

A Critical Analysis of a Law on the Prevention of Sexual Harassment at the Workplace in India

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Abstract

In a developing country like India, with more and more entry of women into the workforce, which was conventionally and comparatively monopolized by men, the sexual harassment at workplace is steadily growing and women have started experiencing the intensity of it. Sexual harassment is considered as a violation of a woman's fundamental right to equality, which is guaranteed by Articles 14 and 15 of the Constitution. The problem of sexual harassment relates not so much to the actual biological differences between men and women, but to the gender or social roles which are attributed to men and women in social and economic life, and perceptions about male and female sexuality in a society. Gender inequality is both the cause of sexual harassment and the consequence of it. Sexual harassment is not an epidemic, it is a pandemic that is occurring every day and everywhere. Sexual Harassment is pervasive, there is no institution or industry which is immune to it. Women will not be fully equal with men as long as this behaviour continues. To curb this menace the Government of India has enacted 'the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013' with the objective of providing a safe and secure work environment for women. However, nine years since its enactment, the government has still not published any information on how effectively this law and its committees are functioning. But the surveys conducted by private agencies highlight the poor implementation of the Act in the country.

The present paper critically analyses the provisions of the Act and its implementation while discussing its evolution, objectives, and important provisions of the Act.

Keywords: Sexual harassment, Workplace, Gender Equality, Fundamental rights, violation, Redressal mechanisms, and Complaints Committees

Introduction

Gender equality in all dimensions is a basic human right and the Constitution of India guarantees all its citizens' equality of status and opportunity¹. In the contemporary world, women irrespective of their sex, age, nationality, caste, background, and occupation are subjected to go through some or the other form of violence in their distant phases of lives, it may be in the form of assault, sexual harassment, rape, verbal or physical abuse, stalking, trafficking, domestic violence, dowry- deaths, foeticide, infanticide, etc. They are tortured mentally, physically, sexually, economically, socially, and emotionally as well, and they are neglected and discriminated against in all most all fields of life². Power structures that enable violence against women in India are pervasive in work environments and other

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¹ Article 14, 15 and 16 of the Constitution of India

² Crime by Another Name: The Casual Acceptance of Sexual Harassment at Workplace must End, 48 Economic and Political Weekly 7, 7-9 (30 Nov 2013)

public spaces, across both formal and informal sectors. For a long time, sexual harassment was not visible in society. Particularly with feminist movements, it has come to the forefront as a significant social problem, especially for women at the workplace³.

sexual harassment in today's age of work from home and COVID-19 seems to have shifted online. As harassers took advantage of online work platforms and social media during the pandemic, firms like Cohere Consultants, working on sexual harassment in India, reported a 20% rise in complaints received by them, after the introduction of work from home policies⁴.

Underreporting of all forms of violence makes the scale of the problem difficult to understand and complicates attempts to address the issue⁵. Sexual harassment is considered as a violation of a woman's fundamental right to equality, which right is guaranteed by Articles 14 and 15 of the Constitution. Workplace sexual harassment creates an insecure and hostile work environment, thereby discouraging women's participation in work and adversely affecting their social and economic growth⁶. The Constitution also provides every citizen the right to practice or carry out any occupation, trade, or business⁷, which includes the right to a safe environment, free from all forms of harassment.

India's first legislation specifically addressing the issue of workplace sexual harassment was enacted in the year 2013. The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 was made effective from December 09, 2013, by the Ministry of Women and Child Development, India. The Government has also notified rules under the Prevention of Workplace Sexual Harassment Act titled the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Rules 2013.

Evolution of the Law on Workplace Sexual Harassment

The practice of sexual harassment is centuries old, at least, if we define sexual harassment as unwanted sexual relations imposed by superiors on their subordinates at work. For example, sexual coercion was an entrenched feature of chattel slavery endured by African-American women without protection of law⁸. While there were crucial differences in the situation of free women employed in domestic service, they too, commonly faced sexual advances by men of the households in which they worked. Surviving accounts of women employed in manufacturing and clerical positions in the late nineteenth and early twentieth centuries also point to a variety of contexts in which men imposed sexual relations ranging from assault to all manner of unwanted physical or verbal advances on women who worked for them⁹.

