

Understanding Sexual Harassment at the Pakistani Workplace

Palvasha Shahab

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For more copies and other related queries, please contact Legal Aid Society at:

Legal Aid Society Spanish Homes Apartment, Mezzanine Floor Plot A-13, Phase – 1, D.H.A., Karachi, Pakistan

Tel: (92) 021 – 35390132 – 33

Fax: (92) 021 – 99266015

Email: hr@lao.org.pk, info@lao.org.pk

Website: <https://www.las.org.pk>

Facebook: LegalAidSocietyPakistan

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Overview of the Sindh Legal Aid Advisory Call Centre

The Sindh Legal Aid Advisory Call Centre (SLACC) was first established as the Legal Advisory Call Centre (LACC) by the Legal Aid Society (LAS) in 2014 to provide free legal advice and information to citizens calling a toll free legal advisory number. In 2018, the Government of Sindh, through the Law Department, entered into a public-private partnership with LAS under which the SLACC would be supported to ensure that vulnerable and marginalized citizens of Pakistan were provided access to affordable and effective legal information otherwise unavailable to them.

SLACC offers telephonic guidance by connecting callers directly with qualified and experienced lawyers, who are licensed to practice before High Courts. This is done through a distinctive CRM system (based on a popularly deployed Avaya Telephony System) which has been customized to record metrics relating to socio-economic demographics in addition to the content of the query and the solution provided. Each call is tracked and categorized, depending on the nature of the inquiry. The data received is tabulated and analyzed, with the ultimate goal of allowing the Sindh Government to better understand the legal needs of the people and to design informed and evidence-based projects and programs as needed.

Since the Call Center's inception, it has utilized data from calls to analyze the diverse range of legal queries about which people all over the country call. A 2018 LAS paper found, for instance, that the top three legal queries raised by women were on family law issues, female and gender-based violence, and inheritance.¹ For the purposes of this paper, SLACC data on calls related to sexual harassment in the workplace was accessed, and a number of useful observations were made. Most callers did not know about the legal avenues for pursuing a sexual harassment claim and some wanted clarification on what behaviors and actions constituted sexual harassment in the workplace. The latter is a particularly pertinent question, especially as one of the known responses to whistleblowing on sexual harassment is punitive actions by the employer, which a couple of callers experienced in the form of an illegal job transfer and a forced resignation. Other questions that emerged were how to proceed when workplace sexual harassment committees (which are mandated by law) refused to take corrective action, or how to provide evidence when witnesses to the sexual harassment decide not to come forward.

The issues SLACC callers brought up are pertinent to larger discussions happening in society on workplace sexual harassment, a topic brought to the fore in recent years due to several high-profile cases reported in the media, and a renewed focus on whether legal protections sufficiently protect the interests of victims and provide them with justice. This paper therefore seeks to provide an overview of the context of workplace sexual harassment, assess the adequacy

¹ Understanding Domestic Violence within the Legal Framework of Pakistan, Maliha Zia, Legal Aid Society, 2018. Available at: <https://www.las.org.pk/wp-content/uploads/2019/12/Understanding-Domestic-Violence-within-the-Legal-Framework-of-Pakistan.pdf>

of existing legislation and legal codes, and set forth recommendations for the considerations for policy makers, lawyers, and other stakeholders.

Executive Summary

This paper examines the form and substance of sexual harassment at the workplace in Pakistan. It first considers the socio-economic milieu in which sexual harassment becomes possible and rampant. It then engages with the patchwork of laws and legal remedies available and unavailable to a person seeking relief for sexual harassment at the workplace.

Sexual harassment at the workplace varies contextually but different laws and scholarly works have consistently understood it as one or both of two things: (a) sexual advances or participation in sexual activities in return for employment, continued employment or any kind of advantage at work, and (b) a hostile work environment which discriminates on the basis of sex, gender (or sexual orientation) in a manner as to interfere with a person's work.² Within this, it is important to understand that sexual harassment is an intersectional concern and does not affect victims in the same way. For instance, if suffered by a woman who is economically disadvantaged, belongs to a race or ethnicity that is historically marginalized, or belongs to a religious group that is persecuted, then her womanhood shoulders the individual and collective weight of all these instances of being marginalized and discriminated against.

The three key laws which can be accessed in order to seek a legal remedy against sexual harassment at the workplace are as follows:

1. [Protection Against Harassment of Women at the Workplace Act, 2010](#)
2. [Sections 509, Pakistan Penal Code, 1860](#)
3. [Sections 20, 21, 24 of the Prevention of Electronic Crimes Act, 2016](#)

Despite this, sexual harassment law is developing in a haphazard manner in Pakistan. There are encouraging legal judgements but there are also instances where sexual harassment claims have failed due to a technicality and/or due to unsympathetic or uninformed judicial attitudes. The law itself is largely unimplemented and most workplaces have failed to even so much as display the Code of Conduct, much less constitute their Inquiry Committees and Competent Authorities as required by the 2010 Act. The 2010 Act also leaves out a vast majority of the workforce by limiting itself to the formal workplace. Even within the formal workplace, the 2010 Act is practically not accessible to the working class. Moreover, evidentiary burdens remain ambiguous and tilted to favor the accused. Sexual harassment itself remains hugely underreported and those

² The two types of sexual harassment, first articulated and popularized by American legal theorist Catherine MacKinnon, also form the basis of the test for sexual harassment in the Pakistani law, i.e. the Sexual Harassment of Women in the Workplace Act, 2010.

who do come forward are faced with multiple intimidation tactics such as systemic delays, character assassinations and countersuits for defamation.

If sexual harassment at the workplace is to be tackled with any seriousness so that all vulnerable persons can access and obtain equality and equity at the workplace, then the relevant law and policy needs to be restructured. This restructuring needs to result in a more inclusive law; clearer and more accessible process and procedure for complaints; and a law that can actually be implemented whilst keeping in mind the capacity of the enforcement bodies.

1. Introduction

When considering sexual harassment at the workplace (hereinafter “sexual harassment”), it is useful to ask two questions: firstly, what *exactly* is sexual harassment,³ and secondly, how and when is it justiciable? This paper will address both questions. To answer the first, it examines influential theoretical approaches to sexual harassment and the socio-economic context in which it is embedded in Pakistan. To answer the second, it provides an overview of the constitutional guarantees and international commitments that set the foundation for the pursuit of justice against sexual harassment through the judicial system of Pakistan, and then examines the three legal routes available to file a lawsuit for sexual harassment.

By its very nature, sexual harassment can vary contextually from society to society and even within a society.⁴ Different laws and scholarly works understand it as one or both of two things: (a) sexual advances or participation in sexual activities in return for employment, continued employment or any kind of advantage at work, and (b) a hostile work environment which discriminates on the basis of sex, gender (or sexual orientation) in a manner as to interfere with a person’s work.⁵ Even though these two types of sexual harassment carry a host of variables within them, they are clear yardsticks against which behaviours and attitudes can be measured for harassment.

Those who fight for protections against sexual harassment struggle to make it legible to those who are skeptical of its existence and/or ignorant of its pervasiveness. The news media reinforces stereotypical attitudes about sexual harassment by portraying it as mysterious and confusing. This trope of pretending to not understand women’s problems or not making the effort to

³ All persons who are not heterosexual males are disproportionately across the gender and sexual orientation spectrums. Therefore, for the purposes of this paper, the words ‘woman’ or ‘women’ denote women and all non-heteronormative persons (any person anywhere on the gender or sexuality spectrum) who are likely to be victims of gender- or sexuality -based discrimination and/or abuse of power. While it is understood that such a use of the words seemingly conflates gender and sexuality, this seems to be the only way to maintain the flow of the paper, whilst remaining cognizant of the fact the sexual harassment at the workplace takes one or both types of victims. See Frances Peraddaun, *Survey finds 70% of LGBT people sexually harassed at work*, The Guardian 17th May 2019. Available at: <https://www.theguardian.com/uk-news/2019/may/17/survey-finds-70-of-lgbt-people-sexually-harassed-at-work>; Trade Unions Congress Report, *Sexual harassment of LGBT people in the workplace*, April 2019.

Available at: [https://www.tuc.org.uk/sites/default/files/LGBT Sexual Harassment Report 0.pdf](https://www.tuc.org.uk/sites/default/files/LGBT_Sexual_Harassment_Report_0.pdf)

⁴Human Rights Library, *Stop Violence Against Women Sexual Harassment* (Adapted from *Back Off! How to Confront and Stop Sexual Harassment and Harassers* by Martha Langelan), 2003. Available at: <http://hrlibrary.umn.edu/svaw/harassment/explore/1whatis.htm>; RICHMOND WEST, WITCH HUNT, 462 (2009).

⁵ The two types of sexual harassment, first articulated and popularized by American legal theorist Catherine MacKinnon, also form the basis of the test for sexual harassment in the Pakistani law, i.e. the Sexual Harassment of Women in the Workplace Act, 2010.

understand them is commonly used as mechanism to maintain the status quo in favour of men.⁶ Sexual harassment is perceived as a women's issue. The problems of disempowered groups, such as women, are commonly made illegible by those in power.⁷ Power "renders illegible discrimination and violence against ...women who do not fit neatly into categories".⁸ However, just because it is not circumscribed in stone does not mean it is impossible to identify what constitutes sexual harassment at the workplace and/or to take measures to bring harassers to justice and/or minimize the prevalence of sexual harassment itself. The mystery and confusion surrounding sexual harassment at the workplace seems exaggerated.

This brings us to the second of the two questions we asked in the beginning: how and when is sexual harassment at the workplace justiciable? There are three routes available to a sexual harassment complainant:

1. Protection Against Harassment of Women at the Workplace Act, 2010
2. Sections 509, Pakistan Penal Code, 1860
3. Sections 20, 21, 24 of the Prevention of Electronic Crimes Act, 2016

This paper analyses the costs and benefits associated with all three routes.

⁶ Rhode, Deborah L. "Feminist Critical Theories." *Stanford Law Review* 42, no. 3 (1990): 617-38. Accessed June 3, 2020. doi:10.2307/1228887.; Minow, Martha. "Feminist Reason: Getting It and Losing It." *Journal of Legal Education* 38, no. 1/2 (1988): 47-60. Accessed June 1, 2020. www.jstor.org/stable/42893007.; Even the definition of rape has struggled for stability. Professor Pratiksha Baxi discusses how rape has now been recharacterised as sexual assault. Baxi, Pratiksha. "Sexual Violence and Its Discontents." *Annual Review of Anthropology* 43 (2014): 139-54. Accessed June 1, 2020. www.jstor.org/stable/43049567.

⁷ Alexander-Floyd, Nikol G. "Critical Race Black Feminism: A "Jurisprudence of Resistance" and the Transformation of the Academy." *Signs* 35, no. 4 (2010): 810-20- 811,814-15. Accessed June 3, 2020. doi:10.1086/651036.

⁸ Ibid at 814

2. Methodology and Limitations

The methodology involves three prongs. First, in-depth secondary research into the concept of sexual harassment and the socio-economic realities in which it is embedded; second, a dissection of legal remedies and case law; and third, interviews conducted with practicing lawyers who are working to reduce sexual harassment and/or have experience in litigating sexual harassment in Pakistan. For the third prong, twelve lawyers were contacted but responses were gathered in time for writing from 4 of them. Two of the lawyers, Nighat Daad and Shmyla Khan, responded collectively on behalf of their organization, the Digital Rights Foundation, which is doing pioneering work against harassment. We are very grateful for the responses we received.

The original methodology centered around a detailed analysis of sexual harassment cases adjudicated by the Ombudsperson for Sexual Harassment in Sindh. SLACC had met with the Ombudsman's office to facilitate access to the case judgments which are not publicly available otherwise, but the Covid-19 pandemic led to unprecedented closures of Government Line Departments and other organizations, as a result of which such data collection became impossible.

SLACC was forced to amend its research methodology accordingly to analyze publicly available data, which consists of case judgments at the Sindh High Court level. Only those cases that exhaust the remedies under the Protection Against Harassment of Women at the Workplace Act, 2010 ever approach the High Courts. As a result, only eleven cases have been publicly reported in the law journals during the past decade. While these cannot be deemed to be representative of the ways in which the sexual harassment law is developing in Pakistan as a whole, they offer a starting point for reflection. In addition, therefore, this paper has chosen to bolster its analyses by also examining scholarly sources and the legal instruments invoked in sexual harassment cases. It is hoped that in a subsequent paper we will be able to analyze the sexual harassment cases from the past ten years and be able to compare them to other jurisdictions to holistically map progress and make further recommendations.

3. Theoretical Approaches to Sexual Harassment

Sexual harassment is a form or symptom of gender-based discrimination which hinders equal opportunity for employment, performance and advancement.⁹ U.S. legal scholar Catherine Mackinnon's writings and litigation beginning in the 1970s, popularized and embedded the understanding that sexual harassment as gender-based discrimination.¹⁰ She writes that sexual harassment "undercuts woman's potential for social equality in two interpenetrated ways: by using her employment position to coerce her sexually, while using her sexual position to coerce her economically".¹¹ Mackinnon divides sexual harassment into two categories: the first type, "quid pro quo" (abuse of power), includes seeking sexual favours or compliance in exchange for employment, continued employment, benefits, opportunities or promotions; and the second type, which is hostile "conditions of work" such as verbal or physical behaviour that compromise the work and well-being of the person being subjected to such conditions.¹²

Sexual harassment is also a pervasive structural problem which leads to serious economic and human costs.¹³ It is a global problem that is particularly acute in Pakistan because there is a vast disparity in the safety and opportunity afforded to men and women. Pakistan ranks 151 out of 153 countries in the Global Gender Gap Index; it ranks 150 on the sub index of Economic Participation and Opportunity and 143 on the sub index of Educational Attainment.¹⁴ Moreover, Pakistan ranks 133 on the Gender Inequality Index.¹⁵ The lack of female participation in the formal workforce also has a significant negative effect on the country's annual GDP.¹⁶ According to the World Economic Forum Report, "economic opportunities for women are extremely limited" in Pakistan (a meagre 32.7%) and the country falls close to war torn countries, such as Syria, Yemen and Iraq, in the spectrum.¹⁷ A study conducted by the National Commission on the Status of Women found that 50% of women the working in the public sector faced some form of

⁹ Franke, Katherine M. "What's Wrong with Sexual Harassment?" *Stanford Law Review* 49, no. 4 (1997): 691-772. Accessed June 3, 2020. doi:10.2307/1229336.

