

ANTI-SEXUAL HARASSMENT LAW VIS-A-VIS CONSTITUTIONAL GUARANTEE OF EQUALITY

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INTRODUCTION

For long, women in India had been confined within the boundaries of their home and accorded the role of caretaker of their families. This system was in line with the patriarchal set up of society which still dominates public and private lives of women. The women, for a major part of recent history, were economically dependent on men resulting in their absence from workforce which also meant absence of laws relating to their protection from sexual violence at workplace, maternity benefits or equal payment of wages. But this social situation began to alter with the enactment of the Constitution of India in 1950 which, under Part III, guaranteed right to equality as well as protection against discrimination on ground of sex. Moreover, a liberal interpretation of Constitutional provisions and expansion of writ litigation by the judiciary started changing the treatment of women in law since 1970s. The Supreme Court of India became increasingly concerned with the discrimination faced by female population of the country in almost all walks of life; and took up the responsibility for emancipation of women.

The combined efforts of judiciary and women's movement in the area of sex discrimination led to the enactment of Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 (referred to as POSH Act). The present article concerns itself with the study of relationship between the above-stated law protecting women from sexual harassment at workplaces and the constitutional guarantee of substantive equality. The POSH Act owes its origin to the landmark decision of Supreme Court in *Vishaka v. State of Rajasthan*¹ which, for the first time, laid down a law for regulating harassment of women at workplaces on the ground of their sex. This judgment resulted from the direct application of constitutional guarantee of gender equality which was held to include protection from sexual harassment and right to work with dignity.² Thus, the Supreme Court had adopted substantive equality approach in applying

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¹ AIR 1997 SC 3011

² Ibid.

the constitutional rights rather than basing its reasoning in formal equality which fails to recognise the disadvantaged position of women employees in workplaces. This article adopts the fundamental research method to understand the judicial approaches of substantive and formal equality and attempts to explore the reason for applying substantive equality approach while dealing with the issue of sexual harassment at work.

The article also discusses the concepts of patriarchy and traditional stereotypes which dominate the social structure of India and are useful in understanding the complex nature of sexual harassment faced by women employees.

SEXUAL HARASSMENT AT WORKPLACE: MEANING AND CONTEXT

In order to understand the true meaning and context of sexual harassment against women employees, it is important to understand two concepts: the concept of patriarchy and traditional stereotypes.

Generally, patriarchy is understood as a social arrangement where the male head of the family dominates women and all young members. Indian society is marked by this arrangement which has culminated into many social evils and discriminatory practices against women. V. Geetha, in her book 'Patriarchy', defines patriarchy as resting on "defined notions of masculine and feminine which is held in place by sexual and property arrangements that privilege men's choices, desires and interests over and above those of women in their lives and is sustained by social relationships and cultural practices which celebrate heterosexuality; female fertility and motherhood on the one hand and valorise female subordination to masculine authority and virility on the other."³ This patriarchal arrangement has given way to traditional gender stereotypes which construct women as weak sexual beings in need of protection. These socially constructed differences between men and women prevent women from being a part of public sphere and resultantly normalise sex-based discrimination at workplaces. This kind of sex discrimination against women was evident in the case of *Air India v. Nergesh Meerza*,⁴ wherein the airline's regulation provided for termination of service of an air hostess in Air India International on her first pregnancy. This is a clear example where women were being discriminated in public sphere on account of their biological differences by construing pregnancy as an impediment to their attractive looks essentially required for the job. The case is also

³ V. Geetha, *Patriarchy* (Stree Publication, Calcutta 2015).

⁴ (1981) 4 SCC 335

important for describing the dominant maleness of workplaces flowing in their rules and regulations as well as shows a clear lack of due regard for special needs of women employees.

Sexual harassment at workplaces has to be analysed keeping in view the above-discussed male-dominated public sphere and employment policies. The POSH Act of 2013, is a carefully drafted instrument and defines sexual harassment in Section 2(n) as including any one or more of the following unwelcome acts or behaviour (whether directly or by implication) namely:

- (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 conduct of sexual nature

The POSH Act has effectively covered the two globally recognised forms of sexual harassment viz., quid pro quo harassment and hostile environment. Quid Pro Quo harassment is described as denial of an economic benefit in order to punish the victim for their rejection of a sexual request; whereas, hostile environment harassment comprises of creation of an offensive working environment in retaliation to such rejection.⁵

Thus, the anti-harassment law encompasses every sexual act which may result in harassment and consequently discrimination against women employees in India. The acts prohibited under the Act are open to very wide interpretation depending on the subjective experience of women victim.

