WHEN SEXUAL HARASSMENT LAW GOES EAST: FEMINISM, LEGAL TRANSPLANTATION, AND SOCIAL CHANGE

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Activism around sexual harassment has sparked developments around the globe, but every legal system has its own individualized story of sexual harassment law. This article engages in a comparative study of sexual harassment in India and Israel, which seem to share a very similar development. Both countries introduced reforms in the area of sexual harassment around the same time and have legal systems that share common denominators, such as a British colonial past and a mixture of modernity and tradition. This article follows the processes that shaped the reforms and uncovers significant differences between Indian and Israeli sexual harassment law. In general, Israeli law is more robust in both its substantive scope and its enforcement. Paradoxically, for these very reasons, it is encountering a significant backlash not traced in the Indian context.

I. INTRODUCTION: SEXUAL HARASSMENT LAW AS A LEGAL TRANSPLANT

"Over the past two decades, activism around sexual harassment has sparked developments around the globe, with differing results as each nation has drawn on its own legal and cultural traditions to fashion its own approach to regulating harassment." Yale Law Professor Vicki Schulz offered these opening remarks to the panel dedicated to the discussion of sexual harassment under the auspices of the Association of American Law Schools in 2004.[1] This Article looks into this process of global-local transplantation more closely by uncovering the differences between supposedly similar case studies.

Inspiration and borrowing from other legal systems has always been a major technique in the development of law, known also as "legal transplantation."[2] This practice has been criticized by scholars pointing to the danger of imposing foreign notions that do not necessarily conform to domestic culture and needs. At the same time, it is obvious that inspiration from other systems also has its virtues, and, at any rate, is part of modern reality.[3] Sexual harassment law is an interesting example of a transplant that was conceptualized and developed originally in the United States[4] and then adopted by many other systems in different forms and degrees.[5] In fact, it represents the hegemonic mode of legal transplantation today: The impact of American law on law reforms in other countries has often been characterized as the "Americanization" of other laws.[6]

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[1] Vicki Schultz et al., *Global Perspectives on Workplace Harassment Law: Proceedings of the 2004 Annual Meeting, Association of American Law Schools Section on Labor Relations and Employment Law*, 8 EMP. RTS. & EMP. POL'Y J. 151, 151 (2004).

[2] *See generally* ALAN WATSON, LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW (2d ed. 1993) (arguing that since most laws are borrowed from other countries, they usually do not operate in the society for which they were originally designed).

[3] *See, e.g.*, Otto Kahn-Freund, *On Uses and Misuses of Comparative Law*, 37 MOD. L. REV. 1 (1974).

[4] The driving force behind this legal revolution was Catharine MacKinnon with her groundbreaking book on this matter and her ongoing work on the issue. *See generally* CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN (Yale University Press 1979) (arguing that sexual harassment is a form of employment discrimination and proposing a legal framework for addressing sexual harassment within the workplace). The United States Supreme Court adopted the thrust of MacKinnon's views on this matter when it accepted the notion that sexual harassment is a form of discrimination under Title VII. *See* Meritor Sav. Bank v. Vinson, 477 U.S. 57, 57 (1986).

[5] For reviews of sexual harassment law in various systems, *see generally* DIRECTIONS IN SEXUAL HARASSMENT LAW (Catharine A. MacKinnon & Reva B. Siegel eds., 2004) (discussing approaches to sexual harassment in a range of contexts and addressing advances in sexual harassment law and policy throughout the years).

[6] For further discussions of the "Americanization" of other systems, *see, e.g.*, Máximo Langer, *From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure*, 45 HARV. INT'L L.J. 1 (2004) (examining the adoption of an American legal innovation, plea bargaining, in four civil law countries); Ugo Mattei, *A Theory of Imperial Law: A Study of U.S. Hegemony and the Latin Resistance*, 10 IND. J. GLOBAL LEGAL STUD. 383 (2003) (positing that the Americanization of law is a form of control exercised by an imperial capitalist regime imposed on other countries); Wolfgang Wiegand, *The Reception of American Law in*

This Article follows and assesses the processes of adoption of sexual harassment law in two case studies: India and Israel. The justification for looking into these two case studies lies in the basic traits of the two systems. Both systems are based on western constitutional traditions but remain very rooted in traditional and multicultural social contexts. The issue of women's rights is a prime example of this ambivalence in both Israel and India.[7] In addition, the legal systems of India and Israel merit comparison because of their common backgrounds (originating from British colonialism around the same period—India in 1947 and Israel in 1948) and the mixture of modern values and tradition.[8] This combination of "new" and "old" in Israeli and Indian society makes analysis of the transplantation of a progressive normative standard such as the prohibition on sexual harassment, and evaluation of its introduction and the level of its acceptance, even more intriguing. Very interestingly, the two countries introduced reform in the area of sexual harassment around the same time—in 1997 the Indian Supreme Court gave the *Vishaka* decision,[9] which serves the basis for the sexual harassment law in the country, and in 1998 Israel enacted an advanced statute in this area.[10] Both countries introduced these reforms against the background of gender stereotypes and assumptions regarding male privileges that the new legal reforms aimed to uproot. The following discussion evaluates the victories and shortcomings of both reforms and the comparative study will reflect on each of these reforms by juxtaposing them against each other. Finally, this article demonstrates that Israeli law is more robust in both its substantive scope and its enforcement and that, paradoxically, for these very reasons, it is encountering a significant backlash not seen in the Indian context.

Following this introduction (which serves as Part I of the Article), the discussion starts by reviewing the basic structure of sexual harassment law in both India and Israel (in Part II). An analysis of the actual implementation and enforcement of sexual harassment law in the two countries (in Part III) complements this review. Based on this discussion, the Article juxtaposes the legal developments against the prevailing attitudes in the two countries towards the new legal regulation of sexual harassment (in Part IV). Lastly (in its concluding Part V) the Article evaluates the factors that promote feminist reforms such as the introduction of sexual harassment law.

Europe, 39 AM. J. COMP. L. 229 (1991) (comparing the Americanization of law in modern Europe to the dissemination of Roman law during the Middle Ages).

[7] For the inclusion of both countries in a comparative analysis that deals with the protection of women by laws which regulate women's sexuality and subordination, *see* Janet Halley et al., *From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work, and Sex Trafficking: Four Studies in Contemporary Governance Feminism*, 29 HARV. J.L. & GENDER 335, 361–76 (2006).

[8] For other comparative discussions of the Indian and Israeli legal systems, *see* GARY JEFFREY JACOBSOHN, THE WHEEL OF LAW: INDIA'S SECULARISM IN COMPARATIVE CONSTITUTIONAL CONTEXT 72–88, 227–65 (2003) (discussing secularism); Daphne Barak-Erez, *Symbolic Constitutionalism: On Sacred Cows and Abominable Pigs*, 6 LAW, CULTURE & HUMAN. 420 (2010) (exploring symbolism in the context of constitutional law); Marc Galanter & Jayanth Krishnan, *Personal Law and Human Rights in India and Israel*, 34 ISR. L. REV. 101 (2000) (discussing personal laws).

[9] Vishaka v. State of Rajasthan, (1997) 6 S.C.C. 241 (India).

[10] Prevention of Sexual Harassment Law, 5758-1998, SH No. 166 (Isr.).

II. INTRODUCING SEXUAL HARASSMENT LAW IN INDIA AND ISRAEL

We start our analysis by presenting the basic reforms that introduced sexual harassment law in Indian and Israeli law, respectively.

A. Sexual Harassment Law in India

Sexual harassment law in India began in 1997 with the landmark *Vishaka* decision, which for the first time defined sexual harassment at work and recognized it as a violation of women's fundamental rights to dignity and equality.[11] Prior to this decision, there was no law preventing sexual harassment at the workplace in India. Sexual harassment was not regulated by any of the labour or employment legislations. To some extent, traditional criminal law provisions under the Indian Penal Code (IPC) criminalized some forms of sexual harassment with the aim to preserve women's modesty. For example, section 509 of the Indian Penal Code states that any word, gesture or act intended to insult the modesty of a woman is an offense[12] and section 354 creates an offence out of any act that outrages the modesty of a woman,[13] but these were not actually used to address the problem of sexual harassment in the workplace. They were not effectively enforced, and at any rate, were not understood as aimed at promoting gender equality.

