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**SHOULD SEXUAL HARASSMENT BE CRIMINALISED? A STUDY OF  
SELECTED DEPARTMENTS IN THE PUBLIC SECTOR OF HARARE,  
ZIMBABWE**

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### **1.3 Significance of the Study**

This study argues that sexual harassment will be effectively curbed if it is criminalised. To criminalise an act or omission is to make it punishable as a crime under the law. Criminalising sexual harassment would act as a deterrent to those contemplating committing the offence. In Zimbabwe there is scant legislation that touches on the subject of sexual harassment. In fact it is in the realm of labour law that any attempt is made to address it. An analysis of the Zimbabwean laws will be made with a view to seeing whether they effectively address the scourge of sexual harassment. If not, what are the possible interventions that can be put in place to reduce cases of sexual harassment? In the alternative I explore the extent to which criminalising sexual harassment will be the panacea to solving the problem. Various jurisdictions in Africa and beyond have already taken the lead in criminalising sexual harassment and this is despite their having labour laws covering that subject.

### **1.4 Objectives of the Study**

The objectives of the study are to:

1. Establish whether women employed in the public sector are subjected to sexual harassment.
2. Endeavour to find the underlying reasons for sexual harassment and who are the usual victims and perpetrators of sexual harassment.
3. Find out how sexual harassment cases are dealt with right from the reporting stage to the time the disciplinary hearing is concluded.
4. Come up with recommendations based on the findings on how best sexual harassment may be curbed.

3. Are government departments adequately equipped to investigate sexual harassment complaints?
4. Do women decide not to report sexual harassment for fear of losing their jobs and do they consider the legal remedies effective?
5. Is there provision for victim support services?
6. Do people who handle sexual harassment cases receive formal training on how to handle such cases?
7. Will law reform curb sexual harassment in the public sector?

### **1.7 Conclusion**

This Chapter gave a brief background to the study. It looks at what sexual harassment is generally and what influenced me to look into this subject. It also sets out the objectives of the study as well as outlining the research assumptions and questions that informed the study.

had made the report. This was the person who was supposed to give effect to the law; instead the victim's rights were further violated.

I would therefore agree with (MacKinnon 1979) who says that liberalism is false because it ignores the realities and hierarchies of power which are determined on the basis of gender. So though law reform is essential there are other salient factors which need to be addressed if women are to be liberated.

**Existential feminists** argue that women have come to believe that, compared to men, they are inessential and are merely objects that are used by men to achieve their goals. They see women as being oppressed by virtue of their '*otherness*'. Man is the self, the free, determining being who defines the meaning of his existence, and woman is 'the other', the object, whose meaning is determined for her (Simone de Beauvoir 1974). Men therefore sexually harass women to fulfil their egos and lust while women have to accept this harassment as something to expect and accept. One woman in the field said:

"I could not report him because I feared that he might be dismissed from work."

So instead of considering that her rights have been infringed she is more worried that her harasser might be discharged. This aptly shows the extent to which women have come to see themselves as inessential. Consciousness-raising becomes important for women to realise and assert their rights. According to MacKinnon (1979) consciousness-raising involves getting women to realise that their problems are shared by others and that they are not alone in their suffering. Such realisation will help transform women from being silent into assertive victims prepared to defend their dignity and rights.

### **Dominance Theory**

This theory argues that women suffer oppression at the hands of men because of male power and dominance. Women do not become prostitutes for enjoyment; women do not participate in hardcore, sadistic pornography for enjoyment. Women do not enjoy sexual and other physical violence at the hands of strangers and their partners. These are conditions largely

*'such unwelcome sexually determined behaviour as physical contact and advances, sexually coloured remarks, showing pornography and sexual demands, 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 ground to believe that her objection would disadvantage her in connection with her employment.'*

In other jurisdictions such as in the United States, the Equal Employment Opportunity Commission which is responsible for enforcing the Civil Rights Act defines *sexual harassment* as:

*'unwelcome sexual advances ,request for sexual favours and other verbal or physical conduct of a sexual nature constitutes sexual harassment when submission to or rejection of this conduct explicitly or implicitly affects an individual's employment , unreasonably interferes with an individual's work performance or creates an intimidating ,hostile or offensive work environment.'*

It can be discerned from the above definitions that the elements that constitute sexual harassment in the work place include the following:

1. It must occur in the place of work or in a work-related environment. Thus the harassment can occur at any place where the harasser and the victim are doing a work-related job. It is therefore not confined to the office but could happen at work-related workshops, seminars and conferences.
2. It must also be unwelcome, unwanted, uninvited; not returned and not mutual. This distinguishes it from behaviour which is welcome and mutual. Thus fellow employees and employers are allowed to engage in sexual behaviour and relationships so long they are consensual and welcome. There are some forms of behaviour which appear to be relatively innocent such as joking and flirting. However sexual harassment differs from flirting in that the unwelcome behaviour persists despite the woman's obvious displeasure or lack of interest. Thus it becomes apparent to the harasser that his advances are unwelcome but he nonetheless persists in his conduct. Sexual harassment thus denies women the choice to control their sexuality. They are forced into sexual relations with people they would otherwise not entertain.



also same sex harassment where people of the same sex sexually harass each other (men harassing men and women harassing women).

