

# Review of Literatures on Definition of Sexual Harassment in the Workplace: Underscoring their Prescriptive Implication

**Adetutu D. Aina-Pelemo, \* Paul A. Ejembi, \*\* Iseoluwa T. Aina\*\*\***

## **Abstract**

*Sexual harassment is a prevalent problem which occurs in different sectors. Laws define sexual harassment in the workplace according to their jurisdiction, considering the lack of universal meaning of sexual harassment. These varied interpretations have led to a lot of controversies, as sexual harassment in the workplace is measured according to diverse apparatuses, circumstances, and individual perception. The focus of this review is to examine the various definitions given to sexual harassment in selected countries so as to ascertain the major elements and gaps as well as their prescriptive implications in preventing, prohibiting and redressing sexual harassment in the workplace. In achieving this review, the definitions are classified based on perception in developed and developing countries, and doctrinal research methodology is adopted in extracting information for this review. The review finds that most of the definitions of sexual harassment exclude gender-based harassment and patently stand in need of copious clarifications for the benefit of stakeholders in the workplace. The review recommends a more comprehensive definition of sexual harassment to encompass all possible connotations of the concept along gender lines so as to engender a more illuminating understanding of sexual harassment in the workplace.*

**Keywords:** Definition; developing and developed countries; general review; sexual harassment in the workplace; prescriptive implication;

---

\* Lecturer, Redeemer's University, Department of Law, Ede, Osun State, Nigeria.  
Aina-pelemao@run.edu.ng, **Corresponding author:**ainaadetutud@gmail.com

\*\* Lecturer, Benue State University, Department of Law, Makurdi, Benue State, Nigeria  
Paulejembi1972@gmail.com

\*\*\* Lecturer, Afe Babalola University, Department of Law, Ado, Ekiti State, Nigeria  
iseoluwaaina@abuad.edu.ng

## Introduction

There are several definitions of the phrase ‘sexual harassment in the workplace’, and this is determined from individual point of view, ranging from distinct legal instruments, cultural perspective, victims’ school of thought, to the academicians’ perspective. However, previous research perceives domination of workplace sexual behaviours to be triggered by an urge for sexual gratification or desire.<sup>1</sup> Mapped out research opined that sexual harassment is an attack against the dignity of women in a male-controlled environment.<sup>2</sup> Based on this patriarchal structure of most settings, sexual harassment is further known as a form of gender preference of males over females at workplace,<sup>3</sup> and a means to keep women under

---

<sup>1</sup> B Nauman, and AS Abbasi. ‘Sexual harassment at workplace...a case of Banking Sector in Lahore’ [2014] (20)(5) *Middle-East Journal of Scientific Research* 558; J H Hussin ‘Sexual Harassment in the Workplace: An Exploratory Study from Lebanon’ [2015] (7)(1): *Journal of Management Research* 107; C Akhtar. ‘Sexual Harassment at Workplace and in Educational Institutions: A Case Study of District Srinagar, India’ [2013](8)(3) *International NGO Journal* 54; JL Berdahl, ‘Sexual Harassment of Uppity Women’ [2007a](92)(2) *Journal of Applied Psychology* 425.

<sup>2</sup> AD Aina-Pelemo, and others, ‘Sexual Harassment in the Workplace: Case Study of the Nigerian Legal Sector’ [2019] (86) *Journal of Law, Policy and Globalisation* 121; S Hills, and TC Marshall, ‘Beliefs about Sexual Assault in India and Britain are Explained by Attitudes Toward Women and Hostile Sexism’ [2018](79)(7-9) *Sex Roles* 421; AD Aina and P. Kulshrestha, ‘Sexual Harassment in Educational Institutions in Delhi’ NCR, (India): Level of Awareness, Perception and Experience’ [2017] (21)(1) *Sexuality and Culture* 106; Fapohunda. ‘Gender Differences in Perceptions and Experiences of Sexual Harassment in the Workplace’ [2014] (1)(2) *Global Journal of Management and Business* 36; Pereira, and Rodrigues. ‘Sexual harassment at workplace in India medico-legal aspects’ [2014] (36)(4) *Journal of Indian Academy Forensic Medicine* 421.

<sup>3</sup> AD Aina-Pelemo, MC Mehanathan, and P Kulshrestha ‘Indian Legal Profession and the Sexual Harassment of Women at Workplace Act’ [2020] *Sexuality and Culture*; A Aina-Pelemo, and S Saluja ‘Comparative Analysis of Sex-Selection in Nigeria and India’ [2018] (4)(6) *International Journal of Humanities and Social Science Studies* 70; S Mishra. ‘Women in Indian Courts of Law: A Study of Women Legal Professionals in the District Court of Lucknow, Uttar Pradesh, India’ [2015] (24) *E-cadernos ces* 78; P Kannan. ‘An Empirical study on the satisfaction level of women lawyers towards their work life balance’ [2013] (12)(3) *IOSR Journal of Business and Management* 16.

the subordination of men,<sup>4</sup> consequently leading to gender-pay gap and sex-spilled roles in the workplaces.<sup>5</sup>

One of the motives, other than sexual lust, behind sexual harassment is to demonstrate supremacy upon the victim,<sup>6</sup> whether male or female: if female- to remind her of her status as sex object even at work or to tell her that, she is good only for gratifying sexual needs.<sup>7</sup> While, in the instance of male, it is a form of punishment for those who deviate from the traditional masculinity orders or to enable the victim to submit to whatsoever requested of him.<sup>8</sup> This implies that the motive for harassment at workplace, determines the type of harassment, and further broadens the theme 'sexual harassment' to include all forms of harassment in work setting. Meanwhile, some research focus on the sexual aspects of harassment in the workplace in isolation from the non-sexual aspects which also amount to harassment.

This often causes confusion or controversy. Even some laws define workplace harassment to include harassment that is not driven

---

<sup>4</sup> D Izugbara. Understanding Human Sexuality Seminar Series 2: Patriarchal Ideology and Discourses of Sexuality in Nigeria. (Lagos: African Regional Sexuality Resource Centre 2004) ARSRC (1-34); M C Nussbaum. 'Whether from Reason or Prejudice: Taking Money for Bodily Services' [1998] (27) *Journal of Legal Studies* 693; S A Menon, and S Kanekar. 'Attitudes toward Sexual Harassment of Women in India' [1992](22)(24) *Journal of Applied Social Psychology* 1940; B Unnikrishnan, and others, 'Harassment among Women at Workplace: A Cross-Sectional Study in Coastal South India' [2010](35)(2) *Indian Journal of Community Medicine* 350; York. 'Defining Sexual Harassment in Workplace: A Policy-Capturing Approach' [1989](32)(4) *Academy of Management Journal* 830; LF Fitzgerald, and others, 'The Incidence and Dimensions of Sexual Harassment in Academia and the Workplace' [1988](32) *Journal of Vocational Behaviour* 152; L Farley, Sexual shakedown: the sexual harassment of women on the job. New-York: McGraw-Hill. Kannan (1978) (n3); Mishra (n3).

<sup>5</sup> Schultz, and others, 'Causes of Sexual Harassment' in L I Gerdes, (eds) *Sexual harassment: Current controversies* (San Diego: Green Haven Press Inc 1999) 80-141.

<sup>6</sup> AD Aina-Peleum, MC Mehanathan and P Kulshrestha 'Sexual Harassment at Workplace: Judicial Impact in Nigeria and India' [2018] (4) (2) *Indian Journal of Law and Human Behaviour* 211; K R Browne. 'Sex, Power, and Dominance: The Evolutionary Psychology of Sexual Harassment' [2006] (27) *Managerial and Decision Economics* 145.

<sup>7</sup> R Gupta, *Sexual Harassment at Workplace*. (Haryana: LexisNexis 2014); DM Szymanski, LB Moffitt, and ER Carr. 'Sexual Objectification of Women: Advances to Theory and Research' [2011] (39)(1): *The Counseling Psychologist* 6.

