

Gender Neutral Laws with Special Reference to the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013

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Citation: Harsha Goyal et al. (2024), The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013, *Educational Administration: Theory and Practice*, 30(11) 1018-1022

Doi: 10.53555/kuey.v30i11.8962

ARTICLE INFO

ABSTRACT

Workplace sexual harassment prevalent in various forms is a worldwide social evil faced by women that violates their fundamental right to work, life, dignity, equality. Apart from creating an intimidating and hostile work environment, it interferes with their performance at work, adversely affects their economic and social growth and puts them through emotional, physical and mental suffering. Vishaka case was the genesis of the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 that mandates all workplaces to provide a safe and secure working environment to all women, which is free from sexual harassment and also have proper grievance redressal mechanisms in place. However, the Act has failed to produce desired results with several cases of workplace harassment going unreported, no inquiries being conducted in reported cases, non-compliance of provisions of the Act and widespread unawareness. This paper is an attempt to evaluate the provisions of the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 along with its limitations. Further, the paper sheds light on the evolution of the law on workplace sexual harassment and discusses recent judicial pronouncements on the same. The paper talks about the impact of workplace harassment and the initiatives taken by the government to curb this practice. The paper also discusses the position of men and transgenders under the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 and the urgency of gender-neutral laws and lastly concludes with suggestions.

INTRODUCTION

Long bygone are the days when men used to be the sole breadwinners of a family and women were merely considered to be 'kitchen-lizards.'. Globalization has brought a radical change in the status of women worldwide. From being a homemaker to the breadwinner of the family, women significantly entered the mainstream workforce in India but this shift led to an increase in offences against women and the most common being workplace sexual harassment. Sexual harassment at the workplace is deeply rooted in gender discrimination which violates a woman's right to equality and right to life guaranteed under the Constitution of India and creates an apprehensive and hostile work environment for them that interfere with their performance. It discourages women's participation in economic activities thus adversely affecting their mental and physical health, economic and social empowerment and aim of inclusive growth. A 2012 poll conducted by Oxfam India and Social and Rural Research Institute suggested that women most vulnerable to workplace harassment were those working as labourers (26%), domestic workers (23%) and small scale manufacturing hubs (16%)¹.

The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 (POSH Act) was enacted on 9th December 2013 by the Ministry of Women and Child Development with the purpose of providing a secure, safe and enabling work environment to every woman free from sexual harassment and for effective redressal of complaints of sexual harassment and thus help set clear boundaries for interaction. The Act attempts to fill the legislative void on the subject and ensure every woman irrespective of her age or

¹ Available at <https://samajho.com/upsc/sexual-harassment-of-women-at-workplace-prevention-prohibition-and-redressal-act-2013/>.

employment status a safe workplace free from all forms of harassment. Criminal Law Amendment Act, 2013 was promulgated which criminalises offences such as voyeurism, stalking and sexual harassment.

IMPACT

Right to work is fundamental to living in order to afford basic needs of food, shelter, clothing etc. This right also includes the right to have a safe, secure and friendly workplace where every individual flourishes and excel in their involvement in work without any threat to human life, dignity and reputation. However, workplace sexual harassment is far-reaching and is an injury to the equal right of women. According to National Crime Records Bureau, in the year 2017 and 2018 the number of workplace sexual harassment cases registered under Section 509 of IPC (i.e., words, gesture or act intended to insult the modesty of a woman) were 479 and 401 respectively.

There is a strong relationship between sexual harassment and lower job satisfaction and organisational commitment. It creates an insecure working environment which leads to work withdrawal and decreases the productivity of employees thus impeding their ability to deliver in today's competing world. Sexual harassment creates physical, emotional and psychological difficulties and suffering for victims and has a negative impact on individuals who observe such incidences or work in an environment that shows tolerance for such behaviour. It can lead to loss of self-esteem and extreme anxiety and stress. Apart from victims, even organisations suffer negatively impacting their financial capacity, low morale, low productivity, employee turnover, high legal costs and overall performance goals. The economy suffers too due to premature retirement and higher insurance costs. Women may quit their job in order to avoid a hostile work environment which can adversely affect their economic and social growth. However, in many instances, harassment goes unreported and no action is taken by women due to fear of losing their job, fear of getting stigmatised, loss of job references, lack of awareness about redressal mechanism and absence of complaints mechanism at the workplace.