(Khan 1998;17) points out that men who harass women are likely to be more authoritarian, lack empathy (i.e. find it difficult to understand what other people are feeling) and have a strong belief in traditional sex roles and attitudes. This means that harassers may not even appreciate that what they are doing is wrong or may not care what the consequences are for the victim. Sexual harassment could therefore be a spill over into the work place of the existing unequal power relationships between men and women in society. On the streets it is common to witness men harassing women in different ways and this includes passing sexually explicit comments on women with impunity.

Sexual harassment is an issue often not taken seriously by either harassers or those harassed. (Khan 1998) has observed that in developing countries sexual harassment still appears to be *'an unrecognised, insidious crime perpetrated against 'silent' women who have no means of seeking redress.'* Thus society has tended to condone sexual harassment with the result that victims do not see it as a violation of their rights but rather as an acceptable social vice.

(MacKinnon 1979) argues that women are sexually harassed because they are generally men's subordinates in their jobs, with men in the position of doing the hiring, firing, supervising, and promotion of women. Thus they then use their advantageous positions to exert sexual demands on hapless women.

## **2.5 Arguments about Criminalising Sexual Harassment**

Various arguments have been raised on whether sexual harassment should be criminalised. (Estrich 1985) argues that *soliciting a subordinate employee to perform/submit to sexual intercourse as a condition of employment* amounts to *sexual extortion*. Thus we should prohibit extortion to secure sex in the same way as we prohibit extortion to secure money. In other words, if we criminalise the extortion of money then we should also criminalise the extortion of sex. So, basically the point is extortion is extortion regardless of what consideration is being asked for.

In its *Handbook for Legislation on Violence against Women*, the United Nations Division for the Advancement of Women has identified several key areas that laws related to sexual harassment should address. In section 3.4 the UN Handbook specifies that legislation should criminalize sexual harassment. It further notes that most countries are now moving towards criminalising sexual harassment. It actually states that:

*‘sexual harassment has traditionally been associated solely with labour-related offences and defined as occurring only in the context of unequal power relations (such as boss against employee). As a result, sexual harassment has often been dealt with in countries’ labour codes and only applied to those who experience such behaviour in the formal employment sector. Over time, countries have acknowledged these limitations and begun to address sexual harassment in a more comprehensive manner and in various areas of the law, such as anti-discrimination law, and criminal law.’*

The need to criminalise sexual harassment therefore finds direct support from the United Nations.

## **2.6 Jurisdictions that have criminalised Sexual Harassment**

Various jurisdictions have criminalised sexual harassment. For instance the French Penal Code in Article 222-33 describes *sexual harassment* as:

*‘The fact of harassing anyone using orders, threats or constraint, in order to obtain favours of a sexual nature, by a person abusing the authority that functions confer on him...’*

This has been criticised because it means the harasser can only be someone with authority over the harassed. Basically, this definition does not recognise sexual harassment between co-workers of the same rank. The study will show there harassment occurs between people of the same rank or between higher and lower ranks. It further provides that the *‘harassment of another person for the purpose of obtaining favours of a sexual nature is punished by one year’s imprisonment and a fine of \$15 000, 00.’* I consider the penalty quite a deterrent in terms of both the prison term and the amount of fine.

There are other jurisdictions in Africa that have also gone a step ahead and have criminalised sexual harassment in their Penal Codes. For instance with Kenya, section 23 of the Sexual Offences Act provides that:

sexual conduct involves physical conduct and thus it is easy to conclude that sexual harassment has taken place. Also when a victim loses a tangible job related benefit if she does not comply with the unwelcome sexual advances it becomes apparent that sexual harassment has taken place.

The difficulty arises in hostile or offensive working environments which do not entail the loss of any tangible benefits and the offensive conduct may be merely verbal. In such cases men and women may have different perceptions of whether a hostile working environment exists. Questions arise whether the hostile working environment should be judged from the perspective of the victim, the harasser or a reasonable person. Three theories have been developed to determine whether *a hostile working environment* exists:

### **The Subjective Test**

In terms of this test, one relies solely on the perceptions of the victim. This means that the fact that the accused knew or ought to have known that his sexual advances were unwelcome or, whether another person in the same situation might not have found the environment not hostile, is irrelevant (Basson 2004). So, once the victim perceives the conduct as unwelcome then that amounts to sexual harassment. This approach has however been criticised for being too wide. All behaviour, no matter how trivial, will amount to sexual harassment as long as the victim perceives it to be harassment. This is especially so considering that there are some women who are highly sensitive and will whinge at any conduct they perceive to be offending. For this reason the test is not desirable.

### **The Objective Test**

This test entails that if a reasonable man would not consider certain conduct as hostile, then sexual harassment would not have taken place. Thus the enquiry focus on what a reasonable man would feel or react in the given circumstances (Basson 2004). The criticism has been that the reasonable man standard reflects men's perceptions about sexual harassment. Society is dominated by men and they will determine what conduct amounts to sexual harassment and disregard women's perceptions.

