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DECLARATION BY STUDENT

I, **Mr. Jacob Pheagane Mangena**, declare that this dissertation titled “A legal analysis of the law regulating sexual harassment in the workplace in South Africa” is my own work in plan and execution. I also declare that I has not previously submitted this mini-dissertation to the University of Limpopo or any other University. All the sources herein have been acknowledged by means of references.

Signature: 

Date: 21 May 2024

DECLARATION BY THE SUPERVISOR

I, **Adv. Lufuno Tokyo Nevondwe**, hereby declare that I have supervised this mini-dissertation by **Mr. Jacob Pheagane Mangena** titled "A legal analysis of the law regulating sexual harassment in the workplace in South Africa" for the degree of Master of Laws (LLM) in Labour Law, and in my own view and its scope is suitable and be accepted for examination.

Signed:



Date: 21 May 2024

DEDICATION

This mini-dissertation is dedicated to the following people:

1. To my mother Maropeng Grace Mangena for her encouragement, financial and emotional support throughout my life more in particular for the support on my studies.
2. To my entire family, my aunts, uncles, sisters and brothers may this work inspire confidence in you, that the possibilities are limitless, and the sky has never been a boundary for anyone; there are still opportunities to go beyond the sky.

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To all those who have supported me along the way, whether through words of encouragement, guidance, or simply being there when I needed it most, I am profoundly grateful. Your contributions have made this academic pursuit a reality.

ABSTRACT

This mini-dissertation investigates the historical roots of sexual harassment in the South African workplace, deeply entrenched in a legacy of gender inequality exacerbated by the apartheid era. The oppressive system fostered an environment where women, particularly black women, were vulnerable to unwanted sexual advances in exchange for job security or advancement. Post-apartheid, legislative measures such as the Employment Equity Act of 1998 and the Code of Good Practice on the Prevention and Elimination of Violence and Harassment in the World of Work sought to address sexual harassment and create safer workplaces. However, challenges persist. The study is centred on *quid pro quo* sexual harassment, analysing the legal framework, specifically the Code of Good Practice, to identify gaps and challenges in addressing this issue, particularly concerning gender-based violence. Objectives encompass defining violence and harassment, fostering respectful workplace cultures, promoting HR procedures for addressing harassment, encouraging stakeholder cooperation, and ensuring victim support.

LIST OF ABBREVIATIONS

CEE - Commission for Employment Equity.

EEA - Employment Equity Act.

ILO - International Labour Organization.

GBV - Gender-Based Violence.

LRA - Labour Relations Act.

PDA - Protected Disclosure Act.

COIDA - Compensation for Occupational Injuries and Diseases Act.

ICC - Internal Complaints Committee.

CCMA - Commission for Conciliation, Mediation and Arbitration.

LC – Labour Court.

APA - American Psychological Association.

PTSD - Post-Traumatic Stress Disorder.

NIOSH - National Institute for Occupational Safety and Health.

WHO - World Health Organisation.

OHSA - Occupational Health and Safety Act.

LAC - Labour Appeal Court.

LCC - Local Complaints Committee.

CHAPTER ONE: INTRODUCTION

1.1. The historical background of the study

Sexual harassment in the South African workplace history is rooted in the broader context of gender inequality and discrimination that has persisted throughout the country's history.¹ Apartheid was a system of institutionalized racial and gender inequality that lasted in South Africa from 1948 to 1994.² While apartheid created a highly unequal society, it also fuelled gender-based discrimination and harassment within the workplace.³ Women, especially black women, faced systemic disadvantages and were often subjected to unwanted sexual advances and demands in exchange for job security or advancement opportunities.⁴ These exploitative practices perpetuated a culture of silence, as victims feared retaliation and had limited avenues for seeking justice.⁵

During the apartheid era in South Africa, power imbalances and discrimination were deeply entrenched. Sexual harassment in the workplace often occurred within this oppressive system, where women and marginalized groups were particularly vulnerable. Post-apartheid South Africa embarked on a transformative journey to resolve historic injustices and promote gender equality.⁶ The new Constitution, adopted in the same year, enshrined the rights to dignity, freedom and equality from unfair discrimination.⁷ The Employment Equity Act (EEA),⁸ introduced in 1998, in attempts to prevent sexual harassment and make workplaces safer.⁹ The legislation empowers employees to report instances of harassment and promotes a free

¹ Kubjana L.L, 'Understanding the law on sexual harassment in the workplace (through a case law lens): A classic fool's errand' (2020) 41(1) *OBITER* 95; Code of Good Practice: Sexual Harassment, Item 3 and 4.

² Digby A, 'Black doctors and discrimination under South Africa's apartheid regime' (2013) 57 *Medical history* 270.

³ Gradín, C, 'Occupational Gender Segregation in Post-Apartheid South Africa' (2021) 27 *Feminist Economics* 103 & 105.

⁴ Ibid.

⁵ Fernando, D., & Prasad, A, 'Sex-based harassment and organizational silencing: How women are led to reluctant acquiescence in academia' (2019) 72 *Human Relations* 1566.

⁶ S 9 of the Constitution of the Republic of South Africa, 1996 ('the Constitution') confers the right to equality to any person and further protects all people from violation of their equality right.

⁷ S 9 and 10 of the Constitution.

⁸ Act 55 of 1995.

⁹ Act 55 of 1998.

environment. However, sexual harassment remains a prevalent issue, requiring further action.

A thorough legal framework to address sexual harassment while defending the rights of the employees has been developed by virtue of the historical context of sexual favours in South Africa. By virtue of the EEA, “quid pro quo” in the work environment is discouraged.¹⁰ In attempt alleviate all sorts of violence and harassment in the workplace, the Department of Employment and Labour adopted the “Code of Good Practice on the Prevention and Elimination of Violence and Harassment in the Workplace”.¹¹ The code aims to provide recommendations for employers, employees, and stakeholders on how to prevent and handle workplace violence and harassment.¹² The ILO Discrimination Convention and Convention,¹³ and Violence and Harassment Convention,¹⁴ address occupational Health and Safety and manages, prevents and eliminates any form of harassment or violence in a work environment.

The code emphasizes the importance of proactive measures, such as clear policies, awareness-raising initiatives, and training programs, to prevent sexual harassment. It highlights the need for employers to create an environment that promotes dignity and respect, with effective reporting mechanisms, support structures, and appropriate disciplinary action against the perpetrator. The code also emphasizes the significance of ensuring that victims are protected from retaliation and provided with the necessary support and redress.

¹⁰ Ibid.

¹¹ EEA (as amended): “Code of Good Practice on the Prevention and Elimination of Harassment in the Workplace,” 2022 (hereinafter referred as the EEA Code for Prevention of Workplace Harassment).

¹² werksmans.com. “<https://www.werksmans.com/legal-updates-and-opinions/draft-code-of-good-practice-on-the-prevention-and-elimination-of-violence-and-harassment-in-the-world-of-work>” (accessed June 19, 2023).

¹³ International Labour Organization. *Discrimination (Employment and Occupation) Convention, 1958 (No. 111)*. 1958. [Convention C111 - Discrimination \(Employment and Occupation\) Convention, 1958 \(No. 111\) \(ilo.org\)](#) (Accessed by 08 April 2024).

¹⁴Labour Organization. *C190 - Violence and Harassment Convention, 2019 (No. 190)*. 2019.[Convention C190 - Violence and Harassment Convention, 2019 \(No. 190\) \(ilo.org\)](#) (accessed 08 April 2024).

Quid pro quo sexual harassment must be addressed immediately due to the historical context of sexual favours in South African workplaces, which are rooted in the nation's colonial and apartheid histories.¹⁵ It enables us to recognize the importance of ongoing initiatives aimed at preventing and eradicating such forms of harassment.¹⁶ The South African government has made a significant effort to prevent workplace sexual harassment and through this code ensure the safety of employees while also preserving their dignity.¹⁷ The code has the potential to have a positive effect on preventing and eliminating harassment in the workplace by defining sexual favours as a type of harassment and outlining thorough guidelines for employers.¹⁸

1.2. Statement of the research problem

The issue of sexual favours at work refers to circumstances in which an employee is pressured or asked to perform sexual favours in return for something favourable or to avoid a negative employment-related consequence.¹⁹ According to a recent survey conducted in South Africa, 18% of men and 30% of women in South Africa had experienced unwelcome sexual approaches at work.²⁰ According to the survey, the poll, which was carried out among 1,000 urban South Africans by the contemporary insights firm Columinate, produced "somewhat dismaying" results.²¹ The study by Oni et al reveals that workplace sexual harassment is an on-going issue, which many employees especially junior female employees victimised often due to being vulnerable to sexual harassment.²² A total of 18% of men and 30% of women who reported receiving unwelcome sexual approaches at work stated that harassment at work might take many different forms.²³ However, the issue is that the South African law, particularly the EEA and its Code do not address these issues as necessary. For

¹⁵ Kujana (2020) 41(1) *OBITER* 95.

