

Is the Women's Treaty a Paper Tiger?

Indian Courts' Application of the United Nations Treaty

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Abstract

This Article examines whether the United Nations ("U.N.") Treaty, the Convention on the Elimination of All Forms of Discrimination Against Women ("CEDAW"), is a "paper tiger"—a law that seems powerful but is in fact weak and ineffectual. While some scholars question the Treaty's effectiveness based on statistical studies, others point to legal reforms in state parties as evidence of its success. Neither provides a nuanced middle ground by examining the CEDAW at a micro rather than a macro level. This Article fills this gap by conducting a qualitative analysis of 10 Indian judicial opinions. Specifically, the Article explores how the CEDAW, the so-called "Women's Treaty," functions on the ground, particularly in workplace sexual harassment cases after India adopted reforms, including the CEDAW in 1993 and Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 ("PoSH Act"), to combat this transnational gender-violence form.

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Findings reveal that Indian courts apply the Treaty, often resulting in favorable outcomes for relatively privileged women alleging sexual harassment (eight out of 10 cases). In four cases, courts used the CEDAW to create judicial reforms, which broadened protections for women against workplace sexual harassment. In four other cases, courts used it to enforce employers' compliance with the PoSH Act. But accessibility issues persist for marginalized groups, including lower-class women and trans women, rendering the Treaty ineffective for them. Thus, this Article argues that although the CEDAW successfully addresses gender discrimination for women who have sufficient resources and societal privileges, it remains a paper tiger for those who do not.

Therefore, through an intersectional feminist approach, this research underscores the complex interplay between international treaties, domestic legal systems, and social hierarchies in the pursuit of women's equality. Implications for the United States, one of the few U.N. member states that has yet to ratify the Treaty, are also discussed. As a champion for human rights, the United States should ratify the CEDAW. But, at the same time, the United States should consider the Treaty's effectiveness for making women's equality a reality for all women.

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I. INTRODUCTION

Is the Convention on the Elimination of All Forms of Discrimination Against Women (“the CEDAW” or “the Treaty”) a “paper tiger” for women’s rights? As this Article will argue, the answer depends on *which* women’s rights are in issue. *Dictionary.com* defines a “paper tiger” as “a person, group, nation, or thing that has the appearance of strength or power but is actually weak or ineffectual.”¹ *Merriam-Webster* provides this example in the legal context: “The new laws are just paper tigers without any method of enforcement.”² Occasionally, United States federal courts and legal scholars use this concept to express their perception of how law should operate: as an effective mechanism for regulating social behavior so that socially unacceptable behavior is discouraged while acceptable behavior is encouraged.³ For example, in *Power Home Solar, LLC v. Sigora Solar, LLC*, U.S. District Court Judge Thomas Cullen used the concept of a paper tiger to explain how Federal Rule of Civil Procedure 37(d), outlining sanctions for failing to cooperate during discovery, should (and should not) function: “[U]nless Rule 37 is perceived as a credible

1. *Paper tiger*, DICTIONARY.COM, <https://www.dictionary.com/browse/paper-tiger> (last visited Apr. 26, 2024) [hereinafter *paper tiger*].

2. *Paper tiger*, MERRIAM-WEBSTER.COM, <https://www.merriam-webster.com/dictionary/paper-tiger> (last visited Apr. 26, 2024).

3. See, e.g., *Power Home Solar, LLC v. Sigora Solar, LLC*, 339 F.R.D. 64, 88 (W.D. Va. 2021) (quoting *Cine Forty-Second St. Theatre Corp. v. Allied Artists Pictures Corp.*, 602 F.2d 1062, 1064 (2d Cir. 1979); Alexandra Klein, *The Eighth Amendment’s Paper Tiger*, NE. UNIV. L. REV. (forthcoming 2024) (on file with author).

deterrent rather than a ‘paper tiger’ . . . the pretrial quagmire threatens to engulf the entire litigative process.”⁴

Above, Judge Cullen used “paper tiger” to suggest Rule 37(d) should not operate as an ineffectual mechanism for preventing parties’ abuse of discovery rules; instead, it should effectively deter parties from violating discovery rules and foster their compliance.⁵ Likewise, in this Article, I use this concept to suggest that the CEDAW, a United Nations (“U.N.”) treaty, should not operate as a paper tiger for women’s rights. In other words, the Treaty should not be an ineffectual mechanism for forcing its state parties to “take all appropriate measures to eliminate discrimination against women” and “en[sure] the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.”⁶ To state my argument positively, the CEDAW should effectively incentivize its state parties to work toward these goals.⁷ If the CEDAW does not, then it is a paper tiger.

Whether the Treaty is a paper tiger remains a major debate.⁸ Some scholars who view human rights treaties, such as the CEDAW,

4. *Power Home Solar, LLC*, 339 F.R.D. at 88; FED. R. CIV. P. 37(d).

5. *Id.*

6. G.A. Res. 34/180, art. 2–3 (Dec. 18, 1979) [hereinafter CEDAW].

7. *Id.*

8. Compare Eric Posner, *Should Human Rights Law Play a Role in Development?*, 30 WORLD BANK ECON. REV., Supp. S16, S25–26 (2016) (arguing that although one would expect human rights violations, including human torture, would decrease in states that have ratified human rights treaties, they have not, which suggests treaty ratification has minimal impact on state behavior), and Cochav Elkayam-Levy, *A Path to Transformation: Asking “The Woman Question” in International Law*, 42 MICH. J. INT’L L. 429, 467–68 (2021) (noting limited improvements in women’s status around the world despite states’ ratification of the CEDAW and other human rights treaties), with Rangita de Silva de Alwis & Ambassador Melanne Verveer, *“Time Is A-Wasting”: Making the Case for CEDAW Ratification by the United States*, 60 COLUM. J. TRANSNAT’L L. 1, 52–53 (2021) (arguing that ratifying the CEDAW can empower women to reform constitutions, pass new legislation, and impact judicial decision-making based on evidence from states that have ratified the CEDAW), and Harold Hongju Koh, *Why America Should Ratify the Women’s Rights Treaty (CEDAW)*, 34 CASE W. RES. J. INT’L L. 263, 270 (2002) (same).

as ineffectual, point to statistical studies showing that state⁹ parties to human rights treaties have not witnessed a decrease in human rights violations.¹⁰ However, just because aggregate studies show gender discrimination still exists in the CEDAW's state parties does not mean it has had no effect because "correlation does not imply causation."¹¹ Meanwhile, other scholars, proclaiming the CEDAW's efficaciousness, point to state parties' legal reforms as evidence that the Treaty has successfully eliminated some forms of gender discrimination and improved women's societal status.¹² But, just because the CEDAW inspires a state to grant women additional rights—as Kuwait did in 2005 by granting women's suffrage—does not mean women can actually access their new rights.¹³ This access-to-justice problem especially holds true for women experiencing intersectional discrimination.¹⁴ Additionally, gender inequality, a complex problem,

9. In international law scholarship, countries are commonly referred to as "states." See, e.g., Posner, *supra* note 8, at S25–26.

10. *Id.*

11. Samuel J. Gershman & Tomer D. Ullman, *Causal Implications from Correlational Statements*, 18 PLoS ONE 1, 4–5 (2023).

12. See de Silva de Alwis & Verveer, *supra* note 8, at 52–53; see also Koh, *supra* note 8, at 270.

13. See *The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) ... Because Women's Rights are Human Rights*, AM. C.L. UNION (Apr. 29, 2010), <https://www.aclu.org/documents/cedaw-fact-sheet> [hereinafter ACLU's CEDAW Fact Sheet]; see, e.g., Benedetta Faedi Duramy, *#MeToo and the Pursuit of Women's International Human Rights*, 54 U.S.F. L. REV. 215, 260–61 (2020) (discussing 2015 survey data from the Federation of Indian Chambers of Commerce and Industry showing that 36% of domestic companies and 25% of international companies in India had not created internal sexual harassment complaint mechanisms—despite a requirement to do so under India's Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 ("PoSH Act"), a CEDAW-inspired reform, as discussed below).

14. See Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine*, 1989 UNIV. CHI. LEGAL F. 139, 148–50. Crenshaw explains that Black women, who frequently experience discrimination at the intersection of their race and sex, are excluded from meaningful avenues to achieve equity in U.S. employment discrimination lawsuits under Title VII of the Civil Rights Act of 1964 ("Title VII") because statutes and courts recognize gender discrimination claims or race discrimination claims but not claims at the intersection of both. *Id.* See also Diksha Munjal, *What is the PoSH Act and Why has the Supreme Court Flagged Lapses in Its Implementation?* THE HINDU

exists, in part, because of heteropatriarchy, a “system of domination” that “favors” heterosexuality and “cisgender men” and permeates laws, policies, ideologies, practices, and cultural life.¹⁵ Therefore, one law, whether a paper tiger or not, cannot be the scapegoat—or panacea—for inequality’s persistence.

Because neither side provides a nuanced middle ground by examining the CEDAW at a micro rather than a macro level, this Article does so by examining the CEDAW at the micro level. So instead of focusing only on statistical studies or legal reforms, which, to be sure, are useful for analyzing the Treaty’s impacts at a structural level, I conduct a qualitative analysis of Indian judicial opinions to analyze how the Treaty functions on the ground. The benefit of studying Indian judicial opinions is they indicate how courts apply the CEDAW and how ordinary women may (or may not)—as well as *which* women—reap the benefit of a treaty designed specifically to safeguard and promote their equality.¹⁶ As the United States, which has not ratified the CEDAW, entered the 2024 presidential election cycle, with Vice President Kamala Harris as the Democratic candidate and Donald Trump as the Republican candidate, this analysis was especially important.¹⁷ Not only did the American people again have

(May 21, 2023), <https://www.thehindu.com/news/national/explained-the-indian-law-on-sexual-harassment-in-the-workplace/article66854968.ece> (discussing inability of working-class women in India’s unorganized or informal sector (domestic workers, artisans, craft producers, etc.) to access the sexual harassment complainant mechanisms required under the PoSH Act).

15. Christina Cross et al., *Interlinking Structural Racism and Heteropatriarchy: Rethinking Family Structure’s Effects on Child Outcomes in a Racialized, Unequal Society*, 14 J. FAM. THEORY & REV. 482, 483 (2022).

16. See, e.g., Crenshaw, *supra* note 14, at 139, 141–43 (performing a qualitative analysis of U.S. federal court opinions to suggest that Black women plaintiffs lost their Title VII claims because courts interpreted Title VII using a “single-axis framework,” which failed to acknowledge Black women’s discrimination at the intersection of gender and race).

17. See *Ratification Status for CEDAW - Convention on the Elimination of All Forms of Discrimination against Women*, OHCHR.ORG, [hereinafter *CEDAW Ratification Status*], https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?Treaty=CE&Lang=en (last visited Apr. 26, 2024) (showing that out of 193 U.N. member states, 186 states have ratified the CEDAW, thus leaving only seven states—including the United States—that have not); *Member States*, U.N., [hereinafter *U.N. Member States*], <https://www.un.org/en/about-us/member-states> (last visited May 2, 2024)

to decide upon a president but also on the American values worth fighting for. As a champion for human rights, the United States should ratify the CEDAW because “human rights are women’s rights . . . [a]nd women’s rights are human rights.”¹⁸ But, at the same time, the United States should consider the Treaty’s effectiveness for making women’s equality a reality for all women.

Therefore, in this Article, I build upon my research on the CEDAW’s effectiveness.¹⁹ I previously developed a model for analyzing whether a state’s ratification of the CEDAW results in the state’s adoption of gender-equality reforms.²⁰ Through a comparative case study of Canada and India, two state parties of the CEDAW, I found nongovernmental organizations (NGOs) and legal officials use the Treaty to enact legal reforms that promote gender equality.²¹ For example, in *Vishakha v. Rajasthan*, the Supreme Court of India relied on the Treaty to prohibit workplace sexual harassment against women for the first time and promulgated the *Vishakha* Guidelines (“Guidelines”), which outline employers’ responsibilities for addressing and preventing workplace sexual harassment.²² This judicial reform inspired the Parliament of India’s eventual passage of the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 (“PoSH Act”).²³

(showing that the United States became a U.N. member state on Oct. 24, 1945); *Tracking the 2024 Presidential Candidates*, NBC NEWS (Aug. 24, 2024, 10:11 AM), <https://www.nbcnews.com/politics/2024-elections/presidential-candidates-tracker>.

18. See Hillary Clinton, First Lady, Remarks for the U.N. Fourth World Conference on Women (Sept. 5, 1995) (transcript available at <https://www.un.org/esa/gopher-data/conf/fwcw/conf/gov/950905175653.txt>); see also de Silva de Alwis & Verveer, *supra* note 8, at 33–34; Koh, *supra* note 8, at 264.

19. Amanda Stephens, *A Model for Understanding CEDAW’s Impact on Implementing Gender Equality Reforms: Lessons from Canada and India*, CLEV. STATE. L. REV. 1027, 1044–51 [hereinafter Stephens, *A Model*].

20. *Id.* at 1052–67.

21. *Id.* at 1044–51.

22. *Id.*; see *infra* Section VI.C.; see also de Silva de Alwis & Verveer, *supra* note 8, at 52–53 (remarking on the Supreme Court of India’s reliance on the CEDAW’s gender equality norms in *Vishakha v. Rajasthan* in 1997 because India lacked an anti-sexual harassment in the workplace law); *Vishakha v. Rajasthan*, LNIND 1997 SC 1081, *4–10 (1997) (India).

23. See Stephens, *A Model*, *supra* note 19, at 1048–49; *infra* Sections VI.C., VI.D. The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013, Statement of Objects and Reasons (India). [hereinafter PoSH

Whereas the former paper analyzed the Treaty's effectiveness macroscopically by focusing on CEDAW-inspired reforms, this follow-up paper analyzes whether Indian courts after *Vishakha* and the PoSH Act apply the Treaty in workplace sexual harassment cases and whether their application actually helps the women alleging sexual harassment enforce their right to gender equality at work.²⁴ While previous scholarship has analyzed *Vishakha* and the PoSH Act, especially to proclaim the CEDAW's effectiveness for creating reforms, no scholarship to date has analyzed Indian courts' engagement with the Treaty after the PoSH Act or its potential impacts on women involved in the lawsuit.²⁵ Such an analysis would provide insight into current judicial engagements with the Treaty and their effects after these two monumental judicial and legislative reforms, which the CEDAW inspired, in India.²⁶

Thus, this Article examines whether courts apply the CEDAW after the PoSH Act, and if so, how, and to what end. More specifically, it asks: Do courts apply the Treaty in sexual harassment cases? If so, do courts, like the *Vishakha* Court, use it to create judicial reforms or, alternatively, enforce existing domestic law (e.g., the PoSH Act)? If courts apply the Treaty in these ways, which women tend to benefit when they do? Answering this last question will shed light on how the Treaty may operate effectively for some women but ineffectually—i.e., as a paper tiger—for others.

Act] The CEDAW's Article 11 is referenced as a basis for enacting the statute in Statement of Objects and Reasons' first sentence, specifically:

Article 11 of . . . [the CEDAW], to which India is a party, requires State Parties to take all appropriate measures to eliminate discrimination against women in the field of employment Equality in employment can be seriously impaired when women are subjected to . . . sexual harassment at the workplace.

Id. See also *Annual Review on the State of Sexual Harassment in India*, COUNCIL ETHICS 1, 16 (2021) [hereinafter *Annual Review on the State of Sexual Harassment in India*], councilofethics.org/2020Review.pdf (stating the Parliament of India relied on CEDAW while drafting the PoSH Act).

24. See *Stephens, A Model*, *supra* note 19, at 1044–67; see also *infra* Part VII.

25. See, e.g., de Silva de Alwis & Verveer, *supra* note 8, at 52–53.

26. See *Stephens, A Model*, *supra* note 19, at 1048–49; *infra* Sections VI.C., VI.D; *Annual Review on the State of Sexual Harassment in India*, *supra* note 23, at 16 (stating the Parliament of India relied on CEDAW while drafting the PoSH Act).

To analyze this issue, I conducted a systematic qualitative analysis of 10 Indian civil cases decided after the PoSH Act's passage in 2013.²⁷ All constitute workplace sexual harassment cases, and the courts rendered the opinions between 2015 and 2023.²⁸ Then, I examined the cases to determine common themes regarding courts' applications of the CEDAW.²⁹ Afterward, I discovered that all 10 cases applied the CEDAW, eight of which resulted in a favorable outcome for the woman complainant.³⁰ By "favorable outcomes," I mean that in four cases courts used the CEDAW to create judicial reforms, which broadened protections for women against workplace sexual harassment, and in four other cases, they used it to enforce employers' compliance with the PoSH Act.³¹ Theoretically, these are favorable outcomes for *all* women because they either produced more robust protections for women or required employers to abide by India's anti-sexual harassment laws, respectively.³² However, most women complainants (eight out of ten) benefitting from these outcomes were relatively privileged—they held professional occupations (e.g., as nurses, civil servants, office employees, etc.), and all worked for large government or private employers (e.g., police departments, public universities, an oil company, etc.) with sexual harassment reporting mechanisms (albeit largely defective ones).³³

Based on the above findings, I make three arguments.³⁴ First, after *Vishakha* and the PoSH Act's passage in 2013, Indian courts apply the CEDAW, and, in the process, create further judicial reforms or enforce India's anti-sexual harassment laws.³⁵ Second, India's continued application of the Treaty indicates it has internalized the Treaty's gender-equality norms, which may facilitate compliance.³⁶

27. See *infra* Part III, Table 1.

28. See *infra* Part III, Table 1.

29. See *infra* Part VII.

30. See *infra* Part III, Table 1; *infra* Part VII.

31. See *infra* Part VII.

32. See *infra* Parts VII, VIII.

33. See *infra* Parts VII, VIII.

34. See *infra* Parts VII, VIII.

35. See *infra* Parts VII, VIII.

36. See *infra* Part VIII; see also Koh, *supra* note 8, at 268–69; see also Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2657 (1997).

