

## The Protection against Harassment of Women at the Workplace Act 2010: A Legislative Review

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Harassment at workplace has been one of the major contributing factors that impede women from joining the workforce in Pakistan. The Protection against Harassment of Women at the Workplace Act 2010 provides legal protection to women against harassment at the workplace, and reforms the existing legislation regarding women's right to work in Pakistan. This legislative review discusses the scope of the Act with regard to international obligations of Pakistan. The review also analyses the interpretation of the Act by the superior courts by examining the reported case law on the subject. Besides, it highlights the shortcomings of the Act and makes recommendations for its improvement.

### **Introduction**

Harassment against women at workplace is a grim reality in Pakistan, according to several studies, including one conducted by the Alliance against Sexual Harassment ('AASHA').<sup>1</sup> A research study conducted in Lahore has shown that about 58 percent of nurses and doctors are sexually harassed, usually at the hands of other doctors, nurses, attendants, patients and visitors.<sup>2</sup> In the same vein, the Inquiry Report on the Status of Women Employment 2003, commissioned by the National Commission on the Status of Women Employment, mentions that nearly 50 percent of the interviewed females working in the public sector are alleged to have been subjected to sexual harassment.<sup>3</sup> Yet another study conducted shows that a total 24,119 cases of violence against women were reported in Pakistan between 2008 to 2010; of these, 520 are workplace harassment cases. Furthermore, the Human Rights Commission of Pakistan ('HRCP') has reported that around 91 percent of women in the domestic work sector face harassment.<sup>4</sup> These statistics indicate that the verbal and physical harassment of women, alongside the exploitative and hostile working conditions they face in workplaces, is a common phenomenon in Pakistan. This not only discourages women in Pakistan from continuing employment, but it also reduces their job performance, often leads to long lasting psychological effects, and has severe consequences for their health. In light of this statistical evidence, the Government of Pakistan has passed the Protection against Harassment of Women at the Workplace Act 2010, which aims to protect women from incidents of workplace harassment. This legislative review seeks to analyze the aforementioned Act through a critical and analytical lens, and provides a legal insight on the issue of harassment at the workplace.

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<sup>1</sup> AASHA is a non-governmental organization operating in Islamabad, Lahore and Karachi which raises awareness regarding sexual harassment and lobbies the policymakers to take action against it.

<sup>2</sup> Lubna Khan, 'Breaking the Silence', *Muslim Women's League* <<http://www.mwlusa.org/topics/violence&harrasment/breakingsilence.htm>> accessed 9 September 2016.

<sup>3</sup> Ibid.

<sup>4</sup> 'Alarming Rise in Crimes against Women: HRCP' *Pakistan Press Foundation* (4 February 2005), <<http://www.pakistanpressfoundation.org/2005/02/alarming-rise-in-crimes-against-women-hrcp/>> accessed 9 September 2016.

This legislative review has been divided into two parts. Part I looks into the Statement of Purpose of the Act and delves into the rights allegedly being protected. By first highlighting how harassment at the workplace violates an individual's right to work, this part of the review will investigate whether the legislation fulfills its purpose of protecting women from workplace harassment and eventually protecting their right to work. It further analyzes the claim made by the Act of being in consonance with Pakistan's international obligations with respect to the protection of rights of women. Part II of the review overviews provisions of the Act in a sequential manner. This part further assesses the interpretations of the various provisions of the Act by the Ombudsmen. Since both the federal and the provincial Ombudsmen have jurisdiction to hear complaints under this law, it is important to understand how they interpret the law in light of various policy considerations. The aim of this legislative review is to make suggestions to the legislature and the judiciary for better implementation and interpretation of the Act. It is argued that through this legislation the Government of Pakistan has played its part towards eliminating harassment against women at the workplace, but certain shortcomings in the legislation and its incorrect application by courts have diminished its potential effectiveness.

