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## **Sexual Harassment: Comparative Analysis of Legislative and Institutional Arrangements in India and Pakistan**

### **Abstract**

*The paper seeks to take a detailed overview of the legislation both in India and Pakistan. The paper argues that the extant legislation is an endeavor to encompass some of the oddities of the problem and concludes that much more clarity and specificity is needed to avoid a crusade for reforms. Refurbishment of the legislation relating to the protection of women at business place is the clarion call of the current crusade against this menace.*

### **Introduction**

Although, no pragmatic effort has ever been made for the amelioration of the deteriorated situation of the females in Pakistan but, after almost three decade of the independence, the Pakistan Women's Rights Committee, 1976\* was set up. It comprised of 14 members with Attorney General as its head. The committee was mandated to examine all the existing laws pertaining to women in Pakistan and make recommendations for the uplift of women. Albeit, the committee came up with numerous reports but the same couldn't be materialized due to change of government.

Similarly, another attempt was made in 1985 by constituting a Commission on the Status of Women. Like its predecessor, the Commission had a flexible composition of 15 members with Begum Zari Sarfraz as its head. The commission was tasked to make suggestion to safeguard the rights of the women and to ensure maximum participation in education, healthcare and employment. The commission submitted its report in 1985.

The Commission of Inquiry for Women, 1994 was third attempt for the amelioration of women in Pakistan. The commission was entrusted the task of examining all existing laws with the object of making necessary measures for elevating the status of women in Pakistan. The Commission comprised of 10 members and Mr. Justice Nasir Aslam Zahid was appointed as its chairman. The commission submitted its report in 1997 recommending the repeal of certain discriminatory laws. It also recommended amendments in some laws and reiterated to device an effective mechanism for monitoring the enforcement

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\* Various Commissions and committees had been set up to find out the solution for strengthening the position of the women in Pakistan.

thereof. The commission emphasized the establishment of institutions for early disposal of incidents of gender discrimination. So, a close view of the situation reveals that the laws relating to women issues have been subject to periodical revisions in Pakistan and, in this respect, the commissions/ committees have been submitting their recommendations for refurbishment thereof. It was owing to the indifferent attitude of the successive governments that the said recommendation could not be materialized.

As both India and Pakistan are signatories to the International Convention on Economic, Social and Cultural Rights of women, therefore, both of them are under an international obligation to ensure the indigenous legislation to be consistent with the provisions of the said conventions. It is pertinent to mention that Article 7 of the said convention recognized the right of women to fair working condition and reiterated that the women would not be sexually harassed at their place of work. In this context, the duty of the courts increases manifold. As to Indian side, it has been held by the apex court time and again that while interpreting the provision relating to rights of women, the courts and the councils must be conscious of the parameters incorporated in such international instruments and make pragmatic endeavors for giving due effect to the principles enshrined in those instruments<sup>1</sup>.

### **International Scenario**

According to the ILO, sexual harassment is an unwelcome sexual advancement or verbal or physical conduct of a sexual nature which has the purpose of effect of unreasonably interfering with the individual work performance or creating an intimidating, hostile abusive or offensive working environment. As to the international recognition of sexual harassment as gender discrimination, the demand has been resolved in 1993 in a seminar at Manila under the auspices of ILO. Moreover, the CEDAW 1979 as well as the Beijing Declaration, which also enjoins upon the states to initiate effective measures for the prevention of discrimination against the women, are an open proof of awareness of the comity of the nation. Furthermore, the International Convention pertaining to economic, social and cultural rights of women is another millstone regarding the protection of rights of women. As stated earlier that Article 7 of the said convention strengthens the position of women by bestowing upon the right to enabling conditions at workplace and warns that the workplace shall be free of hostile environment. Being signatories to the said conventions, both India and Pakistan are obliged to gender sensitise their laws. Thus, the courts have to ensure that the message adumbrated in these instruments may not wither away.

As far as the guidelines for legislation on the subject are concerned, it is submitted that the United Nations Organization and the regional treaties may serve as beacon light as sexual harassment has been recognized as an act of discrimination and violence against women. For instance, while defining violence against women, resolution No.48/104 of the General Assembly on the Declaration of Violence against Women also includes sexual harassment and reiterates its prohibition at workplace, in educational institutions. Art.2 (b) and Article 4(d-f) urge upon the authorities the development of penal, civil or other administrative initiatives coupled with preventive measures for elimination thereof. Similarly, CEDAW is deemed to be another milestone regarding the protection of women's rights at

workplace. Articles 7-16 of the said convention un-equivocally obligate the state parties to take effective steps for the eradication of discriminatory treatment against femininity in all walks of life (Art.7-16).

