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Critical Analysis Of The Prevention Of Sexual Harassment At Workplace Act {Posh} 2013- The Need For A Shift Towards Gender Neutrality?

Authored By - Manvi Kishore
and Arnold Stanley

ABSTRACT

Sexual harassment at work in India is handled by the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 (POSH Act), a women-specific law created to prohibit sexual harassment at work specifically against women. The POSH Act doesn't protect other genders from sexual harassment; hence this paper advocates for gender-neutral laws. Industrialization and globalization have boosted women's workforce participation and contribution, therefore preventing sexual harassment has become more important in the last 25 years. Sexual harassment violates women's rights to equality and dignity at work. It stunts her career, traumatizes her mentally and physically. With sexual harassment complaints going unreported and investigations not being done, the POSH Act is widely unknown and rarely followed. This paper analyses the Act's provisions and shortcomings through a gender-neutral approach where the act is silent on and poses challenges in its implementations.

KEYWORDS-POSH, Sexual Harassment, Gender-neutral, Legislation, Apex Court.

INTRODUCTION

Gender-based discrimination in the workplace has always been a problem for women. Another major issue that prevented women from entering the workforce of the country was sexual harassment of women in the workplace. An anti-discrimination law, the POSH Act of 2013, was passed to protect women from harassment and unfair treatment in the workplace. A major question raised by the POSH Act was whether it was gender biased, even though the legislation

was designed to protect women from sexual harassment. The POSH Law only protects women, thus other genders have no recourse if they are harassed in the workplace. The POSH legislation has failed to develop a free society that adheres to norms of right to equality because of an increase in malicious POSH complaints, according to recent trends. While dismissing a bogus sexual harassment allegation in 2018, the Delhi High Court stated that women cannot be treated as "*innocent naive victims*" during investigation. It is still widely accepted that the POSH Act is an important law to ensure a safe workplace for women. POSH law may have stricter provisions for dealing with false instances, but it is still an exaggeration to argue that it has not had a good influence or sparked a debate about the necessity of gender equality in society. This POSH act's influence on women's welfare can't be denigrated by the fact that other genders have no recourse for reporting sexual harassment.

With the onset of the COVID-19 pandemic, which has led to the Ministry of Home Affairs (MHA) issuing orders prescribing nationwide lockdowns, there have been several questions raised about the whether it can be put into practice, as well as the process by which sexual harassment charges are decided. Currently, the Sexual Harassment of Women at Work Act governs most cases of workplace sexual harassment. Workplace (Prevention, Prohibition, and Redressal) Act, 2013 legislation aimed at protecting women from sexual harassment in the workplace was passed specifically for female employees only. The POSH Act takes a narrow view, as it does not address or provide protection from. In India, men and women of both sexes may be subjected to workplace sexual harassment. India's attitude to gender-neutral laws and its attempts to define sexual harassment are examined in this paper. A breach of human and constitutional rights; a critical examination of the concept of gender that perpetuate the idea of a dichotomy between men and women through this sexual harassment legislation in India is a glaring omission. As such India's current workplace sexual harassment regulations should be revised. Males and non-binary genders need to be adequately safeguarded.

OVERVIEW OF POSH ACT 2013

Women and Child Development Minister, Krishna Tirath, reportedly said in December 2012 that the government would launch a study on

“What kind of (sexual) harassment of males is prevalent at workplaces”¹

¹ Men too are victims of sexual harassment - Times of India, <https://timesofindia.indiatimes.com/life-style/relationships/love-sex/men-too-are-victims-of-sexual-harassment/articleshow/16336627.cms> (last visited Jul 30, 2022)

while answering queries on whether or answering queries on whether the Sexual Harassment of Women at Workplace Bill, 2010 would include male employees.² A reading of its Statement of Purpose clearly demonstrates that the Bill was drafted with the goal of creating a legislation that would only apply to female employees. According to SCR of the 239th Parliamentary Standing Committee,³ "Sexual harassment in a workplace is deemed violation of women's right to equality, life, and liberty. It fosters an environment of fear and hostility in the workplace, which deters women from working and undermines their social and economic empowerment as well as the goal of inclusive growth.⁴ To ensure that every woman, regardless of her age or employment status (except for domestic workers working at home), is protected from all forms of sexual harassment, a comprehensive legislation should be enacted to lay the responsibility on the employer, the District Magistrate or Additional District Magistrate or Deputy Collector of every District in the State as a District Officer and to lay the groundwork for an investigation. The primary issue about the POSH Act's gender-specific nature were made when addressing concerns about the inclusion of men in the legislation. To assume that women are solely victims of sexual harassment is erroneous.

