot be used as a gagging mechanism to prevent them from speaking out against any injustice they believe was meted out to them).

for the complainant. The complainants received little institutional support in pursuing inquiries. They also faced the accompanying stigma that by filing a complaint, they had ‘ruined the future’ of the perpetrator. Arguably, such stereotypical responses from fellow community members may not be reflective of the institution’s attitudes. However, complainants reported that even where the ICC acted in a facilitative manner, the institution itself was biased to the perpetrator in terms of delaying the enforcement of the remedy awarded by the ICC. This indicates that institutional apathy towards complainants and/or support for perpetrators is linked with cynical attitudes towards pursuing inquiries in the wider community.

This is apparent from the responses of the persons in the second category, who had chosen informal settlements over pursuing ICC proceedings. Both interviewees admitted that they were dissatisfied by the lack of formal culpability assigned to the alleged offender. Nevertheless, they stated that if given a second opportunity, they would still prefer such a solution over the rigors of the ICC mechanism.

On the other hand, ‘Z’, who had previously been an ICC member, claimed that from their end, the ICC had followed the mandate of the SHARIC that the inquiry shall not be guided by the standards of a criminal trial or other legal proceeding. The standard of balance of probabilities had been followed in all inquiries, and sometimes a prima facie standard had been applied for granting interim relief. In fact, according to Z the ICC had followed relaxed procedural standards, for example by allowing electronic evidence in the form of printouts and screenshots of messages to be admitted, without insisting on proof of the originals. However, Z explained that from the ICCs point of view, it was important to have a certain degree of procedural formality as too much flexibility would give scope for misuse to biased ICC members.

C. #METOO IN INDIA

Apart from these surveys, the #MeToo movement in India, and its aftermath, is the biggest indictment of institutional mechanisms under the Vishaka Guidelines and POSH. The movement began in India with the release of the List of Sexual Harassers (‘LoSHA’) by Raya Sarkar, an Indian-origin US-based law student on her Facebook profile, in October 2017. LoSHA was a crowd sourced list naming persons in Indian academia who had allegedly committed sexual harassment, without any specific details of the allegations or the identities of the accusers. Though a few of the academics on the list had official complaints pending against them, the majority of them had never faced any formal charges. A group of prominent Indian feminists published an open statement criticising LoSHA on the ground that genuine complainants ought to have utilised ‘institutions and procedures.’³⁸ Sarkar defended LoSHA on the ground that the victims had hesi-

³⁸ Nivedita Menon, *Statement by Feminists on Facebook Campaign to ‘Name and Shame’*, KAFILA, October 24, 2017 available at <https://kafila.online/2017/10/24/>

tated from officially reporting perpetrators because the ones investigating the case were often friends with the accused, and due process had failed women in academia.³⁹ The open statement itself acknowledged that due process “is harsh and often tilted against the complainant.”⁴⁰

Subsequently in October 2018, Bollywood actress Tanushree Dutta accused her former co-star Nana Patekar, of having sexually harassed her on the sets of their film ‘Horn OK Please’ in 2008. This was followed by a string of allegations made against *inter alia* prominent actors, directors, journalists, politicians, comedians and authors.⁴¹ At that time, these allegations led to many of the accused being fired or resigning from their positions, and even led to the dissolution of some workplaces in cases where the organisation was alleged to have facilitated their behaviour.⁴²

However ultimately, most of these allegations have been forgotten and have not resulted in any formal institutional or legal outcome for the accused. In the case of LoSHA, a majority of the institutions named maintained radio silence about the action taken by them against employees named in the list.⁴³ The biggest difficulty pointed out by those who did offer comment was that they could not take ‘*suo moto* cognizance’ based on an anonymous complaint.⁴⁴ In the few cases where formal complaints were registered, only some of the accused were found guilty. In other cases, either the complainant demanded a re-investigation, or the accused stepped down before the inquiry could be completed, or the accused

statement-by-feminists-on-facebook-campaign-to-name-and- shame/ (Last visited on June 14, 2021).

³⁹ Elizabeth Cassin & Ritu Prasad, *Student’s ‘Sexual Predator’ List Names Professors*, BBC NEWS, November 6, 2017, available at <https://www.bbc.com/news/blogs-trending-41862615> (Last visited on June 14, 2021).

⁴⁰ Menon, *supra* note 38.

⁴¹ Abhery Roy, *2018: The Year When #MeToo Shook India*, THE ECONOMIC TIMES, June 1, 2019, available at <https://economictimes.indiatimes.com/magazines/panache/2018-the-year-when-metoo-shook-india/2018-the-year- of-metoo-in-india/slideshow/66346583.cms> (Last visited on June 14, 2021).

⁴² Lata Jha, *#MeToo takes a toll on Bollywood projects*, LIVEMINT, (October 17, 2018), available at <https://www.livemint.com/Home-Page/bnZj9BrPEJo44wwBmQ0XWK/MeToo-takes-a-toll-on-Bollywood- projects.html> (Last visited on June 14, 2021); *#MeToo Continues to Haunt AIB; Tanmay Bhat to to ‘Step Away’, Khamba Sent on Leave*, THE ECONOMIC TIMES, October 8, 2018, available at <https://economictimes.indiatimes.com/magazines/panache/metoo-continues-to-haunt-aib-tanmay-bhat-to-step-away- says-comedy-group/articleshow/66119810.cms> (Last visited on June 14, 2021).

⁴³ Piyasree Dasgupta, *#MeToo In India: 75 Professors, 30 Institutes, What Happened To Raya Sarkar’s List of Sexual Harassers?*, KRACTIVISM , October 31, 2018, available at <https://www.kractivist.org/india-75-professors-30-institutes- what-happened-to-roya-sarkars-list-of-sexual-harassers-metoo/> (Last visited on June 14, 2021).

⁴⁴ Shreya Roy Chowdhury & Aroon Deep, *Universities Respond to Raya Sarkar’s List of Alleged Sexual Predators: Mostly Silence, some Denials*, SCROLL.IN, November 4, 2017, available at <https://scroll.in/article/856589/universities- respond-to-roya-sarkars-list-of-alleged-sexual-predators-mostly-silence-some-denials> (Last visited on June 14, 2021).

challenged the decision of the ICC in court,⁴⁵ which points out the difficulty in obtaining closure in internal inquiries.

In other sectors, one positive effect of #MeToo was that it led to a spike in reporting of sexual harassment cases in the corporate sector, and also led to increased emphasis by organisations on compliance with POSH.⁴⁶ However it also led to a pronounced fear of false cases and increased reluctance to hire or openly interact with female colleagues amongst male executives.⁴⁷ Women who made allegations publicly, or provided a public platform for victims to anonymously voice their allegations, were hit with defamation suits.⁴⁸ Therefore #Me Too appears to have resulted in short-term changes to status quo, without any radical improvement or systemic overhaul of existing due process mechanisms.

IV. WHY DUE PROCESS HAS FAILED

As is evident from the discussion in Part III, the Vishaka guidelines and POSH have not significantly contributed towards the goals of prevention and punishment of sexual harassment. This problem should not be construed as having arisen merely on account of laxities in implementation of the law. Rather, the law itself is inherently insufficient to address the needs of women aggrieved by sexual harassment. Both the Vishaka guidelines and POSH are based on the conventional ‘desire-dominance’ paradigm of sexual harassment (as conceptualised by Schultz). In this paradigm sexuality, and therefore male-female sexual advances, is placed at the centre of the problem. Consequently, this paradigm overemphasises punishing unwanted sexual advances and ignores underlying structural conditions of gender discrimination which facilitate such behaviour.⁴⁹ This is apparent inasmuch as both the Vishaka Guidelines and POSH define sexual harassment as unwelcome *sexual* behaviour. Other non-sexual forms of gender-based harassment are excluded from the definition of ‘sexual harassment’.

However, scholarship shows that sexual harassment is not a distinct issue from gender discrimination; it is one of the structural tools through

⁴⁵ Dasgupta, *supra* note 43.

⁴⁶ Indulekha Aravind, *A Year Since #MeToo: What has been Done is #TooLittle*, THE ECONOMIC TIMES, October 10, 2019, available at <https://economictimes.indiatimes.com/news/company/corporate-trends/a-year-since-metoo-what-has-been-done-is-toolittle/articleshow/71456710.cms> (Last visited on June 12, 2021).

⁴⁷ *Id.*

⁴⁸ Samira Sood et al., *One Year After India's Big #MeToo Wave, a Reality Check*, THE PRINT.IN (October 12, 2019), available at <https://theprint.in/features/one-year-after-india-big-metoo-wave-reality-check/304787/> (Last visited on June 14, 2021).

⁴⁹ See Vicki Schultz, *Reconceptualizing Sexual Harassment*, Vol. 107, YALE L.J., 1683 (1998); See also Vicki Schultz, *Reconceptualizing Sexual Harassment, Again*, YALE LAW JOURNAL FORUM, 2018, available at <https://www.yalelawjournal.org/forum/reconceptualizing-sexual-harassment-again> (Last visited on June 14, 2021) for detailed discussion on this point.

which men assert their power over women at the workplace,⁵⁰ and maintain existing gender hierarchies. Most prevalent forms of harassment are not motivated by sexual desire but are designed to maintain the workplace as a bastion of ‘masculine competence and authority’.⁵¹ Men deliberately act to undermine their female colleagues’ competence for the job through behaviours such as characterising certain work as appropriate for men only, withholding important professional opportunities, providing sexist evaluations of women’s performance or denying them promotions, excluding them from workplace social networks, etc.⁵² In this regard even sexual conduct is not merely about sexual desire, but aims at undermining a woman’s image and self-confidence by reducing her from a professional to a mere object of sexual attention.⁵³

In the Indian context, this is evident from the findings of surveys on sexual harassment, wherein several women have reported facing non-sexual discriminatory behaviour linked to their gender characteristics. For example, in the Sanhita Study, half of the respondents reported facing gender discrimination at the workplace. This includes instances such as an organisational preference for recruitment in favour of men. It further includes the institutional prevalence of gendered stereotypes about female employees, for example, that the advancement of women employees was contingent on them ‘pleasing the boss’.⁵⁴ In the INBA survey, 12.5% of the respondents stated that they experienced sexual harassment not in the form of inappropriate physical advances, but in the form of sexism.⁵⁵

Similarly, in the Women Manager’s Study, out of the respondents who reported having faced sexual harassment personally, eighty percent reported that it was ‘behavioural’ in nature. This consisted of behaviours such as not letting a female colleague sit at her work station, sending offensive material in the form of pornography or lewd text messages, inviting her to a hotel room at night during work trips so that they could ‘get to know each other better’, as opposed to direct acts of physical or sexual assault. Women who were lower in the organisational hierarchy were more liable to be harassed, and men in senior positions, who were believed to be ‘high performers’, were likelier to indulge in such behaviour.⁵⁶ This can also be seen from the findings of the NLSIU study; wherein fifty percent of the respondents who reported facing sexual harassment inside campus claimed that they experienced harassment in the form of unpleasant behaviour targeted at them on account of their being women or displaying feminine characteristics. This

⁵⁰ For a general overview of the literature on this point see Sahgal & Dang, *supra* note 27, 50; Christopher Uggen & Amy Blackstone, *Sexual Harassment as a Gendered Expression of Power*, vol. 69, AMERICAN SOCIOLOGICAL REVIEW, 64 (2004); Justine E. Tinkler, *Resisting the Enforcement of Sexual Harassment Law*, Vol. 37, LAW & SOC. INQUIRY, 1 (2012).

⁵¹ Vicki Schultz, *Reconceptualizing Sexual Harassment*, Vol. 107, YALE L.J., 1687 (1998).

⁵² *Id.*

⁵³ *Id.*

⁵⁴ Chaudhuri, *supra* note 22, at 102, 103.

⁵⁵ Indian National Bar Association & Netrika Consulting, *supra* note 26, at 14.

⁵⁶ Sahgal & Dang, *supra* note 27, at 51-52.

indicates that women's perception of what constitutes sexual harassment is much broader than what the law currently penalises.

However, remedial mechanisms such as ICCs are premised on the assumption that sexual harassment stems only from the errant sexual behaviour or perversion of the concerned individual respondent. Since it is a problem of individual sexual misconduct, employers bear no liability for such behaviour. The law further assumes that employers are sufficiently impartial to internally investigate sexual harassment claims, and appropriate action taken through such internal inquiries can prevent harassment. Hence redressal strategies target individualised sexual harm rather than broader workplace discrimination,⁵⁷ attacking the symptom, not the cause. This is even though sexual advances, when severed from an overall pattern of discriminatory conduct, may appear insufficiently severe to be actionable.⁵⁸ Similarly, employers may perceive non-sexual advances as examples of gender-neutral hazing that can happen to any employee.⁵⁹ Consequently, sexual harassment law fails as a long-term deterrent as internal complaint mechanisms are mostly designed to punish individual harassers and avoid disruption to the organisational work culture and do not address the broader workplace conditions that foster harassment.⁶⁰

In the Indian context specifically, the law's failure to take cognizance of the structural origins of sexual harassment has the following consequences: first, the law provides for a complaint mechanism constituted from the same environment which facilitated the misconduct, which is unlikely to be impartial or representative of all interests. Second, by delegating the responsibility for formulating internal complaint procedures to employers, the law gives flexibility for employers to adopt procedures suited to their interests. Third, the inquiry procedure and the use of 'due process' safeguards thereunder leads to a 'quasi-criminal' trial which more or less replicates the costs of a judicial proceeding for the complainant. Fourth, there is lack of employer liability for ensuring the successful completion of the inquiry and enforcement of any remedies prescribed by the ICC.

⁵⁷ Tristin Green, *Was Sexual Harassment Law a Mistake? The Stories We Tell*, Vol. 128, YALE L.J. FORUM, 153 (2018).

⁵⁸ Schultz, *supra* note 51, at 1690.

⁵⁹ *Id.*, at 1690.