### **European Approach**

As a result of realization of magnitude of the plague, the Charter of Fundamental Rights of the European Union has made ample provisions for the prohibition of discriminatory treatment against the women and had reinforced the stance through a series of directives dealing with the sexual harassment<sup>2</sup>. The directives further obligate the state parties to bring these provisions onto indigenous statutes.

Similarly, Organization of American States has positively responded to the emerging realities and instead of confining it only to squabble pertaining to discrimination, it has treated sexual harassment as an issue of violence against women. So, the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women has envisioned the right of women to be free of violence including sexual harassment and renders the sexual harassment as violence against women<sup>3</sup>.

### **American Approach**

It is too difficult to define sexual harassment in an exhaustive fashion.<sup>4</sup> The reason, *inter alia*, seems to be its nascency as legal discourse. As a result of an academic debate on the topic of “women and the work” in Cornell University, Faley calculated that the concept of sexual harassment emerged on the horizon as lately as in 1974<sup>5</sup>. Unfortunately, despite the enactment of Civil Rights Act, 1964, the judiciary was not willing to take sexual harassment as discrimination under the said Act. However, the *Barnes V Castle*<sup>6</sup> turned out to be a turning point in a sense that it enlarged the scope of sexual harassment by adding that any remark of sexual nature and solicitation coupled with the threat of being fired would come within the ambit of sexual harassment. Albeit, the decision in *Barnes’* case paved the way to the creation of Equal Opportunities Commission in 1980, which anchored the formulation of guidelines on sex based discrimination and bifurcated the harassment into two categories i.e. *quid pro quo* harassment and hostile environment harassment but the concept of hostile environment harassment remained alien to American jurisprudence till the decision of Federal Court in *Bundy V Jackson*<sup>7</sup> in which the court held that any oblique utterance or implied threat would constitute intimidating and hostile atmosphere and would also be unlawful notwithstanding that the complainant had not sustained any tangible loss. In 1986, the views expressed in *Bundy v Jackson* also found the favour of the Supreme Court of the U.S in the case of *Vinson V Meritor Bank*<sup>8</sup>.

Sexual harassment, a transnational phenomenon, is a menace which every working woman has to face. The worrisome aspect of the episode is that despite having large number of women in employment and after knowing the gravity of the issue, no serious, legislative or executive, efforts have been demonstrated towards its eradication from the society. Until recently, the only recourse opened to a victim was the initiation of criminal proceedings or suit for compensatory damages. The countervailing disadvantage of such proceedings was that a high degree of proof was required, which in case of harassment was always missing<sup>9</sup>. In India, sexual

harassment has been confined only to criminal law and the employment law has not been included within the ambit of sexual harassment<sup>10</sup>.

### **Zimbabwe**

According to a report of World Bank, Zimbabwe has maximum participation rate of female in employment i.e. 83%<sup>11</sup>. In the face of such a situation, there is likelihood of more chances of sexual harassment at workplaces. So, according to a meticulous research survey conducted by a local NGO, 33% of female workforce in Zimbabwe has to experience the agony of harassment at workplace which ranges from unwelcome sexual attention to sexual assault<sup>12</sup>.

Legislation is sine qua non as the same may prove to be kinetic in giving required impetus because it is reinforced by the educative and legal sanctions which prove to be panacea against this menace<sup>13</sup>, there is, indeed, dire need to address the issue from other angles as well<sup>14</sup>. But all this doesn't mean that the legislation should not be made at all<sup>15</sup>. Sexual harassment or Eve-Teasing is a perennial issue<sup>16</sup>. The menace has also been termed as euphemism, specie of the conduct which entails penal action and, sometimes, attracts bad consequences<sup>17</sup>.

As to the Indian side, it has been said that in the last 60 years, entry of women in almost all walks of life has increased manifold. From the power corridors to the grass root democracy, they have earned reasonable representation<sup>18</sup>. The statistics reveal the hazards to which working eyes are exposed on both sides of the border and the figures range from 40% to 90% of working women<sup>19</sup>. The percentage fluctuates according to the behavior experienced, perpetrator and the organizational context<sup>20</sup>. As the harassment at the place of job violates the interest of a worker to safeguard the honour of her reputation<sup>21</sup>, therefore, it not only results in bringing about mental agony to the victims but the protracted trials also bring about tremendous emotional and financial costs<sup>22</sup>.