¹⁰ MacKinnon, Catharine A., and Thomas Irwin. Emerson. In *Sexual Harassment of Working Women: a Case of Sex Discrimination*, xiv-312. New Haven, CT: Yale University Press, 1979. (The book was first published in 1976.)

¹¹ Ibid at 7

¹² Taub, Nadine. *Columbia Law Review* 80, no. 8 (1980): 1686-695. Accessed June 5, 2020. doi:10.2307/1122289.

¹³ "Sexual Harassment at Work," accessed June 5, 2020, Declaration on Fundamental Principles and Rights at Work. Available at: https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_decl_fs_96_en.pdf

¹⁴ Amin Ahmed, "Pakistan Ranks 151 out of 153 on Global Gender Parity Index: World Economic Forum Report," *Dawn*, December 17, 2019, <https://www.dawn.com/news/1522778>.; "Global Gender Gap Report 2020" (World Economic Forum, 2019), http://www3.weforum.org/docs/WEF_GGGR_2020.pdf, 11, 32.

¹⁵ "Human Development Reports," accessed June 2, 2020, <http://hdr.undp.org/en/composite/GII>, Table 5.

¹⁶ Amin Ahmed, "Pakistan Ranks 151 out of 153 on Global Gender Parity Index: World Economic Forum Report," *Dawn*, December 17, 2019, <https://www.dawn.com/news/1522778>.

¹⁷ "Global Gender Gap Report 2020" (World Economic Forum, 2019), http://www3.weforum.org/docs/WEF_GGGR_2020.pdf, 11.

sexual harassment.¹⁸ It is believed that sexual harassment at the workplace is severely underreported and the problem is likely much more pervasive than our figures show. Even so, high profile sexual harassment cases have emerged in a wide range of professional fields from the public sector to private organizations, to sports to music to academics to civil aviation.¹⁹ In some cases the complainants have even been moved to commit suicide,²⁰ while in others they have lost their livelihoods and their careers,²¹ and in yet others they have been threatened and otherwise forced to withdraw their complaints²². As a result of this generally 'anti-women' environment, more and more women either end up abandoning, not joining or not being allowed to join the workforce.²³

On the other hand, women comprise 70% of the informal economy, which is unprotected by labour laws and by sexual harassment laws.²⁴ A large part of the Pakistani economy is informal.²⁵ Even within the formal economy, there has been a mass trend towards outsourcing and subcontracting,²⁶ which makes it increasingly difficult to prove the employee-employer relationships²⁷ – an often necessary legal pre-requisite for establishing a sexual harassment

¹⁸Abira Ashfaq, "Sexual Harassment," *Dawn*, June 8, 2019, <https://www.dawn.com/news/1486846>.

¹⁹ Nazish Brohi, "SEXUAL HARASSMENT: PAKISTAN'S TIPPING POINT?" *Dawn*, May 6, 2018, <https://www.dawn.com/news/1405703>.

²⁰ Ibid.

²¹ Shazia Mehboob, "After 2-Year Legal Battle, Samaa FM Staffer Wins Sexual Harassment Case Against Colleagues," *Samaa*, May 27, 2020, <https://nayadaur.tv/2020/05/after-2-year-legal-battle-samaa-fm-staffer-wins-sexual-harassment-case-against-colleagues/>.

²² Zainab Husain, "Sued for Saying #MeToo," *Soch*, January 27, 2020, <https://www.sochwriting.com/sued-for-saying-metoo/>.

²³ Musarrat Jabeen, Dure Shehwar, and Muhammed Arafat Yameen, "Harassment of Working Women in the Public Health Sector of Abbottabad in Socio-Legal Perspective," *Journal of the Pakistan Medical Association* 67, no. 1 (2017): pp. 37-41, <https://doi.org/https://ipma.org.pk/article-details/8040>; Sanjay Kumar, "What Keeps Women from the Workforce: The Invisible Scourge of Sexual Harassment at Informal Workplaces," *Times of India*, September 22, 2018, <https://timesofindia.indiatimes.com/blogs/toi-edit-page/what-keeps-women-from-the-workforce-the-invisible-scourge-of-sexual-harassment-at-informal-workplaces/>; Saman Amir and Rohini P. Pande, "Are Pakistan's Urban Professional Women Immune to Sexual Harassment?," *World Bank Blogs*, September 11, 2018, [https://blogs.worldbank.org/endpovertyinsouthasia/are-pakistan-s-urban-professional-women-immune-sexual-harassment](https://blogs.worldbank.org/endpovertyinsouthasia/are-pakistan-s-urban-professional-women-immune-sexual-harassment;);

²⁴ "According to the latest available labour force statistics in the Pakistan Labour Force Survey (2014-15), out of the total employed women in the non-agriculture sector, 74% are working in the informal sector and only 26% are working in the formal sector." Aliya H. Khan, "Women in the Informal Economy in Pakistan Chalking out Ways to Bridge the Disconnect between the Feminist Movement, the Workers' Organizations and Political Parties" (Friedrich-Ebert-Stiftung, 2017), <http://library.fes.de/pdf-files/bueros/pakistan/14909.pdf>, iv.

²⁵ Labour survey

²⁶ Workers are hired by third party contractors who are paid a lump sum to provide labour to a factory or to bring work to workers' homes. These third party contractors regularly flout all protective laws but the enterprise that is actually benefitting from the labour of these workers avoids liability because the workers are not directly employed by it. "No Room to Bargain," Human Rights Watch, January 23, 2019, <https://www.hrw.org/report/2019/01/24/no-room-bargain/unfair-and-abusive-labor-practices-pakistan>.

²⁷ Ibid

claim.²⁸ The laws, debates, discussions, and even activism pertaining to Sexual Harassment at the workplace exclude a vast majority of the workforce. These are mostly limited to the formal workplace. A vast majority of Pakistan's workforce does not belong to the formal workplace, or even the formal economy.²⁹ Pakistan is particularly hard hit by the mass outsourcing and subcontracting of jobs,³⁰ therefore, it is even more important for it to respond with legal and administrative mechanisms that understand the working conditions of the workforce.

The Structuralist "Pink Collar" theory ("Pink Collar Theory") nods to those jobs that were created for women and were meant to perpetuate gender segregation in terms of tasks. The Pink Collar Theory of sexual harassment (also called the sex-role spillover theory)³⁰ says that women in the workplace are not conceived or treated as just any other employee, but specifically as women:

"For MacKinnon, sexual harassment was best viewed as a structural feature of women's inferior position in the workplace. Influenced by the work of sociologist Rosabeth Moss Kanter...MacKinnon argued that women in feminized jobs - the vast force of pink collar workers - were "set up" for sexual harassment. In such jobs a woman is employed as a woman. She is also, apparently, treated like a woman, with one aspect of this being the explicitly sexual. Specifically, if part of the reason the woman is hired is to be pleasing to a male boss, whose notion of a qualified worker merges with a sexist notion of the proper role of women, it is hardly surprising that sexual intimacy, forced when necessary, would be considered part of her duties and his privileges."³¹

When it was first coined, the Pink Collar Theory spoke about women who were hired for gendered, domesticated and repetitive jobs as secretaries, typists, etc. while men were assigned responsibility and stimulating tasks that carried opportunities for career advancement. Today, particularly in the working class, the Pink Collar Theory can still speak to women who are given gendered, domesticated and repetitive jobs in oppressive work environments. But instead of being ancillary support staff, as they did as secretaries and typists, these jobs are shouldering the

²⁸ The most recent high profile instance of the lack of an employment relationship causing the dismissal of a case occurred during the Misha Shafi case. Wajih A Sheikh, "Rejection of Meesha's Complaint by Ombudsperson: Employment with Firm Couldn't Be Established: LHC," *Dawn*, October 29, 2019, <https://www.dawn.com/news/1511655>.

²⁹Saud Bin Ahsen, "Workplace Harassment Law in Pakistan," *Daily Times*, February 13, 2019, <https://dailytimes.com.pk/353990/workplace-harassment-law-in-pakistan/>; Malkani, Sara. Personal Interview (by phone), May 15, 2020.

³⁰Schultz, Vicki. "Reconceptualizing Sexual Harassment." *The Yale Law Journal* 107, no. 6 (1998): 1683-805. Accessed July 3, 2020. doi:10.2307/797337.; Konrad, Alison M., and Barbara A. Gutek. "Impact of Work Experiences on Attitudes Toward Sexual Harassment." *Administrative Science Quarterly* 31, no. 3 (1986): 422-38. Accessed June 6, 2020. doi:10.2307/2392831.;

³¹ Martha Chamallas, "Writing about Sexual Harassment: A Guide to the Literature," *UCLA Women's Law Journal* 4, no. 1 (1993): pp. 37-58, 40 <https://escholarship.org/content/qt81j6f9v1/qt81j6f9v1.pdf>.

economy and creating massive profits for various industries, such as garment and textile, hospitality, agriculture etc. 71.8% of employed women work in the informal sector, as opposed to only 28.2% of the men.³² In recent years, the job market has been restructured; contractual labour has become the norm and this has contributed to the feminization of the economy and increased exploitation of predominantly female labor.³³ Female workers do not only regularly face wage theft, unpredictable work hours, and so on. Kalpona Akhter, the founder director of Bangladesh Centre for Worker Solidarity, says that “[w]omen workers get raped, get touched inappropriately by men. If you talk you are the bad one. We organize against it all— the beatings and the mental pressure”.³⁴

The agricultural sector employs the lion’s share (38.5 %) of Pakistani workforce,³⁵ and women form a large part of the agricultural workforce.³⁶ Agricultural labor is almost completely unregulated by labour and employment laws,³⁷ particularly since the 1960s.³⁸ The full extent of women’s agricultural labour often does not even get recognized by the annual Labour Force Survey prepared by the Pakistan Bureau of Statistics which shows rural female participation in the labour force at 18% and urban female participation at 8%; 76% of rural employment is with the informal sector.³⁹ The working conditions of the agricultural workforce are also deeply colored by the immense power disparity between the genders and between the *zameendar* (landlord/feudal lord) and the muzara (landless tenant/ bonded labourer). For example, when the muzara is a woman, serves twice the purposes: she does agricultural labour but is denied economic independence; she is vulnerable to sexual exploitation and she is also expected to reproduce the next generation of subordinated labor.⁴⁰ Further discussion on the dynamics of the agricultural economy, albeit interesting and alarming, is beyond the scope of this paper.

³² “Labour Force Survey 2017-18 (Annual Report),” vol. 34 pp. 32 (Pakistan Bureau of Statistics, 2018).

³³ Annelise Orleck, “You Can’t Dismantle Capitalism Without Dismantling Patriarchy,” in *We Are All Fast-Food Workers Now* (Boston, MA: Penguin USA, 2018), pp. 48-55, 48-9.

³⁴ Annelise Orleck, “You Can’t Dismantle Capitalism Without Dismantling Patriarchy,” in *We Are All Fast-Food Workers Now* (Boston, MA: Penguin USA, 2018), pp. 48-55, 55.

³⁵ “Labour Force Survey 2017-18 (Annual Report),” vol. 34 pp.vi (Pakistan Bureau of Statistics, 2018).

³⁶ Nazish Brohi, “SEXUAL HARASSMENT: PAKISTAN’S TIPPING POINT?,” *Dawn*, May 6, 2018, <https://www.dawn.com/news/1405703>

³⁷ *Ibid.*

³⁸ Deneb Sumbul and Karamat Ali, “Interview: Labour Movement in Pakistan,” *Alternatives International*, June 1, 2017, <https://www.alterinter.org/?Labour-Movement-in-Pakistan>.

³⁹ “Labour Force Survey 2017-18 (Annual Report),” vol. 34 pp.vi (Pakistan Bureau of Statistics, 2018).

⁴⁰ Brewin, Sarah, and Sophia Murphy. “The Farmer and Her Husband:: Legal innovations for women in contract farming” Report. International Institute for Sustainable Development (IISD), 2019. Accessed July 3, 2020. doi:10.2307/resrep22009.; Annelise Orleck, “No Rice Without Freedom, No Freedom without Rice: The Global Uprising of Peasants and Farmworkers” in *We Are All Fast-Food Workers Now* (Boston, MA: Penguin USA, 2018), pp. 180-240.; Alexander-Floyd, Nikol G. “Critical Race Black Feminism: A “Jurisprudence of Resistance” and the Transformation of the Academy.” *Signs* 35, no. 4 (2010): 810-20. Accessed June 06, 2020. doi:10.1086/651036.