⁶⁰ Vicki Schultz, *Open Statement on Sexual Harassment from Employment Discrimination Law Scholars*, STAN. L. REV. ONLINE, 2018, available at <https://www.stanfordlawreview.org/online/open-statement-on-sexual-harassment-from-employment-discrimination-law-scholars/> (Last visited on June 14, 2021); Lauren Edelman, *How HR and Judges Made it Almost Impossible for Victims of Sexual Harassment to Win in Court*, HARV. BUS. REV., 2018, available at <https://hbr.org/2018/08/how-hr-and-judges-made-it-almost-impossible-for-victims-of-sexual-harassment-to-win-in-court> (Last visited on June 14, 2021).

A. FLAWS IN THE CONSTITUTION OF ICCS

§4 of POSH gives the employer unilateral power to constitute the ICC, giving scope for picking favourites from the hierarchy.⁶¹ Since sexual harassment is likelier to occur in male-dominated workplaces and where the workplace climate lacks proactive policies to deal with harassment,⁶² such organisations are unlikely to take the process of constituting a fair and impartial ICC seriously. This will be further aggravated in cases where the organisation wants to avoid the disrepute incurred by a guilty finding.

Prior to POSH, many institutions constituted ICCs on the basis of election by various constituencies, for example, students, teachers, workers, etc., thus ensuring the equal representation of each group.⁶³ However, the enactment of POSH has led to replacement of the election system by the nomination-based system provided for under the Act, leading to concerns that such moves are designed to exacerbate existing power dynamics and enable institutions to suppress claims against persons in positions of authority.⁶⁴ The protests over the replacement of the Gender Sensitisation Committee Against Sexual Harassment with an ICC in Jawaharlal Nehru University, New Delhi and the subsequent legal challenge thereto⁶⁵ highlight the need for considering alternatives to the current system (though it may be argued that an election based system will lead to the ‘politicisation’ of sexual harassment claims by third-party interests).⁶⁶

POSH tries to account for power differentials by providing that the ICCs Presiding Officer shall be a senior women employee, and the other members should be employees ‘committed to the cause of women’. Further, as mentioned, fifty percent of the committee is required to be women. However, this will still be of no use in an organisation where the senior management is overwhelmingly male, and therefore in a position to retaliate against female ICC members. For example, in the Sanhita Study it was found that government organisations frequently

⁶¹ Maya John, *Fears and Furies of Sexual Harassment*, Vol. 49, EPW, 31 (2014).

⁶² James E. Gruber, *The Impact of Male Work Environments and Organizational Policies on Women’s Experiences of Sexual Harassment*, Vol. 12(3), GENDER & SOCIETY, 301 (1998).

⁶³ Rukmini Sen, *To Promote Contemporary Feminist Politics, We Need Sexual Harassment Watchdog Bodies*, THE WIRE, October 3, 2017, available at <https://thewire.in/education/sexual-harassment-committee-universities-jnu-gscash> (Last visited on June 14, 2021); Sarah Zia, *Can Institutional Safeguards Prevent Campus Sexual Harassment?*, LIVEMINT, October 15, 2017, available at <https://www.livemint.com/Education/ZkM6SeJwUa15o8LBmwRWJ/Can-institutional-safeguards-prevent-campus-sexual-harassment.html> (Last visited on June 14, 2021).

⁶⁴ *Id.*

⁶⁵ Shihabudeen Kunju S., *JNU’s GSCASH Vs ICC Issue: Important Things to Know*, NDTV September 22, 2017, available at <https://www.ndtv.com/education/jnus-gscash-vs-icc-issue-important-things-to-know-1753525> (Last visited on June 14, 2021).

⁶⁶ Further, institutions may design election quotas in a manner which denies equal representation to constituencies or ensures that the dominant group’s interests are represented in the ICC., see Ritika Thakur, *Sexual Politics Mars Anti-Harassment Panel Polls in Hindu College*, NEWSLAUNDRY, January 24, 2018, available at <https://www.newslaundry.com/2018/01/24/hindu-college-icc-election-sexual-harassment> (Last visited on September 17, 2021).

appoint junior female officials to fulfil the quota mandated under POSH, who lack the bargaining power to negotiate with the management about gender issues.⁶⁷

This arrangement also fails to account for the prevalence of internalised misogyny within the workplace. Research indicates that when women are employed in a ‘token’ capacity, they may incorporate the same gender biases as their male colleagues so as to assimilate in a male-dominated workplace. Therefore, women may end up unconsciously imitating the discriminatory practices employed by their male superiors.⁶⁸ In fact female-on-female hostile behaviour created due to structural discrimination may in itself be construed as a form of sexual harassment that the ‘desire-dominance’ paradigm fails to account for,⁶⁹ though it may be argued that the gender-neutral definition of ‘respondent’ under POSH⁷⁰ encompasses such claims.

Additionally, merely mandating the inclusion of women in the ICC ignores the intersectionality of caste and class, and resulting power differentials, in sexual harassment claims. In sectors employing blue collar workers, ICCs often overwhelmingly side with the management.⁷¹ The Parliamentary Standing Committee Report on the Protection of Women Against Sexual Harassment Bill, 2010 (‘PSC Report’) had pointed out that daily wage/casual workers, which constitute the most vulnerable section of the Indian workforce, are usually hired indirectly through a third-party contractor. The Report stated that it was unlikely that a contractor as an ‘employer’ would take the responsibility of initiating an inquiry or criminal case in the case of sexual harassment of such workers.⁷² Hence the Report had recommended the inclusion of trade union/employee association representatives in ICCs.⁷³ However POSH does not provide for any such representative.

It is true that similar to the Vishaka guidelines, POSH also mandates the inclusion of an NGO member in the ICC to avoid undue influence from the organisational hierarchy. However, the ratio is too less to make a difference—the law prescribes appointing only one independent NGO member ‘familiar with issues relating to sexual harassment’, in a committee of at least three internal members.⁷⁴ Such a member, who is unfamiliar with the internal power dynamics of the organi-

⁶⁷ Chaudhuri, *supra* note 22, at 101.

⁶⁸ See Rosabeth Moss Kanter, *Some Effects of Proportions on Group Life: Skewed Sex Ratios and Responses to Token Women*, Vol. 82(5), AM. J. SOC., 965 (1977).

⁶⁹ See Ramit Mizrahi, *Hostility to the Presence of Women: Why Women Undermine Each Other in the Workplace and the Consequences for Title VII*, 113 YALE L.J. 1579 (2004).

⁷⁰ POSH, §2(m).

⁷¹ Aravind, *supra* note 46.

⁷² DEPARTMENT-RELATED PARLIAMENTARY STANDING COMMITTEE ON HUMAN RESOURCE DEVELOPMENT, TWO HUNDRED THIRTY-NINTH REPORT ON THE PROTECTION OF WOMEN AGAINST SEXUAL HARASSMENT AT WORKPLACE BILL, 2010, ¶6.13 (December 8, 2011) (‘PSC Report’).

⁷³ *Id.* ¶8.22.

⁷⁴ Sexual Harassment of Women at the Workplace (Prevention, Prohibition and Redressal) Act, 2013, §4(2)(c).

sation, may lack the bargaining power to have their point of view taken seriously by the rest of the ICC, and perhaps, may be influenced to side with the verdict desired by them.

B. FLAWS IN THE PROCEDURAL FUNCTIONING OF ICCS

The fact that ICCs are constituted of management appointed representatives has negative implications for whether the committee will be neutral in its inquiry procedure, particularly in organisations which do not consider sexual harassment as a pressing issue. POSH prescribes little guidance for how an inquiry is to be conducted, except that it should be ‘in accordance with the service rules applicable to the respondent’.⁷⁵ Thus the employer has wide discretion in adopting a procedure that is suited to their interests.

POSH also does not clearly define the standard of training to be met by ICC members before conducting an inquiry. §4 only provides that at least two members should *preferably* have legal knowledge. This is even though the ICC is vested with the powers of a civil court with respect to summoning witnesses and requiring the discovery of documents.⁷⁶ The Sexual Harassment of Women at the Workplace (Prevention, Prohibition and Redressal) Rules, 2013 (‘POSH Rules’) prescribe that employers shall conduct ‘capacity building and skill building’ programmes for ICC members,⁷⁷ but the meaning of these terms, and the frequency at which such programmes should be conducted, has not been specifically expanded upon.

The lack of clearly defined procedural standards means that ICCs often rely on informal networks for fact-finding and are susceptible to pressurising from their colleagues.⁷⁸ For example, it was found from the result of the Women Managers’ Study that organisations expressed more concern about losing high-performing employees and preserving their reputation than about building a respectful and safe culture.⁷⁹ In one case where the respondent was a senior employee, though he was found guilty, the organisation only took insignificant action so as to ensure he suffered minimal consequences.⁸⁰ Therefore ICC inquiries are often bound to be motivated by the desire to exonerate an errant employee, rather than focusing on securing justice to the complainant.

⁷⁵ *Id.*, §11(1).

⁷⁶ *Id.*, §11(3); For a similar critique, see also JUSTICE J.S. VERMA COMMITTEE, REPORT OF THE COMMITTEE ON AMENDMENTS TO CRIMINAL LAW, 128 (January 23, 2013) (The Committee was constituted by the Central Government as part of the legislative reforms against sexual violence undertaken after the ‘Nirbhaya’ case).

⁷⁷ Sexual Harassment of Women at the Workplace (Prevention, Prohibition and Redressal) Rules 2013, r. 13(d).

⁷⁸ Monica Sakhrani, *Sexual Harassment: The Conundrum of Law, Due Process and Justice*, EPW ENGAGE (December 16, 2017), available at <https://www.epw.in/engage/article/sexual-harassment-conundrum-law-due-process-and-justice> (last visited April 17, 2020).

⁷⁹ Sahgal & Dang, *supra* note 27, at 54.

⁸⁰ *Id.*

Further, ICCs lack effective powers to handle third-party harassment, for example harassment by another company's employee. In such a scenario, since only the respondent's workplace can take action against them, the complainant would have to institute a claim in that workplace, in front of people who are more familiar with the respondent, without any compensation for costs. The Vishaka guidelines⁸¹ and POSH⁸² prescribe that the employer should offer support in initiating action against third-party harassment. However, this does not take into consideration that organisations may be reluctant to jeopardise their relations with business partners or clients over acts of sexual misconduct by senior employees of other workplaces.

1. Difficulty in Inquiring into Accusations against State Functionaries

Another significant lacuna under POSH is that it appears to be based on the assumption that the ICC will be operating in a conventional government department or private organisational set-up. The ICC mechanism does not apply to women working in the unorganised sector, even though ninety-percent Indian workers are employed in the informal economy.⁸³ Further, POSH does not address the question of the procedure to be followed if the respondent is a constitutional or statutory functionary. The Representation of People Act, 1954, which states the grounds for disqualification of members of the Parliament and State legislatures, does not contain any specific provision for the procedure to be followed in case a legislator is accused of sexual harassment. Similarly, the Judges (Inquiry) Act, 1968, which prescribes the procedure for investigating impeachment motions passed by the Parliament for the removal of Judges, does not provide for the conduct of such an inquiry for allegations of sexual harassment. Arguably, this exclusion of State institutions is a general policymaking loophole and not linked to the desire- dominance paradigm *per se*. However, alternate procedures adopted by these institutions appear to be based on this paradigm insofar as they provide for internal inquiries without accounting for the heightened structural pressures which operate against complainants in such cases.

In *Judge "X" v. High Court of M.P.*,⁸⁴ a division Bench of the Supreme Court had held that an 'in-house procedure' may be adopted in cases of allegations of sexual harassment against sitting Judges of the High Court. The procedure is

⁸¹ *Vishaka v. State of Rajasthan*, (1997) 6 SCC 241, ¶16.10.

⁸² Sexual Harassment of Women at the Workplace (Prevention, Prohibition and Redressal) Act, 2013, §19(h).

⁸³ See INITIATIVE FOR WHAT WORKS TO ADVANCE WOMEN AND GIRLS IN THE ECONOMY, *Women in the Indian Informal Economy*, 4 (February 2021), https://www.indiaspend.com/uploads/2021/03/26/file_upload-446784.pdf (Last visited on June 15, 2021); POSH provides for a separate 'Local Complaints Committee' mechanism for such workers. *Infra* Part V.B. on "Replacing ICCs with an External Inquiry Mechanism" (The implementation of the Local Complaints Committee mechanism has been discussed).

⁸⁴ *Judge "X" v. High Court of M.P.*, (2015) 4 SCC 91.

in the form of an inquiry by a three-Member Committee to be nominated by the Chief Justice of India. The Court's reasoning was that since such a Committee would consist of judges of the High Courts of another State, the in-house procedure would be without any prejudice in favour of the respondent.⁸⁵ However, this decision does not address the difficulty that arises when a Supreme Court judge or the Chief Justice of India himself is accused of sexual harassment.

In April 2019, a former staffer of the Chief Justice of India (as he was then), Ranjan Gogoi, filed an affidavit before the Supreme Court alleging that he had sexually harassed her on two occasions, and that her service had been terminated in retaliation for resisting his advances. The Supreme Court, upon the direction of Gogoi C.J. himself, constituted an in-house committee consisting of two male judges (who were the senior-most Supreme Court judges after Gogoi C.J.) and a female judge to inquire into the allegations. This was not done under the Vishaka Guidelines or POSH, but as an ad-hoc procedure,⁸⁶ which perhaps explains why the gender ratio prescribed under POSH was not followed.

After the complainant raised an objection, one of the male judges recused, and was replaced by another female judge. Ultimately, the complainant withdrew from the proceedings on the grounds that she was denied the right to legal representation and was not given copies of her statement; further, that she was denied permission to take recordings of the proceedings and not provided with information about the procedure being followed by the committee.⁸⁷ The complainant claimed that the in-house committee itself acknowledged to her that it was not a sexual harassment committee, and the process they were following was not even a departmental proceeding. Though the committee assured her that she would get her job back, she found the experience intimidating, especially as she was denied a support person or advocate to represent her.⁸⁸ The committee ultimately *ex-parte* dismissed the allegations against Gogoi C.J, finding there was 'no substance' in them. The committee also declined to place their report in public domain.⁸⁹

⁸⁵ *Id.*, ¶49 (This does not take into account the possibility that even judges in different High Courts may have previously practised together or may be acquainted with each other prior to their elevation).