The proponents of gender empowerment have been anchoring the cause of the oppressed segment of the society time and again but the crusade couldn't get the required impetus in both of the jurisdictions due to various factors. Therefore, the philanthropists are of the view that the extant initiatives may be deemed to be panacea in upholding the dignity of rights pertaining to equality. As the legislations have been termed an attempt to infuse some sense of security, therefore, it will be equally efficacious in improving their participation in work. The sexual harassment has not only been recognized at regional level but has, equally, been given due space in international instruments as well.

### **American Cases**

In the case of *McCoy v Pacific Maritime Association*, it was held that as the harassment was not so grave and ubiquitous as to leave any adverse effect on her job and defendant's conduct failed to meet the extreme and outrageous standards necessary for the emotional distress claim. Similarly, in the case of *Westendorf v. West Coast Contractors of Nevada* not only the standard established in the case of *McCoy v Pacific Maritime Association* was reaffirmed but the test of reasonable person was also expounded by the court.

As to the guidelines for legislation on the subject is concerned, it is submitted that the United Nations Organization and the regional treaties may serve as beacon light. The encouraging aspect of the episode is that sexual harassment has been

recognized as an act of discrimination and violence against women. For instance, while defining violence against women resolution No.48/104 of the General Assembly on the Declaration of Violence against Women also includes sexual harassment and reiterates its prohibition at workplace, in educational institutions<sup>23</sup> and urges upon the authorities the development of penal, civil or other administrative initiatives coupled with preventive measures for elimination thereof<sup>24</sup>. Similarly, CEDAW is regarded another milestone about the protection of rights of working women. The said convention un-equivocally obligates the state parties to take effective steps for the elimination of discrimination against women in all walks of life<sup>25</sup>. As a concomitant of pledge demonstrated in Beijing Platform for Action, sexual harassment has been acknowledged to be a denomination and discrimination against the women<sup>26</sup>. At the same time, it equally reiterates the governments as well as the employers to demonstrate prompt adherence to the said para by taking legislative initiatives and introducing anti-harassment strategies<sup>27</sup>.

### **Specific Indian-Pakistani Differences**

#### **Constitutional Safeguards**

Since the dawn of independence from the colonial rule, India and Pakistan have been gender sensitizing their laws. Unlike its counterpart, India succeeded in making constitutional arrangements in 1950. On the contrary, being riddled with numerous gigantic problems as a nascent state, Pakistan had to face constitutional crises till 1956. However, in its first regular constitution, Pakistan had ensured sufficient constitutional guarantees to the women. Especially, protections against discrimination in service on the basis of sex<sup>28</sup> and non discrimination in respect of access to public places<sup>29</sup> were the salient feature of the said constitution. So much so, the state was empowered to enact special laws for the uplift of the women in Pakistan<sup>30</sup>. The said constitution could not gain ground any longer and after remaining of constitutional horizon for less than a decade, it was replaced by the constitution of 1962. At the outset, no mention of fundamental rights was made in the said constitution, however, as a result of first constitutional amendment, fundamental rights were granted to the citizens. Like its predecessor, the constitution of 1962 ensured the women fundamental rights like non-discrimination in access to public places on the basis of sex<sup>31</sup>. Similarly, discrimination in services on the basis of sex was outlawed<sup>32</sup>.

After remaining in force for a little more than a decade, the said constitution was replaced by the Constitution of 1973 which, unlike its predecessors, contained exhaustive provisions pertaining to the well being of the women. The hall mark of the extant constitution is that besides containing fundamental rights as to the protection women in Pakistan, it also provides guidelines, (under the title of principles of policy), to the state for the promulgation of future laws relating to women.

#### **a) Definition of Harassment**

As to Indian aspect, it is submitted that necessary guidelines and directions had already been given by the apex court in the case of Vishaka<sup>33</sup> and the definition devised by the apex court has not only been brought as such onto the statute but the same has been tailored to be exhaustive by adding “the promise or threat to a

woman's employment prospects or creation of hostile work environment as sexual harassment at workplace and expressly seeks to prohibit such acts"<sup>34</sup>.

