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### Sexual Harassment - A Comparative Study of India & Pakistan in the light of Recent Developments in Pakistan

<sup>a</sup>Sabeen Rehman\*, <sup>b</sup>Mudassara Sabreen

<sup>a</sup> PhD Scholar, School of Law, Bahria University, Islamabad, Pakistan.

<sup>b</sup> Head of Department, Department of Sharia and Law, International Islamic University, Islamabad, Pakistan.

\*Corresponding Author Email ID: [sabeenr234@yahoo.com](mailto:sabeenr234@yahoo.com)

#### ABSTRACT

The study is a comparison and analysis of the laws relating to sexual harassment in Pakistan and India, in light of the legal feminist theory. An attempt is made to identify gaps in them and amendments are proposed. The law is supposed to act as a protector, but it seems to have failed in providing much-needed protection to women. The study discusses the reasons behind this failure and proposes certain amendments for lawmakers to ensure women's rights in the current changing environment. It is a dire need of the hour to make laws that not only fulfil the purpose of protecting the citizens but are feasible to enforce given the social norms of society.

**Keywords:** Feminism; Gender equality; Harassment; Legal feminism; Women rights; Patriarchy and law.

#### INTRODUCTION

Women are the most fragile part of the society who needs constant care and protection not only from the various segments of society but also from the whole system including the legal system (Evans, 2015; Lips, 1991). The law has not performed its role effectively, and it has become a tool in the hands of the abuser i.e., male. It should play the role of protector for her. It is the need of the hour (DeLaet, 2013).

Nearly one in three women face abuse at least once in their lifetime (Organization, 2020). That number increases in times of crisis such as witnessed during the COVID-19 pandemic and recent humanitarian crises, conflicts, and climate disasters (*In focus: 16 Days of Activism against Gender-based Violence*, 2021). A female faces violence of one sort or another both in their homes and outside, which is due to their unequal position in a patriarchal society (Figes, 1986). The World Health Organization estimates that 13 to 61% of women aged 15–49 years worldwide have experienced some form of physical or sexual violence carried out by a partner. Despite various International Instruments to upgrade her status, there is not much change in her position (Jha & Nagar, 2015). Some of the international efforts are:

- In 2010, the UN General Assembly voted to form a UN task force to pursue the equality of women in social and legal practice, and the UN Charter imposes a legal obligation on UN Organizations to ensure respect for human rights and equality (International Economic and Social Cooperation, 1945; United Nations Sixty-fourth General Assembly, 2010).
- Universal Declaration of Human Rights (1948) deals with the issue by stating that everyone is equal in dignity & right and entitled to all rights & freedoms without any discrimination on the basis of sex. Again it provides protection for life liberty & freedom without any discrimination & prohibits torture or cruel, inhuman, or degrading treatment or punishment to anyone. There have been three United Nations world conferences on women. Wherein strategies were framed to promote gender equality and opportunities for women.
- Covenant on Civil and Political Rights (Art. 6 and 9, 1966) talks about some very valuable rights which include the right to life, and the right to liberty & security, hence imposing an implied obligation to protect women from violence.
- The Vienna Declaration (1993) declares all forms of

gender-based violence & sexual harassment incompatible with the dignity of humans and calls for its elimination through national and international cooperation.

- The Beijing conference (1995) provides a platform for concentration on some of the key issues identified as fundamental obstacles to the advancement of the majority of women in the world. It focused on issues such as discrimination against women, violence against women, etc.
- The Convention on Elimination of all Forms of Discrimination against Women (1981), to which 166 countries are members, is a landmark document because it was established to monitor and promote women's rights. It was the first document which has brought women rights under the domain of human rights.

Almost every country is a signatory of one or another document and also incorporated various provisions of them in their national legislation, but the position does not improve much. It has been observed that one of the major reasons is that most women are dependent and weak and so are not only exploited by the world outside, but also by their families. Economic stability and empowerment can play a key role in upgradation of her status. But when she decides to step out of her home, she faces a number of problems. Amongst them, sexual harassment is the worst which has detrimental effects on her life. Strict action is required to eliminate this terrifying act.

It has been observed that though legislation is available on the point, the question is of its effectiveness. Difficulty in its enforcement is a key indicator of the fact that there are some inherent defects in existing legislation. A good and effective piece of legislation could be enacted only by doing thorough and comparative research. India & Pakistan have so much in common including but not limited to the same mindset, same culture, same problems at the implementation level due to the patriarchal approach of society, etc. With so much in common, both the countries could provide a good basis for comparative research to enact an effective piece of legislation. To achieve the objective, an attempt has been made through this research to compare the legislation available to deal with the problem of sexual harassment in both the countries and find out the gaps in existing available legislation and try to learn through this comparative study, how those gaps could be filled on the

basis of experience gained at implementation level in both countries.

The research has been heavily based upon library-based resources. It's a mixture of research methodologies which includes historical, descriptive, analytical and legal research methodologies. Through this research concept of sexual harassment has been explained in detail, an attempt to trace the history of the law i.e. the circumstances which trigger the enactment of the law, a discussion of various sections of law and a comparison between the law of sexual harassment in India and Pakistan has been made by analyzing the laws of both the countries.

