

Critical Appraisal of the Protection.....	
The Law	Spring 2021 Issue: 01

Critical Appraisal of the Protection Against Harassment of Women at the Workplace Act 2010

Muhammad Haroon Khan¹ Dr. Syed Raza Shah Gilani²
Kamran Abdullah³

Abstract:

The Protection Against Harassment of Women at the Workplace Act 2010 was enacted by the Federal Government to protect the women in workplace and fulfil its obligations under International Law. There are many lacunas in the Act. This paper has only highlighted few with regard to jurisdiction, appeal, limitation, burden of proof, Federal nature of the Act.

Keywords: 2010-Act, Federal Nature, jurisdiction, appeal, limitation

Introduction:

Harassment of women is not a new phenomenon. The women in every society had remained victim of the harassment particularly in the work places. With the passage of time, this issue surged to a peak, which was addressed in one way or another. International Labor Organization stated that “all human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity”¹. UN Convention on the Elimination of All Forms of Discrimination against Women, 1979, explains that

¹ Assistant Professor, Department of Shariah & Law, Islamia College Peshawar

² Assistant Professor, (Law) at Abdul Wali Khan University Mardan, Pakistan

³ Lecturer, Department of Shariah & Law, Islamia College Peshawar

Critical Appraisal of the Protection.....	
The Law	Spring 2021 Issue: 01

“State Parties shall take appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights...”².

While construing it, the General Recommendation No. 19 elaborates that *“Equality in employment can be seriously impaired when women are subjected to gender-specific violence, such as sexual harassment in the workplace”³.*

Besides these, there are numerous legal instruments are addressing the menace of harassment like “The Indigenous and Tribal Peoples Convention, 1989; The Maternity Protection Convention (No. 183) and Recommendation (No. 191), 2000; The Domestic Workers Convention, 2011; The Protocol of 2014 to the Forced Labor Convention, 1930; The Transition from the Informal to the Formal Economy Recommendation, 2015 (No. 204); The Employment and Decent Work for Peace and Resilience Recommendation, 2017 (No. 205)”⁴; “Secretary-General’s Chief Executives Board (CEB) Task Force on Sexual Harassment 2017”⁵; etc.

Regional International Law has also contributed to curb this menace. “The Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women 1994”⁶; The Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, 2003”⁷; The Convention on Preventing and Combating the Trafficking in Women and Children for Prostitution, 1997”⁸; The Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention), 2011”⁹.

Laws on protection of women in Pakistan

Pakistan being a responsible state has enacted different laws to curb the issue. But no specific law was there to prevent the harassment. The table below will enumerate the relevant laws with the issue in hand.

Critical Appraisal of the Protection.....	
The Law	Spring 2021 Issue: 01

S. No	Legal Instrument	Section	Description
1.	Pakistan Penal Code, 1860	294 - <i>Obscene acts and songs</i>	<i>“Punished with imprisonment up to three months, or with fine, or with both”</i>
2.	Pakistan Penal Code, 1860	354 A- <i>Assault or use of criminal force to woman and stripping her of her clothes</i>	<i>“Punished with death or with imprisonment for life, and shall also be liable to fine”</i>
3.	Pakistan Penal Code, 1860	366 A - <i>Procuration of minor girl</i>	<i>“shall be punishable with imprisonment which may extend to ten years and shall also be liable to fine”</i>
4.	Pakistan Penal Code, 1860	496 C <i>Punishment for false accusation of fornication.</i>	<i>“shall be punished with imprisonment for a term which may extend to five years and shall also be liable to fine not exceeding ten thousand rupees”</i>
5.	Pakistan Penal Code, 1860	509 <i>Insulting modesty or causing sexual harassment</i>	<i>“shall be punished with imprisonment which may extend to three years or with fine up to five hundred thousand rupees or with both.”</i>

Critical Appraisal of the Protection.....	
The Law	Spring 2021 Issue: 01

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| 6. | Pakistan Penal Code, 1860 | <i>510
Misconduct in public by a drunken person:</i> | <i>“punished with simple imprisonment for a term which may extend to twenty-four hours, or with fine which may extend to ten rupees, or with both”</i> |
| 7. | Prevention of Electronic Crimes Act, 2016 | <i>20 Offences against dignity of naturel person</i> | <i>“shall be punished with imprisonment for a term which may extend to three years or with fine which may extend to one million rupees or both.”</i> |
| 8. | Prevention of Electronic Crimes Act, 2016 | <i>21 Offences against modesty of a natural person and minor</i> | <i>“punished with imprisonment for a term which may extend to seven years and with fine which may extend to five million rupees”</i> |
| 9. | Prevention of Electronic Crimes Act, 2016 | <i>22 Child pornography</i> | <i>“shall be punished with imprisonment for a term which may extend lo seven years, or with fine which may extend to five million rupees or with both”</i> |

Critical Appraisal of the Protection.....	
The Law	Spring 2021 Issue: 01

The Act of 2010

However, no special law was there till 2010, when the Federal Government enacted the Protection Against Harassment of Women at the Workplace Act 2010. Although the Act was passed after a long time and need was of the hour, however, the same was/is full of complications. In below lines few of the problems with the Act are discussed.