Since it is impossible to say that only women are subjected to sexual harassment and that harassment of men cannot be placed on an equal footing in terms of character or frequency, there is no data to support the Ministry's claim that only women are subjected to it. Sexual harassment legislation in most nations, such as Denmark, the United Kingdom, Italy, Ireland, Finland, France, Germany, Portugal, Spain, and the Netherlands, are gender neutral. This is justified by claiming that women bear the majority brunt in terms of harassment, and thus, a gender-specific legislation on sexual harassment at work should be regarded an affirmative action under Article 15 of the Constitution of India 1950 ("Constitution"). A survey or study is required, as well, according to the SCR; alternatively, a company may be required to disclose incidents of male sexual harassment as well. According to the SCR, only women are victims of workplace sexual harassment, which is based on poor and illogical reasoning.

² Sexual harassment at work: The limits of the law - The Hindu, <https://www.thehindu.com/news/cities/mumbai/sexual-harassment-at-work-the-limits-of-the-law/article59857021.ece> (last visited Jul 30, 2022)

³ 239th Report on the Protection of Women Against Sexual Harassment at Workplace Bill, 2010, Department Related Parliamentary Standing Committee on Human Resource Development (Presented to the Rajya Sabha on 08.12.2011 and Laid on the Table of Lok Sabha on 08.12.2011), December 2011

⁴ Protection of Women from Sexual Harassment (POSH) Act, 2013, <https://www.drishtias.com/daily-updates/daily-news-analysis/protection-of-women-from-sexual-harassment-posh-act-2013> (last visited Jul 30, 2022)

A reading of its Statement of Purpose clearly demonstrates that the Bill was drafted with the goal of creating legislation that would only apply to female employees. According to SCR of the 239th Parliamentary Standing Committee, sexual harassment in a workplace is deemed violation of women's right to equality, life, and liberty. It fosters an environment of fear and hostility in the workplace, which deters women from working and undermines their social and economic empowerment as well as the goal of inclusive growth. To ensure that every woman, regardless of her age or employment status (except for domestic workers working at home), is protected from all forms of sexual harassment, a comprehensive legislation should be enacted to lay the responsibility on the employer. The District Magistrate/Additional District Magistrate or Deputy Collector of every District in the State as a District Officer should be empowered to lay the groundwork for an investigation.⁵

JUDICIAL INTERPRETATION OF POSH ACT 2013

In the case of *Vishaka v. Rajasthan (1997)*⁶ for the first time, the Supreme Court acknowledged the idea of workplace sexual harassment, which is defined by the CEDAW treaty. It outlined principles to be followed until legislation was enacted to address the issue. The POSH Act now incorporates these standards; however, its execution has been generally unsuccessful, which we will address in the following sections to come.

In *Apparel Export Promotion Council v A.K. Chopra (1999)*⁷ reported that a secretary was assaulted by another employee who was her immediate superior. An uninvited sexual act was found to constitute sexual harassment in this case. A request for sexual favours or other verbal or non-verbal conduct with a sexual undertones, if the acceptance or rejection of these overtures has ramifications for the woman's employment. The court also noted that sexual harassment has the consequence of creating a hostile work environment, which negatively impacts a woman's performance. Gender equality and the right to life and liberty are clearly violated by this. the necessity of international cooperation was also emphasized in the decision coping with this problem, treaties and agreements are essential.