## **2.8 The Effects of Sexual Harassment**

Sexual harassment affects women in a number of ways. The Commission on the European Union States summarized the effects as follows:

*‘sexual harassment pollutes the working environment and can have a devastating effect upon the health, confidence, morale and performance of those affected by it. The anxiety and stress produced by sexual harassment commonly leads to those subjected to it taking time off work due to sickness, being less efficient at work, or leaving their job to seek work elsewhere. Employees often suffer the adverse consequences of the harassment itself and short- and long-term damage to their employment prospects if they are forced to change jobs.’*

So the harassment affects both the performance at work as well as the physical and mental well-being of women.

## **2.9 National Legislative Framework**

### **2.9.1 Labour Law**

Zimbabwe has a two tier labour law system. There is the Public Service Act and the Public Service Regulations, 2000 (hereinafter called ‘the Regulations’), made in terms of section 31 of the Public Service Act. These govern the conditions of service for members in the public sector. The Regulations recognise sexual harassment as an act of misconduct under the First Schedule. That Schedule provides that *‘improper, threatening, insubordinate, or discourteous behaviour, including sexual harassment, during the course of duty towards any member of the Public Service’* is *‘an act of misconduct’*. However the Regulations do not list or outline actual types of behaviour which amount to or which may be included in the category of sexually harassing conduct. In terms of the said Regulations an aggrieved party makes a formal report based upon which the matter is investigated, after which a disciplinary hearing is held.

On the other hand the Labour Act recognises *sexual harassment* as *an unfair labour practice*. Section 8 attempts to define acts that constitute sexual harassment. Under section 8(g) one commits an act of unfair labour practice if he demands sexual favours as a condition for an employment matter. Section 8(h) further provides for unwelcome sexually-determined

substantial justice should be done at the end of the day and the alleged harasser should be given an opportunity to respond to all allegations levelled against him.

### **2.9.2 Criminal Law and Procedure**

An act of sexual harassment may also amount to a criminal offence depending on the nature of the sexual conduct. For instance in terms of section 67(1) of the Code '*indecent assault*' is committed where a male '*commits upon a female person any act involving physical conduct that would be regarded by a reasonable person to be an indecent act...*' Thus one of the elements of indecent assault is that the act must be of an indecent nature involving physical contact. So not all acts of sexual harassment will amount to indecent assault since some do not involve physical contact. However it is worth noting that one of factors taken into account when sentencing is whether the person committing the indecent assault was the parent or guardian, or in a position of authority over, the person indecently assaulted. Thus abusing one's authority which is the case in sexual harassment cases is an aggravating factor.

One may also be charged with *criminal insult*. Criminal insult is committed in terms of section 95 of the Code where '*any person who, by words or conduct (a) seriously impairs the dignity of another person or (b) seriously invades the privacy of another person.*' Thus in terms of this section of the Code the crime is committed where the accused by words or conducts seriously impairs the complainant's dignity or seriously invades her privacy. This crime is therefore committed only when one's dignity is '*seriously*' impaired. What amounts to serious impairment of dignity is not defined. This could mean that cases of sexual harassment which are often trivialised by society will not constitute an offence under this section.

With the earlier definition of sexual harassment in mind, what is apparent from the above elements of the said criminal offences is that not all acts of sexual harassment will constitute a criminal offence. Worse still, section 270 of the Code which in section (1) provides that '*subject to this section a person charged with a crime shall be entitled to be acquitted of the charge if the conduct constituting the crime is of a trivial nature.*' This means a harasser who has been charged with this offence may be acquitted of it if the Magistrate shares society's attitude which trivialises sexual harassment.

### 2.9.3 Civil Law

The victim may also institute a civil claim for damages in delict depending on the nature of conduct. The main purpose of such civil suits is to recover financial compensation for the loss suffered by the victim. In essence the court will try to put the victim in a position she would have been had the wrong not been committed.

Civil proceedings are completely separate from criminal proceedings. One can institute a civil claim regardless of whether the assailant has been convicted or acquitted in the criminal court. This is so because the two have different standards of proof. With criminal matters the standard of proof is beyond a reasonable doubt while in civil it is on a balance of probability. So although an alleged offender may be acquitted in a criminal trial, he may be held liable to pay damages to the victim in a civil suit.

Compensation is usually sought for the pain and suffering endured by the victim. This is pain for the experience of sexual harassment itself and includes the physical harm and subsequent emotional pain. The victim can also claim back pay in cases where she eventually quits her employment. This also happens in situations where the victim eventually loses her employment because of the harassment. The back pay would include salaries and allowances the victim would have received from the time her employment ceases to the time the matter is heard in court. For those who would not have been promoted it would be from the time the promotion was due to the time of the court judgement. I have not come across any civil cases filed with our courts on sexual harassment. In South Africa in the case of *Ntsabo v Real Security*<sup>2</sup> the victim of harassment resigned and then sued the employer successfully for constructive dismissal and was awarded compensation. The case involved a female security guard who was repeatedly harassed. She reported the incidents to her employer but no action was taken. The Labour Court held the employer liable for failing to take action to investigate the harassment. Similarly in another case of *Grobler v Naspers Bpk*<sup>3</sup> the victim of sexual harassment resigned and then sued the employer for common law damages based on the principles governing vicarious liability.