### **Part I – Purpose of the Legislation: Right to Work and International Commitments**

While describing the objectives of the Act, the Statement of Objectives and Reasons states that the Act builds upon the principles of equal opportunity for men and women and their right to earn a livelihood. It further clarifies that the main purpose of the legislation is to create a safe working environment where women are able to contribute towards the economy of the country without any fear of harassment, abuse or discrimination. Moreover, the statement of purpose states that the Act adheres to the Universal Declaration of Human Rights ('UDHR'), the Convention on the Elimination of All Forms of Discrimination against Women ('CEDAW') and International Labor Organization ('ILO') Conventions 100 (ILO Convention for Equal Remuneration for Men and Women for Work) and 111 (The Discrimination (Employment and Occupation) Convention of 1958). It is to be noted that all of the aforementioned international conventions have been ratified by Pakistan and serve to protect an individual's right to work.

Under the international human rights legal framework, the right to work is multifaceted. Therefore, rather than being understood as a single right, it should be considered as a collection of rights. These include the rights to remuneration, human dignity, protection from forced labor, just and favorable conditions at the workplace, enjoyment of work, and free choice work, among various other basic benefits which are essential in pursuance of the right to work. According to Rhona K.M. Smith:

It comprises of a variety of related rights and obligations, it is ... a cluster of provisions entailing equally classic freedoms and modern rights approaches as well as obligations-oriented perspective made up of strictly enforceable legal obligations and political commitments.<sup>5</sup>

This right is protected under Article 23<sup>6</sup> of UDHR, Article 6<sup>7</sup> and 7<sup>8</sup> of the International Covenant on Economic, Social and Cultural Rights ('ICESCR') and Article 11<sup>9</sup> of CEDAW.

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<sup>5</sup> Rhona K.M. Smith, *Textbook on International Human Rights* (3rd edn Oxford University Press) 268.

<sup>6</sup> Art. 23, the Universal Declaration of Human Rights protects the individuals' right to work.

Similarly, under the ILO Convention 100, every state party is under an obligation to ensure equal remuneration for men and women for work which is of the same value, whereas the ILO Convention 111 compels member states to take action by any appropriate means to ensure equality of opportunity and treatment in respect of employment and occupation. Pakistan, by virtue of having ratified the aforementioned treaties, is bound to protect an individual's right to work.

Before moving on to examine how harassment at the workplace violates one's right to work, it is important to understand the term harassment itself. According to the United Nations, harassment is any kind of behavior, whether verbal or physical, that hinders work or promotes offensive work environment.<sup>10</sup> It can be understood as an unethical act of coercion, or of gaining attention, though not necessarily sexual in nature. Harassment manifests itself in various forms of unethical and unwelcome behavior, ranging from stalking, gazing, unwanted jokes and intimidation to sexually demeaning attitudes such as passing sexual remarks or exerting subtle pressure for a sexual act. Harassment at the workplace specifically refers to those incidents of harassment which take place in a workplace setting and which make working conditions hostile or offensive for the victim. Statistical evidence indicates that incidents of harassment against women are significantly more frequent than those against men, highlighting that women are generally more vulnerable to workplace harassment than men.

Now that a definition of harassment has been delineated, it can be assessed how it violates the right to work primarily due to two reasons. Firstly, any form of harassment makes the working environment unsafe and unhealthy for a person, thus violating the right to just and favorable working conditions. For instance, research has indicated that women who are harassed at their workplace are more likely to be mentally disturbed, which eventually hampers their work performance.<sup>11</sup> Secondly, the fact that harassment disproportionately affects women makes it gender-based discrimination, which is considered violence against women and is prohibited under the international human rights law. In particular, CEDAW prohibits any gender-based violence, and defines it as 'violence directly affecting the women disproportionately than men'.<sup>12</sup> In its General Recommendation No. 19, CEDAW defines sexual harassment as:

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<sup>7</sup> Art. 6, the International Covenant on Economic, Social and Cultural Rights protects an individual's right to work.

<sup>8</sup> Art. 7, the International Covenant on Economic, Social and Cultural Rights protects an individual's right to just and favorable conditions at the workplace.

<sup>9</sup> Art. 11, the UN Convention on the Elimination of All Forms of Discrimination against Women protects a woman's right to work and every state party is required to take appropriate measures to eliminate discrimination against women in the field of employment in order to ensure the same rights to women as that to men on the basis of equality between men and women.