At the end of the research, one would be in a position to answer the following questions:

- Whether unequal treatment of law towards females provides the basis for injustice towards them or not?
- Are the existing laws to curb the harassment against women, sufficiently effective to serve their purpose, or do they need certain amendments?
- What are the problems that has been faced at the implementation level?
- What amendments or reforms are required to make harassment laws for the protection of women, more effective?

In the next sections, based on the relevant literature review, an attempt is made to provide a better understanding of the concept of sexual harassment.

### **SEXUAL HARASSMENT OF WOMEN AT WORKPLACE**

Women face challenges in all spheres of life. Whether they are domestic workers, employed in offices, or working in any other capacity, they are confronted by the evil of sexual harassment. There is an array of research available regarding Pakistan and India which highlights the challenges faced by women and how law can become a way of dealing with them. Yet, on practical level efforts to that effect remain insufficient. As Gupta, (2019) points out. The study is focused on the problems faced by female domestic workers in India and concludes that the current legal framework is not sufficient to tackle the injustices. According to one estimate, every 12 minutes a woman is harassed in India (Srivastava, 2010). Women in India are playing an even bigger role in the present era than ever before due to rapid industrialization and globalization. Thus making sexual harassment at the workplaces, an issue that needs to be tackled with utmost urgency. To do that the first step is to enhance the awareness among

people about the existing forms of sexual harassment, as well as, their preventive measures and legal framework for addressing the issue (Poonia, 2019).

Ramakrishnan, (2019) evaluates the current situation of sexual harassment in India and points out that even today 70% of women do not report such incidences in the cases where perpetrators are their male superiors or co-workers. Moreover, such cases have constantly increased in Indian workplaces since 2014. Even when the preventive legal instruments are made available, lack of awareness remains a hurdle in eradicating this prevailing problem. The study concludes that law enforcement agencies should be involved in process of creating relevant awareness among people and training them to identify as well as report the incidences of sexual harassment at workplaces.

Sexual harassment at workplaces is not a problem unique to Indian society. It is a worldwide issue and women in developed, as well as developing countries, have been dealing with these injustices. In Pakistan, too, the problem persists. According to Hadi, (2018) the reason for an increase in harassment issues is that, traditionally, interactions between men and women were minimum, but in the past few decades Pakistani society has changed and a hostile environment has been witnessed with unwelcome sexual behavior. With the economic change, more women are seeking employment to provide financial support to their families. And this has necessitated the awareness and prevention of sexual harassment in workplaces. The study further notes that gender segregation and bias are common in Pakistan. Therefore, there is a need to not only make laws providing protection to the women but also to enforce their implementation, which might be challenging in a country like Pakistan where rule of law is not prevalent. Another study by Jamil, (2020) reveals that female journalists in Pakistan suffer from verbal abuse and sexual harassment within and outside of their organizations. It not only affects their work but also has an impact on their personal lives. The study shows that Western ideologies of feminism might have minimum or no impact in Pakistan because most the women are illiterate and unable to understand such philosophies. Therefore, there is a need to adapt the ideas of "freedom" and "women rights" according to the local cultural and religious context. Only then the efforts to enhance gender equality might succeed in the country.

Ali and Siddiqi, (2019) explore the contemporary state of

sexual harassment regarding female political workers in Pakistan and find that it is a major problem. In the light of increasing women participation in the political sphere, as well as in other workplaces, there is an immediate need to address the problem of sexual harassment at workplaces.

There are numerous studies available that provide evidence of sexual harassment in Pakistan (Naizi, 2012). Patriarchal practices are rooted in Asian culture (Richter, 1991), especially when it comes to limiting women's power and control over their destiny (Heimer, 2000). Not only that, it is an issue that remains underreported in both India and Pakistan. It is one of the biggest hurdles for women in practicing their rights (Centre for strategic and International Studies, 2018) and thus, needs immediate attention by the law makers. To fully understand the extent of the problem, it is important to learn what is meant by sexual harassment.

Sexual Harassment is an act against a woman that is not only a violation of her fundamental rights but also detrimental to her physical, psychological, emotional, as well as economic wellbeing and growth. All the efforts at the international and national level seem to have failed as females are still victims of discrimination, inequality, oppression, and bias (Rahman, 2021). These circumstances have given birth to the feminist movement. This movement is based on feminist theory, which talks about the understanding of the nature of gender inequality and the experiences, interests, chores, roles, etc. of man and woman in the society (Andermahr, 1997). Themes explored in feminist theory include discrimination, objectification, oppression, patriarchy, and harassment. It is said that most of the problems faced by females originated due to the biased behavior of the society towards them and the law is a tool, by the use of which, those patriarchal rules were imposed (Beaumont, 2016). The law is supposed to provide protection to them in such kinds of circumstances, but it is actually aggravating the situation by providing a basis for injustice towards them (Scutt, 1995).

It seems that the laws made for the protection of females are enacted on the basis of legal feminist theory, which believes the laws that are actually made by males without any consultation with females are responsible for the current status of women. Thus, if one desires to change or upgrade the status of females, then more female-friendly laws are required to be passed by the legislature having a fair number of female representation (Lal et al., 2015).

