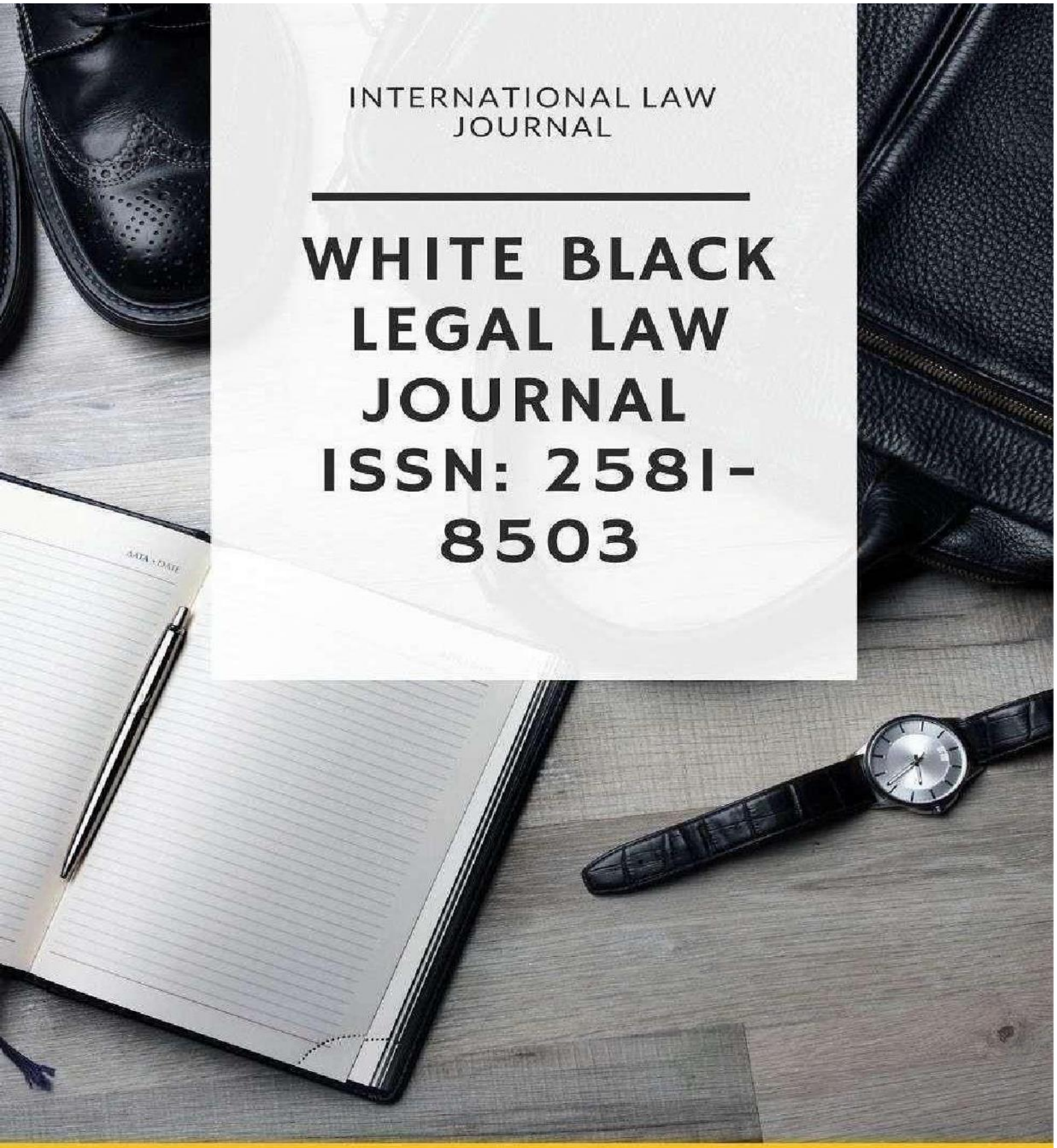


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PROTECTING WOMEN AT WORK: POSH ACT 2013 IN COMPARATIVE PERSPECTIVE

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ABSTRACT

Sexual harassment at work is a wrong done to one woman and, at the same time, a failure of the institution that employs her. How a legal system divides responsibility between the harasser and the employer, who has to prove what, and what a complainant can realistically recover decides whether a statute works on the shop floor or only on paper. This paper examines the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act 2013 (the POSH Act) in comparison with Title VII of the US Civil Rights Act 1964, the UK Equality Act 2010 and the equal treatment directives of the European Union, with Directive 2006/54/EC at the centre. The comparison is built around three questions: when is the employer liable, how is the burden of proof allocated, and what remedies are open to the complainant. The paper argues that the POSH Act is a compliance-driven, committee-based scheme which penalises an employer chiefly for failing to put machinery in place, whereas Title VII and the Equality Act hold the employer answerable for what happens inside the workplace and excuse it only where it has acted in time. The POSH Act is also silent on the burden of proof and gives the complainant no direct claim against the employer. The paper closes with reform suggestions suited to the Indian setting.

Keywords: Sexual Harassment, POSH Act 2013, Title VII, Equality Act 2010, Employer Liability, Burden of Proof, Remedies, Comparative Labour Law.

1. INTRODUCTION

For a long time Indian law had no word for what many working women experienced every day. Offensive remarks, unwanted touching and quiet threats to a woman's career were treated, when they were treated at all, as matters of personal morality or, at best, as an insult to modesty under the Indian Penal Code. The law spoke to the offender and ignored the workplace in which the offence took place. It was only after the gang rape of Bhanwari Devi, a social worker employed in a government programme in Rajasthan, that the Supreme Court recognised in Vishaka v State of Rajasthan (1997) 6 SCC 241 that sexual harassment at work offends the right to