A well-known case was that of *Rupan Deol Bajaj v. K.P.S. Gill*[14], in which the then-Chief of Police in Punjab slapped a senior administrative services officer on the bottom at a dinner party. The general public opinion was that the officer was blowing the case out of proportion, and top officials in the state tried to suppress the case.[15] Despite this attitude, the Supreme Court found the officer guilty of offences under section 354 (assault or criminal force to a woman with intent to outrage her modesty) and section 509 (an act intended to insult the modesty of a woman) of the Indian Penal Code.[16]

Another well-known case was *Radha Bai v. Union Territory of Pondicherry*,[17] in which the appellant was a government officer who was sexually harassed and molested by the Home Minister of Tamil Nadu when she exposed his illegal involvements with the inmates of a shelter home for women.[18] When she

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[11] *Vishaka*, 6 S.C.C. 241 (India).

[12] Indian Penal Code, No. 45 of 1860, PEN. CODE § 509:

> Whoever, intending to insult the modesty of any woman, utters any word, makes any sound or gesture, or exhibits any object, intending that such word or sound shall be heard, or that such gesture or object shall be seen, by such woman, or intrudes upon the privacy of such woman, shall be punished with simple imprisonment for a term which may extend to one year, or with fine, or with both.

[13] Indian Penal Code, No. 45 of 1860, PEN. CODE § 354:

> Whoever assaults or uses criminal force to any woman, intending to outrage or knowing it to be likely that he will thereby outrage her modesty, shall be punished with imprisonment of either dissipation for a term which may extend to two years, or with fine, or with both.

[14] Rupan Deol Bajaj v. K.P.S. Gill, A.I.R. 1995 S.C. 309 (India).

[15] Bhavdeep Kang, *Brought Down a Peg*, OUTLOOK INDIA, Oct. 25 1995, *available at* www.outlookindia.com/article.aspx?200051.

[16] Rupan Deol Bajaj v. K.P.S. Gill, A.I.R. 1995 S.C. 309 (India).

[17] Radha Bai v. Union Territory of Pondicherry, A.I.R. 1995 S.C. 1476 (India).

[18] *Id*. ¶ 2.

complained, she was removed from service. Following additional complaints, the Supreme Court intervened in the investigation of the case almost seventeen years after the incident. Ultimately, the Supreme Court held that although the complainant was terminated from service, she would be entitled to full retirement benefits and directed the State and the harasser to compensate her for lost reputation and honor.[19]

The *Vishaka* decision[20] resulted from a public interest petition filed in the Supreme Court that arose out of the gang rape of a woman employee of the state government and the failure of officials to investigate her complaints.[21] As part of her work, the employee was engaged in advocating against child marriage. In the course of her advocacy, members of the upper caste harassed her and when she reported the occurrence to the local authority, it did nothing. That negligence led to her rape by five upper caste men. A women's rights organization then filed a writ in the Supreme Court requesting it to direct the state to form a committee to frame guidelines for the prevention of sexual harassment and abuse of women at the workplace.

The Supreme Court recognized that sexual harassment in the workplace violated women's rights to equality and that employers were obligated to provide a mechanism for the prevention of sexual harassment and for the resolution, settlement, or prosecution of sexual harassment.[22] Accordingly, the Court framed guidelines on sexual harassment in the workplace and declared the guidelines as law of the land until the legislature took further action.[23]

More specifically, the Supreme Court held that incidents of sexual harassment violate women's fundamental rights to life and liberty guaranteed under Article 21 of the Constitution, equality under Articles 14 and 15 of the Constitution, and the right to "practice any profession or to carry out any trade or business" protected under Article 19(1)(g) of the Constitution.[24] The right to life was interpreted to mean a "right to life with dignity."[25] The Supreme Court held that "gender equality includes protection from sexual harassment and the right to work with dignity, which is a universally recognized basic human right."[26] Keeping these principles in mind, the Supreme Court framed detailed guidelines for the protection of these rights to fill the legislative vacuum. In giving such a finding, the Court relied not only on fundamental rights under the Constitution of India and on the Court's jurisdiction under Article 32 of the Constitution to enforce fundamental rights[27], but also on Article 11 of Convention on the Elimination of All Forms of Discrimination Against Women [CEDAW] and General Recommendations 19 and 22–24 made by the CEDAW Committee.[28]

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[19] *Id*. ¶ 6.

[20] *Vishaka*, 6 S.C.C. 241 (India).

[21] *Id*.

[22] *Id*.

[23] *Id*.

[24] *Id*. (citing INDIA CONST. arts. 14–15, 21, 19 § 1 cl. g.)

[25] *Id*.

[26] *Id*.

[27] *Id*.

[28] *Id*. (citing Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW]).

The legal definition of sexual harassment given by the Supreme Court adopted the general recommendations of CEDAW (exemplifying the practice of legal transplantation) as follows:

> [S]exual harassment includes such unwelcome sexually determined behaviour (whether directly or by implication) as:
> a) physical contact and advances;
> b) a demand or request for sexual favours;
> c) sexually coloured remarks;
> d) showing pornography;
> e) and any other unwelcome physical, verbal or non-verbal conduct of a sexual nature. Where . . . such conduct can be humiliating and may constitute a health and safety problem.[29]

More specifically, the Supreme Court held that such conduct would amount to discrimination "if a woman has reasonable grounds to believe that objecting to the conduct would disadvantage her in terms of her recruitment or promotion or when it creates a hostile work environment."[30] The Court also recognized "the duty of the employer or other responsible persons in work places or other institutions to prevent or deter the commission of acts of sexual harassment and to provide the procedures for the resolution, settlement or prosecution of acts of sexual harassment by taking all steps required." [31]

The Court placed an obligation on employers in both the public and private sectors to "take appropriate steps to prevent sexual harassment" and "provide for appropriate penalties" against the offender.[32] Employers in both the public and private sectors must provide procedures for deterring workplace sexual harassment.[33] Upon the creation of such workplace rules, the employer must notify all workers of the anti-sexual harassment policy.[34] The employer has a duty to initiate appropriate criminal and/or disciplinary action when necessary.[35] In addition, the employer also has to shield workers from third-party harassment.[36] Thus, in principle, the Court imposed an affirmative duty on the employer to prevent sexual harassment in the workplace.[37] The Supreme Court also directed that a complaint mechanism be created in the employer's organization to redress the complaint made by the victim, and that such a committee should be headed by a woman, and not less than half of its members should be women.[38]

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[29] *Id*.

[30] Ratna Kapur, *Sexcapades and the Law*, 505 SEMINAR 40, 40–53 (2001), *available at* www.india-seminar.com/2001/505/505%20ratna%20kapur.htm.

[31] *Vishaka*, 6 S.C.C. at 252.

[32] *Id*.

[33] *Id*.

[34] *Id*.

[35] *Id*.

[36] *Id*.

[37] *See also* 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, 1260 (2002) (comparing the development of sexual harassment law in the United States and India).

[38] *Vishaka*, 6 S.C.C. at 252.

The *Vishaka* judgment is "significant at a symbolic level for its validation of the problem of sexual harassment and recognition of the fact that it is an experience many women are almost routinely subjected to in the workplace."[39] *Vishaka* is considered transformative because, despite the absence of enacted legislation, the Supreme Court promulgated guidelines that constitute law, leading to the recognition and prevention of sexual harassment in both public and private workplaces.[40]

The *Vishaka* decision has been reaffirmed in other Supreme Court decisions such as *Apparel Export Promotion Council v. A.K. Chopra*[41] and *D. S. Grewal v. Vimmi Joshi and Others*.[42] However, after *Vishaka*, the courts have treated sexual harassment as a moral issue in contrast to the earlier judicial trend that focused on equality and human rights. The *Apparel Export Promotion Council* case shows this new direction by the court. This decision was important in that it clarified that "actual molestation or even physical contact" are not required for the purpose of establishing a case of sexual harassment "if the background of the case establishes the genuineness of the complaint."[43] At the same time, however, it also held that the harassing conduct of the respondent was "against moral sanctions and . . . did not withstand the test of decency and modesty and . . . projected unwelcome sexual advances."[44] Thus, the Supreme Court collapsed the definition of sexual harassment that originated from the right to equality and dignity into the criminal law offence of outraging the modesty of a woman. It held that "[a]ny action or gesture, whether directly or by implication, [which] aims at or has the tendency to outrage the modesty of a female employee, must fall under the general concept of the definition of sexual harassment."[45]

B. Sexual Harassment Law in Israel

Sexual harassment law in Israel is based mainly on the reform introduced by a comprehensive statute enacted in 1998—the Prevention of Sexual Harassment Law.[46] This law, its implementation, and the controversies around it will be at the focus of the current analysis. It is, however, first important to note that this statute was not the first stage in the introduction of the prohibition on sexual harassment into Israeli law. It was preceded by earlier statutes, which, while less inclusive and less influential, are worth mentioning in order to fully understand the revolution brought about by the new law.