## FEMINISM

Feminism is the opposite of patriarchy. The word patriarchy has its roots in the Greek word “patria” which means father. A male member of the family having an autocratic power over the females of the family or a member of ruling class having authority to control the actions of female members of the society is patria. According to feminists, patriarchy is an unjust social system that aims at subordination, discrimination, and oppression of females (Ayub & Raina, 2018; Beechey, 1979). Even the jurists like Aristotle once said, “The relation of male to female is by nature a relation of superior to inferior and of ruler to ruled.” Again, Thomas Jefferson said, “Women’s position is in house and not in parliament and public office. They should be confined chiefly to housekeeping and childbearing.” In the nineteenth century, the violence and aggression against women led to introduction of the term feminism to combat patriarchy, and it is said that Charles Fourier coined the term in 1837 (Fitzpatrick et al., 2013). For the first time, it was used in France and Netherland in 1872, Great Britain in 1890 (Watkins et al., 1992), and the US in 1910 (Cott, 1987).

It is difficult to acquire a unified definition of feminism because even if we accept feminism as a struggle of oppressed women, there may arise disagreements over the meaning of oppression. Some understand it in the context of economic oppression and the others consider the root cause of this in physical oppression of patriarchy (Bowden & Mummery, 2014).

Though its meaning in the modern era has now changed, Estelle Freedman (2002) has made an attempt to devise a comprehensive four-part definition which says, “Feminism is a belief that women and men are inherently of equal worth. Because most societies privilege men as a group, social movements are necessary to achieve equality between women and men, with the understanding that gender always intersects with other social hierarchies.”

Broadly speaking, feminism can be understood in two ways, one as ideology and other as a movement, but strictly speaking, these two cannot be separated from each other because every movement is based on an ideology and every ideology gives birth to a movement so both are inseparable. Many link feminism with women’s movement and this has produced the “Wave Theory” of

feminism, i.e., 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, and the most recent one, 4<sup>th</sup> wave feminism (Humm, 2014).

### First Wave Feminism

Mary Wollstonecraft in 1792, challenged the biased attitude of the society in her book “Vindication of the Rights of Women” (Sapiro, 1992; Sharlach, 2009; Taylor, 2003). It gave birth to a demand for equality and the end of discrimination, which turned into an organized movement in 1848 through a declaration in a convention in the US.<sup>1</sup> This was the formal beginning of first wave feminism (Magarey, 2001).

Initially, feminism started as a social reform effort, but later it got a missionary zeal through the revivalism of evangelical movements (Midgley, 2007; Mikaelsson, 2003). The main focus of the first-wave movement was on full citizenship and suffrage. This early movement was criticized on various grounds including not representing properly the women’s needs as a whole. Consequently, the second and third wave have made it a priority to understand the intersection between gender, class, and race (Schuller, 2017).

The first wave was limited to America and Europe only. It never came out of these areas and was limited to these places till its end. The efforts of feminism started to bore fruit when the right to vote was first given in New Zealand in 1893 and then in the UK in 1918 and in the US in 1920. As the focus of the first wave movement was on the acquisition of the right to vote for women, as soon as this right was granted by the US in 1920, the movement came to its end (Baxandall & Gordon, 2002).

### Second Wave Feminism

Though it is said that the second wave of feminism was initiated when Betty Friedan’s book, “The Feminine Mystique” was published in 1963, not all authors agree with it. According to some of them, like Banks (1981), the book was “a consequence rather than the cause of a new mood among middle-class women.”

The second wave of the 1960s and 1970s fought for equality in legal, educational, and economic spheres like the first wave, but both the movements are quite different from each other (Humm, 2014). Some feminists like Nicholson are of the view that the second wave in itself contains two separate political movements since the time of its inception. One of them is the women’s rights movement, while the other one is the women’s

<sup>1</sup> Seneca Falls Convention, 1848

liberation movement (Freeman, 1973). The focus of the first movement is to end workplace inequalities and it is led by the dissatisfied white middle-class housewives. Whereas, the second movement is led by those females who felt excluded from leadership, decision-making, and intellectual roles.

Another important feature of second-wave feminism is that it was theoretical. They introduced new theories and tools in an academic study of feminism, published in 1949, where it is pointed out that women's problems are deeply rooted in the culture, institutions of society, etc., and the existing theories cannot deal with these issues adequately (De Beauvoir, 1997).

### Third Wave Feminism

It was introduced in the middle of the 1990s. Generation Xers, born in the 1960s and 70s in the developed world, is the one who led this movement. It rejects all core ideas of 2nd Wave Feminism, which believed that there exists a sisterhood on the basis of shared experience by the women of this world. But it has been observed in the third wave that the experience of every woman depends on the circumstances where she lives. Therefore, everyone has a different experience. Key features of 3rd Wave feminism are non-universality, intersectionality, cultural relativism, plurality, and diversity.

### Fourth Wave Feminism

It started in 2012 in most parts of the world except in Europe, Latin America, and Spain (Abrahams, 2017). It focuses on the idea of women empowerment and the use of internet tools and is centered on intersectionality. It worked against the principles that provide a basis for oppression and discrimination and believes that social media, news, and print media platforms should be effectively engaged. Kira Cochrane has argued that the 4th Wave is "defined by technology" (Saxena et al.; Starkey et al., 2019). The fourth wave also worked against the stereotype standards of masculinity which stigmatized gay men and create undue pressure on men and women by specifying their roles that women have all the burden of home making, while the male has all the economic burden (Cochran, 2018; Munro, 2013; Parry et al., 2018).