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<sup>2</sup> *Ntsabo v Real Security C.C (2004) 1 BLLR 58 L.C.*

<sup>3</sup> *Grobler v Naspers Bpk (2004) 5 BLLR 455.*

separate legislation, i.e., an Act of Parliament. This means that although Zimbabwe's courts may consider provisions of CEDAW persuasive when dealing with sexual harassment, they cannot enforce them even though Zimbabwe has ratified that Convention. Kenya has made a major innovation in its 2010 Constitution by providing in its section 2(6) that any treaty or convention ratified by Kenya shall form part of the laws of Kenya. So through this constitutional provision issues of sexual harassment can be dealt with using international human rights framework.

## **2.10 International Human Rights Framework**

Sexual harassment is covered by various international human rights instruments which Zimbabwe has ratified. The United Nations and regional treaty systems have recognized sexual harassment as a form of discrimination and violence against women. The General Assembly Resolution 48/104 on the Declaration on the Elimination of Violence Against Women defines violence against women to include sexual harassment, which is prohibited at work, in educational institutions, and elsewhere in Article 2(b). Art.4 (d-f) encourages the development of penal, civil or other administrative sanctions, as well as preventative approaches to eliminate violence against women.

Some of the instruments like the Convention for the Elimination of all Forms of Discrimination against Women, CEDAW specifically defines what sexual harassment is while with others the language used is broad enough to cover sexual harassment. Under Article 11 (1) b of CEDAW state parties are obliged to *'take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular the right to the same employment opportunities, including the application of the same criteria for selection in matters of employment.'* The Committee on the Elimination of All Forms of Discrimination against Women has analysed the import of Article 11 in its 19th General Recommendation. This is the UN Committee charged with the responsibility of overseeing the implementation of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and its recommendations form the basis upon which modifications to CEDAW may be considered and for this reason it gives important clues as to the meaning of provisions of the Convention. The Committee noted *'the pernicious consequences of violence against*

Sub-regional bodies in Africa also have addressed sexual harassment. For example, the Southern African Development Community Protocol on Gender and Development, in Article 22, requires that states parties by 2015 to:

*‘...enact legislative provisions, and adopt and implement policies, strategies, and programmes which define and prohibit sexual harassment in all spheres, and provide deterrent sanctions for perpetrators of sexual harassment.’*

The Protocol has been signed by Angola, Democratic Republic of Congo, Lesotho, Madagascar, Mauritania, Mozambique, Namibia, South Africa, Swaziland, Tanzania, Zambia, and Zimbabwe.

The issue of sexual harassment is therefore well covered at the international and regional level and what is left is for state parties to give effect to the provisions of the instruments. Zimbabwe as a state party to the said international instruments is found wanting when it comes to adopting and implementing legislation and other measures to combat sexual harassment.

## **2.11 Conclusion**

This segment looked at feminist theoretical perspectives informing the study as well as the body of literature that has been written on sexual harassment. It also looks at other research that has been done on sexual harassment. It further provides a critical analysis of the law governing sexual harassment in Zimbabwe as well as international instruments which cover the same subject.



encouraged to search for interventions that will help improve the position of women in the work place.

### **3.1.2 Grounded Theory**

Grounded theory can be defined as *'the discovery of theory from data systematically obtained from social research'* (Glaser and Strauss 1967:2). This theory employs an open approach in that an issue under consideration may unravel other issues that may need further probing. These will be emerging issues which if fully probed will lead to a better understanding of women's lived realities. Thus when I went into the field I had my own assumptions regarding the issue of sexual harassment. In the field other pertinent issues then arose and I was able to analyse those emerging issues. For instance when I went to the field I was of the firm view that women are harassed with impunity because of the inadequacies of the law governing sexual harassment. As with liberal feminists I was of the view that law reform would solve the problem. However upon interviewing women the role of culture and socialisation came to the fore. It emerged that some women resort to cultural ways of resolving such issues. One woman said:

“There is no culture of formal reporting. I just seek advice from elderly women at the work place and act according to their advices.”

Other women have been socialised in such a way that that they cannot discuss issues of sexuality with men. One woman actually asked:

“How do I tell my male boss that someone has fondled my buttocks?”

Thus with this theory you *'get through and beyond conjecture and preconception to exactly the underlying processes of what is going on, so that professionals can intervene with confidence to help resolve the participant's main concern'* (Glaser 1978). For instance, there was an assumption that women are not aware of the reporting structures. In other words they do not know who to approach and lodge a complaint of sexual harassment. It turned out that some women do not even know that sexual harassment is an act of misconduct which one can report. I had then to go back to the human resources personnel and supervisors to find out

are women who occupy different positions. Women also harass men but such cases are quite isolated. The fact that such cases exist, however, may be a reflection of women improperly asserting themselves and challenging perceived roles and power of men.

Men often sexually harass women as a demonstration of the power they wield over women. There is one case I found interesting. An office orderly verbally harassed his female supervisor knowing full well that she could bring misconduct charges against him. It was as though he had imagined himself saying to her: *'Although you are my boss you are still a woman and I am endowed with power over you.'*

To demonstrate how gender is a social construct, men tend to trivialise sexual harassment. They either try to justify it by blaming women for the harassment they are subjected to or see it as an act not worth pursuing. This came out in a case in which men presiding over a sexual harassment case were overheard questioning whether the harasser had any case to answer. This was a case in which a woman had had her breasts fondled. It would appear that they found fondling a woman's breast to be of no consequence to the woman.