³Anil Kumar, Sexual Harassment of Women At Workplace: How Far is Indian Law Protective? International Academic Journal of Law, available at <https://papers.ssrn.com/abstract=3818814>

⁴ Singh P. Even in the virtual office, sexual harassment continues. Mint. July 12, 2020. <https://www.livemint.com/news/business-of-life/even-in-the-virtual-office-sexual-harassment-continues-11594561717967.html>.

⁵Bhavya Jhaveri, Women in Indian Workplaces: Challenges in addressing workplace sexual harassment, globalpolicyreview.org, 12 August 2021

⁶Statement of Objects and Reasons, Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013

⁷ Statements of Objects and Reasons, Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013

⁸ Directions in Sexual Harassment Law, edited by Catharine A. MacKinnon, and Reva B. Siegel, Yale University Press, 2003. ProQuest Ebook Central, <http://ebookcentral.proquest.com/lib/yale-ebooks/detail.action?docID=3420225>. Created from yale-ebooks on 2020-07-20 12:09:51

⁹Ibid

Though the issue of sexual harassment of women at their workplace has been a relevant subject for academic discussion across the world for several years, deliberations over this topic in the legal arena, only began around 1979 in the United States of America. Ever since India gained independence, its commitment with respect to women's protection is conspicuous from the provisions provided in the Constitution and other available statutes. Over the past few years, various programmes, policies and strategies have been initiated to support the cause of Women's survival, growth and development in all spheres of life. The Indian Constitution which was adopted in the year 1950, explicitly empowers the legislature to make laws on subjects related to the protection of women from injustices inflicted on them since time immemorial. Exercising the same authority, the Indian Parliament has enacted a plethora of legal safeguards for the protection of women against sexual harassment. India recognized sexual harassment at workplace as a legal injury in 1997, in the landmark Supreme Court pronouncement of *Vishakha v. State of Rajasthan*.¹⁰

In 1992, Bhanwari Devi, a woman employed with the rural development programme of the Government of Rajasthan was brutally gang-raped on account of her efforts to curb the then prevalent practice of child marriage. This incident revealed the hazards that working women were exposed to on a day-to-day basis and highlighted the urgency for safeguards to be implemented in this regard. Championing the cause of working women in the country, women's rights activists and lawyers filed public interest litigation in the Supreme Court of India under the banner of *Vishaka*.¹¹ In this pioneering case apex court recognised sexual harassment at the work place as a human rights violation and the judgement of the case laid down guidelines for the effective enforcement of basic human right of gender equality through prevention, protection and punishment of sexual harassment. The court also directed the State, public sector & other institutions to set up a complaint mechanism. The court relied on the Convention on the Elimination of All forms Discrimination against Women, adopted by United Nations, in 1979 and held that in the absence of any law in the field in the country, international treaties can be relied upon to bridge the gap and protect human rights of people in India.

Until the landmark decision in *Vishaka Case* was delivered, there was as such no law or rule in India that specifically addressed Sexual Harassment. Even the preventive and retributive justice rendering mechanism in India had no specific provision for dealing with sexual harassment until recently. The provisions of the Indian Penal Code, 1860 Section 354 (outraging modesty of a woman), section 375 (Rape) and section 509 (dealing with act intended to insult the modesty of a woman) were all insufficient to address and curb the menace of sexual harassment incidents in India. Sexual Harassment infringes the Fundamental right of a woman to gender equality under Article 14 of the Constitution of India and her right to life and live with dignity under article 21 of the Constitution which includes a right to a safe environment free from Sexual Harassment. Many judgements of the Supreme Court interpreting these Articles have emphasised the right to lead a life with dignity assured by Article 21 of Indian constitution.

Finally in 2013 India witnessed the introduction of some significant legislations and regulations pertaining to sexual harassment. The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 (known as the Sexual harassment Act), the Criminal Law (Amendment) Act, 2013 and the Gender Sensitisation and Sexual Harassment of Women at the Supreme Court of India (prevention, Prohibition and Redressal) regulations, 2013 taking into consideration the

¹⁰*Vishakha and others v. State of Rajasthan*, A.I.R. 1997 S.C. 3011

¹¹ Varun Malik, A Deliberate Critique to Sexual Harassment Laws in India, 4(1) NLUJ Law Review 46 (2017)

seriousness of situation in India with reference to sexual harassment incidents. IPC was amended in April 2013 to include a new section pertaining to sexual harassment of women. The criminal law amendment Act has introduced Section 354 A which enlists the acts which constitute the offence of sexual harassment and prescribes penalty and punishments for such acts.