⁸⁶ Seema Chishty et. al., *SC Clears 3-Judge Panel to Probe Sexual Harassment Complaint against CJI Ranjan Gogoi*, THE INDIAN EXPRESS, April 24, 2019, available at <https://indianexpress.com/article/india/sc-clears-3-judge-panel-to-probe-sexual-harassment-complaint-against-cji-ranjan-gogoi-5691303/> (Last visited June 14, 2021).

⁸⁷ Japnam Bindra, *In-house Probe Panel Clears CJI Ranjan Gogoi in Sexual Harassment Case*, LIVEMINT, May 7, 2019, available at <https://www.livemint.com/news/india/sc-inquiry-panel-dismisses-complaint-of-sexual-harassment-against-cji-gogoi-1557144334119.html> (Last visited on June 14, 2021).

⁸⁸ Sruthisagar Yamunan & Ipsita Chakravarty, *Interview: 'I've Lost Everything. Financially, Mentally, Everything,' says Ex SC Staffer in CJI Case*, SCROLL.IN, May 9, 2019, available at <https://scroll.in/article/922751/interview-ive-lost-everything-financially-mentally-everything-says-ex-sc-staffer-in-cji-case> (Last visited on June 14, 2021).

⁸⁹ LIVEMINT (Bindra), *supra* note 87 (However, after Gogoi C.J. retired, the complainant was subsequently reinstated with back wages. The criminal cases filed against her, allegedly in retaliation for the complaint, were also withdrawn); See also Ashish Tripathi, *Woman who Accused*

This is not an isolated instance. Prior to this, two judges of the Supreme Court have been accused of committing sexual harassment while in office, though unlike Gogoi C.J., the accused had already retired and were serving in honorary posts by the time the claims were made. In the case of Swatanter Kumar J., who was serving as the Chairperson of the National Green Tribunal, the Central Government declined to take any action as the alleged offence had taken place while he was serving as a Supreme Court judge.⁹⁰ In the case of Ashok Kumar Ganguly J., though a Supreme-Court appointed panel (again interestingly, consisting of two male judges and one female judge) found *prima facie* merit in the allegations, they did not recommend any action as Ganguly J. had already resigned from his post as Chairperson of the West Bengal Human Rights Commission.⁹¹ Additionally, the Central Government found there was insufficient evidence for a criminal case as the complainant was unwilling to give a statement to the police.⁹²

Irrespective of the veracity of these claims, it can be inferred that the idea of the peers of the respondent sitting in judgement over a claim, combined with the standing of the respondent/inquiry committee members as public figures of national importance, and lack of legal support, is bound to create psychological pressures reducing the complainant's motivation to pursue an 'in-house' inquiry against a State functionary. Moreover, the focus on individual liability ensures that the institution does not have to answer for its role in enabling harassers, especially if the alleged perpetrator has resigned or retired at the time of inquiry.⁹³

2. Lack of Protection against Victimisation

In this backdrop, it is important to note that POSH lacks adequate measures for protecting the complainant from formal or informal reprisal at the

Gogoi of Sexual Harassment Reinstated in SC, DECCAN HERALD (January 23, 2020), available at <https://www.deccanherald.com/national/north-and-central/woman-who-accused-gogoi-of-sexual-harassment-reinstated-in-sc-797267.html> (Last visited on June 14, 2021).

⁹⁰ Ashish Tripathi, *Govt not to Take Action Against Justice Kumar*, DECCAN HERALD, May 31, 2014, available at <https://www.deccanherald.com/content/410737/govt-not-take-action-against.html> (Last visited on June 14, 2021).

⁹¹ Vibhuti Agarwal, *Panel: Judge Guilty of Sexual Harassment*, THE WALL STREET JOURNAL, (December 6, 2013), available at <https://www.wsj.com/amp/articles/indian-judge-guilty-of-sexual-harassment-panel-1386324890> (Last visited on June 14, 2021). The Supreme Court has held in *Indira Jaising v. Registrar General, Supreme Court of India*, (2003) 5 SCC 494 that in-house committee inquiry reports are wholly confidential and not subject to disclosure even under the Right to Information Act, 2005. Hence the Court said that only the operative portion of the judgment can be shared with the public. See *Can't Disclose Report on Allegations against Ganguly: SC*, OUTLOOK, (January 30, 2014), available at <https://www.outlookindia.com/newswire/story/cant-disclose-report-on-allegations-against-ganguly-sc/826940> (Last visited on November 11, 2021). The operative portion of the judgment is no longer available on the Supreme Court website. Hence it has been cited as mentioned in news media reports.

⁹² (Ajanta Chakraborty), *No Case against Justice Ganguly*, THE TIMES OF INDIA, July 10, 2014, available at <https://timesofindia.indiatimes.com/city/kolkata/No-case-against-Justice-Ganguly/articleshow/38099424.cms> (Last visited on June 14, 2021).

⁹³ *Infra* Part IV.D. on "*Absence of employer liability*".

workplace. There is no provision barring the employer from prejudicially changing the service conditions of a complainant during the pendency of ICC proceedings, though this is provided in cases of general labour disputes under the Industrial Disputes Act, 1947.⁹⁴ The POSH Rules only stipulate that the *respondent* may be restrained from reporting on the complainant's performance.⁹⁵ However, this does not consider the possibility that the respondent may use his informal networks in the workplace to victimise the complainant.

Monica Sakhrani, a lawyer working as part of ICCs and the Local Committee (Suburban) in Mumbai has acknowledged that there are cases of biased ICCs and reprisal against complainants in the form of counter-charges, allegations of incompetence and findings of malicious complaints.⁹⁶ POSH formally enables this by allowing the employer to take action for 'false' complaints, though it adds as a safeguard that the mere inability to provide adequate proof cannot be a ground for adjudging a complaint as false.⁹⁷

There is also no safeguard under POSH to protect witnesses from reprisal by the workplace hierarchy. Though the Vishaka guidelines state that employers should ensure that both victims and witnesses are not victimised,⁹⁸ POSH does not address the issue of witness protection. Even in cases where the complainant is willing to bear the cost of inquiry proceedings, any employees who can testify in her favour may be pressurised by their superiors to withdraw their support. If the workplace culture is tolerant of sexual harassment and gender hierarchies, witnesses may also voluntarily recuse themselves from deposing because they feel the behaviour is not severe enough to merit an inquiry or because they feel their professional networks will be jeopardised if they depose against the respondent. This is particularly in cases where women witnesses do not want to be regarded as 'troublemakers' by their male superiors.⁹⁹ In such cases, the complainant may have little by way of 'evidence' to prove her claim before the ICC.

C. INQUIRY AS A QUASI-CRIMINAL TRIAL

The most significant consequence of the 'desire-dominance' paradigm under POSH is that it reduces a gender and labour rights issue to a private 'he-said, she-said' dispute between the complainant and the alleged perpetrator/respondent.¹⁰⁰ As a result, a problem of structural gender discrimination is to be

⁹⁴ The Industrial Disputes Act, 1947, §33.

⁹⁵ Sexual Harassment of Women at the Workplace (Prevention, Prohibition and Redressal) Rules, 2013, Rule 8.

⁹⁶ Sakhrani, *supra* note 78.

⁹⁷ Sexual Harassment of Women at the Workplace (Prevention, Prohibition and Redressal) Act, 2013, §14.

⁹⁸ Vishaka v. State of Rajasthan, (1997) 6 SCC 241, ¶16.4.

⁹⁹ See Kanter, *supra* note 68 (Kanter's 'token' theory can also be used to explain why women may act as passive bystanders, or even actively facilitate harassment against other women).

¹⁰⁰ John, *supra* note 61, at 30.

resolved in the same manner as an ordinary disciplinary proceeding against an errant employee. Arguably, the logic behind instituting such an inquiry is that there has to be *some* kind of procedure to inquire into sexual harassment claims. POSH provides for a less onerous mechanism, with a lesser evidentiary burden, for pursuing a punitive remedy—as opposed to criminal trials, where there is a presumption of innocence in favour of the accused, and the State is required to prove the case beyond reasonable doubt.¹⁰¹

However POSH provides little guidance on how an inquiry is to be conducted in terms of the burden and standard of proof, except for stating that principles of natural justice are applicable.¹⁰² Given that many organisations are more concerned about the ‘future’ of an accused employee than addressing gender disparity,¹⁰³ any disciplinary remedy may be perceived as no less than a criminal punishment. This perception may be additionally heightened by the specific social stigma and connotation of criminality attached to sexual misconduct, given that sexual harassment and rape are offences under the Indian Penal Code. As a result, the inquiry under POSH often ends up becoming a ‘quasi-criminal’ trial, wherein members of the ICC adopt the same procedures and evidentiary standards which are used in a criminal trial, or wherein the complainant is exposed to similar or worse levels of procedural rigors and psychological trauma as incurred in a criminal proceeding.

For example, the Supreme Court has held that the respondent is entitled to cross-examine the complainant and her witnesses in sexual harassment inquiries.¹⁰⁴ In cases where the complainant is granted anonymity, the respondent can still submit a written questionnaire in lieu of direct verbal cross-examination.¹⁰⁵ The terminology of ‘witnesses’, ‘cross-examination’, etc. symbolises that the ICC inquiry procedure, even though it appears inquisitorial on paper, approximates an adversarial criminal trial.

Admittedly such terminology is employed in ordinary disciplinary inquiries as well. However, a crucial difference is that in such inquiries it is the disciplinary authority itself which is pursuing the charge against a delinquent employee. Hence, there is a greater power imbalance against the respondent. Even in a criminal trial, the State bears at least some responsibility for the successful investigation and prosecution of sexual harassment/rape cases as offences which threaten the safety of women in its territory. However, since a sexual harassment complaint risks exposing discriminatory power dynamics at the workplace, the

¹⁰¹ *Id.*

¹⁰² Sexual Harassment of Women at the Workplace (Prevention, Prohibition and Redressal) Rules, 2013, Rule 7(4).

¹⁰³ See John, *supra* note 61.

¹⁰⁴ *Bidyut Chakraborty v. Delhi University*, 2017 SCC OnLine Del 9935.

¹⁰⁵ See *Id.*; See also *Ashok Kumar Singh v. University of Delhi*, 2017 SCC OnLine Del 9935 (Discussion on how the High Courts have tried to balance the right to cross-examination with safeguarding complainants from direct confrontation with the respondent).

disciplinary authority has no stake in achieving a satisfactory outcome in ICC inquiries. Though employers are required to ‘assist’ in the conduct of the inquiry,¹⁰⁶ the burden of proof is primarily on the complainant to produce evidence and prove her case, effectively making her a ‘prosecutrix’. This is even though in workplace settings, sexual harassment often happens behind closed doors, without any witnesses or footage of the incident. Therefore, similar to rape trials, a complainant may have little by way of formal evidence to prove a claim of sexual harassment, except for her statement against the respondent’s.¹⁰⁷

Additionally, there are no ‘rape shield’ equivalents under POSH e.g. the bar against evidence relating to the complainant’s character, as there is under the Indian Evidence Act, 1872 for criminal trials.¹⁰⁸ In such situations the ICC, particularly in an already sexist workplace, may rely upon stereotypes about the ‘ideal victim’ or the socio-economic background of the offender while reaching its conclusions, as courts do while adjudicating rape cases.¹⁰⁹

For example, one of the complainants from the NLSIU study who had pursued an ICC inquiry (‘Ms. X’) felt that she was not an ‘ideal victim’ for the ICC as she was popular and had actively vocalised her feelings about the incident.¹¹⁰ Further, that the ICC was sympathetic to the respondents, because they hailed from a lower socio-economic background (whereas X was relatively more privileged) and because the incident was perceived as not being sufficiently grave in nature. According to X, the respondents adopted such an intimidating attitude during the inquiry that one of the witnesses requested an in-camera examination. On the other hand, the ICC censured X even for making eye-contact with her witnesses, on the ground that she was attempting to influence them. X also claimed that the ICC failed to enforce the production of certain key evidence even though she had emphatically requested them to do so.

¹⁰⁶ Sexual Harassment of Women at the Workplace (Prevention, Prohibition and Redressal) Act, 2013, §19.

¹⁰⁷ Jessamine Mathew, *Do Courts Rely on Stereotypes Instead of Legal Frameworks in Cases of Sexual Harassment?*, 54(44) EPW ENGAGE (November 9, 2019), available at <https://www.epw.in/engage/article/sexual-harassment-workplace-false-complaints-stereotypes-posh-act> (Last visited on June 15, 2021).

¹⁰⁸ The Indian Evidence Act, 1872, §§146, 53A.

¹⁰⁹ See MRINAL SATISH, *DISCRETION, DISCRIMINATION AND THE RULE OF LAW: REFORMING RAPE SENTENCING IN INDIA* 34, 38, 42-43, 69 (Cambridge University Press, 2017) (Satish has argued that Indian courts have a tendency to construct a stereotypical rape victim and test the alleged victim’s behaviour against that of this stereotypical victim. The ‘ideal’ victim, whose testimony can be relied upon without corroboration, is one who is generally from a rural area, and from a traditional and conservative family background. She would be ashamed to speak about her chastity in court, and exhibit visible signs of emotional trauma, agony and suffering on account of rape. With the passing of rape law reforms, the site of stereotyping has shifted from the adjudication to the sentencing phase of the trial, resulting in widespread disparity in rape sentencing).

¹¹⁰ See Sahgal & Dang, *supra* note 27. (On a cautionary note regarding concerns of confidentiality and one-sided allegations with respect to the interviews reported in this paper.)

In the case of another complainant ('Ms. Y'), the ICC asked both Y and the respondent to submit a list of questions for 'cross-examination' which were to be posed by the ICC to the other party. Though the ICC did not allow direct cross-examination, Y was solely enjoined with the task of drafting the 'cross-examination' questions and preparing a set of formal 'evidence' to be presented to the ICC (similar to the prosecution in a criminal trial). According to Y the process was therefore mentally exhausting and she regretted not having any support person apart from the SHPA whom she could approach for advice or psychological support.¹¹¹ Rather, the respondent regularly complained to the ICC that by even confiding in close friends, Y was violating the confidentiality requirements under the SHARIC which further suppressed her ability to share her difficulties. Y also felt that the time she spent on the procedural formalities involved in the 'trial' had significant opportunity costs for her academic and extra-curricular activities. Therefore, there is a disjuncture between women's experiences of harassment and the evidence-based procedural inquiries conducted by ICC's,¹¹² which is similar to that experienced in a criminal trial.