Prior to 1998, sexual harassment was partially regulated in employment legislation, in the criminal code (mainly with regard to incidences that involved

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[39] Kapur, *supra* note 30 (explaining the significance of the *Vishaka* decision).

[40] The judgment given by the Supreme Court in *Vishaka* is considered law under Article 144 of the Indian Constitution, which states that "[a]ll authorities, civil and judicial, in the territory of India shall act in aid of the Supreme Court." INDIA CONST. art. 144.

[41] Apparel Export Promotion Council v. A.K. Chopra, A.I.R. 1999 S.C. 625 (India).

[42] D. S. Grewal v. Vimmi Joshi and Others, (2009) 2 S.C.C. 210 (India).

[43] Anu Saksena, *CEDAW: Mandate for Substantive Equality*, 14 INDIAN J. OF GENDER STUD. 481, 492 (2007), *available at* http://ijg.sagepub.com/cgi/reprint/14/3/481.pdf.

[44] *Apparel Export Promotion Council*, A.I.R. 1999 S.C. at 632 (¶ 24).

[45] *Id.* at 633 (¶ 24).

[46] Prevention of Sexual Harassment Law, 5758-1998, SH No. 166 (Isr.).

physical aspects of harassment), and in the law regulating disciplinary provisions of state employees. The relevant employment legislation was section 7 of the Equal Opportunities in Employment Law.[47] In its original version, this provision defined sexual harassment very narrowly in a manner that applied it solely to employer-employee relations.[48] In 1995, the legislature amended this provision to include sexual harassment of a person seeking a job.[49] In addition to this employment legislation, several provisions of the Penal Law covered the more severe cases of harassment.[50] Section 348, which states the offense of "indecent act," applies to acts of sexual advances of a physical nature, such as an unwanted kiss. In addition, section 346(b), which states the offense of "forbidden intercourse by consent," applies to sexual intercourse that was conducted in circumstances of "exploiting . . . of authority in employment or service," like that of a superior and his employee with no need to establish lack of consent. These provisions might seem to cover many cases of sexual harassment but in fact did not prove to be satisfactory. First, they could be used only in the harsher cases of harassment. Second, they were limited to criminal enforcement, and did not give the victims a right to sue.[51]

Another aspect of the partial regulation of the issue of sexual harassment prior to 1998 was the power to bring state employees to disciplinary proceedings if the employee "conducts himself in a manner unbecoming his office as a State employee."[52] As in the area of criminal law, the initiative to start such proceedings was given only to the state and not to the victim. In addition, the litigation was based on a very abstract concept of "unbecoming." The potential ingrained in this disciplinary norm had started to materialize only in 1998, just a short time before the enactment of the new law. In this case, the Supreme Court, in its appellate capacity, convicted a professor in a state college of unwanted advances towards his

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[47] Equal Opportunities in Employment Law, 5748-1988, SH No. 38 (Isr.).

[48] Rachel Benziman, at that time the legal adviser of the Israel Women's Network, indicated in 1995 that "since the law [Equality of Opportunities in Employment Law] came into force until these lines are written there was not even one single significant judgment given in a suit regarding sexual harassment at the workplace, and only a few suits regarding this issue were filed." *See* RACHEL BENZIMAN, *Sexual Harassment at the Workplace*, *in* WOMEN'S STATUS IN ISRAELI LAW AND SOCIETY 318, 338 (F. Raday, C. Shalev, M. Liban-Kooby eds., 1995) (transl. by author).

[49] Equality of Opportunities in Employment Law (Amendment No. 3), 5755-1995, SH No. 334 (Isr.).

[50] Penal Law, 5737-1977, 8 LSI 133 (1977) (Isr.).

[51] A relatively famous example of a case of sexual harassment that was litigated in the framework of criminal law was the *Yitzhak Mordechai* affair. At the time, Mordechai was a prominent politician, a retired hero General, a former Minister of Defense and a possible contender for the position of the Prime Minister. He was indicted for incidences of "indecent behavior" which involved sexual physical advances towards women who were subjected to his authority. One incident involved his actions from the time of his military service and another involved his actions towards a state employee who worked for him. During the first incident, he laid on top of a woman officer who was under his authority in his apartment while trying to kiss and undress her. In the second incident, he opened his pants during a job interview with the complainant, laid her down, and touched her. The indictment specified other incidents, but he was acquitted of them due to limitation provisions. Three courts dealt with and decided the case. It started at the Magistrate Court level, CrimC (Jer.) 3185/00 State of Israel v. Mordechai (2001). Later on litigation continued in the District Court and the Supreme Court, respectively, which denied Mordechai's appeals. *See* CrimA (Jer.) 2206/01 State of Israel v. Mordechai IsrDC 2001(1) 337 (2001); CrimA 332/02 Mordechai v. State of Israel (2002). It should be noted that the *Mordechai* affair was litigated after the enactment of the Sexual Harassment Law in 1998, but related to former events, and at any rate was litigated and decided based on the traditional offenses mentioned above.

[52] *See* section 17(3) of the State Service (Discipline) Law, 5723-1963, SH No. 50 (Isr.).

students, after he was acquitted by the state disciplinary tribunals where his case was originally litigated.[53] This precedential judgment, together with the new law that has reinforced its main holdings, served as a basis for many other decisions in which both the disciplinary tribunals and the Supreme Court found state employees guilty of sexual harassment.[54]

The Israeli Prevention of Sexual Harassment Law states that it was enacted "to prohibit sexual harassment in order to protect human dignity, liberty, and privacy, and to promote equality between the sexes."[55] The bill was symbolically initiated by all of the eight women who then served as MKs (Members of Knesset, the Israeli parliament).[56] The drafting of the law was inspired by the experience of other countries, once again exemplifying the process of cross-fertilization between legal systems. However, the law did not confine itself to existing models of anti-sexual harassment legislation. In fact, at the time of its enactment, this law was the most comprehensive and far-reaching of its kind worldwide,[57] even in comparison with countries in which the awareness of sexual harassment was much more established than in Israel. According to Dr. Orit Kamir, one of the architects of the Israeli law on sexual harassment, Catharine MacKinnon, "the mother of sexual harassment law" in the United States, had said that she didn't believe the U.S. Congress would pass such a law.[58]

The law's broad and detailed definition of sexual harassment includes repeated sexual references or propositions to a person who shows that he or she is not interested in these references or propositions,[59] the prohibition of such comments by a superior to a subordinate, even if the subordinate does not show he or she is not interested,[60] and disparaging remarks to a person because of his or her

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[53] CA 6713/96 State of Israel v. Ben Asher 52(1) IsrSC 650, 661 [1998] (Isr.).

[54] *See, e.g.*, CA 309/01 Zarzar v. The Commissioner of the State Service 55(2) IsrSC 830 [2001] (Isr.); CA 1928/00 State of Israel v. Bruchin 54(3) IsrSC 649 [2000] (Isr.).

[55] Prevention of Sexual Harassment Law § 1. It is interesting to note that, in harmony with Israel's constitutional law and the importance of the right to human dignity, the law was heavily inspired by the concept of human dignity. *See* Orit Kamir, *Dignity, Respect, and Equality in Israel's Sexual Harassment Law, in* DIRECTIONS IN SEXUAL HARASSMENT LAW 561 (Catharine A. MacKinnon & Reva Siegel eds., 2004) (discussing the role of the concept of human dignity in Israeli sexual harassment law); Orit Kamir*, Rethinking Sexual Harassment in Terms of Human Dignity-Respect*, 29 MISHPATIM 317 (1998) (comparing US sexual harassment Law and Israeli sexual harassment law). However, there is a theoretical controversy between scholars in Israel concerning the appropriate doctrinal basis for the law. Critics argue that this doctrinal basis calls for the courts' judgment of the complainant's sexual morality. *See* Noya Rimalt, *Stereotyping Women, Individualizing Harassment: The Dignitary Paradigm of Sexual Harassment Law Between the Limits of Law and the Limits of Feminism*, 19 YALE J.L. & FEMINISM 391 (2007) (arguing that the Israeli conceptualization of sexual harassment as a dignitary harm has had the unintended effect of reinforcing existing patriarchal social norms).