¹⁶ ILO, 'Sexual harassment in the world of work' 1.

¹⁷ Objectives of the EEA Code for Prevention of Workplace Harassment.

¹⁸ *Ibid.*

¹⁹ Kujana (2020) 41(1) *OBITER* 95.

²⁰ Smith C, (2018) 'Dismaying level of sexual harassment in corporate SA – survey.' News24. <https://www.news24.com/fin24/dismaying-level-of-sexual-harassment-in-corporate-sa-survey-20180901-2> accessed 08 April 2024.

²¹ *Ibid.*

²² Oni, H. T., Tshitangano, T. G., & Akinsola, H. A, 'Sexual harassment and victimization of students: a case study of a higher education institution in South Africa' (2019) 19 *African health sciences* 1478.

²³ *Ibid.*, Smith (2018).

instance, sexual harassment is recognised as discrimination in the EEA,²⁴ this, in light of the frequency of sexual harassment at work, seems overly permissive. To reduce workplace sexual harassment, however, particular legislative measures should be implemented rather than treating it as a form of discrimination.

1.3. Aims and objectives

1.3.1. Aims

The aim of this study is to examine the gap in the existing legal framework governing sexual harassment in South African workplace, which make it onerous and absurd to take legislative measures to prevent sexual harassment.

1.3.2. Objectives

- The study seeks to examine the loophole in South Africa's legislation prohibiting sexual harassment at work.
- The assess the extent at which workplace sexual harassment takes place in South Africa.
- To determine if workers who experience sexual harassment are afford legal measures which allow them to report and thereafter protect them after reporting workplace harassment.
- To discuss proactive legislative and regulatory measures which can be adopted to reduce and prevent workplace sexual harassment in South Africa.
- Providing a clear definition of violence and harassment in a workplace, including “quid pro quo” harassment, and promoting awareness of its harmful effects on individuals and organizations.

²⁴ Section 6 of the EEA.

- To provide legal framework for promoting a culture of respect, dignity, and non-discrimination in the workplace, where all workers are treated with equality and fairness.

1.4. The significance of the study.

The significance of this study is found on the on-going initiatives to prevent and produce the workplace sexual harassment. The study examines legislative gaps in South African which make it onerous to prevent workplace sexual harassment. Therefore, the study seeks to improve the EEA and its Code on proactive legislative and regulatory measures to alleviate workplace sexual harassment. Therefore, this study will benefit mostly people who are vulnerable such as ladies in entry job positions and also men on the same level who are most venerable to sexual harassment in the workplace. The study will therefore provide policy, regulatory, and legislative recommendations which will assist to reduce and prevent workplace sexual harassment in South Africa.

1.5. Literature review

Workplace sexual harassment is a serious problem with significant social, legal, and economic ramifications. The purpose of this research is to present a thorough examination of the laws pertaining to workplace sexual harassment in South Africa. By reviewing various sources of law and presenting critical viewpoints, this study seeks to shed light on the effectiveness and challenges of the current regulatory regime.

Section 9 of the Constitution, which enshrines the right to equality and forbids discrimination on any basis, including sex and gender, is the cornerstone of the legal framework against sexual harassment.²⁵ This section serves as a fundamental tool for addressing workplace sexual harassment. Second to that is the EEA, which addresses issues of unfair discrimination and promotes equal opportunities in the workplace.²⁶ Section 6(1) explicitly prohibits any unfair discrimination, including sexual harassment.

²⁵ Section 9 of the Constitution.

²⁶ Section 6 of the EEA as it aligns with the provision in the above footnote for serving employment equality.

The Act also mandates employers to adopt measures to prevent and eliminate sexual harassment. Lastly, the Labour Relations Act (LRA)²⁷ which provides mechanisms for resolving employment disputes. While it does not specifically address sexual harassment, it indirectly covers harassment through its provisions on unfair dismissal and constructive dismissal. The concept of a "hostile work environment" has been used to address cases of sexual harassment.²⁸

South African courts have played a significant role in shaping the legal understanding of sexual harassment. The case of *Shoprite Checkers (Pty) Ltd v JL*,²⁹ has helped to clarify expectations for employers when they meet with parties involved in claims of sexual harassment by offering useful insights. The case of *McGregor v Public Health and Social Development Sectoral Bargaining Council*,³⁰ provides the definition of workplace sexual harassment.³¹ However, gaps and challenges remain. The legal framework could benefit from further refinement to explicitly address power dynamics and intersectionality.

The legal framework in South Africa demonstrates a commitment to addressing sexual harassment in the workplace. While significant progress has been made, challenges such as many cases going unreported due to fear of retaliation, burden of proof, stigma, lack of awareness about rights and procedures, victims often face challenges in proving harassment, as it often involves subtle behavior while some cases result in inadequate disciplinary measures, potentially perpetuating a culture of impunity. Therefore, strengthening legal enforcement mechanisms and providing support for victims are essential steps toward ensuring a safer and more inclusive work environment.³²

In conclusion, the legal analysis of the law regulating sexual harassment in the workplace in South Africa reflects a multifaceted approach that draws on legislative provisions and judicial interpretations. While strides have been made to address this

²⁷ Act 66 of 1995.

²⁸ The LRA focuses more on employment relations such as dismissals, dispute resolution, collective labour law practices and employment contracts.

²⁹ [2021] ZALCCT 95.

³⁰ [2021] ZACC 14.

³¹ According to section 4: "sexual harassment is unwelcome conduct of a sexual nature that violates the rights of an employee and constitutes a barrier to equity in the workplace".

³² ILO, 'Sexual harassment in the world of work' 4.

issue, ongoing efforts are necessary to ensure a comprehensive and effective framework that safeguards individuals from all forms of sexual harassment and promotes a culture of equality and respect in the workplace.³³

1.6. Research methodology.

The research methodology of this study is purely qualitative desktop literature review for academic legal research. This research approach will assist to properly conduct research in order to examine laws regulating workplace sexual harassment and related loopholes. The researcher uses primary and secondary legal materials, such as the Constitution, books, journal articles, legislation, international and regional legal instruments, and judicial precedents pertaining to sexual harassment in the workplace. The fundamental clauses of the Constitution that will be examined are the right to fair employment practices found in section 23. The study goes on to address foreign legislative frameworks pertaining to the prevention of sexual harassment in the workplace. This study also discusses the national legislative framework of South Africa, which includes the EEA and its code. Additionally, the study examines South African workplace sexual harassment incidents and case law. Lastly, the study also discusses comparative laws, looking at laws relating to workplace sexual harassment in India to draw effective lessons to improve South African law.

1.7. Scope and limitations of the study.

The mini-dissertation shall be divided into five interrelated chapters. The first being an introduction chapter that lays the groundwork while chapter two focuses on legislative and policy frameworks. The third chapter focuses on case laws, while the fourth chapter focuses comparative studies. The study's overall conclusions and suggestions are covered in the fifth and final chapter. The following chapter makes up the mini-dissertation:

Chapter 1 – Introduction and background

³³ Oni, H. T., Tshitangano, T. G., & Akinsola, H. A (2019) 19 *African health sciences* 1482.

This chapter examines workplace sexual harassment in South Africa, tracing its origins to apartheid-era inequalities that fostered exploitation and a culture of silence. Despite post-apartheid reforms like the Constitution³⁴ and the EEA³⁵, harassment persists.

Recent measures, including the “Code of Good Practice on the Prevention and Elimination of Violence and Harassment in the Workplace,” aim to address these issues but face implementation challenges. A survey highlighting significant harassment rates suggests existing laws are inadequate.³⁶

The chapter aims to identify gaps in the current legal framework, assess harassment prevalence, and propose improvements. It reviews South African laws and court cases, emphasizing the need for stronger enforcement and support. The study uses a qualitative literature review approach and is structured into five chapters, with limitations including a focus on South African law and qualitative analysis.

Chapter 2 – The essence and prevalence of workplace sexual harassment

This chapter examines workplace sexual harassment in South Africa, focusing on its nature, prevalence, causes, and legal frameworks. Sexual harassment—ranging from unwanted sexual advances to abusive behavior—creates a hostile work environment and violates human rights.