In the non-rural context, the detrimental impact of pink collar jobs is felt in the mass subcontracting and outsourcing of jobs, as mentioned above. Industries such as textile, garment, hospitality, food, agriculture etc. predominantly hire through third party contractors and heavily employ women's labour *informally*.⁴¹ The products of the textile and garment industry are Pakistan's largest export.⁴² Women shoulder the textile and garment industry in Pakistan (as in other parts of the world) through sweatshops.⁴³ They do the feminine labour of sewing and finishing garments and suffer job insecurity and horrific work conditions which include sexual harassment and other forms of cruelty, such as not being allowed to use the washroom or even facing physical violence. The sweatshop may be in a factory or women may sewing, embroidering etc. whilst working from home. Often, the employers even put these demeaning and unsafe jobs under the garb and name of women empowerment and economic independence.⁴⁴ The same problems of harassment and mistreatment are faced by women generally but particularly in the hospitality, agriculture and food industries; where again, they do feminine tasks such as making beds, making food, doing laundry, etc. These women suffer much worse conditions that they had been subjected to before they entered the workforce.⁴⁵

These informal feminized jobs do not establish a clear employee—employer relationship and mirror the domestic labour that women are expected to perform labor in their homes without getting paid or being recognized for it. Instead of truly empowering women, these employment opportunities simply reiterate and/or magnify domestic condition of politically and economically disempowered women; they are expected to work even whilst suffering physical and psychological violence, abuse or other mistreatment. When they perform this labor at home,

⁴¹Annelise Orleck, "Realising Precarity: "We are all fast food workers now"" & "Contractualization" in *We Are All Fast-Food Workers Now* (Boston, MA: Penguin USA, 2018), pp. 65-68, 99-102, 66, 100.

⁴² Mohsan Mazhar, "Product Report: Ready Made Garments", SPR Division, Trade Development Authority of Pakistan, Accessed June 1, 2020.doi: https://www.tdap.gov.pk/doc_reports/RMG-REPORT.pdf?_cf_chl_jschl_tk_=7c24b92a8273a7237878760987b03be08df7800c-1591885538-0-Abx00JKBvmt4Upw_XAGm8Z6ZZ0vbMUKzmd7G5sE8O-3q41MziTFD4pD1f84yMKJd4i7PaBo8d1xAwjpLCZRYgeaWjSZpGyTYF93zD3807pXpYn4OZtlaJG_dKlkg-7Q2T96uMkDRQTgli3OvywM8Ay11QzLWP_eKYnofNXzf8QNwaQtE5uJ0nfVjTsE7YBY9UD8zi-6mpymW_4mb-SKzBr3Z1MGpZY3e9WGBMQTNmLh6SZu-0pZIS33HGp0Uc2htDqqAsxXlksJtPz1pSseOW9PQFI-bM0MXBsPrpdL6r0jXdwovcHCddrUrhYHdsKjQ; "Pakistan Textiles and Clothing Exports By Country," WITS, 2016, https://wits.worldbank.org/CountryProfile/en/Country/PAK/Year/2016/TradeFlow/Export/Partner/BY-COUNTRY/Product/50-63_TextCloth.

⁴³A sweatshop is "a shop or factory in which employees work for long hours at low wages and under unhealthy conditions" "Sweatshop," Merriam-Webster (Merriam-Webster), accessed July 3, 2020, <https://www.merriam-webster.com/dictionary/sweatshop>.; "Within the informal sector, the majority of the females work in the Manufacturing sector (64%)" Aliya H. Khan, "Women in the Informal Economy in Pakistan Chalking out Ways to Bridge the Disconnect between the Feminist Movement, the Workers' Organizations and Political Parties" (Friedrich-Ebert-Stiftung, 2017), <http://library.fes.de/pdf-files/bueros/pakistan/14909.pdf>, iv.

⁴⁴ Annelise Orleck, *We Are All Fast-Food Workers Now* (Boston, MA: Penguin USA, 2018), pp. 130-133.

⁴⁵Annelise Orleck, "You Can't Dismantle Capitalism Without Dismantling Patriarchy," in *We Are All Fast-Food Workers Now* (Boston, MA: Penguin USA, 2018), pp. 48-55

their sexuality is also deemed to be the property of the patriarch of the home and they are expected to submit sexually; at work, this takes the form of sexual harassment at the workplace—where again those who are providing women with economic means, feel an entitlement over women’s physical and psychological being. This is regardless of the fact that these women have already held up their end of the bargain (if the bargain had been equitable) by laboring to earn the money provided to them by a patriarch at home or by an employer at the workplace.⁴⁶ Women’s labour in the workforce, in the home and in the intimate realm can be understood on a continuum. Women’s work is underpinned by the notion of ownership over them, their labour, their sexuality and their ability to reproduce. For example, the word ‘husband’ comes from husbandry (of crops and animals).⁴⁷ This is important to understand that when women are hired at such jobs, their urban ‘shepherds’ (employers, managers, contractors) feel some remnants of entitlement to sexual control over them. This can also be understood through the Sexual Desire-Dominance Paradigm, which suggests that sexual harassment is as much about sexual desire as it is about the desire to subordinate a person. “This sexual desire-dominance paradigm governs our understanding of harassment. Its influence is reflected in the very fact that the category is referred to as "sexual" harassment rather than, for example, "gender-based" or "sex-based" harassment.”⁴⁸ The origin of this paradigm is explained through historical context. In the United States of the 1960s and 1970s, when women’s movements fought for economic independence, against gender-based discrimination and to be included in the affirmative action guidelines of the Equal Employment Opportunity Commission (EEOC), they were also simultaneously unpacking the power relations that underpinned sexual relations and women’s exclusion from public life. As a result, the Sexual Desire-Dominance Paradigm came to characterize the definition and understanding of sexual harassment.⁴⁹

Understanding rape culture—both globally and in Pakistan— is important for understanding sexual harassment. Rape culture means that “sexual violence against women is normalized and excused in the media and popular culture. Rape culture is perpetuated through the “use of misogynistic language, the objectification of women’s bodies, and the glamorization of sexual

⁴⁶ Deepa, K. N. "ENGENDERING SUBJECTIVITIES: WOMEN AND LABOUR." *Proceedings of the Indian History Congress* 77 (2016): 1044-048. Accessed July 3, 2020. doi:10.2307/26552741.; Himmelweit, Susan, and Simon Mohun. "Domestic Labour and Capital." *Cambridge Journal of Economics* 1, no. 1 (1977): 15-31. Accessed July 3, 2020. www.jstor.org/stable/23596457.

⁴⁷ Brewin, Sarah, and Sophia Murphy. “The Farmer and Her Husband:: Legal innovations for women in contract farming” Report. International Institute for Sustainable Development (IISD), 2019. Accessed July 3, 2020. doi:10.2307/resrep22009.

⁴⁸ Schultz, Vicki. "Reconceptualizing Sexual Harassment." *The Yale Law Journal* 107, no. 6 (1998): 1683-805, 1692. Accessed July 3, 2020. doi:10.2307/797337.

⁴⁹ Ibid at 1693-1710

violence, thereby creating a society that disregards women's rights and safety."⁵⁰ In Pakistan, where gender disparity and the power imbalance between men and women is stark, there is a stronger culture of impunity towards all kinds of gender based discriminatory and demeaning behaviours, practices and attitudes.⁵¹ The fact is that sexual violence, gender-based discrimination, sexual harassment and lax (almost tolerant) attitudes towards these behaviours and practices plague the entire country and are not limited to the workplace.⁵² Although this report focuses strictly on sexual harassment at the workplace, it recognizes that this stems from tolerant and/or apathetic social attitudes, and even a sense of moral ambiguity, generally towards sexual violence and gender-based discrimination.⁵³ The fact that societal attitudes towards sexual harassment are lax makes it even more difficult for victims/survivors to raise their voices against harassers.

Sexual harassment at the workplace undermines women's right to public life. It serves to perpetuate the false dichotomies of public and private life and forces women out of public life, back into the '*Chardivari*' (*four corners of the home*). Sexual harassment at the workplace compromises and attacks women's rights to economic independence, to health, to mobility, to further education, to their bodies, to the city, to the village, to political participation and to being considered equally productive and valuable members of society. If a woman abandons the workforce or continuously changes jobs as a result of sexual harassment, she is not only likely to suffer loss of income or loss of advancement opportunity but may also lose out on pension or old age schemes for which she may only become eligible after a sustained period of employment. As a result, she may find herself economically dependent in the present and during her old age in the future. For similar reasons, she may also lose out on health insurance or the ability to afford healthcare on her own. As a result of a lack of economic dependence and tolerant societal attitudes towards sexual harassment, she may not be able to interact with her city or her village and actively engage in life outside the privacy of home. The lack of economic independence may also prevent her from seeking further education and skill enhancement despite the fact that advanced degrees and/or skills could serve not only her but also the workplace and the economy. As a result of being pushed into the private sphere, she may feel distanced, excluded and prevented from her fundamental right to participate in the political process of her city, village,

⁵⁰ "Rape Culture," Womens Center, accessed July 3, 2020, <https://www.marshall.edu/wcenter/sexual-assault/rape-culture/>.

⁵¹ Alexander-Floyd, Nikol G. "Critical Race Black Feminism: A "Jurisprudence of Resistance" and the Transformation of the Academy." *Signs* 35, no. 4 (2010): 810-20, 816. Accessed June 06, 2020. doi:10.1086/651036.

⁵² Mudaser Kazi, "93% Of Pakistani Women Experience Sexual Violence'," *Express Tribune*, March 8, 2017, <https://tribune.com.pk/story/1348833/93-pakistani-women-experience-sexual-violence>.

⁵³ "Rape Culture," Sexual Harassment & Rape Prevention Program (SHARPP), May 28, 2019, <https://www.unh.edu/sharpp/rape-culture>.; "16 Ways You Can Stand against Rape Culture," UN Women, accessed July 3, 2020, <https://www.unwomen.org/en/news/stories/2019/11/compilation-ways-you-can-stand-against-rape-culture>.

district or country. Moreover, the lack of economic independence, lack of opportunities for advancement and tolerant societal attitudes towards sexual harassment and violence may prevent her from escaping domestic abuse because she remains unable to support herself.⁵⁴

The intersectional approach understands sexual harassment as the sum of multiple layers of disadvantage.⁵⁵ Therefore, the frequency, intensity and type of sexual harassment that a victim suffers will be based on the number of biases that a person activates in the offender.⁵⁶ It does not affect all women the same way. If sexual harassment is suffered by a woman who is economically disadvantaged, and belongs to a race or ethnicity that is historically marginalized such as Baloch, Bengali or Sheedi, and belongs to a religious group that is persecuted such as being Ahmedi, then her womanhood shoulders the individual and collective weight of all these instances of being marginalized and discriminated against. The Socio-cultural theory states that what constitutes sexual harassment varies from culture to culture.⁵⁷ Not just culture, what is perceived as sexual harassment is also determined by one's position in society and whether we can afford to think of certain behaviours as sexual harassment. These factors may include race, ethnicity, citizenship documentation (such as a CNIC), possibility of survival without a job and so forth.⁵⁸

Sexual harassment is under-reported and there is a dearth of reliable data. The number of instances across the country is difficult to determine in the absence of a streamlined system that can collect and represent data. According to the Annual Report of the Human Rights Commission of Pakistan, The State of Human Rights, 2015, "[t]he Federal Ministry of Law and Justice claims that between January 2012 and January 2015, there have been no reports of cases of harassment against women. The Sindh Women Development Department, on the other hand, said in December that they had registered 1,007 cases of sexual harassment under the Harassment Act and had managed to resolve at least 887 of them."⁵⁹ Independent organizations such as

⁵⁴ F Rabbani, F Qureshi, and N Rizvi, "Perspectives on Domestic Violence: Case Study from Karachi, Pakistan," *Eastern Mediterranean Health Journal* 14, no. 2 (2008): pp. 415-426, <https://doi.org/10.4135/9781446220795.n3>; Musarrat Jabeen, Dure Shehwar, and Muhammed Arafat Yameen, "Harassment of Working Women in the Public Health Sector of Abbottabad in Socio-Legal Perspective," *Journal of the Pakistan Medical Association* 67, no. 1 (2017): pp. 37-41, <https://doi.org/https://jpma.org.pk/article-details/8040>.

⁵⁵ McDonald, Paula, and Sara Charlesworth. "Workplace Sexual Harassment at the Margins." *Work, Employment & Society* 30, no. 1 (2016): 118-34. Accessed July 3, 2020. doi:10.2307/26655451.

⁵⁶ Alexander-Floyd, Nikol G. "Critical Race Black Feminism: A "Jurisprudence of Resistance" and the Transformation of the Academy." *Signs* 35, no. 4 (2010): 810-20. Accessed June 11, 2020. doi:10.1086/651036.

⁵⁷ Welsh, Sandy, Jacquie Carr, Barbara MacQuarrie, and Audrey Huntley. "'I'm Not Thinking of It as Sexual Harassment': Understanding Harassment across Race and Citizenship." *Gender and Society* 20, no. 1 (2006): 87-107, 103. Accessed July 3, 2020. www.jstor.org/stable/27640867.

⁵⁸ Ibid

⁵⁹ "In March, an inquiry committee comprising senior teachers of Karachi University found a fellow teacher guilty of sexual harassment of his students. However, the students had little hope that the teacher would be punished because in a similar case in 2014, a teacher was first found guilty but later on absolved of all charges. In June, a nurse

Mehergarh and Digital Rights Foundation report that they have dealt with thousands of cases.⁶⁰ Although Ombudspersons for Sexual Harassment have been designated and the law also stipulates internal Inquiry Committees to be established at all organizations (this will be fleshed out shortly), these and other mechanisms do not inspire widespread confidence and most instances of harassment may go entirely unreported. Regardless of whether a complaint reached the Ombudsperson, or the Inquiry Committee, there is no mechanism for data collection, amalgamation and publication.

Pakistan is a complex and stratified society. Sindh is also representative of this complexity. It is important to remember that not only can one not copy and use the legal developments in other countries without confronting them with the local cultural context, it is also important to understand that the local cultural context is not a homogenous whole.

in Hayatabad Medical Complex in Peshawar accused the hospital's deputy medical superintendent of sexual harassment. In September, a woman employee of the Bhakkar Population Welfare Department lodged a complaint with the provincial ombudsperson that the Bhakkar district population officer was creating hurdles for her for refusing his sexual advances." Human Rights Commission of Pakistan, "Rights of the Disadvantaged: Women" (Human Rights Commission of Pakistan, 2016), http://hrcp-web.org/hrcpweb/wp-content/uploads/2016/04/Women_12.pdf, 14,15.