<sup>8</sup> KJ Holland and others, 'Sexual Harassment Against Men: Examining the Roles of Feminist Activism, Sexuality, and Organizational Context' [2016] (17)(1) *Psychology of Men and Masculinity* 17; J L Berdahl, VJ Magley and CR Waldo, 'The Sexual Harassment of Men?: Exploring the Concept with Theory and Data' [1996](20)(4) *Psychology of Women Quarter* 527; CR Waldo, JL Berdahl and LF Fitzgerald, 'Are men sexually harassed? If so, by whom?' [1998] (22) *Law and Human Behaviour* 59.

by sexual behaviours *The Equality Act 2010* (UK) S. 26(1) (Equality Act), and some omitted the humiliating aspect of sexual harassment victims which often occur as a result of acceptance or refusal of the sexual advance. Can sexual or non-sexual harassment be discussed in isolation of the other when discussing sexual harassment in the workplace? Hence, this review seeks to identify the important elements of a definition of sexual harassment, then comparatively examine the definitions in a number of developed and developing countries to see whether they meet certain requirements, as well as examine likely commonality among them and identify directions for future research for legislative reform.

### ***General Definitions of Sexual Harassment in the 80s and 90s***

Until mid70s, the term 'sexual harassment' was unheard,<sup>9</sup> as at then, some developed countries perceived such act as unwanted sexual behaviours anticipated to restrict women from desired employment and make men economically dominant.<sup>10</sup> Such workplace behaviours were seen as a relationship of unequal power between men and women as opposed to sexual attraction or gratification.<sup>11</sup> In the 80s, mapped out research defined sexual harassment as an unsolicited sexual attention, request for sexual favour, which often involves threat or coercion and such acceptance or refusal is conditioned on working women's career or education as the case may be<sup>12</sup> in order to keep women within the confines of sexual and domestic spheres. Men that are mostly in support of social male dominance see women more as sex objects than colleagues or contemporaries.<sup>13</sup> From the existences of the phrase sexual

---

<sup>9</sup> BA Gutek. 'Understanding Sexual Harassment at Work' [2012](6)(2)*Notre Dame Journal of Law, Ethics and Public Policy* 335; CA Mackinnon, R B Siegel *Directions in Sexual Harassment Law* (New Haven: Yale University Press 2004).

<sup>10</sup> L Farley (n, 4); CA Mackinnon, *Sexual Harassment of Working Women* (New Haven: Yale University Press 1979).

<sup>11</sup> R Gupta (n, 7); JL Berdahl, (n, 1)

<sup>12</sup> LF Fitzgerald, and others, 'The Incidence and Dimensions of Sexual Harassment in Academia and the Workplace'[1988](32) *Journal of Vocational Behaviour* 152;

<sup>13</sup> *Ibid*; BA Gutek, and AG Cohen, 'Sex Ratios, Sex Role Spillover and Sex at Work: A Comparison of Men's and Women's Experiences' [1987] (40) (2) *Human Relations* 97; JB Pryor. 'Sexual Harassment Proclivities in Men' [1987] (17) (5/6) *Sex Roles* 269.

harassment till date, sexual harassment, is perceived as a consequence of organisational and social structure that directly and indirectly permits demeaning sexual behaviours against women.<sup>14</sup> Women were the major victims of sexual harassment so it is seen as an act of sex-discrimination due to the organisational climate and patriarchal structure of the society.<sup>15</sup>

In the eighties, Canadian jurists find it difficult to associate sexual harassment with discrimination on the basis of sex, as discrimination was viewed in the generic sense, since not all women were victims of sexual harassment or treated differently from the men in workplaces.<sup>16</sup> Hence, sexual harassment could not constitute discrimination on the basis of sex, unlike United States of American legislative provisions that see harassment and sexual harassment as a form of employment discrimination contrary to Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967, (ADEA), and the Americans with Disabilities Act of 1990, (ADA). Also, see the cases of- *Hall v. Gus Construction Co.*,<sup>17</sup> *Hicks v. Gates Rubber Co.*,<sup>18</sup> as well as cases decided in some developing countries, that clearly states, sexual harassment is a form of discrimination at work (*Abisola Akinsete v. Westerngeco Seismic Nigeria Limited*;<sup>19</sup> *Ejieke Maduka v Microsoft Nigeria Limited & 2 Ors*,<sup>20</sup> *Vishaka & Ors v. State of Rajasthan & Ors*.<sup>21</sup> U.S. Equal

---

<sup>14</sup> AE Tenbrunsel, MR Rees, and KA Diekmann. 'Sexual Harassment in Academia: Ethical Climates and Bounded Ethicality' [2019] (70) *Annual Review of Psychology* 245; L Vasudevan, N Mahadi. 'Sexual Harassment and Management Behaviour at the Workplace' [2018](9)(2) *IJM Journal of Case Studies in Management* 5; BA Gutek, AG Cohen, and AM Konrad. 'Predicting Social-Sexual Behaviour at Work: A Contact Hypothesis' [1990](33)(3) *The Academy of Management Journal* 560; BA Gutek, and B Morasch. 'Sex-ratios, sex-role spillover, and sexual harassment of women at work' [1982](38)(4) *Journal of Social Issues* 55; A Khan, and A Mills, 'Sexual Harassment' [1990](134)(3) *Solicitors Journal* 66; AG Cohen, and BA Gutek. 'Dimensions of Perceptions of Social-Sexual: Behaviour in a Work Setting. [1985] (13)(5/6) *Sex Roles* 317.

<sup>15</sup> CA Mackinnon (n, 10).

<sup>16</sup> *Janzen v. Platy Enterprises Ltd* Case No: 20241 (Supreme Court of Canada (1 S.C.R. 1252) May 04, 1989).

<sup>17</sup> (1985); (842) F.2d 1014.

<sup>18</sup> (1991)833 F. 2d at 1416

<sup>19</sup> Suit No. NICN/LA/516/2012 (National Industrial Court, Lagos Division November 27th, 2014).

<sup>20</sup> NICN/LA/492/2012 (National Industrial Court, Lagos Division December 19<sup>th</sup>, 2013).

<sup>21</sup> *Vishaka & Ors v. State of Rajasthan & Ors*, (1997).

Employment Opportunity Commission (EEOC, 2011b, Para 1-2)<sup>22</sup> defines sexual harassment as unwelcome sexual advances, requests for sexual favors, and other verbal or physical harassment of a sexual nature which interferes with the recipient's employment or work performance or creates a hostile or offensive work environment. In a broader term, some United States of American scholars opined that sexual harassment involves sexual coercion, unwanted sexual attention and gender harassment against women in exchange for employment-related considerations<sup>23</sup>. This definition covers both sexual and non-sexual harassment, as sexual coercion (*quid pro quo*) deals with sexual harassment, and unwanted sexual attention/gender harassment deals with non-sexual harassment (hostile environment).

During the early stage of sexual harassment discussions, very few researchers acknowledged that men experience sexual harassment in the workplace, thus, men were initially excluded from the definition of sexual harassment just like that of rape in most legislative jurisdictions.<sup>24</sup> The phrase sexual harassment was broadened to include both men and women at work due to globalisation, socialisation, and changes in the trend of social behaviours<sup>25</sup>, European Union defined sexual harassment as unwanted conduct of a sexual nature, or other conduct based on sex affecting the dignity of women and men at work. The modified definition of sexual harassment provided by the United States Equal Employment Opportunity Commission (1980) includes men, same-sex and transgender harassment at work.<sup>26</sup> These definitions indicate that sexual harassment is a form of sex discrimination against all gender, though in various forms and perspectives. However, in the

<sup>22</sup> US Equal Employment Opportunity Commission (EEOC), 'Harassment: Washington, D.C. Equal Employment Opportunity Commission' (2011a) <<http://www.eeoc.gov/laws/types/harassment.cfm>> accessed 19 December 2019.

<sup>23</sup> LF Fitzgerald, S Swan, and K Fischer, 'Why didn't she just report him? The psychological and legal implications of women's responses to sexual harassment' [1995](51)(1) *Journal of Social Issues* 117.

<sup>24</sup>NL Fisher and A Pina, 'An overview of the literature on female-perpetrated adult male sexual victimization' [2013](18)(1) *Aggression and Violent Behaviour* 54.

<sup>25</sup> Commission of the European Communities, *Consultation of Management and Labour on the Prevention of Sexual Harassment at Work*. 1996, February (Catalogue number: CB-C0-96-415-EN-C. ISBN 92-78-07865-4). Brussels: The Commission.