Surveys reveal that 18% of men and 30% of women in South Africa face sexual harassment at work.³⁷ The forms of harassment include verbal, physical, and suggestive acts, but many victims do not report these incidents due to fear of retaliation or inadequate reporting mechanisms.

The root causes include gender inequality and power imbalances, which are perpetuated by societal norms and traditional gender roles. Women, especially in lower-level or male-dominated roles, along with young and migrant workers, are particularly vulnerable.

³⁴ The Constitution of the Republic of South Africa, 1996.

³⁵ Act 55 of 1998.

³⁶ Smith C, (2018) ‘Dismaying level of sexual harassment in corporate SA – survey.’ News24. [‘https://www.news24.com/fin24/dismaying-level-of-sexual-harassment-in-corporate-sa-survey-20180901-2’](https://www.news24.com/fin24/dismaying-level-of-sexual-harassment-in-corporate-sa-survey-20180901-2) (accessed 08 April 2024).

³⁷ Ibid

Occupational Health and Safety Act (OHSA)⁴⁴, provides further protections, though OHSA primarily focuses on physical health. Case laws, including *Lynne Martin-Hancock v Computer Horizons*⁴⁵, *Amathole District Municipality v CCMA*⁴⁶, *PE v Dr Beyers Naude Local Municipality*⁴⁷, and *Ekurhuleni Metropolitan Municipality v South African Local Government Bargaining Council*⁴⁸, highlights the importance of fair treatment, balanced evidence, and employer accountability in upholding these protections. Together, these frameworks create a robust system for ensuring safe, respectful, and equitable workplaces.

Chapter 4 – Comparative analysis

The chapter explores the issue of sexual harassment in the workplace, comparing the legal frameworks of South Africa and India. Both countries have established laws to address this problem—South Africa through the EEA⁴⁹ and the Code of Good Practice, and India through the Sexual Harassment of Women at Workplace Act.⁵⁰

South Africa's legislation mandates employers to prevent and address harassment, emphasizing proactive measures and clear reporting mechanisms. India's law requires Internal Complaints Committees (ICCs) in larger organizations and provides a detailed complaint process.

While both frameworks aim to create safer work environments, they face challenges such as overburdened legal systems, corruption, and cultural issues. Recommendations include improving judicial infrastructure, combating corruption, and enhancing legal awareness. Addressing these challenges is crucial for effective implementation and fostering respectful workplaces.

Chapter 5 – Conclusion and Recommendations

⁴⁴ Act 85 of 1993.

⁴⁵ (*unreported case no NH 11/2/14268, 10-1994*)

⁴⁶ (PA9/2018) [2022] ZALAC 119 (10 November 2022).

⁴⁷ (828/2011) [2021] ZAECGHC 35.

⁴⁸ (2022) 43 ILJ 825 (LAC).

⁴⁹ Act 55 of 1998.

⁵⁰ Act 14 of 2013.

This chapter wraps up the study on workplace sexual harassment, highlighting its deep-rooted nature due to historical injustices and the necessity for robust legal frameworks and proactive measures.

Historical context reveals that South Africa's apartheid era fostered a culture of silence around harassment, although post-apartheid laws like the EEA⁵¹ have made strides. Similarly, India has progressed with the Vishaka Guidelines and the Sexual Harassment of Women at Workplace Act⁵². Furthermore, the chapter concludes by recommendations.

⁵¹ Act 55 of 1998.

⁵² Act 14 of 2013.

CHAPTER 2 – THE ESSENCE AND PREVALENCE OF WORKPLACE SEXUAL HARASSMENT IN SOUTH AFRICA

2.1. Introduction

The ILO regards workplace sexual harassment as a material and severe form of workplace discrimination which go as far as violation of human rights of victims of workplace sexual harassment.⁵³ Sexual harassment cases are troubling because they are on the rise in South Africa and around the world. In order to guarantee that the research offers a clear knowledge of crucial terms and characteristics of workplace sexual harassment, this chapter addresses the nature of the practice. The chapter also covers the prevalence, reasons for, and outcomes of sexual harassment at work. The chapter concludes by going deeper into the categories of people who are particularly susceptible to sexual harassment and how the law can be used to prevent and shield victims of sexual harassment at work.

2.2. The nature of workplace sexual harassment

Sexual harassment refers to “a persistent, unwanted sexual advances, verbal abuse, and/or demands for sexual favours”, often as a condition of continued employment, which “creates an environment that is hostile or intimidating”.⁵⁴ Any sexually suggestive physical, verbal, or nonverbal behaviour as well as other behaviour based on sex that is unwanted, irrational, and offensive to the recipient; additionally, behaviour that makes the recipient feel intimidated, hostile, or dehumanised at work; and behaviour that, whether explicitly or implicitly, justifies rejecting or submitting to such behaviour in order to make decisions that have an impact on one's employment.⁵⁵

Therefore, a variety of actions and behaviours of a sexual character can be classified as sexual harassment, including unwelcome sexual propositions or remarks, "jokes," the exhibition of images or posters objectifying women, physical contact, and sexual

⁵³ ILO, 'Sexual harassment in the world of work' 1. ILO Discrimination Convention 1958.

⁵⁴ Kubjana L.L., 'Understanding the law on sexual harassment in the workplace (through a case law lens): A classic fool's errand' (2020) 41(1) *OBITER* 95; Code of Good Practice: Sexual Harassment, Item 3 and 4.

⁵⁵ ILO, 'Sexual harassment in the world of work' 1.

assault.⁵⁶ A variety of people, including co-workers, managers, employees, and outsiders, may engage in sexual harassment. Sexual harassment, in any form, creates a hostile and hazardous work environment for those who are subjected to it, as well as for others who witness it.⁵⁷ Furthermore, the frequently ongoing, "normalised" character of sexual harassment can have debilitating consequences, including severe emotional suffering, harm to one's reputation, a loss of one's own dignity and self-worth, and victimisation by peers, family, and other acquaintances.⁵⁸

There are various ways that workplace sexual harassment transpires in the workplace. In the case of *SA Metal Group v CCMA*,⁵⁹ sexual harassment transpired when a male employee (the perpetrator) the complainant (female co-worker), whether she was "offering to play with me (him)" and had further mentioned that he "can't wait for summer to see you (her) strut your stuff". For her side, the complainant had once given the purported offender a "Little Love" card as a birthday greeting.⁶⁰ The commissioner held that the alleged perpetrator's statements did not amount to sexual harassment as they are not clearly linked with anything sexual and further that the complainant did not indicate that they statements were not welcome.⁶¹ This decision was overruled by the Labour Court (LC) and the LC found the statements constituted sexual harassment and ordered that the perpetrator be dismissed. This case indicates that even minor incidents and statements that employers and employees take lightly may affect another employee and taken as sexual harassment.

A case law with clear acts of sexual harassment is the case of *Bandat v De Kock Consulting Engineering*.⁶² The accused individual in this case is accused of acting inappropriately by removing his pants in public while swimming, thereby exposing his genitalia. The accused further suggested that she be offered R1,000.00 for sex, to

⁵⁶ Ngwane, K. S., "Workplace harassment and its impact on staff performance: A case study of a South African higher education institution" 2018 2 *Journal of Management & Administration* 163-189.

⁵⁷ Cortina, L. M., & Areguin, M. A., 'Putting people down and pushing them out: Sexual harassment in the workplace' (2021) 8 *Annual Review of Organizational Psychology and Organizational Behavior* 285.

⁵⁸ *Ibid.*

⁵⁹ [2014] ZALCCT 15.

⁶⁰ *SA Metal Group* para 3.

⁶¹ *SA Metal Group* para 4.

⁶² (2015) 36 ILJ 979 (LC).

which she jokingly replied that her rate is R10,000.00 and invited her to Teazers, where they watched strippers perform.⁶³

Another case where there are clear acts of sexual harassment is in the case of *Vodacom Service Provider Company v Phala*.⁶⁴ The accused party in this case is accused of pinning the complainants' bottoms, grabbing one of them by the crotch and attempting to take off his belt, grabbing one of their cell phones and hiding it under her skirt, and taking a picture of her privates to show one of the complainants. Additionally, it is said that after speaking with the complainants and the accused, she summoned them to her office to gauge the size of their manhood.⁶⁵ This conduct was considered unacceptable since the perpetrator was holding a senior position at work.