Objectives of the Sexual Harassment Act 2013

There are many objectives of the Act. Some of the aims and objectives that are incorporated in the Preamble of the Act are as under:

- a. To prevent violation of the fundamental rights of the women to equality under Articles 14 and 15 and to live with dignity under Article 21 of the Constitution of India.
- b. To protect the right of women to practice any profession or to carry on any occupation, trade, or business, which includes a right to a safe, secure and enabling environment for every woman, irrespective of her age or employment status.
- c. To protect women against sexual harassment and to assure the right to work with dignity which is a universally recognized human right by the international conventions and instruments such as the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) ratified on the 25th of June 1993 by the Government of India.
- d. To make provisions for giving effect to international conventions and instruments such as mentioned above for the protection of women against sexual harassment at workplaces.
- e. It creates a mechanism for redressal of complaints of sexual harassment. It also provides safeguards against false or malicious charges

Key Provisions of the Act

i. Sexual Harassment - Meaning

The Prevention of Workplace Sexual Harassment Act defines 'sexual harassment in line with the Supreme Court's definition in the Vishaka Judgment. As per the statute, 'sexual harassment' includes 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 nature¹².

Presence or occurrence of circumstances of implied or explicit promise of preferential treatment in employment; the threat of detrimental treatment in employment; threat about the present or future employment; interference with work or creating an intimidating or offensive or hostile work environment; or humiliating treatment likely to affect the lady employee's health or safety could also amount to sexual harassment¹³.

i. Aggrieved woman

The Act defines an aggrieved woman to be a woman of any age, whether employed or not, who alleges to have been subjected to any act of sexual harassment. There has been no linkage between the aggrieved women being an employee. This means that any woman can file a complaint in relation to a particular workspace.

¹²Section 2(n) of the Prevention of Workplace Sexual Harassment Act

¹³Section 3(2) of the Prevention of Workplace Sexual Harassment Act

ii. **Employee**

The definition of an ‘employee’ under the Prevention of Workplace Sexual Harassment Act is fairly wide and covers regular, temporary, ad hoc employees, individuals engaged on a daily wage basis, either directly or through an agent, contract labourers, co-workers, probationers, trainees, and apprentices, with or without the knowledge of the principal employer, whether for remuneration or not, working on a voluntary basis or otherwise, whether the terms of employment are express or implied¹⁴.

iii. **Workplace**

Recognising that sexual harassment of women may not necessarily be limited to the primary place of employment, the Prevention of Workplace Sexual Harassment Act has introduced the concept of an ‘extended workplace’. As per the statute, ‘workplace’ includes any place visited by the employee arising out of or during the course of employment, including transportation provided by the employer for the purpose of commuting to and from the place of employment¹⁵.

iv. **Complaint Mechanism**

An important feature of the Prevention of Workplace Sexual Harassment Act is that it envisages the setting up of grievance redressal forums for both organized and unorganized sectors.

a. **Internal Complaints Committee:**

The Prevention of Workplace Sexual Harassment Act requires an employer to set up an ‘internal complaints committee (ICC) at each office or branch, of an organization employing 10 or more employees, to hear and redress grievances pertaining to sexual harassment¹⁶. The presiding officer of the committee shall be a woman employed at a senior level at the workplace from amongst the employees. Not less than 2 members from amongst employees preferably committed to the cause of women or who have had experience in social work or have legal knowledge. One external member from an NGO or association is committed to the cause of women or persons familiar with issues relating to sexual harassment. Not less than half of the ICC Members shall be women; the term of the ICC Members shall not exceed 3 years. A minimum of 3 Members of the ICC including the Presiding Officer are to be present for conducting the inquiry.

b. **Local Complaints Committee:**

At the district level, the Government is required to set up a ‘local complaints committee’ (LCC) to investigate and redress complaints of sexual harassment from the unorganized sector or from establishments where the ICC has not been constituted on account of the establishment having less than 10 employees or if the complaint is against the employee.

c. **Powers of the ICC/LCC**

The Prevention of Workplace Sexual Harassment Act stipulates that the ICC and LCC shall while inquiring into a complaint of workplace sexual harassment, have the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 when trying a suit in respect of:

- i. summoning and enforcing the attendance of any person and examining him on oath.
- ii. requiring the discovery and production of documents; and