It now becomes easy to conclude that the evil of sexual harassment at workplace is one of species of sex discrimination practiced in economic sphere and one that is most dominated by cultural practices and patriarchal mindset of viewing women as sexual objects confined to private sphere of home and family; and this discrimination is further exacerbated by the power relations at work where superiors exercise authority over junior employees.⁶ While sex based discrimination in employment may be said to be a broad area covering all rules, regulation,

⁵ Ashok Bhasin, *Sexual Harassment at Work* (Eastern Book Company, Lucknow 2007).

⁶ Sheba Tejani, *Sexual Harassment at the Workplace: Emerging Problems and Debates*, 39 EPW 4491-94 (2004).

practices and policies according unequal treatment to women as was seen in Air India case above, sexual harassment specifically involves acts and requests of sexual nature that target specific women employees and cannot be generalised. The next part of this article locates the law against sexual harassment within the fundamental rights guaranteed by the Constitution and the different approaches to equality adapted by the Indian judiciary in dealing with sex discrimination.

ANTI-SEXUAL HARASSMENT LAW AND CONSTITUTIONAL RIGHT TO EQUALITY

It was in the case of *Vishaka v. State of Rajasthan*⁷, that the Supreme Court recognised sexual harassment at workplace as a violation of Fundamental Rights guaranteed under the Constitution of India. The Supreme Court observed that availability of a 'safe' working environment was the primary requirement of the fundamental right to carry on any occupation, trade or profession. The Court, while referring to incidents of such harassment, held that, "Each such incident results in violation of the fundamental rights of 'Gender Equality' and 'Right to Life and Liberty'. It is a clear violation of the rights under Article 14, 15 & 21 of the Constitution. One of the logical consequences of such an incident is also the violation of the victim's fundamental right under Article 19 (1)(g) to practice any profession or to carry out any occupation, trade or business."⁸ This judgment paved the way for enactment of POSH Act in 2013 which seeks to protect women from being subject to sexual discrimination in line with the fundamental rights.

The fundamental right to equality under the Constitution of India is guaranteed under three Articles namely, Articles 14, 15 & 16. While Article 14 is the principal Article guaranteeing, to every person, the right to equality before the law or the equal protection of the laws within the territory of India, Articles 15 and 16 deal with prohibition of discrimination. Article 15(1) prohibits the state from discriminating on the grounds only of religion, race, caste, sex, place of birth or any of them. This means that all laws are to be applied equally to both men and women. Article 15(3) enjoins the State to make any special provision in favour of women and children. And Article 16(1) and (2) embody the general rule that the State shall provide equal opportunities for all citizens in matters relating to employment or appointment to any office under the State. There shall be no discrimination on the grounds of religion, race, sex, caste or place of birth in providing employment. These provisions are an extension of the principle of equality before law

⁷ (1997) 6 SCC 241

⁸ Supra note 1.

and of the goal of 'equality of status and opportunity' as set in the Preamble of the Constitution.⁹

Thus, the right to equality guaranteed under Articles 14, 15 and 16 is the most important right which not only grants equality to women but also empowers the State to adopt measures of positive discrimination in favour of women for neutralizing the cumulative socio economic, education and political disadvantages faced by them. This positive discrimination is based on what is called 'substantive equality approach', whereas equal treatment to all enshrined under Article 14 leads to 'formal equality approach.' In the next part, the article explains these two approaches to equality and their effect on decision of sex discrimination cases.

JUDICIAL APPROACH TOWARDS CONSTITUTIONAL EQUALITY: FORMAL AND SUBSTANTIVE

The fundamental right to equality enshrined in the Constitution has led to dual treatment of the subject by judiciary in deciding the cases of sex-based discrimination against women. In declaring sexual harassment at workplace as being violative of Constitutional rights, the Supreme Court had adopted the substantive equality approach.

The Constitution has clearly indicated that equality is a fundamental right which primarily flows from Articles 14, 15 and 16 and this concept of equality has not been defined in the Constitution. But in law, there is a formal approach to equality which requires that those who are equal are to be treated equally. It implies treating likes alike. According to this approach those who are similarly situated are to be treated similarly and conversely those who are different are to be meted with differential treatment. It does not permit any beneficial rule or reservation to be made. The second approach is substantive equality which takes into account the historical disadvantage or discrimination suffered by any group of people in society. This approach requires that the inequalities of such disadvantaged groups be eliminated. It is noted that the concept of equality requires a level playing field and permits adopting special beneficial policies for the disadvantaged group. Treating persons who are in an unequal situation equally does not do away with injustice. This situational imbalance has to be rectified first.¹⁰ Therefore the substantive approach to equality is preferred over formal equality in order to ensure that interests of a particular group are protected and promoted in view of past discrimination. In terms of gender equality, substantive approach leading to differential treatment of state in favour of

⁹ M.P. Jain, Indian Constitutional Law, (LexisNexis Butterworths Wadhwa, Nagpur, 6th Ed. 2012).