<sup>10</sup> Munir Moosa Sadruddin, 'Sexual Harassment at Workplace in Pakistan: Issues and Remedies about the Global Issue at Managerial Sector' (2013) 7 (1) *Journal of Managerial Sciences* 113.

<sup>11</sup> Shaukat Ali Lohar, 'Women Harassment in Pakistan: Causes, Consequences and Remedies' *Online Indus News* (26 May 2016) <<http://www.onlineindus.com/women-harassment-in-pakistan-causes-consequences-and-remedies/>> accessed 9 September 2016.

<sup>12</sup> UN Committee on the Elimination of All Forms of Discrimination against Women (CEDAW), 'CEDAW General Recommendation No. 19: Violence against women' 1992, in 'Note by the Secretariat, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies' (29 July 1994) UN Doc HRI/GEN/1/Rev.1, <<http://www.refworld.org/docid/52d920c54.html>> accessed 9 September 2016.

include[ing] such unwelcome sexually determined behavior as physical contact and advances, sexually coloured remarks, showing pornography and sexual demand, whether by words or actions. Such conduct can be humiliating and may constitute a health and safety problem; it is discriminatory when the woman has reasonable grounds to believe that her objection would disadvantage her in connection with her employment, including recruitment or promotion, or when it creates a hostile working environment.<sup>13</sup>

This definition indicates that the right to work is violated when an employee is subjected to harassment at the workplace. Moreover, it is important to note that underlying the right of an individual to work is also the right to dignity. If individuals are denied their protected rights to work, to just and favorable working conditions, or to be free from discrimination at the workplace, they cannot be said to have a well-maintained right to dignity. Therefore, in situations where women in Pakistan are either harassed at their workplace or are exploited on the basis of their gender, the State is accountable for its failure to discourage gender-based discrimination. In fact, the State is also responsible for its failure to properly discharge its several international commitments as mentioned above.

The 2010 Act was passed in pursuance of protecting the aforementioned rights of an individual and fulfillment of the international obligations with respect to protection of a woman's right to work. This legislation ostensibly complies with Article 23(1) of UDHR.<sup>14</sup> Moreover, the Act also complies with the requirements of CEDAW by giving consideration to women through a separate legislation for them. The definition of harassment used by the Pakistani legislature is similar to the definition of sexual harassment provided by the CEDAW Committee, indicating the legislature's commitment to its international obligations. However, it should be noted that the objective of the ILO Convention 100 has not been satisfied. While the ILO Convention 100 pertains to equal remuneration for men and women, it is unclear as to how this convention has been incorporated into the present legislation, which does not discuss equal pay for men and women at all, and appears to be a form of window-dressing. Likewise, the ILO Convention 111 deals with the elimination of discrimination at employment and occupation for men and women. While the Pakistani legislature has worked towards eliminating one of the disadvantages faced by women i.e. harassment, it should be noted that the State should not presume that its obligations towards the ILO Convention 111 have been satisfied on the basis of this Act alone. It requires a broader application in terms of not only gender-based discrimination, but also on the basis of race, color, religion, political opinion or social origin. Hence, the legislature cannot claim fulfillment of its obligations under the ILO Convention 111. While the Act is a symbolic step forward for women empowerment, the actual protection of women rights is contingent upon its effective implementation and enforcement.

## **Part II – Provisions of the Legislation: Meanings and Interpretations**

This part analyzes the provisions of the Act in a sequential order. Beginning with an explanation of the scope and jurisdiction of the legislation, it moves on to explain how harassment and workplace have been defined in it. Furthermore, it analyses the role of the

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<sup>13</sup> Ibid.

<sup>14</sup> Article 23(1), Universal Declaration of Human Rights reads: 'Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment'.

inquiry committee, the Ombudsman, management and employer in a workplace with respect to elimination of harassment and implementation of the present legislation.

