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**Suppressed voices, grand dialogues**

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When, nearly two years ago, Meesha Shafi accused a prominent singer and actor of inappropriate physical contact on multiple occasions she walked onto a legal chessboard mined against her. Soon she, and the other women who came out with similar allegations, as well as those who sought to support her found themselves facing what the Guardian has described as the ‘asphyxiating vortex of litigation’ that awaits any woman in most parts of the world who has been harassed and has chosen not to remain silent.

It would be entirely inappropriate for this piece to attempt to comment on the veracity or otherwise of Ms Shafi’s claim. It is, however, entirely apt to examine the structure of the law within which her claim is being processed.

Pakistan’s criminal defamation laws are weaponized to silence, stifle and suppress. The burden of proof placed on the woman speaking out leaves her, eventually, in a desperate bid to salvage whatever dignity she can.

Two distinct attitudes towards defamation have come to exist in modern legal systems. The United States inherited its defamation jurisprudence from the English common law tradition but since the civil rights movement of the 1960s defamation law in the US has departed, radically, from that tradition.

The English tradition, that Pakistani law continues to follow, places the burden to prove the truth of an apparently defamatory statement on the maker of the statement. Federal and state laws in the US have, increasingly, come to require the complainant to prove the falsity of what is claimed to be defamation committed by the defendant.

So great has been the distaste in the US for the English tradition that judgments of English courts in defamation cases based only on the defendant’s failure to establish the truth of her or his defamatory statement have been held by American courts to be against the public policy embedded in the speech rights guaranteed by the constitution of the United States.

It is the balancing in the US between the reputational rights of the accused and the speech rights of the accusers that has allowed abused women, and men, to come out against men, both powerful and sly, and survive with confessions by the abusers and convictions granted by the courts.

Pakistani law, it turns out, provides no plausible remedy to a woman, or indeed to a child or man, who has been molested or subjected to unwanted sexual advances, but not raped, at a place that is not the victim’s workplace. A woman who alleges sexual harassment becomes a hunted being. Consider.

An essential attribute of power in our land is the ability to ensnare an opponent in a criminal case through the registration of a first information report, the FIR, against him or her. The FIR transforms an indignant opponent into a cowering accused. The colonial state understood the profound efficacy of this degradation.

An FIR silences those who might have spoken to expose or protest inequity, injustice or sexual harassment. Apart from the civil wrong of defamation that may result in monetary compensation, criminal defamation and criminal annoyance came to share space in the colonial penal code with seditious speech against the state.

Criminal defamation was, and is, punishable with imprisonment. Around the world, prosecution for criminal defamation has become extremely rare – with state authorities refusing to register criminal cases. In other jurisdictions, criminal defamation has been removed altogether from the penal code. Not so in Pakistan.

Section 509 of the Penal Code of 1860, as amended in 2010, defines the offence of sexual harassment through verbal or physical conduct and prescribes the punishment of imprisonment up to three years or fine of up to five hundred thousand rupees or both. The same penal code also carries, since 1860, section 499 that defines the offence of criminal defamation with imprisonment up to two years. If the alleged defamation is carried out through an electronic information system the Prevention of Electronic Crimes Act of 2016 kicks in and provides for imprisonment up to three years or fine up to one million rupees or both.

The Defamation Ordinance of 2002 also allows for money damages in civil proceedings, on top of the punishment for criminal defamation, against a person said to have committed defamation. All laws on the Pakistani statute book, criminal and civil, ultimately place the burden to establish truth on the woman who claims sexual or other harassment.

Ms Shafi wisely chose not to press charges under section 509 of the Penal Code. Proving the crime of sexual harassment imposes on the accuser the usual criminal law burden of producing evidence that establishes the ingredients of the crime, from groping in the dark to willfulness on the part of the offender, beyond any reasonable doubt. Given the opportunistic circumstances alleged by Ms Shafi, such conclusive evidence would have been impossible to produce before a court.

Ms Shafi made her allegations on the electronic media and filed a complaint before the Ombudsman for Sexual Harassment, who acts in terms of the Protection Against Harassment of Women at the Workplace Act of, 2010. The standard of proof required in the administrative proceedings before the ombudsman is lower than before a criminal court.

The legal blowback that Ms Shafi now faces has scratched on the dark landscape of misogyny the need for an urgent redesign of the harassment and defamation laws of the country. Her complaint before the ombudsman stands quashed on the ground that the sexual harassment law only recognises harassment at the workplace between an employer and an employee, or by one employee against another. It was held that neither Ms Shafi nor her alleged harasser had an ‘employment relationship’ covered by the Protection Against Harassment of Women at the Workplace Act of, 2010.

Ms Shafi and the women who have come out in her support must, however, face criminal defamation charges as well as civil action for monetary damages on account of the alleged reputational harm caused by them to the alleged groper. On September 29 this year, FIRs were registered against them under section 20 of the Prevention of Electronic Crimes Act, 2016.

The women have either left the country, capitulated and sought pardon, or have obtained bail in order to retain their freedom and dignity as the accused in a criminal trial. A successful defence in the trial would require them to establish through evidence beyond reasonable doubt that the alleged harassment did indeed occur.

Defence of the civil action for damages also places on Ms Shafi the burden of proving the allegations made through evidence that satisfies the lower, but still onerous, evidentiary threshold of balance of probabilities. The situation is grim.

Prospects for the abused will remain bleak until the burden of proof is re-balanced between the accuser and the accused in matters of sexual harassment, and criminal defamation is removed as a threat to those speaking out.

Circumstances are bleaker for another set of victims. Children inappropriately touched, often for years, by relatives and tutors abound around us – scarred psyches and small voices muzzled by a mist of denial. Much before the law – defective as it might be – can be invoked, the awareness and courage to call out a predator is needed. Children need that awareness and overcoming of guilt to be instilled in them. Societal taboos are letting them down. Efforts to have awareness about sexual abuse included in school curricula have met with outrage.

Are our women and children to be restored their voices? In the season for grand dialogues, do we have an ear for such things?

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