Comment

Sexual Harassment at the Workplace Act: Providing Redress or Maintaining Status Quo?

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Despite a law against sexual harassment of women at the workplace, persons holding high offices, including senior judges, seem to enjoy impunity. By critically examining the allegations made against Justice Ranjan Gogoi (retd), former Chief Justice of India, and analysing five other cases of sexual harassment, we highlight how women are routinely denied justice. In doing so, we ask: are women actually able to file complaints of sexual harassment without the fear of facing a backlash? And do they ultimately get justice when they do so? We argue that the implementation of the law against sexual harassment is mediated by caste, class and gender, both of the survivor and of the perpetrator. We point to a changing polity that makes laws, guarantees and protections for women, but stumbles in implementing them in a fair and non-arbitrary manner.

Keywords
Sexual harassment, workplace, India, legal redress

Introduction

Movements for the rights of women, including recent ones such as the #Metoo movement (Burke, 2017; Roy, 2018) have highlighted the need for a safe working environment. This article reflects on select High Court and Supreme Court
judgments on sexual harassment at the workplace in India to highlight how our legal and political systems are inadequate in providing redress to the complainants. We explore how the redress mechanisms routinely fail to deliver justice to women thus discouraging others from coming forward and filing complaints. We examine five judgements, including the one involving Justice Ranjan Gogoi, the former Chief Justice of India (CJI), to underscore how sexism and patriarchal attitudes permeate redressal mechanisms. Gogoi’s case of sexual harassment has been in the eye of controversy particularly because of his subsequent appointment to the Rajya Sabha, the upper house of the Indian Parliament. The contours of this case force us to reckon with existing laws on sexual harassment, which were promulgated after a long and protracted struggle by women’s rights groups. The manner in which the complaint against Justice Gogoi was handled, his rapid exoneration, and his subsequent appointment to the Rajya Sabha, stood in complete violation of both the letter and the spirit of the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013, hereafter referred to as the Prevention of Sexual Harassment (POSH) Act, and the existing provisions of the Gender Sensitisation Internal Complaints Committee (GSICC) Regulations (2017). Gogoi’s case underscores the apathy of the political class towards survivors of sexual harassment and alludes to the inability of countless women to access the safeguards guaranteed under POSH without the fear of retribution or loss of employment and finally limits the everyday safeguards and protections women can claim under POSH. Notwithstanding the gains made through decades of struggle, the women’s movement is yet to make substantial inroads into the political and legal institutions of India (Roy, 2018).

We argue that the implementation of the provisions under POSH is mediated by socio-economic indicators of the complainant and the accused alike, including caste, class, gender and social location. The status of the survivor and that of the perpetrator have a significant bearing on the process and nature of justice delivery. The judgements that we present here allow for a discussion on why some cases grab the attention of the political class and the general public alike while others do not. Further, these judgements offer us a lens with which to examine the everyday forms of violence encountered by women. The failure to implement the provisions of POSH significantly undermines women’s ability to experience safe workspaces and to access a redress mechanism that is free of retribution and fear.

The rest of the paper is organised as follows: By examining CJI Gogoi’s case and five other judgments, all under the POSH Act, we aim to understand the possibilities and limitations of the law and how it aids or impedes the survivors’ ability to access justice. Though not exhaustive our analysis underscores the different factors that play a role in guaranteeing justice to survivors. We also reflect on how the socio-economic status of the perpetrator and how the complainant influences proceedings and the delivery of justice. In doing so we ask, why believing the survivors in cases of sexual harassment is important? Why is the lack of evidence in cases of sexual harassment more complicated than in the case of a false complaint? In asking these questions, we also highlight the need for examining existing power imbalances in these institutions.
Sexual Harassment and Legal Redress: Gogoi and Beyond

A junior assistant in the Supreme Court filed a complaint against the Chief Justice of India Rajan Gogoi in April 2019 alleging sexual harassment. The accompanying affidavit detailed instances of sexual advances made by Justice Gogoi in October 2018. The affidavit was also posted on various news websites and was thus available to the public. The initial inquiry panel that was constituted to look into the complaint also comprised Justice Gogoi, the accused. This stood in violation of both the principles of natural justice and the provision of POSH. Expectedly, Justice Gogoi denied all the allegations against him (Rautray, 2019).