equality and the right to life and dignity under Articles 14, 15 and 21 of the Constitution. The Court filled the legislative gap with guidelines. Parliament followed sixteen years later with the POSH Act 2013.The Act is often described as a progressive statute, and in several ways it is. It defines sexual harassment broadly, it covers organised and unorganised workplaces, and it requires every employer with ten or more employees to set up an Internal Committee. Yet reports from the courts and from the government's own monitoring show that many establishments have no functioning committee, and that women who do complain often meet delay, pressure to settle and a fear of retaliation. In Aureliano Fernandes v State of Goa 2023 SCC OnLine SC 621 the Supreme Court itself lamented that, a decade after the Act, employers and statutory bodies were still failing to comply. The question this paper takes up is whether that failure is only a problem of enforcement or whether it is partly built into the design of the statute.To answer it, the paper looks outward. The United States, the United Kingdom and the European Union have each regulated workplace sexual harassment for much longer and through a different technique: they treat it as a form of sex discrimination, enforced through claims against the employer. Title VII of the Civil Rights Act 1964, the Equality Act 2010 and Directive 2006/54/EC (the recast Equal Treatment Directive) therefore make a useful comparison. They are not offered as models to be copied. Each rests on its own constitutional and labour market conditions, and the comparison is meant to show which design choices matter and which of them India might adapt.Three questions structure the study. First, on what basis is the employer made liable for harassment committed by a supervisor, a colleague or a third party? Second, how does the law allocate the burden of proof between the complainant and the respondent? Third, what can a successful complainant actually obtain by way of remedy? These three questions are chosen because together they show how far a statute turns a right on paper into something that can be enforced.The method is doctrinal and comparative. The paper relies on the statutes, the leading decisions of the Supreme Court of India, the Supreme Court of the United States, the Court of Appeal and Employment Appeal Tribunal in England and the Court of Justice of the European Union, and on secondary writing in books and journals. It restricts itself to sexual harassment of women in employment, and it does not examine the criminal law in detail. The discussion proceeds country by country, beginning with India, and then draws the three threads together in a comparative section before concluding with proposals for reform.