2.3. Prevalence of workplace sexual harassment in South Africa

According to a recent poll, 18% of men and 30% of women in South Africa had experienced unwelcome sexual approaches at work.⁶⁶ According to the report, the poll, which was carried out among 1,000 urban South Africans by the contemporary insights firm Columinate, produced "somewhat dismaying" results.⁶⁷ According to the survey's findings, South African enterprises must enhance their sexual harassment policies and processes to guarantee that their workers are sufficiently protected. Thirty percent of women and eighteen percent of men who reported receiving unwelcome sexual approaches at work said that harassment took many different forms.⁶⁸

Of those who reported being harassed, 15% stated the approaches were verbal in nature and 38% claimed they were physical and involved inappropriate touching. About 42% of respondents said they had been lustfully glancing at their body parts, and 32% said they had received sexually suggestive communications.⁶⁹ While 26% of women said that their supervisor or superior was the source of the harassment, over 57% of women and 47% of men said that the unwelcome approaches originated from

⁶³ *Bandat* paras 27, 28 and 29.

⁶⁴ JR2178/05) [2007] ZALC 13.

⁶⁵ *Vodacom Service Provider* paras 4, 5 and 6.

⁶⁶ Smith C, (2018) 'Dismaying level of sexual harassment in corporate SA – survey.' News24. '<https://www.news24.com/fin24/dismaying-level-of-sexual-harassment-in-corporate-sa-survey-20180901-2>' (accessed 08 April 2024).

⁶⁷ *Ibid*

⁶⁸ *Ibid*.

⁶⁹ *Ibid*.

a peer at work. However, 20% of males claimed that their subordinates made unwelcome approaches and attention towards them.⁷⁰

About 22% of women and 39% of men said they had never experienced abuse. Men made up roughly 30% of those who said they didn't think anybody would believe them, while women made up 29% of those who said they didn't think management would take any action. Roughly 10% of individuals who experienced harassment said they were afraid of being punished if they reported it. While just 16% of respondents reported the event to HR and 10% to the authorities, more over half of the victims—56% of women and 36% of men—confronted their harasser.⁷¹

About 34% of the 24% of participants who said they had witnessed harassment at work responded right away, while 31% confronted the harasser or reported the occurrence to the employer. As per the report's results, it is apparent that corporate SA still has to take more precautions steps to safeguard against workplace sexual harassment. The study indicates further that in order for the victims of sexual harassment to report the incidence without fear of reprisal or negative effects on their careers, employers must ensure that staff members are aware of the protocols in place. Additionally, training must be provided to enable anyone witnessing sexual harassment at work to behave appropriately, assist the victim, and then report the incident.⁷²

2.4. The causes of workplace sexual harassment

Sexual harassment frequently focuses more on maintaining pre-existing power dynamics than it does on sexual pleasure.⁷³ Sexual harassment is greatly influenced

⁷⁰ Oni HT, Tshitangano TG, Akinsola HA, 'Sexual harassment and victimization of students: a case study of a higher education institution in South Africa. (2019) 19(1). Afri Health Sci. 1478-1485. dx.doi. org/10.4314/ ahs. v19i1.21 (accessed 08 April 2024).

⁷¹ Smith C, (2018) "Dismaying' level of sexual harassment in corporate SA – survey" News24 (accessed 08 April 2024).

⁷² Ibid.

⁷³ McCann, D, "Sexual harassment at work: National and international responses, Conditions of Work and Employment" (2005) Series No. 2 (Geneva, ILO).

by gender norms and assumptions about what constitutes appropriate behaviour for men and women, which are mirrored in the workplace. For example, sexual harassment can be utilised as a kind of discipline or disincentive when women are perceived as violating these norms, for instance, working outside the home or choosing a profession that is typically held by men.⁷⁴

Gender inequality and power imbalances are the main root causes of sexual harassment and sex discrimination in the workplace. Additionally, certain persons are more likely to commit crimes due to the overlapping forms of discrimination and exclusion they experience. A lack of accountability may also serve as a driving force for illegal workplace activities.⁷⁵

Workplace hierarchies and other forms of power imbalances can encourage a sense of entitlement among the powerful while robbing the weaker individuals of the courage to challenge or question their authority. While it may not be possible to totally eradicate power disparities, organisations and businesses might consider reducing their effects. Providing a secure channel for leaders and managers to report unethical conduct and emphasising that they will be held accountable for their actions are two strategies to achieve this.⁷⁶

Gender inequality

Gender inequality is the uneven allocation of opportunities, values, and resources based on an individual's gender. Examples of gender inequality in the workplace include male-dominated leadership positions or work environments, gender pay gaps, gender segregation, restricted access to facilities for women and other diverse

⁷⁴ Berdahl, J.L., 'The sexual harassment of uppity women' (2007) 92 *Journal of Applied Psychology* 425-437 (accessed 08 April 2024)

⁷⁵ Oni HT, Tshitangano TG, Akinsola HA, 'Sexual harassment and victimization of students: a case study of a higher education institution in South Africa. (2019) 19(1). *Afri Health Sci.* 1478-1485. dx.doi.org/10.4314/ahs.v19i1.21 (accessed 08 April 2024).

⁷⁶ Cortina, L. M., & Areguin, M. A, "Putting people down and pushing them out: Sexual harassment in the workplace" (2021) 8 *Annual Review of Organizational Psychology and Organizational Behaviour* 285-309.

workers, expectations placed on employees to perform particular tasks based solely on their gender, and a culture of jokes that are transphobic or sexist.⁷⁷

Intersectional factors

The various and overlapping forms of discrimination that an individual may encounter due to their identity (e.g., race, ethnicity, Aboriginal or Torres Strait Islander identity, disability, gender, age, or migration status) that place them at a higher risk of discrimination are known as intersecting forms of discrimination and exclusion. A person's experience of illegal activity may also be made worse by intersectional variables. For instance, individuals could be made to put up with acts of sexual harassment and discrimination based on their gender in addition to acts of discrimination based on their colour, age, or handicap.⁷⁸

Lack of accountability

Inappropriate and discriminatory behaviour at work might flourish if there is a lack of responsibility for it. The tone of the workplace is established by a lack of accountability, which fosters environments where pertinent illegal behaviour is tolerated and unchecked. On the other hand, businesses that establish and enforce clear standards for proper behaviour might lessen the possibility that pertinent illegal activity will take place.⁷⁹

2.5. The victims of sexual harassment

Anyone can be the target of sexual harassment at work. Nonetheless, it frequently stems from the misuse of authority, and documented instances are typically done by males against women.⁸⁰ Despite the fact that both men and women experience sexual harassment, the majority of victims are women, according to statistics from worldwide surveys.⁸¹ Young employees who are at entry level and junior positions are likely to

⁷⁷ Berdahl, J.L., 'The sexual harassment of uppity women' (2007) 92 *Journal of Applied Psychology* 425-437 (accessed 08 April 2024)

⁷⁸ Cortina, L. M., & Areguin, M. A. (2021) *Annual Review of Organizational Psychology and Organizational Behavior* 8, 285-309.

⁷⁹ Cassino, D., & Besen-Cassino, Y. (2019) (2019) 26 *Gender, Work & Organization* 1221-1240.

⁸⁰ ILO, 'Sexual harassment in the world of work' 2.

⁸¹ Hersch, J, "Sexual harassment in the workplace." IZA World of Labor (2015) 1 – 10.

fall victim of workplace sexual harassment and receive most of their supervision from individuals of different gender sex, and, in the case of female victims, to work in fields where males predominate.⁸² Particularly vulnerable groups include migratory labourers, who are more likely to experience sexual assault and other types of abuse and violence. The military has a very high rate of sexual harassment against women.

Further details on the characteristics of victims might be found in court records pertaining to sexual harassment cases. The US EEOC's calculation of the rate of sexual harassment per 100,000 workers reveals significant differences by age, sex, and industry. The study of Hersch indicates that women are more likely to fall victim of workplace sexual harassment than men and this applies in every field of employment including the women dominated fields.⁸³ The age group of 25–44 has the highest risk for both men and women. In businesses where males predominate, women are more likely to experience sexual harassment; nevertheless, men are equally at risk regardless of the gender makeup of the industry. Though it is not as high as it is for males, sexual harassment of women is nonetheless a problem in the predominately female fields of education and health care. In the male-dominated mining sector, the number of female cases per 100,000 workers is 71, which is 31 times higher than the number of male cases.⁸⁴ This is because there are a number of variables or situations that might interact to increase the likelihood of harassment and violence.

Sexual harassment is a global issue that affects all nations, industries, and professions. Nonetheless, it can also be challenging for sexual harassment victims to come forward. This is frequently caused by the normalisation of sexual harassment, a lack of knowledge about what sexual harassment is, fear of retaliation from co-workers, superiors, family members, or the employer, a lack of efficient channels for reporting incidents or seeking remedies, and stereotypes that place the blame on the victim rather than the harasser. It may also be challenging to demonstrate sexual

⁸² McCann (2005) Series No. 2 (Geneva, ILO).