Following the public outrage over this lapse, CJI Gogoi asked another Justice of the Supreme Court Sharad Arvind Bobde to set up an in-house panel. The panel thus set up comprised two female judges, but did not have a single external member as is stipulated by POSH.

The complainant produced evidence in the form of phone call logs and video recordings, ultimately testifying before the panel. While testifying she raised objections about the constitution of the in-house panel. But her objections were disregarded. The complainant needed a person to support her as she had a hearing disability. This support was denied to her. Further, she was also denied copies of her deposition. All these factors forced her to withdraw her case. Instead of sticking to fair play, the panel of judges proceeded *ex parte* to dismiss her allegations as being ‘without substance’.

Following the panel’s arbitrary exoneration of CJI Gogoi, groups such as the Women in Criminal Law Association (2019) and People’s Union for Democratic Rights (Bhattacharya & Tandon, 2019) issued statements demanding a fair trial. Protests were held outside the Supreme Court premises and on social media platforms, demanding an independent inquiry. The findings of the independent inquiry have remained under wraps. None of the details were released nor made available, leaving the public with no sense of closure nor justice, shaking one’s belief in the Indian judicial system, raising important questions that need to be addressed. To whom do women facing harassment at the work place, approach? What are the institutional mechanisms available to them? What are the standards and ethics of the power holders within these institutions, and how do they plan to reclaim some semblance of faith to its people?

CJI Gogoi’s hearing reflects not just a gender-based but also a caste-based bias—the complainant is a dalit— inherent in the redressal procedures under POSH. The intersection of gender, caste and disability can make accessing justice difficult even for someone who works in a court and is aware of its workings. Complaining against the CJI cost this woman her job, and led to her arrest on alleged charges of cheating, criminal conspiracy and criminal intimidation. A case of bribery was also filed against her for added measure. The aforementioned experience of the complainant in the Justice Gogoi case leads us to ask why the odds are stacked against women who seek redress under POSH, especially when the accused is in a position of power. Class, caste and one’s position in the organisational hierarchy are central to understanding how complaints of sexual harassment play out in India. Thus, even though sexual harassment of a subordinate
as in the case of Gogoi is an offence under POSH. Initiating any legal action against the CJI, under its provisions becomes extremely difficult if not impossible due to the preeminent position of the CJI within India’s judicial hierarchy. Furthermore, getting the CJI to recuse himself from a particular case, to conduct an impartial inquiry against the CJI or to initiate proceedings for their impeachment are long drawn and politically charged processes, that are virtually inaccessible to most survivors of sexual harassment. As was seen in this particular case, attempts to hold the CJI responsible resulted in retribution on multiple fronts, economic, professional and legal. Thus, the Indian judiciary is riddled with procedural loopholes that make it very hard to pin charges of sexual harassment against most judges, particularly in the higher judiciary. So the question then becomes who judges the judges?

Justice Gogoi’s case received considerable traction in the popular media, but the wide coverage could not bring justice to the survivor nor could it stop his nomination to the Rajya Sabha. This raises the rather uncomfortable question as to whether sexual harassment is an important question at all for the political class in India. The fact that Justice Gogoi was nominated to the Rajya Sabha by the President of India upon the recommendation of the ruling alliance, namely the National Democratic Alliance (NDA) led by the BJP makes a mockery out of not only POSH, but also one of the government’s highly publicised slogans, Beti Bachao (Save the Girl Child).

By nominating Justice Gogoi to the Rajya Sabha the government in particular and the political class in general is conveying a message that sexual harassment is not a priority for them. While campaigns like Beti Bachao, the abolition of Triple Talaq or those to make the armed forces more gender inclusive are important and do result in an increased participation of women in work spaces, it is equally important to ensure that the workplaces themselves are free from fear of harassment thereby ensuring that women can work with dignity. Simply increasing the number of women who participate in workspaces cannot be the sole yardstick of gender equality. The ambit of what entails safety of women has to be expanded to include the everyday forms of sexual harassment.