⁶⁰ Nazish Brohi, "SEXUAL HARASSMENT: PAKISTAN'S TIPPING POINT?," *Dawn*, May 6, 2018, <https://www.dawn.com/news/1405703>.

4. Pakistan's Legal Framework on Sexual Harassment at the Workplace

4.1. Constitutional Guarantees

There are gender equality provisions in 194 constitutions across the world.⁶¹ The Constitution of Pakistan, 1973, also contains several provisions about gender equality and the mainstreaming of women into the public and political life of the country. The rights to life and the inviolable dignity of a person are recognized in Articles 9 and 14 of the Constitution.⁶² The right to life is understood not as bare life but also as socio-economic well-being. Article 25 grants equality to all citizens of Pakistan⁶³ and Article 26 of the Constitution, 1973, grants the equal rights to access public spaces and both Articles make the provision for affirmative action for women and children.⁶⁴ Article 27 of the Constitution, 1973, specifically addresses the issue of employment and discrimination.

27. Safeguard against discrimination in services.

No citizen otherwise qualified for appointment in the service of Pakistan shall be discriminated against in respect of any such appointment on the ground only of race, religion, caste, sex, residence or place of birth.

The Principles of Policy⁶⁵ articulated in Chapter III of the Constitution of Pakistan, 1973, express national commitments and aims which guide public policy and governance. Under the Principles of Policy, Article 34 expresses the commitment to enable full participation of women in national life; Article 37 commits the country to social justice and eradication of social evils and Article 38 commits the country to the economic and social well-being of all.⁶⁶ Therefore, it is safe to say that the right to a workplace free of sexual harassment is constitutionally guaranteed.

In addition to the abovementioned constitutional commitments, Pakistan has also signed and ratified several international legal instruments that create obligations on the state of Pakistan to ensure universal access to the right to work, to eliminate gender-based discrimination and thus to minimize sexual harassment at the workplace. These obligations are generally present under Article 23⁶ of UDHR, Article 6⁷ and 7⁸ of the International Covenant on Economic, Social and

⁶¹ Global Gender Equality Constitutional Database (UN Women), accessed July 3, 2020, <https://constitutions.unwomen.org/en>.

⁶² Articles 9,14, Chapter II Fundamental Rights, Constitution of the Islamic Republic of Pakistan, 1973

⁶³ Article 25, Chapter II Fundamental Rights, Constitution of the Islamic Republic of Pakistan, 1973

⁶⁴ Article 26, Chapter II Fundamental Rights, Constitution of the Islamic Republic of Pakistan, 1973

⁶⁵ Although, unlike fundamental rights described in Articles 9, 14, 25, 26 and 27, principles of policy are non-justiciable, they highlight commitments of the constitution and must be followed by policy makers and legislators in order to abide by the test and spirit of the constitution.

⁶⁶ Articles 34, 37, 38, Chapter II Fundamental Rights, Constitution of the Islamic Republic of Pakistan, 1973

Cultural Rights ('ICESCR'); and specifically under Article 11⁹ of Convention on the Elimination of All Forms of Discrimination against Women ('CEDAW') and International Labor Organization (ILO) Convention 111 (The Discrimination (Employment and Occupation) Convention of 1958).⁶⁷

4.2. Protection Against Harassment of Women at the Workplace Act, 2010

In Pakistan, a remedy against sexual harassment at the workplace can be a criminal complaint or civil claim. The burden of proof on the complainant is higher in a criminal case (proof beyond a reasonable doubt) and lower in a civil case (a balance of probabilities). Consequently, there have been much fewer criminal convictions for sexual harassment at the workplace (under PPC or PECA) than findings of civil liability (under the 2010 Act). The focus of this section is the Protection Against Harassment of Women at the Workplace Act, 2010 ('2010 Act'), which is the main civil remedy available to complainants.

The 2010 Act was passed into law in the presence of over one hundred professional women cheering from the galleries of the national assembly of Pakistan. It was the brainchild of Fouzia Saeed and the fruit of a decade of labour.⁶⁸ Although a further 10 years have passed since the passage of the 2010 Act, no rules have been made, although they are required to be made under Section 13 of the Act. (This Act was also preceded by an earlier draft titled as the Code of Conduct for Gender Justice.⁶⁹)

After the passage of the 18th Amendment to the Constitution of Pakistan, 1973, the provinces of Pakistan were required to pass relevant provincial laws; Punjab has re-enacted the 2010 Act as it is,⁷⁰ Gilgit -Baltistan passed its law in 2013,⁷¹ Balochistan passed its law in 2016,⁷² Khyber Pakhtunkhwa passed its law in 2018⁷³. Sindh is still discussing drafts of its own sexual harassment law.⁷⁴ At the present moment, the 2010 Act is still applicable in the province of Sindh.

⁶⁷ Maria Khan and Ayesha Ahmed, "The Protection against Harassment of Women at the Workplace Act 2010: A Legislative Review," *LUMS Law Journal* 3, no. 1 (November 2016): pp. 91-98.

⁶⁸ Nazish Brohi, "SEXUAL HARASSMENT: PAKISTAN'S TIPPING POINT?," *Dawn*, May 6, 2018, <https://www.dawn.com/news/1405703>.

⁶⁹ "Code for Gender Justice at Workplace Sought," *Dawn*, July 18, 2003, <https://www.dawn.com/news/111885/code-for-gender-justice-at-workplace-sought>.

⁷⁰ Available at: <http://punjablaws.gov.pk/laws/2426a.html>

⁷¹ Available at: http://na.gov.pk/uploads/documents/questions/1414655739_617.pdf

⁷² Available at: <http://pabalochistan.gov.pk/pab/pab/tables/alldocuments/actdocx/2018-10-23%2012:15:43act012016.pdf>

⁷³ Available at: <http://www.pakp.gov.pk/2013/bills/the-khyber-pakhtunkhwa-protection-against-harassment-of-women-at-the-workplaceamendment-bill2018/>

⁷⁴ Hafeez Tunio, "Sindh Govt's Proposed Anti-Harassment Law to Also Protect Transgender Community," *Express Tribune*, December 18, 2018, <https://tribune.com.pk/story/1869420/1-workplace-harassment-new-bill-drafted-sindh-govt-tackle-issue>.

The Protection Against Harassment of Women at the Workplace Act, 2010, is the primary legislation that controls sexual harassment at the workplace. However, the alternative legal routes will briefly be examined for their utility in a sexual harassment claim.

The 2010 Act envisages no mechanism for previous decisions of the Ombudsperson and of the Inquiry Committees to be archived and made available for use as reference. As a result, it is unclear how the law is developing and whether the different Ombudspersons and Inquiry Committees are taking entirely divergent views and interpretations of the Act. While complainants and organizations may worry that their complaints and proceedings will no longer remain private and confidential, and that their safety and/or reputations may be at risk if these judgements are made public, Advocate Sara Malkani points out that this problem can be avoided if the names and identifying details are redacted from the decisions that are made publicly available.⁷⁵

The case law that has developed under the 2010 Act is very limited. There are only 11 reported cases available in law journals from across Pakistan. Of the cases that do exist, most are Constitutional Petitions before the High Courts, which have been filed after the avenues of the Inquiry Committee, the Ombudsperson and the appeal before the Governor have been exhausted. They provide no insight into what happened at the earlier stages. As a result, the case law that does exist is haphazard and inconsistent. Therefore, a comprehensive analysis of the law is not possible. Nevertheless, the following sections attempt to use the available case law to understand the developments in different aspects of the law. However, it is important to note that there cannot be implementation of the law until there is more clarity on what it is aiming to do.

4.3. Definitional Issues

The 2010 Act defines sexual harassment in terms that closely follow the definition provided in General Recommendation No. 19 (1992) of the Convention on the Elimination of all Forms of Discrimination Against Women, 1979, (CEDAW).^{76 77} This closely follows the definition provided by the United States' Equal Employment Opportunity Commission (EEOC) guidelines, 1980.⁷⁸

⁷⁵ Malkani, Sara. Personal Interview (by phone), May 15, 2020.

⁷⁶ Maria Khan and Ayesha Ahmed, "The Protection against Harassment of Women at the Workplace Act 2010: A Legislative Review," *LUMS Law Journal* 3, no. 1 (November 2016): pp. 91-98.; "General Recommendations Adopted by the Committee on the Elimination of Discrimination against Women," United Nations (United Nations), accessed July 3, 2020, <https://www.un.org/womenwatch/daw/cedaw/recommendations/index.html>.

⁷⁷ United Nations High Commissioner for Refugees, "CEDAW General Recommendation No. 19: Violence against Women," Refworld, accessed July 1, 2020, <https://www.refworld.org/docid/52d920c54.html>.

⁷⁸ "Sexual Harassment," U.S. Equal Employment Opportunity Commission, accessed July 3, 2020, <https://www.eeoc.gov/sexual-harassment>.

According to the Protection Against Harassment of Women at the Workplace Act, 2010, Section 2(h) "harassment" means any unwelcome sexual advance, request for sexual favors or other verbal or written communication or physical conduct of a sexual nature or sexually demeaning attitudes, causing interference with work performance or creating an intimidating, hostile or offensive work environment, or the attempt to punish the complainant for refusal to comply to such a request or is made a condition for employment;⁷⁹

The definition of sexual harassment needs to be studied with respect to two features: (i) the use of the word 'unwelcome'; and (ii) understanding the phrase 'sexual harassment' as a sum of its parts.

The use of the word 'unwelcome' in the definition of sexual harassment has been a source of problems. It implies that there do exist 'welcome' forms of sexual behaviours.⁸⁰ This opens the complainant to scrutiny even before the accused is scrutinized. The adjudicator begins to determine whether a behaviour had been invited and welcome or not.⁸¹ Susan Estrich compares the judicial treatment of sexual harassment to rape cases where the complainants are often required to (thoroughly) prove a negative — that is, the lack of consent. She says, "unwelcomeness has emerged as the doctrinal stepchild of the rape standards of consent and resistance and shares virtually all of their problems."⁸² Given that sexual harassment is already underreported, it is all the more problematic that an attack on the credibility of the complainant is built into the very definition of sexual harassment. Furthermore, sexual harassment is difficult to prove because it does not leave behind conventional forms of evidence. To additionally prove that it was also unwelcome is extremely difficult.⁸³

The use of the word 'unwelcome' in the definition of sexual harassment in the 2010 Act shows how a copy/paste job of other legislation from other parts of the world ignores the cultural context of a country like Pakistan in which even a rape victim is still subjected to a two-finger test in order to prove whether a woman is 'habitual', that is, sexually active or not.⁸⁴ Therefore, the implication that a woman could want any kind of sexual attention would damn her before any inquiry or adjudication has begun. In the reported case law that is available, there is only one case that discusses the word 'unwelcome' and the said discussion lays bare our

⁷⁹ Section 2, Protection Against Harassment of Women at the Workplace Act, 2010

⁸⁰ Abira Ashfaq, "Sexual Harassment," *Dawn*, June 8, 2019, <https://www.dawn.com/news/1486846>.

⁸¹ Martha Chamallas, "Writing about Sexual Harassment: A Guide to the Literature," *UCLA Women's Law Journal* 4, no. 1 (1993): pp. 37-58, 44-45 <https://escholarship.org/content/qt81j6f9v1/qt81j6f9v1.pdf>.

⁸² Susan Estrich, *Real Rape*, 287 (Harvard Univ Press, 1988)

⁸³ Martha Chamallas, "Writing about Sexual Harassment: A Guide to the Literature," *UCLA Women's Law Journal* 4, no. 1 (1993): pp. 37-58, <https://escholarship.org/content/qt81j6f9v1/qt81j6f9v1.pdf>.

⁸⁴ Zainab Z Malik, "It's Time Pakistan Banned the Two-Finger Test for Decoding Consent in Rape Trials," *Dawn*, December 18, 2017, <https://www.dawn.com/news/1377364>.

apprehensions against the usage of the word:

“7. From the plain reading of the above mentioned section it is clear that a key part of the definition is the use of the word unwelcome or uninvited conduct or communication of a sexual nature is prohibited. The sex based behavior shall be severe or persuasive enough to alter the conditions of the victims’ employment and create an abusive working environment or renders the work place atmosphere intimidating, hostile or offensive. The respondent No.2 has alleged that appellant called her "Jahil and Badtameez Aurat". None of the words uttered by appellant qualifies the term sexual harassment. Although the comments were sufficiently offensive to cause discomfort for a women but they did not rise to the level of interfering with the respondent's work performance as it was an isolated incident, occurred on a very minor dispute. Had there been a man in her place, situation would have been equally bad for him. The respondent No.2 failed to make a prima facie case of sexual harassment.”⁸⁵

It appears that the Federal Ombudsperson who was deciding the above cited case has been swayed by the word unwelcome and has conflated it with the severity of sex-based behavior which would qualify as sexual harassment. This paragraph betrays the notion that sex-based behaviour is acceptable unless it crosses a, presumably subjective, limit. And additionally, sexual behaviours need not be addressed until (proven) unwelcome or uninvited.

In light of the fact that laws against workplace sexual harassment are made to improve women’s access to equal opportunity and safety, it is also important to see whether courts take this context into consideration when adjudicating claims. While simple harassment does not qualify as “sexual harassment,” it is also true that sexual behaviors are not the only ones that limit women’s access to the workplace.⁸⁶ Recently, the Islamabad High Court passed a judgement in a group of connected Writ Petitions against the Federal Ombudsperson, which contended that she was taking on cases of simple harassment and going beyond her jurisdiction in doing so. The judgement pointed out that simple harassment was not actionable, and to succeed, a sexual harassment complaint had to be sexually colored—meaning it must relate to physiological or intimate relations:

“10. When the provisions of the Act of 2010 are read as a whole, it unambiguously shows that the public office of the Ombudsman has been established with a specific object and purpose i.e. to protect women against harassment as defined ibid and not merely harassment at workplace as understood in its ordinary dictionary meaning. ...

