

THE POSH ACT, 2013: A CRITICAL ANALYSIS OF ITS INCLUSIVITY

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ABSTRACT

The vulnerable have always been targeted by perpetrators and they have been but in such a condition due to the lack legislative safeguards and supports that offer protection to them and provide them with redressal mechanisms. Sexual harassment has been widely prevalent throughout the history of mankind and women have always been targeted yet they are not the only victims of such harassment. In the modern world, the statistical data portrays that the sexual harassment against other genders is on the rise and therefore, gender inclusivity into the current legislation should be considered. The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 was enacted to curb sexual harassment at the workplace, however owing to the gender specific nature of the act, it does not provide redressal to the members of the LGBTQ+ community. The Transgender Persons (Protection of Rights) Act provides that any 'transgender person' under the act is entitled to protection from any form of harassment and creates a binding obligation upon the POSH Act to ensure that such individuals are protected. This research paper aims to critically analyze this Act and judicial interpretations in providing protection to all victims of sexual harassment. Furthermore, relies on the judicial interpretation, existing literary works, and other authorities, to suggest that the Act needs to adopt gender inclusivity in its provisions. In order to achieve true gender inclusion, its shortcomings in recognizing and safeguarding people with varied gender identities, calls for a thorough reevaluation and reform.

Keywords: *sexual harassment, gender identity, gender inclusivity, aggrieved woman*

INTRODUCTION:

Sexual harassment has always been a nemesis to the protection of the rights of individuals subjected to it and also to ensuring a dignified and wholesome life and it has affected most members of the civilized society despite their background. Sexual harassment transcends the boundaries of just a household or domestic setting and also persists at the workplace too and it is the duty of the legal system to prevent and provide recourse to those who are affected. Furthermore, the Statement of Objects and Reasons given in the 239th Parliamentary Standing Committee Report stated that "Sexual harassment at a workplace is a derogation of a women's right to life and liberty. It creates a work Environment that discourages women's

participation in work."⁵⁴⁴In response to the prevailing sexual harassment at the workplace the Supreme Court passed guidelines in the case of Vishaka & other v. State of Rajasthan and Others for the prevention and controlling of sexual harassment at the workplace and it was further elucidated by the Justices in the judgement that "Gender Equality includes protection from sexual harassment and the right to work with dignity is a universally recognized basic human right."⁵⁴⁵ Later, succeeding these guidelines the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 (referred to as POSH Act hereinafter) was passed.

⁵⁴⁴ Bill No. 144 of 2010, The Protection Of Women against Sexual Harassment at Workplace Bill, 2010 (Introduced in the Lok Sabha and referred to the Standing Committee on 30.12.2010)

⁵⁴⁵ Vishaka and Others v. State of Rajasthan and Others, 6 SCC 241 (Cri)932

The transgender community has further experienced its fair share of sexual harassment and discrimination and as a result has been left devoid of basic necessities such as quality education and chances of employment. According to the 2011 census, there exist a 56.07% literacy rate amongst the transgender community consisting of 4,87,803 individuals compared to a 74% of the larger general public.⁵⁴⁶ Further in the case of National Legal Service Authority v. Union of India, it was adjudged that “Gender identity and sexual orientation are different concepts. Each person’s self-defined sexual orientation and gender identity is integral to their personality and is the most basic aspects of self determination, dignity and freedom.”⁵⁴⁷ Furthermore, the Transgender Persons (Protection of Rights) Act elucidates that any individual who does not conform to the gender assigned at birth would be considered a ‘transgender person’ and such person is entitled to the gender so perceived by them.⁵⁴⁸ The act further mandates the protection of the well being and the rights of individuals who fall under the ambit of this act. Thus, to correspond with the rights provided by the act and the constantly changing society and its issues, the POSH Act requires revision and amendment.

EVOLUTION OF THE ACT IN MOVING AWAY FROM HETERONORMATIVITY INHERENT IN IT

For a period of 5 years since the enactment of the POSH Act in 2013, in this world of normative perspective, the term ‘respondent’ as defined in Section 2(m) of the POSH Act was generically interpreted to mean only men, with a biased view that the perpetrators of sexual harassment can mean only men and that the victims can only be women.