The government in responding to sexual assault cases and overlooking sexual harassment cases or rather ‘rewarding’ perpetrators of sexual harassment has set a faulty precedent. Addressing cases of sexual harassment is significant for all institutions, including the Indian government and all political parties. CJI Gogoi’s judgment is therefore symptomatic of the barriers that women face in seeking a redress under existing laws. Despite popular sentiment, legal challenges (Bar and Bench, 2020; The Wire 2020), and intense protests by opposition political parties inside the Rajya Sabha, Justice Gogoi took the oath to India’s Upper House in March 2020.

While Justice Gogoi’s case drew a lot of attention and highlighted the limitation of POSH there are others which showcase the remedial capacity of the Act. We discuss six such cases under POSH below.

In the Mohini Pessuram Tilwani vs. Union of India and Others (2019), the petitioner approached the Gujarat High Court challenging her arbitrary termination from her employment. Since 2017, the petitioner was facing a hostile work environment, including sexual advances and comments from the accused.
On refusing his advances on 27 November 2017 she was first issued death threats, then arbitrarily terminated on 28 November 2017. Along with this, a false police complaint of theft was filed against her. The petitioner, Mohini, approached the National Commission for Women in 2018 with a complaint of sexual harassment against the managing director of the National Dairy Development Board. Following this, in January 2018, a formal complaint was filed with the Internal Complaints Committee (ICC). The petitioner approached the Gujarat High Court under a writ jurisdiction of Article 226, challenging her termination and seeking reinstatement with all benefits. The court focussed on her arbitrary termination in this writ petition u/a 226 rather than on the details of the complaint of sexual harassment. The key argument was whether an alleged complaint of sexual harassment could lead to termination of the petitioner. After examining arguments on both sides, the court took into account how the termination was framed as the end of a contractual obligation which was arbitrary and punitive in intent and against the principles of fairness enshrined in Article 14 of the Constitution. Setting aside her termination, the High Court ordered that the petitioner be reinstated into service. This High Court judgment sets an important precedent in cases of sexual harassment thereby giving the message to survivors that they can safely file complaints against their perpetrators. This judgment also calls for a fair treatment of employees, cautioning against ‘retaliatory acts’ such as her arbitrary removal from service. In doing so, the judgment is also addressing key factors that inhibit women from filing complaints in the first instance.

A 2019 judgment of the Delhi High Court, in the case of X vs. District Magistrate (South) and Another, held that the local complaint committee should provide an opportunity to the complainant to add further evidence to her complaint, filed against the CEO of Edible Routes. In doing so, the court did not comment on the limitation period under section 9 of the POSH Act but it held that the documents that the complainant wanted to submit be considered by the local complaints committee.

However, in Institute of Hotel Management, Catering Technology and Applied Nutrition & Others vs. Suddhasil Dey & Another (2019) the accused Suddhasil Dey, a senior lecturer, was accused by several lady students of sexual harassment and having been found guilty by the ICC of the institute was dismissed from service. But Dey challenged the decision of the ICC approaching the Central Administrative Tribunal (CAT) and demanding his reinstatement to service on the grounds that the ICC did not give him a fair chance nor did it follow procedures in dealing with the allegations against him. The fact that Dey approached CAT, Kolkata Bench on the grounds that there was a procedural lapse in the way the ICC had handled the case relegates the sexual harassment issue to the background giving more importance on ICC’s lack of procedure as they did not provide a copy of the proceeding documents to him. Dey partially succeeded in his pursuit in reversing the order of the ICC. Had not advocate Soumya Majumder, representing the petitioners and the governing board of the institute who had filed a writ against the decision of the tribunal, not argued substantially in the High Court, Dey would have managed to quash the order of the ICC. Ultimately, the High Court of Kolkata in Nutrition & Others vs. Suddhasil Dey & Another on 13 March 2020 dismissed the writ of the petitioners and re-directed the case to the ICC while the service of Dey
was in suspension till the case of sexual harassment was proved. In doing so, the court did not go into the details of the sexual harassment case instead it reflected on the procedural lapse and provided an opportunity to the ICC to look into the matter again: in this way, Dey could not be let off easily. This case highlights that in many instances justice for the survivor is delayed by the numerous avenues for litigating and relitigating a case that are available to the perpetrators.