## **3.2 Research Design**

### **3.2.1 Research Site**

This research was carried out in Harare, the capital city of Zimbabwe since it houses the head offices for all the departments in the public sector. Thus staff at the management level is found at these offices. However the study was confined to the departments of Justice and Legal Affairs as well as that of Labour and Social Welfare. Thus it was a case study of these departments. This case study method enabled me to fully depict the experiences of women. These were selected not for any particular reason but just out of the realisation that there are too many departments in the public sector and I could not cover all of them.

### **3.2.3 Desk Research**

The researcher must begin with as few predetermined ideas, particularly hypotheses, as possible so that he or she can be as sensitive to the data as possible. In other words, the researcher must have '*an open mind, not an empty head*' (Dey 1999). Before going into the field I analysed a wide variety of literature and laws on sexual harassment to ascertain and fully understand the issue of sexual harassment. The advantage of doing this desk research is that your assumptions will be well informed. You avoid situations where you can for instance just pre-suppose that a certain law does not exist when in actual fact it has been in existence for some time.

## **3.4 Data Collection Methods**

### **3.4.1 In-depth Interviews**

These were done with both female and male public service employees. The purpose was mainly to get to know their personal experiences regarding the subject of sexual harassment, their knowledge about the grievance procedure in sexual harassment cases and also the faith they repose in the manner in which such misconduct cases are handled. Supervisors and personnel from the human resources were also then interviewed with the aim of ascertaining how sexual harassment cases are dealt with right from the reporting stage to the time a misconduct hearing is finalised. The questions posed to the interviewees were open ended and this allowed me to get clarification and at the same time getting answers fuller than simply a yes or no. I started by asking broad questions on the subject of sexual harassment and then would move on to narrow down the questions to my area of interest.

### **3.4.2 Focused Group Discussion**

I had a discussion with a group of 6 (six) men. It was a subject they found titillating and they openly gave their views. They all seemed to blame women for the harassment they suffer with some boasting that they harass women who sexually provoke them. I however realised one shortcoming of having such group interviews on a subject like mine. When men are a group there is a tendency to exaggerate things just for one to be seemed as 'a real man'.

in the public sector. I however draw comfort from the fact that the data I was getting from the women tended to be similar in material respects and at the end of the day it was the content and not the number that mattered most. In other words I had reached a saturation point. *'Saturation means no additional data are being found whereby the sociologist can develop the properties of the category'* (Glaser and Strauss 1967).

### **3.6 Conclusion**

The methodological concepts that were engaged in the study are explored in this Chapter. This was done by looking at what they entail and why they were chosen. The Chapter also looks at the research methods that were used and their effectiveness. Limitations that were encountered in the field are also discussed.

they expect from men. They do not know whether it is a criminal offence or even an act of misconduct. This lack of knowledge is confirmed by (Khan 1996) who observed that most people are not educated about what it means to be sexually harassed and that legislation alone will not cure the problem. The people of Zimbabwe must develop with the law.

One clerk said:

“I did not know that I can report when I am sexually harassed. Do I go to the police?”

I then had to explain to her that sexual harassment is an act of misconduct which she can report to her supervisor so that her harasser can face disciplinary action. So in cases such as this the issue of consciousness-raising arises, i.e., making people aware of what sexual harassment is and how to defend themselves against it using the proper authorities. This will ensure that women come to realise that sexual harassment is a violation of their rights and that they are entitled to and should take action when they are harassed in order to protect themselves and others as well (a properly disciplined offender is less likely to continue harassing others).

#### **4.2 The Complaint Mechanism**

Data obtained from the field revealed that women in general do not know where they are supposed to lodge complaints when they are sexually harassed at work. This is typical of those in the lower grades like office orderlies, clerks and assistant accountants. Surprisingly most thought such cases should be reported to the police and were unaware that sexual harassment is not a criminal offence.

There has not been any formal education at the instance of the employer or management on how sexual harassment cases should be handled. In most cases it is simply a question of guessing who one should report to. One clerk remarked:

“I have worked in different departments in the public sector but not even once was I made aware of the reporting structures.”

hold senior positions and wield a lot of power and influence in their respective departments. Women then see it as a futile exercise reporting such people because they influence the outcome of whatever disciplinary hearing is held. The situation is made worse by the fact that people who preside over misconduct hearings are drawn from the same ministry as the alleged harasser. They can therefore be easily manipulated by those in positions of authority. There is therefore that lack of conviction that when a report is made the matter will be dealt without fear or favour. One clerk aptly put it:

“I won’t make a report because it is simply a waste of time. Nothing will be done to the harasser.”

This is once again yet another demonstration of the power and control men have over women. They dominate the power structures at the work place with the result that when a report is made they can influence the male colleague/s presiding over the case. To further demonstrate the power that men exercise over women, a victim may harassed by the very man to whom the report is correctly made. This was revealed by one woman who said:

“I once made a report and the person I made the report to said, but look at yourself , you are beautiful, what do you expect men to be saying and doing to you.”

So at each level you have a man and this leaves women with nowhere else to go.