When the Supreme Court of India ruled in *Medha kotwal lele v Union of India (2012)*⁸ that all states and union territories must update their civil service codes to include sexual

⁵ Explained: What is POSH, the law against sexual harassment in India? | Explained News, The Indian Express, <https://indianexpress.com/article/explained/everyday-explainers/explained-posh-law-against-sexual-harassment-in-india-7825733/> (last visited Jul 30, 2022)

⁶ Vishakha v. State of Rajasthan, (1997) 6 SCC 241

⁷ Apparel Export Promotion Council v A.K. Chopra, AIR 1999 SC 625

⁸ Medha kotwal lele v Union Of India, (2013) 1 SCC 297

harassment, it had a significant influence on workplace sexual harassment. The Vishaka judgement's complete implementation was thereafter mandated by the State and the commercial and public sectors alike and that the victim will not be forced to work with or under an accused if they are proven guilty. Disciplinary action was also ordered against the accused in the event that witnesses, or complainants were intimidated. The court ruled that the Vishaka guidelines should be implemented in both substance and spirit.

In *Punjab and Sind Bank and Others v Mrs Durgesh Kuwar and Others (2020)*⁹ a complaint of sexual harassment filed against another officer resulted to the victim's transfer after she uncovered corruption and irregularities at her branch. Her transfer was reversed because the court found that sexual harassment violated women's equality rights by Articles 14 and 15, as well as her right to life and liberty guaranteed by Article 21 and her right to engage in any profession, trade, or business. Commenting on her current circumstances "This is indicative of a reward and stick approach," the judge who oversaw the transfer stated. The Supreme Court rulings on sexual harassment in the workplace have repeatedly emphasized the importance of putting right systems in place, but things haven't changed much.

REACTIONS IN INDIA TO GENDER NEUTRALITY- EVALUATING IMPORTANT CHANGES

A. RECENT DEVELOPMENTS

A case involving rape and gender neutrality was first brought up in *Sudesh Jhaku v. KC Jhaku*¹⁰, where it was stated that "men who are sexually abused will have the same protection as female victims, and women who sexually assault men or other women should be held to the same standards as conventional rapists," Justice Jaspal Singh said in an opinion piece in the Indian Express. Raped women's rights advocates argue that by defining rape as an assault on a woman rather than a specific offence targeting women, rape law can be put in a healthier context and mythological components can be reduced.

As a result of the 172nd Law Commission's recommendations¹¹, the Criminal Law Amendment Bill, 2012¹² advocated the inclusion of a gender-neutral definition of rape in the bill. The Justice

⁹Punjab and Sind Bank and Others v Mrs Durgesh Kunwar, Civil Appeal No 1809 of 2020(India).

¹⁰ Sudesh Jhaku v. K.C.J., 1998 Cri LJ 2428

¹¹ ROLE OF THE LAW COMMISSION OF INDIA AGAINST SEXUAL VIOLENCE AND RAPE, <https://blog.ipleaders.in/role-law-commission-india-sexual-violence-rape/> (last visited Jul 30, 2022)

¹² THE CRIMINAL LAW (AMENDMENT) BILL, 2012, <https://prsindia.org/billtrack/the-criminal-law-amendment-bill-2012> (last visited Jul 30, 2022)

Verma Committee (JVC)¹³ was formed after the Nirbhaya gangrape incident to investigate possible changes in criminal law provisions that would allow for faster trials and harsher penalties for those who commit sexual assaults of extreme nature on women. This legislation, however claiming to follow the Supreme Court ruling in **Vishakha v State of Rajasthan**, does not fully reflect its spirit, according to the JVC's opinion. Despite the JVC's approval of Section 2(n) of the Sexual Harassment of Women at Workplace Bill, 2012, the JVC advised that the offence of rape be made gender neutral. UGC sexual harassment laws, published in May 2016, mandate that universities take decisive action against all forms of gender-based violence. (Hereinafter referred to as the "UGC Sexual Harassment Regulations").¹⁴

Any "aggrieved individual" can file a sexual harassment complaint under the UGC Sexual Harassment Regulations instead of just an "aggrieved woman" under the POSH Act. To make a complaint of sexual harassment, students can use the UGC Sexual Harassment Regulations, which cover students of both genders. Two petitions were filed in the Supreme Court of India in 2018 arguing that the Indian Penal Code, 1860's Sections 354, 354A, 354B, 354C, 354D, and 375 are unconstitutional and should be repealed.¹⁵ However, both were ruled out because of their incapacity to be maintained. After issuing a notice, the Delhi High Court dismissed a plea alleging that Sections 375, 376, 376D, 354A, 354C, and 354D of the IPC breached fundamental human rights and deprived people's access to gender neutral laws, therefore violating Articles 20(1), 14 and 21 of the Constitution in violation. As a result of this, a petition to change certain provisions of India's constitution was thrown out by the Supreme Court since it did not have any merit.¹⁶