Similarly, in *Anita Suresh vs. Union of India and Others (2019)* the accused, an employee of ESIC (Employees’ State Insurance Corporation) was let off while the onus of proving that she was subjected to sexual harassment at her workplace was placed on the complainant. The complainant did not have enough evidence as she could not recollect who may have been a witness to the sexual advances made by the perpetrator on the two occasions cited. The court ruled against her. In both these cases, the courts, in overlooking the details of the complaints and the institutional context in which sexual harassment took place failed to deliver justice to the survivors. In doing so, the courts gave wind to the perception that it was the women who had misused the provisions of POSH to file false complaints.

In the case of Anita, both the ICC and the court held that she had filed a false complaint and let the accused go scot free for lack of evidence. The courts have to contextualise when evidence is available and when it is lacking and what these situations mean in terms of sexual harassment. The court also overlooked the petitioner’s (Anita) statement that the accused had also pressured her to withdraw her complaint (Mathew, 2019). The Court even penalised the survivor, citing some lapses in her work record as the motivation behind her allegation. In doing so, the courts have set a precedent which can work against complainants coming forward. In matters of sexual harassment, often evidence of the crime is lacking. However, the absence of evidence does not necessarily imply the absence of a crime. This inherent tension between the need for evidence and the need for justice is often the reason why cases against perpetrators of sexual harassment don’t stand up to scrutiny in courts of law. At the same time, the unwillingness of the courts to take cognisance of this tension, often results in victim-blaming and allows perpetrators to get away with impunity.

The social context and power relations within the workplace and that often harassment takes place behind closed doors cannot be overlooked. The problem of believing the survivor without adequate evidence could reflect the absence of fair play. However, in not believing the survivors, as we have seen in the Anita case, the courts negatively impact the work of different social justice groups and women’s movements that have been pushing to create safe work spaces for women. In the past the courts have often been supportive institutions in amplifying women’s voices and surfacing their concerns. The famous Vishaka guidelines issued by the Supreme Court of India in 1997 is a case in point. For the courts to play a constructive role in furthering women’s rights it is important that they look beyond the narrow definition of evidence and take other associated factors in account, for example, a hostile work environment, verbal and non-verbal communications.

With women constituting nearly 26 per cent of the formal labour force in India, numerous instances of sexual harassment are coming to light. This indicates that across the labour market women’s forays into different professional spaces are encountering deep seated patriarchy. In recent years, a number of high profile
cases involving politicians from the ruling party, media personalities and film stars have come to light: in each of these cases, one can see that men in positions of power were able to wield clout, hire high profile lawyers and wriggle their way out of the allegations.

**Sexual Harassment Act: A Critical Appraisal**

*Convictions under POSH Act*

According to the data provided by the National Crime Records Bureau (NCRB), the number of cases filed under the sexual harassment provisions has been growing. In 2014, when the NCRB first started collecting data on sexual harassment, only 54 cases were filed. In 2016, there were 119 cases, 530 in 2017, 570 in 2018 and 965 in 2019 (Press Information Bureau. Ministry of Women and Child Development, 2019). Conviction rates can enable us to assess the working of the law on sexual harassment. There is very little information on conviction rates. However, numbers don’t tell the complete story.