[56] The ninth MK, Limor Livnat, was at that time a Government Minister, and therefore, according to Israeli constitutional law, could initiate a non-governmental bill.

[57] *See, e.g.*, Tsili Mor, *Law as a Tool for a Sexual Revolution: Israel's Prevention of Sexual Harassment Law—1998*, 7 MICH. J. GENDER & L. 291, 292 (2001) ("Today, Israel boasts an extraordinary law, billed as one of, if not the most, progressive laws of its kind in the world").

[58] Larry Derfner, *Flirting With Disaster*, JERUSALEM POST, Mar. 13, 1998, at 17.

[59] In the case of CSA 11976/05 Ruchi Halil v. Civil Service Commission [2007] (Isr.), Justice Procaccia discussed the concept of hostile work environment as another form of harassment prohibited by the law as well.

[60] The interpretation of who qualifies as a subordinate was addressed by the court in its case law. *See, e.g.*, CA 1599/03 Tapiro v. State Service Commissionership 58(2) IsrSC 125 [2003] (Isr.).

sex or sexual orientation. The law also defines sexual harassment as incidences of an "indecent act," as defined by section 348 of the Penal Law, 5737-1977, as well as incidences of blackmail by means of threat, as defined by section 428 of this law, when the act demanded to be performed is of a sexual character.[61]

The law provides for three alternative enforcement channels—in criminal, civil, or labor courts—through which people can file complaints. It defines sexual harassment as both a criminal offense[62] and a cause for a civil suit,[63] without the need to prove a concrete damage caused to the complainant or the prosecutor. In addition, the law serves as a basis for disciplinary proceedings according to the State Service (Discipline) Law.[64]

In the context of the workplace, the law sets out specific obligations that employers must meet to prevent sexual harassment, and if they fail to do so they can be held liable in court.[65] Among other things, the law requires employers to take reasonable actions to prevent sexual harassment in the workplace, to appoint an employee responsible for receiving, investigating, and preparing a report about complaints of sexual harassment at work, and to publicize "sample rules" in any workplace with more than twenty-five employees, explaining the prohibition on sexual harassment and procedures for filing complaints if it occurs. Moreover, the law does not limit the prohibition of sexual harassment to the workplace; the law's wording does not mention an employer-employee relation, but rather gives a wide definition that applies to any person.[66]

III. IMPLEMENTATION AND ENFORCEMENT OF SEXUAL HARASSMENT LAW REFORMS

Following this review of the new regimes of sexual harassment law in the two countries, it is important to assess their application and implementation.

A. Implementation in India

In addition to defining sexual harassment in the workplace as a legal claim, the Indian Supreme Court in *Vishaka* laid down guidelines for employers and

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[61] At the same time, the law refrained from including the more serious criminal offenses, which refer specifically to cases of sexual intercourse, including the offense of "Forbidden Intercourse by Consent," prohibited under section 346(b) of the Penal Law. At the same time, although this offense is not included in the Prevention of Sexual Harassment Law, that law gives the offense an additional reinforcement in terms of its normative legitimacy. *See* HCJ 1284/99 Anonymous v. Commander in Chief of the Israel Defense Forces 53(2) IsrSC 62, 71–72 [1999] (Isr.) (also known as the *Nir Galili* case). The Israeli Supreme Court emphasized the severity attributed to exploitation of authority also in later cases. *See* HCJ 4869/01 Anonymous v. Military Judge Advocate General 56(3) IsrSC 944, 956 [2002] (Isr.).

[62] Prevention of Sexual Harassment Law § 5.

[63] *Id*. § 6.

[64] *See, e.g.*, CSA 11976/05 Ruchi Halil; CSA 2192/06 Moshe Rahmani v. Civil Service Commission [2007] (Isr.); CSA 4193/06 Chai-Cohen v. Civil Service Commission [2006] (Isr.); CSA 1934/03 Falach v. Civil Service Commission [2003] (Isr.); CSA 43/01 Darwish v. Civil Service Commission 55(3) IsrSC 817 [2001].

[65] Prevention of Sexual Harassment Law §§ 7–8.

[66] *Id*. § 4 ("a person may not sexually harass another or subject him to prejudicial treatment").

institutions for preventing and redressing sexual harassment in the workplace. Employers were required to set up complaints committees to take up complaints of sexual harassment and investigate those complaints.

While the Supreme Court guidelines have opened up the discourse on sexual harassment in the workplace, it is clear that much remains to be done on the ground to address gender stereotyping and harassment in the workplace and to ensure that women have recourse to effective resolution of complaints.[67] The Supreme Court guidelines are far from being introduced at all levels of employment in India, and "for the most part, continue to languish on paper."[68]

In protest against the dismissal of her complaint and victimization, several women's organizations wrote protest letters to the Chief Justice of India. The letters were converted into a public interest petition in the name of *Medha Kotwal Lele and Ors. v. Union of India*,[69] and the Supreme Court started supervising the implementation of the *Vishaka* guidelines. Notices were issued to the Central Government, all State Governments and the Union Territories, asking them to report to the Supreme Court on the measures taken by them for complying with the *Vishaka* guidelines. Due to this petition, many of the service rules were amended at the Central Government and the State Government level to define sexual harassment as a specific form of misconduct.[70] In addition, labour welfare and employer liability being a subject which both the State and Central governments have power to legislate upon, many similar State amendments were made to the Industrial Employment (Standing Orders) Act 1946, which applies to private employers, to include sexual harassment as a form of misconduct.[71] As a result, Complaints Committees were set up in various public sector organizations, and the University Grants Commission sent a letter to all universities asking them to set up committees. In addition, the Supreme Court continued monitoring the progress and in 2004 passed an order stating that the Complaints Committee as envisaged in *Vishaka* should be deemed an inquiry authority for the purposes of the 1964 Central Civil Services (Conduct) Rules, that the report of the Complaints Committee should be deemed an inquiry report under these rules, and that the disciplinary authority should act on the report in accordance with these rules.[72]

Despite these reforms, more than thirteen years since the *Vishaka* judgment, change in the workplace is still moving very slowly. The majority of employers still do not have Complaints Committees established. Apart from a few public sector bodies, universities, and some large private companies, Complaints

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[67] Paramita Chaudhuri, *Sexual Harassment in the Workplace: Experiences of Women in the Health Sector,* 28–29 (Health & Population Innovation Fellowship Programme, Working Paper No. 1, 2006), *available at* http://www.popcouncil.org/pdfs/wp/India_HPIF/001.pdf.

[68] Sheba Tejani, *Sexual Harassment at the Workplace: Emerging Problems and Debates*, 39(41) ECON. & POL. WKLY., Oct. 9, 2004, at 4491.

[69] *See* Medha Kotwal Lele & Ors. vs. UOI & Ors., Writ Petition (Crl.) Nos. 173–177/1999, Order dated 26.04.2004, *available at* http://www.iiap.res.in/files/VisakaVsRajasthan_1997.pdf.

[70] Central Civil Services (Conduct) Rules, Revised, 1964, Gazette of India, part II, section 3, No.S.O.4177 (Dec. 1964). (These Conduct Rules were revised to prevent all acts of sexual harassment against women).

[71] *See* Industrial Employment (Standing Orders) Punjab Rules, 1978, Punjab Gaz. Extr. 465 (15 May 1978), Schedule II(23)(I)(u), *available at* http://pblabour.gov.in/pdf/notifications/nc04_payment_of_wages_act_1936.pdf

[72] *Medha Kotwal*, *supra* note 69.