<sup>26</sup> JC Quick and McFadyen MA 'Sexual Harassment: Have We Made Any Progress?' [2016] (22)(3) *Journal of Occupational Health Psychology* 286.

review study conducted among (11) eleven member states of European workplaces from 1987-1997, attention was drawn to the absence of a universal definition of sexual harassment throughout Europe, specifically among the Southern member states, as some concluded that defining sexual harassment as sex-discrimination is inadequate.<sup>27</sup> Nevertheless, gender is the traditional characteristic assigned to male and female by the people and society, while ‘sex’ means the biological uniqueness of human body.<sup>28</sup>

However, recognition was not legally given to the vulnerability of men to any workplace harassment in most jurisdictions, but a lot of men’s sexual experiences were reported by few studies in the nineties<sup>29</sup> indicating that sexual harassment is an unwanted sexual behaviour capable of being experienced and practiced by both men and women, but the process of evaluation of happenings should be assessed differently. Meanwhile, as at the eighties, occurrences of workplace harassment was mostly in form of sex-role spillover, meaning; the transfer of traditional roles of men and women to work environment, especially the non-traditional work setting, worsened by the imbalanced sex ratio at work.<sup>30</sup> Hence, women especially those in traditional workplace were seen more as sex objects and men as sexual agents due to the feminization of women and masculinity of men in the society.

---

<sup>27</sup> MC Timmerman, and WC Bajema, *Sexual Harassment in European Workplaces: A Review of Research in 11 Member States (1987-1997)*. Dutch: European Commission 1998.

<sup>28</sup> A Khan, and A Mills, (n, 14)

<sup>29</sup> MA Donovan, and F Drasgow, ‘Do Men’s and Women’s Experiences of Sexual Harassment Differ? An Examination of the Differential Test Functioning of the Sexual Experiences Questionnaire’ [1999] (11)(3) *Military Psychology* 265; CR Waldo, JL Berdahl and LF Fitzgerald, ‘Are men sexually harassed? If so, by whom?’ [1998] (22) *Law and Human Behaviour* 59; JL Berdahl, VJ Magley and CR Waldo, ‘The Sexual Harassment of Men?: Exploring the Concept with Theory and Data’ [1996](20)(4)*Psychology of Women Quarter* 527.

<sup>30</sup> BA Gutek, and AG Cohen, ‘Sex Ratios, Sex Role Spillover and Sex at Work: A Comparison of Men’s and Women’s Experiences’ [1987] (40)(2) *Human Relations* 97; BA Gutek, and B Morasch. ‘Sex-ratios, sex-role spill-over, and sexual harassment of women at work’ [1982](38)(4) *Journal of Social Issues* 55; R Gutek, ‘Experiences of sexual harassment: Results from a representative survey’ Paper presented at the 89th Annual Convention of the American Psychological Association, Los Angeles, August 1981.

From inception of the subject matter even till now, sexual harassment remains a major problem experienced by women,<sup>31</sup> and the commonest form is that from men to women.<sup>32</sup> Beyond that, plethora of 20s studies also found that sexual and non-sexual harassment is the major challenge experienced from male to female,<sup>33</sup> female to male,<sup>34</sup> male to male<sup>35</sup> and female to female.<sup>36</sup> However, the classification of the types or forms of harassment experienced and perpetrated by the victims and harassers respectively remain poorly understood under various definitions as the motive behind the act differs.

According to the US case law of *Meritor Savings Bank v. Vinson*,<sup>37</sup> the foremost types or forms of sexual harassment are *quid pro quo* and *hostile environment*; the means of denying or subjecting the employee's economic benefits on sexual favours is known as 'quid pro quo' and the continuous refusal or retaliation from such sexual advances leading to humiliation and maltreatment of the victim is regarded as 'hostile environment'.<sup>38</sup> The latter, non-sexual type of harassment based on abusive work setting was regarded as

<sup>31</sup> SM Burn, 'The Psychology of Sexual Harassment' [2019] (46)(1) *Teaching of psychology* 96; AD Aina-Pelemo, MC Mehanathan and P Kulshrestha 'Sexual Harassment at Workplace: Judicial Impact in Nigeria and India' [2018] (4) (2) *Indian Journal of Law and Human Behaviour* 211; LF Fitzgerald, F Drasgrow, and VJ Magley, 'Sexual Harassment in the Armed Forces: A Test of an Integrated Model' [1999] 11(3) *Military Psychology* 329; Pralhadrao. 'Sexual Harassment in College Campus' [2014] (2)(5) *Review of Literatures* 1; Rahama Jahan 'Sexual Harassment in workplace in South Asia: A Comparative study of Blangdesh, India, Nepal and Srilanka' [2015] (17)(6) *IOSR Journal of Business and Management* 49.

<sup>32</sup> JA Scarduzio, SJ Wehlage, and S Lueken, 'It's like Taking Your Man Card Away: Male Victims' Narratives of Male-to-Male Sexual Harassment' [2018] 00(00) *Communication Quarterly* 1; BL Russell, D Oswald 'When Sexism Cuts Both Ways: Predictors of Tolerance of Sexual Harassment of Men' [2015] (19)(5) *Men and Masculinities* 524; McDonald, and Charlesworth Workplace sexual harassment at the margins. Work, employment and society 118–134 2015.

<sup>33</sup> AD Aina-Pelemo, MC Mehanathan and P Kulshrestha (n, 31)

<sup>34</sup> Hussin. (n, 1)

<sup>35</sup> TE Page, and A Pina. 'Moral disengagement and self-reported harassment proclivity in men: the mediating effects of moral judgement and emotions' [2018] (24)(2) *Journal of Sexual Aggression* 157.

<sup>36</sup> JL Berdahl, 'Harassment based on Sex: Protecting Social Status in the Context of Gender Hierarchy' [2007b](32)(2) *Academy of Management Review* 641.

<sup>37</sup> *Meritor Savings Bank v. Vinson*, No: 84-1979 (U.S. Supreme Court, 477 U.S. 57 June 19th, 1986).

<sup>38</sup> P Sahgal, and A Dang 'Sexual Harassment at Workplace: Experiences of Women Managers and Organisations' [2017] (3)(22) *Economic and Political Weekly* 49; AD Aina and P Kulshrestha, 'Sexual Harassment in Educational Institutions in Delhi' NCR, (India): Level of Awareness, Perception and Experience' [2017] (21)(1) *Sexuality and Culture* 106;



sex-discrimination,<sup>39</sup> *Meritor Savings Bank v. Vinson*,<sup>40</sup> bringing confusion on what sexual harassment really represents, as the link between sexual harassment and sex-discrimination is yet to be clearly theorized by some developing countries (*Abisola Akinsete v. Westerngeco Seismic Nigeria Limited*;<sup>41</sup> *Ejike Maduka v Microsoft Nigeria Limited & 2 Ors*;<sup>42</sup> *Vishaka & Ors v. State of Rajasthan & Ors*.<sup>43</sup> On the one hand, Gruber<sup>44</sup> emphasised on the confusion over sexual harassment definitions due to the gap connecting research and legal conceptualisations of the exact meaning of harassment at workplace. In an attempt to resolve the identified problem, Gruber<sup>45</sup> exclusively categorised the definition of sexual harassment into (3) three parts, subdivided into (11) eleven types as follows; **verbal requests** (sexual bribery, sexual advances, relational advances and subtle pressure), **verbal comments** (personal remarks, subjective objectification and sexual categorical remarks), and **non-verbal displays** (sexual assault, sexual touching, sexual posturing and sexual materials). The first part falls under quid pro quo type of sexual harassment, the second deals with gender harassment and partial discussion of the other type of sexual harassment (hostile environment) although the focus was on only women and the third part deals with quid pro quo but, in an aggressive and severe manner, for example, attempted intercourse or fondling. The major challenge is that he excluded the possibility of men harassment from his analysis.

On the other hand, from the (5) five- **gender harassment, seductive behaviour, sexual bribery, sexual coercion, and sexual imposition or assault** classifications of sexual harassment distilled by Till,<sup>46</sup> Fitzgerald and others<sup>47</sup> categorised sexual harassment into

---

<sup>39</sup> JL Berdahl (n, 36)

<sup>40</sup> *Meritor Savings Bank v. Vinson* (n, 37)

<sup>41</sup> *Abisola Akinsete v. Westerngeco Seismic Nigeria Limited* (n, 19)

<sup>42</sup> *Ejike Maduka v Microsoft Nigeria Limited & 2 Ors* (n, 20)

<sup>43</sup> *Vishaka & Ors v. State of Rajasthan & Ors* (n, 21)

<sup>44</sup> JE Gruber, 'A typology of personal and environmental sexual harassment: Research and policy implications for the 1990's' [1992] (26) *Sex Roles* 447.