EVOLUTION OF LAW

The requirement to throw wide open an issue that was swept under the rug for the longest time was first observed by Supreme Court in the case of **Vishaka v. State of Rajasthan**² under which a dalit woman named Bhanwari Devi who was employed under the rural development program of Rajasthan Government was brutally gang-raped by five upper-class men on account of her attempts to prevent the practice of child marriage. The incident exposed the risks and evils working women were exposed to on an everyday basis and called for an urgent need to implement proper safeguards in this regard. Women's rights activists and lawyers together filed a Public Interest Litigation in Apex Court under the banner Vishaka. The court acknowledged the lack of legislative safeguard and recognised workplace sexual harassment as a human right violation. Relying heavily on the Convention on Elimination of All Forms of Discrimination against Women which is both signed and ratified by India, the Supreme Court under Article 32 of the Constitution framed Vishaka guidelines and issued direction to the Central Government to enact appropriate law for preventing workplace sexual harassment. Until a legislative framework on the subject has been drawn and enacted, Vishaka guidelines would have the effect of law and have to be mandatorily followed by private and government organisations. The guidelines made it obligatory for every employer to arrange for a mechanism to redress grievances pertaining to sexual harassment at the workplace and thus enforce the right to gender equality of working women.

There are certain remarkable judgements post the Vishaka case. In the case of **Apparel Export Promotion Council v. A.K Chopra**³ the Supreme Court upheld the dismissal of a superior officer of Delhi based Apparel Export Promotion Council who was guilty of sexually harassing at the workplace a subordinate female employee and also enlarged the definition of sexual harassment by ordering that physical contact was not necessary to constitute an act of sexual harassment and further explained that ***“Sexual harassment is a form of sex discrimination projected through unwelcome sexual advances, request for sexual favours and other verbal or physical conduct with sexual overtones, whether directly or by implication, particularly when submission to or rejection of such conduct by the female employee was capable of being used for affecting the employment of the female employee and unreasonably interfering with her work performance and had the effect of creating an intimidating or hostile work environment for her.”***

A letter by **Dr. Medha Kotwal, a member of an NGO named Aalochana** brought to light numerous individual cases of sexual harassment and the failure of effective implementation of Vishaka guidelines⁴. Supreme Court taking cognizance of the matter, treated this letter as a writ petition and undertook monitoring

² Vishaka v. State of Rajasthan 1997 SC 3011.

³ Apparel Export Promotion Council v. A.K Chopra (1999) 1 SCC 759.

⁴ Medha Kotwal Lele & ors. V. Union of India & ors. (2013) 1 SCC 297.

of the implementation of Vishaka guidelines throughout the country by requiring State Governments to file affidavits mentioning the steps taken by them in implementing the said guidelines. In this case, the Court noted that ***“The implementation of the Vishaka Guidelines has to be not only in form but also in substance and spirit so as to make available safe and secure environment for women at workplace in every aspect and thereby enabling working women to work with dignity, decency and due respect.”*** Court not being contented with the implementation of Vishaka guidelines further directed the States to develop sufficient mechanisms to ensure effective implementation of Vishaka guidelines and in case of non-adherence, it would be open to the aggrieved party to approach the respective High Court.

In the case of **Malabika Bhattacharjee v. Vivekananda College**,⁵ the Calcutta High Court held that POSH is maintainable even against a person of the same gender as that of the complainant stating that at the outset **Section 2(m) of the Act** shows that the term **respondent** brings within its fold **‘a person’ thus including persons of all genders**. Also, the definition of sexual harassment under the Act can’t be a static concept and has to be interpreted against the backdrop of social perspective. “A person of any gender may feel threatened and sexually harassed when her/his modesty or dignity as a member of said gender is offended by any of the acts contemplated in Section 2(n), irrespective of the sexuality and gender of the perpetrator of the act. Thus, sexual harassment can be perpetrated by the members of any gender, even inter se.”

In **Punjab and Sind Bank and Ors v. Mrs Durgesh Kuwar**,⁶ victim was transferred after she reported irregularities and corruption at her branch and also filed a complaint of sexual harassment against another officer. The court quashed her transfer order and held that workplace sexual harassment is an affront to a woman’s right to equality guaranteed under Articles 14 and 15 and right to life and liberty enshrined under Article 21 and also right to practice any trade, occupation or business under Article 19(1)(g). On her transfer order court appropriately stated that ***“This is symptomatic of a carrot and stick policy adopted to suborn the dignity of a woman who is aggrieved by unfair treatment at her workplace.”***

In **Anita Suresh v. Union of India**⁷, Delhi High Court dismissed the petition on the ground of lack of merit and ordered a cost of 50,000 on the petitioner for filing a false complaint and exploiting the provisions of the POSH Act. This judgement can be a watershed moment in rethinking the provisions of POSH from a diverse viewpoint.