S. No	Problem	Description
1.	Original jurisdiction	Under Section 3 (1) each organization is bound to enquire into complaints, whereas, Section 8 (1) poses an option before the complainant to prefer a complainant either to Ombudsperson or Committee.
2.	Appeal	Under Section 6 (2) appeal against the decision of the Committee may be preferred to the Ombudsperson, under Section 9 the aggrieved party may prefer an appeal to the Governor/President against the decision of ombudsperson.
3.	Period of limitation	Under Section 6 (2) & (3) appeal may be filed within 30 days against the decision of the Committee, whereas, within thirty days' appeal may be filed with the Governor/President against the decision of the Ombudsperson.
4.	Remedy	Under Section 5 (3), the Inquiry Committee can only recommend appropriate punishment to the Ombudsperson to be imposed on the complainant, if allegations are false, whereas, no such power has been mentioned in powers and functions of Ombudsperson.

Critical Appraisal of the Protection.....	
The Law	Spring 2021 Issue: 01

5. Burden of Proof There is no provision with regard to burden of proof, which may lie upon whom.
6. Federal Act This Act was enacted by the Federal Government and after 18th Amendment Federal Ombudsperson is retained by the Federal Government under Schedule 4 of the Constitution vide Federal Legislative List Part I Item 13.

Critical appraisal

From above discussion, it is clear that the Act is self-contradictory. It will therefore, create hurdles and smooth functioning will be troublesome. Some of these issues are criticized in lines below:

Criticism

- **Original jurisdiction:** This Act has conferred concurrent jurisdiction on the Internal Committee as well as Ombudsperson. Similarly, both have been mandated with same powers, though Committee is first in order. Thirdly, there is no provision by which one can stop other.
- **Appeal mechanism:** Appeal against the decision of the Committee shall be preferred to Ombudsperson, which is also empowered to hear the complaint at first instance. Secondly, second appeal against the decision of ombudsperson will lie to the Governor/President. Thirdly, in case where an appeal has been lodged with Ombudsperson directly, so only first appeal is an option with either party.
- **Period of limitation:** Period of thirty days is available with parties to file an appeal either with Ombudsperson against the decision of the Committee or with

Critical Appraisal of the Protection.....	
The Law	Spring 2021 Issue: 01

Governor/President against the decision of the Ombudsperson.

- **Non-availability of focused remedy for complainant:** The Internally Committee one hand is bound to recommend appropriate punishment for complainant, if allegations are false, on other hand there is no such power of the Ombudsperson to punish complainant for levelling false and frivolous allegations.
- **Burden of proof:** The Act is silent as to who will shoulder the burden of proof. It is a general rule that burden of proof lies on complainant, however, no such provision is there in 2010 Act.
- **Federal Nature:** This Act is federal in nature and the federal Government has established Ombudsperson Offices, therefore, after 18th Amendment-devolution plan- Federal Ombudsperson is retained by the Federal Government. It is a question of law as to how can provincial governments using the 2010 Act or enacting new acts on the same issue? Second question is that Ombudsperson is federal subject, how can provinces establish Provincial Ombudspersons?

Ramifications

- **Questioning the credibility of committee:** Overriding powers of the Ombudsperson undermines the credibility and authority of the Committee.
- **Overriding power of the Ombudsperson:** Unbridled powers of the Ombudsperson will cripple the authority of the Committee.
- **Limitations period:** Period of thirty days is retained in both cases, one against the decision of the Committee and other to the Governor/President against the decision of Ombudsperson, which will create problems for either parties.
- **Inquiry committee having no mechanism for false allegations:** Inquiry committee cannot punish complainant in case allegations levelled are false but has to report to the ombudsperson for taking an appropriate

Critical Appraisal of the Protection.....	
The Law	Spring 2021 Issue: 01

action. On other hand, Ombudsperson has also no such powers under the Act.

- **Committee power for inquiry and burden of proof on accused:** As there is no provision in the Act, which can compel either party to prove case beyond reasonable doubt. However, due to special nature of this Law, burden of proof will be shifted to the accused.
- **Federal Nature:** as this subject is Federal in nature, the provinces cannot and should not legislate and operate on the same. Operations under 2010 Act should be carried under the proper hierarchy established by the Federal Government.

Conclusion

From above discussion it is clear that the 2010 Act was no doubt enacted for the protection of women in workplace, however, the same has many contradictions in itself. It is essential that the federal Government should amend and update the Act and include the new developments in it and removed lacunas from the same.

References

- ¹ Article II (a) of the ILO Philadelphia Declaration 1944
- ² Article 11 of the Convention on the Elimination of Discrimination against Women, 1979.
- ³ CEDAW, 1992, Article 11, para. 17.
- ⁴ Un Women (2019). HANDBOOK Addressing violence and harassment against women in the world of work. New York, pp. 17-19.
- ⁵ UN Women (2018). TOWARDS AN END TO SEXUAL HARASSMENT: THE URGENCY AND NATURE OF CHANGE IN THE ERA OF #METOO. New York, p. 17.
- ⁶ Articles 7 (b), (f) & 9 (g) of the Convention deal with the issue in hand.
- ⁷ Article 4.1 (a) & 4.2 (b) of the Protocol discusses the issue.
- ⁸ The South Asian Association for Regional Cooperation (SAARC) adopted this Convention in 1997.
- ⁹ Article 40 of the Convention is relevant here.