B. INADEQUATE STATISTICS FOR HARASSMENT OF MALE AND OTHER GENDERS

There are no official statistics on male harassment or gender-based stereotypes. A study by Centre for Civil Society indicated that out of ninety-six nations, six had partially gender-neutral legislation on rape or sexual assault and sixty-three had laws stated in gender neutral terminology. Eighteen percent of men surveyed by the Delhi-based Centre for Civil Society

¹³ Justice Verma Committee

¹⁴ Section 9 (1) POSH Act read with Regulation 7, UGC (Prevention, Prohibition and Redressal of Sexual harassment of women employees and students in higher educational institutions) Regulations, 2015

¹⁵ Rishi Malhotra v. Union of India, Writ Petition (Criminal) No. 7/2018, Order dated 02.02.2018; Criminal Justice Society of India v. Union of India, Writ Petition (Civil) No. 1262/2018, Order dated 12.11.2018;

¹⁶ Sanjiv Kumar v. Union of India, W.P. (C) 8745/2019, Judgment dated 17.12.2019

reported being compelled or forced to engage in sex.¹⁷ Whereas Sixteen percent of the victims identified a female attacker, whereas just two percent identified a male perpetrator.¹⁸ When sexual harassment is defined in terms of the male or female paradigm, it not only assigns a certain gender to the victim and perpetrator, but also the various prejudices that go with it. One theory holds that men are or should be masculine, while women are or should be feminine, and that these concepts are inextricably related.¹⁹ By eliminating sexist assumptions about men and women, gender neutrality may help us move past the idea that women are always the weaker party. Secondly, the absence of statistical data does not mean that such incidents do not take place.²⁰ Due to the hegemonic masculinity and non-gender neutrality of the POSH Act, no official statistics exist. Although forcible sexual assaults by females upon males are undoubtedly less common than those by males onto females this numerical disparity cannot by itself make it permissible for the state to punish.²¹

C. TRANSGENDERS AND POSH

People who identify as transgender, or "TG," are often referred to as those who have gender identification issues. There is a discrepancy between how they present themselves and their biological sex. Persons with TG can also be included. Hijras and eunuchs who do not identify with the gender they were assigned at birth. None of these people identify with either male or female. There are a few hijras that don't believe in God. A group of men who have been castration (aka nirvana) or akva/akka castrated (non-emasculated men) (hermaphrodites). Sex Re-Assignment patients are also included in TG.²² As a result of their gender identification, these individuals have undergone surgery (SRS) or are currently undergoing SRS to change one's sex Transsexuals are commonly referred to as such. In addition, there are individuals. transvestites are those who enjoy dressing in attire of the opposite sex. This led to a change in the name of the phrase today, "transgender" is used as an umbrella term to represent a wide range of people. A wide range of identities and experiences, including but not limited to transsexual people who strongly identify with the gender opposite to their biological sex;

¹⁷ Putting Men at ease with PoSH: Adopting a gender neutral policy, <https://newskarnataka.com/special/open-space/putting-men-at-ease-with-posh-adopting-a-gender-neutral-policy> (last visited Jul 30, 2022)

¹⁸ Is the PoSH law gender neutral? - Serein — Serein, <https://www.serein.in/legal-insights/2021/4/14/gender-neutrality-in-prevention-of-sexual-harassment-law> (last visited Jul 30, 2022)

¹⁹ Gender Neutrality and POSH Law eLearnPOSH Gender Neutral, <https://elearnposh.com/gender-neutrality-and-posh-law/> (last visited Jul 30, 2022)

²⁰ Deborah Denno, Why the Model Penal Code's Sexual Offense Provisions Should Be Pulled and Replaced (2004) 1 Ohio State Journal of Criminal Law 207 to 211