¹⁰ Leila Seth, Talking of Justice: People's Rights In Modern India (Aleph Book Company, New Delhi 2014).

women is to be regarded as an initiative to raise their standard of livings and other conditions which were degraded due to a long history of institutional and systematic oppression, so that they can stand on equal plane with men and enjoy their rights to the fullest.

The Supreme Court has applied the substantive approach in a number of cases to uphold the rights of women. In *Air India v. Nergesh Meerza*¹¹, the Supreme Court has maintained the substantive approach in which women are not to be denied opportunities because of their biological differences. Similarly in the case of *Mackinnon Mackenzie and Co. Ltd. v. Andre D' Costa*¹², the question involved was getting of equal pay for equal work. The Court ruled that when female stenographers and male stenographers were not getting equal remuneration it led to discrimination and any settlement in that regard could not save the situation. In *Madhu Kishwar v. State of Bihar*¹³, the Chota Nagpur Tenancy Act, 1908 was challenged on the ground that the Act denied the right to succession to tenancy land to scheduled tribe women and hence, it violates Articles 14, 15 & 21 of the Constitution. The Supreme Court, by admitting the petition, quashed the discriminative provisions of the Act and paved a way for tribal women to entitle their rights to tenancy lands along with men.

In the context of sexual harassment at workplace, adoption of formal approach to equality is problematic as it requires treating alike both male and female employees working at the same level. It forbids applying of any different policies or laws favouring females as that would be considered as discriminatory against males. Also, as per this approach, if a comment or remark is not considered as sexually harassing a male employee then it is also not so for the female employee. It fails to take account of the socio-cultural factors affecting women in Indian society. Therefore, in Vishaka case, the Supreme Court adopted the substantive equality approach in recognising sexual harassment at workplace as a distinct evil only affecting women and laid down a number of guidelines in absence of any legislative Act on this subject. As a result of this judgment, any women employee who is subjected to sexual harassment at the workplace can take recourse to initiating criminal proceedings and/or disciplinary action and can also seek compensation from the guilty employer and other persons responsible for the harassment. The court further directed that the guidelines laid down in this case should be followed until the

¹¹ Supra note 4

¹² AIR 1987 SC 1281

¹³ AIR 1996 SC 1864

legislature enacts a statute in this regard.¹⁴ The resulting POSH Act is a special beneficial legislation only for protection of women.

CONCLUSION

The article seeks to conclude that substantive equality approach is best suited to deal with issue of sexual harassment at workplace as this approach takes into account the effect of rules or policies. Equal treatment often leads to outcomes that are unequal because of differences between men and women as well as their different experience owing to socio-cultural structure of society. The acts of sexual harassment at workplace are not always direct and visible and capable of being judged upon an objective criterion applicable alike to both male and female employees. In a patriarchal society like ours, women have been subjected to completely different treatment than men and traces of this differential treatment also creep into workplaces. Katharine Bartlett¹⁵ has discussed different versions of substantive equality that may be adopted to remedy the defects of past discrimination. She mentions affirmative action for boosting women into occupational fields dominated historically by men as one of the versions of substantive equality. Safe working environment as guaranteed by the anti-harassment law (POSH Act) is such a boost. Further, Catherine Mackinnon¹⁶ observes that India's constitutional text holds great potential for ameliorating the subordination of women to men. The Constitution under Article itself recognises substantive equality approach clearly stated in textual form which she notes is absent in most other countries. Mackinnon remarks that, the language of Article 15 recognizes in the structure and provisions of the Constitution of India itself that sex has been made into a social disadvantage for women, in violation of the equality principle. She notes that the provisions of article 15 offer a substantive lens through which women's equality rights can be read.

¹⁴ Flavia Agnes, Unit 4 Women's Equality: Formal and Substantive, (Nov. 21, 2018, 10:30 A.M.), <http://egyankosh.ac.in/bitstream/123456789/5623/3/MWG-010-B3-U4.pdf>.

¹⁵ Katharine T. Bartlett, Gender Law, 1 DJGLP 1-20 (1994).

¹⁶ Catharine A. MacKinnon, Sex Equality under the Constitution of India: Problems, Prospects, and Personal Laws, 4 Int'l J. Const. L. 181 (2006).