¹⁴Section 2(f) of the Prevention of Workplace Sexual Harassment Act

¹⁵Section 2(o) of the Prevention of Workplace Sexual Harassment Act

¹⁶Section 4 of the Prevention of Workplace Sexual Harassment Act

- ii. any other matter which may be prescribed

d. Procedure for filing the Complaint

An aggrieved woman who intends to file a complaint is required to submit six copies of the written complaint, along with supporting documents and names and addresses of the witnesses to the ICC or LCC, within 3 months from the date of the incident and in case of a series of incidents, within a period of 3 months from the date of the last incident. The ICC/ LCC can extend the timeline for filing the complaint, for reasons to be recorded in writing, by a period of 3 months. The law also makes provisions for friends, relatives, co-workers, psychologists, psychiatrists, etc. to file the complaint in situations where the aggrieved employee is unable to make the complaint on account of physical incapacity, mental incapacity, or death¹⁷.

e. Interim Reliefs

The new law empowers the ICC and the LCC to recommend to the employer, at the request of the aggrieved employee, interim measures such as

- (i) transfer of the aggrieved woman or the respondent to any other workplace; or
- (ii) granting leave to the aggrieved woman up to a period of 3 months in addition to her regular statutory/ contractual leave entitlement

Challenges in addressing the issue

Despite the POSH Act being in place for close to 6 years now, the incidence of sexual harassment has not gone down. Registered cases of sexual harassment at Indian workplaces increased 54% from 371 in 2014 to 570 in 2017, according to official data¹⁸.

In all, 2,535 such cases were registered over the four years ending July 27, 2018 that is nearly two cases reported every day as per government data tabled in the Lok Sabha (lower house of parliament) on July 27, 2018 and December 15, 2017. Over the first seven months of 2018, ending July 27, 533 cases of sexual harassment were reported across the country, as per the data. Uttar Pradesh the country's most populous state reported the most cases (726 or 29%) over 2014-18, followed by Delhi (369), Haryana (171), Madhya Pradesh (154), and Maharashtra (147), as per the data presented in Lok Sabha.

In another set of data, the National Crime Records Bureau (NCRB) categorises "insult to modesty of women" under section 509 of the IPC. This includes workplace harassment. NCRB reported 665 such cases in 2016, down 20% from 833 cases in 2015 and up 26% from 526 cases in 2014. The offense could be uttering a word or sound, making a gesture or committing an act intended to insult a woman.

Despite the rise in numbers, women, are finding that their complaints are not redressed effectively by employers. Employers are either unaware of the law's provisions or have implemented them partially and even those that do set up internal panels have poorly trained members. Above all, there is little gender parity in organisations even today. The high-profile case of the woman employee at The Energy & Resources Institute who had to fight a case of harassment against its then director-general, R.K. Pachauri, for two years despite clear evidence illustrates the inequality.

¹⁷Section 6 of the Prevention of Workplace Sexual Harassment Act

¹⁸ government data tabled in the Lok Sabha (lower house of parliament) on July 27, 2018 and December 15, 2017

Why women are not filing complaints

Women in both formal and informal industries are less likely to report incidents of sexual harassment due to pervasive patriarchal cultural narratives and the phenomenon of victim-blaming. A study carried out by Menon and Allen in 2018 demonstrates that patriarchal narratives and victim-blaming are common practices amongst traditional formal responders, such as police. Additionally, the onus for protecting oneself from sexual harassment and violence is largely placed on women. As many as 70% women said they did not report sexual harassment by superiors because they feared the repercussions, according to a survey conducted by the Indian Bar Association in 2017, of 6,047 respondents, IndiaSpend reported on March 4, 2017. Low or no reporting speaks volumes about the gender sensitivity of a particular organisation, Women may not know where to go to report harassment or it could be that the cases may not have been dealt with sincerely. Often, women go to committees believing them to be independent, and find that they are actually puppets in the hands of their superiors.

Another barrier to the reporting of workplace sexual harassment is the fear of dismissal as a result of making a complaint. In a study done of healthcare workers in Kolkata, it was found that in incidents where the perpetrator was in a position of relative authority, victims were less likely to report them as they did not think that any action would be taken against the perpetrator, and because of the possible consequences of making a complaint¹⁹. A non-Governmental organisation called Azaadi conducted a survey to know the reasons for not filing the complaints by women though they have been sexually harassed at their workplaces. The respondents gave different reasons for not filing the complaint. For example, 10% of the women said I was worried I would be fired if I complain. 32% of them said I was worried I would be blamed for it or told that I asked for it. Where as 32% of women said that they did not know whom to approach.