1. Possibility of Judicial Appeal as a Procedural Hurdle

Another feature of the quasi-criminal trial under POSH is that an aggrieved respondent has the right to appeal to a court or tribunal, again 'in accordance with the provisions of the service rules' applicable to the institution.¹¹³ This is irrespective of the nature of the offence or the penalty imposed by the ICC. Additionally, many organisations have internal appeal mechanisms, which provide scope for the employer to reverse or modify the ICC's verdict. POSH Does not provide for any limit on the scope of appeal against ICC proceedings as is present in other ordinary civil proceedings, such as restricting re-appreciation of evidence, interference with the merits of the ICC's conclusions and so on.

It defeats the purpose of instituting ICCs as an alternative to judicial proceedings if ultimately a powerful respondent can drag the complainant to court. Further, the possibility of the verdict being overturned in appeal increases the level of procedural rigour stressed upon by the ICC. For example, in the case of Ms. X, she claimed that she was informally told by ICC members that they deliberately applied a higher standard than 'preponderance of probabilities' whilst evaluating her evidence so as to avoid a legal challenge. Though faculty member Z, who was a part of the ICC, denied the same, they acknowledged that certain

¹¹¹ Under the SHARIC 'Student Facilitators' may act as support persons during the inquiry proceedings. However, these are unlikely to be equipped with the same skills as a professional counsellor or legal practitioner trained in issues of sexual harassment. Further, in Y's case, she claimed that the Student Facilitator assigned to her colluded with the University authorities in forcing her to mediate with the respondent.

¹¹² Sahgal & Dang, *supra* note 27, at 54.

¹¹³ The Sexual Harassment of Women at the Workplace (Prevention, Prohibition and Redressal) Act, 2013, §18.

fixed procedural standards had to be insisted upon. This was to avoid the possibility of interim relief being granted in case the ICCs verdict was challenged in court.

In the case of Ms. Y, though the ICC found the respondent guilty, the verdict had to pass through three levels of appeal, firstly through the Registrar, secondly, the Vice-Chancellor and lastly, the Executive Council of the University. In the meanwhile, Y had to continue attending classes with the respondent. POSH envisions interim reliefs in the form of ‘transfer’ of the respondent, or granting of ‘leave’ to the complainant,¹¹⁴ which cannot be applied to cases of educational institutions wherein both parties have to fulfil class attendance requirements.¹¹⁵

Though the Executive Council confirmed the penalty awarded to the respondent, the ICC verdict was challenged before the High Court, and Y was impleaded in these proceedings. Y had to arrange for her own legal representation to defend the verdict, and was not offered any institutional support for the same. The High Court proceedings effectively amounted to a re- inquiry into the case for her, wherein the respondent raised the same arguments regarding the merits of her claim. This is even though the ordinary rule in service jurisprudence is that the High Court cannot act as a court of appeal against the substantive merits of orders passed in departmental enquiries, and is only supposed to examine whether procedural norms were followed.¹¹⁶ Ultimately Y compromised with the respondent out of court as she had graduated, and no longer wanted to incur the economic and psychological costs of fighting the case.

Y’s ordeal with the courts is not an isolated instance. In *Anita Suresh v. Union of India*,¹¹⁷ a public sector employee filed a writ petition challenging the benefit of doubt given to the respondent in the ICC claim filed by her. She claimed that the respondent had made sexual advances, including filthy remarks, towards her. The Delhi High Court not only dismissed her petition, but also declared her claim ‘false’ and imposed costs of Rs 50,000. The High Court further granted liberty to the employer to take action against her. The Court’s reasoning was that since the complainant had not specified the exact details of the remarks made (which she claimed was on account of reasons of modesty), did not remember the

¹¹⁴ Sexual Harassment of Women at the Workplace (Prevention, Prohibition and Redressal) Act, 2013, §12.

¹¹⁵ Regulation 5 of the University Grants Commission (Prevention, Prohibition and Redressal of Sexual Harassment of Women Employees and Students in Higher Educational Institutions) Regulations, 2015 provides that ICCs in higher educational institutions shall provide mandatory relief by way of relaxation of attendance requirement as required during the pendency of the complaint. It is further pertinent to note that §28 of POSH states that the Act is in addition to and not in derogation of any existing law. This creates a grey area with respect to any conflicts between the standards laid down in POSH and those provided in specialized delegated legislations like the aforementioned Regulations. However, I have refrained from discussing the Regulations in detail as the scope of this paper is confined to analysing the implementation of POSH.

¹¹⁶ *Union of India v. P. Gunasekaran*, (2015) 2 SCC 610.

¹¹⁷ *Anita Suresh v. Union of India*, 2019 SCC OnLine Del 9116; See Mathew, *supra* note 107, for a detailed case critique.

witnesses who were present at the time, and did not have a clean service record, the complaint could not be believed.¹¹⁸ Given the precedent on the High Court's restricted powers of review over departmental orders, the appropriate course of action would have been to recommend a re-inquiry. However, the Court not only went into the merits of the case, but made a finding against the complainant herself. This even though POSH requires that a separate internal inquiry be conducted before a complaint is adjudged as malicious.¹¹⁹

2. Lack of Support Structures

It is unclear how women who lack material and legal resources will be able to navigate the legal complexities mentioned above. The Vishaka guidelines had recommended that ICCs should be equipped with a special counselling service.¹²⁰ However POSH does not provide for this. Further, POSH bars parties from availing of legal representation during ICC proceedings.¹²¹ Though this prevents privileged respondents from using legal practitioners to intimidate the complainant or gain an upper hand during ICC proceedings, the complainant does not even have the option of a 'support person' or 'facilitator' under the law. She is left to face the respondent, and the ICC, which consists of persons hailing from the same hostile work environment, all by herself, as seen in the aforementioned case of Ms. Y. Hence there is little incentive for anyone to report harassment to ICCs, especially if the conduct is perceived as 'lesser' in degree, given that the complainant will have to undergo the inquiry in addition to her normal duties at her workplace.

3. Need to Reconceptualise 'Due Process'

It may be argued that there have to be some kind of 'due process' safeguards to protect respondents from 'false claims'. Further, that the above-mentioned examples are due to faulty implementation of an otherwise fair and just procedure. This argument ignores the critique that 'due process' itself is more often than not conceived from a patriarchal point of view, and is designed to maintain gender-based structures of power.¹²² In many ways, the due process under sexual harassment law is more rigorous than that required to be followed in a criminal trial. For example, under POSH, there is a limitation period of three months for

¹¹⁸ Anita Suresh v. Union of India, 2019 SCC OnLine Del 9116, ¶17, ¶18.

¹¹⁹ Sexual Harassment of Women at the Workplace (Prevention, Prohibition and Redressal) Act, 2013, §14(1).

¹²⁰ Vishaka v. State of Rajasthan, (1997) 6 SCC 241, ¶16(7).

¹²¹ Sexual Harassment of Women at the Workplace (Prevention, Prohibition and Redressal) Rules, 2013, Rule 7(6).

¹²² Feminist scholars have long since critiqued 'neutral' liberal-legalist procedural rules for protecting patriarchal interests, See generally Catharine A. Mackinnon, TOWARD A FEMINIST THEORY OF THE STATE (Harvard Univ. Press, 1991); Katharine T. Bartlett, *Feminist Legal Methods*, Vol. 103, HARV. L. REV., 829 (1990); Cynthia Farina, *Conceiving Due Process*, Vol. 3, YALE J.L. & FEMINISM (1990).

reporting sexual harassment, which can only be extended at the discretion of the ICC. This is even though Indian criminal law jurisprudence has acknowledged that delay in lodging complaints is natural in cases of sexual offences.¹²³

Moreover, in the Indian socio-legal context it is important to acknowledge that gender is only one of the axes of discrimination that may operate at the workplace. Women may also experience discrimination on account of their intersectional identities e.g. as a marginalised caste woman in a workplace populated by dominant-caste men, as Bhanwari Devi did. Consequently ‘due process’ is often skewed against Dalit Bahujan Adivasi (‘DBA’) women, who have lesser access to remedial mechanisms than dominant caste women, and whose narratives have been erased even within #MeToo discourse.¹²⁴

However, there are some cases in which the courts have taken a progressive view of the procedural and evidential standards required to prove a sexual harassment claim, so as to safeguard the interests of the complainant. In *State of Maharashtra v. Madhukar Narayan Mardikar*, the Supreme Court held that a complainant’s testimony is not liable to be discarded merely because she is a woman of ‘easy virtue’.¹²⁵ The Court made this observation in the context of upholding a departmental enquiry proving charges of sexual harassment made by a third-party civilian against a police officer, and the consequent order of dismissal passed against him. Notably, this decision was rendered long before the Vishaka guidelines were framed. Though the decision does not wholly deconstruct the binary between the stereotypical blameless complainant and a woman of ‘bad character’, it is still noteworthy in so far as it lays down a protective standard similar to the one available to complainants under rape law.

More recently, the High Court of Uttarakhand has held that it is acceptable for an ICC to rely solely on the testimony of the complainant for reaching a finding of culpability in the course of a departmental enquiry, without requiring corroboration, if it is otherwise reliable.¹²⁶ This was based on the reasoning that the standard of proof required for proving charges in an internal inquiry is one of ‘preponderance of probabilities’. Therefore, it follows that if the testimony of a prosecutrix can form the basis of conviction in a criminal trial for sexual assault charges, where the standard of proof required is ‘beyond reasonable doubt’, it can be relied upon in an ICC inquiry as well. The Court additionally observed that internal inquiries are not governed by the strict technicalities of the Indian Evidence

¹²³ *State of Punjab v. Gurmit Singh*, (1996) 2 SCC 384, ¶8.

¹²⁴ Nikita Sonavane & Disha Wadekar, *Dalit Bahujan Women Need to Reclaim Vishaka Guidelines — They Started Indian #MeToo First*, THE PRINT, February 25, 2021, available at <https://theprint.in/opinion/dalit-bahujan-women-need-to-reclaim-vishaka-guidelines-they-started-indian-metoo-first/611188/> (Last visited on June 15, 2021).

¹²⁵ *State of Maharashtra v. Madhukar Narayan Mardikar*, (1991) 1 SCC 57.

¹²⁶ *Bhuwan Chandra Pandey v. Union of India*, 2020 SCC OnLine Utt 268.

Act. Circumstantial evidence or hearsay may also be admissible if it is credible and has a reasonable nexus to the case.¹²⁷

The High Court further held that it is not open to the Courts to re-appreciate evidence or to act as a court of appeal against the findings of the ICC. The Courts can only set aside ICC verdicts if the findings are perverse or the prescribed procedure has not been followed.¹²⁸ Courts also cannot interfere with the punishment imposed in the course of an internal inquiry unless it is grossly disproportionate, and even then, the appropriate course of action would be to remand the matter for the re-consideration of the disciplinary authority.¹²⁹

The precedent created by this High Court decision is a significant step forward in reducing the probability of ICCs functioning in a ‘quasi-criminal’ manner, and restricting the scope for judicial interference with verdicts in favour of the complainant. However, the law may be interpreted or applied differently by other courts in subsequent decisions. Hence, the aforementioned precedents should be statutorily incorporated, so as to make sexual harassment inquiry procedures more “*calculated to encourage victims of harassment to come forward*” as prescribed in Meritor.

D. ABSENCE OF EMPLOYER LIABILITY

The focus on the ICC process as a means of proving the ‘truth’ of a complainant’s claim under the ‘desire-dominance’ paradigm of sexual harassment has led to a relative lack of emphasis on employer liability under POSH. Under POSH, an employer who fails to constitute an ICC or contravenes the provisions of the Act is only liable to a criminal penalty of a fine that may extend up to fifty thousand rupees,¹³⁰ which is perhaps nothing for high-net-worth organisations.

Additionally, making non-compliance with POSH provisions a criminal penalty only posits it as an offence against the *State*. Though Sections 357 and 357A of the Criminal Procedure Code 1973 provide for victim compensation, the award of such compensation is subject to a successful outcome in the criminal trial. Moreover, the quantum of compensation to be awarded is at the sole discretion of the Court or the relevant government authority. The victim cannot make a *suo motu* application for compensation as assessed in their own terms, except where the offender is untraceable or no trial takes place.¹³¹ There is no statutory provision entitling a victim to initiate a civil or tortious action against an employer claiming damages and/or injunctive relief for failing to implement the provisions of POSH.

¹²⁷ *Id.*, ¶¶35, 40-44.

¹²⁸ *Id.*, ¶35.

¹²⁹ *Id.*, ¶¶100-105.

¹³⁰ Sexual Harassment of Women at the Workplace (Prevention, Prohibition and Redressal) Act, 2013, §26.

¹³¹ Criminal Procedure Code, 1973, §357A (4).

Interestingly, even in *Vishaka*, the Supreme Court refrained from discussing the State's negligence in failing to protect Bhanwari Devi from the caste violence her work engendered, or awarding compensatory damages. Instead, the Court assumed that criminal adjudication was sufficient to impose liability.¹³² Ironically, the accused were eventually acquitted.¹³³

Further, POSH frames employer liability in negative terms, i.e. it has to be proved that there was 'contravention' of the Act. There is no separate cause of action or aggravated penalty for cases where the employer has actively abetted sexual misconduct or hindered the progress of an ICC inquiry. For example, in *Ms. Y's case*, she contended that the University authorities knowingly allowed the respondent's mother into the women's hostel wherein she attempted to compel Y into interacting with her. This has nothing to do with technical compliance with POSH or the SHARIC, but is a separate act of harassment in itself, calculated to intimidate Y into withdrawing from the proceedings. Subsequently, when the ICCs verdict was tabled for confirmation before the University's Executive Council, the University purportedly neglected to give the respondent notice of the same. The respondent used the lack of notice as a ground for challenging the verdict before the High Court.