However in 2018, the Delhi High Court ordered in **Anamika v. Union of India**⁵⁴⁹ that transgender individuals file complaints under the criminal

sexual harassment laws and cannot receive any remedies under the POSH Act as the victims. But transgender individuals who identify themselves as women and hold a legal identification certificate that has been provided to them by the District Magistrate after submitting an application,⁵⁵⁰ can file a complaint under the POSH Act as they fall under the ambit of ‘aggrieved women’ defined under Section 2(a), ensuring there is no discrimination between cis-gender and transgender women.

Further in 2020, the judiciary held that complaints can be filed against any person irrespective of their gender as Section 2(m) of the Act defines respondent as “persons” which is inclusive of all genders, as held in case of **Malabika Bhattacharjee v. Internal Complaints Committee, Vivekananda College**,⁵⁵¹ indicates this idea but the protection and relief only extend to women which is concerning as it is subject centric.

It can be observed that the POSH Act has evolved to a large extent where perpetrators are concerned, to include all persons, however, in the context of the “aggrieved person” it has evolved to a miniscule extent to include only transgender individuals who identify as women and has a legal identification certificate to prove it.

ISSUES PREVALENT WITH THE POSH ACT, 2013

The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 is landmark legislation in India that seeks to protect women from sexual harassment at the workplace. However, the Act has been criticized for being heteronormative, meaning that it assumes that all employees are cis-gender individuals and that sexual harassment occurs between heterosexual men and women. This gender specific character serves as a barrier for members of conforming to other gender identities, as it leaves people of all other

⁵⁴⁶ Ritwik Mehta ‘Analyzing Transgender Rights in India’ (2021) 2 Indian JL & Legal Rsch

⁵⁴⁷ National Legal Service Authority v. Union of India and Others, (2014) 5 SCC OnLine SC 328

⁵⁴⁸ Section 4(2), Transgender Persons (Protection of Rights) Act, 2019

⁵⁴⁹ Anamika v. Union of India & Ors., 2014 SCC OnLine Ker 27771

⁵⁵⁰ Section 5 and 6(1), Transgender Persons(Protection of Rights) Act, 2019

⁵⁵¹ Malabika Bhattacharjee v. Internal Complaints Committee, Vivekananda College, 2020 SCC OnLine CAL 3262

genders vulnerable to sexual harassment without a possible path of recourse.

One of the biggest issues with the POSH Act is that it does not explicitly define what constitutes "sexual harassment." This means that it is up to the courts to decide what constitutes sexual harassment, giving the opportunity for multiple interpretations, which can lead to inconsistent rulings. This can make it difficult for victims of sexual harassment to come forward, as the lack of an explicit definition leaves the victim oblivious of whether they have been subjected to sexual harassment and if their complaint would be accepted under the law.

Another issue with the POSH Act is that it does not explicitly protect people of all gender identities. This means that transgender and non-binary people are not explicitly protected from sexual harassment under the law. This can make it difficult for men and LGBTQIA+ community people to report sexual harassment, as they may not be sure if they will be taken seriously.⁵⁵²

The Transgender Persons (Protection of Rights) Act, 2019 specifically states that harming, endangering or injuring the life and safety of a transgender person would constitute an offence. Any act that may be physical or mental that causes physical abuse, sexual abuse, verbal and economic abuse would also be considered an offence. Therefore, it can be ascertained that transgender individuals have right to be protected against sexual harassment at the workplace and it falls as an obligation of the POSH act ensure the affected transgender individuals receive due recourse and protection.

The POSH Act further does not provide any specific remedies for victims of sexual harassment. This means that it is up to the courts to decide what remedies are appropriate and this can lead to victims of sexual harassment not receiving adequate compensation or redressal for their experiences.

The lack of protection for people of all gender identities under the POSH Act is a major issue and it leaves people of all other genders vulnerable to sexual harassment and can make it difficult for the affected to come forward and report sexual harassment.⁵⁵³

CHAPTER III: THE ACT IS VIOLATIVE OF CONSTITUTION OF INDIA

Although it is true that women are viewed as being in a disadvantaged position and have experienced discrimination, abuse, and harassment, this does not mean that women are the only group in society that is impacted. This exposes a weakness in the act's intended protection of women against sexual harassment, which alienates other people. No other identities, such as male or other identities from the LGBTQIA+ community, are defined or included in the act as victims, regardless of the situation.