²¹ People v. Liberta, 64 NY 2d 152 (1984) Liberta

²² Your gender-neutral IC is in violation of the PoSH Act 2013, <https://rainmaker.co.in/your-gender-neutral-ic-is-in-violation-of-the-posh-act-2013-heres-why/> (last visited Jul 30, 2022)

masculine and both male and female are included.²³

In the NALSA judgement²⁴, the Supreme Court in support of transgender/third-gender individuals' rights, laid down the rules stating that Articles 14, 15, 16, 19, and 21 of the Indian Constitution do not preclude hijras/transgender people from their scope of application. It was the case that it was also in general, the Indian legal system is aware of the binary genders of male and female, according to this statement. The gender is ascribed to a person at birth. The legal system also reflects the binary conception of gender where adoption, marriage, and other family-planning practices are all governed by specific laws. Not being able to accept Hijras/transgenders are denied equal protection of the law because of their distinct legal status they are subjected to intense skepticism.²⁵

Because of this, it was concluded that the term discrimination based on sexual orientation or gender identity encompasses any preference or exclusion based on race, gender, or other characteristics that has the impact of under our constitution, ensuring equal protection of the law in order to protect the Constitution.²⁶ Members of the Transgender community have constitutional rights the primary right being the legal right to be recognized as a third gender was in fact debated by the Supreme Court asserting that a person's gender identity is fundamental to their "personality". Self-determination and autonomy are synonyms. Hijras/eunuchs, then, would be the third group to consider gender, which goes beyond the constitutional and legal definitions of binary gender.

D.SEXUAL HARASSMENT AGAINST GENDERS UNDER LGBQA+

There are no explicit provisions in the Indian sexual harassment legislation to protect those who identify as Gay, Bisexual, Queer or Asexual, or those who do not identify as heterosexuals from being harassed by others. In *Hiral P. Harsora v. Kusum Narottamdas Harsora*²⁷, the Supreme Court noted that while the statute's goal is to safeguard women in many aspects of

²³ With Recent Updates On The LGBTQ+ Community in India, <https://rainmaker.co.in/with-recent-updates-on-the-lgbtq-community-legal-status-in-india-can-transgenders-file-a-complaint-under-the-posh-act/> (last visited Jul 30, 2022)

²⁴ National Legal Services Authority v. Union of India & Ors., AIR 2014 SC 1863, Para 13

²⁵ PoSH Act Decoded: Is Gender Neutrality a Part of the PoSH Law, <https://muds.co.in/gender-neutrality-a-part-of-the-posh-law/> (last visited Jul 30, 2022)

²⁶ No proposal to amend workplace harassment Act to include LGBTQ community: Centre | The News Minute, <https://www.thenewsminute.com/article/no-proposal-amend-workplace-harassment-act-include-lgbtq-community-centre-117769> (last visited Jul 30, 2022)

²⁷ *Hiral P. Harsora v. Kusum Narottamdas Harsora*, (2016) 10 SCC 165

life, the term "Respondent" has been defined under Section 2(m) of the POSH Act to cover all genders. A person can be either a male or female sexual harasser under the POSH Act and hence the POSH Act may be considered as addressing the issue of sexual harassment of lesbians as well as the sexual harassment of other women. Individuals who identify as lesbians, gays, bisexuals, and transgenders are protected by the Indian Penal Code, 1860 (IPC)²⁸ if they do not engage in sexual activity with a person who is not a heterosexual. Section 377 of the IPC should not be used as a tool for harassing those who participate in such consenting sexual behaviour, the court opined, because such rights stem from the Constitution.²⁹

To maintain our togetherness as a cohesive group of free citizens, we must respect the strength of our diversity and promote tolerance and respect for one another's rights as we work toward a more harmonic and peaceful coexistence within the universal tie of humanity. Individuals' distinct identities must be accepted and respected rather than forced to 'become' something they are not. This requires a shift in mindset and a change in attitude. All people have the equal right to be who they truly are, without having to conform to the preconceived dogmatic ideals of a particular group. It is our responsibility to "stand up and speak out" against any sort of transgender discrimination that we come across to change the cultural bias and root out the weed. It is time to move from darkness to light, and from bigotry to tolerance and from the winter of just surviving to the spring of life as a herald of a New India.³⁰