There is also no positive obligation for the employer to materially incentivise internal ICC members for effectively performing their functions. Only NGO members are entitled to claim an allowance.¹³⁴ There is no additional compensation for the internal employees' effort, who must balance their regular work-related responsibilities alongside handling complaints.¹³⁵ Hence even impartial ICC members may be de-incentivised to devote much time or attention to handling complaints, especially if the internal organisational culture supports the respondents and is unlikely to reward them for their work. For example, in the NLSIU Study, previous ICC member 'Z' stated that while they believed that the functioning of ICCs was an important institutional responsibility, they often found the process unpleasant as it was time-consuming and also took an emotional toll. Z therefore opined that it was desirable that ICC members be compensated for the unpaid labour invested in ICC inquiries, and that this was likely to impact the amount of time they devote to the same.

Lastly, as discussed earlier, though employers are required to assist the conduct of an inquiry, they have no stake in obtaining a satisfactory outcome.

¹³² *Vishaka v. State of Rajasthan*, (1997) 6 SCC 241, ¶2.

¹³³ Pandey, *supra* note 2 (The trial court cited bizarre reasons for acquittal, stating *inter alia*, that men from a higher caste would not rape a lower-caste woman as their purity would have been defiled).

¹³⁴ Sexual Harassment of Women at the Workplace (Prevention, Prohibition and Redressal) Rules, 2013, Rule 3.

¹³⁵ This is perhaps reflective of how in a capitalist framework, conducting ICC inquiries is perceived more as a formalistic legal compliance obligation than an integral part of workplace duties as workplaces do not stand to directly 'profit' from it. Hence there is no provision under POSH for additionally compensating employees who are assigned to be part of ICCs.

Rather, the effective conduct of an ICC inquiry is contingent on the prompt reporting of the incident by the victim and the continued presence of the respondent at the organisation. As the #MeToo movement has revealed, a common response of men accused of sexual harassment is to simply resign from their position and take up employment elsewhere, which makes any relief sought by the complainant redundant. Further, there is no obligation for organisations to maintain a public record of those found guilty under the ICC proceedings. §16 of the POSH provides for confidentiality of the ICC proceedings, including the identity of the respondent.¹³⁶ In such a scenario, any inquiry conducted by the ICC will have no material or reputational consequence for the perpetrator where the perpetrator resigns from the workplace or where the complainant abandons the inquiry. Thus, POSH is designed to suppress public knowledge of employers' culpability in creating conditions that lead to sexual harassment. Instead, sexual harassment is reduced to shameful instances of individual men harassing individual women, to be buried in the organisation's confidential records.

An example of this can be found in the #MeToo sexual harassment allegations made by journalist Sandhya Menon against K.R. Sreenivas, the former head of the Hyderabad division of the Times of India; Gautam Adhikari, the former editor of the newspaper DNA, and Manoj Ramachandran, the former senior editor of the Hindustan Times. After the allegations were made, all three men resigned from their positions. Further, Sreenivas moved to Chennai, where he was hired by another publication. Though Sreenivas apparently submitted himself to an ICC investigation, Bennett Coleman and Co, which is the parent company of the Times of India, did not reveal the outcome as it was 'confidential'.¹³⁷ Therefore the respondent has the option of shifting to another workplace, and repeating the same behaviour in that workplace, without any repercussions.

V. ALTERNATIVE REMEDIES

A. *CHANGING THE CONCEPTUALISATION OF 'SEXUAL HARASSMENT' UNDER POSH*

A possible reason why the law chooses to adopt the 'desire-dominance' paradigm, in spite of its failings, is because under liberal jurisprudence, an issue is one of equality between the sexes only when it concerns features which are common to men and women. Consequently, sexual abuse is seen as a problem

¹³⁶ The proviso to §16 contains an ambiguously worded exception to the effect that "information may be disseminated regarding the justice secured to any victim of sexual harassment under this Act" without disclosing the identities of the complainant and witnesses. However, it does not clarify whether this exception extends to publicizing the name of the respondent as well.

¹³⁷ Menon ultimately filed a criminal case against Sreenivas, but according to the police, that investigation was likely to get hampered as he had changed cities, see Archana Chaudhary et al., *How the #MeToo Cases that Shook India have Played Out*, BLOOMBERG, October 12, 2019, available at <https://www.bloomberg.com/news/features/2019-10-12/-metoo-in-india-one-year-later-how-cases-played-out-for-accusers> (Last visited on June 15, 2021).

of sex, and not one of inequality, as it happens almost exclusively to women.¹³⁸ Therefore, sexual harassment law conceives of sexual harassment as a problem of unwanted sexual advances towards women and not as one of inequality between genders. This leads to remedial mechanisms that are ineffective in addressing gender discrimination at the workplace.

Schultz has argued that if the current paradigm is to change, the legal definition of sexual harassment has to be modified from one focusing solely on the 'sexual' nature of harassment, to one targeting *any* behaviour, sexual or non-sexual, that creates a hostile and discriminatory work environment based on gender.¹³⁹ This 'competence-centred' paradigm would investigate whether the alleged behaviour has the effect of forcing conformity with the dominant group's conception of the gender stereotypes associated with a particular job, and therefore undermining the complainant's competence.¹⁴⁰ Hence, under this new definition, persons of any gender who face harassment on account of not conforming to hegemonic standards of gendered behaviour¹⁴¹, including persons who experience harassment on account of their sexual orientation, can make a claim of harassment.¹⁴²

Further, under this paradigm the inquiry into whether harassment has occurred need not be one which requires the complainant to prove whether or not a particular conduct was 'unwelcome',¹⁴³ which in turn leads to an inquiry into the 'intent' of the respondent, whether such behaviour could be regarded as sexually inappropriate, etc. Instead, the central question would be whether the behaviour had the effect of denigrating the complainant's competence or enforcing gender stratification in the workplace.¹⁴⁴

¹³⁸ Mackinnon, *supra* note 122, at 243.

¹³⁹ Schultz, *supra* note 51, at 1762.

¹⁴⁰ *Id.*, 1774.

¹⁴¹ It is pertinent to note that Schultz uses the term 'masculinity' and argues that the competence-centred paradigm should investigate whether harassment creates pressure to conform to the harassers' image of 'manly competence.' However, this may not account for examples such as cisgender women harassing persons of another gender (particularly transgender or non-binary persons) for not conforming to hegemonic standards of femininity. Hence the I have opted to use the more neutral term 'gendered behaviour'.

¹⁴² At this stage, this paper does not propose to comment on whether inquiries into sexual desire should become *completely* irrelevant, or whether sexual misconduct should be labelled as more severe than other forms of gender-based discrimination. These issues may be explored in future scholarship.

¹⁴³ Schultz, *supra* note 51, at 1802.

¹⁴⁴ Concerns may be raised that allowing for a gender-neutral paradigm will incentivize men to 'misuse' sexual harassment redressal policies against women. However, the focus on inquiring into gender-based animus under the competence-centred paradigm will make such 'misuse' harder than under the desire-dominance paradigm which merely pits two competing versions of sexual misconduct against each other; *Id.*,

1. Locating alternate Paradigms of Sexual Harassment under Indian Law

It may be argued that both the Vishaka guidelines and POSH already recognise, or at least contain the potentiality for a conceptualisation of sexual harassment which is based on gender discrimination. The Supreme Court in Vishaka acknowledged that protection from sexual harassment is a broader component of the guarantee of gender equality under Articles 14 and 15 of the Constitution.¹⁴⁵ The Vishaka guidelines enjoin employers to generally ensure that women have appropriate work conditions and are not disadvantaged in connection with their employment.¹⁴⁶ Similarly, POSH mandates employers to formulate an internal policy for the prevention of sexual harassment, which is intended to “promote gender sensitive safe spaces and remove underlying factors that contribute towards a hostile work environment against women”.¹⁴⁷

However the Vishaka guidelines treat the creation of a hostile work environment only as a consequence of unwelcome sexual acts, not as a causative factor thereof.¹⁴⁸ Similarly, POSH only makes a hostile work environment actionable if it “occurs or is present in relation to or is connected with” any act of sexual harassment.¹⁴⁹ This can be broadly interpreted to mean that there is scope for making employers liable for the creation of a hostile work environment only if the complainant first proves that sexual misconduct has taken place. Reconceptualising sexual harassment under Indian law requires that the creation of a hostile work environment in itself should be made actionable.

Changing the ‘desire-dominance’ paradigm under POSH to a competence- centred/‘hostile work environment’ based paradigm would also entail providing civil remedies against employers who fail to prevent the creation of such an environment or actively contribute to it. The adjudication of such civil remedies would necessarily have to be done by an external body. The Supreme Court has on various occasions given directions for the proper implementation of the Vishaka guidelines.¹⁵⁰ Therefore one remedy is to approach the High Courts under Article 226 of the Constitution or the Supreme Court under Article 32, for the issuance of appropriate writs for the prevention and redressal of a hostile work environment.

¹⁴⁵ Vishaka v. State of Rajasthan, (1997) 6 SCC 241, ¶¶7, 9.

¹⁴⁶ Vishaka v. State of Rajasthan, (1997) 6 SCC 241, ¶¶(16)(3)(d).

¹⁴⁷ Sexual Harassment of Women at the Workplace (Prevention, Prohibition and Redressal) Rules, 2013, Rule 13(a).

¹⁴⁸ Vishaka v. State of Rajasthan, (1997) 6 SCC 241, ¶16.2.

¹⁴⁹ Sexual Harassment of Women at the Workplace (Prevention, Prohibition and Redressal) Act, 2013, §3(2).

¹⁵⁰ Medha Kotwal Lele v. Union of India, (2013) 1 SCC 297; Seema Lepcha v. State of Sikkim, (2013) 11 SCC 641.

2. Recent Developments towards an Alternate Paradigm

Recently, the Supreme Court in *Nisha Priya Bhatia v. Union of India* (‘Nisha Priya Bhatia’) has laid down a landmark precedent to the effect that a sexual harassment complainant would be entitled to claim compensation for violation of the Vishaka guidelines as part of her fundamental rights under Articles 14 and 21 of the Constitution. This is *irrespective* of the outcome of the internal inquiry, though the Court observed that the petitioner/appellant would have been entitled to a higher compensation amount if the charges were duly proved.¹⁵¹

The background of the case was as follows: the appellant, a senior official working for India’s foreign intelligence agency RAW, had filed a complaint in 2007 (i.e. prior to the enactment of POSH) accusing agency chiefs of demanding sexual favours in exchange for promotion, and persecuting her when she refused to comply. The ICC was constituted *ultra vires* the Vishaka guidelines, by the very person who had been accused of harassment. When the appellant refused to participate in the process citing violation of the Vishaka guidelines, the ICC by way of an *ex-parte* inquiry exonerated the respondents.

The appellant subsequently attempted to commit suicide outside the Prime Minister’s Office in 2008. Thereafter, possibly due to the bad press resulting from the incident (which the Court’s decision implies¹⁵²), the-then Prime Minister constituted an ‘External Committee’ to inquire into the case. The External Committee upheld the ICC’s finding that no acts of sexual harassment were proved. However, the Committee found that RAW had committed ‘gross violation’ of the Vishaka guidelines whilst conducting the inquiry. The Court, taking notice of the same, held that:

“102. The scheme of the 2013 Act, Vishaka Guidelines and Convention on Elimination of All Forms of Discrimination Against Women (CEDAW) predicates that a non-hostile working environment is the basic limb of a dignified employment. The approach of law as regards the cases of sexual harassment at workplace is not confined to cases of actual commission of acts of harassment, but also covers situations wherein the woman employee is subjected to prejudice, hostility, discriminatory attitude and humiliation in day to day functioning at the workplace.... The factual matrix of the present case is replete with lack of sensitivity on the part of Secretary (R) qua the complaint of sexual harassment. To wit, time taken to process the stated complaint and improper constitution of the first Complaints Committee (intended or unintended) in violation of the Vishaka Guidelines, constitute an appalling conglomeration of undignified treatment

¹⁵¹ *Nisha Priya Bhatia v. Union of India*, (2020) 13 SCC 56, ¶104, ¶106.

¹⁵² *Id.*, ¶99.

and violation of the fundamental rights of the petitioner, more particularly Articles 14 and 21 of the Constitution.

104. In the present case, the petitioner had faced exceedingly insensitive and undignified circumstances due to improper handling of her complaint of sexual harassment. Regardless of the outcome of the inquiry into the stated complaint, the fundamental rights of the petitioner had been clearly impinged. Taking overall view of the circumstances, we consider this to be a fit case to award compensation to the petitioner for the stated violation of her right to life and dignity, quantified at Rs.1,00,000 (Rupees one lakh only). Had it been a case of allegations in the stated complaint of the petitioner been substantiated in the duly conducted inquiry (which the petitioner had failed to do), it would have been still worst and accentuated violation of her fundamental rights warranting suitable (higher) compensation amount.” (emphasis supplied)

Therefore, Nisha Priya Bhatia is a seminal decision insofar as it breaks away from the ‘desire-dominance’ paradigm by recognising that sexual harassment extends beyond the conventional definition of ‘unwelcome sexual acts’ to acts, which create a discriminatory, hostile, and prejudicial environment. The words ‘prejudice’ and ‘discriminatory’ have been used broadly and can hence be interpreted to include the intersectionality of gender with caste, class and sexuality-based discrimination within its fold. The decision also states that the victim can claim compensation for violation of the Vishaka guidelines as a matter of constitutional right, regardless of the ‘intent’ of the employer in committing such violation.

However, it is worth noting that in the facts of Nisha Priya Bhatia, the appellant was compulsorily retired under the RAW (Recruitment, Cadre & Services) Rules, 1975 on account of being ‘exposed’ as an intelligence officer. The Court upheld the order of retirement without analysing how such premature dismissal from service might constitute a form of victimisation in hostile workplaces, and effectively act as a gag on any woman intelligence official who wishes to complain of sexual harassment. Therefore, the Court did not apply its radical understanding of sexual harassment to enforcing the remedy actually sought by the appellant.¹⁵³

¹⁵³ For a more extended critique of the decision, see Megha Mehta, *Guest Post: Nisha Priya Bhatia vs Union of India – Redefining the Scope of Sexual Harassment?*, INDIAN CONSTITUTIONAL LAW AND PHILOSOPHY, May 18, 2020, <https://indconlawphil.wordpress.com/2020/05/18/guest-post-nisha-priya-bhatia-vs-union-of-india-redefining-the-scope-of-sexual-harassment/> (Last visited on November 8, 2021).