Third, the CEDAW constitutes, at least for normatively gendered (i.e., cis-gendered) Indian women with sufficient economic and organizational resources, a viable mechanism for addressing workplace sexual harassment after it occurs.³⁷ However, the Treaty is a paper tiger in so far that it remains less accessible—and thus ineffectual—for less-privileged Indian women.³⁸ These women include those working in India’s informal sector (e.g., as domestic workers, day laborers, etc.), which tends to have less job security and fewer legal protections against an employer’s unlawful practices, and transgender women.³⁹ None of these women appeared as litigants in the sample, which indicates they might not have sufficient access to India’s sexual harassment laws, including the CEDAW, due to limited resources and social hierarchies, including those based on gender, class, and caste.⁴⁰

The rest of this Article is structured as follows: Part II explains my positionality as a White American woman researching the CEDAW’s impacts in India. Part III states my research methods. To contextualize the legal system from which the cases derive, Parts IV, V, and VI provide an overview of India’s pervasive violence against women (“VAW”) problem, political and judicial system, and anti-workplace sexual harassment laws, respectively. Part VII analyzes how Indian courts applied the CEDAW after the PoSH Act. Part VIII discusses my analysis’ implications. Part IX concludes that the Treaty simultaneously constitutes a successful mechanism for addressing gender discrimination for moderately privileged women and a paper tiger for underprivileged women.

II. AUTHOR POSITIONALITY

I enter this scholarly discourse on the CEDAW’s efficacy in India, a postcolonial state, by acknowledging my positionality as a White American woman, academic, and attorney based in the southwestern United States. As feminist scholars have pointed out,

37. See *infra* Part VIII.

38. See *infra* Part VIII; Munjal, *supra* note 14.

39. See *infra* Part VIII; Munjal, *supra* note 14; see also Gayathri Kumar et al., *Exploring the Discrimination and Stigma Faced by Transgender in Chennai City—A Community-Based Qualitative Study*, 11 J. FAM. MED. & PRIMARY CARE 7060, 7061 (2022).

40. See *infra* Part VIII; see Munjal, *supra* note 14.

researchers should acknowledge that they too are enmeshed in hierarchical power relationships shaping and limiting their analyses in critical ways.⁴¹ In other words, a feminist research approach resists the notion of “objective” researchers—the idea that researchers are separate from their social context and possess omnipresent, “rational” viewpoints.⁴² Instead, a feminist research approach views the objective research (and researchers) as a myth emerging from an androcentric research model.⁴³ Consequently, feminist research methods produce more—not less—objective research because they acknowledge scholars’ limited perspectives in light of their particular social backgrounds and contexts.⁴⁴ However, some scholars demand that scholars go beyond mere “textual performances” in research position statements and instead collaborate with subjects to produce research that addresses subjects’ needs.⁴⁵

For me, this research orientation means I carefully reflect how my American perspective limits my scholarship on India’s gender inequality issues, including sexual harassment. Additionally, this orientation means I acknowledge my expertise in India studies, international law, gender and law, and qualitative research methods. I developed this expertise by earning my JD and PHD in gender studies at Indiana University–Bloomington. Moreover, I lived in southern and northern India for more than a year while engaged in legal internships at women’s rights NGOs while collecting qualitative data for my doctoral research.⁴⁶ In addition to contributing to the NGOs through

41. See, e.g., Donna Haraway, *Situated Knowledges: The Science Question in Feminism and the Privilege of Partial Perspective*, 14 *FEMINIST STUD.* 575, 581, 583 (1988) (advocating for “feminist objectivity,” which is best understood as “situated knowledge” that is constantly connected to its producer; this approach enables researchers to be held accountable for “what they see”).

42. See *id.*

43. See *id.*

44. See *id.*

45. See, e.g., Richa Nagar, Farah Ali & Sangatin Women’s Collective, *Collaboration Across Borders: Moving Beyond Positionality*, 24 *SING. J. TROPICAL GEOGRAPHY* 356, 356–60 (2003).

46. See generally AMANDA STEPHENS, *WOMEN VOLUNTEERS IN INDIA AND THE UNITED STATES: BETWEEN ACTIVISM AND COMPLICITY* (under contract with Lexington Books) (forthcoming 2025) (on file with author) [hereinafter Stephens, *WOMEN VOLUNTEERS*] (arguing that Indian and American patriarchies limit women volunteers’ ability to effectively improve women’s social status in both states).

legal research, teaching English, and other activities, that experience also enabled me to supplement my coursework knowledge regarding India's patriarchal culture and legal system with real-world experience.⁴⁷ Equally important, by studying India's socio-legal system and collaborating with my Indian colleagues, I developed a better understanding of America's system and ideas for how it could be improved.⁴⁸ In fact, India's system contains some features worth the United States' consideration; for example, while in India, I learned the United States—unlike India—has yet to ratify the CEDAW.⁴⁹ This knowledge inspired this research journey into evaluating the Treaty's limits and possibilities for the United States if it were to ratify it.⁵⁰

III. METHODOLOGY

To examine judicial applications of the CEDAW post the PoSH Act, I conducted a systematic qualitative analysis of 10 Indian civil sexual harassment cases decided between 2015 and 2023. I selected cases on LexisNexis using a terms and connectors search for "CEDAW and Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013." I also limited my search to cases rendered between 2013 and 2023 to identify recent cases citing the CEDAW and the statute. I selected cases based on whether courts cited both the CEDAW and the PoSH Act and whether women complainants had alleged workplace sexual harassment.

The above search yielded an initial sample of fourteen civil cases—more specifically, three Indian Supreme Court cases and eleven high court cases.⁵¹ I omitted four cases from my sample because two

47. *Id.*

48. *See infra* Part V (for an explanation of India's centralized judicial system).

49. *See infra* Parts V, VI; *U.N. Member States*, *supra* note 17; Stephens, *A Model*, *supra* note 19, at 1029–30.

50. *See generally* Stephens, *A Model*, *supra* note 19; *see also infra* Part VIII.

51. *See generally* *AE & E Chennai Works v. Lab. Ct.*, LNINDORD 2019 MAD 11548 (Mad. H.C. 2019) (India); *Sethulatha v. Sec'y of Dep't of Higher Educ.*, LNINDORD 2017 MAD 3890 (Mad. H.C. 2017) (India); *Murugan v. Tamil Nadu*, LNINDORD 2019 MAD 906 (Mad. H.C. 2019) (India); *Malik v. Union of India*, LNINDORD 2023 DEL 2821 (Del. H.C. 2023) (India); *Harsora v. Harsora*, 1 MLJ (CRL) 348 (2016) (India); *Daisyrani v. Inst. of Rd. Transp.*, LINDORD 2017 MAD 3788 (Mad. H.C. 2017) (India); *Bhatia v. Union of India*, LNIND 2020 SC 266 (2020) (India); *Baitha v. App. Auth./Dir.*, LNIND 2018 ALL 255 (All. H.C. 2018) (India);

were duplicates of the same sexual harassment cases⁵² and two were duplicates of a Supreme Court, non-sexual harassment case (a domestic violence case).⁵³ As shown in Table 1, these omissions produced a final sample of 10 cases.⁵⁴ Then, I analyzed the sample to determine emerging themes among the courts' application of the Treaty.⁵⁵

TABLE 1

No.	Case Name
1	<i>Gurjar v. State of Gujarat</i> , LNIND 2015 GUJ 2506 (Guj. H.C. 2015) (India).
2	<i>Akhave v. Union of India</i> , LNIND 2016 BOM 545 (Bom. H.C. 2016) (India).
3	<i>Daisyrani v. Inst. of Rd. Transp.</i> , LNINDORD 2017 MAD 3788 (Mad. H.C. 2017) (India).
4	<i>Sethulatha v. Sec'y of Dep't of Higher Educ.</i> , LNINDORD 2017 MAD 3890 (Mad. H.C. 2017) (India).
5	<i>Ranjini v. State of Tamil Nadu</i> , LNINDORD 2017 MAD 5599 (Mad. H.C. 2017) (India).
6	<i>Baitha v. App. Auth./Dir.</i> , LNIND 2018 ALL 255 (All. H.C. 2018) (India).
7	<i>Murugan v. State of Tamil Nadu</i> , LNINDORD 2019 MAD 906 (Mad. H.C. 2019) (India).
8	<i>AE & E Chennai Works Ltd. v. Lab. Ct.</i> , LNINDORD 2019 MAD 11548 (Mad. H.C. 2019) (India).

Gurjar v. State of Gujarat, LNIND 2015 GUJ (Guj. H.C. 2015) (India); *Akhave v. Union of India*, LNIND 2016 BOM 545 (Bom. H.C. 2016) (India); *Ranjini v. State of Tamil Nadu*, LNINDORD 2017 MAD 5599 (Mad. H.C. 2017) (India) (repetitious cases omitted).

52. In the initial sample, the following sexual harassment cases appeared twice: *AE & E Chennai Works Ltd., v. Lab. Ct.*, LNINDORD 2019 MAD 11548 (Mad. H.C. 2019), and *Murugan v. Tamil Nadu*, LNINDORD 2019 MAD 906 (Mad. H.C. 2019) (India).

53. In the initial sample, the following Supreme Court of India domestic violence case appeared twice: *Harsora v. Harsora*, LNIND 2016 SC 414 (2016) (India).

54. See *infra* Table 1 (showing 10 cases in the final sample).

55. See *infra* Part VII; see also Virginia Braun & Victoria Clarke, *Using Thematic Analysis in Psychology*, 3 QUALITATIVE RSCH. IN PSYCH. 77, 79 (2006).

9	<i>Bhatia v. Union of India</i> , LNIND 2020 SC 266 (2020) (India).
10	<i>Malik v. Union of India</i> , LNINDORD 2023 DEL 2821 (Del. H.C. 2023) (India).

IV. VIOLENCE AGAINST WOMEN IN INDIA

Because the CEDAW and the Indian cases address workplace sexual harassment, a violence against women (“VAW”) form, this term must be defined and contextualized transnationally and with regard to India. Defined as “gender-based violence, that is, violence that is directed against a woman because she is a woman or that affects women disproportionately,” VAW occurs in various forms (e.g., physical, sexual, and psychological).⁵⁶ VAW includes intimate partner violence, sexual violence and harassment, human trafficking, child marriage, and feminicide.⁵⁷ Additionally, VAW constitutes the primary way in which women’s oppression and gender stereotypes become reinforced socially, politically, and economically.⁵⁸ Consequently, VAW is a form of gender discrimination.⁵⁹

Notwithstanding the intersectional discriminatory forms based on gender, class, caste, race, and other social statuses that a woman may experience, any women can—and commonly do—experience

56. U.N. Comm. for the Elimination of Discrimination against Women, *General Recommendation No. 19: Violence against Women*, U.N. Doc. A/47/38 § 6 (Jan. 30, 1992) [hereinafter *General Recommendation No. 19*].

57. *FAQs: Types of Violence Against Women and Girls*, U.N. WOMEN [hereinafter *FAQs: Types of Violence*], <https://www.unwomen.org/en/what-we-do/ending-violence-against-women/faqs/types-of-violence> (last visited Apr. 28, 2024).

58. U.N. Comm. for the Elimination of Discrimination against Women, *General Recommendation No. 35: Gender-based Violence against Women*, U.N. Doc. CEDAW/C/GC/35 § 10 (July 26, 2017) [hereinafter *General Recommendation No. 35*] (updating *General Recommendation No. 19*).

59. *Id.* See Aditi Mitra & J. David Knottnerus, *Sacrificing Women: A Study of Ritualized Practices Among Women Volunteers in India*, 19 VOLUNTAS 242, 245–46 (2008) (explaining that even upper-class women in India experience gender discrimination).

VAW.⁶⁰ Worldwide, one third of all women experience VAW, typically by someone known to them.⁶¹ Trans women also experience VAW at extraordinarily high rates.⁶² Moreover, this discriminatory form affects women physically, psychologically, and economically.⁶³ In terms of health effects, women who experience gender discrimination may live longer than men, but they disproportionately suffer from higher morbidity and illness.⁶⁴ Sexism also contributes to women's higher rates of depression, substance abuse issues, and poorer mental and physical health.⁶⁵

Gender discrimination also contributes to economic disparities.⁶⁶ The gender pay gap remains approximately 20%, demonstrating that working women make approximately 80% of their male counterparts.⁶⁷ For women with disabilities, migrant women, mothers, and women of color, this gap exceeds 20%.⁶⁸ Additionally, women with children are more likely to be denied occupation or hired

60. *Ending Violence against Women*, U.N. WOMEN, <https://www.unwomen.org/en/what-we-do/ending-violence-against-women> (last visited Apr. 14, 2024).

61. *Id.* (“One in three women worldwide experience physical or sexual violence, mostly by an intimate partner.”).

62. See Michele Lanham et al., “*We’re Going to Leave You for Last, Because of How You Are*”: Transgender Women’s Experiences of Gender-Based Violence in Healthcare, Education, and Police Encounters in Latin America and the Caribbean, 6 GENDER & VIOLENCE 1, 38 (2019), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6442261/pdf/vio.2018.0015.pdf> (noting that due to trans women’s significantly high mortality rates in Latin America and the Caribbean, their life expectancy is only 30–35 years old).

63. *General Recommendation No. 35*, *supra* note 58, § 10.

64. See generally Amanda Stephens & Sean Viña, *On Women Professors Who Teach Legal Writing: Addressing Stigma and Women’s Health*, 48 VT. L. REV. 237, 251–52 (2024) (discussing gender discrimination’s health effects on women generally as well as in the legal academy context).

65. *Id.*

66. See *Everything You Need to Know About Pushing for Pay Equity*, U.N. WOMEN (Feb. 22, 2024), <https://www.unwomen.org/en/news/stories/2020/9/explainer-everything-you-need-to-know-about-equal-pay>.

67. *Id.*

68. *Id.*

at a lower income level—a gender injustice termed the motherhood penalty.⁶⁹

While VAW is underreported worldwide, this is especially so in India because of women’s fear of being blamed for the violence and the sexist association of women’s sexuality with their familial honor, which may result in “honor killings” of women by their husbands and other family members.⁷⁰ Every year, India has approximately 1,000 honor killings, which are a type a femicide.⁷¹ Relatedly, India, because its patriarchal culture tends to privilege boys rather than girls, also has had historically unequal ratio of boy-to-girl birth rates, which began in the 1970s because of prenatal diagnostic testing that allowed Indian parents to determine the fetus’ sex.⁷² This technology enabled sex-selection abortions of female fetuses.⁷³

Moreover, if Indian girls become adult women, they may encounter various VAW forms.⁷⁴ For instance, although India

69. See Shelley J. Correll et al., *Getting a Job: Is There a Motherhood Penalty?*, 112 AM. J. SOCIO. 1297, (2007); see also Weih-sin Yu & Janet Chen-Lan Kuo, *The Motherhood Wage Penalty by Work Conditions: How Do Occupational Characteristics Hinder or Empower Mothers?*, 82 AM. SOCIO. REV. 744, 744–69 (2017).

70. Amana Fontanella-Khan, *How India’s Honor Culture Perpetuates Mass Rape*, DAILY BEAST (Apr. 14, 2017), <https://www.thedailybeast.com/how-indias-honor-culture-perpetuates-mass-rape>; see also Natl’ Child Traumatic Stress Network, *Why Don’t They Tell? Teens and Sexual Assault Disclosure*, (2018), <https://www.nctsn.org/resources/why-they-dont-tell-teens-and-sexual-assault-disclosure>.

71. *Honour Killings by Region: South & Central Asia*, HONOUR BASED VIOLENCE AWARENESS NETWORK, <https://hbv-awareness.com/regions> (last visited Apr. 28, 2024); *FAQs: Types of Violence*, *supra* note 57.