⁸³ Hersch, J "Compensating differentials for sexual harassment" (2011) 3 *American Economic Review Papers and Proceedings* 630–634.

⁸⁴ *Ibid.*

harassment through supporting documentation due to issues with evidence, especially in situations when there are no witnesses.

2.6. The impact of sexual harassment to employees

Employees who engage in sexual harassment may treat it casually since they typically don't think about the psychological effects it has on the employees who report it. The mental health of employees may be significantly impacted by workplace harassment, which may also contribute to the emergence of mental health issues. The American Psychological Association (APA) states that anxiety, sadness, and post-traumatic stress disorder (PTSD) are among the symptoms that employees may encounter as a result of workplace harassment. According to the APA, these mental health conditions may have a lasting negative influence on an employee's quality of life, performance at work, and interpersonal relationships with co-workers.⁸⁵

However, in South Africa, it is not required to keep separate records for workplace harassment. It is often believed that more women than men are victims of sexual harassment.⁸⁶ Because they frequently buy into the discourse of "toxic masculinity," which implies that women are somehow to blame for the harassment because they lack the ability to "self-regulate," female victims also frequently hesitate to report it right away.⁸⁷ Excluding unreported occurrences, statistics on sexual assaults in South Africa show that there are 142 reports of sexual harassment annually.⁸⁸

Furthermore, the National Institute for Occupational Safety and Health (NIOSH), states that harassment at work can have a detrimental impact on workers' quality of life and result in higher absenteeism, turnover, and job satisfaction rates⁸⁹ The association also points out that mental health conditions like anxiety and depression may be brought on by workplace harassment and can affect a worker's capacity to perform both at work and in their home lives.⁹⁰ According to the World Health Organisation

⁸⁵ American Psychological Association, 'Harassment takes a toll on mental health' (2019) 50(2) *Monitor on Psychology* 24.

⁸⁶ Le Roux R, et al "Harassment in the workplace: law, policies and processes" (2010) Durban: LexisNexis 178 & 140.

⁸⁷ Smit D.M, (2021) 5 *Law Democracy & Development* 37.

⁸⁸ Kubjana L.L (2020) 41(1) *OBITER* 88.

⁸⁹ Ngwane (2018) 2 *Journal of Management & Administration* 180.

⁹⁰ National Institute for Occupational Safety and Health, 'Workplace violence prevention strategies and research needs' (2015) *DHHS (NIOSH) Publication No.2015-106*, 1.

(WHO), harassment at work may lead to stress, anxiety, and sadness, all of which can eventually result in the emergence of mental health issues. According to the WHO, harassment at work can also have a detrimental effect on an employee's physical health, increasing their risk of musculoskeletal illnesses and cardiovascular disease.⁹¹ Harassment is one of the causes of mental health disorders in the workplace.

Sexual harassment in the workplace according to the ILO Committee of Experts weakens workplace equality by putting workers' moral fibre, self-worth, and general wellbeing in jeopardy. It harms a company by undermining the foundations of employee relationships and decreasing output. Governments and employers bear significant financial expenses as a result of sexual harassment, especially when it comes to legal settlements, lost productivity, counselling, and medical treatment and rewards. Sexual harassment may have a serious negative impact on an employer's reputation. For victims, it also results in major health, financial, and professional expenses.

Sexual harassment may worsen gender disparities in the workplace that already exist, such as the gender wage gap, the disparity in women's labour force participation, and the segregation of women into lower-paying or less-advancing industries and professions. This is because sexual harassment disproportionately affects women. This also adds to the status inequality that exists for women in the workplace and in global society and further influences on income and professional advancement as one possible reason why women earn less than men are sexual harassment.

For instance, a woman working for tips who does not put up with sexual harassment from clients may receive less money or none, as sexual harassment frequently stems from unequal gender power relations. Harassment can often lead victims to cut back on work hours or quit their jobs, putting them at danger of long-term unemployment or their complete departure from the labour. When a victim of sexual harassment chooses to remain in their current position, it may deter them from applying for higher-profile, higher-paying positions which impact the labour division.

⁹¹ World Health Organization. (2020). "Occupational health: Stress at the workplace" https://www.who.int/occupational_health/topics/stressatwp/en/ accessed 15 April 2023.

Due to gender norms and prejudices, men and women typically work in various professions depending on which jobs are deemed more socially "appropriate" for them. This divide is often already apparent in the classroom, when there are preconceived notions about the things that boys and girls should (or shouldn't) study. Workplaces where one gender predominates may be more hostile to individuals of the opposite gender, which could explain why sexual harassment of women may be more common in traditionally male-dominated businesses. Furthermore, sexual harassment may be more common in highly feminised businesses where males make up line supervisors and managers but females make up the majority of production workforce. In this situation, women may be discouraged from pursuing specific, frequently higher-paying careers due to the fear—or reality—of sexual harassment, which widens the gender pay gap.

2.7. Protecting against sexual harassment through law

It's critical to implement strong policies to forbid and prevent sexual harassment at work.⁹² In the workplace, sexual harassment is one of the types of violence and harassment that is most frequently controlled. Of the 80 nations the ILO examined, 65 had laws governing this kind of thing.⁹³ Legislative deficiencies must be filled in order to successfully prevent and defend against sexual harassment. Combating sexual harassment at work calls for an integrated, inclusive, and gender-responsive approach. Criminal law, for instance, permits victims to request police protection; nevertheless, it is usually restricted to sexual assault, necessitates a high level of proof, and ignores the vast array of improper actions and behaviours that are classified as sexual harassment.

Criminal law charges for sexual harassment are uncommon and unlikely to be effective in the real world. Although labour law can address a broader variety of situations, the conditions of the contract may restrict its applicability. Employment contracts and

⁹² ILO. (2003). "Report of the Committee of Experts on the Application of Conventions and Recommendations" (Report III (Part 1A) International Labour Conference, 91st Session, Geneva, p.463.

⁹³ ILO. "Report V (1) Ending violence and harassment against women and men in the world of work" ILC.107/V/1 (Geneva).

formal relationships between employers and employees are the only contexts in which labour laws often apply; independent contractors, trainees, volunteers, job applicants, and others are not. Certain workers, such as domestic helpers or agricultural labourers, could not get the same protection while having a higher risk of sexual harassment. As a result, in many legal circumstances, it is imperative to combat sexual harassment.⁹⁴

2.8. Conclusion

Sexual harassment is harmful to one's physical and mental well-being and ought to be condemned in all contexts, including the workplace. The key to preventing sexual harassment is to establish warm, supportive work settings where it is made clear that it is not tolerated. In addition, it's critical to challenge the gender, cultural, and societal norms that condone harassment and assault, as well as the culture of impunity that frequently surrounds it. It is recommended that a policy or code of conduct be implemented in the workplace that clearly defines and prohibits sexual harassment. Educating and training staff members and other pertinent parties on sexual harassment is one of the most significant preventive strategies and legislative initiatives. It is crucial to communicate that misconduct is not acceptable and that disciplinary action and repercussions will follow. Including sexual harassment in workplace risk assessments and ensuring safe, fair, and effective procedures for filing complaints and reporting incidents are also essential. The next chapter discusses the legal basis for workplace sexual harassment in light of this decision.

⁹⁴ De Rebus. (2023). "Eliminating sexual harassment in the workplace – #TimesUp for employers" [online] Available at: <https://www.derebus.org.za/eliminating-sexual-harassment-in-the-workplace-timesup-for-employers/>.

CHAPTER 3 – LEGAL FRAMEWORK ON WORKPLACE SEXUAL HARASSMENT

3.1. Introduction

This part of the study delves into various aspects of labour laws and international conventions that shape the modern workplace law including case law. From the far-reaching implications of the ILO's Violence and Harassment Convention,⁹⁵ to the complexities surrounding Sections 9(2), (3), and (4) of the Constitution of the Republic of South Africa,⁹⁶ and the critical provisions of the EEA,⁹⁷ each part explores the legal foundations that underpin employee protection and workplace equality. Additionally, the Protected Disclosure Act,⁹⁸ and the role of the Code of Good Practice in addressing workplace violence and harassment offer valuable insights into the evolving landscape of labour rights and ethical employment practices. In the realm of labour law and workplace misconduct, several noteworthy cases have shed light on critical principles and issues surrounding sexual harassment and employer accountability. Two key cases, *Amathole District Municipality v CCMA*⁹⁹ and *PE v Dr Beyers Naude Local Municipality*,¹⁰⁰ highlight the importance of fostering safe working environments and addressing sexual harassment comprehensively. Meanwhile, *Ekurhuleni Metropolitan Municipality v South African Local Government Bargaining Council and Others*¹⁰¹ delves deep into the broader societal context, highlighting the significance of power dynamics and gender inequality.¹⁰²

⁹⁵ Act no. 190 of 2019.