2. INDIA: THE POSH ACT 2013

2.1 From Vishaka to the statute

The Vishaka guidelines defined sexual harassment as unwelcome sexually determined behaviour, placed a duty on employers to prevent it and to provide a complaints mechanism, and were expressed to be law under Article 141 until Parliament legislated. The Court read the guidelines in the light of the Convention on the Elimination of All Forms of Discrimination Against Women, which India has ratified. Two later decisions showed how the guidelines worked in practice. Apparel Export Promotion Council v A.K. Chopra (1999) 1 SCC 759 upheld the dismissal of a superior who tried to molest a subordinate, even though no completed physical act was shown, and the Court held that unwelcome sexually determined behaviour need not involve physical contact and that courts should not interfere with a finding of misconduct on technical grounds. Medha Kotwal Lele v Union of India (2013) 1 SCC 297 pressed the Union and the States to put complaints committees in place, and it is a reminder that the compliance problem is older than the statute.

2.2 Scope and definition

Section 2(n) of the POSH Act defines sexual harassment as any unwelcome act or behaviour, whether direct or by implication, including physical contact and advances, a demand or request for sexual favours, sexually coloured remarks, showing pornography, or any other unwelcome physical, verbal or non-verbal conduct of a sexual nature. Section 3(2) adds the circumstances that, if present in connection with such conduct, may amount to sexual harassment: an implied or express promise of preferential treatment, an implied or express threat of detrimental treatment, a threat about present or future employment status, interference with work or the creation of an intimidating or hostile environment, and humiliating treatment likely to affect health or safety. The definition therefore reaches both quid pro quo and hostile environment harassment, although the Act does not use those labels.The notion of workplace in section 2(o) is wide. It includes government bodies, private establishments, hospitals, sports institutions, any place visited by the employee during the course of employment, including transportation provided by the employer, and a dwelling place or house. Only women are protected as aggrieved persons under section 2(a), and the Act is therefore gender specific on the complainant's side. The respondent may be of any gender.

2.3 Employer duties and employer liability

Section 4 requires every employer with ten or more workers to constitute an Internal Committee, presided over by a senior woman employee, with at least two members committed

to the cause of women or with legal knowledge, and one external member from a non-governmental organisation. At least half of the members must be women. Where an establishment has fewer than ten workers, or where the complaint is against the employer, the District Officer's Local Committee under section 6 receives the complaint.The duties of the employer are listed in section 19. They include a safe working environment, the display of the penal consequences of sexual harassment and of the order constituting the committee, regular awareness workshops, support to the committee during the inquiry, and action under the Indian Penal Code, now the Bharatiya Nyaya Sanhita 2023, where the woman wishes to proceed against the perpetrator. Sexual harassment is to be treated as misconduct under the service rules. The Internal Committee must submit an annual report under section 21, the employer must disclose the number of cases in its own annual report under section 22, and the appropriate Government may call for information and inspect records under section 25.The important point for comparative purposes is what happens when the employer fails. Section 26 provides for a fine of up to fifty thousand rupees for contravening the duty to constitute a committee or other provisions, with twice the punishment on repetition and the possible cancellation of a licence or withdrawal of registration. The Act, in other words, penalises the employer for non-compliance. It does not make the employer answerable to the woman for the harassment that took place. A woman whose Internal Committee never existed has a remedy only through the courts, usually by a writ petition or a civil claim, and the statute gives her no right to compensation from the employer on that ground.

2.4 Burden of proof

The POSH Act contains no provision that shifts the burden of proof or that sets a standard of proof. The inquiry is conducted in accordance with the service rules, or under the Rules of 2013 where there are none, and the committee has the powers of a civil court for summoning witnesses and requiring documents under section 11(3). The Supreme Court has made it clear, in Apparel Export Promotion Council, that a departmental inquiry into sexual harassment is not a criminal trial and the guilt need not be proved beyond reasonable doubt, which means in practice that the standard is the preponderance of probabilities. The burden stays on the complainant throughout. There is a safeguard against false complaints in section 14, but its proviso states that inability to substantiate a complaint or to produce adequate proof is not by itself a ground for action against the complainant, and that malicious intent must be established through an inquiry.