Committees have not been set up on a large scale. Complaints Committees are often hurriedly established when employers receive a complaint of sexual harassment. Even when they are constituted, they remain largely non-functional.[73] Explanations behind the lack of Complaints Committees are many. As Sheba Tejani has pointed out,

> [F]irst, entrenched patriarchal attitudes prevent sexual harassment from being seen as a serious offense; worse, they invert the stigma of harassment on women themselves. Second, the vagueness of the guidelines on the internal grievance mechanism has left organizations with a great deal of room to manipulate the process or bypass it altogether. Third, a partial result of the first and second, is the failure of organizations to treat sexual harassment as a policy matter and integrate it into their service rules.[74]

The limited level of compliance to the guidelines is also exemplified by the recent judgment of the Supreme Court in *D.S. Grewal v. Vimmi Joshi and Anr*.[75] In this case, a teacher who was employed in a school run by an Army Welfare Society received unwelcome suggestive letters and sexual advances from an army officer who was the Vice Chairman of the school. Despite her complaints to the management, no Complaints Committee was constituted to address her complaint. The management pressured her to withdraw her complaints. Finally, when she did not withdraw her complaints, the management terminated her services. The complainant challenged her termination, alleging sexual harassment as one of the grounds, and the High Court gave a finding that the termination was illegal because a case of sexual harassment was made out. When this matter reached the Supreme Court on appeal, the Court reaffirmed the *Vishaka* definition and held that

> It is a matter of great regret that the Army which is a disciplined organization failed to provide a complaint mechanism and ignored the decision of this court which was bound to be given effect to in terms of Article 144 of the Constitution of India. A Complaints Committee as per *Vishakha* [sic] was constituted for the other teachers and the staff but evidently no complaint committee was constituted for entertaining a complaint of this nature.[76]

The Indian Supreme Court ruled that the High Court could not have claimed that it was a clear-cut case of sexual harassment of the petitioner without a proper enquiry. The Court directed that, as no Complaints Committee had been constituted, which was imperative in character, the High Court should appoint a three-member committee headed by a woman, and, in the event that it is found that the writ petitioner was subjected to sexual harassment, a report may be sent to the Army Authorities for initiation of a disciplinary action against the appellants on the basis of such a finding. All the expenditures that may be incurred on this behalf were ordered to be borne by the Army Authorities.[77]

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[73] Paramita Chaudhuri, *Sexual Harassment at the Workplace: Experiences with Complaints Committees*, 43(17) ECON. & POL. WKLY., Apr. 26, 2008, at 105.

[74] Tejani, *supra* note 68, at 4491.

[75] D.S. Grewal v. Vimmi Joshi and Anr, (2009) 2 S.C.C. 210 (India).

[76] *Id.* at 213 ¶ 24.

[77] *Id*. at 213 ¶ 26.

In addition to the above case, there have been a series of recent high-profile cases where allegations of sexual harassment have been made by senior women officers in the government, especially in the armed forces and services, where no Complaints Committees as per the *Vishaka* guidelines were set up. One well-known case is that of Nisha Bhatia, a senior officer at the Research and Analysis Wing (RAW), India's premier intelligence agency, who alleged sexual harassment by her superiors.[78] Despite her allegations, no Complaints Committee was set up to investigate the harassment that she had faced. Another important case was that of Anjali Gupta, a Flying Officer with the Indian Air Force[79]. When she complained of sexual harassment at the hands of her senior officers, she was in turn charged with indiscipline, insubordination, and financial misappropriation. She was the first woman officer in the Indian Air Force who faced court martial proceedings for indiscipline, and she was ultimately dismissed from service. During her court martial, she was put under "house arrest" by the Air Force, allegedly for her own protection. When she made complaints of sexual harassment, no Complaints Committee as per *Vishaka* was set up.

It was only due to the intense media coverage of Anjali Gupta's court martial proceedings and the intervention of the National Commission of Women that a Complaints Committee was set up to look into her allegations of harassment. However, this Committee sat for the enquiry only one day after Anjali Gupta was dismissed from service in the court martial proceedings. By that time, she refused to appear before the Committee, and the Committee dismissed her complaint. The Air Force is the first of the defense services in India to open its doors to women in areas other than medical corps, and the case of Anjali Gupta will set important legal and procedural precedents for women in the forces.

In each of these matters, there was high media coverage, and ultimately the cases were hushed up and closed, and the women who complained of sexual harassment were dismissed from service. The victimization of women who complain of sexual harassment has become a regular practice. As Justice K. Chandru of the Madras High Court stated in a similar matter, "[i]t is a classic case, where the complainant has become the accused, and the accused became the complainants."[80]

Even where Complaints Committees exist, they often fail to understand the nature of the harassment incident, underestimate its impact, or function with sexist

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[78] Nisha Bhatia alleged that "when she was the head of RAW's training institute she was subjected to 'vulgar comments' and 'discreet sexual favours' sought by the agency's top brass . . . . On August 3, 2007, a Joint Secretary on her desk offered her Rs 30,000 to spend a night with him in a hotel and even withdrew the sum from secret service funds." She also alleged that RAW Secretary Ashok Chaturvedi had dismissed her complaints, stating in writing that he didn't "'wish to be disturbed on such issues.'" When contacted by the media, Chaturvedi said: "'We have found her allegations unfounded and baseless. She was angling for a foreign posting which was not given to her which is probably behind all this.'" Ritu Sarin, *'Sexually Harassed but No One Listening': Suicide Bid at PMO by RAW Director*, INDIAN EXPRESS, Aug. 20, 2008, *available at* http://www.indianexpress.com/news/sexually-harassed-but-no-one-listening-suicide-bid-at-pmo-by-raw-director/350996/0.

[79] *Anjali Loses Sexual Harassment Case*, EXPRESSINDIA, Dec. 09, 2005, *available at* http://www.expressindia.com/news/fullstory.php?newsid=59771.

[80] *Sexual Harassment at Work Can't Be Taken Lightly: HC*, TIMES OF INDIA, Oct. 6, 2009, *available at* http://timesofindia.indiatimes.com/news/india/Sexual-harassment-at-work-cant-be-taken-lightly-HC/articleshow/5092168.cms.

assumptions (even when such assumptions act in the complainant's favor, for instance, reacting favorably to her sexual innocence.)[81]

Thus, while the recent judgment in the *Vimmi Joshi* case shows that the Supreme Court and the High Courts are still committed to the prevention of sexual harassment at the workplace, there is no real enforcement and implementation of the *Vishaka* guidelines at the ground level. Based on the *Vishaka* guidelines, dealing effectively with sexual harassment in the workplace has been reduced to merely ensuring that Complaints Committees are set up.

Another aspect of the implementation of the *Vishaka* decision that should be considered here is the absence of legislation on the matter of sexual harassment that was supposed to follow it. Although many years have passed since the *Vishaka* judgment, the Indian Parliament has yet to enact legislation preventing sexual harassment in the workplace in India. The drafting process was initiated by the National Commission for Women and then discussed with women's groups and lawyers throughout the country. Finally, a draft law known as the Protection of Women against Sexual Harassment at Workplace Bill 2007 was prepared by the legislature.[82] The draft has received a fair amount of criticism from academics and activists.[83] Recently, a new version of the bill was introduced in Parliament which imposes penalties against the victim if the complaint of sexual harassment is not proved.[84] This bill is pending consideration.

B. Implementation in Israel

In contrast to the situation in India, Israel's implementation of its sexual harassment law has been relatively intensive. The number of cases of sexual harassment that have found their way to the judiciary—through criminal indictments, employment law litigation, and disciplinary proceedings—demonstrate Israel's more thorough approach.[85] In addition, provisions for enforcement followed the law in relatively detailed regulations.[86]

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[81] *See* NIVEDITA MENON, RECOVERING SUBVERSION: FEMINIST POLITICS BEYOND THE LAW 145 (2004); Bina Srinivasan, *Dealing with Sexual Harassment at the Workplace: Impasse Continues*, 34(37) ECON. & POL. WKLY., Sept. 11, 1999, at 2638−39; SAHELI, REPORT, ANOTHER OCCUPATIONAL HAZARD: SEXUAL HARASSMENT AND THE WORKING WOMAN (1998).

[82] Protection of Women against Sexual Harassment at Workplace Bill 2007, http://wcd.nic.in/protshbill2007.htm.

[83] Maitreyi Krishnan and Ponni Arasu, *Sexual Harassment Law*, 583 SEMINAR 51 (2008), *available at* http://www.india-seminar.com/2008/583/583_maitreyi_and_ponni.htm.

[84] Protection of Women against Sexual Harassment at Work Place Bill, 2010, No. 144, Lok Sabha, Dec. 7, 2010, *available at* http://ncw.nic.in/PDFFiles/sexualharassmentatworkplacebill2005_Revised.pdf [*sic*]. As of publication, however, the law has not yet been passed.