### Scope and Jurisdiction

Section 1 of the Act defines the scope of the applicability of the law which extends to the whole of Pakistan. The question of whether a federal law applies to a complaint in which the cause of action arose in one of the provinces was considered by the Lahore High Court in *Salim Javed Baig v Federal Ombudsman*.<sup>15</sup> While noting Section 1(2)<sup>16</sup> of the concerned federal law, the Court held that ‘the Federal Act has to be read down thereby limiting the extent of the Act to territories which do not form part of any province’.<sup>17</sup> This holding indicates that after the passage of the 18<sup>th</sup> Constitutional Amendment, complaints arising in the provinces fall under the jurisdiction of the Provincial Ombudsman, whereas the Federal Ombudsman has exclusive jurisdiction with respect to all complaints pertaining to such areas in the federation that are not included in any of the provinces.

### Harassment

The Act defines harassment as:

any unwelcome sexual advance, request for sexual favors or other verbal or written communication or physical conduct of a sexual nature or sexually demeaning attitudes, causing interference with work performance or creating an intimidation, hostile or offensive work environment, or the attempt to punish the complainant for refusal to comply to such a request or is made a condition for employment.<sup>18</sup>

According to this definition, harassment includes not only sexual harassment but also verbal or written abuse which may affect the working conditions or make the working environment unsafe for an individual. This definition, as already mentioned above, is in compliance with the CEDAW Committee’s General Recommendation No. 19. The three significant forms of sexual harassment in the working environment, as mentioned in the Code of Conduct, are abuse of authority, creating a hostile environment, and retaliation.<sup>19</sup> On the face of it, the definition of harassment is broad and seems to encompass all forms of harassment in addition to sexual harassment. However, the Federal Ombudsman has narrowed its meaning while interpreting it. In one of the cases decided by the Federal Ombudsman, while analyzing whether the words *jahil* (illiterate) and *badtameez aurat* (uncivilized woman) constitute harassment, it was clarified that in order for an action to constitute harassment, the action should be severe and persuasive enough to alter the working conditions of the victims’ employment or render the workplace atmosphere intimidating, hostile or offensive.<sup>20</sup> It is interesting to note that in this case, the Federal Ombudsman did not reject the notion that verbal abuse could be harassment, but by reasoning that the verbal abuse was not severe enough and was an isolated incident, decided that it did not constitute harassment. Contrarily,

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<sup>15</sup> PLD 2016 Lah 433.

<sup>16</sup> Section-1(2) states that the Act extends to the whole of Pakistan.

<sup>17</sup> (n 15).

<sup>18</sup> Section 2(h), the Protection against Harassment of Women at the Workplace Act 2010.

<sup>19</sup> The Code of Conduct, Implementation Watch Committee.

<sup>20</sup> 2013 MLD 198.

in another case, the Federal Ombudsman found that such verbal communication did constitute harassment because of the continuous nature of the conduct and the overall sexually demeaning attitude of the accused.<sup>21</sup> It can be seen that in both cases, the Federal Ombudsman has focused upon the intensity of the conduct.

## Workplace

‘Workplace’ has been defined as:

place of work or the premises where an organization or employer operates and includes building, factory, open area or a larger geographical area where the activities of the organization or of employer are carried out and including any situation that is linked to official work or official activity outside the office.<sup>22</sup>

This definition indicates that the Act is applicable to organizations. In one of the cases before the Federal Ombudsman, the main issue was whether an educational institute falls under this definition of workplace.<sup>23</sup> In this case, a university lecturer was accused of asking sexual favors from a student. The Federal Ombudsman found the defendant guilty of sexual harassment and in the process made two significant contributions with respect to the Act. Firstly, the judgment noted that educational institutes are also organizations and thus fall within the meaning of the workplace as defined under Section 2(n) of the Act. This made clear that the Act is as applicable to universities as it is applicable to other organizations. Secondly, the Federal Ombudsman indicated that a university student should not be barred from bringing complaint to the Ombudsman simply for the reason that she was not an employee of the educational institute. It held:

The fact remains that work means physical and mental effort or activity directed to the production or accomplishment of something that one is doing, making or performing especially as an occupation or undertaking a duty or a task therefore, the Act equally applies to employer, employee and students.<sup>24</sup>

If the definition of workplace is explored further, it may be noted that even though the definition has been widened by the abovementioned decision of the Federal Ombudsman, certain important facets of the workplace are still not covered under the definition i.e., transportation provided by the employer during work or a dwelling house. In contrast, the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act 2013, enacted in India, is wider in scope than the Pakistani Act. The language used in the Indian Act with regard to the definition of an aggrieved woman and workplace is more precise, clear and wide in contrast to that in the Pakistani Act. Under the Indian law, an aggrieved woman includes any working woman hired for a regular term, temporary, ad hoc wage, for remuneration, on a voluntary basis or otherwise. She can be either employed directly or as a contract worker, she can be a probationer, trainee, apprentice or called by any other name.<sup>25</sup> A workplace then includes any place visited by the employee arising out of or

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<sup>21</sup> 2013 MLD 225.