72. *India’s Sex Ratio at Birth Begins to Normalize*, PEW RSCH. CTR. (Aug. 23, 2022) [hereinafter *India’s Sex Ratio*], <https://www.pewresearch.org/religion/2022/08/23/indias-sex-ratio-at-birth-begins-to-normalize>. There is a cultural tendency in India to view girl children as “burdens” because of its long-standing practice of dowry; immense pressure is placed on especially lower-class families to generate sufficient money and other valuables to pay brides’ prospective grooms’ families upon marriage. Janmejaya Samal, *The Unabated Female Feticide Is Leading to Bride Crisis and Bride Trade in India*, 5 J. FAM. MED. PRIMARY CARE 503, 503 (2016), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5084599/pdf/JFMPC-5-503.pdf>

73. Samal, *supra* note 72, at 504; *India’s Sex Ratio*, *supra* note 72.

74. See KANCHAN MATHUR, COUNTERING GENDER VIOLENCE: INITIATIVES TOWARDS COLLECTIVE ACTION IN RAJASTHAN 147–48, 153, 160–61 (2004)

prohibits child marriage, an estimated one in five girls and one in six boys are married before India's legal marriage age (eighteen years old for girls and twenty-one years old for boys).⁷⁵ Further, in 2022, India's National Crime Records Bureau ("NCRB") reported 445,256 cases of crimes against women (e.g., rape, assault, domestic violence, and abduction).⁷⁶ These figures may have increased not only in South Asia but also internationally in the aftermath of the COVID-19 pandemic.⁷⁷ Indeed, the NCRB reports a four-percent increase in crimes against women since 2021.⁷⁸ Additionally, in terms of workplace sexual harassment, a 2021 survey of 23,538 women workers indicated that more than 50% of women workers had experienced sexual harassment at work.⁷⁹ Finally, transgender women and third-gender persons (termed *hijras*) in India regularly endure gender discrimination in all social realms (e.g., education, employment, and medical care) because they do not conform to socially proscribed gender norms.⁸⁰

Recognizing VAW's repercussions (and perhaps hoping laws are not mere paper tigers), India has adopted legal measures to protect

(discussing domestic violence, sexual violence, workplace sexual harassment, child marriage, etc. as common VAW forms in a case study of Rajasthan, an Indian state).

75. The Prohibition of Child Act, 2016, §§ 2(a), 3 (2016) (India); *Stalled Progress Toward Eliminating Child Marriage in India*, HARV. T.H. CHAN SCH. PUB. HEALTH (Dec. 15, 2023), <https://hsph.harvard.edu/news/stalled-progress-toward-eliminating-child-marriage-in-india>.

76. *Crime in India – 2022 Snapshots (States/UTs)*, NAT'L CRIME REC. BUREAU [hereinafter *Crime in India*], <https://www.ncrb.gov.in/uploads/nationalcrimerecordsbureau/custom/ciiyearwise2022/17016097489aCII2022Snapshots-StateandUTs.pdf> (last visited Apr. 28, 2024).

77. *Measuring the Shadow Pandemic: Violence Against Women During COVID-19* (2021), U.N. WOMEN (Nov. 24, 2021), <https://data.unwomen.org/publications/vaw-rga>; Akshaya Krishnakumar & Shankey Verma, *Understanding Domestic Violence in India During COVID-19: A Routine Activity Approach*, 19 ASIAN J. CRIMINOLOGY 19, 21 (2021) (discussing increase in domestic violence globally and India during the COVID-19 pandemic).

78. *Crime in India*, *supra* note 76, at xii.

79. *See 55% Women Did Not File Complaint Against Sexual Harassment: WICCI Council of Ethics Survey*, BUS. MANAGER (May 12, 2022), <https://www.businessmanager.in/55-women-did-not-file-complaint-against-sexual-harassment-wicci-council-of-ethics-survey>.

80. Kumar et al., *supra* note 39, at 7062; indug, *India's Relationship with the Third Gender*, UAB INST. HUM. RTS. BLOG (Oct. 29, 2018) (discussing discrimination against third-gender individuals in India).

women from various VAW forms, including workplace sexual harassment.⁸¹ Below, I discuss India's political and judicial system and then its primary civil laws that protect women from sexual harassment.

V. INDIA'S POLITICAL AND JUDICIAL SYSTEM

Before delving into the anti-workplace sexual harassment laws that appeared in the Indian cases analyzed, I overview India's political and judicial system below. This summary contextualizes the system from which these laws and cases emerge.

With 22 official languages—including Hindi, Urdu, and Telugu—and a population of approximately 1.4 billion people, India is not only among the most linguistically diverse states but also the world's largest democracy.⁸² Furthermore, India's political and judicial system emerges from a complex history.⁸³ Between 1526 and 1857, the Muslim Mughal Empire ruled the territory now known as India and is accredited for unifying Hindus and Muslims—the two most commonly practiced religions in India—under one state.⁸⁴ Subsequently, and despite Indian resistance, the British Raj colonized the South Asian subcontinent, which included both modern-day India and Pakistan.⁸⁵

81. See *infra* Part VI.

82. See INDIA CONST. art. 344; Carmen Ang, *Ranked: The Countries with the Most Linguistic Diversity*, WORLD ECON. F. (Mar. 24, 2021), <https://www.visualcapitalist.com/the-countries-with-the-most-linguistic-diversity/>; Demographic and Economic Data for India, U.S. CENSUS BUREAU (July 1, 2024), <https://www.census.gov/popclock/world/in/>; Zeba Warsi, *Why Elections in India, the World's Largest Democracy, Are Crucial to Watch*, PBS NEWS HOUR (Apr. 22, 2024), <https://www.pbs.org/newshour/world/why-elections-in-india-the-worlds-largest-democracy-are-crucial-to-watch>.

83. Mary Kozlovski, *A Brief Statement of Objects and Reasons to the Indian Judicial System and Court Hierarchy* 1, 5–6 (Asian L. Ctr., Briefing Paper No. 12, 2019), https://law.unimelb.edu.au/__data/assets/pdf_file/0005/3085178/India-Briefing-Paper_final.pdf; *India*, JUDICIARIES WORLDWIDE: A RES. ON COMPAR. JUD. PRAC., [hereinafter *India*, JUDICIARIES WORLDWIDE], <https://judiciariesworldwide.fjc.gov/country-profile/india> (last visited Apr. 30, 2024).

84. See *India*, JUDICIARIES WORLDWIDE, *supra* note 83; *2022 Report on International Religious Freedom: India*, U.S. DEPT OF STATE (2022), <https://www.state.gov/reports/2022-report-on-international-religious-freedom/india>.

85. See *India*, JUDICIARIES WORLDWIDE, *supra* note 83.

In 1947, British rule ended, and India and Pakistan become separate countries.⁸⁶ In 1950, the Indian Constitution, the bedrock and highest legal authority of India's democracy, became effective.⁸⁷ Because state constitutions do not exist in India, except for Jammu and Kashmir, the national constitution governs India's 28 states and eight territories.⁸⁸ As a result of this amalgam of colonial and domestic rule, India has three governmental branches—the executive (termed the Union or Central Government), legislative (termed the Parliament), and judicial (termed the Union Judiciary).⁸⁹ India's executive branch consists of the president, vice president, and council of ministers.⁹⁰ While the prime minister heads the ministers' council, the president heads the Parliament, a bicameral legislature.⁹¹

Regarding treaty-entering powers, India's Constitution states this authority mostly resides in the president.⁹² And although courts are not permitted to create legislation, they have frequently implemented international laws—including treaty law—particularly in human rights cases.⁹³ The Supreme Court of India held that so long as the treaty is not contrary to domestic law, it becomes part of domestic law once the president ratifies it, and Indian courts cannot invalidate it.⁹⁴ As discussed in Section VI.C, in 1997, the *Vishakha* Court relied on this rule as a basis for using the CEDAW to interpret the Indian

86. *Id.*

87. *Id.*; see also Kozlovski, *supra* note 83, at 5–6; Ashish Bhan & Mohit Rohatgi, *Legal Systems in India: Overview*, W-017-5278 (2024).

88. See Kozlovski, *supra* note 83, at 5; *States and Union Territories*, KNOW INDIA, <https://knowindia.india.gov.in/states-uts> (last visited Apr. 30, 2024).

89. See Kozlovski, *supra* note 83, at 5–6.

90. See *Governance & Administration*, NAT'L PORTAL OF INDIA (Apr. 25, 2024) [hereinafter *Governance & Administration*, NAT'L PORTAL OF INDIA], <https://www.india.gov.in/topics/governance-administration>; Romila Thapar et al., *India: Government and Society*, ENCYCLOPEDIA BRITANNICA (Apr. 28, 2024), <https://www.britannica.com/place/India>.

91. See *Governance & Administration*, NAT'L PORTAL OF INDIA, *supra* note 90; Thapar et al., *supra* note 90.

92. See Vivek Sehrawat, *Implementation of International Law in Indian Legal System*, 31 FLA. J. INT'L L. 97, 108 (2019).

93. *Id.* at 115; see *infra* Section VI.C.; *Vishakha v. Rajasthan*, LNIND 1997 SC 1081, *4–10 (1997) (India).

94. See Sehrawat, *supra* note 92, 108–109; see, e.g., *Vishakha*, LNIND 1997 SC 1081 at *7.

Constitution's gender-equality provisions.⁹⁵ In this sense, Indian courts proactively implement international law.⁹⁶

However, in 2004, the Supreme Court of India held that a treaty does not become binding—like a statute—until Parliament passes enabling legislation under Article 253.⁹⁷ In the case of the CEDAW, after India ratified it in 1993, the Indian Parliament passed the Treaty's enabling legislation, the PoSH Act, in 2013, which solidified the CEDAW's binding effect as well as replaced the *Vishakha* Guidelines.⁹⁸ Thus, whether integrated into India's domestic system through judicial or legislative reform, the CEDAW—at least in terms of its anti-sexual sexual harassment provisions—carry the force of law in India and are equivalent to a Parliamentary statute.⁹⁹

In terms of India's judiciary, India has a unified judicial system.¹⁰⁰ This centralized judiciary is separated into two tiers: an upper and a lower tier.¹⁰¹ While the Supreme Court of India and high courts make up the upper tier, India's district courts, which high courts oversee, make up the lower tier.¹⁰² Furthermore, India's highest court

95. *Vishakha*, LNIND 1997 SC 1081 at *7; INDIA CONST. art. 15.

96. *See* Sehrawat, *supra* note 92, at 115.

97. *See* Sehrawat, *supra* note 92, at 111; INDIA CONST. art. 253.

98. *See* PoSH Act, Statement of Objects and Reasons, § 3; *Vishakha*, LNIND 1997 SC 1081, *8–10; Sehrawat, *supra* note 92, at 111; Prem Varma, *Position Relating to Treaties under the Constitution of India*, 17 J. IND. L. INST. 113, 130 (1975).

99. *See* PoSH Act, Statement of Objects and Reasons, § 3; Jaspreet Kaur, *CEDAW Impact and Empowerment of Women in India*, 77 IND. J. POL. SCI. 483, 484 (2016) (stating India ratified the CEDAW in 1993); *Vishakha*, LNIND 1997 SC 1081, *8–10; CEDAW, art. 11; *General Recommendation No. 19*, *supra* note 56, art. 11, §§ 17–18; Sehrawat, *supra* note 92, 111; *infra* Section VI.B.; Varma, *supra* note 98, at 130.

100. *See* Kozlovski, *supra* note 83, at 5–6; *India*, JUDICIARIES WORLDWIDE, *supra* note 83; Jayanth K. Krishnan et al., *Grappling at the Grassroots: Access to Justice in India's Lower Tier*, 27 HARV. HUM. RTS. J. 151, 160–62 (2014) [hereinafter Krishnan et al., *Grappling at the Grassroots*].

101. *India*, JUDICIARIES WORLDWIDE, *supra* note 83; Krishnan et al., *Grappling at the Grassroots*, *supra* note 100, at 152.

102. Kozlovski, *supra* note 83, at 4, 6–7; *India*, JUDICIARIES WORLDWIDE, *supra* note 83; Krishnan et al., *Grappling at the Grassroots*, *supra* note 100, at 152–53.

is the Supreme Court of India.¹⁰³ Meanwhile, India has 25 high courts, and each of its states and territories has one; however, some courts maintain jurisdiction over more than one state or territory.¹⁰⁴

Both the Supreme Court and the high courts have appellate jurisdiction; but the former is India's final court of appeal.¹⁰⁵ So, while Supreme Court decisions are controlling authority for all Indian courts, including the high courts, no lower Indian court decisions are controlling authority for the Supreme Court.¹⁰⁶ Additionally, the Supreme Court and high courts have writ jurisdiction over constitutional rights cases.¹⁰⁷ This feature, in addition to India's recognition of public interest litigation ("PIL"), enabled women's rights activists to sue Rajasthan's Government in the Supreme Court in *Vishakha* to enforce women's constitutional right to gender equality.¹⁰⁸ Finally, India has administrative tribunals staffed by civil servants and some specialized, district-level courts that focus on certain legal areas (e.g., family law courts) as well as an alternative dispute resolution ("ADR") system.¹⁰⁹ Village courts form part of India's ADR system; these are subordinate, village-level courts designed to alleviate India's overly burdened and typically slow-moving court system.¹¹⁰

103. Kozlovski, *supra* note 83, at 4, 6–7; *India*, JUDICIARIES WORLDWIDE, *supra* note 83; Krishan et al., *Grappling at the Grassroots*, *supra* note 100, at 152–53, 153 nn.6–7.

104. Kozlovski, *supra* note 83, at 4, 16; *India*, JUDICIARIES WORLDWIDE, *supra* note 83.

105. See Kozlovski, *supra* note 83, at 6–8, 17.

106. Taruni Kavuri, *Introduction to the Indian Judicial System*, ANIMAL LEGAL & HIST. CTR. (2020), <https://www.animallaw.info/article/introduction-indian-judicial-system>.

107. Kozlovski, *supra* note 83, at 8; INDIA CONST. art. 226.

108. *Vishakha v. Rajasthan*, LNIND 1997 SC 1081, *2 (1997) (India); INDIA CONST. art. 226; Zachary Holladay, Note, *Public Interest Litigation in India as a Paradigm for Developing Nations*, 19 IND. J. GLOB. LEGAL STUD. 555, 557 (2012) (explaining that PIL, a unique feature of India's legal system, enables a person or group claiming a fundamental rights violation under India's Constitution "to bypass the local courts and appeal directly to one of the state's High Courts or to the Supreme Court."); Kozlovski, *supra* note 83, at 34–37.

109. See *India*, JUDICIARIES WORLDWIDE, *supra* note 83; Krishnan et al., *Grappling at the Grassroots*, *supra* note 100, at 156–67.

110. See Krishnan et al., *Grappling at the Grassroots*, *supra* note 100, at 161–63; Jayanth K. Krishnan, *Social Policy Advocacy and the Role of Courts in India*, 21

Based on the above summary of India's judicial system, the relative hierarchy of the 10 Indian cases analyzed herein is as follows: *Bhatia*, decided in 2020, is the only Supreme Court case in the sample; therefore, only *Malik* must follow *Bhatia* because the Supreme Court is India's highest court and the Delhi High Court decided *Malik* in 2023.¹¹¹ However, because high courts decided the eight other cases before *Bhatia*, these courts must follow the *Vishakha* Guidelines ("the Guidelines") or the PoSH Act, depending on when the complainant filed the sexual harassment complaint.¹¹² If the complainant filed the complaint prior to the PoSH Act's passage in 2013, then the high courts must follow the Guidelines because they derive from a seminal Supreme Court case on sexual harassment and thus constituted the mandatory judicial authority at that time.¹¹³ Nevertheless, if the complainant filed the complaint after the PoSH Act but before *Bhatia*, then the high courts must follow the PoSH Act, which superseded the Guidelines.¹¹⁴ In relation to each other, the high courts in the sample are not binding on each other or courts beyond their jurisdiction; instead, they are merely persuasive authority.¹¹⁵ For example, the Delhi High Court in *Malik* would not have to follow the Madras High Court's ruling in *Daisyrani*.¹¹⁶

AM. ASIAN REV. 91, 100 (2003) [hereinafter Krishnan, *Social Policy Advocacy*]; Kozlovski, *supra* note 83, at 25, 29–31, 34.

111. See *supra* Part III, Table 1; *Bhatia v. Union of India*, LNIND 2020 SC 266 (2020) (India); *Malik v. Union of India*, LNINDORD 2023 DEL 2821 (Del. H.C. 2023) (India).

112. See *supra* Part III, Table 1; Compare *Bhatia*, LNIND 2020 SC 266, 5–7 (stating the complainant filed the complaint in 2007 (pre-PoSH Act); therefore, the *Vishakha* Guidelines governed), with *Murugan v. State of Tamil Nadu*, LNINDORD 2019 MAD 906, 9 (Mad. H.C. 2019) (India) (stating the complainant filed the complaint in 2018 (post-PoSH Act); therefore, the PoSH Act governed); see also PoSH Act, Statement of Objects and Reasons (showing 2013 as its passage date); *Vishakha*, LNIND 1997 SC 1081, at *7–10.

113. See, e.g., *Bhatia*, LNIND 2020 SC 266 at 5–7; see also PoSH Act, Statement of Objects and Reasons (showing 2013 as the passage date); *Vishakha*, LNIND 1997 SC 1081 at *7–10; Kozlovski, *supra* note 83, at 6–7.

114. See, e.g., *Murugan*, LNINDORD 2019 MAD 906 at 9; see also PoSH Act, Statement of Objects and Reasons (showing 2013 as the passage date); *Vishakha*, LNIND 1997 SC 1081 at *7–10.

115. Kavuri, *supra* note 106.

116. *Malik*, LNINDORD 2023 DEL 2821; *Daisyrani v. The Inst. of Rd. Trans.*, LNINDORD 2017 MAD 3788 (Mad. H.C. 2017).