2.5 Remedies

The remedies depend on the committee's findings. Under section 12 the committee may

recommend interim relief, such as transfer of the complainant or the respondent, or leave of up to three months for the woman. If the allegation is proved, section 13(3) lets the employer impose the penalties in the service rules or, in their absence, a written apology, warning, reprimand, censure, withholding of promotion or pay rise, termination, community service or counselling. Section 15 sets out factors for assessing compensation, including the mental trauma suffered, the loss of career opportunity, the medical expenses incurred, the income and financial status of the respondent and the feasibility of payment. The sum is recovered from the respondent's salary, or as an arrear of land revenue if he is no longer employed.The woman may appeal under section 18 within ninety days, and section 28 preserves other remedies in law. Two limitations deserve notice. The complaint must be made within three months of the incident, extendable by a further three months under section 9, which is short for a woman dependent on the accused for her livelihood. Section 10 also allows conciliation at the woman's request, though not a monetary settlement, and in practice conciliation may become a route to quiet pressure. Confidentiality under section 16 prohibits publication of the identity of the parties, and this protects the complainant, but it also keeps patterns of repeat offending out of public view.

3. THE UNITED STATES: TITLE VII OF THE CIVIL RIGHTS ACT 1964

3.1 Harassment as sex discrimination

Title VII does not mention sexual harassment. Section 703(a)(1), codified at 42 USC 2000e-2(a)(1), makes it unlawful for an employer with fifteen or more employees to discriminate against any individual with respect to compensation, terms, conditions or privileges of employment because of sex. The harassment doctrine is therefore a creation of the courts. In Meritor Savings Bank v Vinson 477 US 57 (1986) the Supreme Court accepted that a hostile or abusive working environment is a form of sex discrimination, and that the question is whether the conduct was unwelcome and not whether the complainant participated voluntarily. Harris v Forklift Systems Inc 510 US 17 (1993) added that the conduct must be severe or pervasive enough to create an environment that a reasonable person would find hostile and that the complainant herself perceived as abusive, though she need not prove psychological injury. Oncale v Sundowner Offshore Services Inc 523 US 75 (1998) confirmed that the statute applies to same-sex harassment as long as it occurs because of sex.Two categories have emerged. In quid pro quo harassment, a tangible employment decision, such as a dismissal, demotion or refusal of promotion, depends on submission to sexual demands. In hostile environment

harassment, no such decision is needed, but the conduct must meet the severe or pervasive threshold. The distinction matters because it controls the rules on employer liability.

3.2 Employer liability

Meritor refused to hold employers automatically liable and left the matter to agency principles. The Court settled the details in two decisions of 1998. In Burlington Industries Inc v Ellerth 524 US 742 (1998) and Faragher v City of Boca Raton 524 US 775 (1998), the Court held that an employer is vicariously liable for a hostile environment created by a supervisor with immediate or higher authority over the employee. Where the harassment culminates in a tangible employment action, the liability is strict. Where it does not, the employer may raise an affirmative defence with two limbs: that it exercised reasonable care to prevent and promptly correct the harassing behaviour, and that the employee unreasonably failed to use the preventive or corrective opportunities provided or to avoid harm otherwise.The effect of the Ellerth and Faragher defence is that an employer that has a clear policy, trains its managers and investigates complaints seriously can avoid liability, and that is exactly the behaviour the law hopes to encourage. Critics have argued that it also pushes employers toward paper compliance, and that it penalises women who stay silent for fear of retaliation. Vance v Ball State University 570 US 421 (2013) narrowed the category of supervisors, for the purpose of vicarious liability, to those empowered to take tangible employment actions against the victim. For harassment by co-workers or non-employees, the employer is liable only if it was negligent, which means it knew or ought to have known of the conduct and failed to take prompt remedial action.