The purpose of all these movements is to upgrade the status of women and to end the violence against them.

Through awareness campaigns and law, the purpose can be achieved. Another movement that started during the second wave and was developed in the third wave has introduced legal feminism.

### Legal Feminism

Legal feminism is known as feminist jurisprudence and was introduced in the second stage of feminism in the late 1960s. It believes that the law is greatly influenced by patriarchal ideas and that it is responsible for the historical subordination of women. The law has been used as an instrument to maintain the supremacy of man (Polymenopoulou & Rehman, 2021).

The first known use of the term *Legal Feminism* is in the late 70s by Ann Scales (Cain, 1988; Scales, 2006). Later Martha Albertson Fineman,<sup>2</sup> played the vital role in the development of legal feminism by exploring the relationship between feminist theory, practice, and law. In most of the cases where a woman is a victim, the law focuses more on saving an innocent man by not wrongly punishing a man, and in this process, it completely disregards the legal and emotional needs of a woman e.g. rape cases. This attitude has led to the evolution of legal theory (Abrams, 2005). Its purpose is:

- To highlight the ways in which the law plays a role in the discrimination and subordination of women.
- Bring a change in the status of women by introducing amendments and reforms in the existing laws to make it more objective towards its approach to gender.

By applying feminist legal theory on harassment laws, the current study identifies the discourse between laws and their implementation and highlights the areas which need improvement.

### Application of Feminist Legal Theory on Harassment Laws

On the basis of the feminist legal theory, various protective laws have been passed to save the females from discriminatory behavior and to make them a productive part of the society. Sexual Harassment law is one of them. To eradicate hurdles in way of woman's economic empowerment, it is extremely important to ensure a harassment-free environment. It is also a violation of her basic human rights as well as fundamental rights granted and protected by the constitution.

<sup>2</sup> Martha Albertson Fineman is an American jurist

With sexual harassment in the workplace, it is impossible to achieve the goal of maximum participation of females in the mainstream and their contribution to the economic growth of a country. Almost 80% of females face some kind of sexual harassment at work, market, on the roads, in parks, and even at home irrespective of their class, their position, their status, etc. It is a serious threat to the development of any society. The Vienna accord of 1994 and the Beijing Declaration and the platform for action (1995) have acknowledged this. It can be the reason that the Convention on Elimination of All Forms of Discrimination against Women (CEDAW) in its General Recommendation XII (1989) stressed that the states should take some measures to deal with this problem.

The patriarchal approach of society is the root cause behind the failure of effective implementation of the law. People take it as a non-serious, trivial, and harmless matter. Even the training a woman receives at home is to be quiet on such an issue. If any woman refuses to accept this and raises her voice against such behavior, everyone blames her for the act done to her. The fact could be gauged from the figures of reported cases for instance, in 2021 there were 15 cases reported in Pakistan according to the Human Right Commission of Pakistan. These figures clearly point out the fact how fearful today's victim is that she prefers to maintain silence. This is not the situation with Pakistan only, but almost every country is facing the same challenge despite the fact that the right to live with dignity and without fear and discrimination is a right guaranteed by the constitution of every country. Through a comparative study of the laws of Indo Pak, an attempt has been made to find out the gaps so that the goal of maximum female participation can be achieved. Before looking at the matter in detail, it is important to understand the term first.

### Meaning of Sexual Harassment

A few definitions of the term are as under:

- **International Labor Organization (ILO):** "Any physical, verbal or nonverbal conduct of a sexual nature and other conduct based on sex affecting the dignity of women and men, which is unwelcome, unreasonable and offensive to the recipient; and a person's rejection of or submission to such conduct is used explicitly or implicitly as a basis for a decision which affects that person's job or conduct that creates

an intimidating, hostile or humiliating working environment for the recipient."

- **Mr. Alok Bhasin (2007)** defines the term as, "While physically touching and making of sexual demands may be the crudest form of sexual harassment, giving rise to the earliest complaints and court or tribunal decisions, experience has shown that the concept of sexual harassment can be much broader. Innuendo by words or gestures, unwelcome staring, sexually abusive jokes or other language, the unwelcome displaying of pornography and the writing of graffiti on workplace walls which singles out or demeans individual employees are all now generally recognized as forms of sexual harassment, even though they may not involve an abuse of power or making of sexual demands by the member of one sex upon a member of the other sex."

### TYPES OF SEXUAL HARASSMENT

1. Blatant or Higher degree harassment
2. Less Blatant or lesser degree harassment

To eliminate and control this behavior and to ensure full participation of women, some countries have enacted special laws while others incorporated provisions in their general laws. In India and Pakistan, it has been discussed under criminal law, as well as through special legislation dealing only with the menace of the sexual harassment i.e., Protection against Harassment of Women at Workplace Act, 2010, (Pakistan) and the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013, (India).