⁸⁵ 2013 M L D 198 Islamabad (Appeal No.9/FOS of 2011, decided on 5th October, 2011.) before the Federal Ombudsman.

⁸⁶MacKinnon, Catharine A., and Thomas Irwin. Emerson. In *Sexual Harassment of Working Women: a Case of Sex Discrimination*, xiv-312. New Haven, CT: Yale University Press, 1979. (The book was first published in 1976.)

If an enactment has defined an expression, then it has to be construed by confining the interpretation solely to the language used therein. The purpose of a definition clause is to give certainty to the expression defined. The definition may either be extensive or restricted and exhaustive. It is extensive when the phrase 'includes' is used and exhaustive when it explicitly states what an expression 'means'. The expression harassment has been defined in section 2(h) of the Act of 2010 which has been reproduced above. The definition is exhaustive and not extensive. It explicitly refers to various phrases such as "unwelcome sexual advance", "request for sexual favours", "physical conduct of a sexual nature", "sexually demeaning attitudes". The later portion of the definition i.e. "other verbal or written communications causing interference with work performance or creating an intimidating, hostile or offensive work environment, or the attempt to punish the complainant for refusal to comply with such a request" cannot be read in isolation. It inevitably has a nexus with the nature of acts referred to in the earlier part of the exhaustive definition. The act, conduct or attitude essentially has to be sexual in nature to be covered under the definition of 'harassment' for the purposes of the Act of 2010. As an adjective, the expression sexual is related to 'the instincts, physiological processes and with physical attraction or intimate physical contact between two individuals'. It is, therefore, obvious that a gesture made towards another person with the intention of gaining sexual gratification would fall within the definition of 'harassment' in the context of the Act of 2010. For physical conduct to attract the consequences described in the Act of 2010 it has to be of a sexual nature. The legislature, through unambiguous language, has defined the expression 'harassment' and its exhaustive meaning has been confined to acts, advances, requests, attitudes, conduct etc. which are of a sexual nature. Depending on the facts and circumstances, harassment for the purposes of the Act of 2010 can be of different forms, verbal, nonverbal or physical. The most crucial ingredient for determining jurisdiction of the Ombudsman is that the conduct, attitude or act etc complained of must be of sexual nature and the other factors mentioned in section 2(h) are also in existence." ⁸⁷

This judgement both closes and opens the definition of sexual harassment. While it limits sexual harassment to sexually colored acts, it also categorically asserts that these may be verbal, or non-verbal in the form of gestures. Moreover, this judgment reveals the many behaviors and actions that prevent equality in the workplace are not covered by the Act. This hurdle exists in other jurisdictions, as well, and scholars have pointed out how “[t]o a large extent, the courts have restricted the conception of hostile work environment harassment to male-female sexual

⁸⁷ 2020 P L C (C.S.) 186 Islamabad, Paragraph 10

advances and other explicitly sexualized actions perceived to be driven by sexual designs. In doing so, courts have created a framework that is underinclusive.”⁸⁸

In other words, under the Islamabad High Court’s understanding of sexual harassment, it would be acceptable to tell women employees they are inferior, to engage in locker room talk in front of women employees, to assign only domesticated or repetitive tasks to women, to offer them no opportunities for professional advancement, and to psychologically intimidate them out of the workforce in other ways. A plethora of global scholarship establishes that sexual harassment must be understood within the context of sex or gender-based discrimination,⁸⁹ and it will be interesting to see how Pakistani courts and Provincial Ombudsperson’s offices deal with this. Optimistically, other judgements have taken note of larger impact that sexual harassment has on its victims:

“13. It is a matter of fact that sexual harassment, and harassment on non-gender discriminatory grounds, pollute the working environment and can have a devastating effect on the health, confidence, morale and performance of those affected by it. Commonly, the anxiety and stress produced by sexual harassment and harassment may lead to those subjected to it taking time off work due to sickness and stress, being less efficient at work or leaving their job to seek work elsewhere. Under the jurisprudence developed in this matter, the employees often suffer the adverse consequences of the harassment itself and, in addition, the short and long term damage to their employment prospects if they are forced to forego promotion or to change jobs. Henceforth, the sexual harassment and harassment may also have a damaging impact on employees not themselves the object of unwanted behaviour but who is witness to it or has knowledge of the unwanted behaviour. Therefore, for deciding the instant petition, it would be advantageous to make a survey of case law of different jurisdictions dealing with the issue of harassment of women at workplace.”⁹⁰

According to the Digital Rights Foundation, “judgments passed by the ombudsperson are often overturned by the higher judiciary, there seems to be a difference in opinion regarding what constitutes harassment between the two decision making bodies. By and large, in our experience, ombudspersons are seen to be more willing to interpret the law purposefully, while the high courts have been more conservative in their approach.”

⁸⁸ Schultz, Vicki. "Reconceptualizing Sexual Harassment." *The Yale Law Journal* 107, no. 6 (1998): 1683-805, 1710. Accessed July 3, 2020. doi:10.2307/797337.

⁸⁹ "Sexual Harassment," U.S. Equal Employment Opportunity Commission, accessed July 3, 2020, <https://www.eeoc.gov/sexual-harassment>.

⁹⁰ P L D 2019 Lahore 407

4.4. Avenues of Complaint

The 2010 Act requires every organization to establish a three-person Inquiry Committee and a “Competent Authority.”⁹¹ When a complaint is made by an employee, the Inquiry Committee must conduct an investigation and provide its results and recommendations to the Competent Authority within thirty days.⁹² The Competent Authority, designated by the management,⁹³ must finalize and communicate liability and penalty, or the lack thereof.⁹⁴ The Act also provides an alternative avenue to the employee, that is, they may approach the Ombudsperson for Sexual Harassment to lodge a complaint directly.⁹⁵

The 2010 Act defines an “organization” that is, the entity which shall be required to implement it and to which the act shall be applicable, and the “workplace”, that is, the place at which harassment can occur, in expansive terms and fails to establish a clear relationship between the organization and the workplace or to justify why only an organization is primarily responsible for the implementation of the Act but the workplace is not.

Section 2(l)	<i>“organization” means a Federal or Provincial Government Ministry, Division or department, a corporation or any autonomous or semiautonomous body, Educational Institutes, Medical facilities established or controlled by the Federal or Provincial Government or District Government or registered civil society associations or privately managed a commercial or an industrial establishment or institution, a company as defined in the Companies Ordinance, 1984 (XLVII of 1984) and includes any other registered private sector organization or institution;</i>
Section 2(n)	<i>“workplace” means the place of work or the premises where an organization or employer operates and includes building, factory, open area or a larger geographical area where the activities of the organization or of employer are carried out and including any situation that is linked to official work or official activity outside the office. ⁹⁶</i>

The net is both too wide and narrow for the law to be implemented. An organization can be as small as a dispensary, a Basic Health Unit (BHU), or a Single Member Company (SMC), which

⁹¹ Section 3, Protection Against Harassment of Women at the Workplace Act, 2010

⁹² Section 4(4), Protection Against Harassment of Women at the Workplace Act, 2010

⁹³ Section 2(d), Protection Against Harassment of Women at the Workplace Act, 2010

⁹⁴ Section 4(5), Protection Against Harassment of Women at the Workplace Act, 2010

⁹⁵ Section 7, Protection Against Harassment of Women at the Workplace Act, 2010

⁹⁶ Section 2, Protection Against Harassment of Women at the Workplace Act, 2010

makes it impossible to form an Inquiry Committee or Competent Authority. On the other hand, the definition of an organization also does not consider farms, cottage industries, or other outsourced jobs such as workers to whom piecemeal work such as garment stitching or other work may be assigned. The 2010 Act also fails to address the context of transnational, trans-provincial and multi-city organizations. Such an organization is not required to set up an Inquiry Committee in each office location, and would be deemed compliant if a singular Committee was established regardless of whether it were accessible to employees in other locations or not. The Act also fails to include former employees who may bring a complaint of sexual harassment once they have removed themselves from the situation and perhaps once they feel safe enough to do so.⁹⁷ The workplace is distinct from an organization and is separately defined. Yet, it is not the workplace but the organization that is required to maintain an Inquiry Committee or Competent Authority. Moreover, the 2010 Act fails to cover an internet-based workspace where employees work remotely and/or are required to work independently or collaborate through the internet or any other network. In such cases, if a person is subjected to sexual harassment, they would be considered not part of the same workplace under a strict reading of the law.

A decade later, most organizations do not have any such Committee or Competent Authority,⁹⁸ and there is no mechanism that holds employers accountable for failure to comply with the Act. Section 4 provides general guidelines for conducting an inquiry and requires that all evidence provided during the inquiry must remain confidential but it allows the Inquiry Committee of an organization to “regulate its own procedure”.⁹⁹ Although this allows organizations the generous leeway to conduct inquiries most suited to the context of their organizations, a lack of will and indifferent attitudes towards sexual harassment translates to a sense of arbitrariness to inquiries conducted by Inquiry Committees, in the few institutions where they exist. Moreover, lawyer testimonies suggest that when the decisions of these Committees are appealed, the inquiry is often conducted anew.¹⁰⁰ This can be exhausting and demoralizing for the employee complainant and could also deter other women from coming forward.

A complainant can also lodge a complaint directly with the Ombudsperson; but they would have to establish an employment relationship in order to do so.¹⁰¹ Moreover, while this is a welcome means of sidestepping biased or inefficient Inquiry Committees, there is only one office of the Provincial Ombudsperson on Sexual Harassment per province, which makes access a problem for people in cities, towns, or villages far from the place of the office. The Ombudspersons are also empowered to hear appeals against the decisions of the Inquiry Committee and Competent

⁹⁷ 2018 MLD 327 - Side Bar C, D; Paragraph 10 (pages 330-31); 2018 MLD 327, Paragraphs 10-12

⁹⁸ Digital Rights Foundation. Personal Interview (by email), May 27, 2020.

⁹⁹ Section 4, Protection Against Harassment of Women at the Workplace Act, 2010

¹⁰⁰ Digital Rights Foundation. Personal Interview (by email), May 27, 2020.

¹⁰¹ Section 7, Protection Against Harassment of Women at the Workplace Act, 2010

Authority.¹⁰² In addition, a decision of the Ombudsperson may be appealed before the Governor of the Province.¹⁰³ The Digital Rights Foundation points out that, “[m]ost complainants are forced to appeal to the ombudsperson when they feel aggrieved by the verdict passed by the inquiry committee....in provincial and federal capitals, which means that complainants have to travel long distances”. If after other avenues have been exhausted, and either party is not satisfied, the High Courts have held cases under this Act to be maintainable, as well.¹⁰⁴

There is no bar as to when a complainant must bring forward a complaint, against the accused, to the Inquiry Committee or to the Ombudsperson. While several time limits are provided for the Inquiry Committee, the Ombudsperson, the accused and/or the appellant,¹⁰⁵ the 2010 Act is silent as to when a complainant must come forward with their complaint. The Ombudsman has held that “no complaint of harassment can be discarded or disbelieved on the account of limitation nor any offender can claim his innocence for not filing the complaint instantly after its occurrence or has been filed with inordinate delay, therefore, the delay of 178 days in the lodgment of instant harassment complaint would not be fatal to its merits, when same is based on valid and strong grounds.”¹⁰⁶

In terms of relief, under of the Protection Against Harassment of Women at the Workplace Act, 2010, monetary and/or disciplinary penalties may be awarded in accordance with the list of “Major and Minor Penalties” listed in Section 4(4). Moreover, Sections 4(7) & (8) also require the organization to provide psychosocial counselling or medical treatment to the complainant, as need be, and the organization may offer compensation to the complainant “in case of loss of salary or other damages,” respectively.

The 2010 Act also requires employers to display the Code of Conduct in the Schedule to the Act in English and a language easily understood by everyone, and otherwise incorporate it for the purpose of implementing the Act.¹⁰⁷ The Inquiry Committee is also required to meet regularly and monitor the situation with respect to sexual harassment.¹⁰⁸ Furthermore, Section 4(3)(e) of

¹⁰² Section 6, Protection Against Harassment of Women at the Workplace Act, 2010

¹⁰³ Section 9, Protection Against Harassment of Women at the Workplace Act, 2010

¹⁰⁴ 2019 PLD 168 Karachi, Paragraphs 12; 2018 PLD 107 Quetta; 2016 PLD 433 Lahore; 2019 PLD 407 Lahore.