KEY PROVISIONS OF THE ACT

The Act defines **sexual harassment under Section 2(n)** in line with the definition given by Supreme Court in Vishaka case as “Unwelcome sexually tinted behaviour, whether directly or by implication, such as (i) physical contact and advances, (ii) demand or request for sexual favours, (iii) making sexually coloured remarks, (iv) showing pornography, or (v) any other unwelcome physical, verbal or non-verbal conduct of a sexual nature.” Under the Act, **Section 2(a)** provides that an **aggrieved woman** in relation to a workplace is **“A woman of any age, whether employed or not, who alleges to have been subjected to any act of sexual harassment.”** Thus, the definition doesn’t necessitate a woman to be an employee, as even a customer, client, trainee, or visitor who may be subjected to workplace sexual harassment can claim protection under the Act. As the name suggests, the **Act is gender specific and protects only women in the workplace** thus, completely overlooking the fact that men and transgender too can be victims of workplace sexual harassment. The Act applies to both organised and unorganised sectors (having less than 10 workers) and private and government sectors.

POSH Act necessitates employers to conduct educational and sensitisation programs and also develop policies against sexual harassment through eLearning courses, classroom training, posters, banners and communication of organisational sexual harassment policy through emails. The Act envisages the setting up of grievance redressal forum by employer called Internal Committee at every office or branch of an organisation consisting of more than 10 employees for the purpose of hearing and resolving grievances pertaining to harassment. At the district level, the government is necessitated to constitute a Local Complaints Committee under Section 5 of the Act in order to investigate and resolve complaints of sexual harassment in unorganised sectors or establishments that don’t have an Internal Complaints Committee on account of the establishment having less than 10 employees. Local Committee has special importance in cases of sexual harassment of domestic workers or where the complaint is against the employer himself or a third party is not an employee. In case of non-compliance with the provisions of POSH Act or failure to constitute Internal

⁵ Malabika Bhattacharjee v. Vivekananda College WPA 9141 of 2020.

⁶ Punjab and Sind Bank and Ors v. Mrs Durgesh Kuwar Civil Appeal no. 1809 of 2020.

⁷ Anita Suresh v. Union of India WP(c) 5114/2015.

Complaints Committee, fine imposed⁸ on the employers is up to 50,000 and in case of repeated violations punishment is doubled and/or deregistration or cancellation of any statutory business license⁹. All offences under the Act are non-cognizable.

It is open for a woman who has experienced workplace harassment to directly file a complaint with police, making it obligatory for police to register an FIR without delay. Statement of the complainant is always recorded by or in presence of a woman officer and in case police finds that the complainant employer's internal committee failed to perform its job, the company management and panel members are slapped with the penal action. Through Criminal law (Amendment) Act 2013, Section 354A was inserted in the Indian Penal Code which states what constitutes sexual harassment offence and the penalties for committing such offences which range from one to three years of imprisonment and/or fine or both.

INITIATIVES BY GOVERNMENT

Ministry of Women and Child Development launched an online platform called **SHe-Box** for reporting complaints of workplace sexual harassment which can be used by both government and private sector employees. Complaints received on SHe-Box will be directed by the government to the employer's Internal Committee or Local Complaints Committee. It also proposes to work as a repository providing information related to dealing with complaints of sexual harassment at the workplace. In order to create awareness users are free to access available on SHe-Box. In the aftermath of the #MeToo movement where several women shared their ordeal of sexual harassment on social media, Union Ministry for Women and Child Development announced setting up a committee consisting of four retired judges in order to conduct a public hearing of cases arising in this movement.