### SEXUAL HARASSMENT AND PAKISTANI LAW

In Pakistan, the matter has been dealt with in two ways i.e., through an amendment in criminal law and legislation especially dealing with the matter (Pakistan Penal Code, 1860, Amended February 2010 #175; The Protection against Harassment of Women at the Workplace, 2010). The Act, 2010 not only defines the term but also established an independent forum where the victim can present their application. Detailed procedure and punishment have also been provided by the law itself. Apart from these laws, there are also provisions in the Constitution of Pakistan (1973) which deal with the matter when it talks about equality, a safe environment, dignity, etc.

### **CONSTITUTION OF PAKISTAN (1973)**

According to the Constitution of Pakistan (1973), all the laws should be according to the teachings of Islam which talk about human dignity. The study of various articles depicts the fact when it talks about the dignity of man (Art 14), Prohibition of discrimination on the basis of sex (Art 25), Prohibition of discrimination in service on the basis of sex (Art 27), direction to ensure full participation of women in all spheres of national life (Art 34), just and humane conditions of work & maternity benefits (Art 37 (e)), security to the well-being of people irrespective of sex (Art 38 (a)...), etc.

### **PAKISTAN PENAL CODE (1860)**

Pakistan Penal Code (1860) is another piece of legislation where an attempt has been made to deal with the matter. Sec. 509 of the Act deals with it when it states that, “a person doing anything with an intention to insult the modesty of women shall be punished for one year or fine, or both” (Sec. 509). An amendment was made in sec. 509 in 2010, which has enlarged the scope of the section by defining the term sexual harassment in more detail. Now, every unwelcome sexual behavior comes under the ambit of sexual harassment. It has also enhanced the punishment from 1 year to 3 years and a fine of up to 500,000. It is applicable to all the places outside the workplace like parks, hotels, roads, etc.

### **Protection against Harassment of women at workplace Act, 2010**

Islam talks about equality and protection of women and these are the basis of the law enacted for the protection of women in the workplace. The Constitution of the country also provides for the right to earn a livelihood without any fear of discrimination (Art 18, Constitution of Pakistan, 1973) and the dignity of human beings (Art 14, Constitution of Pakistan, 1973). This is a special law enacted to deal with workplace harassment only and applies to everyone irrespective of their gender including the harassment between the same sex when it states, “Harassment means any unwelcome sexual advances, request for sexual favors, other verbal or written communication, 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 an attempt to punish the complainant for refusal to comply to such a request or is made a condition for employment” (Sec. 2(h) of Sexual harassment Act, 2010).

### **Historical Background**

In 2001, six organizations<sup>3</sup> gathered to work against harassment. In a patriarchal society where the woman has been considered an object, this idea was something new and nobody had ever considered it a problem. Surprisingly, the same was the attitude of government and media. With unremitting efforts of AASHA, finally, in December 2001, the government agreed to frame an anti-harassment policy to control the situation in Pakistan. Prior to that, except UN, there was no other organization that had a clear policy on that. The word sexual was not allowed to be used so instead term “Code of Conduct for Gender Justice” was used in the draft of the anti-sexual harassment policy prepared for the government by AASHA. The policy was voluntarily adopted by 300 private organizations, but the government did not adopt it even for its single department. After that, AASHA drafted an amendment in sec. 509 to bring change in existing law and also a law specifically dealing with the issue. The draft was prepared in 2007 and after rigorous efforts of ASSHA the Bill got the assent of the President of Pakistan on 9<sup>th</sup> of March 2010 and became Act.

### **Scope of Law**

The Act 2010 deals only with workplace Harassment, unlike Sec. 509 and is applicable throughout Pakistan.

### **Explanation of Law and its Latest Development**

Whenever the person in authority makes a demand of sexual nature in any manner or makes it a criterion for the wage increase, promotion, or even job itself and on refusal, creates a hostile environment and makes it impossible to work, this law will come to woman’s rescue. For example, unnecessary physical contact, filthy jokes, blocking the way, making personal comments, giving unwanted personal gifts, etc. An office of Ombudsman for sexual Harassment at the Federal and Provincial levels has been established under the law (Sec.

<sup>3</sup> The six organizations are, Mehargarh, Action Aid, Bedari, Interactive Resource Centre, Hawwa Associates, and Pakistan Institute of Labour Education

and Research. And the alliance is known as AASHA (Alliance against Sexual Harassment)

7 of Protection against Harassment of Women at Workplace, Act, 2021). The establishment of an inquiry committee at the organization level is mandatory (Sec. 3). The committee is empowered to impose minor or major penalties depending on the gravity of the offense (Sec. 4); from censure, withholding of promotion or increment, stoppage, compensation to reduction to lower post, compulsory retirement, removal or dismissal from service. To cope with the requirements number of changes were incorporated through *Protection against Harassment of Women at Workplace*, an amendment of the Act in 2021. These include the change in the definition of a workplace which now includes the informal sector and domestic workers also. Word “women” has been replaced by the word “person” to bring clarity. A person who was dismissed or resigned is now competent to file a complaint within 90 days (Sec. 2 (a) of Amendment). A new term “sexist harassment” has been introduced to include harassment based on gender. Another change is the inclusion of cyber activities (Sec. 2 H (d & e) of Amendment), which includes, but is not limited to, online business, cyberstalking, etc. To deal with the misuse of law a new section has been inserted which states that such false complaints will be punished with a fine of up to 50,000 PRs (Sec. 10 A). The court has also delivered valuable judgments on the topic in a recent case<sup>4</sup> Supreme Court interpreted the term “harassment” and explained that only harassment of sexual nature would be covered under the act and not any other like if it is done on the basis of religion, race, ethnicity, etc. even when the act done is of hostile nature. Again, in another case, the Lahore High court endorsed the interpretation of sexual harassment given by the Supreme Court of the US and states, “in evaluating the severity and pervasiveness of sexual harassment, we should focus on the perspective of the victim.... conduct those men consider unobjectionable may offend many women” (Malkani, 2021).