According to Articles 37, 38(1), and 38(2) of the Indian Constitution, which state that "*the state shall strive to promote the welfare of the people*" and "*the state shall strive to minimize inequalities in status, facilities, and opportunities*," it is in conflict with the ideals that our constituent assembly attempted to reflect while drafting the document in order for it to be credible yet flexible enough to cater to the changing social structure of the society and need of the people. when the government itself disregards a large segment of the populace while putting into effect laws that, in fact, create status inequality and make it more difficult for citizens to enforce their rights in a democracy.⁵⁵⁴

The state is obligated under Article 14 of the Constitution to treat all people equally before the law and to provide them with equal protection of the laws within the territory of India. This right is denied when a law discriminates against men and LGBTQIA+

⁵⁵² Poonam Gautam, Ajay Solkhe, Shivangi Singh, Gender Inclusion at Workplace: A Systematic Review and Bibliometric Analysis, Pg 1-28, 2022

⁵⁵³ Seshu, M. (2020), Gender inclusivity and The Prevention of Sexual Harassment in the workplace. Indian Journal of Gender Studies, 27(1), 63-79.

⁵⁵⁴ Dwivedi, D., & Tolbert, P. S. (2018). Gender inclusivity and the prevention of sexual harassment in the workplace: A comparative study of India and the United States. Comparative Labor Law Journal, 39(1), 37-58.

people, which is a violation of Article 14, 19(1)(a), and 21 of the Indian Constitution. According to Article 19(1)(a) of the Constitution, it restricts and discriminates against a person's sexual identity. In the case of *Navtej Singh Johar v. Union of India*,⁵⁵⁵ the Supreme Court ruled that the right to express one's sexuality falls within the purview of the aforementioned Article and cannot be infringed. The Supreme Court noted in the *Union of India v. Mudrika Singh*⁵⁵⁶ case that sexual harassment is a component of the right to life with dignity under Article 21 of the Indian Constitution. When combined with the ruling of Navtej Singh Johar, which recognized the rights of LGBTQIA+ people under Article 21, it can be deduced that the fundamental rights of the community are being violated because it impedes their ability to exercise their right to life, personal liberty, and freedom of choice when it is not addressed or included in the laws. Everyone has the right to life

and personal liberty under Article 21. However, the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013, which guards against sexual harassment in the workplace, only allows women to make a complaint. In that scenario, someone who identifies as LGBT is left helpless and powerless in the event of workplace harassment, which totally defeats the goal of the laws, which is to protect people from sexual harassment at work.

In the case of *Vishaka and Ors. V. State of Rajasthan*, J.S. Verma, the Chief Justice of India at the time, expressed his opinion that, under Articles 14, 19 and 21 of the Indian Constitution, violations of fundamental rights are common place given the current political environment. The effort to prevent such violations is growing along with the emphasis on gender equity and knowledge of it; at the same time, there is a growing hostility towards incidences of sexual harassment. The purpose of the writ petition is to draw attention to this social anomaly and aid

in the development of workable solutions for implementing the genuine meaning of "gender equality." It may be inferred from these statements that the court has always been in favour of gender equality; but, as Indian culture has evolved, the concept of "gender" has come to include the LGBTQIA+ community, which the courts now need to take into consideration.

RECOMMENDATIONS

1. **Expand the definition of sexual harassment to include all forms of unwanted sexual conduct, regardless of the gender or sexual orientation of the perpetrator or victim.**

The current definition of sexual harassment in the POSH Act is limited to unwelcome sexual advances or demands for sexual favours, or other verbal or physical conduct of a sexual nature. This definition is too narrow and does not encompass all forms of unwanted sexual conduct. For example, the current definition does not include sexual harassment that is based on the victim's gender identity or sexual orientation.⁵⁵⁷ To make the POSH Act more inclusive of all gender identities, the definition of sexual harassment should be expanded to include all forms of unwanted sexual conduct, regardless of the gender or sexual orientation of the perpetrator or victim. This could include, for example: unwanted physical contact, such as touching, groping, or kissing, unwanted sexual advances or propositions, unwanted verbal or written comments of a sexual nature, unwanted creation or distribution of sexually suggestive images or videos, unwanted displays of sexual objects or symbols, and unwanted pressure or coercion to engage in sexual activity. By expanding the definition of sexual harassment, the POSH Act would better protect all employees from sexual harassment, regardless of their gender identity or sexual orientation.