⁹⁶ Act no. 108 of 1996.

⁹⁷ Act 55 of 1998.

⁹⁸ Act 26 of 2000.

⁹⁹ (PA9/2018) [2022] ZALAC 119 (10 November 2022).

¹⁰⁰ (828/2011) [2021] ZAECGHC 35].

¹⁰¹ (2022) 43 ILJ 825 (LAC).

¹⁰² LHL. (2021). "Sexual Harassment and Delictual Liability" [online] Available at: <https://lhllaw.co.za/2021/10/04/sexual-harassment-and-delictual-liability/> [Accessed 2 Dec. 2023].

3.2. International legal instruments

3.2.1. *The International Labour Organisation Violence and Harassment Convention*¹⁰³

This represents a crucial step forward in the global effort to address workplace violence and harassment comprehensively.¹⁰⁴ By providing robust protections and guidelines, this Convention aims to create safer and more equitable work environments for all individuals, irrespective of their occupation, gender, or background. As a specialized agency of the United Nations, the ILO plays a pivotal role in monitoring and promoting workers' rights through legally binding Conventions, making this convention a significant milestone in the fight against workplace abuse.

The Convention's significance lies in its comprehensive definition of violence and harassment. It recognizes that these harmful behaviors can manifest in various forms, including physical, psychological, sexual, and economic harm. By acknowledging this wide spectrum of harm, the Convention ensures that no form of abuse is tolerated or overlooked, sending a clear message that workplaces must be free from all types of violence and harassment.

Member states that ratify the Convention commit to adopting a comprehensive, coordinated, and orientation responsive approach to combating workplace violence and harassment. This commitment highlights the global importance of protecting workers' rights and dignity, regardless of their geographic location. By fostering cooperation and collective action, the Convention promotes a unified international effort to create safer workspaces and foster a culture of respect and equality.

The content of the Convention encompasses various critical aspects to achieve its objectives effectively. Articles 1 to 3 set out definitions and the scope of the Convention, providing clarity on the issues it aims to address.¹⁰⁵ Articles 4, 5, and 6 outline the core standards that form the foundation of the Convention, guiding member

¹⁰³ No. 190 of 2019.

¹⁰⁴ [www.ilo.org](https://www.ilo.org/ankara/news/WCMS_861342/lang--en/index.htm). (2022). “*Tez-Koop-Is Union adopts a Union Policy Paper in line with ILO’s Violence and Harassment Convention*” (No. 190). [online] Available at: https://www.ilo.org/ankara/news/WCMS_861342/lang--en/index.htm [Accessed 3 Dec. 2023].

¹⁰⁵ Violence and Harassment Convention, 2019 (No. 190).

states in their efforts to eradicate workplace violence and harassment comprehensively.¹⁰⁶

To ensure effective implementation, the Convention addresses protection and prevention measures (Articles 7 to 9), enforcement and remedies (Articles 10 and 11), as well as guidance, education, and awareness-raising initiatives (Article 11).¹⁰⁷ By taking a multi-faceted approach, the Convention recognizes that addressing workplace violence and harassment necessitates a combination of legal measures, practical policies, and educational efforts to bring about lasting change.

Article 12 emphasizes the importance of integrating the Convention's provisions into national laws, regulations, and collective bargaining agreements.¹⁰⁸ This integration ensures that the Convention's principles become an integral part of each country's legal framework, fostering a culture of respect and accountability in the workplace.

The operative provisions (Articles 13 to 20) outline the procedures for registration and ratification, facilitating the Convention's entry into force and encouraging swift action by member states.¹⁰⁹ By encouraging ratification, the ILO ensures that the Convention gains maximum global impact, bringing together nations in a united front against workplace violence and harassment.

The ILO's Violence and Harassment Convention,¹¹⁰ marks a significant milestone in the global effort to eradicate workplace violence and harassment. By providing a comprehensive framework and legally binding guidelines, the Convention sets a clear standard for member states to create safer and more equitable work environments. Through international cooperation and the commitment of responsible nations like the UK, this Convention offers hope for a future where workers can perform their duties without fear of violence or harassment, fostering a more just and inclusive global workforce.

¹⁰⁶ Ibid, Convention, No. 190 of 2019.

¹⁰⁷ Ibid, Convention, No. 190 of 2019.

¹⁰⁸ Ibid, Convention, No. 190 of 2019.

¹⁰⁹ Ibid, Convention, No. 190 of 2019.

¹¹⁰ No. 190 of 2019.

3.2.2. Sexual harassment and Convention No. 190 and Recommendation No. 206

Sexual harassment has been labelled by the Sexual harassment and Convention to fall under the area of gender-based violence and harassment. Members are obliged to define and forbid sexual harassment.¹¹¹ This incident happened during a period when governments decide to forbid sexual harassment in the workplace as well as other legal environments more and more. The Convention stipulates that ideals and rights vital to the workplace, including the right to be free from discrimination, shall be upheld, promoted, and realised in order to prevent and remedy workplace violence and harassment.¹¹² Certain measures are required in connection to harassment and violence against women under the instruments. Article 9 specify that among these actions are the implementation of preventive and protective measures, such as: “workplace risk assessments that take into account the risks and hazards resulting from discrimination, abuse of power relations, and gender, cultural, and social norms that condone violence and harassment.”

Furthermore, according to Articles 9 and 10 of the Convention, victims must have sufficient access to support, services, remedies, and complaint and dispute resolution procedures that are secure, efficient, and gender-sensitive. The Recommendation provides victims of gender-based violence and harassment with detailed information on available resources, assistance, and remedies. These consist of informational and counselling services together with help with getting back into the workforce (Para. 17). Since sexual harassment in the workplace is still often tolerated, more profound cultural change is needed.

In order to completely eradicate gender-based violence, the Convention acknowledges that addressing its root causes and risk factors is necessary. These include gender stereotypes, overlapping kinds of discrimination, and unequal power relations between the sexes (Preamble). In this sense, creating courteous, gender-responsive workplace environments is a critical responsibility of both employees and employers, as well as their organisations. This can be accomplished by enacting laws,

¹¹¹ Article 7 of the Sexual harassment and Convention.

¹¹² Articles 5 and 6 of the Sexual harassment and Convention.

reaching collective bargaining agreements, and taking other steps to end the culture of sexism and impunity surrounding sexual harassment. It can also be accomplished by offering victims' assistance, increasing awareness, and conducting training programmes.

3.3. The Constitution of the Republic of South Africa¹¹³

The Constitution of the Republic of South Africa, enacted in 1996, is a pivotal document that outlines the principles and values upon which the country is built.¹¹⁴ Section 9, which upholds the rights to equality before the law and freedom from discrimination, is one of its fundamental clauses. However, sections 9(2), (3), and (4) of the Constitution have come to light as contentious and difficult provisions, especially considering the application of affirmative action laws and the complexities of interpreting the equality clause. This study delves into the complexities surrounding sections 9(2), (3), (4), 10, 12 and 23 and its implications for governmental policies concerning minorities in society.

A new South Africa was ushered in by the Constitution, one that was founded, among other things, on the supremacy of the Constitution, the rule of law, equality, and respect for human dignity.¹¹⁵ The Constitution in section 9 protects everyone's right to equality and forbids any kind of illegal discrimination. The right of every employee to fair work practices is likewise safeguarded by the Constitution. As part of their interpretational obligations, courts must protect the spirit, purpose, and aims of the Bill of Rights.¹¹⁶

Consequently, fundamental constitutional ideas serve as a roadmap for the evolution of South African law. Although section 24, which asserts that everyone has the right to an environment that does not damage their health or well-being, does not specifically address it, the right to a safe workplace is implied by the Constitution. In addition, the Constitution's section 12 clearly guarantees everyone's right to security, and section 10 guarantees every individual's right to dignity. There is no definition or

¹¹³ The Constitution of the Republic of South Africa, 1996.

¹¹⁴ S 2 of the Constitution.

¹¹⁵ S 1 of the Constitution.

¹¹⁶ S 39 of the Constitution.

regulation of "sexual harassment" in the Constitution. However, it issues a warning to the courts to respect the Bill of Rights' values, which defend the "equality, human dignity, and freedom" of a free and democratic society.¹¹⁷ According to court decisions, sexual harassment violates a person's dignity and is an unjust form of discrimination.¹¹⁸

Section 36 of the South African Constitution includes the limitation clause, which recognizes that rights, including the right to equity, may be subject to reasonable and justifiable limitations.¹¹⁹ This clause acknowledges that in certain circumstances, measures aimed at achieving substantive equality might need to limit individual rights temporarily. However, the court must carefully assess the necessity, proportionality, and legitimacy of such limitations to ensure they are consistent with the broader principles of the Constitution.