<sup>22</sup> Section 2(n), the Protection against Harassment of Women at the Workplace Act 2010.

<sup>23</sup> 2013 MLD 225.

<sup>24</sup> Ibid.

<sup>25</sup> Section 2(a), the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act 2013.

during the course of employment, including transportation provided by the employer for undertaking such a journey. These definitions indicate that a domestic worker is also included in the category of an aggrieved woman and can file a complaint under the Indian law. However, the Pakistani law does not seem to cater to complaints of domestic workers or those who have been harassed on public transportation while commuting to their workplaces. There are no reported cases in Pakistan in this regard and given the broad language of the law, the matter is now entirely left to the ombudsman/judiciary, who may interpret definitions according to their discretion.

### **Inquiry Committee and Penalties**

Section 3 of the Act requires all organizations, including federal and provincial government organizations, private institutes as well as educational institutes to have an Inquiry Committee.<sup>26</sup> The Inquiry Committee consists of three members where at least one member has to be a woman,<sup>27</sup> and a complaint can also be made against any member of the Inquiry Committee itself. The members of the Committee are required to make sure that the environment of the inquiry process is not intimidating, and to decide cases without any bias. The powers of the Inquiry Committee are described in Section 5 of the Act, which include the power to summon and enforce attendance of any person and examine them on oath, to require the discovery and production of any document, to receive evidence on affidavits, and to record evidence.<sup>28</sup> The Inquiry Committee has the power to medically examine the complainant and to make recommendations to the Ombudsman for appropriate action.<sup>29</sup> Furthermore, the Committee has the power to keep the proceedings confidential.<sup>30</sup> The Inquiry Committee upon its findings can award minor or major penalties to the accused.<sup>31</sup> Minor penalties include censure, withholding for a specific period, stoppages, or recovery of compensation payable to the complainant from the pay or any other source of income of the accused. Major penalties include demotion to a lower post, compulsory retirement, removal/dismissal from service and a fine.<sup>32</sup> It may be noted however that the Inquiry Committee comes into action only when a harassment incident is reported to it.<sup>33</sup> Thus there is no provision in the law which requires it to conduct regular assessments of the workplace or take up anonymous complaints which can be considered as one of the drawbacks of the Act. If the Act mandates the Inquiry Committees for regular assessments of the workplace, it can avoid possible harassment incidents and lead to a safer workplace atmosphere.

### **Role of the Ombudsman**

If the complainant or the accused is not satisfied with the decision of the Inquiry Committee, they can always appeal to the Ombudsman. An Ombudsman has the same powers as are vested in a civil court under the Code of Civil Procedure 1908 (Act V of 1908). Furthermore, a complaint can also be filed by the management of an organization in case it believes that the complainant has made a *mala fide* attempt to intentionally defame someone. The essential

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<sup>26</sup> Section 3, the Protection against Harassment of Women at the Workplace Act 2010.

<sup>27</sup> Ibid.

<sup>28</sup> Section, 5(1), the Protection against Harassment of Women at the Workplace Act 2010.