POSITION OF MALE AND TRANSGENDER UNDER POSH

Gender is just one facet of an individual's identity yet we divide our world, home and even workplace, sometimes subtly and sometimes ruthlessly along gender lines. The issue of sexual harassment at the workplace has become a crucial problem for other genders too which is not covered within the ambit of the POSH Act. **Criminal laws don't even extend to the male gender and thus the inclusion of the third gender seems like a far-fetched dream.** The absence of gender neutrality of the Act has been brought up several times and the reason stated for it mentioned in 239th Parliamentary Standing Committee was that the majority of victims of workplace harassment were women and thus this Act was an affirmative action under Article 15 of Constitution to protect them. However, every individual has the right to live with dignity and legislations such as POSH that selectively protect one person¹⁰ from the grave offence of workplace sexual harassment that deprives a person of their human rights and fundamental right to dignified life only leads to more flagrant violation of such rights.

The transgender community is the sexual minority and is more exposed to such harassment and assault than men because of their gender and more than women due to the lack of laws protecting them. With the legal recognition of the third gender¹¹ and enactment of the Transgender Persons (Protection of Rights) Act 2019, transgenders are free to work anywhere without any discrimination but in reality, pseudo-modern society still doesn't accept the third gender as one of them and subject them to discrimination and workplace sexual harassment. Though Article 15 is nowhere a reasonable justification to exclude men from the legislation but, it certainly acts as a compelling argument to include transgenders in the POSH Act due to their socially and educationally backward status.

Though victims in POSH Act can only be women but, there is no specific gender prescribed for the respondent, thus it includes persons of all genders.¹² Also if a trans person identifies himself as a woman she will fall within the ambit of an aggrieved person under the Act. Though POSH is not a gender-neutral Act but **employers by adopting an inclusive approach choose to extend protection to other genders through their policy thus creating a more equitable workspace.** Several companies including Taj Group of Hotels and Godrej follow gender neutral policies on workplace sexual harassment thus ensuring the safety of all their employees irrespective of their gender. University Grant Commission also took initiative by adopting POSH provisions in a gender-neutral manner.

⁸ Global Health Private Limited & Mr. Arvind Bagga v. Local Complaints Committee, District Indore and Ors WP No. 22314 and 22317 of 2017.

⁹ Section 26 of POSH Act, 2013.

¹⁰ Beyond the Binary: Rethinking Gender Neutrality in Indian Rape Law, Asian Journal of Comparative Law, page 376 (2016).

¹¹ National Legal Services Authority v. Union of India AIR 2014 SC 1863.

¹² Ibid 5; Hiral P. Harsora v. Kusum Narottamdas Harsora (2016) 10SCC 165.

LIMITATIONS OF POSH ACT

Even after the enactment of the POSH Act, the awareness concerning the consequences of sexual harassment and its redressal has been limited. Internal Complaints Committee is given powers of Civil Court without specifying if members need to have a legal background which proves to be a significant lacuna given that ICC forms an essential grievance redressal mechanism under the Act. The penalty imposed in case of non-compliance with regard to the constitution of ICC is too menial to make employers vigilant and act in a time-bound manner. The punishment provisions don't clearly mention which business licenses are subject to cancellation. The Act lacks gender neutrality thus extending no protection to men and transgenders. The Act doesn't impose a duty on any specific person to ensure that there is compliance with the provisions of the POSH Act and can be held responsible in case of non-compliance thus leading to a lack of accountability. The Act mandates employers to conduct sensitisation and awareness seminars and workshops at 'regular intervals'. However, since the term regular interval is not defined in the Act the employers can get away with not conducting such sessions for months or years thus defeating the entire purpose of the Act. Setting a time period of three months from the date of the incident to file a complaint of sexual harassment puts tremendous undue pressure on women and may prove to be detrimental in curbing the act of harassment.

WAY FORWARD

Acknowledgement of the right to protection against sexual harassment is fundamental to the protection of the human rights of women. It is a step towards providing women equality of status and opportunity, independence and the right to work with dignity. Workplace sexual harassment is a social impediment that needs to be eradicated. Enhancing awareness of both employers and employees on the existence of forms of workplace sexual harassment, preventive measures and legal framework of grievance redressal mechanism is imperative. It is vital to adopt inclusive legislations and policies that aid us to cope in suspected gender wars and help develop a society that treats all genders at par. It is paramount for employers to take affirmative actions in implementing zero-tolerance policies towards workplace sexual harassment, hold brainstorming sessions to define their own version of gender-neutral workplace and confirm that complaints are investigated expeditiously, confidentially and comprehensively. Effective implementation of this Act requires not only creating a safe environment where women can freely express their grievances without fear of any negative repercussions and get justice but at the same time sensitizing men and taking measures to cope with gender-based attitudes at the workplace.