3.4. South African legislative framework

3.4.1. The Employment Equity Act¹²⁰

Section 6(3) of the EEA, which regards the primary avenue for victims of sexual harassment to seek justice is through sexual harassment as an instance of unjust discrimination.¹²¹ The EEA is aimed at promoting workplace equity and ending unfair discrimination.¹²² Sections 5, 6, and 60 play pivotal roles in creating a fair and inclusive work environment. This study delves into these sections to understand their significance in fostering equal opportunities and addressing issues related to harassment and vicarious liability.

*Section 5: Prohibition of Unfair Discrimination.*¹²³

¹¹⁷ S 7 of the Constitution.

¹¹⁸ *Campbell Scientific Africa v Simmers* [2016] 37 ILJ 116 (LAC) para 21; *Motsamai v Everite Products* [2011] 2 BLLR 144 (LAC) par 19.

¹¹⁹ Section 36 of the Constitution.

¹²⁰ EEA.

¹²¹ *Ibid.*

¹²² *Ibid.*

¹²³ Section 5 of the EEA.

Section 5 of the EEA focuses on the prohibition of unfair discrimination in the workplace and stipulates that no employer may discriminate against any employee based on race, gender, age, pregnancy, political affiliation, or other arbitrary grounds.¹²⁴ The intent is to eliminate unjust discrimination from all employment-related policies and practices, ensuring that employees are evaluated solely on their skills, qualifications, and merit.

It is important to note that discrimination based on necessary employment criteria is not considered unjust discrimination. Additionally, affirmative action policies aimed at redressing imbalances in the workforce are not regarded as discriminatory. The Act firmly reinforces the principle that every employee should be treated with dignity and respect, regardless of their background or characteristics.

*Section 6: Prohibition of Harassment as Unfair Discrimination.*¹²⁵

Section 6 of the EEA addresses the issue of harassment and defines it as a form of unfair discrimination.¹²⁶ Harassment includes any unwanted conduct related to the discrimination prohibited under section 5(1) of the Act, which affects the terms and circumstances of employment for workers who perform similar or equally valuable labour.

This section is crucial in creating a safe and respectful work environment for all employees. Harassment can take various forms, such as verbal, physical, or visual, and it can occur between employees, as well as between employees and employers. By explicitly defining harassment as a form of unfair discrimination, the Act establishes a robust framework for addressing and preventing such behavior.

*Section 60: Vicarious Liability and Employer's Responsibility.*¹²⁷

Section 60 of the EEA codifies vicarious liability, placing a significant responsibility on employers to take action when incidents of sexual harassment are reported.¹²⁸ If

¹²⁴ Section 5 of the EEA.

¹²⁵ Section 6 of the EEA.

¹²⁶ Section 6 of the EEA.

¹²⁷ Section 60 of the EEA.

¹²⁸ Ibid.

employers fail to take necessary steps to address and prevent harassment, they must be held liable as if they contravened the relevant provisions themselves.

The Act demands that employers promptly notify the relevant parties if an employee is alleged to have violated any terms of the Act or engaged in behavior that might contravene the law. Employers must then consult with the parties involved, take immediate action to stop the alleged activity, and comply with the provisions of the Act to prevent any further misconduct. Furthermore, the Act empowers the Minister to specify standards and a methodology for determining work of equal value following consultation with the Commission.

This is to ensure that employees performing similar work are compensated fairly, irrespective of any discriminatory practices. In order to ensure justice and impartiality in the workplace, the EEA established equality as a basic value and a right guaranteed by the constitution.¹²⁹ Any kind of harassment is prohibited and discouraged under Section 6 of the EEA. According to paragraph 3, it is illegal to harass an employee for any one of the bases for unjust discrimination mentioned in the first paragraph, or for any combination of those reasons. Additionally, employees are shielded from discrimination by anybody—including their employer—for exercising any rights granted by the Act under section 51(1) read in conjunction with section 60 of the EEA. In keeping with Section 51:

"(1) No person may discriminate against an employee who exercises any right conferred by this Act.

(2) Without limiting the general protection conferred by subsection (1), no person may threaten to do, or do any of the following:

(a) prevent an employee from exercising any right conferred by this Act or from participating in any proceedings in terms of this Act; or

(b) prejudice an employee because of past, present or anticipated-

¹²⁹ S 1 and 9 of the Constitution.

(i) disclosure of information that the employee is lawfully entitled or required to give to another person;

(ii) exercise of any right conferred by this Act; or

(iii) participation in any proceedings in terms of this Act.

(3) No person may favour, or promise to favour, an employee in exchange for that employee not exercising any right conferred by this Act or not participating in any proceedings in terms of this Act.

(4) Nothing in this section precludes the parties to a dispute arising out of an alleged breach of any right conferred by this Part, from concluding an agreement to settle the dispute.

(5) For the purposes of this section 'employee' includes a former employee or an applicant for employment."

These provisions were developed knowing that, for whatever reason, some employers could choose to use their disciplinary powers to punish an employee who reports workplace harassment. Good examples in this regard are the cases of *Christian v Colliers Properties*¹³⁰ and *Makoti v Jesuit Refugee Service SA*.¹³¹ In these instances, the courts deemed the disciplinary proceedings taken by the employers against their employees for refusing to accept sexual approaches to be retaliatory. It was determined that the terminations were inherently unjust. In essence, the statute urges victims of sexual harassment to come out fearlessly and protects them from harm. Additionally, the EEA promises to punish companies that take retaliatory action against their employees or ignore their concerns.¹³²

This means that the employer has to be aware of the claimed behaviour in order for section 60 responsibility to start. Laws have made it possible to publish any kind of code of best practices.¹³³ Within the framework of the topic under discussion in this article, "the Code of Good Practice on the Handling of Sexual Harassment Cases"

¹³⁰ C323/2004 [2005] ZALC 56.

¹³¹ (2012) 33 ILJ 1706 (LC).

¹³² Section 60 of the EEA.

¹³³ Section 54 of the EEA.

(also known as "the Code") was released in 1998, made public, and then revised in 2005. Employers are encouraged under the Code to create sexual harassment policies and to inform their staff about them. Employers that do not take action in response to allegations of sexual harassment are subject to vicarious liability, according to the law.¹³⁴

"Sexual harassment" is not defined by the EEA. Nonetheless, the first EEA Code for Handling Sexual harassment cases fill this gap. Up until 2018, this Code was in effect in addition to the revised version. In the following words, the original edition offered a rather comprehensive and flexible definition: inappropriate sexual behaviour. Sexual harassment is distinct from activity that is reciprocal and accepted because to its undesired character.¹³⁵

Item 3 (2) of the Code also provides that sexual attention becomes sexual harassment if: "(a) The behaviour is persisted in, although a single incident of harassment can constitute sexual harassment; and/or

(b) The recipient has made it clear that the behaviour is considered offensive; and/or

(c) The perpetrator should have known that the behaviour is regarded as unacceptable."

Item 4 of the Code provides the following examples as forms of sexual harassment:

"(1) Sexual harassment may include unwelcome physical, verbal or nonverbal conduct, but is not limited to the examples listed as follows:

a) Physical conduct of a sexual nature includes all unwanted physical contact, ranging from touching to sexual assault and rape, and includes a strip search by or in the presence of the opposite sex.

¹³⁴ Section 60 of the EEA; See also *Ntsabo v Real security CC* [2004] 1 BLLR 58; *Liberty Group Ltd v M* [2017] 38 ILJ 1318 (LAC); *Potgieter v National Commissioner of the SAPS & another* [2009] 2 BLLR 144 (LC) and more.

⁴¹ *Supra Campbell* para 24.

¹³⁵ Item 4 of the Code.

b) Verbal forms of sexual harassment include unwelcome innuendoes, suggestions and hints, sexual advances, comments with sexual overtones, sex-related jokes or insults or unwelcome graphic comments about a person's body made in their presence or directed toward them, unwelcome and inappropriate enquiries about a person's sex life, and unwelcome whistling directed at a person or group of persons.

c) Non-verbal forms of sexual harassment include unwelcome gestures, indecent exposure, and the unwelcome display of sexually explicit pictures and objects.

d) Quid pro quo harassment occurs where an owner, employer, supervisor, member of management or co-employee, undertakes or attempts to influence the process of employment, promotion, training, discipline, dismissal, salary increment or other benefit of an employee or job applicant, in exchange for sexual favours.

