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Policy Analysis - The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013

Linda Francesa Macedo Borges^a

^aSymbiosis International University, Pune, India

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In India, sexual harassment at the workplace is increasing manifold and is considered one of the most common crimes against women. Such a crime is viewed as being unconstitutional as it infringes on the fundamental rights of women protected by the Constitution of India. Rarely do women actually voice their grievances against such an injustice. More often than not such crimes are buried with time. Therefore there arises a strong need to prevent such grave injustice. Thereby to deal with the gap and for the appropriate handling of such cases, The Sexual Harassment Act, 2013 came into existence. The Act explains what comes under the purview of sexual harassment and the proactive steps which ought to be undertaken by workplaces to ensure the protection of the dignity of a woman. This paper is an attempt to undertake a legislative analysis of the Sexual Harassment Of Women At Workplace (Prevention, Prohibition And Redressal) Act 2013.

Keywords: sexual harassment, sexual harassment at workplace, POSH act, gender equality.

INTRODUCTION: HISTORICAL EVOLUTION

The Constitutional edifice of the nation has fundamentally sought to eliminate the issue of discrimination revolving around parameters of gender. A move to gender equality is backed by legal principles enshrined in the Constitution, Preamble of the same, Fundamental rights, and corresponding duties. However, the issue of sexual harassment in the Indian workplace was acknowledged by the Apex Court via the landmark judgement "*Vishaka v. State of Rajasthan*"¹. The judgement was instrumental as the Supreme Court was credited with framing guidelines and directions to facilitate the enactment of legislation combating such sexual harassment at work.

A Dalit woman, Bhanwari Devi was employed by the Rajasthan Government for the 'Rural Development Programme'. In 1992, she was gang-raped brutally resulting from her endeavour to reduce child marriages. This case brought into light the working hazards faced by women daily and emphasized the need for the availability of safeguards. As a result, a PIL was filed before the Supreme Court by lawyers and activists under the pseudonym, '**Vishaka**'.' The Court took cognizance of the apparent legislative gap and recognized sexual harassment at work to be a violation of human rights. The Court issued the guidelines decided in the judgement under the Constitution- Article 32. Herein, these guidelines have the effect of legislation and are mandatory to be followed by organizations, until the enactment of such a law.

In the framing of the Vishaka Guidelines reliance was placed on the "*Convention on Elimination of All Forms of Discrimination against Women*"², adopted in 1979 by the UN which India is a signatory, and ratified it. Internationally, a large number of nations prohibit sexual harassment at work through various legislations. For instance, the United Kingdom is governed by "*Employment Equality (Sex Discrimination) Regulations 2005*". A lot of countries have provisions of sexual harassment as part of larger legislation to do with discrimination. Whereas India has a specific law that solely deals with the issue of Sexual Harassment at workplaces.

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

² UN General Assembly, Convention on the Elimination of All Forms of Discrimination against Women, 18 December 1979

The “*Protection of Women Against Sexual Harassment at Work Place Bill, 2010*” was introduced in 2010. The Lok Sabha referred to a “Standing Committee on Human Resource Development” which made certain recommendations in its report in 2011. The Lok Sabha passed the Bill with certain amendments referring to the report. Ironically, the “*Sexual Harassment Of Women At Workplace (Prevention, Prohibition And Redressal) Act, 2013*”³ (“POSH Act”) was enacted 16 years after the aforementioned judgement.

OBJECTIVE OF LEGISLATION

As already emphasized earlier, Sexual harassment at the workplace is in violation of the right to life, equality, and liberty. This results in a hostile workplace environment, thereby affecting a woman’s intellectual participation in her work, thereby degrading economic and social empowerment in the fight for inclusivity. In addition, the need for this legislation finds roots in the increasing number of working women in both organized and unorganized sectors.

OBJECTIVES OF THE POSH ACT, 2013 ARE IN A FOUR-FOLD MANNER-

1. The provisions of the POSH Act, 2013 aim to protect women from sexual harassment at the workplace, irrespective of employment by such an organization.
2. To comply with the Supreme Court guidelines which mandate employers to establish a policy to prevent such sexual harassment.
3. To ensure a mechanism exists for the **prevention** and **redressal** of cases related to sexual harassment and gender-related violence at work.
4. To ensure the implementation of an “*Internal Complaints Committee*” (“IC”) to lay down the requisite redressal-related guidelines.