The law on sexual harassment requires that each company and institution share the number of cases reported to and resolved by the ICC. The same should be published in the Annual Reports of companies and shared with the Board of Directors. However, these checks and balances often falter when the accused are in leadership positions or happen to be ‘star performers’. Often times women working in various institutions, whether in the private or in the public sector, are unaware of the provisions and protections under POSH. This stems from a lack of training or information dissemination by the employers. As a result, when these women encounter sexual harassment at workplaces, they often times do not know how to seek any form of restitution. Even in the cases where women come forward and speak out against the perpetrators of sexual harassment, often procedures for finding redressal under POSH are shrouded by the employers in opacity. This allows the leadership within the institutions, including the perpetrator himself to run rough shod over the women, bullying them to either not to complaint or to withdraw their complaints, or remove complaining employees and continue in their positions unchallenged. Unfortunately, the scenario described here is the norm rather than the exception when it comes to the implementation of POSH. This also explains, to a great degree, the low conviction rates experienced under POSH.

The low conviction rates under the POSH Act are also due to the unique nature of the act. As long as a complaint of sexual harassment is front of the ICC of an institution it is a matter under civil law. It is only when a complaint is filed in a police station that criminal law is invoked. The journey from the occurrence of the harassment to the ICC and onwards to a police station and a court is often fraught. As we saw in the aforementioned section, a lack of awareness, power relations, precarious job positions and a general lack of support from employers, often force women to abandon any attempt at seeking address for sexual harassment in the early stages itself. It is for this reason that it is hard to pin down the precise conviction rates under POSH.
A study conducted in 2017 on sexual harassment at the workplace (Sahgal & Dang, 2017), mapping the experiences of women managers and organisations, found that behavioural harassment was highest, followed by verbal and then physical harassment. Another survey on sexual harassment by the Indian National Bar Association (2017) found that incidences of sexual harassment were not limited to male bosses and female employees, but also common among co-workers and the perpetrators ranged from in-house workers to third parties like suppliers. Women refrained from reporting incidents of sexual harassment perhaps because of embarrassment or simply because of a lack of information about the reporting mechanism.

Safe Work Environment: A Low Priority Political Issue

A lack of sensitivity towards issues pertaining to women has been a characteristic hallmark of Indian politics. The infamous incident where Mayawati, the head of Bahujan Samajwadi Party (BSP) was chased by members of the Samajwadi Party (SP) inside the state guest house in Lucknow while she was a sitting Member of the Legislative Assembly of Lucknow underscores the fact that even women in power lack adequate protection and safety at workplace (The Quint, 2019). Undoubtedly, India has traversed some distance since then and today many women occupy prominent positions in the present cabinet of the Government of India. Still in terms of representation of women in Parliament, India ranks 142 globally (IPU, UN Women, 2020). The harsh reality is that issues related to women’s safety very rarely animate the political class. While a prominent case like that of Nirbhaya could shake up the government, largely due to the widespread protests that ensued, the fact remains that many cases of violence and sexual assault go unnoticed.

Sexual harassment at the workplace is not still a real issue for the electorate as many women still hold on to patriarchal values. For sexual harassment to be noticed, is it necessary for the crime to be steeped in sensationalism?

The Nirbhaya rape case, seen in relation to the other cases of sexual harassment, has shown that speedy justice can be given for spectacular crimes. Crimes like sexual harassment in the workplace take time to register are plagued by convoluted due process and peppered with endless litigation. Support for such cases is also hard to come from the law enforcement agencies and other institutions as they are seen as a minor misdemeanor. Usually such incidents are coyly termed as brash behaviour or macho exuberance. Why do everyday cases of sexual harassment not become exceptional, in terms of the attention that they might need from our political leaders and power-holders? In overlooking the everyday, the visible, yet not significant forms of violence that women face in workplaces, the means of seeking justice has also become disinclined and inimical to women complainants.

The Role of Identity

Caste, class and gender play a significant role in deciding the nature of punishment meted out in cases of sexual assault and sexual harassment. In the case of Nirbhaya punishing the victims was very much a function of caste and class. Similarly, in the
case of Disha, the young woman from Hyderabad, who was sexually assaulted and murdered in November 2019, the police ‘encountered’ the perpetrators instead of following the due process of law. The manner in which the encounter was carried out reflects how class and caste intersect to determine how perpetrators are treated. In the particular case of Disha, the perpetrators were poor without the ability to afford even basic legal defense. Their encounter was met with widespread jubilation, from the wider public and from the political class; and the police officials involved were feted instead of being pulled up. Such macabre celebration of vigilante justice reflects that middle-class India is comfortable with violent reprisals against perpetrators of sexual crimes as long as those perpetrators are the ‘others’ who belong to socially and economically marginalised groups.