Critical analysis of the POSH Act

This means that there is something amiss with the Act itself and that the implementation of the Act and compliance has not reached the desired extent to instil deterrence.

The major lacuna that the present Act suffers from is the way in which it defines sexual harassment. Section 2(n) of the Act defines sexual harassment in a way similar to that of the Vishakha Judgement²⁰. The definition of sexual harassment under the Act has an effect of ‘sexualizing’ the sexual harassment viz. the acts which are perceived as related to sex (such as physical contact or advances, pornography etc.) are considered as sexual harassment. As stated by many authors if the deliberations had taken place regarding the way in which the Act defines ‘sexual harassment’ taking a cue from countries like the United States which consider sexual harassment as “any sex-based discrimination” or Israel which defines sexual harassment as “an act affecting the dignity of women”, the definition of sexual harassment would have been a more comprehensive one. If such deliberations would have been made and either of the “dignity” or “discrimination” paradigms considered in defining sexual harassment we would have escaped the consequences of overtly sexualizing the sexual harassment²¹.

¹⁹ Chaudhuri, P., 2007. Experiences of sexual harassment of women health workers in four hospitals in Kolkata, India. *Reproductive health matters*, 15(30), pp.221-229.

²⁰ Sexual harassment includes 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.

²¹ Varun Malik, A Deliberate Critique to Sexual Harassment Laws in India, 4(1) NLUJ Law Review 46

Justice J.S. Verma Committee on the amendments to criminal law dedicated a separate chapter (viz. chapter 4 of the report) to the issue of sexual harassment at workplace. The Committee in the said chapter suggested certain changes to the Bill while it was pending before the Rajya Sabha. The Committee proposed that Section 10(1) of the Bill, which suggests conciliation between the victim and the person charged must be done away with as such a provision undermines the dignity of the women even more²². Secondly, the Committee observed that Section 14 of the Bill which punishes a woman for filing a false charge must be deleted as the provision might nullify the object of the Act. Thirdly, the Committee recommended the insertion of provisions granting compensation to the victim. Lastly, and most importantly, the Committee advised doing away with the internal complaint committee and establishing an employment tribunal instead to deal with the complaint under the Act, as the domestic committees could not be expected to implement the intent behind the law effectively. However, none of the suggestions given by the Committee were reflected in the Act on sexual harassment at workplaces.

The major flaw arises from the perspective of implementation and compliance. Most of the unorganised workspaces do not have an ICC in place. There is no awareness among the employees that they can file a complaint under the POSH Act. Even companies in the organised sector do not have an ICC in place. Moreover, employees both male and female do not understand what constitutes sexual harassment. What one engages in as banter may be construed as harassment by the other. Hence, it is essential that awareness sessions be held sensitising the employees about sexual harassment issues.

A strict compliance regime should be introduced. Periodic audits to check compliance should also be conducted. Penalties should be made more stringent. Measures such as cancellation of trade licenses should be imposed.

Conclusion:

In India despite the preventive measures and laws, Sexual harassment at Workplace is still in existence on a large scale. It obstructs her work performance and reduces the quality of her work environment. In spite of enacting laws, introducing programmes, policies, and several initiatives for the development of women, India still remains to be one of the worst countries with respect to the number of crimes committed against women in the organized and unorganized sectors. As per the Global Gender Gap Report 2021 published by the World Economic Forum, India is ranked 140 out of 156 countries which makes the above fact clearly evident. Even though the Act is in force since 2013, the awareness regarding the consequences of sexual harassment and its redressal against the same is limited. The effective implementation of the POSH Act not only requires creating an environment where women can speak up about their grievances without fear and get justice but sensitization of men towards the treatment of women at the workplace is equally necessary. The most important of all is to recognize the basic human dignity of women. They should first be respected in society, till then no law will be effective in combating this heinous crime. And also, it is a proven fact, that nation that doesn't respect women, and treats them as objects, has always ended up in shackles and crisis.

(2017)

²² Justice J.S. Verma ET. Al, Report of The Committee on amendments to Criminal Law, 15 (2013)