[85] *See generally* Orit Kamir, *Hachok Haysiraeli Lemeniat Htrada Minit – Efo Anachnu Bimlot Lo Asor* [*Israel's Sexual Harassment Law After Its First Decade: An Assessment of Its Achievements and Failings*], 9 LAW & BUS. 9 (2008) (Isr.) (assessing the achievements and shortcomings of the law after a decade).

[86] *See* Prevention of Sexual Harassment (Employers Duties) Regulations, 1998, http://www.moital.gov.il/NR/exeres/F3B0257A-64C8-4EBE-B3FD-251000C9768F.htm (Isr.). *See also* Rivka Shaked, *Hachok Lemeniat Hatrada Minit Veyisumo Besherut Hamedina* [*The Implementation of The Law Against Sexual Harassment Under State Service*], *in* RODFEI TSEDEK: MECHKARIM BIFSHIA VEACHIFAT CHOK BEYISRAEL [IN THE PURSUIT OF JUSTICE: STUDIES IN CRIME AND LAW ENFORCEMENT IN ISRAEL] 161 (Levi Eden et al., eds., 2004) (Isr).

This does not necessarily mean that women always dare to complain, but from a formal perspective, the law established the necessary processes that enable them to do so. In this context, it is important to mention the provisions which protect the victim by securing his or her anonymity.[87] The fact that women can file lawsuits while their names remain, in most cases, confidential, is a serious incentive that encourages them to uphold their rights.

Another important factor has been the willingness of the state prosecution to move forward with indictments even against high-level officials. A public affair that proved decisive in this context was the trial of Haim Ramon.[88] Ramon was indicted for the unwanted kissing of a young officer who served in the Prime Minister's Chambers, when he visited the place in his capacity of Minister of Justice. The Court focused on the question of consent, or lack thereof, by the officer. Relying on the officer's version of events, the Court found Ramon guilty, and sentenced him to service labor and the payment of damages. Formally speaking, Ramon was indicted with the traditional offense of "indecent behavior," but it is important to note that this offense has been incorporated into the law of sexual harassment.

Another landmark case to be mentioned here is the so-called *Katzav* affair. This case concerned Moshe Katzav, a long-time public figure in Israel, who served at the time as the President of the State of Israel (a symbolic position only, in contrast to the Prime Minister, who is the head of the executive branch, but still an important one).[89] During his term in office, several complaints were filed against Katzav for a series of sexual offenses against women employees, allegedly committed during his time in the office of the President, as well as during former periods of public service (as a Government Minister). The Attorney General initiated an investigation against Katzav, which led to the filing of serious criminal indictments against him for sexual harassment as well as for rape. Katzav, who decided to claim innocence and revoked the plea bargain struck between the Attorney General and his attorneys, was eventually found guilty of two incidences of rape, sexual harassment, and an indecent act.[90] The *Katzav* affair is not a standard case of sexual harassment, but it has been understood and debated in the public sphere in Israel as a meaningful turning point, which celebrated the willingness of women to pursue allegations of sexual harassment.

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[87] Section 352 of the Penal Law, which prohibits publications that may identify an individual as a person who was injured by a sex offense or who complained that he was injured by such an offense, was applied also to offenses against the Prevention of Sexual Harassment Law (by section 5(e) of this law). In addition, lawsuits against employers are regulated by section 10A of the Equal Opportunities in Labour Law, 5748-1988, which authorizes the labor court to order a closed trial (adopted by section 10(c) of the Prevention of Sexual Harassment Law).

[88] CrimC (TA) 5461/06 State of Israel v. Ramon, (2007) (Isr.).

[89] Basic Law: The President of the State, 18 LSI 111, §1 (1963–64) (Isr.) (stating "A President shall stand at the head of the State").

[90] Crim.C, (TA) 1015/09 State of Israel v. Katzav (2010) (Isr.). As of publication, Katzav's sentence was not decided yet. When that stage is completed, he will be entitled to appeal the judgment to the Supreme Court.

IV. THE COMPARATIVE RIDDLE: LEGAL IMPLEMENTATION VIS-À-VIS PUBLIC ATTITUDE

In addition to evaluating the actual implementation of sexual harassment law in India and Israel, another relevant factor in these comparative case studies is that of public support. In this regard, the findings seem to be in some tension with the narrative of implementation and enforcement in the two countries.

In India, there appears to be a broad sentiment of support for the *Vishaka* judgment, although it would not be correct to say that the judicial guidelines were accepted without criticism.[91] This has been the case despite the fact that the reform was introduced through an act of mere judicial activism, without legislation. In contrast, in Israel, the issue of public attitude toward the law proves to be more complex,[92] despite the fact that the law came as a follow-up to earlier legislation, introduced through a democratic legislative process, and not by judicial law-making.[93] Against this background, the question we would like to concentrate on is how this difference should be understood and what its implications are from a feminist perspective. We believe that the difference derives from two main factors: the substantive differences in the contents of the two regimes, and the different levels of their enforcement.

First and foremost, the difference in public response between the two countries should be attributed to the different scope of the two reforms. Indian sexual harassment law currently focuses only on non-consensual events of harassment, whereas Israeli sexual harassment law applies also to acts of harassment conducted by superiors without conditioning the cause of action on lack of consent. It is hard to overstate the significance of this difference. The *Vishaka* decision introduced change, but did not declare a full attack on male supremacy, as it subjects the regulation of sexual harassment to questions of consent. The concern is that, beneath the surface, "moralism may be being smuggled into sexual harassment litigation,"[94] as the courts identify unwelcome behavior with an attempt to "outrage the modesty of a female employee."[95] The "'unwelcomeness' requirement [in the *Vishaka* guidelines] forces women to act in a wholesome and chaste manner, in accordance with socially-prescribed gender roles, in order to have a valid sexual harassment claim."[96] The courts will "protect the 'proper' victim,

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[91] *See, e.g.*, Pratiksha Baxi, *Sexual Harassment*, 505 SEMINAR 54, 54–59 (2001), *available at* http://www.india-seminar.com/2001/505/505%20pratiksha%20baxi.htm; Modhurima Dasgupta, *Social Action for Women? Public Interest Litigation in India's Supreme Court*, 4 L., SOC. JUST. & GLOBAL DEV. 1, 11 (2002), *available at* http://www2.warwick.ac.uk/fac/soc/law/elj/lgd/2002_1/dasgupta; Kapur, *supra* note 30; Avani Mehta Sood, *Gender Justice Through Public Interest Litigation: Case Studies from India*, 41 VAND. J. TRANSNAT'L L. 833, 866–875 (2008).

[92] *See generally* Sergio Herzog, *Public Perceptions of Sexual Harassment: An Empirical Analysis in Israel from Consensus and Feminist Theoretical Perspectives*, 57 SEX ROLES 579 (2007) (explaining that this ambivalence is in place despite the fact that the public generally perceives sexual harassment as a serious matter).

[93] *See generally* Daphne Barak-Erez, *The Institutional Aspects of Comparative Law*, 15 COLUM. J. EUR. L. 477 (2009) (discussing the different institutional routes of legal transplantation).

[94] CATHARINE A. MACKINNON, WOMEN'S LIVES, MEN'S LAWS 195 (2005).

[95] *Apparel Export Promotion Council*, A.I.R. 1999 S.C. at 633 (¶ 24).

[96] Feld, *supra* note 37, at 1277–78.

who appears to be a sexually pure and passive victim,"[97] as was done in the *Apparel Export Promotion Council* case.[98] The *Vishaka* decision has led to a relatively modest form of legal reform in the sense that it explicitly applied itself only to sexual harassment of women. Indeed, sexual harassment law is understood in Israel, as well as in other countries, as relevant to women's life experiences more than to men's. Still, it is not insignificant that the Indian precedent limited its applicability only to women, and thus participated in the construction of only women as needing protection.

In contrast, the Israeli legislation in this area is more radical. Its radical nature expresses itself not only in its gender-neutral drafting, but also in its rejection of the possibility of consent in the context of the superior-subordinate relationship. The radical nature of the new Israeli law on sexual harassment has cast a cloud of doubt on its legitimacy in the eyes of its critics since the very first days of its enactment. Later on, these initial concerns gradually intensified as it began to be enforced. When the legislature first introduced the law, the critiques touched on three main concerns: the fear of "the end of romance and flirting"; the fear that women would use this law to blackmail and take revenge over men, especially male employers; and the wide gap between supposedly common, accepted Israeli societal standards—standards also accepted by Israeli women—and the standards that the law itself set.

