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# THE POSH ACT- TRACING ITS EVOLUTION, SCOPE, AND GENDER-NEUTRAL APPLICABILITY

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Sexual harassment in India, especially in the workplace, is a serious violation of the fundamental rights guaranteed by the Constitution of India. These include the right to equality under Article 14, the right against discrimination under Article 15, the right to engage in any profession, trade or business under Article 19(1)(g), the right to a safe and secure workplace as well as the right to life and dignity under Article 21.<sup>2</sup>

In 1992, history was made when Bhanwari Devi, a social worker associated with the Women's Development Project under the Rajasthan government, was subjected to a brutal gang rape by five men as retaliation for her efforts to prevent the marriage of a one-year-old girl. This sparked widespread outrage, leading activist groups to file pleas before the Supreme Court. While addressing these pleas, the Court highlighted the lack of specific legislation ensuring the enforcement of the fundamental right to gender equality and protection against sexual harassment in workplaces. To bridge this legal gap, the Supreme Court introduced the "Vishakha Guidelines" in 1997.<sup>3</sup> These guidelines, intended to be "strictly observed in all workplaces," were binding and enforceable until any appropriate legislation could be enacted, Now popularly known as the POSH Act. The Court had derived its authority from various constitutional provisions, like Article 15, which prohibits discrimination on the grounds of religion, race, caste, sex, or place of birth, and also drew upon international frameworks like the General Recommendations of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), ratified by India in 1993.<sup>4</sup>

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<sup>2</sup> Pandey, S. (n.d.). *Scope and meaning of sexual harassment at workplace*. Mondaq. Retrieved from <https://www.mondaq.com/india/discrimination-disability-sexual-harassment/1400046/scope-and-meaning-of-sexual-harassment-at-workplace>

<sup>3</sup> Vishaka & Ors. v. State of Rajasthan & Ors. (1997) 6 SCC 241.

<sup>4</sup> Munjal, D. (2023, May 21). *Explained | What is the PoSH Act and why has the Supreme Court flagged lapses in its implementation?* The Hindu. Retrieved from <https://www.thehindu.com/news/national/explained-the-indian-law-on-sexual-harassment-in-the-workplace/article66854968.ece>

Under The Sexual Harassment of Women at Workplace (Prevention, Prohibition, and Redressal) Act, 2013<sup>5</sup>, Section 2(n) defines sexual harassment as direct or implicit unwelcome acts or behaviour such as:

- i. physical contact and advances or
- ii. a demand or request for sexual favours or
- iii. making sexually coloured remarks or
- iv. showing pornography or
- v. any other unwelcome physical, verbal or non-verbal conducts of sexual nature.

Sexual harassment at workplace includes the following circumstances as enumerated under Section 3 (2) of the POSH act;-

- i. Promise of preferential treatment in the workplace either express or implied.
- ii. Threat of detrimental treatment in the workplace either express or implied.
- iii. Threat relating to the current or future employment status of the woman at the workplace either express or implied.
- iv. Interfering with the work of the female or creating an intimidating or offensive or hostile workplace for her.
- v. Treating the woman in a humiliating way that is likely to affect her health or safety.

With evolving times, a few questions have been raised in front of the court, can the application of this act be gender neutral or can it be applicable against the same gender? In a significant order, the Supreme Court of India<sup>6</sup> on November 07, 2023, refused the request made to direct that “sexual harassment” be defined in gender-neutral terms to bring within its purview acts of sexual harassment committed by respondents of the same sex as the “aggrieved person”. The Court also refused to direct that references to “aggrieved woman” be supplanted with “aggrieved persons” to reflect the gender-neutral protection of the Regulations.

The Supreme Court also observed that making this act applicable to men as well would dilute the whole purpose of the regulations, as these were primarily intended to protect 'aggrieved women' within the workplace, and were framed with regard to Article 15(3) of the Constitution of India

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<sup>5</sup> Government of India. (2013). The Sexual Harassment of Women at Workplace (Prevention, Prohibition, and Redressal) Act, 2013. Ministry of Law and Justice. Retrieved from <https://www.indiacode.nic.in>

<sup>6</sup> *Binu Tamta & Anr. v. High Court of Delhi & Ors.*, Miscellaneous Application No. 2308/2023 in W.P.(C) No. 162/2013, (2023, November 7)

and in order to extend the constitutional right of equality and equal protection of the laws to women.<sup>7</sup>

It is obvious The POSH Act is an Act to protect against sexual harassment of women in workplace. However, certain clauses of the POSH Act are gender-neutral. For example, a Respondent is defined as “a person against whom the aggrieved woman has made a complaint”, and such respondent can be of any gender. Similarly, Section 18 of the POSH Act provides for the filing of appeal against decisions made by the IC or LC and utilizes the expression "any person" eligible to file an appeal. The same implies that the aggrieved party in question can be a man, woman, or an individual identifying with any other gender identity.<sup>8</sup>

While passing the above order, the Hon'ble Supreme Court seemed to ignore the landmark case of **National Legal Services Authority (NALSA) vs. Union of India**<sup>9</sup>, recognized transgender people as the third gender, and affirmed their constitutional rights. It was expected that this recognition would have broader implications for various laws, including those related to workplace harassment. However, despite there being no specific judicial pronouncements on this position, the aforesaid order by the Supreme Court of India had impaired the cause.