¹⁰⁵ An Inquiry Committee and Competent Authority has to be set up within thirty days of the passage of the 2010 Act (Section 3); Accused will be informed of the complaint against them within three days and they will submit their written defense within 7 days, the Inquiry Committee will conclude its investigation and submit its findings and recommendations to the Competent Authority within 30 days of initiation of inquiry (Section 4); Any aggrieved party can file an appeal within 30 days of the decision and the Appellate Authority must respond within a further 30 days (Sections 6 & 9); The Ombudsperson must issue notices within 3 days of receiving a complaint and the accused must submit their written defense within 5 days (Section 9). Protection Against Harassment of Women at the Workplace Act, 2010

¹⁰⁶ 2019 PCrLJ 806 Karachi, Paragraph 16

¹⁰⁷ Section 11, Protection Against Harassment of Women at the Workplace Act, 2010

¹⁰⁸ Section 4(6), Protection Against Harassment of Women at the Workplace Act, 2010

the 2010 Act requires the employer to ensure that a hostile environment is not created as a result of a complaint, it does not say what, if any, interim steps need to be taken in case the complaint is regarding the (pre)existence of a hostile work environment.¹⁰⁹ According to Section 11 of the 2010 Act, the employer or the organization is responsible for the implementation of the Act. If they fail to do so, an employee may file a case against the employer or the organization in the district court. However, the Digital Rights Foundation points out that, “most complainants have to fight for a committee to be formed as most workplaces/institutions lack any such committee. It is only once a case has been brought forth that a committee is formed. This means that the entire process takes longer than necessary and there is no training or experience on part of the committee members.”¹¹⁰

4.5. Parties to a Sexual Harassment Claim

The 2010 Act lists three definitions, one of “complainant” and one of “employee” and “accused”, as reproduced below:

Section 2(a)	<i>“accused” means an employee or employer of an organization against whom complaint has been made under this Act;</i>
Section 2(e)	<i>“Complainant” means a woman or man who has made a complaint to the Ombudsman or to the Inquiry Committee on being aggrieved by an act of harassment;</i>
Section 2 (f)	<i>“Employee” means a regular or contractual employee whether employed on daily, weekly, or monthly or hourly basis, and includes an intern or an apprentice;</i>

From a bare reading of the definitions, it appears that the complainant may be any man or woman professionally related to the workplace while the accused must be an employer or an employee (regular or contractual or intern or apprentice). These have specific purposes in the 2010 Act. When the structure, procedure and powers of the Inquiry Committee are laid down in Sections 3,4 and 5 of the 2010 Act, the words used for opposing parties are “complainant” and “accused”. However, in the provisions which lay down the structure and powers of the Ombudsperson, the word “employee” is used to refer to the person who may complain to them directly. The Ombudsperson can be approached in two cases: (i) the accused or the complainant aggrieved by the decision of the Competent Authority in an organization can appeal against the said decision as per Section 6(1) & (2); and (ii) a complainant, who can establish an employment

¹⁰⁹ Section 4 (3) Protection Against Harassment of Women at the Workplace Act, 2010

¹¹⁰ Digital Rights Foundation. Personal Interview (by email), May 27, 2020.

relationship, can prefer to directly approach the Ombudsperson as per Section 8(1) of the 2010 Act.

In a recent high-profile case, musician Misha Shafi took a complaint of sexual harassment to the Ombudsperson, regarding an incident that occurred whilst rehearsing with the accused for a show at which they had been hired, by the event management company, to perform together. The Ombudsperson rejected the complaint and the Governor rejected the appeal; both on the ground that her contract with the event management company did not create an employment relationship between them (nor was there any employment relationship between the event management company and the accused), therefore, she did not have standing to bring a complaint. The Governor relied mainly on Clause 6:11 of the contract signed by the complainant, which read as follows: “This agreement shall not be deemed to create any partnership and or employment relationship between the parties”.¹¹¹

Since there was no employment relationship between the accused and/or the complainant and/or the event management company, therefore, the studio in which the complainant and the accused were rehearsing could not be classified as a workplace. Technically, the complainant, the accused and the event management company were independent agents and none of them was in an employment relationship with the other. This logic would also apply to anyone who chooses to work as freelance operatives such as photographers, web developers, journalists, models, writers etc. By the same token, the relationship between, for example, a client and their lawyer or accountant or architect or fashion designer is also not an employment relationship; they are independent agents. Therefore, they would all be unprotected by the 2010 Act. Nevertheless, employees (lawyers/accountants/architects/designers/ other staff) of a law firm, accountancy firm, architectural firm or design house for example, do have an employment relationship and are protected under the 2010 Act.

Contractual employees are included in the definition of an employee. Contractual labour can be hired directly or indirectly through a subcontractor. So, subcontracted workers who have been hired indirectly by a third party would find it difficult to establish an employment relationship with the organization at which they work. It is also important to note that in Section 2(g)(vi) subcontractors who undertake to procure labour are also defined as employers, therefore, in case of harassment an employment relationship could be established with the subcontractor and not the actual organization for which the workers or employees work. However, it is not an employer but an organization that has to constitute an Inquiry Committee under the provisions of the 2010 Act. An organization or workplace could comprise of various departments where every department is populated by a different subcontractor.

This creates two problems. Firstly, if the harasser is an employee of the larger organization and/or

¹¹¹ Annexure ‘E’, Case file, Misha Shafi’s Complaint before the Ombudsperson.

workplace but not of the subcontractor, the Inquiry Committee of the subcontractor, if it did exist, would not be able to grant any justice or relief. The Ombudsperson may also find the lack of an employment relationship with a common employer is a ground for denying relief, as in the above-mentioned Misha Shafi case. Secondly, workers are usually hired by subcontractors work without any proof of employment. They would very likely not even be able to establish their own employment with the subcontractor or with the larger organization or workplace.¹¹² Contractual labour across the world struggles to establish an employment relationship in order to gain employment benefits, compensation for injury etc. In some instances, they use their uniform or ID tags to prove that they are employed but these are not always available or admissible.¹¹³ Therefore, although there is room for interpretation, the 2010 Act lacks clarity on: (i) if subcontracted employees fall within the ambit of “employee” then how is the employment relationship to be proven, especially with the larger organization or workplace (ii) who has the onus to collect all relevant documents (such as the contract between workplace and subcontractor) (iii) whether subcontracted employees are to be provided an Inquiry Committee by their subcontractor or by the organization or workplace at which they work.

As noted above, to bring a complaint to the Inquiry Committee, the “complainant” need not be an employer or employee per se. Therefore, the complainant can be a former employee, a student of an education institution, a patient at a private medical clinic, or a person seeking the assistance of a civil society organization such as a complaint cell, a legal aid clinic or a shelter may be sexually harassed. The Ombudsperson of Sindh has clearly held that “workplace of either party is sufficient to invoke the provisions of the Act, 2010, and the wrongdoer could not be left unchecked nor can he take benefit of his illegal acts merely on the basis of legal technicalities, therefore, any student or employee or officer of the educational institution can file complaint for causing sexual harassment... and the management is legally empowered and bound to constitute the inquiry committee under the Act, 2010.”¹¹⁴ However, strictly speaking they would not be entitled to approach the Ombudsperson, except with an appeal against a decision of the Inquiry Committee because, as per Section 8(1), only an employee may approach the Ombudsperson with a complaint. Nevertheless, this provision has been interpreted to include students,¹¹⁵ and medical patients¹¹⁶ by the Federal Ombudsman and by the Ombudsman of Sindh variously. In the absence of publicly available decisions by the Ombudspersons offices, it cannot be said whether they have taken this approach consistently

¹¹² “No Room to Bargain,” Human Rights Watch, January 23, 2019, <https://www.hrw.org/report/2019/01/24/no-room-bargain/unfair-and-abusive-labor-practices-pakistan>.

¹¹³ Annelise Orleck, “You Can’t Dismantle Capitalism Without Dismantling Patriarchy,” in *We Are All Fast-Food Workers Now* (Boston, MA: Penguin USA, 2018), pp. 48-55, 48-9.

¹¹⁴ 2019 PCrLJ 806 Karachi, Paragraph 11

¹¹⁵ 2019 PCrLJ 806 Karachi Paragraph 11; 2019 PLD 407 Lahore, Paragraph 12; 2013 MLD 225, Paragraphs 9& 10 [Federal Ombudsman]

¹¹⁶ Provincial Ombudsman Sindh Complaint No. 20(KHI)/2018, Paragraphs 14& 15

and/or if others have taken the same approach. Since each province has its own High Court and Ombudsperson and each High Court and Ombudsperson is interpreting the law independently, a particular reading of the law is not binding in a province until the High Court of the province makes a similar holding.

4.6. Evidentiary Requirements

Since the 2010 Act provides a civil remedy, sexual harassment has to be proven on a balance of probabilities (and not beyond reasonable doubt). This means that it has to be shown that it was more likely, than not, that sexual harassment took place. The procedure of an inquiry under the Inquiry Committee is laid down in Section 4 and requires that the accused be provided an opportunity of hearing, and both parties be allowed to submit evidence. However, unlike rape or physical assault, it is difficult to establish the minimum evidence required to prove a claim of sexual harassment. Lawyers have shared that their complainants have used screenshots and pictures of emails, Whatsapp messages, SMS or social media messages; where possible they have enlisted witnesses to the harassment to bear testimony; or they have used covert audio recordings, CCTV footage and so forth.¹¹⁷ In other instances, some complainants have even written an account of the harassment they suffered and posted it to themselves through registered mail and then submitted that unopened mail as evidence, to prove that even if there is a delay in the complainant coming forward, it is not that the complainant is making up the claim as an after-thought.¹¹⁸ Nevertheless, evidence and proof are notoriously difficult for the victim to collect.

A major hurdle women face is not simply evidence gathering and fighting societal attitudes that distrust their claims; it is also that in retaliation to a sexual harassment claim, complainants are regularly faced with defamation lawsuits that demand substantial amounts of money for purported loss of reputation and so forth. The primary defense against defamation is that what is being claimed is the truth. However, this leaves the complainant to circle back to the fact that sexual harassment is difficult to prove with evidence and is often experienced in the absence of witnesses.¹¹⁹

¹¹⁷ Digital Rights Foundation. Personal Interview (by email), May 27, 2020.; Malkani, Sara. Personal Interview (by phone), May 15, 2020.; Farooq, Uzma. Personal Interview (by phone and email), May 15, 2020.

¹¹⁸ Nazish Brohi, "SEXUAL HARASSMENT: PAKISTAN'S TIPPING POINT?," *Dawn*, May 6, 2018, <https://www.dawn.com/news/1405703>.

¹¹⁹ "Court Stays Proceedings in Meesha Shafi's Defamation Case against Ali Zafar Says Shafi Will Lose Right to Record Testimonies, If She Fails to Produce Witnesses in Her Defence on Feb 18," *Express Tribune*, February 13, 2020, [https://tribune.com.pk/story/2156126/1-court-stays-meesha-shafis-defamation-case-ali-zafar.](https://tribune.com.pk/story/2156126/1-court-stays-meesha-shafis-defamation-case-ali-zafar.;); Zainab Husain, "Sued for Saying #MeToo," *Soch*, January 27, 2020, [https://www.sochwriting.com/sued-for-saying-metoo/.](https://www.sochwriting.com/sued-for-saying-metoo/); Julia Jacobs, "#MeToo Cases' New Legal Battleground: Defamation Lawsuits," *New York Times*, January 12, 2020, <https://www.nytimes.com/2020/01/12/arts/defamation-me-too.html>.

4.7. The Burden of Proof

Section 4 of the 2010 Act lays down the basic procedure while Section 5 and 8 detail the powers of the Inquiry Committee and the Ombudsman respectively. The complainant shoulders the primary burden of proof along with the Inquiry Committee or the Ombudsman, as the case may be. That is, the complainant is required to make the positive case that they have faced sexual harassment at the workplace an account of the accused. After being informed, in accordance with Section 4(1)(b), the accused is required to defend themselves against the case. From a bare reading of Section 5(2) and Section 8(3) it can be seen that the Inquiry Committee or the Ombudsman are not simply required to be passive adjudicators, but also have an inquisitorial role. That is, they are empowered to seek out and conduct an inquiry into the claim— to seek out evidence, testimony and have the complainant examined by a medical professional. The Inquiry Committee is required to take part in the investigation and then convey its finding and suggested penalty, if any, to the Competent Authority, which then makes a final decision on the submissions of the Inquiry Committee.

It is also important to note that the 2010 Act is a specialized law, that essentially provides a civil remedy against sexual harassment at the workplace, but it does carry with it the undertones of a criminal law. Although the 2010 Act provides a civil remedy, the vocabulary used in the Act have undertones of criminal law— for example, opposing sides of a sexual harassment claim under the Act are called the “complainant” and the “accused” although in a civil case, opposing sides are called the plaintiff or petitioner and a respondent respectively. In a civil claim, if a person has breached their duty of care and/or been negligent, they may be held accountable. No intent needs to be proven for a civil claim. While the intent of the accused remains immaterial here as well, the intent of the complainant is material according to the letter of this law. That is whether certain behavior is welcome or unwelcome is material to the claim. When a civil case goes to court, the State does not provide a lawyer to pursue the cases, however, in a criminal case the State Prosecutor is required to make their case against the accused. In a sexual harassment claim under the 2010 Act, as in any other civil case, either a private lawyer has to be hired or the complainant would have to make their case in person. Although the mechanisms created under the 2010 Act purportedly do not require that a lawyer be hired, the law itself is not designed to be straightforward or easy to apply; a non-lawyer may not be able to optimally use the law to get justice, especially before the Ombudsman or any Appellate Authority.

In an encouraging development, the Ombudsman for Sindh has recently given a judgement in which it was held that, particularly for sexual harassment claims with respect to a student-teacher relationship, it would be the accused who would shoulder the burden of proof and would have to show that he has not engaged in behaviours or attitudes that qualify as sexual harassment:

“There exists a relationship of trust between a teacher and the parents of a student which operates as a bar, which continues even if the student or the parents of that student accord their consent. This trust acts as a core foundation of our society which allow the parents to handover their children into the protective care of a teacher. Any kind of compromise on this trust will have a far reaching and dire consequences. The burden of this trust exclusively lies upon the teacher of any gender, and the student regardless of his gender will be presumed to be weak and potential victim. ... Furthermore, besides teacher's authority over student and the obligation of being impartial, a friendship might interfere with the studies and learning of that student. Moreover, consent of a student does not mean that teacher should cross the teacher and student relationship boundaries and in case of any complaint for sexual harassment by a student, the burden should lie upon the teacher to clarify his position to refute and, nullify the allegations levelled against him, as he is in dominating, commanding and authoritative position. The safety of students and the fiduciary relationship of the teacher towards his students are sacrosanct and cannot be allowed to be abused, and any insignificant act of harassment ruins the decorum and dignity of the said relationship”.¹²⁰

Although the defendant does not shoulder the burden of proof per se, and a positive case was made against the defendant in this case, this holding is valuable in that it recognizes and seeks to correct the power differential between the harasser and the harassed. Proving harassment is not as straightforward as proving a murder or physical assault in the criminal realm or a breach of contract in the civil realm where there exists a dead body or an injured limb, or an unperformed contractual duty for the investigation to work back from. It is also important to remember that in the case of the 2010 Act, the accused is not simply required to defend themselves to the extent that their actions cannot be proven beyond reasonable doubt. They are required to defend themselves to the extent that in the balance of probabilities, it is less likely that they have committed an act of harassment. Therefore, even within the 2010 Act, the accused does have to go a further length in making a case for themselves, than a person accused under a criminal law who only poke holes in the positive case presented by the prosecution and has to defend themselves to the extent that they prove that a case cannot be made against without reasonable doubt.