In summary, India has a unique political and judicial system that derives from its complicated history as a formerly colonized nation. Additionally, this system provides the backdrop against which India's anti-sexual harassment laws arose. The next section describes the main anti-sexual harassment laws appearing in the 10 Indian court opinions.

VI. INDIA'S ANTI-WORKPLACE SEXUAL HARASSMENT LAWS

The Indian courts in this study commonly referenced the following civil laws to evaluate workplace sexual harassment claims in their opinions: (1) the Indian Constitution, (2) the CEDAW, (3) *Vishakha*, and (4) the PoSH Act.¹¹⁷ Thus, proceeding from the broadest to the narrowest source of law, I summarize these sources below. Collectively, these authorities show a complainant establishes a sexual harassment claim by demonstrating the following elements: (1) a "respondent" (i.e., a perpetrator); (2) "subject[s];" (3) the "aggrieved woman" (i.e., the complainant), whether employed at the workplace where the harassment occurred or not; (4) "sexual harassment" (5) "at any workplace."¹¹⁸

A. The Indian Constitution

Like most U.N. countries' constitutions, India's Constitution explicitly forbids state actors from committing sex discrimination against citizens; it states: "The State shall not discriminate against any

117. See, e.g., *Akhave v. Union of India*, LNIND 2016 BOM 545, §§ 65, 6, 9 (Bom. H.C. 2016) (India) (referencing the Constitution, CEDAW, *Vishakha*, and PoSH Act, respectively); *Sethulatha v. Sec'y of Dep't of Higher Education*, LNINDORD 2017 MAD 3890, §§ 2, 3, 5, 16 (Mad. H.C. 2017) (India) (same).

118. INDIA CONST. arts. 14, 15, 19(1)(g), 21; CEDAW, *supra* note 6, art. 11; *General Recommendation No. 19*, *supra* note 56, at art. 11, §§ 17–18; *Vishakha*, LNIND 1997 SC 1081, at *4–10; PoSH Act, § 2.

citizen on grounds . . . of sex”^{119, 120} But a law banning sexism certainly would be a paper tiger without judicial enforcement.¹²¹ Thus, India’s Constitution grants the Supreme Court and high courts the power to enforce this—as well as other—fundamental rights when state actors violate these rights.¹²²

Moreover, Indian courts play powerful roles in this regard.¹²³ Indeed, enforcing this sex discrimination prohibition is precisely what

119. INDIA CONST. art. 15(1) (banning state actors from discriminating based on sex as well as religion, race, caste, or birthplace); see *How Constitutions Around the World Address the Rights to Equality, Education, and Health*, WORLD POL’Y ANALYSIS CTR., <https://www.worldpolicycenter.org/how-constitutions-around-the-world-address-the-rights-to-equality-education-and-health> (last visited May 5, 2024) (discussing 2020 analysis of all 193 U.N. countries’ constitutions, which showed that 85% prohibited sex or gender discrimination).

120. Noticeably, the United States, a U.N. member state, does not have a sex discrimination ban in its Constitution. See U.S. CONST.; *U.N. Member States*, *supra* note 17. Thus, like its failure to ratify the CEDAW, the United States once again (unfavorably) distinguishes itself as a U.N. member state that does not support gender equality—this time, by failing to incorporate a constitutional sex discrimination ban. See *CEDAW Ratification Status*, *supra* note 17 (showing that 186 out of 193 U.N. member states have ratified the CEDAW and the United States is among the seven states that have not); Koh, *supra* note 8, at 269 (stating that the United States’ ongoing failure to ratify the CEDAW “has reduced [its] . . . global standing, damaged . . . diplomatic relations, and hindered [its] . . . ability to lead in the international human rights community”); Katharine Jackson, *US Equal Rights Amendment Blocked again, a Century after Statement of Objects and Reasons*, REUTERS (Apr. 27, 2023), <https://www.reuters.com/legal/government/us-equal-rights-amendment-blocked-again-century-after-introduction-2023-04-27> (demonstrating that the U.S. Constitution still does not have a sex discrimination ban, as evidenced by the United States’ failure to adopt the Equal Rights Amendment (“ERA”), a proposed amendment from 1923 banning sex discrimination and safeguarding sex equality); *ERA: Frequently Asked Questions*, ALICE PAUL INST., <https://www.equalrightsamendment.org/faq> (last visited May 2, 2024); Julie C. Suk, *An Equal Rights Amendment for the Twenty-First Century: Bringing Global Constitutionalism Home*, 28 YALE J.L. & FEMINISM 381, 383–86 (2017) (putting the United States’ failure to adopt the ERA in a global context by showing that numerous countries have included “sex equality provisions” in their constitutions).

121. See *paper tiger*, *supra* note 1; *Power Home Solar, LLC v. Sigora Solar, LLC*, 339 F.R.D. 64, 88 (W.D. Va. 2021).

122. INDIA CONST., arts. 15(1), 226 (permitting the Supreme Court and high courts to issue writs to enforce constitutional rights); Kozlovski, *supra* note 83, at 8.

123. See, e.g., Sehrawat, *supra* note 92, at 111–12 (discussing the Indian Supreme Court’s use of treaties in *Vishakha* and other cases to extend constitutional

the Supreme Court in *Vishakha* and later Indian courts have done.¹²⁴ More specifically, Indian courts construe Articles 14, 16, 19(1)(g), and 21 as prohibiting government employers from sexually harassing women in the workplace.¹²⁵ While Articles 14 and 15 mandate that states may not “deny . . . any person equality before the law or the equal protection of the laws” or “discriminate” on the basis of “sex,” respectively, Article 19(1)(g) provides “citizens . . . the right . . . to practi[c]e any profession, or to carry on any occupation, trade or business.”¹²⁶ Finally, Article 21 provides: “No person shall be deprived of his life or personal liberty except according to procedure established by law.”¹²⁷ Nevertheless, the courts and, later the Indian Parliament, would rely on the CEDAW to define sexual harassment.¹²⁸

B. The CEDAW

The CEDAW, which the U.N. General Assembly adopted in 1979 and put into effect in 1981, is an international treaty requiring state parties to eradicate all types of discrimination against women—hence, its name.¹²⁹ The Treaty’s breadth of protection for women is remarkable; it mandates that state parties ensure that women and men enjoy equal rights in political, civic, economic, cultural, social, educational, and any other sphere of life by declaring women’s right to

rights when no conflicts exist between the treaties and India’s Constitution); *infra* Section VI.C.; *Vishakha v. Rajasthan*, LNIND 1997 SC 1081, *5–7 (1997) (India) (using the CEDAW to construe workplace sexual harassment as sex discrimination under Article 15(1) of the Indian Constitution); *Nat’l Legal Servs. Auth. v. Union of India*, 3 MLJ 595, §§ 47, 49, 51, 77 (Sup. Ct.) (2014) (India) (using treaties and international legal principles to construe gender identity and sexual orientation discrimination as violative of multiple Indian constitutional rights).

124. *Vishakha*, LNIND 1997 SC 1081 at *5–10; *Nat’l Legal Servs. Auth.*, 3 MLJ 595 at § 77; *see infra* Section VI.C.; *infra* Part VII.

125. INDIA CONST. arts. 14, 15, 19(1)(g), 21; *see generally Vishakha*, LNIND 1997 SC 1081 at *2; *Ranjini v. State of Tamil Nadu*, LNINDORD 2017 MAD 5599 (Mad. H.C. 2017) (India); *Baitha v. App. Auth./Dir.*, LNIND 2018 ALL 255 (All. H.C. 2018) (India).

126. INDIA CONST. arts. 14, 15, 19(1)(g).

127. INDIA CONST. art. 21.

128. *See, e.g., Vishakha*, LNIND 1997 SC 1081, *5–8; *Bhatia v. Union of India*, LNIND 2020 SC 266 at § 102 (2020) (India); *see* PoSH Act §§ 2(n), 3(2); *see also General Recommendation No. 19*, *supra* note 56, at art. 11, §§ 17–18.

129. *See* CEDAW, *supra* note 6, at arts. 1–2.

equality in their national constitutions or “other appropriate legislation.”¹³⁰ Consequently, the CEDAW has been described as a “practical blueprint” for states as they endeavor to eliminate discrimination against women.¹³¹ To date, approximately 191 out of 193 U.N. countries have ratified the Women’s Treaty.¹³² India ratified the Treaty in 1993.¹³³ Yet, the United States and Palau have not.¹³⁴ As a result, these states remain outcasts in the international community in this regard.¹³⁵

The U.N.’s adoption of the CEDAW represented a monumental achievement because of its breadth and broad focus on women’s equality.¹³⁶ Before the CEDAW, women’s international legal protections primarily existed in general human rights treaties—including the International Covenant on Economic, Social and Cultural Rights (1966), which prohibits sex discrimination—or they existed in narrowly focused treaties forbidding specifically sexist practices, such as the Convention on the Consent to Marriage and Minimum Age for Marriage and Registration of Marriages (1962), which bans child marriage.¹³⁷ Because these treaties insufficiently protected women, the U.N. General Assembly requested its Commission on the Status of Women to draft the CEDAW.¹³⁸ Additionally, although the CEDAW focuses on eradicating gender oppression, it also acknowledges that gender oppression may intersect with race, marital status, nationality, and rurality-based oppressions.¹³⁹

Despite the CEDAW’s breadth, it would be ineffectual if it lacked an enforcement mechanism. So, to ensure states’ compliance, state parties must submit reports to the CEDAW Committee, consisting

130. *Id.* at arts. 1–2(a), 8–13.

131. ACLU’s CEDAW Fact Sheet, *supra* note 13, at 1.

132. *CEDAW Ratification Status*, *supra* note 17.

133. Kaur, *supra* note 99, at 484.

134. *CEDAW Ratification Status*, *supra* note 17.

135. *See* Koh, *supra* note 8, at 269 (“Our continuing failure to ratify CEDAW has reduced our global standing, damaged our diplomatic relations, and hindered our ability to lead in the international human rights community.”).

136. *Short History of CEDAW Convention*, U.N. WOMEN, <https://www.un.org/womenwatch/daw/cedaw/history.htm> (last visited May 2, 2024).

137. *Id.*

138. *Id.*

139. CEDAW, *supra* note 6, at Preamble.

of 23 women's equality experts.¹⁴⁰ A state's first report is due within a year of the date in which the treaty became effective.¹⁴¹ Afterward, a state must submit supplemental reports every four years.¹⁴² Based on its report review, the CEDAW Committee can then make recommendations to help states fulfill the Treaty's requirements.¹⁴³ Since the treaty's adoption—and CEDAW's adoption more than 40 years ago—the CEDAW Committee has made numerous general recommendations to clarify the treaty's provisions and address persistent and developing gender injustices.¹⁴⁴

For example, in 1992, the CEDAW Committee promulgated General Recommendation No. 19, which suggests that state parties consider workplace sexual harassment as gender discrimination, because the Treaty had not defined this term.¹⁴⁵ In the 1990s, VAW constituted one of the U.S. Second Wave Feminist Movement's core goals; therefore, this recommendation's implementation is unsurprising.¹⁴⁶ In fact, General Recommendation No. 19's workplace sexual harassment definition, recognizing both *quid pro quo* and hostile work environment harassment forms, derives from one of the Second Wave's most influential works on this topic: Catharine MacKinnon's *Sexual Harassment of Working Women: A Case of Sex Discrimination*.¹⁴⁷ First published in the late 1970s, MacKinnon's

140. *Id.* at arts. 17 § 1, 18, § 1.

141. *Id.* at arts. 17 § 1, 18, § 1.

142. *Id.* at arts. 17 § 1, 18, § 1.

143. *Id.* at art. 21, § 1; see *Committee on the Elimination of Discrimination against Women*, UN WOMEN, <https://www.un.org/womenwatch/daw/cedaw/committee.htm> (last visited May 2, 2024).

144. U.N., UN TREATY BODY DATABASE, https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?Treaty=CEDAW&Lang=en (last visited May 2, 2024).

145. *General Recommendation No. 19*, *supra* note 56, at art. 11 §§ 17–18.

146. See Martha Rampton, *Four Waves of Feminism*, PAC. UNIV. OR. (Oct. 15, 2015), <https://www.pacificu.edu/magazine/four-waves-feminism>.

147. *General Recommendation No. 19*, *supra* note 56, at art. 11 § 18; CATHARINE MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* 32, 40 (1979) (describing *quid pro quo* sexual harassment as a scenario in which a supervisor, typically a male, abuses his power by convincing a lower-level employee, usually a female, to engage in sexual favors and lists hostile working environment as a substantially more common harassment form that “makes

work set the stage for how the U.N., the United States, and indeed many countries, including India, would conceptualize anti-workplace sexual harassment law—i.e., as “unwelcome sexually-determined behavior, reasonably perceived to negatively impact one’s workplace environment” that assumes both the *quid pro quo* and hostile work environment forms.¹⁴⁸

Consequently, General Recommendation No. 19’s definition inherits MacKinnon’s definition’s strengths and limitations.¹⁴⁹ Although MacKinnon’s conceptualization provided a starting point for addressing sexual harassment through the law, it has several limitations, including that it assumes sexual harassment is heterosexual, which precludes possibly broader forms of gender discrimination that may be non-sexual as well as non-heterosexual.¹⁵⁰ Relatedly, MacKinnon’s framework assumes that the sexual harassment victim is a cis-gendered woman employee, which excludes unemployed women generally, transgender people, and men as potential victims.¹⁵¹

Similar to MacKinnon’s definition, General Recommendation No. 19 defines workplace sexual harassment as primarily sexual in nature. It is defined as “unwelcome sexually determined behaviour,” (whether directly or by implication), including “physical contact and advances,” “sexual demand,” “sexually coloured remarks,” “showing pornography,” or any other “unwelcome physical verbal or non-verbal conduct of sexual nature.”¹⁵² The definition also imposes an objective standard for determining when the harassment amounts to a hostile

the work environment unbearable”); see Louise Feld, *Along the Spectrum of Women’s Rights Advocacy: A Cross-Cultural Comparison of Sexual Harassment Law in the United States and India*, 25 *FORDHAM INT’L L.J.* 1205, 1233–39 (2002).

148. MACKINNON, *supra* note 147, at 32–46; Feld, *supra* note 147, at 1233–39, 1270; see also Akhave v. Union of India, LNIND 2016 BOM 545 (Bom. H.C. 2016) (India) (remarking on MacKinnon’s influence on various countries’ anti-sexual harassment legal frameworks).

149. See *General Recommendation No. 19*, *supra* note 56, at art. 11, § 18; Feld, *supra* note 147, at 1233–39; MACKINNON, *supra* note 147, at 32–46.

150. MACKINNON, *supra* note 147, at 32–46; see Feld, *supra* note 147, at 1233–39.

151. MACKINNON, *supra* note 147, at 32–46; see Feld, *supra* note 147, at 1233–39.

152. *General Recommendation No. 19*, *supra* note 56, at art. 11, § 18; see Vishakha v. Rajasthan, LNIND 1997 SC 1081, *8.

work environment: Sexual harassment “is discriminatory when the woman has reasonable grounds to believe that her objection would disadvantage her in connection with her employment, including recruitment or promotion, or when it creates a hostile working environment.”¹⁵³ Additionally, by including demands for sexual favors and hostile working environments as harassment, the CEDAW definition, like MacKinnon’s, recognizes *quid pro quo* and hostile working environment sexual harassment claims.¹⁵⁴ Finally, by using feminine nouns and pronouns (i.e., “woman” and “her”), this definition, like MacKinnon’s, also indicates only cis-gendered women employees can be sexual harassment victims/survivors and thus, by implication, only cis-gendered men can be perpetrators.¹⁵⁵

Despite the limitations of the CEDAW’s sexual harassment definition, this definition provided a starting point for defining and addressing workplace sexual harassment. Indeed, as discussed below, India uses General Recommendation No. 19’s sexual harassment definition in its anti-sexual harassment laws.¹⁵⁶ In addition to Indian courts, India’s Parliament has also adopted this definition.¹⁵⁷

Indian courts also tend to apply the CEDAW’s Article 11 in workplace sexual harassment cases.¹⁵⁸ Article 11 requires state parties to “take all appropriate measures” to eliminate discrimination against women in the workplace so that women and men enjoy the same employment rights.¹⁵⁹ Equipped with these treaty components, the Indian Supreme Court in *Vishakha* held that workplace sexual harassment violated women’s rights to gender equality under the Indian Constitution.¹⁶⁰

153. *Id.*

154. *Id.*

155. *Id.*

156. *General Recommendation No. 19*, *supra* note 56, at art. 11, § 18; *see, e.g., Vishakha*, LNIND 1997 SC 1081 at *5–8; *Bhatia v. Union of India*, LNIND 2020 SC 266, § 102 (2020) (India); *see* PoSH Act, §§ 2(n), 3(2).

157. *General Recommendation No. 19*, *supra* note 56, at art. 11, § 18; *see, e.g., Vishakha*, LNIND 1997 SC 1081 at *5–8; *Bhatia*, LNIND 2020 SC 266 at § 102; *see* PoSH Act, §§ 2(n), 3(2).

158. *See, e.g., Vishakha*, LNIND 1997 SC 1081 at *5–8.