When everyone of us realizes that the LGBT community has the same constitutional rights as any other citizen of the United States, this freedom will be realized in its fullest sense. It is their monumental "walk to freedom" and journey to a constitutional ethos of dignity, equality, and liberty. As a result, Section 377 of the Indian Penal Code cannot be considered constitutional insofar as it penalizes any consenting sexual intercourse between two adults, be it between a man and a man, a man and a woman, or a woman and a woman.³¹ Laws against sexual harassment against individuals who identify as Gay, Bisexual, Queer, Asexual, and other related groups should be enacted since the Supreme Court has advocated for suitable

²⁸ CONSTITUTIONALITY OF SECTION 377 IPC - SUPREME COURT OBSERVER, <https://www.scobserver.in/cases/navtej-singh-johar-v-union-of-india-constitutionality-of-section-377-ipc-background/> (last visited Jul 30, 2022)

²⁹ LGBTQIA+ – POSH – PREVENTION OF SEXUAL HARASSMENT AT THE WORKPLACE, <https://poshhelp.in/lgbtqia/> (last visited Jul 30, 2022)

³⁰ DIVERSITY AND INCLUSION ADVISORY POSH ACT COMPLIANCE, <https://www.ungender.in/is-posh-law-applicable-on-transgenders/> (last visited Jul 30, 2022)

³¹ INDIA CODE: SECTION DETAILS, https://www.indiacode.nic.in/show-data?actid=AC_CEN_5_23_00037_186045_1523266765688&orderno=434 (last visited Jul 30, 2022)

protections and safeguards for these individuals.³²

CONCLUSION AND WAY FORWARD

To keep pace with today's technological advances, the existing legal framework is woefully inadequate. The requirements of this act and the ramifications of non-compliance are not well known. There must be awareness of the POSH Act and a safe environment where women can freely express their concerns for the act to achieve its stated goals. We need a shift in how the state deals with workplace sexual harassment. Non-sexual types of gender-based discrimination should also be recognized as kinds of sexual harassment. To be clear, it's not just sexual advances that are being made. Such an environment can be unfriendly to one's job. Here, we're taking on our society's patriarchal mentality. To ensure that the transgender population can properly exercise their rights, we need to ensure that the legislations are more inclusive of transgender people. Gender-neutral rules for dealing with sexual harassment in the workplace can be implemented by organizations themselves until such revisions are made by the legislation. Take, for example, Godrej's policy against sexual harassment or the Taj Hotels, which are open to all guests regardless of a person's gender is where we need a radical shift in the way we think about sexual harassment laws. It must be more than just another "offences against women" brick in the wall if it is to be effective. Creating a legislation will not remove the stigma linked to it. A fear of retaliation prevents victims of sexual harassment from coming forward, and even when they do, the ICCs (Internal Complaints Committee) are not properly established, and it is not uncommon for them to engage in unethical acts. As a result, a shift in perspective is needed. Educating the public about this issue is essential if victims are to come forward without fear or reluctance.

With regard to remedies in cases involving sexual harassment at work for people of all genders, it is generally accepted that the Constitution's articles 14, 15, 16, 19, and 21 protect the rights of men as well as women. When it comes to sexual harassment against people who identify as gay or bisexual or transgender or queer or allied other than heterosexual people, India has been far less effective than the rest of the world, even though public awareness is progressively rising. Gender-neutral sexual harassment rules appear to have taken a step forward with the passage of the UGC Sexual Harassment Regulations. As the UGC Sexual Harassment

³² POSH ACT : DISCUSSING GENDER NEUTRALITY, TRANSGENDER RIGHTS & INCLUSION OF LGBTQ, <https://www.livelaw.in/columns/posh-act-discussing-gender-neutrality-transgender-rights-inclusion-of-lgbtq-157906> (last visited Jul 30, 2022)

regulations, which recognize that employees and students of all sexes, as well as male students and those of third gender, are vulnerable to many forms of sexual harassment and humiliation, In the interim, organizations and entities can create gender-neutral rules and codes of conduct to assure diversity and inclusion and to encourage sensitization, however, in conclusion it is deemed expedient that the POSH Act be amended or, alternatively, appropriate legislation be enacted, to provide for the prevention, prohibition, and rectification of sexual harassment laws.