<sup>45</sup> *Ibid.*

<sup>46</sup> F Till 'Sexual Harassment: A Report on the Sexual Harassment of Students, Washington: National Advisory Council on Women's Educational Programs' (1980) <<https://files.eric.ed.gov/fulltext/ED197242.pdf>> accessed 2 July 2019.

(3) three behavioural constructs; **unwanted sexual attention, gender harassment and sexual coercion**. The first two are categorised under hostile environment and the sexual coercion under quid pro quo type of sexual harassment. Based on these categorisations, Fitzgerald and colleagues were able to develop a research instrument (SEQ) for measuring the occurrence of sexual harassment in organisations and possible definition of sexual harassment. But, they emphasised on the inability to legally link the difference between sexual harassment and gender harassment as one of the significant weakness affecting the body of sexual harassment research and definitions. The instant study discovered that both studies focused on sexual harassment against women with the exclusion of men or same-sex harassment and the analyses were beyond those sexual behaviours the legal provisions of US laws.<sup>48</sup> Hence, those measures and categories might not actually resolve or be sufficient as a scale for measuring or defining men and women harassment at work, as well as differentiating between sex-discrimination and sexual harassment in the workplace.

Conversely, the feminist defined sexual harassment as a sex-discriminatory act that is committed by men against women because of sex, and, therefore, liable to legal actions<sup>49</sup>. What if the sexual harassment is from same- sex, would such behaviour still amounts to sex-discrimination? Franke<sup>50</sup> argues that workplace sexual conduct between same-sex should be regarded as sex-discrimination so far it reflects gender stereotype and in fact, sexual harassment be reconceptualised as gender harassment. He finally defined sexual harassment as a kind of sex discrimination not because the conduct

---

<sup>47</sup> LF Fitzgerald, S Swan, and K Fischer (n, 23).

<sup>48</sup> US Equal Employment Opportunity Commission (EEOC) 'Sexual Harassment. Washington, DC Equal Employment Opportunity Commission' (2011b) <[http://www.eeoc.gov/laws/types/sexual\\_harassment.cfm](http://www.eeoc.gov/laws/types/sexual_harassment.cfm).> accessed 19 December 2019.

<sup>49</sup> LF Fitzgerald and others (n,12); BA Gutek, and AG Cohen (n,30); CA Mackinnon (n,10); Uggen, Blackstone. 'Sexual Harassment as a Gendered Expression of Power' [2004] (69)(1) *American Sociological Review* 64; York. 'Defining Sexual Harassment in Workplace: A Policy-Capturing Approach' [1989](32)(4) *Academy of Management Journal* 830.

<sup>50</sup> KM Franke, 'What's wrong with sexual harassment?' [1997](49) *Stanford Law Review* 691.

would not have been undertaken if the victim had been a different sex, not because it is sexual, and not because men do it to women, but precisely because it is a technology of sexism.<sup>51</sup> Some gender harassment behaviours are not sexual in nature so, they may not qualify as sexual harassment. Also, not all sexual advances at work could amount to sexual harassment, especially when this lead to good relationships or marriage. Thus, conceptualisation of sexual harassment as gender harassment will further complicate the definition of sexual harassment at work. So, what should be the general standard for defining sexual harassment in the workplace?

### ***Recent Definitions of Sexual Harassment in the workplace***

In contrast, harassment was generally defined as frequent or unrelenting conduct that pressures, incites, terrifies, threatens, disgraces, or demeans a person while, sexual harassment is a sex-based behaviour that derogates, degrades or demeans individual (be it male or female) in a guise to protect or increase the social status of the perpetrator.<sup>52</sup> This definition differs from that of Fitzgerald et al.<sup>53</sup> and Gruber<sup>54</sup> as it focuses generally on the social meaning of sexual harassment, the likelihood of same-sex harassment and female to male harassment due to the need for individual protection of social status against any form of threats. She proceeded by saying that men derogate women to protect their social identity, and everyone is capable of doing so to protect his or her status based on sex, coupled with the fact that women harass other women or men that tend to challenge their status, vice versa with men.

From the social-psychological perspective, sexual harassment can be defined by the specific behaviours and the recipient's response to those behaviours<sup>55</sup>. This indicates that sexual harassment is a two-sided phenomenon involving some certain behaviours and

---

<sup>51</sup> *Ibid.*

<sup>52</sup> JL Berdahl (n, 36) 651.

<sup>53</sup> LF Fitzgerald, S Swan, and K Fischer, 'Why didn't she just report him? The psychological and legal implications of women's responses to sexual harassment' [1995](51)(1) *Journal of Social Issues* 117.

<sup>54</sup> JE Gruber (n, 44).

<sup>55</sup> JL Berdahl (n, 36) 651; P Ejembi, A Aina-Pelemo, O Ejembi and I Aina 'The Trajectory of Nigerian Law Regarding Sexual Harassment in the Workplace' [2020] 4) (2) *African Journal of Law and Human Rights* 5.

the reaction of the victim.<sup>56</sup> Socially, those sexual behaviours are deemed welcome and the onus of proof lies on the victim to establish that the behaviours were unwelcomed.<sup>57</sup> Sexual harassment was also defined as ‘unwanted sex-related behaviour at work that is appraised by the recipient as offensive, exceeding her resources, or threatening her well-being’.<sup>58</sup>

The style of sexual harassment is another significant issue complicating its true meaning or definite definition, and this in most cases varies from male to female, female to male, male to male and female to female. Those harassing behaviours from male to female are in form of unwanted sexual advances, pressure for dates or social gatherings, kiss, folding, physical touch, seductive dressings or remarks, innuendos, rape, and derogatory words or sexual jokes etc.<sup>59</sup> those from female to male are the same with that of male to female<sup>60</sup>, especially in the uniformed organisations<sup>61</sup> while, those from male to male<sup>62</sup> as well as female to female,<sup>63</sup> are in form of discrimination

---

<sup>56</sup> LM Cortina, and JL Berdahl, ‘The Sage Handbook of Organizational Behaviour’ in CA Cooper, (eds), *Sexual Harassment in Organizations: A Decade of Research in Review* (CA, Thousand Oaks: Sage 2008) 470 - 497.

<sup>57</sup> LF Fitzgerald, ‘Who says? Legal and Psychological Constructions of Women's Resistance to Sexual Harassment’ in CA Mackinnon, and R B Siegel, (eds) *Directions in Sexual Harassment Law* (New Haven, London: Yale University press 2004) 94-110.

<sup>58</sup> LF Fitzgerald, and others, ‘Antecedents and Consequences of Sexual Harassment in Organizations: A Test of an Integrated Model’ [1997] (82)(4) *Journal of Applied Psychology* 578.

<sup>59</sup> KJ Holland and others, ‘Sexual Harassment Against Men: Examining the Roles of Feminist Activism, Sexuality, and Organizational Context’ [2016] (17)(1) *Psychology of Men and Masculinity* 17; I Abe. ‘Defining and Awareness of Sexual Harassment among Selected University Students in Lagos Metropolis, Nigeria’ [2012] (3) (3) *Journal of Emerging Trends in Educational Research and Policy Studies* 212; Pryor (n, 13).