Like India, formal legislation on the subject could get space as lately as in 2010 in Pakistan. The first case which, in this context, came up before the Federal Ombudsman was as to the scope of the word harassment. The question to be mooted before the Ombudsman was whether the words "Jahil and Badtameez Aurat" (Illiterate and ill-mannered woman) used by the accused do come within the ambit of harassment? While dilating upon the scope of harassment, the Ombudsman held that the key part of the definition used in section 2(h) of the Protection against Harassment of the Women at Workplace Act, 2010 was the use of words unwelcome or uninvited conduct or communication of a sexual nature<sup>35</sup>. In order to bring particular sex based behavior within the bound of harassment, it needs to be so severe and persuasive enough that the same should change the conditions of the victim's employment to the disadvantage of the victim and ought to pave the way to disparaging intimidating, hostile or offensive atmosphere at the workplace<sup>36</sup>. As far as the use of disputed words like Jahil and Badtameez Aurat were concerned, the Ombudsman held that the same were adequately affronting to bring about unease for a female, however, the same could not be construed to be interfering with her employment<sup>37</sup>. If judged in this scale, the words uttered by the appellant would not qualify the term sexual harassment by any stretch of imagination<sup>38</sup>. Similarly, the question of applicability of the said Act to the educational institutions came up for discussion before the Ombudsman and it was held that being an education institution, the university was an organization within the meaning of section 2(L)<sup>39</sup>. By virtue of section 2(e), the Ombudsman observed, the application of the Act was not confined to the employees of an organization rather the same was equally applicable to educational institutions as well<sup>40</sup>.

In Pakistani context, harassment has been defined as:

"any unwelcome sexual advance, request for sexual favours 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 attempt to punish the complainant for refusal to comply to such a request or is made a condition for employment"<sup>41</sup>.

#### **b) Inquiry Committee**

The law in Pakistan enjoins upon the employer of each establishment to establish an inquiry committee within a period of thirty days of the enactment of the said law. The committee shall comprise of three members. Out of three members, at least, one would be a female and one would be from amongst the senior management. In case there is Collective Bargaining Agent, one member shall be nominated by it and in case there is no Collective Bargaining Agent, a most senior employee would be included in the panel as representative of the employees of the concerned organization. However, in case the organization is unable to designate the required number of members, the same may be co-opted from outside<sup>42</sup>.

As to Indian law, it is submitted that adequate arrangements have been ensured for the formulation of "Internal Complaints Committee" which would comprise of four members. The Committee would be headed by a woman under all

eventualities<sup>43</sup>. As far as remaining members of the Committee are concerned, it is submitted that the composition demonstrates diversification as the persons belonging to different walks of life have to be included in such committee<sup>44</sup>. As the committee occupies a pivotal position in disposing of the issues pertaining to sexual harassment at workplace, therefore, its composition is of paramount importance. In this context, Indian provisions seem to be flexible as compared to its Pakistani counterpart. For instance, firstly, the number of the members is four in India while it is three in case of Pakistan secondly, tenure of the members including the Presiding Officer has been fixed three years in case India, while such important provision is missing in case of Pakistan. Thirdly, in case of India, atleast, 50% representation would be given to women, but no such bifurcation has been made in case of Pakistan. Fourthly, in case of India, all the non official appointments would be non-gratuitous and expenditure would be borne by the employers on *pro rata* basis while no such arrangement has been made in case of Pakistan.

#### **c) PROCEDURE OF MAKING COMPLAINT**

In India, the victim may bring a written complaint in the knowledge of Internal Committee or the Local Committee within three months of the accrual of grievance<sup>45</sup>. However, in case of recurrence of incident, the day of last incident would be deemed to be the date of commencement of limitation<sup>46</sup>. In case of her inability to reduce the application to writing, the law enjoins upon either the presiding officer or any other member of the Internal or Local Committee to render necessary assistance to aggrieved women to make the complaint in writing<sup>47</sup>. Similarly, the said Committee has the powers to extend the time for lodging the complaint for another thirty days if it had the reasons to believe that it was owing to some unavoidable exigencies that the aggrieved woman could not espouse her grievance within stipulated time<sup>48</sup>. Furthermore, the statute also confers the right of anchoring the cause of the victim on a prescribed legal heir or person provided that the victim, owing to physical or mental incapacity or death, is unable to lodge the complaint<sup>49</sup>. As far as the law in Pakistan is concerned, it is submitted that the same seems to have been enacted mawkishly as it omits to address this important aspect of the issue. It would not be out of place to mention that the Indian law goes one step ahead of its counterpart in Pakistan by incorporating the provisions relating to conciliation. The law mandates the committees, Internal or Local, to settle the matter, on the request of victim, between the parties through conciliation subject to the restriction that any numismatic arrangement between the parties would not be deemed to be the basis of conciliation<sup>50</sup>. However, in case any settlement is concluded between the parties, copies thereof would be forwarded to the employer or as the case may be to the government for action<sup>51</sup>. Similarly, one copy of the said settlement would also be communicated to the aggrieved women for her information<sup>52</sup>