At the other end of the spectrum, cases where the perpetrators are from the upper caste or class unlike the survivors often law enforcement agencies display slackness in gathering evidence and building a watertight case that can stand up to scrutiny in courts of law. Neither does the popular media cover such cases diligently and in a sustained manner. Where the perpetrators are more like ‘us’ (urban, educated and upper/upper middle class) and the survivors are more like the other (lower class, dalits, adivasis, or minorities, or rural) it is easier for the general public to turn a blind eye. If the perpetrator happens to be star performer in an institution, with the right pedigree, then complaints of sexual harassment are usually ignored. A case in point was the late R.K. Pachauri, former head of TERI. Despite a known history of sexual harassment Pachauri continued to enjoy considerable standing in establishment circles and in the public eye.

The CJI Gogoi sexual harassment case and then his eventual appointment as a member of the Rajya Sabha reflects the limitations of the law and its different institutions in providing redress to survivors of sexual harassment. It also speaks to the patriarchal nature of these institutions. Of equal concern is the fact that institutions including courts, the police, and political parties overlook caste and class imbalances when dealing with questions of sexual harassment at workplace. This puts paid to the efforts to achieve safety and equality at the workplace for women.

The Numbers Fetish: Women’s Rights sans Nuance

The contestations between safety and patriarchy within workplaces will continue, and these complexities are laid bare before the women’s movement. How can women demand safety within patriarchal work spaces? Where does one begin? Through the analysis of the different cases of sexual harassment presented in this paper we aim to reflect on the limitation of the general approach taken by various institutions to address the question of sexual harassment at the workplace. We find that increasingly women’s empowerment is defined in reductive terms as a mere increase in the number of women present within particular spaces. Thus where on the one hand, women rights activists have sought to take an egalitarian and intersectional approach to women’s rights, the state and its various organs have fetishised the number of women. This number fetish means that more women occupy key positions within current government; women are a prominent presence in the armed forces contingents at the Republic Day parade; and government
programmes seek to increase the outreach to women or girls through various catchily named programmes like Beti Bachao or Ladli Lakshmi but an increase in the number of women in public spaces does not mean that women have increased safety and access to rights. If we are not cautious of these tokenistic approaches, they may seem to be progress, but may not lead to substantive changes. Further, we must also contend with the consequences of the increase in the presence of women in various spaces. What happens when women come out and encounter everyday patriarchy? How do we move away from the big splash, ‘newsworthy’ examples of women’s rights to establishing these rights in the everyday realm of the home or the workplace? This is the central dilemma that women’s movements confront today. The challenge is to move past the tokenism and bring nuance to the discourse on sexual harassment.

Women are being increasingly forced to make binary choices—between working and taking a stand against sexual harassment at the workplace; between having a workplace and having a ‘safe’ workplace; and between career and complaint. Such binary choices feed into existing biases that are themselves rooted in patriarchy and polarise the debate on it.

Conclusion

To conclude, we highlight the complexities involved in the implementation of the sexual harassment law in India. How can we change the nature of power imbalances in these institutions? Why does the filing of a complaint of sexual harassment lead to systematic denial of employment opportunities and character allegations for the woman? Why are leadership qualities of the perpetrator brought into question, diverting attention from the case? What is the role of the law in providing a safe and fair trial? What are the factors that perpetuate this pattern in cases of sexual harassment? How can the women’s movement widen its net and navigate these complex yet everyday spaces where law, politics, gender and other axis of power intersect, more dexterously? In raising these concerns, we aim to underscore the significance of due process and the rule of law in cases of sexual harassment. These are the fundamental safeguards that can allow a fair trial, building in features of natural justice, so that women can come forward to file complaints without fear of a backlash and retribution.

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