#### **SEXUAL HARASSMENT AND INDIAN LAW**

India is no different from the rest of the world where the stereotype of “a weak and helpless woman” is fostered to ensure complete dependence on males (Haq, 2017; Sharma, 2015). India was voted the most dangerous

country for women in 2018 by a poll conducted by Thomson Reuters Foundation. According to NCRB data, only in Delhi, a total of 13640 cases are registered in 2018 (Turrey, 2019; Urvashi, 2021). Consequently, her fundamental right to achieve economic independence in a safe environment is affected. Government always puts its efforts to ensure equality and a safe environment through existing and new legislation and also made amendments to existing laws.

#### **Constitution of India (1949)**

There are a number of provisions available in the Indian Constitution which deals with the discriminatory behavior against woman and provides her protection. Article 14 is one of the examples that talks about equality, Article 15 (1) (2) & 16 (1 & 2) elaborate on the principle by adding that difference in treatment between men and women by the state is totally prohibited on grounds of religion race, caste, sex, or place of birth. The same section even provides a special power to the state to make special provisions for women which will not be considered discriminatory. Again, there is a right to live with dignity and a right to have an equal opportunity with no difference in pay or other facilities on the basis of sex is protected under Constitution (Art 21 and 39, the Constitution of India, 1948). Article 51 imposes a duty on every citizen to promote harmony and condemn practices derogatory to the dignity of women. On the basis of these Articles, some new laws were enacted and certain amendments were made to existing laws.

#### **Indian Penal Code (1860)**

Prior to the Act of 2013, there were few sections in IPC dealing with the issue of sexual harassment, but without using the term like sec. 294 which prohibit obscenity in a public place, sec. 366 prohibits forceful intercourse and marriage, sec. 503 injury to reputation, sec. 510 misconduct while drunk, sec. 354 use of criminal force to any woman, intending to outrage her modesty are punishable, sec. 509 prohibits outraging of modesty of women etc. But the terms used in these sections are not clear and create confusion like “obscene or modesty” has not been defined anywhere. It creates a lot of trouble for enforcing agencies, e.g., in the case of swapna,<sup>5</sup> Supreme

<sup>4</sup> That is, Nadia Naz vs. President of Islamic Republic of Pakistan & Others, Supreme Court, Civil Petition No. 4570 of 2019

<sup>5</sup> That is, Swapna Barman vs. Subir Das (2004) 1 GLR 168



Court held that “the word modesty does not lead only to the contemplation of sexual relationship of indecent character.”

Therefore, an amendment was made in 2013 and sec. 354-A was inserted which defined and explained the term sexual harassment with clarity. Sec. 35-A brings clarity when it describes sexual harassment as any physical contact and advances involving sexual overtures or demand or request for sexual favor as punishable with rigorous imprisonment for a term which may extend to 3 years or fine, or both. Again, showing pornography against the female’s will or making sexually colored remarks are made punishable with imprisonment up to one year or fine, or both (Sec. 354). The term sexual harassment was used explicitly through this amendment and the act was made cognizable and bail able. The law covers not only the place of work but also places like markets, cinema halls, public gatherings, etc.

#### **Indecent Representation of Women (Prohibition) Act, (1987)**

It is the responsibility of a State to provide security and protection to the females, State is also responsible to ensure respect & dignity for her. Sexiest advertisements and hoardings are one of the ways in which her dignity could be affected in an adverse manner. To achieve these objectives and to stop the trend of sexist advertisements and hoardings, The Indecent Representation of Women (Prohibition) Act, 1986 was passed by the Parliament. The Act is a result of public demand and women’s movement for legislative action against the derogatory depiction of women. The Act prohibits the representation of a woman, her figure, or any body part in any indecent, derogatory, or denigrating (criticize unfairly) manner. Though the Act lacks the precise definition of derogatory or denigrating women, the courts are trying to do their best in the interpretation of the law keeping in view the circumstances in which it has been done. The case<sup>6</sup> of a famous Tennis player Boris Becker posing nude with her dark-skinned fiancée is an example of it where the courts decided in favor of the player by stating that though both of them are nude in the picture, the purpose is not of any kind of objectification of a woman and it was done to eradicate the evil of racism by showing that a white-skinned man can marry a dark-

skinned girl. The ambiguity of law also affected the 3rd Wave feminism adversely, because at that time indecent meant nude but the fight for equality by the feminist groups also demanded that women should be allowed to wear whatever they like just like men. And they should also have the freedom to express their sexual desires, sexuality, and dress codes which were actually assumed as indecent at that time. Apart from this confusion, another problem is that when a thing has been banned without taking its purpose into account, it also harms society like how a breast cancer awareness campaign cannot be made without involving women’s bodies in it. Thus, clarity on these terms is required to stop its interpretation based on orthodox morality.