3.3 Burden of proof

Title VII claimants carry the burden of proving each element of a hostile environment claim: that the conduct was unwelcome, based on sex, sufficiently severe or pervasive, and that there is a basis for imputing liability to the employer. In disparate treatment claims that rely on circumstantial evidence, the three-stage framework of McDonnell Douglas Corp v Green 411 US 792 (1973) shifts a burden of production to the employer after the complainant makes a prima facie case, but the ultimate burden of persuasion remains with the complainant. The only real shift in a harassment case is the affirmative defence in Ellerth and Faragher, which the employer must prove. The practical tension is evident: the employer carries the burden on the matter that is most within its own knowledge, namely what it did to prevent harassment.

3.4 Remedies

A complainant must first file a charge with the Equal Employment Opportunity Commission, generally within 180 days of the incident, or 300 days in states with their own enforcement agency. The remedies in 42 USC 2000e-5(g) are equitable: reinstatement, back pay, front pay

in lieu of reinstatement and injunctive relief. The Civil Rights Act 1991 added compensatory and punitive damages under 42 USC 1981a, but capped the combined award according to the size of the employer, from fifty thousand dollars for employers with between fifteen and one hundred employees to three hundred thousand dollars for employers with more than five hundred. Punitive damages require malice or reckless indifference, and in Kolstad v American Dental Association 527 US 526 (1999) the Court held that an employer is not vicariously liable for punitive damages where it made good faith efforts to comply with the statute. Reasonable attorney's fees are available to a prevailing party under 2000e-5(k).Two recent statutes also bear on remedies. The Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act 2021 allows a person alleging sexual harassment to choose to bring the dispute in court notwithstanding a pre-dispute arbitration agreement, and the Speak Out Act 2022 restricts the enforcement of pre-dispute non-disclosure and non-disparagement clauses in such disputes.

4. THE UNITED KINGDOM: THE EQUALITY ACT 2010

4.1 Statutory definition

Unlike Title VII, the Equality Act 2010 names sexual harassment in the statute. Under section 26(2), a person harasses another if he engages in unwanted conduct of a sexual nature and the conduct has the purpose or effect referred to in section 26(1)(b), namely violating the other's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her. Section 26(3) treats it as harassment where a person engages in unwanted conduct of a sexual nature, or conduct related to sex, and then treats the victim less favorably because she rejected or submitted to it. In deciding whether the conduct had the required effect, section 26(4) directs the tribunal to take into account the perception of the complainant, the other circumstances of the case and whether it is reasonable for the conduct to have that effect. The test therefore combines a subjective and an objective element, and, unlike the American standard, it contains no requirement that the conduct be severe or pervasive.

4.2 Employer liability

Section 40 prohibits an employer from harassing its employees and job applicants. The central provision on responsibility for the acts of others is section 109, which says that anything done by a person in the course of his employment is treated as also done by the employer, whether or not it is done with the employer's knowledge or approval. Section 109(4) gives the employer a defence if it can show that it took all reasonable steps to prevent the employee from doing that thing or from doing anything of that description. The courts read 'in the course of

employment' broadly, and workplace social events and informal gatherings have repeatedly been treated as falling within it. The harasser is also personally liable under section 110, and the Protection from Harassment Act 1997 supplies a parallel route, as Malinowski v Guy's and St Thomas' NHS Trust [2006] UKHL 34 shows by holding that an employer may be vicariously liable under that Act.The most notable development is on prevention. The Worker Protection (Amendment of Equality Act 2010) Act 2023, in force from 26 October 2024, inserted section 40A, which places a positive duty on the employer to take reasonable steps to prevent sexual harassment of its employees in the course of their employment. A breach of the duty is not itself an actionable wrong, but the Equality and Human Rights Commission may enforce it, and a tribunal may increase the compensation awarded for a proven harassment claim by up to twenty-five per cent where the employer has breached the duty. Further reform, raising the standard from reasonable steps to all reasonable steps, has been advanced through the Employment Rights legislation, although the date of its commencement remains to be confirmed. The 2023 Act also marks a shift from reaction to prevention. It resembles the Indian model more than the American one in that it imposes a duty to act before a complaint is made.