CONSTITUTIONAL SAFEGUARDS WITH REFERENCE TO SEXUAL HARASSMENT

Sexual Harassment at the workplace is an issue that is contradictory to the provisions of the Constitution. Thereby the introduction of the POSH Act aims to fill in such a gap. For instance, Article 19 (1) (g) of the Constitution which guarantees the right to practice occupation, profession,

³ Sexual Harassment Of Women At Workplace (Prevention, Prohibition And Redressal) Act 2013

or business. Hence, in light of this Sexual Harassment denies the right to a woman and keeps her away from her place of employment. In addition, it also poses to violate Article 21 which ensures the right to life and personal liberty of a woman. For a woman to meaningfully enjoy her life under such a provision, she is entitled to the removal of gender-based obstacles. Hence for a true 'Right to Work,' there should be no obstacles to facilitate a safe environment. Furthermore, the preamble secures equality in opportunity and status for all Indian citizens. Sexual harassment contradicts the basic ideals of the Constitution. Hence, the POSH Act is legislation whose objectives are sought to be met by the basic tenets of the Constitution of India.

SUMMARY OF LEGISLATION

What is defined as sexual harassment?

The POSH Act defines Sexual Harassment on the same pedestal as in the Vishaka judgement. "According to Section 2 (n) of POSH Act⁴ includes unwelcome sexual behavior whether by implication or directly such as –

- Making physical contact or advances
- Making demand for sexual favors
- Sexually colored remarks
- Showcasing pornographic material
- Any other unwelcome verbal, physical, or non-verbal sexual conduct."

It also covers sexual harassment on a 'quid pro quo basis' wherein the male pressurizes a subordinate for advancement in promotion or fear of being fired in providing sexual favors.

Workplace

The Vishaka Guidelines confined applicability to traditional office setup. However, the POSH Act recognized that sexual harassment is not limited only to the primary place of employment. Hence

⁴ Sexual Harassment Of Women At Workplace (Prevention, Prohibition And Redressal) Act 2013

'extended workplace' was introduced which includes places visited arising out of the employment including transportation facilities offered by the employer.

Internal Committee

The POSH Act mandates the establishment of a redressal forum. This is an 'Internal Committee' to be set at each office of an organization with more than 10 people. If an IC is not set, it would attract a fine.

Constitution—

Presiding Officer – Senior most woman at workplace.

Members – Minimum of 2 members (Should have some amount of social work or legal knowledge).

External Member – From an NGO dealing with cause of women.

Local Committee

The government has to set a 'Local Committee' ("LC") at the district level to redress such complaints from the unorganized sector where there is no IC due to less than 10 employees.

Constitution—

Chairperson – Eminent woman in social work.

Local Woman – One member nominated from women working in block, tehsil, taluka or ward or municipality in the district.

NGO Member – 2 members from an NGO dealing with women issues. At least 1 should be a woman. At least 1 member should have a law background and 1 from SC/ST.

Interim Relief

The IC or the LC may recommend interim measures to be provided by the employer –

1. Transfer of aggrieved woman to another workplace
2. Grant leave to such woman up to 3 months over and above her contractual leave.
3. Restrain the respondent to report the performance of the woman. Such tasks should be transferred to other employees.

PUNISHMENT AND COMPENSATION

The POSH Act imposes the following punishment on an employee or employee for acts of sexual harassment:

1. Punishment is under the rules of the organization.
2. *If there are no such rules –*

Disciplinary action in addition to a written apology, reprimand, warning, withholding promotion, termination of service, or undergoing community service.

3. In addition, the act mandates for payment of compensation determined on a case-to-case basis.

Frivolity of Complaint

To ensure that the legislative benefit is not misused, provisions are included under POSH Act for action against malicious or false complaints. As per the act, if such a situation arises, the company is empowered to initiate disciplinary actions against the complainant in accordance with the organizations' service rules. However, the inability of the complainant to provide proof does not fall under this ambit.

Non-Compliance

If the employer does not comply with the POSH Act, a penalty of up to Rs. 50,000 may be imposed. Repetition of the same offenses could lead to double the punishment or de-registration or revocation of licenses of the entity. All offenses under POSH Act are non-cognizable.