159. *General Recommendation No. 19*, *supra* note 56, at General Comments, § 9.

160. *Vishakha*, LNIND 1997 SC 1081 at *5–10.

C. Vishakha v. Rajasthan

In *Vishakha*, the Indian Supreme Court applied the CEDAW to render a groundbreaking ruling: for the first time, Indian women would be able to sue employers for workplace sexual harassment.¹⁶¹ Prior to *Vishakha*, workplace sexual harassment had not been explicitly defined in Indian law, and extant civil and criminal laws insufficiently protected women at work.¹⁶² Thus, the CEDAW constituted a vital tool for the Court as well as for women to enforce their constitutional right to gender equality.¹⁶³ Additionally, the Court set the stage for how later courts applied the Treaty in their opinions.¹⁶⁴ Specifically, like the Court in *Vishakha*, subsequent courts typically relied on the CEDAW in two ways: (1) to extend women's protections against workplace sexual harassment or (2) to hold employers accountable for addressing sexual harassment complaints.¹⁶⁵

Although *Vishakha*'s horrific facts easily justified the Court's ruling, the Court carefully framed them as symptomatic of a systemic social injustice—the sexual harassment of working women—that the Court felt an “urgent . . . need” to address.¹⁶⁶ In *Vishakha*, five “prominent men” assaulted and gang-raped a government social worker for trying to prevent a child marriage of a one-year-old girl in a village in Rajasthan.¹⁶⁷ In response, NGOs, including Vishakha, and women's rights activists—the petitioners—sued Rajasthan state in a class action in the Supreme Court due to the lack of Indian legislative avenues available to women; they alleged the state had violated working women's constitutional rights and demanded legal protection against sexual harassment for working women.¹⁶⁸ In holding for the petitioners, the Court relied on a judicial construction rule allowing

161. *Id.* at *5–10; CEDAW, *supra* note 6, at art. 11.

162. *Vishakha*, LNIND 1997 SC 1081 at *4, *7; Feld, *supra* note 147, at 1252–1256.

163. *See* Feld, *supra* note 147, at 1258–1260; de Silva de Alwis & Verveer, *supra* note 8, at 52–53.

164. *See infra* Part VII.

165. *See infra* Part VII.

166. *Vishakha*, LNIND 1997 SC 1081 at *2.

167. *Id.*; MATHUR, *supra* note 74, at 207.

168. *Vishakha*, LNIND 1997 SC 1081 at *2; MATHUR, *supra* note 74, at 207–209.

courts to contrive domestic law, such as the Constitution, using “international conventions and norms when there is no inconsistency between them and there is a void in the domestic law.”¹⁶⁹ Because the Indian Government had ratified the CEDAW but lacked a sexual harassment statute, the Court “[had] no hesitation in placing reliance on . . . [the CEDAW] for . . . construing the nature and ambit of constitutional guarantee of gender equality in . . . [the Indian] Constitution.”¹⁷⁰

While interpreting women’s constitutional right to gender quality, the Court quoted the CEDAW Articles 11 and 24 and General Recommendation No. 19; it used these to justify its ruling that sexual harassment is gender discrimination and violates women’s constitutional right to gender equality.¹⁷¹ The Court also relied on these CEDAW components to promulgate the Guidelines.¹⁷² Collectively, the Guidelines form a *de facto* statute—in a judicial opinion—requiring all employers to address and prevent workplace sexual harassment.¹⁷³ Because the Supreme Court lacks constitutional authority to create legislation to implement a treaty, the Court’s creation of the Guidelines constituted an unusual and extraordinary example of judicial activism, which the Court stated that it took due to the urgency of the issue and the lack of a domestic law on it.¹⁷⁴ As a result, feminist scholars and activists have used *Vishakha* to argue that the CEDAW demonstrably furthers women’s equality and the United States should thus ratify it.¹⁷⁵ Below, I discuss the Guidelines’ main features.¹⁷⁶

Broadly, the Guidelines impose duties on all employers, whether private or government, to investigate and resolve workplace

169. *Vishakha*, LNIND 1997 SC 1081 at *7.

170. *Id.*

171. *Id.* at *5–6; INDIA CONST. art. 15; CEDAW, *supra* note 6, at arts. 11, 24; *General Recommendation No. 19*, *supra* note 56, at art. 11, §§ 17–18.

172. *Vishakha*, LNIND 1997 SC 1081 at *7–10.

173. *Id.*

174. *Id.* at *2; *see Gurjar v. State of Gujarat*, LNIND 2015 GUJ 2506 (Guj. H.C. 2015) (India) (stating the Guidelines “were to be accepted as law, which is rarely being done by the Apex Court [Supreme Court]”); Feld, *supra* note 147, at 1256 (remarking similarly); *Sehrawat*, *supra* note 92, at 115 (commenting that Indian courts cannot “make legislation”).

175. *See de Silva de Alwis & Verveer*, *supra* note 8, at 33, 52–53.

176. *See generally* Feld, *supra* note 147, at 1260–62 (summarizing the Guidelines).

sexual harassment complaints as well as prevent workplace sexual harassment.¹⁷⁷ The Guidelines begin by defining workplace sexual harassment.¹⁷⁸ The Court, in relying on the CEDAW's General Recommendation No. 19's sexual harassment definition, describes sexual harassment as "unwelcome sexually determined behaviour (whether directly or by implication)," including, "physical contact and advances," "a demand or request for sexual favours," "sexually coloured remarks," "showing pornography," or "any other unwelcome physical verbal or non-verbal conduct of sexual nature."¹⁷⁹ Additionally, the Court uses General Recommendation No. 19's objective woman standard for examining whether the incident in issue amounts to a hostile work environment: Sexual harassment "is discriminatory . . . when the woman has reasonable grounds to believe that her objection would disadvantage her in connection with her employment or work including recruiting or promotion or when it creates a hostile work environment."¹⁸⁰ But the Court also considered the women's subjective perception of the harassment, as evidenced by requiring a woman to head the internal complaints committee ("ICC").¹⁸¹ Thus, like General Recommendation No. 19's definition, the Court likewise contemplates both *quid pro quo* and hostile working environment sexual harassment claims as well as cis-gendered women employees as the only victims of workplace sexual harassment while cis-gendered men are its assumed perpetrators.¹⁸²

The Guidelines proceed by describing private and government employers' duties.¹⁸³ These duties fall into two categories: (1) prevent sexual harassment and (2) institute mechanisms for addressing sexual harassment after it occurs.¹⁸⁴ Regarding sexual harassment prevention, the Guidelines require employers to (1) circulate notices to all employees of the prohibition of sexual harassment and (2) provide a

177. See *Vishakha*, LNIND 1997 SC 1081 at *7–10.

178. *Id.* at *8.

179. *Id.*

180. *Id.*; *General Recommendation No. 19*, *supra* note 56, at art. 11, § 18.

181. See *Vishakha*, LNIND 1997 SC 1081 at *8; Feld, *supra* note 147, at 1276–77.

182. See *Vishakha*, LNIND 1997 SC 1081 at *8; *General Recommendation No. 19*, *supra* note 56, at art. 11, § 18.

183. See *Vishakha*, LNIND 1997 SC 1081 at *8–10.

184. *Id.* at *8–10.

suitable work environment “in respect of work, leisure, health and hygiene to further ensure that there is no hostile environment towards women . . . and [that] no employee woman [has] . . . reasonable grounds to believe that she is disadvantaged in connection with her employment.”¹⁸⁵ Regarding post-sexual harassment duties, these include the following: (1) report sexual harassment incidents to the appropriate government authorities when they rise to the level of criminal offenses under the Indian Penal Code (“IPC”), (2) assist and provide support to women even when the alleged perpetrators are not employees, (3) take “appropriate disciplinary action” against employees determined to have committed sexual harassment, (4) implement an internal complaints committee (“ICC”) to address sexual harassment complaints in a “time[-]bound” manner, and (5) report adherence to the Guidelines to the appropriate government authority.¹⁸⁶

Regarding the ICC, the Court provided further parameters: (1) The ICC must keep all complaints confidential, (2) investigate and resolve sexual harassment complaints, and (3) make yearly reports to the appropriate government authority regarding the complaints and the ICC’s actions regarding them.¹⁸⁷ Additionally, the Court stated that each ICC’s composition must meet these three criteria: (1) have a woman chairperson, (2) have a committee composed of at least 50% women, and (3) have a third-party member with expertise in sexual harassment prevention (e.g., an NGO representative).¹⁸⁸

Beyond employer duties, the Guidelines also provide a few specific rights to women employees beyond the right to work in an environment free from sexual harassment.¹⁸⁹ These include women employees’ right to have the alleged perpetrators transferred from their employment department to another after they report the sexual harassment to their employer.¹⁹⁰ Alternatively, women employees can request their own transferral to a different department.¹⁹¹

185. *Id.* at *8.

186. *Id.* at *8–10.

187. *Id.* at *9.

188. *Id.* at *9.

189. *Id.* at *9.

190. *Id.*

191. *Id.*

The Court stated the Guidelines would remain in force until the Indian Parliament passed a statute to replace them.¹⁹² In the interim, the Court stated that the Guidelines must be “strictly observed in all work places.”¹⁹³ Later, the Indian Parliament used the CEDAW and the Guidelines to draft the PoSH Act.¹⁹⁴ In the next section, I explain the PoSH Act’s similarities to and differences from the Guidelines.

D. The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013

Overall, the PoSH Act, legislation enabling the CEDAW’s implementation in India, constitutes a more detailed version of the Guidelines.¹⁹⁵ As such, the former likewise generally provides women with the ability to sue for workplace sexual harassment.¹⁹⁶ But, unlike the Guidelines, which the Indian Supreme Court more broadly stated, the PoSH Act has all the regular statutory anatomy.¹⁹⁷ For example, the PoSH Act has a “Statement of Objects and Reasons” (analogous to a preamble in an American federal statute).¹⁹⁸ Furthermore, like the *Vishakha* opinion, the PoSH Act’s Statement of Objects and Reasons incorporates the CEDAW’s Article 11 and General Recommendation No. 19 as legal authority:

Article 11 of the Convention on Elimination of All Forms of Discrimination (CEDAW), to which India is a party, requires State parties to take all appropriate measures to eliminate discrimination against women in the field of employment. In its General Recommendation No. 19 (1992), the United Nations Committee on CEDAW further clarified that equality in employment can be seriously impaired when women are subjected to gender-

192. *Id.* at *10.

193. *Id.*

194. *See General Recommendation No. 19, supra* note 56, at art. 11, § 18; PoSH Act §§ 2(n), 3(2).

195. PoSH Act §§ 1–30.

196. *Id.*; *Vishakha*, LNIND 1997 SC 1081 at *7–10.

197. *Compare Vishakha*, LNIND 1997 SC 1081 at *7–*10, *with* PoSH Act §§ 1–30.

198. *See* PoSH Act, Statement of Objects and Reasons.

specific violence, such as sexual harassment at the workplace. India's commitment to protection and promotion of women's Constitutional rights as well as respect for its obligations under various international treaties is unequivocal.¹⁹⁹

Later, Indian courts would frequently cite this paragraph in their opinions.²⁰⁰ Additionally, the statute contains definitions and topically organized provisions via chapters and subsections.²⁰¹ Below, I discuss further similarities and differences to illustrate not only the CEDAW's monumental impact on the Supreme Court and Parliament but also to broadly illustrate how the Treaty can inspire state parties to use it as a baseline for expanding—and limiting—women's protections against gender discrimination.²⁰² Similarities and differences between the PoSH Act and Guidelines fall into four categories: (1) the complainants, (2) sexual harassment standard, (3) complaint mechanism, and (4) employers' penalties for failing to comply.²⁰³

First, although General Recommendation No. 19, the Guidelines, and the PoSH Act indicate only a cis-gendered woman, rather than a man, transgender person, or gender minority, can experience sexual harassment and thus file a complainant, the PoSH Act does not require the woman to be employed at the workplace where the harassment occurs.²⁰⁴ As a result, if a woman is not employed at a workplace where she experiences harassment—or employed at all—she can still sue under the statute if she meets its other criteria.²⁰⁵ Also, unlike the Guidelines, the statute explicitly enables women domestic workers to sue.²⁰⁶ This inclusion likely resulted because most of India's domestic workers are lower-class and caste Indian women and

199. *Id.*; *Vishakha*, LNIND 1997 SC 1081 at *5–7; CEDAW, *supra* note 6, at art. 11; *General Recommendation No. 19*, *supra* note 56, at art. 11, §§ 17–18.

200. *See infra* Section VII.B.

201. *See* PoSH Act §§ 1–30.

202. *See Vishakha*, LNIND 1997 SC 1081 at *5–7; PoSH Act §§ 2(n), 3(2).

203. *Compare Vishakha*, LNIND 1997 SC 1081 at *7–*10, with PoSH Act §§ 1–30.

204. *Compare General Recommendation No. 19*, *supra* note 56, at art. 11, §§ 17–18, with PoSH Act § 2(a)(i).

205. *See* PoSH Act § 2(a)(i).

206. *Id.*

they are especially vulnerable to abuse.²⁰⁷ Furthermore, in addition to requesting a transfer while the complaint is pending before the ICC, the complainant under the PoSH Act may also request up to three months' leave.²⁰⁸ Throughout the process under the statute, the woman can also request the employer help her register the complaint with the police.²⁰⁹ Finally, the PoSH Act also outlines the complainant's remedy if the ICC determines the respondent committed harassment—compensation resulting from the employer's garnishment of the respondent's wages, or, if not possible, from the respondent individually.²¹⁰ While determining the compensation amount, the ICC must consider (1) the complainant's pain and suffering, (2) loss of career opportunity, (3) medical expenses, (4) economic status, and (5) practicality of making the payment in one or multiple installments.²¹¹

Moreover, unlike the Guidelines, the statute also imposes certain constraints on complainants.²¹² For example, women must file the complaint within three months of the alleged incident—or of the last incident if there were multiple.²¹³ But the ICC may extend the filing deadline depending on the circumstances.²¹⁴ Additionally, the PoSH Act enables the ICC to suggest for the employer to initiate disciplinary action against the complainant if it determines she made a “malicious” or knowingly “false” complaint.²¹⁵ This provision has been widely criticized by feminist scholars for the chilling effect it will have on women filing complaints.²¹⁶

207. See Akshaya Vijayalakshmi et al., *Domestic Workers and Sexual Harassment in India: Examining Preferred Response Strategies*, 155 *WORLD DEV.* 1, 1–2, 10 (2022) (discussing prevalent sexual harassment against Indian domestic workers—approximately a quarter of whom are women—who lack access to formal reporting avenues).

208. PoSH Act § 12(1)–(2).

209. *Id.* at § 19(g).

210. *Id.* at §§ 13(3)(ii), 15.

211. *Id.* at § 15.

212. Compare *Vishakha v. State of Rajasthan*, LNIND 1997 SC 1081, *4–10 (1997) (India), with PoSH Act §§ 9(1), 14.

213. PoSH Act § 9(1).

214. *Id.*

215. *Id.* at § 14.

216. *Id.*; see Anagha Sarpotdar, *Examining Local Committees Under the Sexual Harassment of Women at Workplace Act*, 55 *ECON. & POL. WKLY.* 51, 55–56 (2020) (discussing the PoSH Act's limitations, including the chilling effect it may

Second, although the PoSH Act and the Guidelines incorporate General Recommendation No. 19's sexual harassment definition and recognize *quid pro quo* and hostile work environment harassment forms, the PoSH Act's standard for determining unlawful sexual harassment differs.²¹⁷ Whereas General Recommendation No. 19 and the Guidelines impose a reasonable woman standard for evaluating a hostile work environment claim, the PoSH Act omits the reasonable woman standard.²¹⁸ Instead, it provides a non-exhaustive list of scenarios that could constitute harassment if they happen in conjunction with a sexually harassing act: (1) "implied or explicit promise of preferential treatment in her employment;" (2) "implied or explicit threat of detrimental treatment in her employment;" (3) "implied or explicit threat about her present or future employment status;" (4) "interference with her work or creating an intimidating or offensive or hostile work environment for her;" or (5) "humiliating treatment likely to affect her health or safety."²¹⁹

Third, even though the Guidelines and PoSH Act require complaint mechanisms, four critical differences exist.²²⁰ First, while the Guidelines state all employers must create ICCs, the PoSH Act states only employers with 10 or more employees must do so.²²¹ If the employer has fewer, then a "Local Committee" ("LC") shall resolve the complaint like an ICC would.²²² The law requires every district—analogue to state counties in the United States—in every state to create LCs with similar ICC composition requirements.²²³ Second, unlike the Guidelines, the statute explicitly equips ICCs with the same adjudicatory authority as a civil court while evaluating whether the

have on the reporting of sexual harassment because it permits ICCs and Local Committees to recommend that employers take action against complainants if the committees determine the complainants made false complaints).

217. See PoSH Act §§ 2(n), 3; *General Recommendation No. 19*, *supra* note 56, at art. 11, § 18.

218. *General Recommendation No. 19*, *supra* note 56, at art. 11, § 18; PoSH Act §§ 2(n), 3; see Feld, *supra* note 147, at 1270.