4.3 Burden of proof

Section 136 provides the shifting burden. If there are facts from which the tribunal could decide, in the absence of any other explanation, that the respondent contravened the provision concerned, the tribunal must hold that the contravention occurred, unless the respondent shows that it did not. The Court of Appeal explained the operation of this two-stage test in Igen Ltd v Wong [2005] EWCA Civ 142, and in Madarassy v Nomura International plc [2007] EWCA Civ 33 it added that a difference in status and a difference in treatment, on their own, are not enough to move the burden. The claimant must still point to something from which discrimination or harassment could be inferred. Once that stage is passed, the respondent must give an adequate non-discriminatory explanation, or, under section 109(4), prove that it took all reasonable steps. The employer therefore has both an evidential and a persuasive burden at the second stage, which is a more demanding position than in the United States.

4.4 Remedies

Claims by employees are brought in the Employment Tribunal, ordinarily within three months less one day of the act complained of, subject to extension where it is just and equitable. Under section 124 the tribunal may make a declaration, recommend that the respondent take steps to reduce the adverse effect on the claimant, and award compensation. The compensation is calculated in the same way as damages in tort and, unlike the American system, there is no statutory cap. It covers financial loss, such as lost earnings, and injury to feelings, which is

assessed according to the three bands set out in Vento v Chief Constable of West Yorkshire Police (No. 2) [2002] EWCA Civ 1871 and uprated periodically by the Presidential Guidance of the Employment Tribunals. Aggravated damages and interest are available in suitable cases. The cost of litigation falls differently from the United States, since costs are not ordinarily awarded in tribunals, and this affects the economics of bringing a claim.

5. THE EUROPEAN UNION: DIRECTIVE 2006/54/EC AND BEYOND

5.1 Harassment as discrimination at the EU level

The European Union reached the subject through its equal treatment law. Directive 2002/73/EC first defined harassment and sexual harassment as forms of sex discrimination, and the provisions were consolidated in Directive 2006/54/EC of the European Parliament and of the Council on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation. Article 2(1)(d) defines sexual harassment as any form of unwanted verbal, non-verbal or physical conduct of a sexual nature with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment. Article 2(2)(a) provides that discrimination includes harassment and sexual harassment, together with any less favourable treatment based on a person's rejection of or submission to such conduct.Two features distinguish the EU model. A directive binds the Member States as to the result to be achieved but leaves the form and method to them, so the actual rules on employer duties and procedures differ from one country to another. The Directive is also expressed in the language of discrimination, which means that a complainant in an EU country usually pleads her case as a breach of equal treatment before an employment court or tribunal and not before an institution inside the workplace.

5.2 Employer responsibility

The Directive is rather weak on employer responsibility. Article 26 asks Member States to encourage employers and those responsible for access to vocational training to take effective measures to prevent all forms of discrimination on grounds of sex, in particular harassment and sexual harassment. It does not require a complaints committee or prescribe the content of a prevention policy, and it says nothing in terms about vicarious liability. The detail is left to national law. France, for example, imposes by its Code du travail a duty on the employer to take all necessary steps to prevent sexual harassment, to put an end to it and to sanction it. In other countries the main liability is that of the harasser, and the employer's responsibility

depends on general principles of tort or labour law.The wider European framework is moving toward a stronger duty. The International Labour Organization's Violence and Harassment Convention 2019 (No 190), which has been ratified by a number of EU Member States, requires States to adopt an inclusive and integrated approach to prevention, including the duty of employers to take appropriate steps. India has not, to date, ratified it. Directive (EU) 2024/1385 on combating violence against women and domestic violence, which Member States must transpose by June 2027, adds obligations in relation to cyber harassment, an area that is increasingly connected with working life.