<sup>60</sup> *Ibid.*

<sup>61</sup> Haas Timmerman. ‘Sexual Harassment in the Context of Double Male-dominance’[2010] (19)(6) *European Journal of Work and Organizational Psychology* 717; LF Fitzgerald, F Drasgow, and VJ Magley, ‘Sexual Harassment in the Armed Forces: A Test of an Integrated Model’[1999]11(3) *Military Psychology* 329; VJ Magley, CR Waldo, F Drasgow, and LF Fitzgerald. ‘The impact of sexual harassment on military personnel: Is it the same for men and women?’[1999] (11)(3) *Military Psychology* 283;

<sup>62</sup> L Spencer, and J Barnett, ‘When Men Are Sexually Harassed: A Foundation for Studying Men's Experiences as Targets of Sexual Harassment [2011] (48)(2): *Speaker & Gavel* 53; Haas, Timmerman (n60); CRWaldo, JL Berdahand and LF Fitzgerald (n, 29); JL Berdahl, VJ Magley and CR Waldo, ‘The Sexual Harassment of Men?: Exploring the Concept with Theory and Data’ [1996](20)(4)*Psychology of Women Quarter* 527.

i.e. verbal and non-verbal abuse to annoy, offend and humiliate the person but, the bottom line of all these styles is to display their respective social power, and those harassing behaviours from same-sex or female to male are less threatening to the victims when compared with those male to female.<sup>64</sup>

Beside, motive for workplace harassment could also create problems for its definition. The reasons for occurrence of sexual harassment ranges from power,<sup>65</sup> male dominance,<sup>66</sup> sex-role spillover,<sup>67</sup> culture,<sup>68</sup> experience,<sup>69</sup> organisational tolerance or unprofessional ambience to sexual harassment,<sup>70</sup> economical factors, social structure,<sup>71</sup> unemployment or under-employment,<sup>72</sup> to sexist hostility.<sup>73</sup> These variances in occurrences, styles, types, motives have posed problems in defining sexual harassment at workplace.

---

<sup>63</sup> M Biernat, and K Fuegen, 'Shifting standards and the evaluation of competence: Complexity in gender-based judgment and decision making' [2001](57) *Journal of Social Issues* 707; Rudman. 'Self-promotion as a risk factor for women: The costs and benefits of counter-stereotypical impression management' [1998] (74) *Journal of Personality and Social Psychology* 629.

<sup>64</sup> L Brenda, BL Russell, and D Oswald, 'When Sexism Cuts Both Ways: Predictors of Tolerance of sexual Harassment of Men' [2015](19)(5) *Men and Masculinities* 524; C Goldberg, and L Zhang. 'Simple and Joint Effects of Gender and Self-Esteem on Responses to Same-Sex Sexual Harassment' *Sex Roles* [2004] (50)(11/12): 823; JL Berdahl, 'Sexual Harassment of Uppity Women' [2007a](92) (2) *Journal of Applied Psychology* 425; JL Berdahl, VJ Magley and CR Waldo, 'The Sexual Harassment of Men?: Exploring the Concept with Theory and Data' [1996](20)(4) *Psychology of Women Quarter* 527; J B Pryor (n, 13); CRWaldo, JL Berdahi and LF Fitzgerald (n, 29)

<sup>65</sup> R Gupta, *Sexual Harassment at Workplace*. (Haryana: LexisNexis 2014).

<sup>66</sup> RA Bhat, and A Deshpande 'An Overview of Sexual Harassment of Women at Workplace in India: An Analytical Study' [2017](6)(7) *International Journal of Innovative Research in Science, Engineering and Technology* 14361.

<sup>67</sup> BA Gutek, and AG Cohen (n, 30).

<sup>68</sup> R Peters, and P Bourne, 'Sexual Harassment and Sexual Harassment Policy in Jamaica: The Absence of a National Sexual Harassment Policy, and the Way Forward' [2012] (4) (1) *Asian Journal of Business Management* 1.

<sup>69</sup> LF Fitzgerald and others.(n57) 15.

<sup>70</sup> KJ Holland and others; (n, 59); Fitzgerald and others (n60); A Khan, and A Mills, 'Sexual Harassment' [1990](134)(3) *Solicitors Journal* 66;

<sup>71</sup> S Hills, and TC Marshall, 'Beliefs about Sexual Assault in India and Britain are Explained by Attitudes Toward Women and Hostile Sexism' [2018](79)(7-9) *Sex Roles* 421.

<sup>72</sup> AD Aina-Pelemo, MC Mehanathan and P Kulshrestha (n, 31).

<sup>73</sup> LS Rikleen. 'Survey of Workplace Conduct and Behaviours in Law Firms' (2018) <<https://wbawbf.org/sites/default/files/WBA%20Survey%20of%20Workplace%20Conduct%20and%20Behaviours%20in%20Law%20Firms%20FINAL.pdf>> accessed 28 October 2018.

Meanwhile, some scholars based their scale for measuring sexual experience, perception, occurrence, etc on Sexual Experience Questionnaire (SEQ) of Fitzgerald and colleagues which involves selected sexual behaviours between men and women without averting their minds to the fact that those categories of sexual behaviours were strictly structured for women.

Research found that the commonest type of sexual harassment in the workplace is gender harassment.<sup>74</sup> This may or may not be sexually driven but referred to as behaviours involving verbal or non-verbal sexual passes, sexist comments, humor, vulgar words which demean, derogate or humiliate the victim based on sex as opposed to direct request and victimisation for sexual affairs.<sup>75</sup> Equally, many researchers generalised sexual harassment as an unwelcome conduct that has the effect of threatening, demeaning, humiliating, hostile and offensive.<sup>76</sup> From this definition, we can perceive the generalisation of all workplace harassing conducts as sexual in nature which is contradictory to the school of thought that some workplace harassment might not be sexually inclined, for example- racial harassment.<sup>77</sup> This leads us to the legal definition of sexual harassment as it differs from jurisdiction to jurisdiction.

<sup>74</sup> *Ibid*; AD Aina-Pelemo, MC Mehanathan and P Kulshrestha (n, 31); J Ellis, and A Buckett. 'Women in Commercial Legal Practice- International Bar Association, Research and Legal Unit' (2017) <<https://www.ibanet.org/Document/Default.aspx?DocumentUid=9a9d8fe6-347f...>> accessed 26 October 2019; CS Stamarski, and LS Son Hong 'Gender Inequalities in the Workplace: The Effect of Organisational Structure, Processes, Practices and Decision makers' Sexism' [2015] (6) *Frontiers in Psychology* 1; Fitzgerald and others (n, 60); Fitzgerald and others (n, 57) 15; L.F. Fitzgerald and others (n, 12); Pryor (n, 13); LF Fitzgerald, and AJ Ormerod, 'Perceptions of Sexual Harassment: The influence of Gender and Academic Context' [1991](15) *Psychology of Women Quarterly* 281.

<sup>75</sup> D Herbenick, and others, 'Sexual Harassment in the Field of Sexuality Research' [2019] (48)(4) *Archives of Sexual Behaviour* 997; LF Fitzgerald, S Swan, and K Fischer, 'Why didn't she just report him? The psychological and legal implications of women's responses to sexual harassment' [1995](51)(1) *Journal of Social Issues* 117; J L Berdahl (n, 36).

<sup>76</sup> JC Quick and McFadyen MA 'Sexual Harassment: Have We Made Any Progress?' [2016] (22)(3) *Journal of Occupational Health Psychology* 286; McDonald. 'Workplace Sexual Harassment 30Years on: A Review of the Literature' [2012] (14)(1) *International Journal of Management Reviews* 1.

<sup>77</sup> CS Stamarski, and LS Son Hong (n, 73).

## **Legal Definitions of Sexual Harassment in Selected Countries**

By and large, it would appear that there is no universally accepted definition of sexual harassment. The definition of sexual harassment is a complicated issue with varied meanings. This article considers the legal definitions of sexual harassment in five selected countries in the developed world and five selected countries in the developing world. The developed states considered are; United States of America, Canada, the United Kingdom, France, and Germany while, the developing countries considered include; Kenya, Uganda, India, Tanzania, and South Africa.<sup>78</sup> The countries were randomly selected and classified under countries within the rubric of developed states and those within the rubric of developing states to ascertain their perception regarding the definition of sexual harassment. All the countries considered have experienced the phenomenon of sexual harassment and have duly enacted legislation prohibiting sexual harassment and they have also provided legal definitions of sexual harassment.