Women are also dissuaded from reporting because the people who preside over cases of sexual harassment are dismissive of those cases. A case in point was that of a victim of sexual harassment who had her breast fondled and the matter was referred to a hearing. The woman overheard one of the men presiding asking his colleagues whether the accused had a case to answer. He was asking them, in other words, whether a man could be formally charged just for fondling a woman’s breast. This brings to mind the reasonable man’s test used in determining whether sexual harassment has taken place. This incident shows that men do and will take their own perceptions into account if the ‘reasonable man’ test is used and they will do so at the expense of women and their realities. The fact that the man was questioning whether there was a case to answer shows his disregard for the woman’s feelings. Women who witness their complaints of sexual harassment treated in this insensitive manner are

within the system. Once you make a report and even before the matter is heard your matter is discussed throughout the work place with people making all sorts of comments that tarnish your image. In this respect, an office orderly said:

“The problem with reporting is that there is no confidentiality. You make a report today and tomorrow everyone is talking about it. You are asked by people: *‘tiudze kuti chii chakaitika’* (i.e., tell us what happened.)”

Some prefer maintaining good relations at the work place at the expense of being sexually abused. They maintain that reporting strains your working relationship because these are people you interact with on a daily basis. Ultimately this might even affect your performance at work. One female legal officer said:

“These are people you meet every day and once you report you are ruining your relationship.”

The issue of confidentiality and straining the working relationship could lend credence to the existentialist feminist theory. What happens is that, instead of being concerned about the fact that she has been abused, the victim becomes more worried about maintaining the working relationship with this man who has harassed her or she is worried about what people will say if she reports the matter.

It is not only the working relationship that is strained but the institution of marriage may also be threatened. A spouse might turn against you and blame you for the harassment and this may ultimately cause disharmony in the family. One lady said:

“I do not report because my husband might get to know about it and I will be in trouble. He will blame me for the harassment.”

This fact points to women’s lives not being ‘autonomous’. They suffer oppression because they feel less concerned about their own welfare and more concerned about their families and what their husbands, on whom they are dependent, will say if they find out about the sexual harassment.

This totally disregards the fact that cases of a sexual nature are sensitive and that is why the criminal justice system has taken measures to ensure that these cases are handled differently from other cases, even at the investigating stage.

In cases where an act of misconduct is linked to a criminal offence, the disciplinary panel will make use of police investigations. No independent investigations are carried out by the department. Police investigations are thorough since in criminal cases the prosecution has to prove its case beyond reasonable doubt. This could be taken as an admission that internal investigations are seriously flawed.

With criminal cases investigations are carried out by members from the investigations department whom have been formally trained in that field. Sensitive cases like sexual offences are done by the Victim Friendly Unit (VFU) which has an investigating department in it. Thus normally female police officers investigate such cases. The need to have such cases handled by professional people comes out when regard is had to what one victim of sexual harassment said. She pointed out:

“I was asked to write a statement and was being asked embarrassing questions by an investigating committee made up of just men.”

Investigating a crime normally involve recording a statement from the complainant, looking for witnesses and recording statements from them, as well as locating and gathering exhibits, if there are any. The accused person is also arrested and detained to prevent him from escaping as well as to ensure that the accused does not tamper with the evidence. Once detained, the accused is interviewed, the charge is read to him and a warned and cautioned statement is recorded from him and he is made to sign it. Adverse inferences are drawn by the Court where the accused materially departs from what is contained in that statement. A docket consisting of the witnesses' statements, the warned and cautioned statement, charge sheet, outline of the state case and exhibits is compiled and send to court together with the accused person. An accused is normally not supposed to be detained for a period exceeding forty eight hours. Women actually have confidence in this process as one female legal officer pointed out:



Thus sexual harassment has long term and short term effects which need to be addressed for them to adapt to a normal life. Short term effects are those that are short-lived. For instance one victim of sexual harassment (a senior legal officer) revealed:

“A colleague forced a hug on me as well as fondling my butt. I could not come to work for two days because I was really disturbed.”

With the long term effects these are harrowing experiences which you will leave with in your life. This was confirmed by one lady (a female legal officer) who said:

“Sexual harassment really affects my performance at work. I am always trying to avoid coming into physical contact with the person who harassed me even if there is a compelling need to consult him. Each time I see him I remember the ordeal I suffered at his hands.”

The criminal justice system has made advances in creating an environment which is conducive to women narrating their ordeals. Vulnerable witnesses who are not in a position to testify in the presence of their harassers make use of the victim friendly court where they can testify from a separate room; court officials and the alleged harasser watch her testimony on television in the court room. One magistrate pointed out:

“Because of the nature of the working relationship, victims may use the victim friendly court. This is especially so in cases that involve bosses and their subordinates. So that court is not just for children.”

With the police there is a victim friendly unit at every police station. This was born out of the realisation that women who are victims of sexual attacks suffer serious psychological effects as a result of their experiences. Thus the police have made great strides in preparing a witness for trial by offering pre-trial counselling. This is done by officers specially trained in counselling. After trial the victim is once again counselled to enable her move on with her life after the experiencing the double traumatic ordeal of firstly being the victim of a sexual assault and then having to relive the experience giving evidence at a trial.

“My case was heard by people from the human resources department who were all male. It did not come as a surprise that the harasser was acquitted of the charges.”