5.3 Burden of proof

Of the three systems, the EU instrument has the most developed rule on proof. Article 19(1) provides that when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment. The rule, which was first adopted in the Burden of Proof Directive 97/80/EC and then absorbed in the recast, applies to harassment as it applies to other forms of discrimination, with an important exception: under Article 19(5) Member States need not apply it to criminal proceedings. Article 19(2) also allows Member States to adopt rules that are more favourable to the claimant. In effect the provision requires a national court to carry out the same two-stage enquiry that appears in section 136 of the UK Act.

5.4 Remedies

Article 18 requires Member States to introduce such measures as are necessary to ensure real and effective compensation or reparation, as the Member States so determine, for the loss and damage sustained by a person injured as a result of discrimination, in a way which is dissuasive and proportionate to the damage suffered. It adds that such compensation or reparation may not be restricted by the fixing of a prior upper limit, save in a narrow case concerning refusal to consider a job application. Article 25 requires effective, proportionate and dissuasive sanctions. The case law supports this. In Von Colson and Kamann v Land Nordrhein-Westfalen (Case 14/83) [1984] ECR 1891 and Marshall v Southampton and South-West Hampshire Area Health Authority (No 2) (Case C-271/91) [1993] ECR I-4367, the Court of Justice insisted that national remedies must have a real deterrent effect and must give full compensation, and in Marshall the Court rejected a statutory ceiling on awards. The EU position therefore contrasts clearly with the American capped scheme and is closer to the position in the United Kingdom.

6. COMPARATIVE ANALYSIS

The table below sets out the four regimes against the three questions of this paper. It is a summary only, and the discussion that follows explains the differences.

Question	India (POSH Act 2013)	US (Title VII)	UK (Equality Act 2010)	EU (Directive 2006/54/EC)
Legal character	Stand-alone workplace statute, women only	Sex discrimination	Statutory harassment, all sexes	Sex discrimination
Employer liability	Fine for not complying; no liability to the woman	Vicarious for supervisors, with a defence; negligence for others	Vicarious under s 109, with an all-reasonable-steps defence; duty under s 40A	Left to Member States; prevention only encouraged (Art 26)
Burden of proof	On the complainant; civil standard; silent in statute	On the complainant; employer proves the defence	Shifts under s 136 once a prima facie case exists	Shifts under Art 19 once facts are established
Monetary remedy	Compensation from respondent's salary (s 15)	Capped compensatory and punitive damages plus back pay	Uncapped, including injury to feelings	Real, effective, no prior upper limit (Art 18)
Forum	Internal or Local Committee, then appeal	EEOC, then federal court	Employment Tribunal	National courts and tribunals

6.1 Two different ideas of the employer's role

The starkest difference is in the conception of the employer. In India the employer is a regulated institution. It must create a committee, display notices and run workshops, and the only penalty the Act provides is a modest fine. The woman's rights are against the respondent, and the employer's part is to host the process. In the United States and the United Kingdom the employer is a party to the dispute. It can be sued, it pays, and it escapes only by showing that it took the problem seriously before the complaint was made. The legal effect of the Ellerth and Faragher defence and of section 109(4) is to convert prevention into a matter of self-interest. A company that fails to train its managers risks a damages claim, and not just a visit from an inspector.This does not mean the foreign systems are free from difficulty. The American defence has been criticised for rewarding formal policies whether or not they work. The British

Act of 2023 reacts to a similar concern by requiring steps that are reasonable and by backing the duty with enforcement powers and a compensation uplift. India's approach has the advantage of an institutional mechanism inside every establishment, which none of the other three regimes requires. A woman who works for a small employer in the United States may have nothing but the EEOC process to rely upon. The POSH Act, at least in theory, offers her an inquiry without a lawyer. The weakness lies in what happens after the inquiry and in the absence of any consequence when the machinery does not exist.

