**Defining sexual harassment**

BY S A R A M A L K A N I 2021-08-02

THE Protection against Harassment of Women in the Workplace Act was enacted more than 10 years ago. Since then, as cases have gone before harassment committees and ombudspersons, parties have struggled to determine the scope of incidents covered by the law and the nature of employment relationships that f all within the law`s ambit.

The Supreme Court recently passed, for the first time, a judgment interpreting a key provision of the Act: the meaning of `harassment`. In `Nadia Naz y President of Islamic Republic of Pakistan & Others` the Supreme Court stated that the meaning of `harassment` in the context of the law is limited to harassment that is of a sexual nature. It clarified that harassment based on any other protected characteristic such as race, religion or ethnicity is not covered by the 2010 Act, and that conduct that is abusive or hostile, but not sexual in nature is not `harassment`.

The Supreme Court declared that the 2010 Act `confines or limits its application to sexualised forms, including orientation of unwanted or unwelcome behaviour or conduct displayed by an accused person towards a victim or any organization`. The Supreme Court further noted that the `aggrieved per son under the [2010 Act] has the responsibility to prove that the perpetrator truly had an accompanying sexual intention or overture...

The judgement, however, does not offer a thorough analysis of the meaning of sexual harassment.

It begs the question: what is the scope of `sexualised` harassment and what is the nature of conduct that expresses `sexual intention or overture`.

It would be a mistake to think this only covers conduct that relates to sexual activity or language.

Conduct that is rooted in gender-based discrimination and creates an abusive and hostile work environment must also be considered sexual harassment.

To understand the extent and nature of conduct that falls under the category of sexual harassment, it`s helpful to turn to guidelines of the Equal Employment Opportunity Commission of the United States, especially since the definition of the 2010 Act mirrors this guidance. The EEOC guidance states that sexual harassment includes `unwelcome advances, requests for sexual f avours, and other verbal or physical conduct of a sexual nature` as well as sexual misconduct that has the `purpose or ef fect ofunreasonably interfering with an individual`s work performance or creating an intimidating, hostile or offensive working environment` Sexual harassment is actionable conduct in the United States under the Civil Rights Act of 1964 which makes `it an unlawful employment practice for an employer ... to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual`s race, colour, religion, sex or national origin`. The EEOC guidelines specify that `sexual harassment` is a form of sex discrimination prohibited by the Civil Rights Act.

Interpreting the prohibition against sexual harassment in the workplace, the US supreme court has emphasised that the key consideration is whetherdiscrimination on the basis of sex created an abusive or hostile work environment for the complainant.

One supreme court decision held that degrading comments addressed to a woman because of her gender (such as `you`re a woman, what do you know`,`we need a man as a manager` and calling the complainant a `dumb ass` woman) constitutes sexual harassment.

This interpretation was endorsed by the Lahore High Court in a judgement from 2019, which also f avourably cited another US supreme court decision stating that `in evaluating the severity and pervasiveness of sexual harassment, we should focus on the perspective of the victim` and that `conduct that many men consider unobjectionable may of fend many women`.While Pakistan does not have anti-discrimination legislation of the scope of the Civil Rights Act in the US, Article 25 of Pakistan`s Constitution provides that all citizens are entitled to equal protection of the law. Article 25 specifically prohibits discrimination on the basis of sex. The Statement of Objects and Reasons annexed to the 2010 Act states that the `Act builds on the principles of equal opportunity for men and women and their right to earn a livelihood without fear of discrimination as stipulated in the Constitution`.

In light of constitutional obligations, how should we read the Supreme Court`s recent judgement? Sexual harassment cannot be restricted to conduct that is related to the act of sex. Harassment rooted in sex-based discrimination should be considered sexual harassment actionable under the 2010 Act, which must be read in light of Article 25 of the Constitution. This is consistent with the purpose of the 2010 Act to address gender discrimination that impacts women in the workplace.

The complete definition of harassment in the 2010 Act supports this view, as it includes `sexually demeaning attitudes`. While the court did not discuss the meaning of `sexually demeaning attitudes`, the inclusion of this phrase shows that the 2010 Act covers workplace conduct that discriminates against persons because of their gender and creates an intimidating or hostile environment.

The Supreme Court has recognised that while `anyone may be subject to sexual harassment, in a culture and society like Pakistan, women are the distressing majority of victims`. Women f ace pervasive harassment in the workplace when they are bullied, stereotyped and denied opportunities and benefits because of their gender. The judgement stated that the 2010 Act `rather than addressing the issue of harassment in all its manifestations ... is a myopic piece of legislation that focused only on a minute f action of harassment`. This appears to be an unduly strong criticism of the law. While the Act is limited to sexual harassment, it nonetheless covers a wide range of discriminatory conduct directed to persons because of their gender that creates an intimidating, hostile or of fensive work environment.  The writer is a lawyer.