⁵⁵⁵ Navtej Singh Johar v. UOI, (2018) 10 SCC 1

⁵⁵⁶ Union of India V. Mudrika Singh, 2018 SCC OnLine Cal 16862

⁵⁵⁷ Jain, M. H., & Kumar, P. (2023). Gender inclusivity and the prevention of sexual harassment in the Indian workplace: A review of the literature. Springer Nature Singapore.

II. Explicitly recognize and protect individuals of the transgender community from sexual harassment.

The current POSH Act does not explicitly recognize or protect individuals of the transgender community from sexual harassment. This means that men and LGBTQIA+ community may not be able to seek redress under the law if they are sexually harassed at the workplace. To make the POSH Act more inclusive of all gender identities, men and LGBTQIA+ community people should be explicitly recognised and protected from sexual harassment. This could be done by adding a new clause to the POSH Act that specifically prohibits sexual harassment based on gender identity or sexual orientation.

III. Use gender-neutral language throughout the Act.

The current POSH Act uses gendered language throughout, which can be alienating and exclusionary for people of all gender identities. For example, the Act uses the terms "women" and "men" to refer to employees, and it defines sexual harassment as "any unwelcome sexual advance or demand for sexual favors, or other verbal or physical conduct of a sexual nature." This language excludes transgender and non-binary people, and it can reinforce the idea that sexual harassment is only a problem between heterosexual men and women. To make the POSH Act more inclusive of all gender identities, gender-neutral language should be used throughout the Act. For example, instead of using the terms "women" and "men," the Act could use the terms "employees" or "workers." Instead of defining sexual harassment as "any unwelcome sexual advance or demand for sexual favors, or other verbal or physical conduct of a sexual nature," the Act could define sexual harassment as "any unwelcome sexual conduct, regardless of the gender or sexual orientation of the perpetrator or victim."

IV. Provide training to employers and employees on the POSH Act and on the importance of creating a safe and inclusive work environment for all employees.

Many employers and employees are not aware of the POSH Act or the rights and obligations that it creates. This can lead to a lack of awareness and understanding of sexual harassment, and it can make it difficult to prevent and address sexual harassment in the workplace.