219. PoSH Act § 3.

220. See *infra* notes 221–236.

221. Compare *Vishakha v. Rajasthan*, LNIND 1997 SC 1081, *9 (1997) (India), with PoSH Act § 6(1).

222. PoSH Act §§ 4–18.

223. *Id.* §§ 4, 7.

alleged misconduct constitutes sexual harassment.²²⁴ For example, like a civil court, the ICC can “summo[n],” require “attendance,” and “examin[e]” under oath “any person” and “requir[e] the discovery and production of documents” to help it render a decision on the complaint.²²⁵ Consequently, “any person aggrieved”—for example, the complainant or the respondent—may appeal the ICC’s decision in court.²²⁶ Third, while the Guidelines require the ICC to timely address all sexual harassment complaints, the PoSH Act provides particular deadlines by which ICCs must complete certain ICC duties.²²⁷ For example, the statute requires the ICC, rather than the employer, to “forward the complaint to the police” if a “*prima facie*” criminal case exists within seven days.²²⁸ Additionally, the ICC must complete the “inquiry”—or investigation—within 90 days.²²⁹

Fourth, in terms of the ICC’s composition, whereas the Guidelines only require a woman employee head it, the PoSH Act specifies that she be a “senior-level” employee.²³⁰ Moreover, while the Guidelines state one representative—the NGO representative—needs a sexual harassment prevention background, the statute recommends that three ICC members do.²³¹ The PoSH Act states the NGO representative must be a women’s rights advocate or have expertise in sexual harassment prevention.²³² Additionally, the statute provides that “preferably” “not less [sic] than two [m]embers from amongst employees” be “committed to the cause of women or who have had experience in social work or have legal knowledge.”²³³

Finally, in contrast to the Guidelines, the PoSH Act specifies employer penalties for failing to comply.²³⁴ This penalty is a monetary fine of up to 50,000 Indian Rupees (\$598.30 U.S. Dollars) for the first

224. *Id.* § 3. *But see Vishakha*, LNIND 1997 SC 1081 at *9.

225. PoSH Act § 11(3).

226. *Id.* § 18.

227. *Id.* § 11(1), (4). *But see Vishakha*, LNIND 1997 SC 1081 at *9.

228. PoSH Act § 11(1).

229. *Id.* § 11(4).

230. *Id.* § 2(a); *Vishakha*, LNIND 1997 SC 1081 at *9.

231. PoSH Act § 2(a); *Vishakha*, LNIND 1997 SC 1081 at *9.

232. PoSH Act § 2(a).

233. *Id.*

234. *Id.* § 26; *Vishakha*, LNIND 1997 SC 1081 at *7–10.

conviction for non-compliance.²³⁵ Second-time offenders must pay twice the fine and have their businesses or activities discontinued.²³⁶

To conclude, the CEDAW has had a significant impact on India's anti-sexual harassment laws. While the Treaty provided a baseline for the *Vishakha* Court to outlaw and address sexual harassment in the Guidelines, the PoSH Act specifies further parameters that broaden and limit women's protections against harassment. The subsequent section describes the Treaty's effects on Indian cases rendered after the PoSH Act.

VII. INDIAN COURTS APPLIED THE CEDAW AFTER THE POSH ACT'S PASSAGE IN 2013.

To determine whether the CEDAW operates as a paper tiger in Indian cases decided after the PoSH Act, I must first determine whether cases apply the Treaty, and, if so, how. After analyzing the ten, post-PoSH Act court opinions, I found that all referenced the CEDAW—mostly Article 11 and/or General Recommendation No. 19.²³⁷ Considering *Vishakha* and the PoSH Act integrated the CEDAW into Indian law, this result is unsurprising.²³⁸ Moreover, of the 10 cases, eight resulted in a favorable outcome for the woman complainant—in other words, the women prevailed against their employers and perpetrators, which suggests the Treaty did not operate as a paper

235. PoSH Act § 26(1).

236. *Id.* § 26(2).

237. See *supra* Part III, Table 1; see, e.g., *Murugan v. State of Tamil Nadu*, LNINDORD 2019 MAD 906 (Mad. H.C. 2019); *AE & E Chennai Works v. Lab. Ct.*, LNINDORD 2019 MAD 11548, ¶ 29 (Mad. H.C. 2019) (India); *Malik v. Union of India*, LNINDORD 2023 DEL 2821, ¶ 18 (Del. H.C. 2023) (India); *Akhave v. Union of India*, LNIND 2016 BOM 545, ¶ 19 (Bom. H.C. 2016) (India); *Sethulatha v. Sec'y of Dep't of Higher Educ.*, LNINDORD 2017 MAD 3890, ¶ 18 (Mad. H.C. 2017) (India); see also CEDAW, *supra* note 6, at art. 11; *General Recommendation No. 19*, *supra* note 56, at art. 11, §§ 17–18.

238. *Vishakha*, LNIND 1997 SC 1081 at *5–7; PoSH Act, Statement of Objects and Reasons, §§ 2(n), 3; CEDAW, *supra* note 6, at art. 11; *General Recommendation No. 19*, *supra* note 56, at art. 11, §§ 17–18; see *infra* Sections VI.B–D.

tiger.²³⁹ Instead, the Treaty seemed to effectively address harassment after it had occurred.²⁴⁰

More specifically, these eight cases featured courts using the CEDAW to broaden women's protections against workplace sexual harassment or enforce employers' compliance with the PoSH Act.²⁴¹ In so doing, these courts follow the *Vishakha* Court's tradition of applying the CEDAW to successfully combat an international human rights injustice—at least for women with sufficient resources.²⁴² Notably, all women complainants, many of whom held professional occupations (e.g., as civil servants, office staff, a nurse, etc.), worked at mostly large government (six cases) or private organizations (two cases).²⁴³ Their occupations, coupled with this work atmosphere, may have provided them with knowledge regarding and access to complaint reporting mechanisms in comparison to a domestic worker, for example, working for multiple, smaller employers (typically, the husbands and/or wives from middle- and upper- class families).²⁴⁴

239. See *infra* Sections VII.A–B. But see *Akhave v. Union of India*, LNIND 2016 BOM 545, ¶¶ 3(e), 5, 8, 17–18 (Bom. H.C. 2016) (India) (dismissing the complainant's petition to the court to increase the perpetrator's punishment for sexually harassing her 25 separate times for approximately a year where the employer, a government-owned finance corporation, lowered his salary and transferred him to an office in a different city because the punishment was not “shockingly disproportionate” to the “serious allegations”); *Sethulatha v. Sec'y of Dep't of Higher Educ.*, LNINDORD 2017 MAD 3890, ¶¶ 2–8, 27–34 (Mad. H.C. 2017) (India) (dismissing the complainant's petition to the court to invalidate her employer's ICC's investigation because the court determined the employer, a government college, had complied with the PoSH Act, Section 4—despite a four-month delay in properly forming an ICC after the complaint had been filed—where the employer initially formed an improperly constituted ICC, fixed it, and then agreed to conduct a new investigation with the properly formed ICC); PoSH Act, §§ 2(a), 11(4).

240. See *infra* Sections VII.A–B.

241. See *infra* Sections VII.A–B.

242. See *Vishakha*, LNIND 1997 SC 1081 at *5–7.

243. See, e.g., *Bhatia v. Union of India*, LNIND 2020 SC 266, 5 (2020) (India) (stating that the complainant worked as a senior-level intelligence officer for the Indian Government's Research and Analysis Service (“RAS”)); *Malik v. Union of India*, LNINDORD 2023 DEL 2821, 3 (Del. H.C. 2023) (stating that the complainant worked as an officer within the Indian Government's Department of Food and Public Distribution).

244. Vijayalakshmi et al., *supra* note 207, at 1 (discussing research showing enhanced accessibility to sexual harassment reporting mechanisms in the formal

*A. Courts Applied the CEDAW to Broaden Women's Protections
Against Workplace Sexual Harassment.*

The following five cases showed courts applying the CEDAW to extend protections for women against workplace sexual harassment: *Baitha*, *Bhatia*, *Malik*, *Murugan*, and *AE & E Chennai Works Ltd.*²⁴⁵ All relied on the Treaty, in part, to construe more liberal interpretations of the Guidelines and/or PoSH Act's terms.²⁴⁶ Consequently, the courts created a relaxed standard for establishing sexual harassment claims, thus making it easier for women to meet their evidentiary burden.²⁴⁷

In *Baitha*, the Allahabad High Court used the CEDAW's General Recommendation No. 19 to create a more liberal interpretation of the hostile work environment sexual harassment form.²⁴⁸ In *Baitha*, the petitioner, the alleged perpetrator and senior-level employee, sued his employer, an Indian oil corporation, under Article 226 of the Constitution of India.²⁴⁹ He alleged his employer's order of punishment (a demotion) and order rejecting his appeal should be quashed because the complainant, a subordinate employee and young woman, did not establish "inappropriate physical contact" because he did not actually "assault her."²⁵⁰ Rejecting the petitioner's argument, the Allahabad High Court used CEDAW to broadly define a hostile work environment.²⁵¹ The High Court declared:

CEDAW . . . recognizes that harassment can be "sex based" and take various forms. The use of abusive and abrasive language and a certain imputation of the

sector—i.e., where women work in an office or other professional setting for a government or company employer—versus in the informal sector—i.e., where women work as domestic workers in informal spaces).

245. See *supra* Part III, Table 1; discussion *infra* Section VII.A.

246. See *id.*

247. See *id.*

248. See *Baitha v. App. Auth./Dir., LNIND 2018 ALL 255*, *1–2, *19–21 (All. H.C. 2018) (India), <https://indiankanoon.org/doc/105242462>; *General Recommendation No. 19*, *supra* note 56, at art. 11, §§ 17–18.

249. See *Baitha*, LNIND 2018 ALL 255 at *1–3, *24.

250. *Id.* at *1–3, *20.

251. *Id.* at *21.

competence of a person only because such person of a certain gender are matters that would be covered under the expression “sex based” discrimination.²⁵²

The High Court reasoned the petitioner’s actions (e.g., ogling the woman, touching her face, asking her about her marriage plans while driving together on a work trip, etc.) thus “did not cease to be outrageous for want of an actual assault or touch by the superior officer.”²⁵³ Additionally, the High Court concluded that in sexual harassment cases, courts must consider “the broader probabilities of a case and not get swayed by insignificant discrepancies or narrow technicalities or dictionary meaning of the expression molestation.”²⁵⁴ Thus, based on the allegations’ seriousness—and despite the absence of a “traditional” sexual assault (e.g., rape)—the High Court upheld the company’s decision to demote the petitioner and dismissed his petition.²⁵⁵

Similarly, in *Bhatia*, in which a senior intelligence officer for the Indian Government’s Research and Analysis Service (“RAS”) alleged two male superiors sexually harassed her, the Supreme Court drew upon the CEDAW’s General Recommendation No. 19 to render two rulings that expand the types of conduct that create a hostile working environment.²⁵⁶ First, the Court held an employer’s mere mishandling of a complaint can amount to sexual harassment regardless of whether its ICC determines that the alleged sexual harassment, which prompted the complaint, has been proved.²⁵⁷ Thus, the *Bhatia* Court further expanded the *Baitha* Court’s definition by including an employer’s mishandling of a complaint.²⁵⁸ According to the Court, the RAS twice failed to form an ICC with a third-party member from an NGO or similar organization familiar with sexual harassment, and the agency delayed the referral of the complaint to the

252. *Id.*

253. *Id.* at *5–6, *20.

254. *Id.* at *20.

255. *Id.* at *24.

256. *Bhatia v. Union of India*, LNIND 2020 SC 266, ¶¶ 5, 102 (2020) (India); *General Recommendation No. 19*, *supra* note 56, at art. 11, §§ 17–18.

257. *Bhatia*, LNIND 2020 SC 266 ¶¶ 10, 102.

258. *Id.*

ICC for three months.²⁵⁹ Additionally, then-Indian Prime Minister Manmohan Singh also publicly “attack[ed]” her mental state in a press release after she allegedly attempted suicide in his office to “protest” the Indian Government’s mismanagement of her complaint.²⁶⁰

Second—and relatedly—the Court ruled that a hostile working environment, one type of sexual harassment, includes not only unwelcome *sexual* advances but also all forms of gender-based discrimination at the workplace—even when the forms are non-sexual.²⁶¹ In *Bhatia*, examples included not only her supervisors’ request for her to “join” a “sex racket running inside the [o]rgani[z]ation for securing quicker promotions” but also overall sexist treatment of her and gross organizational failure to properly handle her complaint.²⁶² As the Court stated:

The scheme of the [PoSH] 2013 Act, *Vishakha* Guidelines and . . . CEDAW predicates that a nonhostile 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 [sic] functioning at the workplace. Taking any other view would defeat the purpose of the law.²⁶³

This definition greatly extended the scope of sexual harassment under the PoSH Act by encompassing various scenarios in which a woman may encounter gender discrimination at work.²⁶⁴ Because of the Indian Government’s violation of her constitutional rights to life and dignity, the Court rendered a judgement 100,000 Indian Rupees (\$1,197.68 U.S. Dollars).²⁶⁵

259. *Id.* ¶¶ 7, 102.

260. *Id.* ¶¶ 9–11, 101.

261. *Id.* ¶¶ 6, 102.

262. *Id.*

263. *Id.* ¶ 102.

264. *Id.* ¶¶ 5, 102.

265. *Id.* ¶ 104.

While the courts in *Baitha* and *Bhatia* used the CEDAW to broadly interpret the sexual harassment definition, the Delhi High Court in *Malik* used the Treaty to broadly interpret the PoSH Act's definitions of employer and employee.²⁶⁶ More specifically, the High Court cited the CEDAW's Article 11 and General Recommendation No. 19, which the PoSH Act also cites, as a justification for expanding the statutory meanings of "employer" and "employee," so that they include instances in which a male employee sexually harasses a female employee from a different department than his own, but they share the same employer.²⁶⁷ Although the PoSH Act liberally defines these terms, it does not specify this circumstance.²⁶⁸ Thus, critically, this ruling expands the scope of employer liability to such situations.²⁶⁹

In *Malik*, the complainant, a woman officer within the Indian Government's Department of Food and Public Distribution, and the petitioner, a Indian Revenue Service ("IRS") officer, both worked for the Indian Government.²⁷⁰ The woman alleged the petitioner had sexually harassed her.²⁷¹ The woman's complaint was filed within her department—the Department of Food and Public Distribution's office—and that department's ICC scheduled a hearing.²⁷² Rather than attending the hearing, the petitioner—the alleged perpetrator—filed suit with the Indian Government's administrative tribunal, challenging the ICC's jurisdiction to hear the complaint because he was not an employee in the complainant's department.²⁷³ After rejecting the petitioner's challenge, the tribunal dismissed the suit.²⁷⁴ He appealed.²⁷⁵

In dismissing his petition, the Delhi High Court reasoned that if it had accepted his approach, then a female employee sexually harassed by a male employee in the same department would have legal recourse

266. *Malik v. Union of India*, LNINDORD 2023 DEL 2821 (Del. H.C. 2023) (India).

267. *Malik*, LNINDORD 2023 DEL 2821, ¶¶ 1–6, 18, 22–26.

268. PoSH Act §§ 2(f), (g).

269. *Malik*, LNINDORD 2023 DEL 2821, ¶¶ 22–26, 43.

270. *Id.* ¶¶ 1–6.

271. *Id.*

272. *Id.*

273. *Id.* ¶¶ 1–6, 9–10.

274. *Id.* ¶¶ 1–6.

275. *Id.*

under the PoSH Act while a woman harassed by a man in another department would not although they share the same employer (here, the Indian Government).²⁷⁶ The High Court stated this perverse outcome “would strike at the very root” of the PoSH Act’s “ethos and philosophy,” deriving, in part, from the CEDAW, to protect women from workplace sexual harassment.²⁷⁷ As the Court stated, the CEDAW, “to which India is a party,” “requires [s]tate parties to take all appropriate measures to eliminate discrimination against women in the field of employment” because such gender violence “seriously impair[s]” women’s right to workplace equality.²⁷⁸ Therefore, the High Court liberally construed “employer” under the PoSH Act to include an accused party’s employer even if he works in a different office than the complainant but the accused party and the complainant share the same employer.²⁷⁹ Similarly, the High Court interpreted “employee” under the PoSH Act to include an accused party even if he works for a different office from the complainant’s so long as the same employer oversees both offices.²⁸⁰

Likewise, in *Murugan*, the Madras High Court applied the CEDAW’s Article 11 and General Recommendation No. 19 to leniently construe the employer’s duty under the PoSH Act to help the complainant file a criminal complaint associated with the sexual harassment.²⁸¹ More specifically, although technically the employer’s duty, the High Court upheld an ICC’s decision to help a complainant initiate criminal action against the accused by registering the complaint with the police.²⁸² Leading up to its holding, the *Murugan* High Court, like the *Malik* High Court, emphasized India’s “unequivocal” “commitment” to eradicating gender discrimination in employment

276. *Id.* ¶¶ 22–26.

277. *Id.* ¶¶ 18, 22; CEDAW, *supra* note 6, at art. 11; *General Recommendation No. 19*, *supra* note 56, at art. 11, §§ 17–18; PoSH Act, Statement of Objects and Reasons, § 3.