The power differential between the complainant and the accused can greatly influence the complainant's and the Inquiry Committee's ability to prove and investigate a claim and thus the effectiveness of the investigation. Therefore, it may be useful to share the burden of proof between the complainant, the Inquiry Committee and the accused. However, this is treacherous territory. It is important to maintain the difference between sharing the burden of proof because

¹²⁰ 2019 PCrLJ 806 Karachi, Paragraph 18

of the nature of the claim and upturning the burden of proof in its entirety. For example, the National Accountability Ordinance, 1999, states in Section 14(d) that the entire burden of proof regarding any abuse of power shall lie with the accused. This is problematic and gives rise to several problems because this implies that the accused will be required to prove a negative. To require the accused to prove a negative in its entirety is also a violation of Article 10A of the Constitution of Pakistan, 1973, which grants every citizen the right to a fair trial.

Sexual harassment is an issue predominantly faced by the demographic that is not the heterosexual male. Sexual harassment law cannot be effective as long as it is understood through the default position of the legal system which is predominated by men. Therefore, any testimony or proof that is presented would be judged in accordance with the preconceived notions and perceptions of the system —which is made up of men. In order to determine if, on the balance of convenience, an accused person is likely to have caused harassment sexual harassment needs to be understood through the vantage point of women. For example, courts in the United States have developed the ‘reasonable woman standard’;¹²¹ and the Lahore High Court had acknowledged the need to use this approach in a judgement from 2019. The United States Supreme Court noted that:

“We realise that there is a broad range of viewpoints among women as a group but we believe that many women share common concerns which men do not necessarily share. For example, because women are disproportionately victims of rape and sexual assault, women have a stronger incentive to be concerned with sexual behavior. Women who are victims of mild forms of sexual harassment may understandably worry whether a harasser’s conduct is merely a prelude to violent sexual assault. Men, who are rarely victims of sexual assault, may view sexual conduct in a vacuum without a full appreciation of the social setting or the underlying threat of violence that a woman may perceive.”¹²²

Women’s experiences, realities and contexts are better suited to inform what would or wouldn’t constitute sexual harassment; the ‘reasonable woman standards’ is an extremely important step towards minimizing the effects of gender based discrimination, including sexual harassment.¹²³ In the United States, courts do vacillate between using the reasonable man and the reasonable woman test; and some courts “modify the reasonable person standard through a two-step "subjective/objective" approach that explicitly considers the perspective both of the victim and

¹²¹ Meritor Savings Bank v. Vinson (1986) 477 U.S. 57; Harris v. Forklift Systems Inc. (1993), 510 U.S. 17; Joseph Oncale v. Sundowner Offshore Services, Inc. 523 U.S. 75 (1998); Ellison v. Brady, (1991) 9th Circuit, 924 F.2d, 872

¹²² Ellison v. Brady, (1991) 9th Circuit, 924 F.2d, 872 cited in P L D 2019 Lahore 407 paragraph 15

¹²³ Robert S. Adler and Ellen R. Peirce, The Legal, Ethical, and Social Implications of the "Reasonable Woman" Standard in Sexual Harassment Cases, 61 Fordham L. Rev. 773 (1993). Available at: <https://ir.lawnet.fordham.edu/flr/vol61/iss4/2>

of a reasonable person.”¹²⁴ Optimistically, the Lahore High Court has also made some moves towards incorporating this scholarship, acknowledging legal developments in the United States, in England and in India and shown an instance where they incorporate the reasonable woman standard in their own understanding of what constitutes sexual harassment.¹²⁵

4.8. Repercussions: Bringing Sexual Harassment to Light

Either because the legal route is riddled with hurdles and obstacles or to gain support and momentum surrounding their complaints, many victims have started to make their sexual harassment claims on different media platforms. In the recent years, this has evolved into and become known as the *#Metoo Movement* against sexual harassment (and sexual assault).¹²⁶ Whether as part of the abovementioned movement or otherwise, victims who have come forward with their sexual harassment claims, whether on internet based platforms, broadcast media or print media, have been faced with a range of reprimands.

On the societal front, harassers with power have used their influence to socially ostracize victims, to deny them any community/organizational support, blame the victim and to rebuke the claims of the harassed person.¹²⁷ In plenty of cases, this also has grave economic and career related consequences. The harassed person can be demoted, denied promotion, terminated from service and/or prevented from getting alternative employment.¹²⁸ Theoretically, according to Section 4(3)(e) of the 2010 Act, the Inquiry Committee is required to ensure that no hostile environment is created for a complainant. However, as mentioned above, most organizations or workplaces do not even have Inquiry Committees and even where they do exist, it is unclear what how much power they would be able to wield. Moreover, if a complaint had been made by someone who was not an employee or employer of the organization of the accused or otherwise does not fall within the purview of the Inquiry Committee, then the Inquiry Committee would be unable to protect the complainant against adverse actions. Additionally, if a complaint was made directly to the Ombudsman, then there is no mechanism for the Ombudsman to communicate with the relevant Inquiry Committee and protect the complainant.¹²⁹

¹²⁴ Ibid at 776

¹²⁵ P L D 2019 Lahore 407, Paras 13-23

¹²⁶ Nazish Brohi, “SEXUAL HARASSMENT: PAKISTAN’S TIPPING POINT?” *Dawn*, May 6, 2018, <https://www.dawn.com/news/1405703>.

¹²⁷ Kim Elsesser, “The Dark Side Of Empathy: Why Women Are Blamed For Being Sexually Harassed,” *Forbes*, August 27, 2019, <https://www.forbes.com/sites/kimelsesser/2019/08/27/the-dark-side-of-empathy-why-women-are-blamed-for-being-sexually-harassed/#22eaed9249de>.

; Shazia Mehboob, “After 2-Year Legal Battle, Samaa FM Staffer Wins Sexual Harassment Case Against Colleagues,” *Samaa*, May 27, 2020, <https://nayadaur.tv/2020/05/after-2-year-legal-battle-samaa-fm-staffer-wins-sexual-harassment-case-against-colleagues/>.

¹²⁸ Ibid

¹²⁹ Protection Against Harassment of Women at the Workplace Act, 2010

On the legal front— the defamation laws have been extensively used to silence victims. Regardless of whether or not they have filed a formal complaint, victims of sexual harassment are jeopardized by the threat of defamation proceedings that may be initiated against them by the accused, even before a formal complaint is filed against the accused. In a defamation case, the plaintiff or complainant can claim that the harassed person is making baseless claims to sully the reputation of the accused and/or serve some personal ulterior motive. Several high profile sexual harassment cases have been shackled by defamation proceedings.¹³⁰ This means that the accused will file a case of civil or criminal defamation against the person coming forward with a sexual harassment claim.¹³¹

A civil defamation case may be filed under the Defamation Ordinance, 2002, even if the person who is filing the suit cannot prove any special damages that they may have suffered.¹³² There are only defenses that may be taken against a suit for defamation listed in Section 5 of the Defamation Ordinance, 2002. With respect to sexual harassment, these boil down to two defenses: truth and public good. Either the respondent will have to prove the truth of their claim (it has already been discussed above that it is difficult to prove sexual harassment) or they will have to show that they made their claims known for the public good. However, proving public good is itself tied to proving the truth of their claims. If a defamation suit is decided against the respondent, the respondent can be asked to write an apology and publish it in the same manner and with the same prominence as the defamatory statement and to pay heavy compensation for damages.¹³³

A criminal case may be filed under Sections 499 and 500 of the Pakistan Penal Code, 1860. There are 10 exceptions, listed in Section 499 of the PPC, 1860, that may be taken as a defense against criminal defamation. These also boil down to the same as above: truth and public good. However, if convicted in a criminal defamation case, Section 500 stipulates that the convict may be imprisoned for up to two years and/or be required to pay a fine.¹³⁴

If the harassed person filed an official complaint and the complaint failed then, as a respondent in a defamation case, it will be even more difficult to take the defense that they were speaking the truth. Even if the harassed person gets a ruling in their favor, they will still have to face the defamation case, engage a lawyer and pay the emotional, social and economic costs that come

¹³⁰“Court Stays Proceedings in Meesha Shafi’s Defamation Case against Ali Zafar Says Shafi Will Lose Right to Record Testimonies, If She Fails to Produce Witnesses in Her Defence on Feb 18,” *Express Tribune*, February 13, 2020, <https://tribune.com.pk/story/2156126/1-court-stays-meesha-shafis-defamation-case-ali-zafar>.

¹³¹ Zainab Husain, “Sued for Saying #MeToo,” *Soch*, January 27, 2020, <https://www.sochwriting.com/sued-for-saying-metoo/>; Julia Jacobs, “#MeToo Cases’ New Legal Battleground: Defamation Lawsuits,” *New York Times*, January 12, 2020, <https://www.nytimes.com/2020/01/12/arts/defamation-me-too.html>.

¹³² Section 4, Defamation Ordinance, 2002

¹³³ Section 9, Defamation Ordinance, 2002

¹³⁴ Pakistan Penal Code, 1860

with it.

In June 2020, there was mass reporting of sexual harassment claims by students and alumni of Lahore University of Management Sciences (LUMS) and various other varsities on social media; primarily through Facebook groups. A group of lawyers who are alumni of the Shaikh Ahmed Hasan School of Law, LUMS, prepared and published a set of guidelines that can help protect publishers (that is, Facebook group administrators) and victims who are bringing forward their claims. These guidelines are reproduced in Annexure I, attached to this paper.

4.9. Criminal Remedies

In a criminal case, two elements have to be proven: mens rea (guilty intention) and actus rea (guilty act). Proving intent is particularly difficult in the case of sexual harassment because an action that causes long term trauma to the victim may be perceived as 'harmless fun' by the perpetrator. In a sense, sexual harassment may be compared to bullying, which can cause severe harm and trauma but may be considered to be a fun pleasurable activity by the perpetrator.

In a criminal remedy, the police would be primarily responsible for investigating the complaint. However, in the civil case the complainant would have to investigate and gather evidence themselves. Due to the personal nature of sexual harassment, the complainant is the most likely source of evidence regardless of whether they make their case or whether the police conducts an investigation. When a criminal case goes to court, a public prosecutor will be available to make the case.

Criminal penalties for sexual harassment at the workplace include imprisonment and/or a fine. It is three years' incarceration and/or Rupees 500,000 under Section 509, Pakistan Penal Code, 1860; and two years' incarceration and/or Rupees 10,00,000 under Sections 20 and 21, and between Rupees 50,000 to 10,00,000 under Section 24 of the Prevention of Electronic Crimes Act, 2016.

4.10. Pakistan Penal Code, 1860

The advantage of pursuing the remedy under Pakistan Penal Code, 1860 (PPC), is that it does not require a complainant to prove an employment relationship, that there was a workplace to speak of and so forth.¹³⁵

For a case under the PPC, a First Information Report (FIR) will have to be filed as soon after the incident as possible; otherwise, the more an FIR is delayed, the more the court will look upon the

¹³⁵ Pakistan Penal Code, 1860; Mahnoor Islam, "Anti-Harassment Laws in Pakistan," *Courting the Law*, June 1, 2019, <https://courtingthelaw.com/2019/06/10/commentary/anti-harassment-laws-in-pakistan/>; Editorial Staff, "15 Sexual Harassment Laws Every Woman Should Know in Pakistan," Stop Harassment Now: Anti Harassment Campaign in Pakistan, March 2, 2018, <http://stopharassmentnow.org/women-sexual-harassment-laws-pakistan/>.

claim itself with doubt and mistrust—as if it were an afterthought. The case will have to be fought before a regular criminal court, at the District and Sessions Courts, which are characterized by their patently discriminatory attitudes towards women.¹³⁶ Moreover, while the complainant is allowed to bring a lawyer, the case would also be prosecuted by a Public Prosecutor, who themselves are likely to be overworked, underpaid and unsensitized to the issue of harassment. As noted above, the standard of proof would also be higher as a criminal offence has to be proven beyond reasonable doubt and intent will also have to be proven along with the act of harassment. Lastly, unlike a case before the Inquiry Committee or the Ombudsperson, which are required to be investigated, heard and decided within specified time frames,¹³⁷ a criminal case before the District and Sessions Courts can take any number of years.

For the key complaints that can be made under the PPC, 1860, the table below provides an overview of the offences and whether it is cognizable (can an accused be arrested without warrant, bailable (can the accused be released from custody on bail) and compoundable (can a complaint be discontinued if a settlement is reached between the parties). The following table breaks down the relevant provisions of the Pakistan Penal Code, 1860:

¹³⁶ Hassan Niazi, “Understanding Pakistan’s Sexual Harassment Law – Part II,” *Express Tribune*, November 22, 2019, <https://tribune.com.pk/article/91190/understanding-pakistans-sexual-harassment-law-part-ii>.

¹³⁷ An Inquiry Committee and Competent Authority has to be set up within thirty days of the passage of the 2010 Act (Section 3); Accused will be informed of the complaint against them within three days and they will submit their written defense within 7 days, the Inquiry Committee will conclude its investigation and submit its findings and recommendations to the Competent Authority within 30 days of initiation of inquiry (Section 4); Any aggrieved party can file an appeal within 30 days of the decision and the Appellate Authority must respond within a further 30 days (Sections 6 & 9); The Ombudsperson must issue notices within 3 days of receiving a complaint and the accused must submit their written defense within 5 days (Section 9).