These critiques are especially evident in the editorials written about the new law when it was first enacted. Yoel Marcus, a senior Israeli columnist, wrote that

> . . . the Sexual Harassment Law and the commandments that were handed down to us by the Supreme Court . . . have not only condemned the race of Israeli machos to extinction but have also converted all Israeli males into potential hostages in the hands of the opposite sex.[99]

Marcus also wrote that "even America—where political correctness has reached the point of madness—does not have such far-reaching legislation." He also criticized the limitation on Israeli men's freedom of speech that the law would have allegedly caused:

> [T]he law . . . undermines or contravenes the Basic Law: Human Freedom and Dignity, because it denies the members of the male species the right to freedom of expression and places heavy restrictions on the right of men to flirt. Today's women are not as defenseless as one might be led to believe by the law and the Supreme Court ruling. Women know how to take care of themselves and they are just as capable as men in the art of conveying

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[97] *Id*.

[98] *Apparel Export Promotion Council,* A.I.R. 1999 S.C. at 635 (¶ 26).

[99] *Id.* The commandments that Marcus refers to were set forth in the *Ben-Asher* case one day before the Sexual Harassment Law was passed, CA 6713/96 State of Israel v. Ben Asher 52(1) IsrSC 650 [1998] (Isr.).

sexual innuendos.[100]

Marcus ended his column stating:

> The moment the law . . . grants a woman the right, the caprice and the final word to decide when a man is just picking her up or when she is being sexually harassed, when she will be receptive to his advances and when she will send him to prison, all male managers will become potential blackmail targets and all possible male suitors will be castrated.[101]

Ruth Sinai, an appreciated social correspondent, also doubted the effectiveness of norms aimed at preventing sexual harassment and their compatibility with the Israeli culture at the time of the law's enactment. Sinai wrote that the ruling of the Supreme Court in *Ben-Asher* imitated US case law, and that while "the standard is desirable . . . as other laws and regulations aimed to imitate the American trend of political correctness, the attempt to apply it on society with very different cultural . . . patterns than those of the American society, may be very complicated."[102] Sinai also argued that "Israeli women are different than American women. Many of them think that American women are 'square' or 'hysterical,' who interpret every pinch or caress as harassment."[103] Yael (Yuli) Tamir, then a professor of philosophy in Tel Aviv University and later on the Israeli Minister of Education, was quoted as saying that "the discourse about violence and sexual harassment . . . makes it possible to act for the benefit of women without waiving the paternalist attitude towards them."[104]

The controversy has also expressed itself in the Knesset, even though the law was eventually passed by a majority of eighteen to one (that is, with a clear plurality of votes, and without the attendance of most of the MKs, whose total number is a hundred and twenty). MK Reuven (Ruby) Rivlin, for instance, stated that at first he had thought that "the issue of sexual harassment" was "a complete nonsense. I came from a very chauvinist point of view, which thought this law would put an end to spontaneous relationships between women and men."[105] Eventually, Rivlin was convinced that the issue required legislation and he voted in favor of the draft, but "only after I became convinced that it wouldn't put an end to romance."[106] At the time, MK Rechav'am Ze'evi, formerly an Israel Defense Forces (IDF) General, remained the lone dissenter. In the Knesset debate prior to the vote, he defined the law as "demonic"[107] and said that while he certainly opposed sexual harassment, he was afraid that the law would serve as a tool for

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[100] *Id.*

[101] *Id.*

[102] Ruth Sinai, *Teken Amerikai, Matrid Yisraeli* [*American Standard, Israeli Harasser*], HAARETZ (Isr.), Mar. 11, 1998, at B3.

[103] *Id*.

[104] Orna Coussin, *Hachakika Mitkademet, Hahatrada Nisheret* [*The Legislation is Advancing, The Harassment is Here to Stay*], HAARETZ (Isr.), Mar. 10, 1998, at A4.

[105] Orna Coussin, *Feminism Be'eravon Moogbal* [*Feminism With a Grain of Salt*], HAARETZ (Isr.), Mar. 17, 1998, at D1.

[106] Derfner, *supra* note 58.

[107] DK (1998) 5901 (Isr.).

women to take revenge on men, especially at the workplace against the employer.[108] While reading from lyric sections of the biblical books of Song of Songs and Proverbs, Ze'evi also warned that the law would destroy romance and that "wooing would be forbidden."[109]

Indeed, in practice, the controversial cases proved to be those in which the issue of consent was ambiguous. In other words, many Israelis do not perceive the prohibition on sexual harassment as legitimate with regard to sexual advances that are understood as welcomed with presumed consent. The *Ramon* case was considered controversial in the Israeli public arena exactly for this reason—many people were outraged over the possibility of convicting Ramon in circumstances in which there were doubts regarding the absence of consent, the inference being that if consent was given everything is fine (despite the clear differences in the power positions of the two people involved). Formally speaking, the court that decided the case had found that the complainant did not give her consent to the kiss, but in the public eye this was still a case of "assumed" consent.

Yael Paz-Melamed, an outspoken woman columnist, wrote that "a kiss following an honest hug, without an intention to humiliate, as a result of misinterpreting of the woman's will, is not an intrusive, humiliating act, but rather an act of courting, which could even be pleased by the complainant."[110] Yael Dayan, a former MK who was known for her feminist views and led the legislative reform in 1998, said that "she [the complainant] said 'no' after the act, not during the act. If you don't consent, express it by act or word."[111] Dayan also emphasized the complainant's status as a reason for not defining her behavior as non-consent: "After all, it is not a helpless person or a minor we discuss here. It is an army officer we discuss here. It doesn't make sense, that in retrospect she comes and says 'he did such and such and I didn't want.' It turns out, unfortunately," Dayan said, "that men do not understand the lack of consent and therefore we should say something or demonstrate it somehow."[112] The late Josef (Tommy) Lapid, a senior columnist and a former Minister of Justice, brought things ad absurdum in a short column titled "Ramon Syndrome."[113] Lapid wrote that "in these days you cannot kiss ninety-year-old Aunt Blooma's hand without apologizing in advance that it is not a rape, not even sexual harassment, but only a gesture of respect." Lapid completed his column prophesying:

> [I]n the far future, when someone will ask how the stupid Israeli custom of men, to ask for a written permission before they kiss a girl, was created, there will probably be found someone who will explain him that the custom was born in the year of 2006, when a Minister of Justice named

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[108] *Id*. at 5902 .

[109] *Id*. at 5903.

[110] Yael Paz-Melamed, *Psika Meyuteret Umazika* [*An Unnecessary, Harmful Ruling*], MA'ARIV MAGAZINE (Isr.), Feb. 1, 2007, at 7.

[111] *See* Nechama Duek & Smadar Shir, *Mutradot* [*Harassed and Bothered*], MA'ARIV MAGAZINE (Isr.), Feb. 1, 2007, at 12.

[112] *Id*.

[113] Josef (Tommy) Lapid, *Syndom Ramon* [*Ramon Syndrome*], AMARTI LACHEM [I TOLD YOU] 17 (Keter, 2008).

Ramon kissed a girl . . . .[114]

The second major difference between the reforms in India and in Israel touches on the effectiveness of their enforcement. The Israeli law gives more alternatives of enforcement and implementation, and is consequently perceived by its opponents as an effective reform. In other words, the relatively high level of awareness, public debate, implementation, and enforcement that the law has received in Israel has created a backlash that did not occur in India due to the relatively less intense enforcement of the judicial declarations there. Under Israeli law, any action and claim of sexual harassment can be taken to the civil courts, subject to the limitations period prescribed by the law. Such an option is not available under the *Vishaka* guidelines in India. The *Vishaka* judgment has received a lukewarm response in the circles that have had to implement it. Most employers consider the implementation of its guidelines an unnecessary hassle.[115] The standard line of defense of organizations that did not have such policies was, "There hasn't been any such trouble in our organization, so we've never felt the need for it."[116] Since there is no legislation that imposes a penalty or criminal action for not implementing the law, the Supreme Court guidelines are often not taken seriously by private employers. According to these guidelines, employers can escape liability if an employee who suffered harassment fails to use the complaint mechanisms. Thus, a hostile work environment may persist, but a woman who works in such an environment is denied a remedy if she fails to complain. In this manner, the *Vishaka* decision fails itself, considering the fact that raising a sexual harassment complaint requires a great deal of strength and a female complainant.