6.2 The burden of proof

The Indian statute says nothing about the burden of proof. This silence leaves the complainant to carry the whole burden before a committee whose members are often employees of the respondent's own organisation, and in sexual harassment cases the evidence is typically one person's word against another's. The shifting burden in section 136 of the Equality Act and in Article 19 of the Directive is a response to that very problem, because the facts that explain a decision lie within the knowledge of the respondent. It would be an exaggeration to say that the shift decides cases. Madarassy shows that tribunals do not move the burden on a bare allegation. But a statutory shift gives structure to the inquiry and obliges the respondent to explain, and it would be a natural addition to the POSH Rules. The American position, where the burden stays with the complainant except for the employer's defence, is closer to India's, and it is not surprising that litigation in the United States depends so heavily on documentary evidence, witnesses and prior complaints.

6.3 Remedies and access to a monetary award

In the matter of remedies, India's scheme is oriented toward disciplinary outcomes. Section 13 and section 15 make compensation a form of penalty recovered from the respondent, which is of limited use where the respondent has left the employment or has little means. The employer pays nothing unless it chooses to. In contrast, the British and EU rules give an uncapped award against an employer that has a realistic ability to pay, and the American rules, despite the statutory caps, provide back pay, front pay and attorney's fees. The American system has the further disadvantage of its arbitration and non-disclosure practices, which Congress recently restricted. The Indian provision on confidentiality in section 16 can be defended as a protection for the complainant, but where it is read broadly it may also suppress information that could help the next woman.There is one more difference of institutional design. The Internal Committee is both investigator and adjudicator, and its recommendations are implemented by the employer who also appoints the presiding officer. A tribunal or court, by contrast, is independent of the employer. The independence of the external member under section 4(2)(c)

is the main guard against bias in India, and the experience reported in Aureliano Fernandes suggests that this guard is not always in place.

7. CONCLUSION AND SUGGESTIONS

The comparison shows that the POSH Act and its foreign counterparts answer different questions. The POSH Act asks whether an establishment has a procedure and whether that procedure was followed. Title VII, the Equality Act and the EU directives ask whether the employer should answer for what happened and what it owes the person harmed. Each approach has its strengths. The Indian Act reaches every kind of workplace, requires a forum inside it and provides for interim relief. The foreign systems offer stronger incentives for employers, clearer rules on proof and larger remedies. The weakness of the Indian scheme is that it has built a process without attaching many consequences to a failure of the process.Several changes would address this without abandoning the Indian model. First, the Act should state expressly that the employer is answerable to the aggrieved woman where it has failed to constitute an Internal Committee, failed to act on a finding or permitted retaliation, and the woman should be able to claim compensation from the employer on that ground. A defence modelled on section 109(4) of the Equality Act, under which an employer who has taken all reasonable steps is excused, would keep the rule fair to well-run institutions. Second, the Rules should say that the standard of proof is the balance of probabilities and that, once the complainant shows facts from which harassment could be inferred, the respondent must offer an explanation. Third, the period for complaint under section 9 should be lengthened, or extended automatically where the respondent holds power over the complainant's career, and retaliation should be defined as a separate wrong. Fourth, the data on committees should be published by district, so that the monitoring envisaged by sections 21 to 25 becomes real. Fifth, India should consider ratifying ILO Convention 190, which would align its law with the most recent international standard.The Supreme Court said in Vishaka that gender equality includes protection from sexual harassment and the right to work with dignity. Nearly three decades of experience since that statement show that a right to dignity at work depends as much on who is accountable for violating it as on how it is described. A statute that makes the employer a stakeholder in the outcome, and not just the host of a procedure, would take the POSH Act closer to its stated purpose of protecting women at work.

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