#### **4.7 Penalties against Sexual Harassers**

The penalties for acts of misconduct which include sexual harassment are set out in the Public Service Regulations. These range from ordering the offender paying a fine (which should not exceed two months’ salary) to his being transferred to another station where he may continue with the harassment. Demotion is also another option. A discharge from service is reserved for the most serious acts of misconduct. However considering that cases of sexual harassment are generally trivialised and usually involve senior people as the perpetrators it is hard to conceive of situations where one can actually be dismissed from employment for such acts of misconduct. This came out clearly from a supervisor who stated:

“The fact that sexual harassment is not a criminal offence means that it is something that is trivialised and any penalty imposed is likely to be lenient.”

In the criminal justice system, however, penalties for sexual offences are usually stiff. For instance, if a man fondles a woman’s breasts he can be charged with misconduct. In the event of a conviction the disciplinary panel has an array of the said sentences to choose from. They can for instance order that you be transferred. For the same act in the criminal justice system you will be charged with indecent assault. In terms of our Criminal Code that offence attracts a sentence of up to two years imprisonment.

For jurisdictions that have criminalised sexual harassment the sentences prescribed can be said to be a deterrent. A relatively lengthy period of imprisonment is provided for as well as an option of paying a hefty fine. Tanzania has even gone further by providing that the harasser may be ordered to pay compensation to the victim.

## CHAPTER FIVE

### 5.0 THE ARGUMENT FOR REFORMING THE LAW IN ORDER TO CRIMINALISE SEXUAL HARASSEMENT

The study revealed that women are sexually harassed at the work place. They are subjected to both *quid pro quo* and hostile environment forms of sexual harassment. The Regulations, though recognising sexual harassment as an act of misconduct, do not specifically define it, neither do they recognise the different forms of sexual harassment. Jurisdictions that have criminalised sexual harassment like Kenya clearly define sexual harassment by catering for the two forms in which it manifests itself. Sexual harassment is equally not adequately covered by the Criminal Code. As shown earlier, not all acts of sexual harassment will amount to a criminal offence.

As far as the complaint mechanism is concerned what came out of the study is that women are not familiar with the reporting structures. The Regulations require them to report to their immediate supervisors but management has not done enough to bring this to the attention of women. This confirms Khan's (1996) earlier observation that in developing countries sexual harassment appears to be an unrecognised crime that is perpetrated against women who have no means of seeking redress. Thus where you are not aware of the reporting structure you are not able to seek legal redress. With the criminal justice system women need not be educated about the reporting structures, all they need to do is to go to any police station and make a report.

Cases of sexual harassment are not reported because there is a lack of faith in the manner in which the disciplinary cases are handled. This is coupled with the fact that there are adverse consequences associated with reporting. Victimisation is one such example. It is conceded that even when sexual harassment is criminalised such adverse consequences will remain. In other words it would not really matter whether a report has been made internally or with the police victimisation will still occur. However with criminalisation at least some faith is likely to be restored in the justice system.

society in general: (1) Women will be able to make reports at any police station throughout the country; (2) The matter will be handled by the victim friendly unit who have female members at every front desk of police stations; (3) Investigations will be independently and professionally carried out by the police. Women seem to repose a lot of confidence in the manner in which police conduct their investigations. One prosecutor stated:

“Such matters should be handled by the police because they are independent. They will not be an interested party and will strive to ensure that justice is done.”

(4) Victims of sexual harassment will have access to victim friendly facilities. They will receive counselling as well as give evidence in an environment that is friendly to them; (5) The courts which preside over these cases are staffed by personnel who are formally trained in the handling of cases of a sexual nature. (6) In delivering judgements the courts are also not subject to the direction or control of any person or authority. This was alluded to by a lady (a legal officer) who mentioned that:

“Advantages of criminalising sexual harassment is that both the police and the courts are neutral.”

(7) More importantly the punishment imposed for offences of a sexual nature usually have a strong deterrent effect on the offender. It is only after someone has been sent to jail for sexual harassment that people will begin to appreciate the serious nature of the offence. (8) The other advantage of making sexual harassment a criminal offence is that the victim will have a lawyer to present her case in the form of a prosecutor. The prosecutor is there to present the victim’s version of events and at the same time protect the victim from hostile accused persons or their defence lawyers. In disciplinary cases it is the harasser who will be entitled to legal representation. The victim simply has to narrate her ordeal without any legal assistance.

This is not to say the criminal justice system is flawless. It has its own shortcomings but those are outweighed by the need to have legislation that effectively deals with sexual harassment. It will present an option for women, as one woman (a senior legal officer) put it:

“Sexual harassment should be criminalised so that I (may) decide where to lodge my complaint.”

## **CHAPTER SIX**

### **6.0 CONCLUSION AND RECOMMENDATIONS**

#### **6.1 Conclusion**

The complaint mechanism for reporting sexual harassment cases in the public sector is not effective. The procedure is not clearly spelt out in the Regulations and at the same time women have not been educated on how to lodge formal complaints. As a result of this ignorance women end up not reporting cases when they are harassed. The reporting structure itself is not user friendly to women. They are obliged to report to their immediate supervisors who are people the victims may not be able to relate to and this again results in women not reporting acts of harassment. With the police, the procedure for reporting is well set out. You report cases of a sexual nature to any police station and they have officers in the victim friendly unit who will be waiting to receive such complaints.