Moreover, At this stage, the words of Justice Bhagwati<sup>10</sup>, need to be set out. They are:

*"We cannot allow the dead hand of the past to stifle the growth of the living present. Law cannot stand still; it must change with the changing social concepts and values. If the bark that protects the tree fails to grow and expand along with the tree, it will either choke the tree or if it is a living tree, it will shed that bark and grow a new living bark for itself. Similarly, if the law fails to respond to the needs of changing society, then either it will stifle the growth of the society and choke its progress or if the society is vigorous enough, it will cast away the law which stands in the way of its growth. Law must therefore constantly be on the move adapting itself to the fast changing society and not lag behind."*<sup>11</sup>

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<sup>7</sup> Anhad Law. (n.d.). *Supreme Court refuses plea to make sexual harassment policy gender neutral*. Retrieved from <https://anhadlaw.com/supreme-court-refuses-plea-to-make-sexual-harassment-policy-genderneutral/#:~:text=The%20Supreme%20Court%20observed%20that,India%20and%20in%20order%20to>

<sup>8</sup> Basu, A., & Haldar, C. (n.d.). *Sexual harassment at the workplace: The state of justice—Six years after the Prevention of Sexual Harassment (POSH) Act, 2013*. Retrieved from <http://feministlawarchives.pldindia.org/wp-content/uploads/six-years-after-the-posh-act-ananya-basu-chaitali-haldar.pdf>

<sup>9</sup> *National Legal Services Authority (NALSA) v. Union of India*, (2014) 5 SCC 438.

<sup>10</sup> *National Textile Workers' Union v. P.R. Ramakrishnan*, (1983) 1 SCC 228, 256.

<sup>11</sup> Lexology. (2023, Month Day). *Supreme Court refuses plea to make sexual harassment policy gender neutral*. Retrieved from <https://www.lexology.com/library/detail.aspx?g=041c276f-001d-4662-8a7b-0e5f3214b329>

It is evident that, If any other individual apart from a woman faces any kind of sexual advances or harassment at the workplace, they do not have any formal recourse in the POSH Act. This matter of gender neutrality within the prospective law was brought up in the **December 2011 parliamentary standing committee's 239th report<sup>12</sup> regarding the Bill**. The committee proposed investigating the feasibility of an inclusion of a provision with a supportive intent, aimed at addressing situations of workplace sexual harassment involving men, the committee suggested the potential requirement for employers and establishments to include cases or occurrences of male sexual harassment in their annual reports. Therefore they believed that such a step could contribute to gaining a more comprehensive understanding of the overall landscape of sexual harassment. Nevertheless, the Standing Committee Report excluded the gender neutrality aspect. The reasoning provided for this exclusion was that women bear a disproportionately significant impact of this issue – which again is very true.

Even though the law does not provide a gender neutral stance on sexual harassment at work place, The High Court of Calcutta clarified in **Malabika Bhattacharjee v. Internal Complaints Committee, Vivekananda College and Ors. 2021(1) SCT 431 (Calcutta)** that sexual harassment complaints against another individual of the same gender is maintainable under the PoSH Act. In this respect, the court pointed out that there is nothing under the PoSH Act which precludes a same gender complaint and that a person of the same gender can also hurt the modesty or dignity of a woman. In the words of the court ‘although it might seem a bit odd at the first blush that people of the same gender complain of sexual harassment against each other, it is not improbable, particularly in the context of the dynamic mode which the Indian society is adopting currently, even debating the issue as to whether same-gender marriages may be legalized<sup>13</sup>

The court held that there is nothing in the POSH Act, 2013 that precludes a same gender complaint of sexual harassment.

*“Although there is substance in the submission of the petitioner that the said expression has to be read in conjunction with the rest of the statute as a whole, there is nothing in Section 9 of the 2013 Act [which has been referred to in Section 2(m)] to preclude a same-gender complaint under the Act. Although it might seem a bit odd at the first blush that people of the same gender complain of sexual harassment against each other, it is not improbable,*

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<sup>12</sup> PRS India. (2010). *Protection of women (sexual harassment at workplace) bill*. Retrieved from [https://prsindia.org/files/bills\\_acts/bills\\_parliament/2010/SCR\\_Protection\\_of\\_Women.pdf](https://prsindia.org/files/bills_acts/bills_parliament/2010/SCR_Protection_of_Women.pdf)

<sup>13</sup> Calcutta High Court. (2020). *Dr. Malabika Bhattacharjee v. Internal Complaints Committee, Vivekananda College & Ors.*, W.P.A. 9141 of 2020. Retrieved from [https://www.livelaw.in/pdf\\_upload/posh-act-same-gender-complaint-maintainable-calcutta-high-court-387462.pdf](https://www.livelaw.in/pdf_upload/posh-act-same-gender-complaint-maintainable-calcutta-high-court-387462.pdf)

*particularly in the context of the dynamic mode which the Indian society is adopting currently, even debating the issue as to whether same gender marriages may be legalized.”*

We can also see that even though the courts have dissenting opinions regarding extending the scope of the POSH to act to more than women, we can see that various companies have adopted gender-neutral policies to safeguard their employees against the same.

The POSH Act's journey from the Vishakha Guidelines to its current form signifies progress, yet it leaves out men, transgender individuals, and non-binary people who can experience workplace harassment. The Act needs to be re-evaluated to address the diverse experiences of harassment. Amendments should be brought in place to safeguard individuals against harassment at the workplace not only from the opposite gender but also from the same gender.

Internationally, the United Kingdom's Equality Act 2010 and the United States' Title VII of the Civil Rights Act have comprehensive frameworks addressing sexual harassment with more gender-inclusive language. In the global push for gender equality, India should strive to amend the POSH Act to be more gender-neutral, providing equal protection to all individuals. Workplace environments must remain safe and respectful for everyone, regardless of their gender identity.<sup>14</sup>

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<sup>14</sup> Mondaq. (2023, Month Day). *Towards gender neutrality: The need to reform the POSH Act to ensure workplace safety for all.* Mondaq. Retrieved from <https://www.mondaq.com/india/whistleblowing/1365342/towards-gender-neutrality-the-need-to-reform-the-posh-act-to-ensure-workplace-safety-for-all>