Additionally, the decision in Nisha Priya Bhatia does not mean that pursuing a constitutional remedy is the most convenient recourse in all cases. Though Nisha Priya Bhatia certainly expands the scope of employer/institutional liability for non-compliance with the Vishaka guidelines, it does not provide any remedy for holding the individual respondent culpable for non-sexual acts of discrimination. A subsequent High Court decision has held that notwithstanding Nisha Priya Bhatia gender-based discrimination *per se* is not actionable under POSH, unless it is accompanied by direct or implied sexual advances.¹⁵⁴ Hence, it would provide more clarity and uniformity if the definition of sexual harassment in POSH itself was expressly modified from one targeting only unwanted ‘sexual’ behaviour, to one penalising all forms of behaviour that contribute to workplace discrimination based on gender.¹⁵⁵

Further, the appellant in Nisha Priya Bhatia had the benefit of an External Committee Report prepared under the sanction of the Prime Minister’s Office to support the allegations concerning improper handling of her complaint. In more low-profile and factually contentious cases, the Courts may decline to entertain questions of disputed facts in the exercise of their writ jurisdiction.¹⁵⁶ It would also not be logistically feasible for the Courts to keep setting up ad-hoc external Commissions to conduct inquiries into errant employers and workplaces, in every such case. There is a need for permanently constituted institutions that can conduct the function of fact-finding currently performed by internal complaint mechanisms, and neutrally adjudicate claims of employer liability.

B. REPLACING ICCS WITH AN EXTERNAL INQUIRY MECHANISM

In India, there is no independent body equivalent to the Equal Employment Opportunity Commission (‘EEOC’) in the United States, which can investigate employment discrimination or unlawful employment practices.¹⁵⁷

¹⁵⁴ Prasad Pannian v. Central University of Kerala, 2020 SCC OnLine Ker 6550, ¶17, ¶18 (The Division Bench of the High Court referred to an earlier finding of a Single Judge Bench in K.P. Anil Rajagopal v. State of Kerala, 2017 SCC OnLine Ker 17727 which had also held that sexual harassment must necessarily involve a ‘sexual’ offence to be actionable under POSH).

¹⁵⁵ It may be argued that many workplaces have incorporated expanded definitions of harassment even in the present scenario. However, even if a workplace provides for a sexual harassment policy which covers acts of discrimination above and beyond POSH, complainants may face hurdles in litigating their claim in the event the decision is appealed before a court. Though the decision of the Delhi High Court in B.N. Ray v. Ramjas College, 2012 SCC OnLine Del 2976 (upholding a gender-neutral sexual harassment policy) indicates that institutions have the autonomy to frame their own policies, the legal validity of such policies would be strengthened if the text of POSH itself included an expanded definition.

¹⁵⁶ State of Orissa v. Binapani Dei, AIR 1967 SC 1269.

¹⁵⁷ The EEOC is a US federal agency which is responsible for the enforcement of federal laws against employment discrimination and harassment, for example Title VII of the Civil Rights Act of 1964. It has the authority to investigate discrimination claims against employers covered under the law, including sexual harassment claims, and file lawsuits against employers if it arrives at a finding that discrimination has occurred, *see* US EQUAL EMPLOYMENT OPPORTUNITY

POSH provides for ‘Local Committees’ (‘LC’) for every village or urban ward to conduct inquiries in workplaces where less than 10 employees are employed, or which employ persons working in the unorganised sector, or in cases where the employer is the respondent. The LC is to be constituted by the district administrative officer, who is a civil servant.¹⁵⁸ §7 of POSH provides for the composition of LCs as follows:¹⁵⁹

“The Local Committee shall consist of the following members to be nominated by the District Officer, namely: —

A Chairperson to be nominated from amongst the eminent women in the field of social work and committed to the cause of women;

One Member to be nominated from amongst the women working in block, taluka or tehsil or ward or municipality in the district;

Two Members, of whom at least one shall be a woman, to be nominated from amongst such non-governmental organisations or associations committed to the cause of women or a person familiar with the issues relating to sexual harassment, which may be prescribed:

Provided that at least one of the nominees should, preferably, have a background in law or legal knowledge:

Provided further that at least one of the nominees shall be a woman belonging to the Scheduled Castes or the Scheduled Tribes or the Other Backward Classes or minority community notified by the Central Government, from time to time;

The concerned officer dealing with the social welfare or women and child development in the district, shall be a member *ex officio*.”

Therefore, the LC has a much more impartial composition than the ICC. The inclusion of members who are not just women, but are committed to the cause of women’s issues and sexual harassment, ensures a more sensitised committee. Further, the provision for a woman representative from the SC/ST

COMMISSION, *Overview*, available at <https://www.eeoc.gov/overview> (Last visited on October 15, 2021).

¹⁵⁸ Sexual Harassment of Women at the Workplace (Prevention, Prohibition and Redressal) Act, 2013, §6.

¹⁵⁹ Sexual Harassment of Women at the Workplace (Prevention, Prohibition and Redressal) Act, 2013, §7(1).

community acknowledges the need for considering intersectionality in the adjudication of sexual harassment claims.

Thus, LCs may be considered as an alternative to the current workplace ICC system. The jurisdiction of LCs under POSH may be extended to all workplaces in a given local area, as a replacement for ICCs. There is also scope for making the LC more inclusive by providing for representation from the queer community, student groups, trade unions/employee associations, domestic workers' unions and other vulnerable groups. The composition of LCs could also be made flexible taking into account the prevalence of a particular trade or industry in a given local area. Importantly, the PSC Report had already recommended the inclusion of representatives from the National and State Commissions for Women in LCs in cases where the respondent is an influential government servant or a high-ranking official from a private organisation such that even the LC cannot adjudicate the complaint impartially.¹⁶⁰

Unfortunately, in the present scenario the constitution and functioning of LCs under POSH has been poorly implemented. In a study conducted by the Martha Farrell Foundation in 2018¹⁶¹ out of all 655 districts in the country, only twenty-nine percent reported that they had constituted LCs. Fifty-six percent of the districts did not even respond to the Foundation's RTI queries on this aspect. Out of the districts which had reported the constitution of LCs, only sixteen percent reported that they had a female Chairperson, and eight percent responded that they have a NGO representative. A staggering ninety-seven percent of the districts with LCs failed to provide information on SC/ST/OBC/minority community membership. The majority of the L's also appeared to have not conducted any orientation program for their members. Hence though on paper LCs have scope for being more impartial and sensitised bodies compared to ICCs, governments have failed to seize on this potentiality. Since LCs are the only redressal option available to women in the informal sector (such as factory labourers and domestic workers), their abysmal functioning has increased such workers' vulnerability to sexual harassment.¹⁶² These aspects will have to be addressed if the LCs are to function as a credible alternative to ICCs.

Constitution of external tribunals as a replacement for ICCs and LC's

¹⁶⁰ DEPARTMENT-RELATED PARLIAMENTARY STANDING COMMITTEE ON HUMAN RESOURCE DEVELOPMENT, *supra* note 72, ¶9.6.

¹⁶¹ Martha Farrell Foundation, *Who Safeguards a Woman's Right to a Safe Workplace?: A Study of Local Committees Across India Using RTI Data*, October 2018, available at https://www.marthafarrellfoundation.org/uploads/pdf_files/15553028_38_RTI%20Study%20PDF.pdf (Last visited on June 15, 2021).

¹⁶² Jayshree Bajoria, 'No #MeToo for Women Like Us': *Poor Enforcement of India's Sexual Harassment Law*, HUMAN RIGHTS WATCH, October 14, 2020, <https://www.hrw.org/report/2020/10/14/no-metoo-women-us/poor-enforcement-indias-sexual-harassment-law> (Last visited on June 15, 2021).

Even assuming that LC's may be a better substitute to ICCs, these are only a surrogate inquiry mechanism. There is also a need for an impartial institution that can take cognizance of gender discrimination at the workplace and implement measures for remedying the same. The Justice JS Verma Committee Report on law reforms against sexual violence had recommended constituting a separate Employment Tribunal for inquiring into cases of sexual harassment, to avoid the suppression of complaints by ICCs.¹⁶³ Such a Tribunal may be set up as an alternative to both ICCs and LCs. Given the geographical and cultural diversity of India, it is preferable that regional Employment Tribunal or Employment Commissions should be constituted, with local divisions/LCs under their supervision. Such Tribunals in turn may be placed under the supervision of an overarching national regulator such as the Ministry of Labour and Employment.¹⁶⁴ The Tribunals should be empowered to take *suo motu* cognizance of gender discrimination at workplaces, take action against errant employers, and adjudicate claims for the grant of compensation/damages and other reliefs to aggrieved complainants.

However, needless to say, a mere amendment in the legal definition of sexual harassment and the constitution of external bodies will not lead to a radical change in status quo. The setting up of external bodies will inevitably have to go hand-in-hand with re-defining sexual harassment under POSH and bringing about greater gender sensitisation at workplaces. Otherwise, they will be prone to the same flaws in their functioning as ICCs.

The #MeToo movement reveals the failure of external committees in the status quo. A notable example is the case of the sexual harassment allegations against Rahul Johri, the CEO of BCCI, the governing body for cricket in India. The Committee of Administrators heading BCCI at that time appointed a panel of three external members to investigate the claim. One of the external members publicly arraigned BCCI for its mishandling of the issue, remarking that it had tried to settle the matter without following due procedure. However, this observation was censured from the final report, in which the committee exonerated Mr. Johri.¹⁶⁵ Instead, it was recommended that Mr. Johri should undergo 'gender sensitivity counselling' for his 'inappropriate behaviour'.¹⁶⁶ This shows the disjuncture that arises from the existing definition of sexual harassment—a person's behaviour, even though denigrating to women may not legally satisfy the level of severity required to prove a charge of harassment. Further, even if an external committee conducts

¹⁶³ JUSTICE J.S. VERMA COMMITTEE, *supra* note 76, at 130-131.

¹⁶⁴ It is pertinent to note that 'welfare of labour' is a subject under the Concurrent List of the Seventh Schedule to the Constitution. Therefore, both the Parliament and the State legislatures may frame laws on this subject; however laws framed by the Parliament will take precedence.

¹⁶⁵ G. Viswanath, *Gowda Blames BCCI and CoA: 'They have not Handled the Issues Raised as Per Law'*, THE HINDU, November 22, 2018, available at <https://www.thehindu.com/sport/cricket/gowda-blames-bcci-and-coa/article25569381.ece> (Last visited on April 17, 2020).

¹⁶⁶ ET Bureau, *BCCI CEO Rahul Johri Cleared in Sexual Harassment Case, CoA Differs on Probe Findings*, THE ECONOMIC TIMES November 22, 2018, available at <https://economictimes.indiatimes.com/news/sports/bcci-ceo-rahul-johri-cleared-in-sexual-harassment-case-free-to-resume-office/articleshow/66735377.cms> (Last visited on April 17, 2020).

the inquiry, they cannot hold employers culpable for attempting to shield harassers from formal proceedings.

In the case of sexual harassment allegations against senior journalist Vinod Dua, his employing organisation (The Wire) constituted an external committee as neither the complainant nor Mr. Dua were employees of *The Wire* at the time the incident took place, and Mr. Dua had joined *The Wire* subsequently. However, the committee suspended its probe after both parties raised objections regarding the procedure to be followed by the committee. According to the committee, Dua was unwilling to cross-examine or be cross-examined by the complainant. On the other hand, the complainant expressed reservations about the manner in which the committee was constituted, and the fact that it would be framing its own procedures.¹⁶⁷

It may be said that in the above two instances, that external proceedings failed because they were initiated by the workplace itself, and thus these amounted to an extension of ICC proceedings. A State-appointed body which follows uniform procedures and can take action against workplaces is probably more likely to inspire confidence in complainants. However, women may still remain hesitant to report employers for gender discrimination out of fear of the negative implication it would have for workplace relations. Further, women are bound to experience structural barriers such as caste and class even while approaching an external Tribunal or Commission to investigate claims of sexual harassment.¹⁶⁸ Inquiries undertaken by an external body may be equally capable of simulating an adversarial experience for complainants. Additionally, allegations against constitutional functionaries such as judges and members of the legislature, and investigating conditions of gender discrimination in such 'workplaces' of national importance, may require a separate procedure given their stature.

Hence, incentivising employees to report and pursue sexual harassment claims also requires a progressive relook at the procedures stipulated under sexual harassment laws, much in the same way as rape law reforms have been carried out in the past few decades. This would entail consideration of a system for filing anonymous complaints, removal of the limitation period for filing a claim, reversal of the burden of proof in favour of the complainant and bars to

¹⁶⁷ The Wire Staff, *External Committee in Dua Matter 'Unable to Proceed Further', Dissolves Itself*, THE WIRE.IN December 31, 2018, available at <https://thewire.in/gender/external-committee-in-dua-matter-unable-to-proceed-further-dissolves-itself> (Last visited on April 17, 2020).

¹⁶⁸ Even the #MeToo movement largely excluded the experiences of workers in the informal sector, which primarily consists of DBA women. These women have reported finding external bodies such as LC's inaccessible and difficult to approach. In the case of domestic workers, POSH mandatorily requires LC's to forward *prima facie* cases of sexual harassment to the police, even though women routinely face humiliation and mistrust at police stations. For such workers, the cost of participating in legal proceedings is prohibitive, especially given that they stand to lose their jobs/earnings if they have to spend too much time on such proceedings. These problems are likely to occur even if ICCs/LCs are replaced with an external tribunal mechanism., see Bajoria, *supra* note 162; Sonavane & Wadekar, *supra* note 124.

inquiries about the complainant's sexual history as are present under rape shield laws. Inevitably, such pro-complainant incentives would have to be balanced with the argument about the need for 'due process' safeguards under sexual harassment prevention mechanisms. Further, any external tribunal mechanism must provide for the adequate representation of socio-economically vulnerable groups in its composition, so that workers from these groups are encouraged to come forward. Modifications in the law and remedial mechanisms would also have to be accompanied by a parallel campaign for promoting gender sensitisation and diversity at the workplace.¹⁶⁹ External bodies may have to devise mechanisms for the *suo moto* monitoring of workplaces, for example surveys like the NLSIU Study, to capture the true state of affairs and take action accordingly.