278. *Malik*, LNINDORD 2023 DEL 2821, ¶ 18; PoSH Act, Statement of Objects and Reasons, § 3.

279. *Malik*, LNINDORD 2023 DEL 2821, ¶¶ 22–26; PoSH Act § 2(g).

280. *Malik*, LNINDORD 2023 DEL 2821, ¶¶ 22–26; PoSH Act § 2(f).

281. *Murugan v. State of Tamil Nadu*, LNINDORD 2019 MAD 906, ¶¶ 54, 61, 89–91, 106–07 (Mad. H.C. 2019) (India); CEDAW, *supra* note 6, art. 11; *General Recommendation No. 19*, *supra* note 56, at art. 11, §§ 17–18; PoSH Act § 19(g).

282. *Murugan*, LNINDORD 2019 MAD 906 ¶¶ 89–91.

under the CEDAW as well as other international treaties and the Indian Constitution.²⁸³

In *Murugan*, the petitioner and complainant worked as senior-level police officers in a city police department's anti-corruption unit.²⁸⁴ She filed a written complaint within her unit against her supervisor, also a senior-level police officer in the same unit and a petitioner.²⁸⁵ In her complaint, she alleged he sexually harassed her multiple times at work.²⁸⁶ She also requested in writing that the complaint be forwarded to the police so that a criminal investigation associated with the harassment could be commenced.²⁸⁷ Although the employer formed an ICC, the ICC never conducted an investigation into the complaint.²⁸⁸ However, the ICC did forward her complaint to the police.²⁸⁹ The alleged perpetrator and the complainant subsequently filed suit.²⁹⁰

At issue were Section 11(1) and 19(g) of the PoSH Act.²⁹¹ The alleged perpetrator challenged the ICC's forwarding of the complaint to the police because the ICC did not first determine a *prima facie* criminal case existed under the IPC, as Section 11(1) requires.²⁹² Therefore, he requested that the ICC's order forwarding the complaint be quashed.²⁹³ However, the complainant argued the High Court should exempt the ICC from this requirement considering the complainant's request and her IPC expertise as a senior-level police officer.²⁹⁴ Additionally, because she made the request based on her legal knowledge, it then became the employer's duty under Section 19(g) to help her register the complaint with the police.²⁹⁵ Although the High Court rejected the complainant's request to "brush aside"

283. *Id.* ¶¶ 54, 61; *Malik*, LNINDORD 2023 DEL 2821 ¶ 18.

284. *Murugan*, LNINDORD 2019 MAD 906 ¶ 17.

285. *Id.*

286. *Id.* ¶ 17.

287. *Id.* ¶¶ 21–22.

288. *Id.* ¶ 14.

289. *Id.* ¶¶ 89–91.

290. *Id.* ¶¶ 4, 10–12.

291. *Id.* ¶¶ 25–26, 63–66, 89–91; PoSH Act §§ 11(1), 19(g).

292. *Murugan*, LNINDORD 2019 MAD 906 ¶¶ 63–66; PoSH Act § 11(1).

293. *Murugan*, LNINDORD 2019 MAD 906 ¶¶ 39–40.

294. *Id.* ¶¶ 25–26.

295. *Id.*

Section 11(1)'s requirement for ICCs and stated that forwarding the complaint was technically the employer's duty under Section 19(g), the High Court did not find the ICC's referral of the complaint as a basis for quashing its registration with the police.²⁹⁶

Finally, in *AE & E Chennai Works Ltd.*, the Madras High Court used the CEDAW to provide better safeguards for women from workplace sexual harassment.²⁹⁷ In particular, the High Court employed the CEDAW's Article 11 and General Recommendation No. 19 to protect women who involuntarily withdraw their complaints.²⁹⁸ Just like previous courts, the High Court emphasized India's obligation to protect women's rights not only under its domestic laws, but also under the Treaty.²⁹⁹

In *AE & E Chennai Works Ltd.*, the perpetrator, the complainant's supervisor and the senior welder at a boiler fabrication company, allegedly sexually harassed the complainant.³⁰⁰ The complainant filed her complaint with the company.³⁰¹ During the ICC's investigation, she withdrew her complaint because of familial pressure and concerns regarding its impact on her job and marriage "prospects."³⁰² After conducting two investigations, the ICC found the perpetrator guilty, and the company terminated him.³⁰³ Afterward, the perpetrator sued for wrongful termination because the company fired him although the complainant had withdrawn her complaint, and the lower court ordered the employer to reinstate him and provide him backpay and benefits.³⁰⁴ The employer appealed, arguing it did not wrongfully terminate him because the complainant withdrew her

296. *Id.* at ¶¶ 64, 89–91.

297. *AE & E Chennai Works Ltd. v. Lab. Ct.*, LNINDORD 2019 MAD 11548, ¶¶ 8, 15–18, 29, 40 (Mad. H.C. 2019) (India); CEDAW, *supra* note 6, at art. 11.

298. *AE & E Chennai Works*, LNINDORD 2019 MAD 11548 ¶¶ 8, 15–18, 29, 40; CEDAW, *supra* note 6, at art. 11; *General Recommendation No. 19*, *supra* note 56, at art. 11, §§ 17–18; PoSH Act, Statement of Objects and Reasons, § 3.

299. *AE & E Chennai Works*, LNINDORD 2019 MAD 11548 ¶¶ 8, 15–18, 27–29.

300. *Id.* ¶¶ 2–3.

301. *Id.* ¶ 3.

302. *Id.* ¶¶ 5, 8, 15–18.

303. *Id.* ¶¶ 4–6.

304. *Id.* ¶ 7.

complaint by “force.”³⁰⁵ In reversing the lower court’s ruling because it agreed with the company, the High Court described the lower court’s ruling as “perverse.”³⁰⁶ As the High Court stated,

[I]f such behaviour and such course of actions . . . are accepted, then [a] large number of such [s]exual [h]arassment in work places will end in exoneration[,] and the same would send a wrong message to . . . female employees working in . . . establishments across the country on par with the men³⁰⁷

Through this acknowledgment, the High Court implicated the CEDAW’s mission—and India’s obligation under it—to eliminate discrimination against women in the workplace.³⁰⁸

In summary, the above cases show Indian courts applying the Women’s Treaty as a vehicle for extending women’s right to work in a sexual-harassment free workplace. Furthermore, and as discussed below, courts also used the CEDAW to enforce employers’ compliance with the PoSH Act.

B. Courts Applied the CEDAW to Enforce Employers’ Compliance with the PoSH Act.

While the five cases above showed Indian courts using the CEDAW to expand women’s protections against sexual harassment, three others showed courts using the Treaty to enforce employers’ compliance with the PoSH Act, Section 4, which regulates the composition of employers’ ICCs: *Gurjar*, *Daisyrani*, and *Ranjini*.³⁰⁹ In *Gurjar*, the Gujarat High Court used the CEDAW’s Article 11 and General Recommendation No. 19 to rule that an employer must create an ICC that complies with Section 4.³¹⁰ Prior to its ruling, the *Gurjar*

305. *Id.* ¶ 8.

306. *Id.* ¶¶ 18, 40.

307. *Id.* ¶ 16.

308. *Id.* ¶ 16; CEDAW, *supra* note 6, at art. 11; *General Recommendation No. 19*, *supra* note 56, at art. 11, §§ 17–18.

309. *See infra* Section VII.B; PoSH Act § 4.

310. *See Gurjar v. State of Gujarat*, LNIND 2015 GUJ 2506, ¶¶ 7, 9–10 (Guj. H.C. 2015); PoSH Act § 4.

Court, like the *Malik* and *Murugan* Courts, reiterated India's charge under CEDAW and the PoSH Act to eradicate sexual harassment:

Article 11 of . . . CEDAW . . . , to which India is a party, requires State parties to take all appropriate measures to eliminate discrimination against women in the field of employment. In its General Recommendation No.19 (1992), the United Nations Committee on CEDAW further clarified that equality in employment can be seriously impaired when women are subjected to gender specific violence, such as sexual harassment at the workplace . . . [The PoSH] Act speaks unequivocally of India[']s commitment to protection and promotion of women[']s Constitutional rights as well as respect for its obligations under various international treaties.³¹¹

In *Gurjar*, the petitioner, also the complainant, worked as a porter for the respondent, a government technical college.³¹² A male senior-level clerk who frequented the office where the complainant worked allegedly harassed the female staff members, including her.³¹³ Afterward, she informed the college's authorities, but they allegedly ignored her.³¹⁴ Instead, the employer transferred the complainant and the alleged perpetrator to different office locations.³¹⁵ Her office then created an ICC to investigate the complaint; it consisted of three members, including two women who were low-ranking employees.³¹⁶ The complainant alleged the ICC violated Section 4 because it lacked a "senior[-]level woman officer to head the committee" and a member from an NGO or another organization committed to women's issues.³¹⁷ Agreeing with the complainant that the ICC was "defective," the

311. *Gurjar*, LNIND 2015 GUJ 2506 at ¶¶ 7, 9–10; *Malik v. Union of India*, LNINDORD 2023 DEL 2821, ¶¶ 18, 22 (Del. H.C. 2023) (India); *Murugan v. State of Tamil Nadu*, LNINDORD 2019 MAD 906, ¶¶ 54, 61 (Mad. H.C.) (India); PoSH Act § 1.

312. *Gurjar*, LNIND 2015 GUJ 2506, ¶ 2.

313. *Id.*

314. *Id.*

315. *Id.* ¶¶ 3–5.

316. *Id.* ¶¶ 8

317. *Id.* ¶¶ 2, 8; PoSH Act § 4.

Gujarat High Court ordered the college to establish an ICC in accordance with Section 4 and then complete the investigation within four months.³¹⁸

Like the *Malik*, *Murugan*, and *Gurjar* Courts, the *Ranjini* Court used the CEDAW's Article 11 and General Recommendation No. 19—and, again, in nearly the same language, which is derived from the PoSH Act's Statement of Objects and Reasons—to rule an employer must constitute an PoSH Act-compliant ICC.³¹⁹ Additionally, the *Ranjini* Court ruled the ICC must investigate the sexual harassment complaint per the PoSH Act.³²⁰ In *Ranjini*, the petitioner, a public university staff member, filed a complaint with the university's registrar office against a man who worked as an assistant registrar.³²¹ The following day, the university employees union also filed a complaint because the university had failed to investigate the complaint.³²² Subsequently, the petitioner, also the complainant, sued the university.³²³ Approximately a week later, the university's two-member ICC—both women university professors—requested the complainant and alleged perpetrator to appear for a hearing.³²⁴ However, only the accused party attended.³²⁵ After the complainant failed to appear before the ICC a second time, the ICC determined the complaint “false” and concluded the investigation.³²⁶

Finding for the complainant, the Madras High Court held that the two-member ICC, investigation, and report were a “mere recording of the proceedings” rather than an examination of the complainant's

318. See *Gurjar*, LNIND 2015 GUJ 2506 ¶ 8.

319. See *Ranjini v. State of Tamil Nadu*, LNINDORD 2017 MAD 5599, ¶¶ 18, 32–33 (Mad. H.C. 2017) (India); *Malik v. Union of India*, LNINDORD 2023 DEL 2821, ¶ 18 (Del. H.C. 2023) (India); *Murugan v. State of Tamil Nadu*, LNINDORD 2019 MAD 906, ¶¶ 54, 61 (Mad. H.C. 2019) (India); *Gurjar*, LNIND 2015 GUJ 2506 ¶¶ 8. See generally CEDAW, *supra* note 6, at art. 11; *General Recommendation No. 19*, *supra* note 56, at art. 11, §§ 17–18; PoSH Act, Statement of Objects and Reasons, §§ 3–4.

320. *Ranjini*, LNINDORD 2017 MAD 5599 ¶¶ 18, 29, 32–33; PoSH Act §§ 11, 13.

321. *Ranjini*, LINDORD 2017 MAD 5599 ¶ 2.

322. *Id.* ¶ 3.

323. *Id.* ¶¶ 3–4.

324. *Id.* ¶¶ 5, 7.

325. *Id.* ¶ 5.

326. *Id.*

allegations and “absolutely [did] not” comply with the PoSH Act.³²⁷ Although the university later composed another ICC, consisting of five university members, the High Court stated the second ICC also did not comply with the PoSH Act or conduct “any” investigation of the complainant’s or the union’s complaint.³²⁸ The High Court ordered the university to constitute an ICC and investigate both complaints in accordance with the PoSH Act.³²⁹

Finally, in *Daisyrani*, the Madras High Court applied the CEDAW’s Article 11 and General Recommendation No. 19 to hold that an employer’s ICC must meet Section 4’s requirements.³³⁰ Like the *Malik*, *Murugan*, *Gurjar*, and *Ranjini* Courts, the *Daisyrani* Court relied on these CEDAW sections to solidify and impose India’s legal obligation to eliminate workplace sexual harassment.³³¹ Similar to the *Ranjini* Court, the *Daisyrani* Court further ruled the ICC’s investigation must comply with the PoSH Act.³³² In *Daisyrani*, the petitioner, a nurse at a government medical college, filed a complaint

327. *Id.* ¶¶ 7–8, 29, 32–33.

328. *Id.* ¶¶ 5, 7–8. Although the *Ranjini* Court does not explain why the university’s ICCs violated the PoSH Act, Section 4, the facts indicate neither had a representative from an NGO or similar organization with knowledge of women’s issues and sexual harassment prevention. *Id.* ¶¶ 5, 7–8; PoSH Act § 4(2)(c). Furthermore, the initial ICC did not have enough members because it only had two members; however, the statute requires one senior-level woman employee who serves as the presiding officer, two members who are employees—preferably with an understanding of women’s issues—and at least one member from an NGO or similar organization.

329. *Id.* ¶ 33.

330. *Daisyrani v. Inst. of Rd. Transp.*, LNINDORD 2017 MAD 3788, ¶¶ 1–2, 11, 20–21 (Mad. H.C. 2017) (India). *See generally* CEDAW, *supra* note 6, at art. 11; *General Recommendation No. 19*, *supra* note 56, at art. 11, §§ 17–18; PoSH Act, Statement of Objects and Reasons, § 3, § 4.

331. *Malik v. Union of India*, LNINDORD 2023 DEL 2821, ¶¶ 18, 22 (Del. H.C. 2023) (India); *Murugan, v. State of Tamil Nadu*, LNINDORD 2019 MAD 906, ¶¶ 54, 61, (Mad. H.C. 2019) (India); *Gurjar v. State of Gujarat*, LNIND 2015 GUJ 2506, ¶¶ 7, 9–10 (Guj. H.C. 2015) (India); *Ranjini*, LNINORD 2017 MAD 5559 ¶¶ 18, 29, 32–33; *Daisyrani*, LNINDORD 2017 MAD 3788 ¶¶ 1–2, 11, 20–21; *see also* CEDAW, *supra* note 6, at art. 11; *General Recommendation No. 19*, *supra* note 56, at art. 11, §§ 17–18; PoSH Act, Statement of Objects and Reasons, § 3, §§ 4, 11.

332. *Ranjini*, LNINDORD 2017 MAD 5599 ¶¶ 18, 29, 32–33; *Daisyrani*, LNINDORD 2017 MAD 3788 ¶¶ 1–2, 11, 20–21.

against the college's dean.³³³ After the college failed to assemble an ICC and investigate the complaint as per the PoSH Act, she filed suit.³³⁴ Deeming sexual harassment as "the most shameful human rights violation" that called for domestic and international laws, such as the CEDAW, the Madras High Court ordered the college to immediately establish an ICC and investigate the complaint in accordance with the PoSH Act.³³⁵ The High Court also ordered the college's lower-level administrators to implement the PoSH Act's provisions.³³⁶

In summary, in the above three cases, Indian courts mobilized the Women's Treaty to enforce women's right to be free from workplace sexual harassment. Collectively, all eight cases analyzed suggest the CEDAW's ongoing role in sexual harassment jurisprudence in India post *Vishakha* and the PoSH Act. Although this examination provides some evidence the Treaty is not a paper tiger for women's rights, below I further elaborate on my examination in this regard.

VIII. IMPLICATIONS

My analysis of 10 Indian sexual harassment cases has three implications for those interested in understanding human rights treaties' impacts generally and for those seeking the CEDAW's ratification in the United States. First, the CEDAW, even after a state adopts a CEDAW-inspired reform on a gender-equality issue, can inspire a state to make further reforms or reinforce existing laws to better address the issue.³³⁷ Second, a state's continued application of the Treaty indicates the Treaty's norms have been internalized, which may facilitate compliance.³³⁸ Third—and however—the CEDAW is not a panacea for eradicating discrimination against women because the Treaty mostly benefits women with some degree of privilege.³³⁹

333. *Daisyrani*, LNINDORD 2017 MAD 3788 ¶¶ 1–2.

334. *Id.*

335. *Id.* ¶¶ 3, 7–11, 20–21.

336. *Id.* ¶ 22.

337. *See infra* Part VII.

338. *See infra* Sections VII.A–B; Koh, *supra* note 8, at 268–70; Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2603, 2657 (1997).

339. *See infra* Part VII; *infra* Section VIII.C.