Amendments

As such there haven't been any major amendments in the POSH Act, 2013. There was a small amendment made in the year 2013, in Sections 6, 7, and 24 of the Act. Herein, the words "**Local Complaints Committee**" were changed to "**Local Committee**" and "**Internal Complaints Committee**" was changed to "**Internal Committee**." In 2018, the Ministry of Corporate Affairs amended the Companies (Accounts) Rules, 2014, Rule 8 which now mandates every Company to report compliance relating to the provisions of an Internal Complaints Committee under the POSH Act. This introduction of the amendment was recommended by "*Ministry of Child and Women Development*" to achieve the implementation of the POSH Act in letter and spirit. This amendment is a positive step as it ensures a statutory compulsion on employers to be compliant with the POSH Act.

Judicial Response

There have been a number of judicial pronouncements in this regard. For the purpose of ease, these decisions will be divided in a two-fold manner. The first dealing with case law prior to the POSH Act and the latter after the enactment of the act.

Prior Decisions

In the case of "*Apparel Export Promotion Council v Chopra*"⁵ the Apex Court reiterated the Vishaka guidelines and hence dismissed the superior officer of the Council who had sexually harassed a female subordinate at work. The Court stated that for sexual harassment, it wasn't necessary for the existence of physical contact.

RECENT DECISIONS

In "*Somaya Gupta v Jawaharlal Nehru University*"⁶ the court stated that mere apprehension of bias is not sufficient to remove a member of the IC. The Court stressed the establishment of a real likelihood as opposed to a mere apprehension of bias. In the case, the Presiding Officer of the IC had witnessed the incident and therefore recused herself. However, there wasn't a remote

⁵ *Apparel Export Promotion Council v Chopra* (1999) 1 SCC 759

⁶ *Somaya Gupta v Jawaharlal Nehru University* 2018 (159) FLR 390

suspicion of the personal interest of the other members conflicting with their obligations as per the POSH Act. Therefore, the court did not reconstitute the IC.

CRITICAL APPRAISAL

The POSH Act is a positive step in the aspect of Sexual Harassment and is a comprehensive extension of the Vishaka guidelines. It covers extended workplaces and direct and indirect acts of sexual harassment. To complement the act, '**She-Box**' is a government initiative enabling female workers to register complaints of sexual harassment. Both the POSH Act combined With She-Box indeed comprehensively tackle the issue at hand. The act provides for action against false or malicious complaints. Though there exist merits, it may deter women from filing complaints fearing it to be considered false (without mala-fide intent). Parallelisms can be drawn to the Public Interest Disclosure Bill, 2010 which only penalises mala-fide complaints.

In addition, the IC mandates NGO membership dealing with women issues. The "Economic Census, 2005" enumerates at least 6 lakh establishments with 10 or more employees. Today's scenario has more organizations. However, the ratio of such establishments to women NGOs is insufficient and could result in implementation difficulties. The real criticism is comparative to International legislation. Many international nations deal with sexual harassment in a gender-neutral manner. Whereas, POSH Act only deals with women complainants. Hence, a man being a victim of sexual harassment at work would not receive redress under this act.

CONCLUSION

The sexual harassment law needs to be revisited in light of the change in the work scenario due to the emergence of Covid-19. When POSH Act was enacted it could not be envisaged that workplaces would move beyond physical avenues and transcend to 'online platforms'. Due to this, 'workplace' was limited to only include physical spaces. However, with the advent of Work From Home, governments need to include all electronic mediums such as laptops, desktops, and phones under the ambit of 'extended workplace' in the POSH Act.

If the golden rule of interpretation was used in this regard, due to lack of applicability to online platforms, it would result in injustice and oppression of justice to women. Hence, the provision should be extended and execution mechanisms ought to be revisited. All in all the Act is progressive in ensuring a safe environment for working women and provision of interim relief. However, there do exist certain loopholes which need to be addressed for an air-tight legislative aimed at deterring such incidents. The Justice Verma Committee recommended amendments for quicker trials and relief to aggrieved women. The report was submitted in 2013 containing a detailed review however, they haven't been implemented. Implementation of these recommendations would only result in more effective legislation.