C. RESTORATIVE JUSTICE MECHANISMS

A remedy for reducing the procedural burden on complainants in sexual harassment claims could be to shift from the current adversarial punitive mechanism to restorative justice. This is a non-adversarial mechanism typically involving mediated conferences in which victims, offenders and community members participate with informed consent. The conference provides a platform for the victim to engage in dialogue with the offender and other community members about the impact of the act. It also provides the offender an opportunity to accept some minimum accountability in the form of therapy, community service, community monitoring of the offender's behaviour, etc. Trained facilitators guide the dialogue. Such conferencing may take place at any stage - as a 'warning' before a formal claim is instituted, as an alternative to a formal inquiry, or as a means for conciliation between parties post the completion of an inquiry.¹⁷⁰

In the United States, the Campus PRISM Project, coordinated by the University of San Diego Centre for Restorative Justice, is one such initiative which has been working on reducing gender-based violence in educational institutions through the restorative approach. Under the PRISM approach, restorative justice also includes the organization of 'prevention circles' for building safe spaces. Such circles may be used for encouraging discussions on issues pertaining to sexual harassment in a specific local context, and conducting simulations to train facilitators in bystander intervention, for e.g. discussing measures to prevent sexual

¹⁶⁹ This would include for example, initiatives by workplaces to increase diversity in hiring and promotion, and provision of equal pay and benefits to women and LGBTQ workers. See Vicki Schultz, *Reconceptualizing Sexual Harassment, Again*, YALE LAW JOURNAL FORUM (2018), available at <https://www.yalelawjournal.org/forum/reconceptualizing-sexual-harassment-again> (Last visited on November 8, 2021).

¹⁷⁰ Mary Koss & Mary Achilles, *Restorative Justice Responses to Sexual Assault*, NATIONAL ONLINE RESOURCE CENTER ON VIOLENCE AGAINST WOMEN 5-8, 2008, available at https://vawnet.org/sites/default/files/materials/files/2016-09/AR_RestorativeJustice.pdf (Last visited on June 16, 2021).

harassment at campus parties.¹⁷¹ Prevention circles and other forms of community conferencing might be particularly useful in cases where a victim wishes to seek redressal of their concerns without holding a specific individual liable (e.g. where an employee wishes to internally highlight organisational practices that lead to a hostile work environment), or where the organisation itself seeks to redress discriminatory practices.

It may be argued that restorative justice is an avenue for easy ‘settlement’ of claims. However, a crucial difference between restorative justice and mediation/private negotiations is that the former is primarily used in cases where the offender admits to having engaged in harmful conduct (though they may not fully grasp its impact) and is prepared to take responsibility for the same¹⁷² This is as opposed to mediation, where an offender may informally admit their guilt to avoid sanctions, but not take any concrete steps towards accountability or behavioural change. In this respect, restorative justice also differs from traditional disciplinary/punitive models of ‘passive offender accountability’ (i.e., where punishment is delivered but the resulting change is not monitored). Instead, it cultivates ‘active’ offender accountability wherein the offender is bound to repair the harm caused by them and demonstrate change.¹⁷³ Further, unlike mediation, restorative conferencing entails following distinct guidelines for creating a safe and non-coercive environment.¹⁷⁴ Restorative justice facilitators meet with participants beforehand for consultation on the method through which dialogue should take place, and to prepare them for the dialogue.¹⁷⁵

Therefore, restorative justice scholars argue that it leads to greater offender accountability and also provides a means for community reintegration of the offender.¹⁷⁶ This is as opposed to the current scenario, where sexual harassment allegations may result in an informal ‘public apology’ or self-imposed ‘community boycott’ of the offender, without the offender being held formally accountable for their actions.¹⁷⁷ In studies conducted on restorative conferencing

¹⁷¹ David Karp et al., A REPORT ON PROMOTING RESTORATIVE INITIATIVES FOR SEXUAL MISCONDUCT ON COLLEGE CAMPUSES, UNIVERSITY OF SAN DIEGO at 15, 16, 2016, available at https://www.sandiego.edu/soles/documents/center_restorative-justice/Campus_PRISM_Report_2016.pdf (Last visited on June 16, 2021).

¹⁷² *Id.*, at 29.

¹⁷³ *Id.*, at 30.

¹⁷⁴ *Id.*, at 28-29.

¹⁷⁵ *Id.*, at 28-29.

¹⁷⁶ *Id.*, at 30.

¹⁷⁷ Post Me-Too, there has been increased debate in the public sphere about boycotting businesses and/or media content in which alleged sexual harassers are involved, or boycotting the harassers themselves, for example by terminating their membership from professional associations. This is even if the alleged harasser has not been legally tried or convicted for their conduct, see Sruthi Ganapathy Raman, *Backing #MeToo, Film Workers' Body says it has Sent Notices to Alok Nath, Vikas Bahl, Nana Patekar*, SCROLL.IN, October 11, 2018, available at <https://scroll.in/reel/897764/backing-metoo-film-workers-body-says-it-has-sent-notices-to-alok-nath-vikas-bahl-nana-patekar> (Last visited on September 17, 2021); Grace Dobush, *How a #MeToo Scandal Led to Calls for a Boycott of Topshop*, FORTUNE, October 26, 2018, available at <https://fortune.com>.

between sexual assault victims and perpetrators, post-conferencing feedback has been overwhelmingly positive, reporting decreased post-traumatic stress for the victim and an increased likelihood of the offender admitting responsibility and submitting themselves to counselling measures.¹⁷⁸

However, this is not to suggest that measures such as restorative conferencing which have been successfully carried out in foreign jurisdictions can be automatically imported in the Indian context. The use of restorative justice carries the risk that in case the offender refuses to accept responsibility or backtracks after the parties have reached a consensus, the complainant will have to return to an adversarial mechanism. Further, it may fall into the same ‘desire- dominance’ trap of pathologizing the source of harassment to an errant individual rather than the underlying structural environment.¹⁷⁹ Indeed, one of the weakest points of restorative justice is formulating the ‘community’ sought to be represented¹⁸⁰- what if the community itself endorses the offender’s behaviour? It is possible that the complainant’s own perception of the perpetrator’s social capital and the ‘severity’ of an incident, as reinforced by members of the community, may influence them to ‘settle’ for a particular outcome even if that is not optimum for preventing the recurrence of harmful behaviour. Caste, class and gender hierarchies are likely to play a role in influencing these decisions.

In the NLSIU study, one of the interviewees who had pursued mediation, Ms. ‘A’ agreed to a public apology as she was friends with her harasser. However, she later regretted the same as she felt that she had allowed her concern for his future to influence her decision to ‘settle’ for a ‘lesser’ sanction. ‘A’ also felt that her harasser had not suffered any social repercussions for his acts. Rather the fact that she chose to ‘settle’ for an apology led to rumours doubting the veracity of her story. Another interviewee, Ms. ‘B’, similarly reported that she had agreed to a public apology so as to avoid the stigma of ‘ruining the future’ of her harasser. The harasser also voluntarily resigned from his positions of responsibility on various student-run committees. However, B nevertheless felt dissatisfied as the NLSIU student community treated the incident as a ‘one-off’ and the fact that she had

com/2018/10/26/metoo-scandal-philip-green-topshop/ (Last visited on September 17, 2021); Roxy Szal, *Elizabeth Warren Joins Growing #MeToo Boycott of Terranea Resort*, MS. MAGAZINE, July 25, 2019, available at <https://msmagazine.com/2019/07/25/elizabeth-warren-joins-growing-metoo-boycott-of-terranee-resort/> (Last visited on September 17, 2021); Many alleged harassers have released public statements after being called out for their conduct. However, a study has found that the majority of these statements were full of denials and defenses, and true ‘apologies’ were relatively rare. Further, forty-four percent of the apologies were conditional apologies which implicitly attribute some blame to the victim, see Charlotte S. Alexander, *Sorry (Not Sorry): Decoding #MeToo Defenses*, vol. 99(2), TEXAS LAW REVIEW 343, 366-67 (2020).

¹⁷⁸ *Id.*, at 31-32; Mary Koss et al., *Campus Sexual Misconduct: Restorative Justice Approaches to Enhance Compliance With Title IX Guidance*, 15(3) TRAUMA AND VIOLENCE 242, 248 (2014).

¹⁷⁹ Barbara Hudson, *Restorative Justice: The Challenge of Sexual and Racial Violence*, 25(2) JOURNAL OF LAW AND SOCIETY, 252 (1998).

¹⁸⁰ *Id.*, at 251.

agreed to an apology led her peers to assume that she did not care about the incident anymore. These testimonies indicate that opting for a non-punitive outcome may dilute community perception of the severity of the conduct.

It is pertinent to note that A and B reached these outcomes through mediation with their harassers, whereas restorative justice follows a more regulated model. Further, community members who participate in restorative justice conferences and listen to victims' testimonies may be persuaded to recognize the role of the workplace culture in enabling sexual harassers. This is as opposed to mediation/ICC inquiries, wherein a confidentiality barrier is imposed between the complainant and the larger community that prevents the former from articulating her experiences. However, if the community cannot be relied upon to effectively express disapproval of the offender's actions and support the victim, restorative justice risks the same outcome as informal mediation processes. Successfully implementing restorative justice in India would require conducting localised experimental studies to examine whether it can be incorporated into domestic socio-legal conditions.

D. INTEGRATED DISPUTE RESOLUTION SYSTEMS

From the above discussion, it is apparent that the success of any procedural reform is ultimately contingent upon changes in the structures and attitudes of those implementing the procedures. However, till the time such an attitudinal shift takes place, it is important to have procedures that are cognizant of the varying needs and difficulties of sexual harassment survivors. Rowe has argued that given the wide range of institutions, there is no 'perfect' system that will be compatible with all organisations. Further, workplaces have to take into account the wide range of interests of complainants; especially those who do not wish to pursue formal grievance procedures.¹⁸¹ This is particularly significant given that formal evidence-based procedures may be ineffective in dealing with covert forms of discrimination, and employees will always fear some degree of reprisal.¹⁸² Hence employers should adopt an *integrated* dispute resolution system which provides the complainant a range of options consisting of conventional rights-based adjudication, mediation, or informal intervention by an external ombudsperson. The external ombudsperson can also provide counselling support. Such measures have to be implemented alongside ongoing prevention and sensitization programs.¹⁸³

While this paper recommends the replacement of ICCs with alternatives such as external tribunals, it is desirable that such external bodies should also offer an integrated range of options to complainants. The regional level Tribunals

¹⁸¹ See Mary P. Rowe, *Dealing with Harassment: A Systems Approach*, in *SEXUAL HARASSMENT IN THE WORKPLACE: PERSPECTIVES, FRONTIERS, AND RESPONSE STRATEGIES, WOMEN AND WORK* Margaret Stockdale ed., 241 (1996).

¹⁸² *Id.*, at 250.

¹⁸³ *Id.*

or municipal level LCs, as the case may be, can be divided into different departments depending upon the functions performed by them. One department can act as a support centre for offering counselling and legal resources, and undertake sensitisation of workplaces. A separate inquiry wing can be constituted for adjudication of sexual harassment claims at the complainant's request. Another department of trained facilitators may be set up to undertake restorative conferencing at any stage of an inquiry proceeding, with the power to make legally enforceable settlements and impose civil sanctions in case of non-compliance by the offender. However, prior to formulating these mechanisms, it is important that the State should gather more data on the prevalence of sexual harassment in workplaces across India and the subjective experiences of women who face sexual harassment, so that complainants' needs may be gauged accordingly.

E. LINKING SEXUAL HARASSMENT LAW REFORM WITH ANTI-DISCRIMINATION AND EMPLOYMENT LAW REFORM

The 'privatisation' of sexual harassment by way of ICC inquiries forms part of a general neoliberal framework wherein Indian law bifurcates sexual harassment from other labor rights issues.¹⁸⁴ POSH has been enforced at a time when the Indian state is increasingly withdrawing itself from the role of regulating employer-employee hierarchies and workplace conditions.¹⁸⁵ During the COVID-19 pandemic, multiple State governments have notified relaxations to their labour laws in order to boost economic activity.¹⁸⁶ However, factors such as the growing contractualisation of jobs, enhancement of workload, inadequate remuneration, etc. contribute to facilitating the exploitation of working women.¹⁸⁷ Hence measures to redress sexual harassment must be accompanied by other labour law reforms which reduce employers' overall ability to exploit their workers. Moreover, it is not sufficient to focus on employer liability in isolation. The State must take responsibility for failing to prevent sexual harassment as a labor rights violation as well (e.g. volunteering to compensate victims of sexual harassment in cases where the employer abdicates responsibility, or in case of self-employed workers).

Further, even reconceptualizing sexual harassment as a form of gender-based discrimination risks reducing sexual harassment to a 'single axis' disadvantage. Notably, *Vishaka* conspicuously lacks analysis of how the intersection of caste, class and gender foregrounds the harassment of working women such as in Bhanwari Devi's case.¹⁸⁸ This has carried over into its successor POSH, which

¹⁸⁴ John, *supra* note 61; Sakhrani *supra* note 78.

¹⁸⁵ John, *supra* note 61, at 30.

¹⁸⁶ Anya Bharat Ram, *Relaxation of Labour Laws Across States*, THE PRS BLOG, May 12, 2020, available at <https://prsindia.org/theprsblog/relaxation-of-labour-laws-across-states> (Last visited on June 16, 2021).

¹⁸⁷ John, *supra* note 61, at 31.