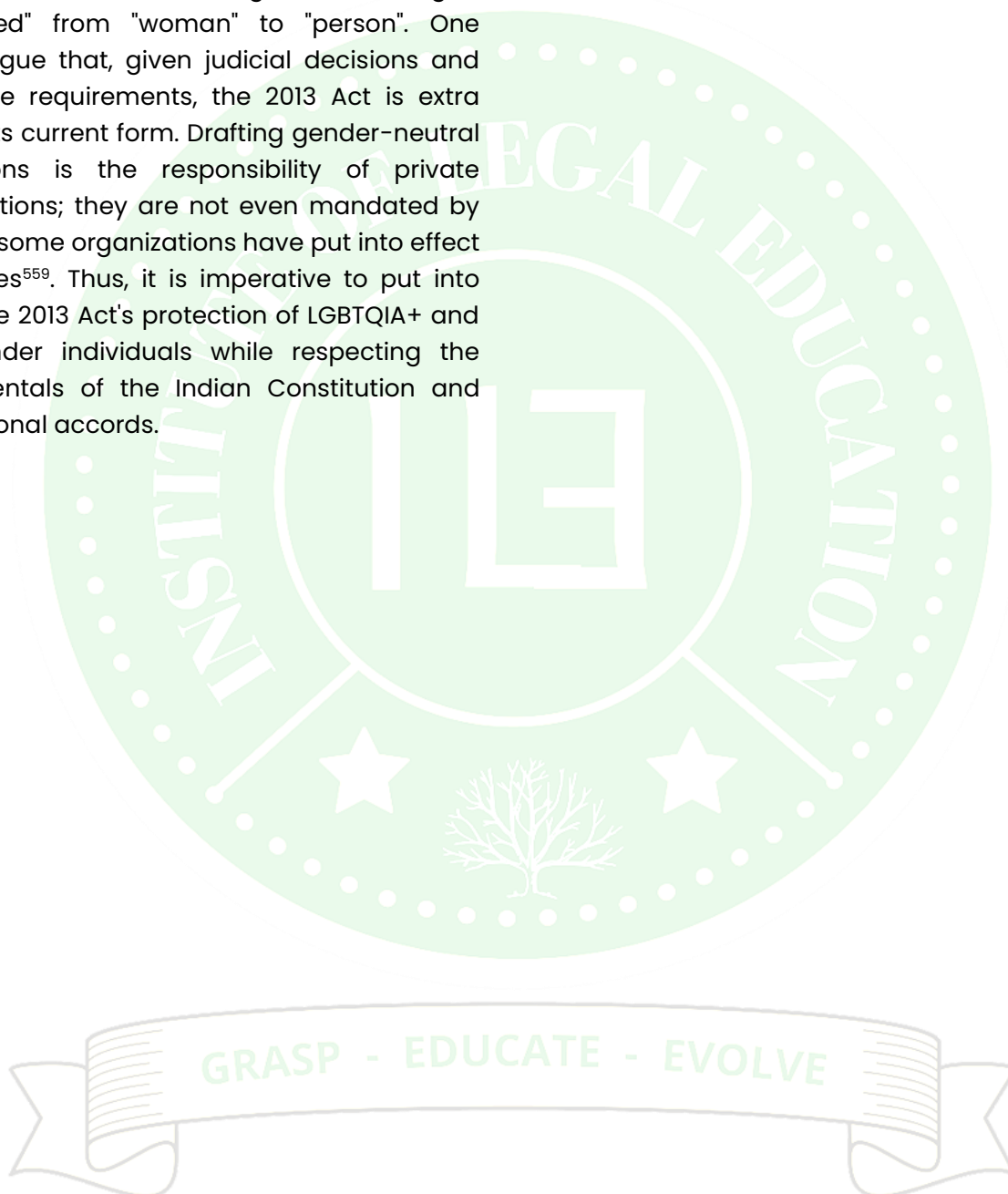
To make the POSH Act more effective, it is important to provide training to employers and employees on the POSH Act and on the importance of creating a safe and inclusive work environment for all employees. This training should cover the following topics: what is sexual harassment, what are the different forms of sexual harassment, what are the rights and obligations of employers and employees under the POSH Act, how to prevent and address sexual harassment in the workplace, and how to create a safe and inclusive work environment for all employees.⁵⁵⁸

CONCLUSION

Sexual harassment, whether it is verbal, psychological, or violent, has a long history in India and it is undeniable that the casualties were mostly women. The Indian government enacted the POSH Act in 2013 with the intention of shielding women from sexual harassment in the workplace and serving as a dispute resolution tool. The Indian legal system makes an effort to address the grievances of the current generation, but occasionally it forgets that as society grows and evolves, future generations will have to bear the consequences of its actions. Despite the fact that the act has benefited millions of women, its shortcomings remain. Indian law needs to adapt to the requirements and desires of its people. History shows that a number of laws intended to

⁵⁵⁸ Agrawal, N. (2023). The role of gender inclusivity in preventing sexual harassment in the workplace: A case study of Indian women in the IT sector. *International Journal of Gender and Women's Studies*, 10(1), 1-15.

protect and promote women have been gravely misapplied, necessitating intervention by the legislature and the courts to correct the mistakes. Therefore, in order to uphold the requirement of the Constitution, the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 should be amended to change the meaning of "aggrieved" from "woman" to "person". One could argue that, given judicial decisions and legislative requirements, the 2013 Act is extra vires in its current form. Drafting gender-neutral regulations is the responsibility of private organizations; they are not even mandated by law and some organizations have put into effect such rules⁵⁵⁹. Thus, it is imperative to put into effect the 2013 Act's protection of LGBTQIA+ and transgender individuals while respecting the fundamentals of the Indian Constitution and international accords.



⁵⁵⁹ Saket Sharan, 'Sexual Harassment Laws in India: Gender Neutrality & Other Limitations.' (2023) 5 Indian JI & Legal Rsch 1