Thus, whether the CEDAW constitutes a paper tiger depends on the social position of the woman who may benefit from the Treaty's protections.³⁴⁰ Activists seeking the Treaty's ratification in the United States should consider these implications, especially the last, because less-privileged women may have less access to its protections due to limited resources.³⁴¹

*A. Post CEDAW-inspired Reforms, the CEDAW Can Inspire
Additional or Reinforce Existing Reforms.*

First, even after a CEDAW state party, incentivized by the CEDAW, adopts gender-equality reforms to combat VAW, the CEDAW can still inspire a state to create additional measures to tackle it or enforce existing ones.³⁴² Post *Vishakha* and the PoSH Act, eight out of the 10 cases show Indian courts using the CEDAW's workplace sexual harassment ban to expand women's domestic protections against sexual harassment or mandate employers' compliance with the PoSH Act.³⁴³ This finding generally parallels other studies on the Indian judiciary, which frequently show Indian courts actively employing treaties in human rights cases.³⁴⁴

Moreover, other CEDAW state parties, mainly those in Africa, likewise show courts mobilizing the Treaty as a "lightning rod for reform."³⁴⁵ For instance, like the *Bhatia* and *Baitha* Courts, the Tanzanian High Court in *Ephraim v. Pastory* and Zimbabwean Constitutional Court in *Mudzuru v. Ministers of Justice* applied the

340. See *infra* Part VII; *infra* Section VIII.C.

341. See *id.*; Munjal, *supra* note 14; Kumar et al., *supra* note 39, at 7060; Vijayalakshmi et al., *supra* note 207, at 1–2, 10.

342. See *supra* Part VII (discussing India's courts' application of the CEDAW).

343. CEDAW, *supra* note 6, art. 11 (noting the CEDAW's ban on workplace sexual harassment); *General Recommendation No. 19*, *supra* note 56, at art. 11, §§ 17–18; PoSH Act §§ 3, 4, 11; see *Bhatia v. Union of India*, LNIND 2020 SC 266, ¶¶ 5, 102 (2020) (India); *Ranjini v. State of Tamil Nadu*, LNINDORD 2017 MAD 5599, ¶¶ 18, 29, 32–33 (Mad. H.C. 2017) (India).

344. See, e.g., Sehwat, *supra* note 92, at 111–12.

345. See *Bhatia*, LNIND 2020 SC 266 ¶¶ 5, 102; *Baitha v. App. Auth./Dir.*, LNIND 2018 ALL 255, *1–2, *19–21 (All. H.C. 2018) (India); de Silva de Alwis & Verveer, *supra* note 8, at 50–53; *Ephraim v. Pastory* [1990] (2001) AHRLR 236 (High Ct. Tanz. at Mwanza); *Mudzuru v. Minister of Just., Legal & Parliamentary Affs.*, CCZ 2015-12 (Zim.).

Treaty to further women's right to equal treatment under the law.³⁴⁶ In *Bhatia* and *Baitha*, the courts relied on the Treaty to affirm *Vishakha*'s ruling that workplace sexual harassment violates India's Constitution and impose more of a lenient standard for establishing workplace sexual harassment, which expanded the scenarios under which women can establish this claim.³⁴⁷ Similarly, the *Ephraim* Court used the Treaty to rule Tanzania's inheritance law discriminated on the basis of sex because it did not allow women to sell land.³⁴⁸ Additionally, the Zimbabwean Constitutional Court in *Mudzuru* applied the Treaty to rule the Zimbabwean Marriage Act violated the Zimbabwean Constitution because the statute permitted sixteen-year-old girls—but not sixteen-year-old boys—to marry if they had parental (or guardian) consent.³⁴⁹

B. A State's Continued Application of the CEDAW Suggests the State Has Internalized the Treaty's Norms.

Second, Indian courts' employment of the CEDAW evidences their internalization of the CEDAW's gender-equality norms.³⁵⁰ Norm internalization occurs when the norms are integrated into a state's "domestic legal system," more specifically, into a state's domestic laws via executive, legislative, judicial, or combination of these branches.³⁵¹ As international law scholars note, without undergoing this process, a state can simply "conform . . . [its] behavior to . . . [the treaty's human rights norms] when [it is] convenient;" however, a state's

346. See *Bhatia*, LNIND 2020 SC 266, ¶¶ 5, 102; *Baitha*, LNIND 2018 ALL 255 at *1–*2, *19–*21; de Silva de Alwis & Verveer, *supra* note 8, at 50–53; *Ephraim*, (2001) AHRLR 236; *Mudzuru*, CCZ 2015-12. See generally CEDAW, *supra* note 6, art 11.

347. See *Bhatia*, LNIND 2020 SC 266 ¶¶ 5, 102; *Baitha*, LNIND 2018 ALL 255 at *1–*2, *19–*21; INDIA CONST., art. 15; *Vishakha v. Rajasthan*, LNIND 1997 SC 1081, *5–10 (1997) (India).

348. See de Silva de Alwis & Verveer, *supra* note 8, at 50–53; *Ephraim*, (2001) AHRLR 236; *Mudzuru*, CCZ 2015-12; CEDAW, *supra* note 6.

349. See de Silva de Alwis & Verveer, *supra* note 8, at 50–53; *Mudzuru*, CCZ 2015-12; CEDAW, *supra* note 6.

350. Koh, *supra* note 8, 268–69; Koh, *Why Do Nations Obey International Law?*, *supra* note 338, at 2603, 2657.

351. Koh, *supra* note 8, 268–69; Koh, *Why Do Nations Obey International Law?*, *supra* note 338, at 2603, 2657.

internalization of the treaty's norms can facilitate the state's adherence to the treaty.³⁵²

In India, the *Vishakha* Court and courts afterward internalized the CEDAW norm that workplace sexual harassment constitutes unlawful gender discrimination through their incorporation of it into their legal reasoning.³⁵³ Similarly, the Indian Parliament, by integrating the Treaty into the PoSH Act, internalized this CEDAW norm.³⁵⁴ As a result, the courts did not hesitate to hold employers and perpetrators accountable for violating the CEDAW, Indian Constitution, *Vishakha* Guidelines, and, later, the PoSH Act.³⁵⁵ For instance, the *Gurjar* and *Daisyrani* Courts, relying on the CEDAW and domestic laws, required government employers to create ICCs so that sexual harassment complaints could be properly investigated under the PoSH Act.³⁵⁶ This finding suggests that activists seeking state parties' compliance with the Treaty or Treaty ratification, in the United States' case, should likewise seek for the Treaty's norms to be internalized in states' domestic laws.

C. The CEDAW Remains a Paper Tiger for Less-privileged Women.

Nevertheless, the women reaping the benefit of Indian courts' use of the Women's Treaty were primarily women with some degree of cis-gender and class privilege.³⁵⁷ Additionally, this result suggests the CEDAW may well prove less helpful—or even a paper tiger—in the daily lives of India's trans women, *hijras*, and lower-class women who may experience discrimination at the intersection of gender, class, caste, and/or other social statuses.³⁵⁸ All 10 cases—even the two cases with unfavorable outcomes for women—involved presumptively cis-

352. Koh, *Why Do Nations Obey International Law?*, *supra* note 338, at 2603.

353. *See supra* Sections VI.C., VII.A–B.

354. *See supra* Section VI.D; PoSH Act, Statement of Objects and Reasons, § 2(n), 3.

355. *See supra* Sections VI.C., VII.A–B.

356. *Gurjar v. State of Gujarat*, LNIND 2015 GUJ 2506, ¶¶ 7, 9–10 (Guj. H.C. 2015) (India); *Daisyrani v. Inst. of Rd. Transp.*, LNINDORD 2017 MAD 3788, ¶¶ 1–2, 11, 20–21 (Mad. H.C. 2017) (India); PoSH Act, §§ 4, 11, 13.

357. *See supra* Sections VII.A–B.

358. Munjal, *supra* note 14; Gayathri Kumar et al., *supra* note 39, at 7060–62; Vijayalakshmi et al., *supra* note 207, 1–2, 10.

gendered women employees.³⁵⁹ The women's cis-gendered privilege is evidenced through the courts' regular use of feminine pronouns ("she" and "her") in reference to the complainants.³⁶⁰

Furthermore, the complainants, as victims and survivors of sexual harassment, were likely assumed to be normatively gendered women simply because they experienced the harassment.³⁶¹ Although inaccurate, in a patriarchal society, including India's, cis-gendered women are the assumed victims of gender violence while cis-gendered men are its assumed perpetrators.³⁶² Indeed, the CEDAW and the PoSH Act also make this assumption, which is illustrated through their usage of feminine pronouns to describe sexual harassment victims.³⁶³ Therefore, why would the courts, which were applying these laws, *not* do the same, especially in the absence of complainants' arguments to the contrary?³⁶⁴ Neither the courts nor the perpetrators challenged the complainants' ability to file a complaint or sue because they were not members of qualifying gender and sex (feminine woman) under the Treaty or the PoSH Act.³⁶⁵ Instead, complainants' (and the respondents') gender and sex remained unquestioned, thus suggesting, at a minimum, its sufficient adherence to gender and sex norms.³⁶⁶

Thus, this outcome suggests the women sufficiently comported with India's femininity norms, especially those for middle-class

359. See, e.g., *Akhavé v. Union of India*, LNIND 2016 BOM 545, ¶¶ 3(e), 5, 8, 17–18 (Bom. H.C. 2016) (India) (dismissing the complainant's petition to the court to increase the perpetrator's punishment for sexually harassing her 25 separate times for approximately a year where the employer, a government-owned finance corporation, lowered his salary and transferred him to an office in a different city because the punishment was not "shockingly disproportionate" to the "serious allegations"); see *supra* Sections VII.A–B.

360. *Akhavé*, LNIND 2016 BOM 545 ¶ 5.

361. *Id.*

362. *Id.*; see also Feld, *supra* note 147, at 1235–36.

363. See *General Recommendation No. 19*, *supra* note 56, at art. 11, § 18; PoSH Act, § 2(a).

364. See, e.g., *Akhavé*, LNIND 2016 BOM 545 ¶ 5.

365. *Id.*; *Malik v. Union of India*, LNINDORD 2023 DEL 2821, ¶¶ 1, 3 (Del. H.C. 2023) (India).

366. See, e.g., *Akhavé*, LNIND 2016 BOM 545 ¶ 5; *Malik*, LNINDORD 2023 DEL 2821 ¶¶ 1, 3.

women.³⁶⁷ I suggest the complainants likely demonstrated middle-class femininity norms because most of the women held professional occupations (eight out of 10 cases) commonly occupied by India's middle classes at primarily large government agencies (eight cases) or private companies (two cases).³⁶⁸ Complainants held professional occupations such as government officers (*Bhatia*, *Malik*, *Murugan*), a nurse (*Daisyrani*), and a public university professor (*Sethulatha*).³⁶⁹ However, only a few held working-class, manual labor jobs, such as serving as a baggage carrier (*Gurjar*) or welder (*AE & E Chennai Works Ltd.*).³⁷⁰ Additionally, complainants' employers included the central government's intelligence agency (*Bhatia*), food and public distribution department (*Malik*), and a finance corporation (*Akhave*); public universities or colleges (*Gurjar*, *Daisyrani*, *Ranjini*, and *Sethulatha*); a city police department (*Murugan*); and privately-owned entities—an oil corporation (*Baitha*) and a boiler fabrication company (*AE & E Chennai Works Ltd.*).³⁷¹ This finding roughly parallels the social position of the state government social worker who experienced harassment in *Vishakha*; it also suggests the combination of working in a professional occupation at a large organization, which probably has

367. See, e.g., *Akhave*, LNIND 2016 BOM 545 ¶ 5; *Malik*, LNINDORD 2023 DEL 2821 ¶¶ 1, 3.

368. See, e.g., *Sethulatha v. Sec'y of Dep't of Higher Educ.*, LNINDORD 2017 MAD 3890, ¶ 2 (Mad. H.C. 2017) (India) (stating complainant worked as a public university professor).

369. See *Bhatia v. Union of India*, LNIND 2020 SC 266 ¶¶ 1, 5 (2020) (India); *Malik*, LNINDORD 2023 DEL 2821 ¶¶ 1, 3; *Murugan v. State of Tamil Nadu*, LNINDORD 2019 MAD 906, ¶¶ 3, 9 (Mad. H.C. 2019); *Daisyrani v. Inst. of Rd. Transp.*, LNINDORD 2017 MAD 3788, ¶ 2 (Mad. H.C. 2017) (India); *Sethulatha v. Sec'y of Dep't of Higher Educ.*, LNINDORD 2017 MAD 3890, ¶ 2 (Mad. H.C. 2017) (India).

370. See *Gurjar v. State of Gujarat*, LNIND 2015 GUJ 2506, ¶ 2 (Guj. H.C. 2015) (India); *AE & E Chennai Works v. Lab. Ct.*, LNINDORD 2019 MAD 11548, ¶¶ 2–3 (Mad. H.C. 2019) (India).

371. See *Bhatia*, LNIND 2020 SC 266 ¶¶ 1, 5; *Malik*, LNINDORD 2023 DEL 2821 ¶¶ 1, 3; *Akhave*, LNIND 2016 BOM 545 ¶ 5; *Gurjar*, LNIND 2015 GUJ 2506 ¶ 2; *Daisyrani*, LNINDORD 2017 MAD 3788 ¶ 2; *Ranjini*, LNINDORD 2017 MAD 5599 ¶ 2; *Sethulatha*, LNINDORD 2017 MAD 3890 ¶ 2; *Murugan*, LNINDORD 2019 MAD 906 ¶¶ 3, 9; *Baitha*, LNIND 2018 ALL 255 at *1–2; *AE & E Chennai Works*, LNINDORD 2019 MAD 11548 ¶¶ 2–3.

established harassment reporting mechanisms, facilitates women's ability to file a complaint.³⁷²

However, noticeably absent were cases with complaints filed by comparatively less-privileged women.³⁷³ These women include cis-gendered women (of any class) working at smaller organizations; cis-gendered, working-class women employed in India's informal sector (e.g., as domestic workers); trans women (of any class); or *hijras* (of any class).³⁷⁴ This absence stems from the CEDAW and the PoSH Act's framing of cis-gendered women as sexual harassment victims as well as India's gender, class, and caste-based hierarchies.³⁷⁵ Unlike the cis-gendered, mostly professional women above, these groups have been denied access to economic and/or institutional resources and certain opportunities that would create the conditions necessary for them to file a sexual harassment complaint.³⁷⁶ Moreover, the CEDAW and the PoSH Act have been frequently criticized for the access problems it creates for underprivileged groups.³⁷⁷ Additionally, this finding parallels other access to justice studies, which indicate that lower-class individuals typically lack sufficient economic resources to hire an attorney to file or defend against civil lawsuits especially.³⁷⁸

In summary, my examination suggests the CEDAW continues to play an important role in promoting women's rights in India. However, whether the Treaty actually combats gender discrimination depends on the complex social background of the women who may benefit from it. In India, the complainants in the cases discussed tended to be cis-gendered and hold professional careers at large organizations,

372. See *Vishakha v. Rajasthan*, LNIND 1997 SC 1081, *2 (1997) (India); Munjal, *supra* note 14; Vijayalakshmi et al., *supra* note 207, 1–2, 9–10.

373. See discussion *supra* Section VIII.C.

374. See *id.*; see also Ankush Kumar, *Indian Supreme Court Declines to Include LGBTQ+ People in Sexual Harassment Law*, L.A. BLADE (Nov. 23, 2023), <https://www.losangelesblade.com/2023/11/27/indian-supreme-court-declines-to-include-lgbtq-people-in-sexual-harassment-law>; Binu Tamta v. High Court of Delhi (Sup. Ct. 2023) (India), <https://indiankanoon.org/doc/27507654>.

375. See *General Recommendation No. 19*, *supra* note 56, at art. 11, §§ 17–18; PoSH Act, § 2(a); Kumar et al., *supra* note 39, at 7060; Munjal, *supra* note 14; Vijayalakshmi et al., *supra* note 207, 1–2, 10.

376. See sources cited *supra* note 375.

377. See sources cited *supra* note 375.

378. See Rebecca Buckwalter-Poza, *Making Justice Equal*, CTR. AM. PROGRESS (Dec. 8, 2016), <https://www.americanprogress.org/article/making-justice-equal>.

which raises a concern regarding how accessible the Treaty remains for non-cis-gendered women as well as women holding jobs in the informal sector. The next section reiterates my findings and the limitations of my analysis.

IX. CONCLUSION

In conclusion, despite the small sample, this study suggests Indian courts continue to engage with the CEDAW to combat workplace sexual harassment after the PoSH Act. But not all women seem to benefit equally from the courts' more recent application of the Women's Treaty. Additionally, this Article did not address the CEDAW's potential to proactively decrease gender discrimination; instead, it only addressed the CEDAW's potential to address gender discrimination after it has occurred, and a lawsuit has been filed. Future research should examine the former using qualitative methods to better tease out potential causal connections between a decrease in gender discrimination and a state's ratification of the CEDAW. Nevertheless, this analysis provides some evidence that after discrimination occurs, the Treaty may effectively tackle it for comparatively more privileged women but not for less privileged women, for whom the Treaty may well be a paper tiger. Hopefully, this analysis inspires—and cautions—feminist activists, including myself, as we continue to advocate for the United States' ratification of the CEDAW.