<sup>29</sup> Section 5(2), *ibid.*

<sup>30</sup> Section 5(4), *ibid.*

<sup>31</sup> Section 4(4), *ibid.*

<sup>32</sup> Section 4(4)(i), *ibid.*

<sup>33</sup> Section 4(4)(i), *ibid.*

purpose of the Federal Ombudsman, as noted in *Saleem Javed v Federal Ombudsman*,<sup>34</sup> is to provide speedy and inexpensive justice to the aggrieved parties and thus any decision made by the Federal Ombudsman cannot be challenged in any other court. However, a representation can be made to the President of Pakistan or Governor of the relevant province, as the case may be, in accordance with Section 9 of the Act.<sup>35</sup>

### **Duty of Management and Employer of the Workplace**

The entire responsibility for protection of women against harassment has been laid on the management of an organization, indicating that an employer is responsible for implementing the relevant provisions of the Act successfully in their workplace. According to Section 11 of the Act, employers are responsible for the effective incorporation of the Code of Conduct for protection against harassment as part of their management policy to form an Inquiry Committee referred to in Section 3, and to designate a competent authority referred to in Section 4 of the Act. Moreover, it is the responsibility of the employer to display the Code of Conduct in English as well as in the language understood by majority of the employees at conspicuous places to increase familiarity to the rules.<sup>36</sup> Section 11 of the Act has followed the employer's liability approach eg any employee of an organization may file a petition before the district court on account of the employer's failure to fulfill his/her duties under the said legislation. The employer's responsibility does not end with the display of the Code of Conduct and formation of an Inquiry Committee, it also extends to making temporary adjustments so as to ensure that the accused and the complainant do not have any interaction with each other during the investigation period. As already noted, this Act has been accompanied by a Code of Conduct which lays down the minimum standards of behavior which can be improved upon by an organization itself.

In light of the above analysis, the Act must be appreciated since it applies to both men and women, private and non-private institutions including educational institutions, and because complaints can be brought against employees, management of an organization and even members of the Inquiry Committee of an organization. The case law on this Act indicates that the Federal Ombudsman has exercised its discretion for effective application of the law. One shortcoming of the Act is that it does not take into account discrimination faced by women at their workplaces on account of their gender. Such discrimination can manifest itself in multiple ways: women are frequently denied adequate salaries, opportunities similar to those as are given to men, or basic necessities at the workplace.<sup>37</sup> These discriminatory practices should also be considered harassment under the law and dealt with accordingly. Furthermore, it is recommended to the lawmakers of Pakistan to clearly add 'dwelling house' and 'transport of the workplace' in the definition of workplace. In addition to this, the Ombudsman should broadly interpret the provisions of the law by applying the principles of justice and fairness and not construe the definitions too narrowly.

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<sup>34</sup> PLD 2016 Lah 433.

<sup>35</sup> Section 9, the Protection against Harassment of Women at the Workplace Act 2010.

<sup>36</sup> Section 11(2), the Protection against Harassment of Women at the Workplace Act 2010.

<sup>37</sup> Ayesha Khan, 'Women and Paid Work in Pakistan: Pathways of Women's Empowerment South Asia Research Programme Pakistan Scoping Paper' (2007) Collective for Social Science Research <[http://www.researchcollective.org/Documents/Women\\_Paid\\_Work.pdf](http://www.researchcollective.org/Documents/Women_Paid_Work.pdf)> accessed 9 September 2016.



## **Conclusion**

The Protection against Harassment of Women at the Workplace Act 2010 must be appreciated since it is the first of its kind to address harassment as a significant legal issue, which is violative of a woman's right to work in Pakistan. By protecting a woman's right to work, the Act affirms the Government's commitment towards fulfilling its international treaty obligations such as those under UDHR and CEDAW. Moreover, it has allowed women to raise their voice against harassment at the workplace and has provided them an equal opportunity to earn livelihood, which will eventually lead to greater women participation in the workforce and the economy of the country. However, the Government of Pakistan needs to take several legal measures to ensure the effective implementation of the Act.

In light of our above analysis, some conclusions can be drawn and recommendations made. The Ombudsmen have a huge responsibility in cases related to workplace harassment. Since harassment is a subjective issue and thus cannot be easily assessed or measured, the context in which such acts take place and their intensity are important determining factors. This places a huge responsibility on the Ombudsmen to ensure that the application of the law is consistent with the objectives of the law and in consonance with the principles of justice, equity and fairness. Furthermore, it should be compulsory for organizations to conduct regular assessments with respect to incidents of harassment. Lastly, awareness-raising campaigns need to be conducted with the help of media and non-profit organizations so that more women are aware of their rights under the legislation and can therefore take advantage of it.