All the legal enactments selected for this survey are national-own legislation that apply to the whole of the country as compared to the territorial restrictive enactment which protects only a particular state or region of a country. Pursuant to those legal enactments of majority of the countries selected (Canada, France, Germany, Uganda and South-Africa), sexual harassment is classified as an actionable wrong under Labour or Employment Law, while Kenya, Tanzania and India regard sexual harassment as a punishable offence under Criminal Law, United Kingdom address such wrong under Human Rights Law and United States of America under Civil Rights Act as compared with other countries that address the issue under Law of Contract or Tort Law. However, the penalties provided for sexual harassment offence or wrong in the countries selected are either criminal and/or civil remedies. The rationale for selecting the countries is to possibly ascertain how sexual harassment is construed globally, its main elements, comparative differentiation and commonalities, as well as the prescriptive implications in effectively

---

<sup>78</sup> N Fantom, and U Serajuddin 'The world Bank Classification of Countries by Income. Policy Research Working Paper 2016 7528. <<http://documents.worldbank.org/curated/en/408581467988942234/pdf/WPS7528.pdf>> accessed 27 October 2019.

preventing or deterring its occurrence in the society. This section underpins the discussion of the various legislative definitions focusing on whether the definitions-

- i. cover all genders as victims and perpetrators;
- ii. cover harassment by co-workers and third party harassers;
- iii. provide for vicarious liability of the employer for failing to take steps to prevent sexual harassment at workplace;
- iv. include gender-based harassment;
- v. Provide for civil liability;

## **Definitions of Sexual Harassment in Selected Developed Countries**

### ***United States***

Sexual harassment is generally prohibited in the United States as a form of discrimination based on sex, although the sanction varies from state to state.<sup>79</sup>

According to the U.S. Equal Employment Opportunity Commission (EEOC),

Harassment denotes unwelcome conduct that is based on race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability or genetic information. Harassment becomes unlawful where (a) enduring the offensive conduct becomes a condition of continued employment, or (b) the conduct is severe or pervasive enough to create a work environment that a reasonable person would consider intimidating, hostile, or abusive (EEOC 2011a).<sup>80</sup>

In the case of *Meritor Savings Bank v. Vinson*,<sup>81</sup> the United States Supreme Court held that sexual harassment is a form of sex discrimination that is actionable under Title VII of the Civil Rights Act, 1964. Employers may also be held vicariously liable for sexual

---

<sup>79</sup> Aeberhard-Hodges 'Sexual harassment in employment: Recent judicial and arbitral trends' [1996] (135) (5) *International Labour Review* 499.

<sup>80</sup> US Equal Employment Opportunity Commission (EEOC), 'Harassment: Washington, D.C. Equal Employment Opportunity Commission' (2011a) <<http://www.eeoc.gov/laws/types/harassment.cfm>> accessed 19 December 2019.

<sup>81</sup> *Meritor Savings Bank v. Vinson*, No: 84-1979 (U.S. Supreme Court, 477 U.S. 57 June 19th, 1986).



harassment if found complicit by way of creating circumstances in which sexual harassment perpetrated by superior staff or supervisors against victims is allowed to thrive with impunity. Thus, in the case of *Borlington Industries, Inc. v. Ellerth*,<sup>82</sup> the United States Supreme Court held employers liable if supervisors create a hostile work environment for employees. However, employers are precluded from liability if it is established that they followed best practices or measures in order to prevent sexual harassment. Thus, an employer would be held vicariously liable to an employee who is sexually harassed by a supervisor with immediate authority over the employee.

The American definition of sexual harassment is devoid of specific reference to gender-based harassment. In other words, it does not mention the gender of persons that could be involved whether male, female, or between members of the same sex. Nevertheless, it may be inferred that the harasser and the person who is a victim of sexual harassment can be either a man or a woman or both of them could be the same gender. This implies that a male or female could be held liable for sexual harassment, unlike the Indian and Tanzanian definitions which do not recognise the possibility of men being sexually harassed in the workplace. As shown on subsequent discussions below, Indian and Tanzanian definitions protect only women from sexual harassment. This might be due to the cultural differences and social structure. Furthermore, there is need for further conceptual clarification in respect of the American definition of sexual harassment regarding what amounts to unwelcome sexual advances as stipulated in the American definition of sexual harassment. The definition ought to include acts or omissions that are deemed to constitute unwelcome sexual advances such as inappropriate touching including rubbing, patting, squeezing, pinching, making sexual oriented utterances about a person's appearance, physique, clothing, and the like. It should also entail telling seductive jokes and gestures, sending suggestive letters, notes,

---

<sup>82</sup> 524 U.S 742 (1998),

text messages or emails, displaying lewd images or videos or pornography with employees.<sup>83</sup>

### **Canada**

The Canadian Labour Code (Division XV.1 of Part III) R.S.C., 1985, c.L-2) S. 247.1 (CLC) defines sexual harassment as:

any conduct, comment, gesture, or contact of a sexual nature that is likely to cause offence or humiliation to any employee, or that might, on reasonable grounds, be perceived by that employee as placing a condition of sexual nature on employment or any opportunity for training or promotion.

The Canadian definition is similar to the American definition in the sense that its connotation of sexual harassment is gender-neutral. Thus, the victim of sexual harassment could be male, female as the case may be. The phrase ‘sexual nature’ used in the foregoing definition is quite obscure. Does it refer to behaviour that is sexually inclined or an inordinate attitude that portends gender harassment? The Labour Code definition of sexual harassment requires further clarification as regards specific unwanted behaviours which may be regarded as being of a sexual nature within the purview of the statute. Nonetheless, the concept of sexual harassment was described in the Canadian case of *Daigle v. Hunter*<sup>84</sup> as:

Verbal abuse or threats, unwelcome remarks, jokes, innuendos, or taunting; displaying of pornographic or other offensive or derogatory pictures; practical jokes which cause awkwardness or embarrassment, unwelcome invitations or requests, whether indirect or explicit or intimidation; leering or other gestures; unnecessary physical contact such as touching, patting, pinching, pinching, punching, or physical assault.

---

<sup>83</sup> A Doyle, ‘Examples of Sexual and Non-Sexual Harassment’ (2019). <<https://www.thebalancecareers.com/examples-of-sexual-and-non-sexual-harassment-2060884>> accessed 26 December 2019.

<sup>84</sup> (1983 at p.5673).

The Canadian Labour Code expressly states that every employee has a right to employment devoid of sexual harassment. Employers are mandated to ensure that employees do not suffer sexual harassment as all employers are required to establish a policy on sexual harassment. The Statute makes no explicit provision regarding the liability of third party harassers neither does it expressly provide for vicarious liability of the employer for failing to take steps to prevent sexual harassment at workplace as construed by the American definition of sexual harassment.

### ***United Kingdom***

Equality Act, 2010 (UK) S. 26 (EA) defines harassment as follows:

- (1) A person (A) harasses another (B) if-
  - (a) A engages in unwanted conduct related to a relevant protected characteristics, and
  - (b) The conduct has the purpose or effect of-
    - (i) violating B's dignity, or
    - (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B
- (2) A also harasses B if-
  - (a) A engages in unwanted conduct of a sexual nature, and
  - (b) The conduct has the purpose or effect referred to in subsection (1)(b).
- (3) A also harasses B if-
  - (a) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,
  - (b) The conduct has the purpose or effect referred to in subsection (1)(b), and
  - (c) Because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.
- (4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account-
  - (a) The perception of B,

- (b) The other circumstances of the case;
  - (c) Whether it is reasonable for the conduct to have that effect.
- (5) The relevant protected characteristics are-age, disability, gender reassignment, race, religion or belief, sex, sexual orientation.

The meaning of sexual harassment stated in Equality Act 2010 is broad and comprehensive. However, there are a few grey areas which require further clarification. For instance, what exactly amounts to unwanted conduct of a sexual nature and vicarious liability of employers to employees? There is need to clarify these observations in order to understand the true concept of sexual harassment in the workplace. Regarding the vicarious liability of employers, employers may be held vicariously liable in respect of sexual behavioural acts carried out by his or her employees during the course of employment. However, employers can successfully raise defence against liability where they establish evidence that they have taken reasonable steps to prevent harassment from taking place.<sup>85</sup>

Previously, the Equality Act, 2010, made employers liable if a third party harasses their employee provided the employer was aware of at least two previous occasions and no reasonable steps had been taken to prevent further acts of sexual harassment. However, third party liability was removed from Equality Act in 2013 by the government on the grounds that it was unfair on employers to make them liable for the acts of parties they had no control over.<sup>86</sup> Nonetheless, employers may be held liable for acts or omissions positively resulting in sexual harassment. Thus, in the case of *Unite the Union v. Nailard*<sup>87</sup>, the Court of Appeal affirmed that an employer's liability for third party harassment has been abolished.