#### **d) Prevention from Retaliation**

As during the pendency of inquiry, there is apprehension of threat, aggression or retaliation from the accused, therefore, effective measures have been taken for the safety of the complainant. Media reports are replete with horrifying news that the women continue to be the victim of harassment at workplaces and they fall a victim to harassment through a couple of methods i.e. legal and extralegal which

results in their insult and indignity. In this background, the states and the institutions are enjoined upon to take pragmatic measures for prevention thereof. On this frontier, despite express instruction of the Indian apex Court in the issue of Vishaka, the Indian legislature could not bring out legislation on envisaged lines until 2012. Factors like lip service to this menace, hollow statements as to its eradication and inadequate legislative initiatives with sloppy enforcement have been instrumental in the flourishing of this menace in our society.

### **Punishment**

Redressal of the complainant woman is one of the important facets of Indian law. Therefore, it seems to be exhaustive to that extent. In case the accused is an employee, the relevant Committee has to proceed against the accused in accordance with section 10 of the Act<sup>53</sup>. In case, however, of non existence of such service rules or the accused comes out to be a domestic worker and in the opinion of relevant Committee, there exists, *prima facie*, a case against the accused, it would refer the issue to the Police within a span of 7 days for the registration of formal case under section 509 or any other section of the Indian Penal Code<sup>54</sup>.

In case the allegation stands proved against the accused, the relevant Committee would recommend to the employer or the government to proceed against the accused under disciplinary law by treating the harassment as 'misconduct'. In case, of non existence of service rules, the committee would recommend that action might be taken against the delinquent employee under the rules to be framed under the Act.<sup>55</sup> Moreover, subject to the law of under section 15 of the Act, the committee may also recommend the deduction from the wages of the accused as compensation to be paid to the applicant or her legal heirs<sup>56</sup>. In case the employer fails to make required deduction, either due to absence of the accused employee or culmination of employment, the Internal Committee or the Local Committee may order the accused to pay such amount to the complainant<sup>57</sup> and in case such orders are not complied with by the accused, the relevant committee may refer the case to the concerned District Officer. The said officer would get the decision implemented within sixty days of receipt<sup>58</sup>. As to the determination of amount of compensation, the relevant Committee has to take into account four factors; firstly, traumatic condition, pain, suffering and emotional destabilization occasioned to the victim, secondly, regression brought about by the sexual harassment in career advancement, thirdly, expenses born by the victim in the process of physical or psychiatric rehabilitation, fourthly, solvent status of the accused and lastly, possibility of payment either in lump sum or in installments<sup>59</sup>.

### **Conclusion**

Despite the fact that stringent measures have been taken to ameliorate the deteriorating situation of the women on both sides of the border, but the graph of cases relating to bride conflagration, cruelty, suicide, sexual harassment at workplace, rape and kidnapping is soaring day by day. For prompt emancipation of this segment of the society, there is dire need to respond to the reality by removing the masquerading effect of the existing law in Pakistan. For this purpose, the enforcement of deterrent punishment will be panacea. Besides responding to international pledges, the Indian law may be used as aide memorie. Despite the fact that crucial endeavors have been demonstrated in India and Pakistan for the acknowledgment women's rights, but a long road is yet to be



traveled. Undoubtedly, India has taken various legislative initiatives for the protection of women but the space between such initiatives and reality is yet to be engulfed. As to creating awareness about the gravity of the menace amongst the masses, India has, it is submitted, surpassed various countries of the globe. Its human rights activists have been instrumental in launching crusade for making the people realized that women through out the world have also right to enjoy their life according to their whims. They are equally entitled to spend the same not only with the notion of fulfillment but also with a sense to contribute in the growth of society, but the ambition remains rhetoric due to a mindset which prevails on both sides of the border. Unlike its counterpart, the judiciary in Pakistan has been lagging behind in according protection to the human rights of the women. For instance, in Vishaka's case in 1997, the Supreme Court of India had to issue guidelines to tackle the issue of sexual harassment which would fill the legal void for next sixteen years till the enactment of formal law on the subject in 2013. In the meantime, the apex court had to reiterate the need of formal legislation in the case of Apparel Export Promotion Council v Chopra (1999) 1 SCC 759, Grewal vVimmi Joshi (2009) 2 SCC 210 and Medha Kotwal Lele v Union of India (2013) 1 SCC 297.

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