#	Law	Offence	Explanation	Punishment	Cognizable? 138	Bailable? 139	Compoundable? 140
509	PPC, 1860	Word, gesture or act intended to insult the modesty of a woman	Anyone harassing a woman through word, sound, gesture or exhibition of an object	Simple imprisonment for 1 year, or fine or both.	No	No	Yes, but only when permission is given by the court before which a prosecution is pending
496C	PPC, 1860 (Protection of Women (Criminal Laws Amendment) Act, 2006.)	Punishment for false accusation of fornication	Anyone making accusation, giving evidence or testimony for a false charge of fornication	five years in prison and with a fine	No	Yes	No
354	PPC, 1860	Assault or criminal force to woman with intent to outrage her modesty	Imprisonment of either description for 2 years, or fine or both.	Imprisonment of either description for 2 years, or fine or both	Yes	Yes	No
294	PPC, 1860	Assaults or uses criminal force to any woman, intending to outrage or knowing it to be likely that he will thereby outrage her modesty	A person who does something that is considered lewd or indecent and vulgar, including singing or reciting a song with vulgar lyrics,	imprisoned for three months or may be given a fine or be ordered to do both	No	Yes	No

¹³⁸ If an offence is cognizable, the accused may be arrested without an arrest warrant.

¹³⁹ If an offence is bailable, the accused can be released from police custody during the trial.

¹⁴⁰ If an offence is compoundable, the complainant is allowed to settle with the accused and withdraw their complaint.

4.11. Prevention of Electronic Crimes Act, 2016

The Prevention of Electronic Crimes Act (PECA), 2016, allows a complainant to seek relief against harassment that is done through the internet or through any electronic medium. In this law also, a complainant does not have to prove an employment relationship, a workplace or organization. So, for example, if a co-worker harasses a woman through electronic media, even if they maintain perfect behaviour at work and during work hours, she may alternatively or additionally make a complaint under PECA. A complaint may be made to the Federal Investigation Agency (FIA) Cyber Crime Circle or special courts set up under PECA.

Sexual harassment through the use of electronic media is a large and growing menace that discourages and pushes women out of the virtual public spaces that can be accessed through the internet.¹⁴¹ The following table breaks down the relevant provisions of the Prevention of Electronic Crimes Act, 2016:

#	Offence	Explanation	Punishment	Cognizable? ¹⁴²	Bailable?	Compoundable? ¹⁴³
20	Against the dignity of a natural person	Whoever intentionally and publicly exhibits, displays or transmits information which he knows to be false, and intimidates or harms the reputation or privacy of a person	Imprisonment of up to three years and/or a fine of up to one million.	No	No	Yes
21	Against modesty of a natural person and minor	Superimposes a photograph of a person on any sexually explicit image, circulating a sexually explicit image, intimidating the person with a sexually explicit act, induces a person to engage in sexually explicit acts	Imprisonment of up to five years and/or a fine of up to five million rupees.	Yes	Yes	No
24	Cyber stalking	Follow, contact or attempts contact to foster personal interaction repeatedly despite a clear indication of disinterest by such person; spy in a manner that creates fear of violence or serious alarm or distress.	Imprisonment of up to three years and/or a fine of up to one million.	No	Yes	Yes

¹⁴¹ Fabian Hepp and by, “Restricting Women’s Space on the Internet Is a Violation of Their Rights’: Heinrich Böll Stiftung,” Heinrich-Böll-Stiftung, February 14, 2018, https://www.boell.de/en/2018/02/07/restricting-womens-space-internet-violation-their-rights?dimension1=ds_digitalasia.

¹⁴² Section 43 & 44, Prevention of Electronic Crimes Act, 2016

¹⁴³ Section 43, Prevention of Electronic Crimes Act, 2016

Section 20 of PECA states that the offender must themselves know the information being spread by them is false.¹⁴⁴ It could potentially be difficult for the prosecution to prove that an offender knew they were lying. In a criminal case, the onus to shoulder the burden of proof is on the prosecution (and/or the complainant). Then, under Section 21 of PECA, an offender must be doing these acts with the intention “to harm a natural person or his reputation, or to take revenge, or to create hatred or to blackmail” which is difficult to prove.¹⁴⁵ Section 24 of PECA refers to the offence of cyber stalking.¹⁴⁶ However, this again requires the offender to have “the intent to coerce or intimidate or harass” which could potentially be difficult to prove. Moreover, a crime committed through electronic mediums allows the offender any amount of anonymity, therefore, the judicial system would need steadfast forensic investigation infrastructures to effectively investigate a crime. Theoretically, Section 40 of PECA requires “The Federal Government shall establish or designate a forensic laboratory independent of the investigation agency, to provide expert opinion before the Court or for the benefit of the investigation agency in relation to electronic evidence collected for purposes of investigation and prosecution of offences under this Act.” However, the extent to which such a laboratory will be functional and if cases of harassment will be given the importance to be investigated thoroughly, remains to be seen. Section 45 of PECA also empowers the Court to award damages or compensation in addition to the punishments of imprisonment and/or fine; this does not prejudice the complainant from pursuing any civil remedy that may be available to them.

Digital rights activist Fareiha Aziz notes that investigations remain pending due to backlog and lack of capacity; “Many litigants now want to settle rather than go through the arduous process of the law, but the law does not give them that option either”.¹⁴⁷ This applies to offences under Sections 10, 21 & 22 of PECA which are not compoundable. Nevertheless, lawyer and digital rights activist, Shmyla Khan, welcomed the first positive judgement that commuted strict sentences against sexual harassment through electronic mediums; however, she also notes that it remains to be seen if and when tests and standards of proof will develop to improve the efficiency of prosecution of these crimes.¹⁴⁸

¹⁴⁴ Section 20, Prevention of Electronic Crimes Act, 2016

¹⁴⁵ Section 21, Prevention of Electronic Crimes Act, 2016

¹⁴⁶ Prevention of Electronic Crimes Act, 2016. Available at: http://www.na.gov.pk/uploads/documents/1472635250_246.pdf

¹⁴⁷ Farieha Aziz, “Pakistan's Cybercrime Law: Boon or Bane?: Heinrich Böll Stiftung,” Heinrich-Böll-Stiftung, February 14, 2018, <https://www.boell.de/en/2018/02/07/pakistans-cybercrime-law-boon-or-bane>.

¹⁴⁸ Shmyla Khan and Zainab Durrani, “Man Convicted in the First Judgement under the Prevention of Electronic Crimes Act (PECA),” Digital Rights Foundation, April 6, 2018, <https://digitalrightsfoundation.pk/man-convicted-in-the-first-judgement-under-the-prevention-of-electronic-crimes-act-peca/>.

5. Conclusion and Recommendations

The sexual harassment law in Pakistan is developing in a haphazard manner. There are instances of encouraging judgements but there are also instances where sexual harassment claims have failed due to a technicality and/or due to unsympathetic or uninformed judicial attitudes. The law itself is unimplemented and most workplaces have failed to even so much as display the Code of Conduct, much less constitute their Inquiry Committees and Competent Authorities. The 2010 Act also leaves out a vast majority of the workforce by limiting itself to the formal workplace. Even within the formal workplace, the 2010 Act is not accessible to the working class. None of the complainants of the reported judgements that are available for reading are from the working class. There are almost no trainings or sensitization materials available on a mass scale so as to spread awareness about the nature of sexual harassment or the remedies available against it. In practice, evidentiary burdens remain ambiguous and tilted to favor the accused. Sexual harassment itself remains hugely underreported and those who do come forward are faced with multiple intimidation tactics such as systemic delays, character assassinations and countersuits for defamation.

Some general directions that may improve the situation in Pakistan are as follows:

1. Mandatory and regular sensitization of Ombudspersons, judges and Inquiry Committees. These do not have to be cost intensive training. These may even be in the form of an annual publication providing an overview of the scholarship, law and policy developments in the country and international. A short electronically conducted test based on the materials provided can ensure that the sensitization materials have actually been read and understood.
2. Union Councils can be given the responsibility to ensure that the workplaces in their area are implementing the law, at least in its barest form. That is, that they have displayed the Code of Conduct and have formed an Inquiry Committee that meets regularly. The minutes of the meetings of Inquiry Committees can be required to be submitted to the Union Councils on an annual basis.
3. All government and semi-government organizations can be required to display the Code of Conduct and establish Inquiry Committees on an immediate basis.
4. When the provincial law is passed for Sindh, it should:
 - i) Have more inclusive definitions and provisions for who can make a sexual harassment claim and what constitutes a workplace so that it does not continue to be limited to the formal economy and comprehensively covers all types of workplace participants in all types of workplaces.

- ii) Stratify the definition of an organization and/or a workplace to apply different standards of implementation to different types of organizations. For example, entities smaller than 10 persons should not be required to have an Inquiry Committee but must be entitled to approach the Ombudsperson. However, all workplaces should be required to use standardized education materials to sensitize all new and existing employees and all employees must take a test based on these materials on an annual or six-monthly basis. For workplaces that employ daily wage workers, public meetings should be conducted on an annual basis to assess the levels of trust, comfort and awareness as to the workers' rights under the sexual harassment law.
 - iii) Set up sub-offices Ombudspersons for sexual harassment at the district level in order to ensure every worker or employee.¹⁴⁹
 - iv) Codify the reasonable woman standard.
5. It may be useful to introduce new evidentiary standards. For example, as in rape cases, a victims' testimony alone can suffice as evidence, if it can stand the test of cross examination. That is, if the victim's account does not materially change in the face of cross examination. A similar approach may be taken with respect to sexual harassment complainants.¹⁵⁰
 6. Innovative means of evidence collection may also be considered. For example, the harassed person could write an account of or videotape their testimony, therein including any other relevant evidence such as emails, Whatsapp messages, photographs or the newspaper from that day, and send it to themselves through registered post and keep the envelope sealed until they are ready to make a complaint. Once a complaint has been filed, that sealed envelope of registered mail can be provided as evidence.
 7. Concrete measures also need to be taken to prevent backlash of a complaint for the complainant and to encourage witnesses to come forward to assist the complainant without fearing similar repercussions for themselves.

¹⁴⁹In India Section 6 of Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 provides that,

"6. (1)Every District Officer shall constitute in the district concerned, a committee to be known as the "Local Complaints Committee" to receive complaints of sexual harassment from establishments where the Internal Complaints Committee has not been constituted due to having less than ten workers or if the complaint is against the employer himself." Available at:

¹⁵⁰ Hassan Niazi, "Understanding Pakistan's Sexual Harassment Law – Part II," *Express Tribune*, November 22, 2019, <https://tribune.com.pk/article/91190/understanding-pakistans-sexual-harassment-law-part-ii>.

Annexure

5.1. Annexure I

The following guidelines were prepared for those coming forward on Social Media by a group of lawyers who are alumni of the Shaikh Ahmed Hasan School of Law, LUMS

“IMPORTANT GUIDELINES FOR VICTIMS WHO ARE POSTING:

(Keeping in mind the potential legal ramifications, several lawyers - LUMS Alumni - have drafted the following guidelines.)

[For the Facebook Group Administrators]

As the publisher of anon accounts from victims, please add the following disclaimer:

"The publisher assumes no responsibility for the veracity of the account being shared. Please consider this to be an expression of opinion being shared to protect female/male/non-binary bodies, dignity and mental health within society, in the greater societal interest of promoting a fairer world."

Having received a story from a victim, please remove it from Facebook chat (messenger etc) immediately after having posted it.

If you are posting on behalf of ‘anons’ [anonymous persons] and have talked over the phone with them, have texted/whatsapped them, or communicated with over any other platform, please delete every trace of your conversation with anon after posting.

The stories should be posted by different people, even if one contact person is receiving them and sending them as anonymous messages to others. This spreads the liability and makes it difficult to target an individual.

For people sharing [personal stories]:

Name and shame without actually naming and shaming, provide other descriptors, hints, etc. Refrain from using overly specific hints, nicknames, or any narrow descriptions which make it easy for any third person to identify who you are referring to.

Do not share your harasser’s Facebook profile, do not share his picture.

You can share his batch year and his initials, for example, if your harasser's name is Zeeshan Kakyzai, you can use ZK19 (19 representing batch of 2019).

Do not name/identify other people as witnesses to the event of harassment.

Kindly replace “Rave” as “Party”, if anything goes to a court of law, people might switch to victim-blaming.

On every post, please add in terms that it is your 'opinion' that women are subjected to harassment and it is necessary that you raise your voice and share with other women so that they can be cautious while dealing with men in general.

Please add the following disclaimer to your personal stories:

"The following story is correct to the best of my knowledge. Any minor deviations are unintentional and do not substantially take away from the truth of my claims. It is being published in good faith to protect men/women/non-binary individuals from violative behavior and to protect female/male/non-binary bodies, dignity and mental health, in the greater societal interest of promoting a fairer world."

Further notes:

If you have received an electronic defamation notice, you can reply to it electronically, without mentioning your house address and contact number. We are ready to help you in drafting a reply.

Threat to sue for Defamation:

- The 14-day period only begins after a physical legal notice is sent at your residence.
- After defamation proceedings are instituted, the burden of proof falls on the victim, which means that the victim has to essentially prove the actions of the harasser. Gather any proof, including corroboration by individuals who may have witnessed the incident, who may have been attacked in a similar manner or whom you may have told right after the incident.
- In case a legal notice is sent to you, please feel free to contact any of the persons mentioned below. We currently have a team of practicing lawyers (LUMS Alumni) who are willing to provide free legal assistance. We will help you draft a counter-notice and provide guidance about any potential penalties or legal remedies available to you."¹⁵¹

¹⁵¹ Drafted by Fatima Wahla, Fatima Anwar, Hafiz Usman, Nabeeha Siddiqui, Aadil Lalani and Hiba Fatima. Whetted by Basil Nabi Malik. Published on Facebook group, 'Democratic LDF [LUMS Discussion Forum]' on 26th June 2020. Reproduced with permission.