---

<sup>85</sup> Peninsula Business Services Limited, 'Are Employers Liable for third Party Harassment?' (2019) <<https://www.peninsulagrouplimited.com/are-employers-liable-for-third-party-harassment>> accessed 26 December 2019; McNicholas. 'Sexual Harassment in the Workplace, Part 3-All Reasonable Steps (UK)' 2019 <<https://www.employmentlawworldview.com/sexual-harassment-in-the-workplace-part-3-all-reasonable-steps-uk/>> accessed 26 December 2019.

<sup>86</sup> *Ibid.*

<sup>87</sup> *Unite the Union v Nailard* [2016] UKEAT/0300/15; [2018] EWCA Civ 1203

However, it held that an employer's inaction in respect of harassment by a third party is tantamount to harassment by the employer.

### ***France***

The French statutory provision stipulates various ways in which sexual harassment may be identified as follows<sup>88</sup>:

- (1) Repeated acts or conduct with a sexual connotation that either violates the dignity of the employee because of its degrading or humiliating nature or creates an intimidating, hostile, or offensive situation against the victim. See Article L.1153-1§1 of the Labour Code (2007) as amended.
- (2) The act of exerting any form of serious pressure, even if not repeated, for the real or apparent purpose of obtaining an act of a sexual nature, whether it is sought for the benefit of the perpetrator or for the benefit of a third party. See Article L.1153-1§2 of the Labour Code (FR).
- (3) When comments or conduct are imposed on the same victim by several persons, in a concerted manner or at the instigation of one of them, even though each of these persons has not acted repeatedly See Article 222-331§ 1 of the (1998) Code Penal (FR) as amended.
- (4) When comments or behaviours are imposed on the same victims, successively, by several persons who, even in the absence of consultation, know that these comments or behaviours characterize a repetition (See Article 222-331§ 2 of the Code Penal).

The French definition is similar to the American and Canadian definitions in the sense that their connotation of sexual harassment is gender-neutral. Thus the victim of sexual harassment could be male, female as the case may be. The French definition of sexual harassment may be distinguished from the American connotation as

---

<sup>88</sup> M Lewis, S Smith-Vidal, and L Pelet. 'Sexual Harassment and Sexism: A Guide for Employers in France' 2018 <<https://www.jdsupra.com/legalnews/sexual-harassment-and-sexism-a-guide-13354/>> accessed 21 November 2019.

expounded in the case of *Borlington Industries, Inc. v. Ellerth*<sup>89</sup> in the sense that the French law no longer limits sexual harassment to relationships between superiors and subordinates, such as between employee and manager. Therefore, sexual harassment can occur between colleagues including between employees and a third party that deals with the organisation such as a customer or contractor.

Although the French definition of sexual harassment is quite elaborate, certain areas are complex. Phrases such as acts with sexual connotation and act of a sexual nature used in the stated definition are quite obscure. Do they refer to behaviour that is sexually inclined or an inordinate attitude that portends gender harassment? It is necessary to specify the elements which constitute acts with sexual connotation and acts of a sexual nature within the purview of the statute. This will make the provision more explicit and comprehensible to prevent sexual harassment in the workspace.

### ***Germany***

General Equal Treatment Act, 2006 (DEU) S. 2 (GETA) states that sexual harassment shall be deemed discrimination when an unwanted conduct of a sexual nature, including unwanted sexual acts and requests to carry out sexual acts, physical contact of a sexual nature, comments of a sexual nature, as well as unwanted showing or public exhibition of pornographic images, takes place with the purpose or effect of violating the dignity of the person concerned, in particular where it creates an intimidating, hostile, degrading, humiliating or offensive environment.

The definition of sexual harassment enshrined under the GETA is conspicuously silent regarding the nature and types of relationships that may be involved in the act of sexual harassment. It is equally silent regarding what may be construed as gender-based harassment. Although the statute seems to state that unwanted conduct of a sexual nature includes unwanted sexual acts, there is need to specifically explain what constitutes unwanted sexual acts. Furthermore, the German statute makes no explicit provisions for the

---

<sup>89</sup> *Burlington Industries, Inc. v. Ellerth*, 524 U. S. 742 1998 (Supreme Court of the United States June 26<sup>th</sup> 1998)

vicarious liability of employers for sexual harassment perpetrated by employees or third parties as the case may be.

## **Definitions of Sexual Harassment in Selected Developing Countries**

### ***Kenya***

Kenya Sexual Offences Act, 2006 (KE) S. 23 (KSOA) defines sexual harassment as follows:

1. Any person, who being in a position of authority, or holding a public office, who persistently makes any sexual advances or requests which he or she knows or has reasonable grounds to know, are unwelcome, is guilty of the offence of sexual harassment...
2. It shall be necessary to prove in a charge of sexual harassment that-
  - (a) The submission or rejection by the person to whom advances or requests are made is intended to be used as a basis of employment or of a decision relevant to the career of the alleged victim or of a service due to a member of a public in the case of a public officer;
  - (b) Such advances or requests have the effect of interfering with the alleged victim's work or educational performance or creating an offensive working or learning environment for the alleged victim or denial of a service due to the member of the;
  - (c) Public from a public office.

A major challenge in the Kenyan definition of sexual harassment may be gleaned from the requirement of proof of mental element of the perpetrator of the act of sexual harassment. The implication of this provision is that it puts the victim of sexual harassment in a very precarious position to prove that an accused person actually has such mental element especially where the accused person denies having knowledge or had no reasonable grounds to know that his or her behaviour is unwelcome.

Unlike the French definition which is applicable to all persons including third parties, it is also contended that the Kenyan legal

provision only contemplates relationships between superiors against subordinates. In other words, it would appear that the law does not take cognisance of acts of sexual harassment that may occur between colleagues of equal ranks or gender. It also seems to be silent about sexual harassment acts that may be perpetrated by a third party dealing with the organisation as the case may be.

### ***Uganda***

The Employment (Sexual Harassment Regulations, 2012) (UGX) S. 2 (SHR) defines sexual harassment in employment as:

- (a) A direct or implicit request to an employee for sexual intercourse, sexual contact or any form of sexual activity that contains-
  - (i) an implied or express promise of preferential treatment in employment;
  - (ii) an implied or express threat of detrimental treatment in employment;
  - (iii) an implied or express threat about the present or future employment status of the employee;
- (b) use of language whether written or spoken of a sexual nature such as unwelcome verbal advances, sexual oriented comments, requests for sexual favours, jokes of a sexual nature, offensive flirtation or obscene expressions of sexual interest that are addressed directly to the person;
- (c) use of visual material of a sexual nature such as display of sexually suggestive pictures, objects or written materials or sexually suggestive gestures; and
- (d) showing physical behaviour of a sexual nature such as unwanted or unwelcome touching, patting, pinching or any other unsolicited physical contact; which directly or indirectly subjects the employee to behaviour that is unwelcome or offensive to that employee and that, either by its nature or through repetition, has a detrimental effect on that employee's employment, job performance or job satisfaction.

The main anomaly in this statutory definition is that it is conspicuously silent about third parties who may be perpetrators of



sexual harassment as otherwise stated as an element in the French definition. The prescriptive implication is that third parties who are perpetrators of sexual harassment may not be found blameworthy. The Ugandan definition is also silent about gender-based harassment. Like some of the statutes of other jurisdictions such as Canada, earlier analysed, the Ugandan concept of sexual harassment is, to a large extent, devoid of reference to the gender of the victim or perpetrator.

### ***Tanzania***

The Sexual Offences Special Provisions Act, 1998 (TZ) S. 138D (SOSPA) defines sexual harassment as follows:

- (1) Any person who, with intention, assaults or by use of criminal force, sexually harasses another person, or by the use of words or actions, causes sexual annoyance or harassment to such other person, commits the offence of sexual harassment...
- (2) Whoever intending to insult the modesty of any woman utters any word, makes a sound or gesture, or exhibits any object including any organ whether male or feminine, intending that such word or sound shall be heard or that the gesture or object shall be seen, by the woman or intrudes upon the privacy of the woman, commits the offence of sexual harassment.
- (3) For the avoidance of doubt, unwelcome sexual advances by words or action used by a person in authority, in a working place or any other place, shall constitute the offence of sexual harassment.