To cater to this problem, a Bill was proposed in 2012 to widen the scope of the Act. It includes all digital and print media, and other modes of electronic distribution of such material, internet, and Satellite-based communication, and incorporates enforcement mechanisms and penalties to make it effective. The Bill is still pending.

#### **The Sexual Harassment of Women at Workplace (Prevention, Prohibition & Redressal) Act, (2013)**

This is a special law, enacted to protect woman at workplace. It is helpful in getting gender equality so that she can be economically empowered. The term has been defined quite elaborately and in sec. 2 (n) it states that “Sexual Harassment includes any one or more of the following unwelcome acts or behavior (whether directly or by implication) namely:

- i. Physical contact & advances, or
- ii. A demand or request for sexual favors; or
- iii. Making sexually colored remarks; or
- iv. Showing pornography; or
- v. Any other unwelcome physical, verbal or non-verbal conduct of sexual nature.”

#### **Historical Background**

Menace of sexual harassment was not new to Indian society, but there was no legislation available on the subject prior to 1997. Though there were provisions in the Constitution and also sec. 354 of IPC (1860), but there was no clarity on the topic, despite the fact that India is a signatory of many international documents (e.g., UDHR (1948) and CEDAW (1979)), which talk about women equality and protection. Even after ratifying CEDAW in

<sup>6</sup> That is, Aweek Sarkar & Anr vs. State of West Bengal. 2014.

Criminal Appeal no 902 Of 2004. Supreme Court of India

1993, there was no piece of legislation enacted by the Indian Parliament till 2013. Although there were two provisions available in IPC (1860), i.e., Sec. 354 and 509, dealing with the act indirectly by prohibiting the offense of outraging of modesty of women, there was no direct legislation available. In 1997, the Supreme Court passed a landmark judgment in Vishaka's case<sup>7</sup> where guidelines were provided and also a direction was issued to enact specific legislation, but nothing was done for the next 16 years. It was only in 2013 when an amendment was inserted into IPC and new legislation was introduced specifically dealing with the offense due to the shocking incident of *nirbhaya*. The *nirbhaya* case<sup>8</sup> gave birth to public outrage and forced the government to enact a law that is able to provide protection to females. The result came in the shape of an amendment in criminal law (Sec. 354 A, (IPC (1980)) and enactment of a special law dealing only with the offense (i.e., Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, (2013)).

### Scope of Law

Law provides protection only to woman working either in the formal or informal sector. Domestic worker, students, volunteers, harassment of the same sex, etc. also comes under the ambit of law (Mustaqeem, 2020).

### Explanation of Law

The Act provides exhaustive definitions of key terminologies like sexual harassment, workplace, aggrieved, harasser, etc. Both organized and unorganized sectors including NGOs, Co-operative Societies, educational institutions, hospitals, industry, and dwelling houses come within the ambit of the workplace (Dubey, 2020). An internal committee at every office has been established to provide a hassle-free mechanism for the victim to acquire justice. The committee enjoys the same powers as the civil court. Law requires 10 members for the committee, in case 10 are not available in the office, then a local committee will be established in every District. The Committee will be headed by the senior-most female worker in the workplace. The Act also requires half of the committee members to be females. Law facilitates the victim by

allowing legal heirs or such other person, as described in Rule 6 of the Act, to file a complaint in case she herself is physically or mentally incapacitated or dead. The Act also provides protection to the domestic workers, but in the case, if the committee is of the view that *prima facie* the case exists, then it will forward the case to the local police station to deal under Sec. 509 or any other relevant law. The time limit for the completion of inquiry is 90 days provided under the law. In case a malicious complaint was lodged, the committee has the power to recommend action against the complainant.

### CONCLUSION AND RECOMMENDATIONS

It is evident from the above discussion that though there is a comprehensive piece of legislation available in both the countries but the problem mostly lies at the implementation level. It is also evident that by studying both the laws on the point, a few good additions could be made to the laws of both the countries. In the light of this study, few changes in existing legislation of both the countries have been recommended so to make the law more practical, workable, and effective for the enforcement agencies and so acquire the objective of the legislation. In 2010, Pakistan introduced its law to deal with matters of sexual harassment in the workplace, and in 2013, it was enacted in India. Following are some of the recommendations after going through both the laws. While some of them are generally applicable to both countries while others are country-specific.

A very important step to discourage and control this practice is to control and discourage the enablers of these harassers. A harasser is a coward and gets his strength from the powerful people around them. A strong mechanism is required to isolate the harasser from those enablers or his network. There has to be a check on media/social media trial as it declares the accused as harasser without following any procedure of law. That attitude is not only a violation of a number of his constitutional rights but also harmful to his mental health, family life, economic stability, etc. Law should include prohibitory measures like the regular assessment of Employees. Awareness campaigns backed by Govt. can act as a backbone for the success of the implementation process of this law. Sometimes the

<sup>7</sup> That is, Vishaka vs. State of Rajasthan & Others AIR 1997 SC 3011

<sup>8</sup> For further information, see Mukesh & Anr vs. State for

NCT of Delhi & Others. Criminal Appeal No. 609-610 of 2017 arising out of S.L.P. (Criminal) No. 5027-5028 of 2014

victim and harasser are unaware of the fact that their act is creating harassment. Through these campaigns, knowledge could be spread in this regard. Maximum participation by women legislators in the law-making process of a woman relating laws is extremely important. Their opinions should have weightage as they are the ones who can fully understand the problems of females and suggest effective measures to handle them. Compulsory fine/compensation needs to be imposed and that amount should be given to the victim so that she should get some financial benefit for all the physical and mental pain she suffered.