When an official report is made an investigation is supposed to be launched to establish what happened. In the public sector such investigations are carried out in a shoddy manner. It is not professionally done as members of the investigation committee are randomly chosen with no regard being paid to any formal training they have received on investigating cases. It is just a question of going to the victim and asking her to narrate what happened without even appreciating the effect the harassment has on the victim. In contrast the police have people specially trained in investigations to do that work. They have been trained on how to investigate sensitive cases like those of a sexual nature.

Sexual harassment cases are not reported for a variety of reasons. Some fear straining their working and marital relationships. Some are concerned with the negative publicity that comes with reporting or they just opt to discuss the matter with colleagues. However the main reason given for not reporting is lack of faith in the system. Women find it a futile exercise to report a case when in the end little or no action is taken against the harasser. This is so because it is mostly senior people at the work place, who have connections and who go about harassing hapless women with impunity. An investigation may be carried out followed by a

## **Steps to follow to reach the abovementioned objectives**

To address the problem of sexual harassment there are quite a range of measures that need to be adopted by different partners:

### **The Government of Zimbabwe**

- There is a need to review the current legislation on sexual harassment. The Regulations which govern the conditions of service for those in the public sector are in great need of reform. The Regulations recognise sexual harassment as an act of misconduct but do not define what sexual harassment is. This leaves employees in the dark as to whether or not they have been sexually harassed when they suffer unwelcome conduct of a sexual nature. Therefore a precise definition of what constitutes sexual harassment is absolutely essential in order to clarify the issue.
- Sexual harassment matters should be treated differently from other acts of misconduct. Instead of providing that women report such cases to their immediate supervisors there should be a focal person who receives formal complaints of this nature. The person should be someone who has been trained in gender issues and is able to appreciate women's lived realities. Equally important is the fact that the person should be someone chosen by both the management and general staff and not simply imposed by management on their staff. If imposed there is a danger that women may not be able to relate to that person and this will also discourage them from reporting incidents of sexual harassment.
- There is a great need to restore confidence in the grievance procedure itself. Investigation of sexual harassment complaints should be carried out by people who have been schooled on how to handle sensitive matters like sexual harassment. There should be women in every investigation committee because even if the men are gender sensitive there might be women who will still not be comfortable relating their cases to men. Thus in the police, investigations of this nature are usually done by female officers in the victim friendly unit. A thorough investigation should be conducted. Any witnesses should be identified. When interviewed or questioned,

and moreover a lot is said about you when you make a report and there is therefore a need to ensure that you adjust to the kind of life you were living before the report.

- The right to legal representation should be considered for the victim. Since the harasser is entitled to have legal representation of his choice there should be no objection to the victim enjoying the same right if she can afford it. This is likely to help her achieve justice at the end of the day. If she does not opt for a lawyer at least she should have a right to have someone by her side during the hearing just to give her support.
- It has been noted that if a disciplinary panel finds the alleged harasser not guilty, the victim may not pursue the matter under labour law. As discussed in earlier chapters this situation is different to that obtaining in the private sector where victims have access to the Labour Court. Therefore victims of sexual harassment in the public sector who are not satisfied with the outcome of a disciplinary hearing should also have a right to refer their case to the Labour Court which was specifically set up to deal with labour issues and there is no reason why members in the public sector should not enjoy equal access to this court.
- As previously noted sexual harassment occurs due to the power differentials between men and women. There is therefore a need for government to come up with affirmative action policies that ensure that more women are promoted to managerial positions.
- Besides amending the Public Service Regulation there is also a need to actually make sexual harassment a criminal offence in our jurisdiction. The criminal justice system has already made special provision for the treatment of cases of a sexual nature. Sexual matters are treated differently right from the time a report is made at the police station to the time the matter is finalised in court.
- Criminalising sexual harassment would not mean removing such cases from the realm of labour law but would present an option for women to decide which forum they feel will best address their problem. Theft from an employer is both an act of misconduct

## **Civil Society /Employer**

- The law can be reformed but if people are not aware of what the law says then no reforms will improve the lives of women. There is therefore a need for legal awareness about sexual harassment cases. This involves educating women and men as to what sexual harassment is and the procedure one has to follow when lodging complaints as well as the whole process of how such cases are handled. The awareness should target not only women but men and those in the management level as well.
- Cultural and social barriers that prevent women from reporting cases of sexual harassment should be removed. Women need to be enlightened on the important issue of their human rights. Men should learn to appreciate how women feel when they are sexually harassed and therefore learn to change their attitudes towards sexual harassment. Instead of going about believing that they are entitled to indulge in sexual harassment with impunity, they should be taught to perceive it for what it really is: a serious and punishable violation of a woman's right to dignity and integrity (physical, emotional, psychological etc.)

## **Employer/Management**

- Annual reports should be compiled for the number of formal complaints received at the work place, the number of convictions as well as acquittals as well as their judgments and their supporting written reasons. This will help determine the effectiveness of the various interventions.
- Similarly annual data needs to be compiled for cases received by the police. The number taken to court and the number of acquittals and convictions. This will help gauge the effectiveness of criminalising sexual harassment.



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