The legal requirement of what constitutes sexual harassment in the SOSPA, particularly under Section 138(D) (1), includes proof of assault and criminal force. This has far-reaching implications. The painstaking question against the backdrop of this statutory provision is how can a victim who suffers subtle or palpable acts of sexual harassment in the form of touching, caressing, patting, kissing, or unwelcome verbal advances and sexual oriented comments, maintain an action involving sexual harassment taking into account the provisions of this law? Also, this definition excludes gender-based harassment particularly as it relates to the male gender or same-sex

relationships. The Tanzanian statute is short of the possibility of third parties harassment unlike the French statute which recognises third parties as potential harassers.

### ***India***

Sexual Harassment of Women at Workplace (Prevention, Prohibition, and Redressal) Act, 2013 (IN) S. 6 (SHWWPPRA) provides that;

Sexual harassment includes any one or more of the following unwelcome acts or behaviour (whether directly or by implication) namely:-

- (i) Physical contact and advances; or
- (ii) a demand or request for sexual favours; or
- (iii) making sexually coloured remarks; or
- (iv) showing pornography; or
- (v) any other unwelcome physical, verbal or non-verbal conduct of a sexual nature.

From the title, ‘SHWWPPRA’, it could be intuited that the statute is strictly meant to protect women who are sexually harassed to the exclusion of the men. Nonetheless, for the benefit of hindsight, assuming the statute accommodates both genders, its extant and literal provisions, is devoid of such supposition. The statute is therefore, devoid of gender-based harassment particularly in the context of the men. The Indian statutory provision also lacks comprehensive conducts or behaviours that could amount to sexual harassment. However, the SHWWPPRA is not silent about vicarious liability of employers to the employees, as well as third parties harassment.

### ***South Africa***

The Amended Code of Good Practice on Handling of Sexual Harassment Cases in the Workplace, 2005, (SA) S. 4 (ACGPOHSH) defines Sexual Harassment as:

Unwelcome conduct of a sexual nature that violates the rights of an employee and constitutes a barrier to equity in the workplace, taking into account the following factors:

1. whether the harassment is on the prohibited grounds of sex and/or sexual orientation;
2. whether the sexual conduct was unwelcome;
3. the nature and extent of the sexual conduct; and
4. The impact of sexual conduct on the employee.

By virtue of section 5(3)(1)(1) of the ACGPOHSH, the unwelcome conduct must be of a sexual nature and includes physical, verbal or non-verbal conduct. The Code further specifies what constitutes physical conduct of a sexual nature, verbal conduct, and non-verbal conduct as follows:

1. Physical conduct of a sexual nature includes all unwelcome physical contact, ranging from touching to sexual assault and rape, as well as strip search by or in the presence of the opposite sex (Section 5(3)(1)(1) of the Amended Code of Good Practice on Handling of Sexual Harassment Cases in the Workplace, 2005).
2. Verbal conduct includes all unwelcome innuendos, suggestions, hints, sexual advances, sex-related jokes or insults, graphic comments about a person's body made in their presence or to them, inappropriate enquiries about a person's sex life, whistling of a sexual nature, and sending by electronic means or otherwise of sexually explicit text (Section 5(3)(1)(2) of the Amended Code of Good Practice on Handling of Sexual Harassment Cases in the Workplace, 2005).
3. Non-verbal conduct include unwelcome gestures, indecent exposure and the display or sending by electronic means or otherwise of sexually explicit pictures or objects (Section 5(3)(1)(3) of the Amended Code of Good Practice on Handling of Sexual Harassment Cases in the Workplace, 2005).

Section 5(3)(2)(1) of the ACGPOHSH, further states that sexual harassment may include but not limited to victimization (where an employee is mistreated or intimidated for failing to submit to sexual advances), quid pro quo harassment and sexual favouritism.

Quid pro quo harassment and sexual favouritism has been defined under section 5(3)(2)(1) of the ACGPOHSH, as follows:

Quid pro quo harassment occurs where a person such as an owner, employer, supervisor, member of management or co-employee, influences or attempts to influence an employee's employment circumstances (for example engagement, promotion, training, discipline, dismissal, salary increment or other benefits) by coercing or attempting an employee to surrender to sexual advances. This could include sexual favouritism, which occurs where a person in authority in the work place rewards only those who respond to his or her sexual advances.

Observably, the South African definition of sexual harassment is comprehensive. It covers all genders as victims or perpetrators. The sanctions of perpetrators of sexual harassment under the code include warnings and dismissals. However, the code is silent regarding the vicarious liability of the employer for failure to take steps to prevent sexual harassment in the work place and the issue of liability of third parties as perpetrators of sexual harassment.

## **Conclusion**

From all the definitions provided above, it is obvious that having a uniform or exhaustive definition of sexual harassment is nigh impossible. Some jurisdictions have a 'state' definition, some 'national' or 'federal' definition which varies from the 'state' definition in some cases. Meticulous observation of developed countries' definitions to sexual harassment indicates that there is a marked difference in elements that constitute sexual harassment. Most developed countries considered recognise male, female and other forms of sexual identity either as victims or perpetrators of sexual harassment, while most developing countries mainly recognise the male gender as perpetrators of sexual harassment and women are majorly regarded as victims. This fundamental difference may be attributed to the prevalent cultural values and norms of the countries concerned. It is pertinent to note that the developed countries considered such as USA, France, Canada, and Germany, are predominantly egalitarian societies. In contradistinction, all developing countries considered such as Kenya, Uganda, Tanzania,

and India could be, in principle, characterised as in-egalitarian societies. The marked difference in the South African definition of sexual harassment may be attributed to the concerted action taken by the South African government to engender affirmative action and the realisation of equality of all persons regardless of their gender or social status as exemplified by the provisions of the South African Employment Equality Act of 1998.

Furthermore, some jurisdictions criminalised the act of sexual harassment, which appears to be much difficult to enforce; some regard it as Civil, Tort, labour and Human rights offence, and some protect only female. Thus male victims of sexual harassment are defenceless in countries like India, Tanzania etc which glaringly exclude males from its characterization of victims of sexual harassment. The most significant omission is the inexplicit behaviours that should connote sexual harassment, the lack of distinction between gender harassment and sexual harassment or the total omission of the term 'gender harassment' from sexual harassment at workplace, the legal provision for only female gender and the lack of update of the legislative provision to the recent trends of same-sex harassment. It is therefore expedient for countries to review their definitions of sexual harassment to include significant elements such as gender-based harassment, sexual orientation, third parties, and comprehensive characterization of what constitutes 'conduct of a sexual nature,' so as to engender a more comprehensive prevention, prohibition, and redressal of the menace of sexual harassment in contemporary society.

It is pertinent to note that omitting gender harassment from the explicit definition or discussion of sexual harassment in the workplace is like removing the shadow directors from the company. Since the commonest form of harassment at work is gender harassment which could be sexual or non-sexual in nature and some legal jurisdictions refer to it as sex discrimination. It is worth noting to say that considering gender harassment under the definition of sexual harassment is a very essential criterion for an unambiguous definition of sexual harassment at workplace in order to erase the often misconstrued meaning of sexual harassment with gender harassment in some countries. Although, at a point, gender

harassment could be sexual harassment, that is when it is sexually inclined but in most cases and according to several studies, it is not sexual in nature but has similar consequences as sexual harassment and that is why it is regarded as a form of sexual harassment in some developed countries. Hence, having a universal definition of the phrase 'sexual harassment in the workplace might be farfetched, but there are some elements that should be included in the definition of sexual harassment in the workplace; it must-

- i. ...include all forms of harassment in the work sphere (sexual, non-sexual or mixed behaviours) that is, gender harassment or sex-discrimination, and sexual harassment.
- ii. ...protect all genders;
- iii. ... include likely conducts that constitute unwanted sexual behaviours explicitly;
- iv. ... include all workplaces;
- v. ... include third parties or all persons that have or might likely have relationship with the workplace (clients or customers, contractors, etc);
- vi. ...include all ranks at work, not only superiors to subordinates, same rank position and subordinate to superior;

This review concludes that most or all definitions of sexual harassment denote the need for expansion of the subject matter in meaning, and the need for research to cover the new trends of sexual harassment in the workplace, that is, harassment from male to male and female to female in order to better understand how sexual harassment should be defined comprehensively.