The amount of fine for an act of harassment has not been determined under IPC Sec. 354 A. It has been left at the discretion of the judge. To create deterrence an effective amount is required to be fixed. It will also minimize the chance of bias and corruption. As the Harassment is not only done against a female but also against a male or a third gender so it is quite important to redefine the term aggrieved in the Indian Law Act 2013 were aggrieved means only women. A gender-neutral law is required. A proper anti-retaliation policy needs to be adopted not only during but also after trial. In the constitution of the Committee, the element of bias is involved especially, where the complaint is against the employer. The law is silent on the point. Training Sessions could be arranged for working women in their respective organizations but the domestic worker has no facility of such kind. Being illiterate, she is in a more vulnerable position and there is no arrangement to sensitize her. Digital media could be utilized in this regard. Compulsory training session to change the mindset of enforcing agencies is also required. Even some compulsory courses in the training course of judges and police officers should be included. The focus should be to change the patriarchal mindset of these agencies which are responsible for the effective enforcement of these laws.

There is a penalty of cancellation of business under Indian law which should be removed as there are so many innocent lives are dependent on that business. By canceling the license, we are actually punishing those innocent individuals. Punishment for Frivolous litigation could deter even the genuine victim from filing suit in the absence of some effective mechanism so such provisions should be removed from the existing legislation. An interesting provision under Pakistani law is available even a person who has resigned or removed or dismissed can file a complaint. But no such provision is available in

the case of Indian law. The law has been amended in Pakistan in 2020 and harassment through modern technologies like cyberstalking, etc. are added to the Act of 2010 but Indian law has no such provision which is the need of the hour and so should be included in existing legislation. An interesting term "Sexist Harassment" has been introduced through an amendment which means a discriminatory behavior based on gender which may or may not include an act of sexual nature. This way the scope of the Act has been enhanced tremendously and complete protection has been offered to females while struggling for economic equality. Indian law has no such provision and resultantly, the law has restricted application in cases of sexual harassment. To achieve the purpose of the law, it is extremely important to enhance the scope of the Act so that all types of sexual harassment could be dealt with effectively. So, an immediate amendment to existing legislation in India is required to incorporate this provision. Victims are many times, bombarded through counter suits so that they could be harassed and consequently take back their complaints. To deal with such a situation a provision through amendment has been added in Pakistani law which puts a responsibility on deciding authority to consider all those suits filed in retaliation at the time of decision. This is an effective check on such suiters but no such law is available in India which is quite important as it is easy to harass a weaker segment of society so effective protection could be provided through the insertion of this provision in Indian law.

A woman can better understand other women and her issues so a great provision that a woman will head the Internal & District Committee is a part of Indian legislation. Pakistani Legislature should also understand this requirement and make changes in their law accordingly. To create deterrence for everyone, the Indian law requires that the consequence of harassment should be displayed by the employer which may act as an effective remedy against future incidents but no such relief has been provided to a Pakistani victim. This provision will not act only as a deterrent but also will satisfy the urge for revenge on the victim who suffered a lot during the whole process. So, a section having this effect should be a part of Pakistani law also. Indian law provides criteria on the basis of which compensation could be given to the victim, but no such criteria have been provided in Pakistan which could provide financial independence to some extent, to the victim and satisfy

her immediate financial needs. Also, a punishment that could affect the pocket of the wrongdoer, could work miraculously and stop him from doing such things in the future. So, an amendment to incorporate this provision is necessary and should be made at the priority level by Pakistan.

Pakistan has established an independent office of the Ombudsman to deal only with cases of sexual harassment but no such forum is available to Indian women. Such a forum could give chance to the relief provider to provide a speedy and effective remedy to the victim which is difficult to achieve through already overburdened courts. So Indian Legislature should instruct to establish an independent forum for the purpose. Major and minor penalties are provided under Pakistani law which conveys clarity and ease for the enforcing agencies as well as deterrence for the harasser. No such list is available under Indian law and so should be inserted for effective implementation of the law. An important provision regarding the Special budget has been allocated by the Central govt. for the purpose, in India. So services of qualified persons are easily hired. No such provision is available in law under Harassment Act, 2010 in Pakistan.

The financial aspect is the most important aspect for the effectiveness of any program, project, or law so the Pakistani Legislature should incorporate the required provision to achieve the objective of the law in a speedy and effective manner.

It is evident from the above discussion that a good attempt has been made by both the countries to deal with the problem of sexual harassment to ensure the objective of women empowerment to get benefits from their skills and improve their participation in the growth of the country but there is still a room for improvement. In the light of the above recommendations, the laws in both the countries could be improved so the objective could be achieved effectively.

We will conclude our discussion on the note that this is a topic which is quite dynamic in nature. New circumstances keep on emerging calling for logical conclusions based on facts of every case. Further detailed research is required so that more effective measures could be proposed.

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