¹⁸⁸ Sumit Baudh, *Demarginalizing the Intersection of Caste, Class and Sex*, Vol. 20(1), JOURNAL OF HUMAN RIGHTS 127, 133 (2021); Sonavane & Wadekar, *supra* note 124.

also privileges the formal sector over the unorganized and informal sector where the majority of marginalized caste and class women are employed.¹⁸⁹ It is therefore necessary for the State to enact an overarching anti-discrimination framework which recognizes the interplay of gender with identities such as caste, class, religion and ethnicity.

Pertinently, Article 15 of the Constitution already states that: “The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.” Article 16 of the Constitution also provides that: “No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect or, any employment or office under the State.” However, this is only applicable with respect to employment in the *public* sector. There are no anti-discrimination/employment discrimination laws which govern the private sector in India analogous to the Civil Rights Act of 1964, and Title VII thereof, in the United States. Even Vishaka did not contain any analysis on Article 16, though it acknowledged that protection from sexual harassment is linked with the right to gender equality and to work with dignity. This perhaps shows how equality in employment opportunities, as a separate component of the general right to equality, remains a neglected right. This under-utilization of the constitutional guarantees under Article 15 and 16 remains to be acknowledged in Indian sexual harassment law reform.

VI. CONCLUSION

This paper sought to establish that internal complaint mechanisms constituted under Indian laws against sexual harassment have failed, as these are located in the ‘desire-dominance’ paradigm of sexual harassment. The definition of sexual harassment under the Vishaka Guidelines and POSH primarily focuses on unwelcome ‘sexual’ behaviour. Thus, the use of internal complaint mechanisms and procedures is premised upon the assumption that sexual harassment is a problem of unwelcome sexual advances made by individual (male) harassers towards female employees. This fails to take into account the broader conditions of gender discrimination, in the context of which sexual harassment is only one of the tools by which structural dominance is exercised over women and others who fail to conform to hegemonic standards of gendered behaviour at the workplace.

Consequently, the very constitution of internal complaint mechanisms is paradoxical in as much as it involves judgement by a group of peers/supervisors over conduct that may already be normalized and promoted at the workplace. Neither the Vishaka guidelines nor POSH provide adequate safeguards to ensure an independent inquiry by an ICC that is representative of all interests and constituencies at the workplace. The procedures adopted under internal

¹⁸⁹ Baudh, *supra* note 188, at 134, 140.

complaint mechanisms are likely to be more motivated by a desire to protect errant employees and safeguard organizational reputation than provide an effective remedy to the complainant. Further, since sexual harassment law focuses more on proving *who* harassed *whom* than investigating *how* and *why* such sexual harassment occurs, ICC inquiries inevitably turn into adversarial, quasi-criminal trials where a complainant must prove the truth of her claim to secure a punitive remedy against the respondent. Employers bear little responsibility for reforming the creation of hostile work environments and providing institutional support to the complainant in pursuing sexual harassment claims.

Therefore, this paper has argued that if the situation is to be remedied, the definition of sexual harassment under POSH has to be expressly modified to one targeted at removing all forms of behaviour, against persons of any gender or sexual orientation, which may create a hostile work environment based on gender discrimination. This paper also recommends the creation of external bodies as a substitute for performing the functions of fact-finding and adjudication currently undertaken by ICCs. Such bodies can be in the form of regional Employment Tribunals or Commissions, with local divisions, which provide an integrated range of options to complainants consisting of *inter alia* counselling measures, conventional rights-based inquiries and restorative justice conferencing. The Tribunals would also be equipped with the power to take action against all workplaces that fail to maintain safe and equitable working conditions. This paper does not conclusively suggest that the creation of such bodies or the introduction of non-adversarial redressal strategies such as restorative justice conferencing will necessarily be more effective than ICCs. However, these alternatives have nevertheless been discussed with the intent of inspiring policymakers to collect more empirical data on the implementation of such solutions in Indian conditions.

Additionally, incentivizing the reporting and investigation of sexual harassment claims requires not only changing the definition of sexual harassment but also deconstructing 'due process' as currently understood from a liberal, masculinist lens. It is desirable that legal practitioners and researchers should collaborate with critical scholars in the fields of gender studies and sociology for conducting such an exercise. Further, the exploitation of women at the workplace is compounded by the intersectionality of caste and class with gender, and the prevalence of generally exploitative workplace conditions. Hence, sexual harassment law reform must go hand-in-hand with broader reforms that aim at strengthening labour rights and eliminating all forms of identity discrimination.

This paper has only sought to study the problem of sexual harassment as it occurs in the workplace. However, women also continue to experience harassment in various forms in their daily interactions outside of the workplace, for which filing a criminal complaint remains the only remedy. It is hoped that the successful implementation of laws aimed at eradicating sexual harassment at the

workplace might pave the way for understanding methods of remedying sexual harassment and uprooting gender discrimination in other spaces as well.

VII. ANNEXURE: NLSIU STUDY SURVEY

1. Which gender do you identify as?¹⁹⁰
Mark only one oval.
 - Male
 - Female
 - Other: _____

2. Where do you identify on the sexuality spectrum?**ark only one oval.*
 - Heterosexual
 - Homosexual
 - Bisexual
 - Asexual
 - Other: _____

3. What income bracket do you/your guardians fall in?**Mark only one oval.*
 - Below Rs 2 lakhs per annum
 - Rs 2-5 lakhs per annum
 - Rs 5-10 lakhs per annum
 - Above Rs 10 lakhs per annum

4. Do you come from a SC/ST/OBC background?**Mark only one oval.*
 - Yes
 - No

5. Which batch do you belong to?**Mark only one oval.*
 - 1st Year LLB
 - 2nd Year LLB
 - 3rd Year LLB
 - 4th Year LLB
 - 5th Year LLB
 - LL.M.

¹⁹⁰ Denotes that the question was mandatory to answer.

- MPP 1st Year
 - MPP 2nd Year
6. Which of the following, in your opinion, constitutes sexual harassment? (regardless of the law on the subject)*
Check all that apply.
- Unwanted physical advances not qualifying as rape (groping, kissing, etc. without consent)
 - Physical sexual assault
 - Verbal harassment (Passing sexist remarks, abusive comments)
 - Showing pornography to someone without their consent
 - Promising benefits in academics/career in exchange for sexual acts
 - Threatening a reduction in marks/affecting career chances for refusal of sexual acts
 - Discrimination in opportunities due to gender stereotypes
 - Stalking
 - Harassment on account of your sexuality (homophobic insults, etc.)
 - None of the above
7. Do you believe that sexual harassment can only happen to women?*
- Mark only one oval.*
- Yes
 - No
 - No, but I believe women face a greater impact than men do
 - Other: _____
8. Do you think victims of sexual harassment are ‘responsible’ for such incidents?*
- Mark only one oval.*
- Yes, they invite it upon themselves
 - No, not at all
 - No, but people ought to be careful and do their best to prevent it from happening (By avoiding late nights, etc.)
9. Which of the following, in your opinion, would NOT constitute a consensual sexual act?*
- Check all that apply.*
- If one individual is drunk and the other is sober
 - If both persons are drunk
 - If the person says ‘no’ midway through the act but the other person proceeds anyway

- If the person consents to one type of sexual conduct (e.g. kissing) and the other person goes beyond that
 - If a person pretends to wear a condom/be on birth control during the act
 - If the person says 'no' initially but gives in later
10. Which of the following signifies consent in your opinion? (regardless of legal opinion on the subject)*
Check all that apply.
- Explicit verbal consent to the act
 - Non-verbal cues/body language (e.g. nodding head to signify 'yes' or 'no', coming closer)
 - Lack of physical resistance
11. Have you ever experienced sexual harassment in law school? (on campus, and any internally organized event/party held outside campus)*
Check all that apply.
- Yes
 - No
 - I witnessed it happen to someone else
12. Was the harassment in the form of...*
Check all that apply.
- Unwanted physical advances
 - Verbal harassment/lewd gestures
 - Unwanted display of pornography
 - Threat of less marks, etc. if I did not perform sexual acts
 - Promising more marks/other benefits in exchange for sexual acts
 - General unpleasant behaviour on account of my being a woman/displaying feminine characteristics
 - Discrimination/harassment targeted at my sexuality
 - Not applicable
 - Stalking (physically following you)
 - Cyber-stalking/phone stalking (e.g. unnecessary phone calls, sending abusive messages on mobile phone/internet)
 - Other: _____
13. Was the culprit a...*
Check all that apply.
- Batchmate
 - Faculty member

- Staff member
- Senior from the same course (LLB, MPP, etc.)
- Junior from the same course
- Student from another course
- Visiting faculty member
- Visiting student/outsider
- Different people at different times
- Not applicable
- Other: _____

14. Have you ever experienced sexual harassment while travelling outside law school?*

Check all that apply.

- Yes
- No
- I witnessed it happen to someone else

15. Was this harassment in the form of...*

Check all that apply.

- Unwanted physical advances
- Verbal harassment/lewd gestures
- Unwanted display of pornography
- Threat of less marks, etc. if I did not perform sexual acts
- Promising more marks/other benefits in exchange for sexual acts
- General unpleasant behaviour on account of my being a woman/displaying feminine characteristics
- Discrimination/harassment targeted at my sexuality
- Not applicable
- Stalking (physically following you)
- Cyber-stalking/phone stalking (e.g. unnecessary phone calls, sending abusive messages on mobile phone/internet)
- Other: _____

16. The culprit was/were...*

Check all that apply.

- Batchmate
- Senior from the same course
- Junior from the same course
- Student from a different course
- Student from another college

- Faculty/staff member of the same college
 - Faculty/staff member of another college
 - Judge/external member at the event
 - Stranger
 - Not applicable
 - Other: _____
17. Tick any one of the boxes if you have experienced sexual harassment in the context of*
- Check all that apply.*
- A romantic/sexual relationship
 - Rejection of a proposal
 - Event/party held at/outside law school
 - Vivas/classroom discussions/examination time
 - Promise of increase in marks/job offer/research position
 - Strangers visiting the college for extra curricular events
 - None of the above
 - Other: _____
18. What was your response to the incident/s? (Tick whichever boxes are applicable. If you are a witness, tick the box which was applicable to that incident)*
- Check all that apply.*
- I kept quiet so as to avoid embarrassment
 - I kept quiet because I thought the incident was trivial
 - I kept quiet because I thought nobody would believe me
 - I told only my close friends/family members about the incident
 - I approached a faculty member/counselor to share my experience and explore remedies
 - I filed a SHARIC complaint
 - I filed a criminal complaint/legal proceedings against the offender
 - Not applicable
 - Other: _____
19. What was the immediate reaction of those to whom you narrated the incident?*
- Check all that apply.*
- It's not such a big deal, let it be
 - I did not narrate the incident to anyone
 - The offender is a very popular/influential person, there is no point in pursuing it

- The offender was drunk when it happened, they didn't know better
 - You were drunk when it happened so you probably don't remember/are confused
 - Why are you complaining so late, you should have raised this point earlier
 - It's your fault for 'leading them on'
 - You must explore your remedies/file a SHARIC complaint
 - Not applicable
 - Other: _____
20. What is your behaviour towards the offender subsequent to the incident?*
- Check all that apply.*
- I avoid the person as much as possible
 - I continue to be friends with them
 - I behave as civilly towards them as possible
 - I confronted them and they apologized, so I moved on
 - I confronted them and they did not apologize, but I moved on regardless
 - I asked a facilitator/friend to mediate with them on my behalf
 - I pursued a SHARIC inquiry/legal proceedings against them
 - Not applicable
 - Other: _____
21. If you resolved the matter outside of a SHARIC inquiry/through mediation, please share your thought/comments on-1. Your reasons for pursuing it 2. Your satisfaction with the outcome 3. Whether pursuing an inquiry would have been better (Long form answer)
22. If you pursued/are pursuing a SHARIC inquiry, please share any thoughts/comments on your experience including 1. Your reasons for pursuing it 2. Maintenance of procedural fairness 3. Institutional support in pursuing the inquiry (Long form answer)
23. Do you think NLSIU offers a supportive environment to persons affected by sexual harassment?*
- Mark only one oval.*
- Only on paper (in terms of SHARIC code, institutional facilities)
 - Yes, the environment is very supportive
 - Not at all
 - Yes, but there is scope for improvement
 - Yes, but the community does not take sexual harassment seriously
 - Other: _____

24. Do you think there is a 'victim blaming complex' within the NLSIU community?*
- Check all that apply.*
- Yes, especially if the person/s concerned were intoxicated
 - Yes, if the person concerned is seen as being 'forward', or 'slutty'
 - Yes, if the victim and the offender were in a relationship
 - No, not at all
 - Other: _____
25. Do you think the perpetrator's social capital (or lack thereof) is a factor in how sexual harassment claims are resolved?*
- Mark only one oval.*
- Yes, but only under informal resolution mechanisms
 - Yes, under formal resolution mechanisms
 - Yes, under both informal and formal resolution mechanisms
 - No
26. What do you think about the scale of the community reaction to the problem of sexual harassment on campus?*
- Mark only one oval.*
- It has been disproportionate in my opinion
 - It has been the appropriate level of reaction
 - It has been less than what it should have been
 - No, but the consequences have been disproportionate (**Note:** To clarify, this means the reaction is proportionate but consequences have been disproportionate)
27. Do you think there's a tendency to falsify claims within the NLS community?*
- Mark only one oval.*
- Yes
 - No
 - Sometimes
28. Are you aware of the provisions of the SHARIC Code?*
- Mark only one oval.*
- Yes
 - Somewhat
 - I have a very superficial understanding
 - No not at all

29. Are you aware of the provisions of the Prevention of Sexual Harassment Act, 2013?*

Mark only one oval.

- Yes
- No
- Only somewhat

30. Do you think the SHARIC Code is an effective deterrent to acts of sexual harassment at law school?*

Mark only one oval.

- Yes
- No
- Only somewhat

31. Do you think there is a need for more gender sensitization/prevention of sexual harassment workshops at law school?*

Mark only one oval.

- Yes
- No, the one at the beginning of the year is enough
- No

32. Any other thoughts/comments you'd like to share: (Long form answer)