Another important difference concerns the criminal enforcement of sexual harassment law. In India, the Supreme Court guidelines, although considered law under Article 144 of the Indian Constitution, are still seen only as "guidelines" by employers, as there are no penal provisions attached to non-implementation. In contrast, the Israeli law is enforced in the arena of criminal law as well, and in fact, the critical arguments against it have become especially intense with regard to the possibility of criminal enforcement of sexual harassment prohibitions. In fact, even scholars, who may have supported the cause of outlawing sexual harassment, have resisted the use of criminal law in this context.[117] The *Ramon* case also served as a battlefield for the debate around the criminal aspects of the law (although, as indicated, from a mere formal perspective, Ramon was charged with a criminal

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[114] *Id*.

[115] *See generally* Radhika Chopra, *Sexual Harassment at Workplace: Tightrope to Justice*, THE HINDU (India), Sep. 9, 2002, *available at* http://www.hinduonnet.com/thehindu/mag/2002/09/29/stories/2002092900360100.htm; Aurina Chatterjee, *Sexual Harassment: Battling Unwelcome Sexual Attention,* INFOCHANGE, (Feb. 2006), http://infochangeindia.org/200602095631/Agenda/Claiming-Sexual-Rights-In-India/Sexual-harassment-Battling-unwelcome-sexual-attention.html (discussing the proposed Bill on sexual harassment, which would implement the *Vishaka* guidelines).

[116] Piali Banerjee and Swati Deshpande, *Sexual Harassment: Dice is Loaded Against Victims*, TIMES OF INDIA, Feb. 29, 2004, *available at* http://timesofindia.indiatimes.com/articleshow/526639.cms.

[117] *See, e.g.*, Mordecai Kremnitzer & Liat Levanon, *Haisur Haplili Al Hatrada Minit – Kidush Haemtsai Umechiro* [*The Criminal Prohibition on Sexual Harassment—Justifying a Means to an End and Its Price*], 2 SHA'AREI MISHPAT 285 (2001) (Isr.) (offering a critical view of the criminal aspects of the law).

offense which existed before the enactment of the law).

The day after Ramon's conviction, the editorial of *Haaretz*, the most important newspaper in Israel, was titled "Strictness Bordering on Harassment."[118] According to the editorial, "[t]he verdict in the trial of Haim Ramon marks the beginning of a new age, and not necessarily a better one, regarding the attitude of the justice system to sexual offenses." The editorial warned:

> [D]efining Haim Ramon as a sex offender and a non-consensual kiss as a sexual crime opens too wide a door and may blur the boundaries between real sexual crimes and inappropriate behavior . . . . The question is not whether Haim Ramon kissed the soldier against her will and whether his behavior is to be tolerated when it comes to a government minister, but rather whether the court is the appropriate place to discuss behavioral norms and whether the ease with which Ramon is defined as a sexual offender does not hold some risk of confusion between real criminals and those whose behavior is intolerable.[119]

The editorial ended by saying that "criminal law should have absented itself from this case . . . . This is another aspect of the transformation of Israeli society into a litigious one ad nauseam, and the giving over of issues of morals and behavior to judges." Ben-Dror Yemini, a senior Israeli publicist, wrote:

> [T]his affair deserves a public debate about morality, not a legal debate, especially not a judicial one. There is no such thing in the world, and there shouldn't be. It is an Israeli invention . . . . The moment our courts become tribunals of modesty, we turn by leaps and bounds into Saudi Arabia and Iran, not Denmark or Sweden.[120]

There were also legal scholars who criticized the use of the criminal law in this case. In an interview with one of the popular tabloids in Israel, George Fletcher, one of the world's most famous criminal law scholars, referred to the facts in the *Ramon* case and said, "it is hard for me to think that it would start a criminal proceeding in another country."[121] Moreover, Fletcher said that he

> [c]hecked if there was a similar case in the United States and couldn't find any. [. . .] As opposed to the United States and other countries, here [in Israel] the use of the criminal law is exaggerated. In the United States, cases like the one of Ramon are mainly an issue for a civil claim in tort.[122]

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[118] Editorial, *Strictness Bordering on Harassment*, HAARETZ, Feb. 1, 2007, *available at* http://www.haaretz.com/hasen/spages/820163.html (Isr.).

[119] *Id.*

[120] Ben-Dror Yemini, *Psika im Degel Shachor* [*A Ruling With a Black Flag Hung Above It*], MA'ARIV, Feb. 1, 2007, at 7 (Isr.).

[121] Moshe Gorali, *Hu Zakai* [*He is Innocent*], MA'ARIV MAGAZINE, Mar. 7, 2007, at 2 (Isr.).

[122] *Id*.

[121] Daniel Friedmann, *Mishpach Ramon* [*Ramon's Mistrial*], YEDIOTH AHRONOTH (SATURDAY

Daniel Friedmann, an influential legal scholar in Israel who later replaced Ramon as the Minister of Justice, said that "[i]ndeed, Haim Ramon failed and committed an inappropriate act, but it was not an act that justified prosecution."[123]

Not only legal scholars criticized the use of the criminal law in this case, but also public figures, among them some who were identified with the feminist struggle throughout the years, including the struggle for the Sexual Harassment Law. Ya'el Dayan also said that she "had a problem with the conviction. I have a problem with the indictment and with the penal clause he [Ramon] was indicted for . . . . To indict him for an indecent assault, which is a penal clause? It seems disproportionate to me." Dayan also suggested amending the law: "I think an amendment of the Law is required. The term 'kiss' should be detailed."[124] Shulamit Aloni, another former Minister of Education, and a pioneering leader in the area of human and women's rights in Israel who was also trained as a lawyer said that in light of the facts, "there isn't a criminal offense in this case."[123] In a column titled "When a Kiss is Just a Kiss," after acknowledging the importance of fighting sexual exploitation and abuse, Yochi Brandes, a popular (woman) novelist wrote: "[W]hat a pity it is that we women are wasting this power on trivial things. How terrible it is that we are misusing it."[125] She went on to state:

> [I]n a society that has a healthy mechanism of checks and balances, this story would be pushed to the margins of the media and the minister would star, not to his benefit, in the gossip columns. It would never occur to the justice system to waste its resources on trivia like this.

Brandes argued:

> A kiss on the lips in the course of a mutual flirtation is not an indecent act, is not a sexual harassment and is certainly not a criminal offense. At most, such a kiss is an act of tastelessness. Should a person's private and professional life be ruined for this? Have we gone out of our minds?

She then concluded with the call: "Girls, we have gone overboard!"[126]

V. CONCLUSION

What are the lessons to be studied for future reforms by juxtaposing these two case studies? The first conclusion to be drawn is that two cases of seemingly identical legal transplantation may be more different than similar—taking into consideration variances in the formulation of the legal regime as well as issues of

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ARTICLES SECTION), Feb. 2, 2007, at 10 (Isr.).

[122] Sinai, *supra* note 102.

[123] Shulamit Aloni, *Hapraklit Kvar Shafat et Ramon* [*The Prosecution Has Already Judged Ramon*], YNET, Oct. 3, 2006, *available at* http://www.ynet.co.il/articles/0,7340,L-3310255,00.html) (Isr.).

[125] Yochi Brandes, *Banot Higzamnu* [*When a Kiss is Just a Kiss*], HAARETZ, Sept. 15, 2006, at B4 (Isr.).

[126] *Id*.

enforcement. Second, enforcement and social change may not go hand in hand. The openness of the Israeli legal system to the sexual harassment reform has not necessarily contributed thus far to a change of social norms that matches the legal change.[127] In contrast, the social environment in India seems to be more receptive to the idea of prohibiting sexual harassment, but this sense of sympathy flourishes against a background of ineffective law and a very low level of enforcement. Third, the two case studies make it clear once again that support for repairing wrongs committed against disempowered groups, like women, is stronger when the reform does not challenge the basic power structures of society, but rather offers benevolent assistance to so-called deserving complainants.

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[127] *See* Aloni, *supra* note 123 (noting that this case would cause men not to hire women); Paz-Melamed, *supra* note 110. Melamed warns:

We women will pay the bill. If I was a man employer and had to choose between hiring a man or woman, I would decide to hire the man. Why getting into trouble? Many years of struggle for equality of opportunities at the workplace went down the drain. The law which requires such equality will remain, but in practice, men will prefer men. It is just a matter of time until it happens, because things become unbearable. And we women are responsible for this.