(2) Sexual favouritism exists where a person who is in a position of authority rewards only those who respond to his/her sexual advances, whilst other deserving employees who do not submit themselves to any sexual advances are denied promotions, merit rating or salary increases."

It should be noted that the 1998 Code was slightly modified in 2005. One significant modification that is relevant to this discussion is the replacement of the previous version's definition for sexual harassment with a test, and the requirement that the alleged behaviour be repeated in order for it to be considered sexual harassment was eliminated. As to the criteria, "the behaviour qualifies as sexual harassment if it is: unwelcome sexual behaviour that violates an employee's rights and creates a barrier to fairness in the workplace," considering all of the following factors:

4.1 whether the harassment stems from a forbidden sexual orientation, gender, or sex;

4.2 whether the inappropriate sexual behaviour was present;

4.3 the nature and intensity of the sexual activity; and

4.4 the effect of the employee's sexual behaviour.”¹³⁶

With the exception of the aforementioned, there are no significant differences between the 2005 edition and its predecessor. Whether or not the actions are considered sexual harassment is up to the receiver.¹³⁷ Furthermore, it's unclear why the Amended Code did away with the need that behaviour be persistent or recurrent. The inference is that unsolicited romantic advances may be seen by the recipient as sexual harassment, which is probably not what the Code's authors intended. It is maintained that this is unjust, hurtful, and prone to misuse. Education, not punishment, should be the primary goal of the law.

Furthermore, the Amended Code urges victims of sexual harassment to report events right away in addition to requiring confidentiality in the treatment of cases involving harassment.¹³⁸ This stipulation addresses a matter of dependability. It is based on the notion that immediately reporting the occurrence to the employer not only ensures a rapid response, but also allows the victim to discuss the incident with someone while it is still fresh in their mind and obtain any pertinent proof, if any. For example, think about the possibility that, in the event of an unwelcome kiss, cosmetics could appear on the skin, clothing, or lips of the harasser.

3.4.2. The Labour Relations Act¹³⁹

Just as it does with the EEA, the LRA also applies to the Code of Good Practice for the Handling of Sexual Harassment Cases. The LRA is one of the most crucial instruments for defending employees' rights and interests at work. The Law Reform Act (LRA) expands its safeguard against sexual harassment by declaring that it is unjustifiable to terminate an employee for disclosing instances of sexual harassment. Additionally, if an employer rejects an allegation of sexual harassment, employees may quit and file a claim for constructive dismissal under section 186(1)(e) of the LRA.

¹³⁶ Item 4 of the Code.

¹³⁷ Item 4.4 of the Amended Code.

¹³⁸ Items 7 and 8 of the Code.

¹³⁹ Act 66 of 1995.

This vital legislation not only ensures fair labour practices but also serves as a powerful instrument in addressing instances of sexual harassment and unfair dismissals. Section 187 of the LRA is especially crucial, as it renders dismissals automatically unfair under certain circumstances.¹⁴⁰ Additionally, section 186(1) empowers employees to claim constructive dismissal when employers fail to address reports of sexual harassment.¹⁴¹ This study explores how the LRA provides a robust framework to protect employees in cases of sexual harassment and unfair dismissals, as exemplified by *Lynne Martin-Hancock v Computer Horizons*.¹⁴²

The LRA,¹⁴³ enacted to foster fair labour practices, recognizes the right of employers to dismiss employees for valid reasons but also ensures that such dismissals are not arbitrary or unfair. Section 187 of the LRA outlines specific grounds under which a dismissal is automatically deemed unfair, providing a vital safeguard against employee exploitation and unjust termination.¹⁴⁴ These grounds include issues related to race, gender, pregnancy, age, and other protected attributes, which encompass cases of sexual harassment.

Sexual harassment remains a prevalent issue in workplaces worldwide, creating hostile environments for victims and disrupting the overall work culture. The LRA acknowledges the seriousness of this problem and ensures that employees reporting sexual harassment are not subject to retaliatory actions or unfair dismissals. The case of *Lynne Martin-Hancock v Computer Horizons*¹⁴⁵ serves as a prime example of the LRA's significance in protecting victims of sexual harassment.

In this case an employee at Computer Horizons, reported a distressing incident of sexual harassment she endured in the workplace. Instead of receiving support and protection, she faced a dismissal that was later deemed automatically unfair under section 187 of the LRA. The court's ruling reinforced the principle that employees who

¹⁴⁰ Section 187 of Labour Relations Act 66 of 1995.

¹⁴¹ Section 186(1) of LRA.

¹⁴² *Lynne Martin-Hancock v Computer Horizons* (1994) 10 NH 11/2/14268 (unreported). (hereinafter referred as *Lynne Martin-Hancock*).

¹⁴³ Act 66 of 1995.

¹⁴⁴ Section 187 of the LRA.

¹⁴⁵ *Supra Lynne Martin-Hancock*.

courageously speak out against sexual harassment should not face adverse consequences.

III. Constructive Dismissal for Unaddressed Sexual Harassment:

Section 186(1) of the LRA empowers employees to claim constructive dismissal when they voluntarily resign due to the employer's failure to address a report of sexual harassment adequately.¹⁴⁶ When an employer's actions make it impossible for an employee to remain employed, they might be constructively dismissed, thereby forcing the employee to quit. This provision strengthens the LRA's stance against sexual harassment and holds employers accountable for their negligence in dealing with such sensitive matters.

3.4.3. The Protection From Harassment Act, 2011

Little more than confirming how the word "sexual harassment" is defined in the EEA and the Code is done by the Protection from Harassment Act. Beyond the EEA and the Code, the Act establishes and governs several other types of harassment.

3.4.4. The Occupational Health and Safety Act, 1993

The Occupational Health and Safety Act (OHSA) expands on the topic of promoting and safeguarding workers' health and safety.¹⁴⁷ Employers must, to the extent that it is reasonably practicable, establish and maintain a workplace free from dangers to employees' health in accordance with Section 8 of the OHSA. There is an implied defence against sexual harassment included in this protection.

Regarding the legislative framework, the OHSA is the primary legislation that deals with health-related matters in South African workplace. The OHSA requires all employers to do all reasonably possible to ensure that their workers are working in a safe environment free from hazards to their health. This is supported by the SANS 45001 standard dealing with OHS management in South Africa, which provides

¹⁴⁶ Section 186(1) of the LRA.

¹⁴⁷ OHSA 85 of 1993.

that an organization's responsibility for workplace safety includes safeguarding and promoting the physical and mental health of its workers.¹⁴⁸

Section 1 of the OHSWA defines the term "healthy" means free from illness' or injury attributable to occupational causes. According to OHSWA Section 8(1), employers are required to establish and as far as is realistically practicable, keep a workplace free from health dangers and safe for personnel to work in. However, the OHSWA hardly deals with mental health issues such as how to treat employees that appear to be suffering from depression, bipolar and anxiety.

3.4.5 The Code of Good Practice on the Prevention and Elimination of Violence and Harassment in the World of Work.

This Code of Good Practice, based on the International Labour Organization's Convention, offers a broader framework to address various forms of workplace violence and harassment, including sexual harassment.¹⁴⁹ However, some aspects of the Code require clarification and stronger guidelines, such as stricter sanctions and addressing the fragmentation of existing laws on sexual harassment.

The Code of Good Practice represents a significant step towards addressing the gaps in the existing regulatory framework. By uncoupling sexual harassment from unjust discrimination and equality, and placing it in the larger framework of the workplace violence and harassment, the Code offers a more comprehensive approach to tackling the issue. The Code focus on education and training for adjudicators is crucial in ensuring a nuanced understanding of sexual harassment cases.

Although the EEA does not clearly define 'sexual harassment', the Code provides definitions for these terms. Employers have a responsibility to do everything possible to abolish of workplace harassment in all its manifestations. During orientation and training sessions, employers should discuss the issue of harassment in terms that are understandable to all.¹⁵⁰ This Code sets out minimum requirements for employers and

¹⁴⁸ SGS, ISO 45001: "Occupational Health and Safety Management Systems (OHSMS)" "<https://www.sgs.com/en-za/services/iso-45001-occupational-health-and-safety-management-systems-ohsms>" accessed 12 April 2023.

¹⁴⁹ De Rebus. (2023) Supra note 73.

¹⁵⁰ Ibid.

policies against discrimination therefore, employers must follow additional laws to prevent workplace harassment and these laws include the PEPDA,¹⁵¹ the LRA,¹⁵² OHSA,¹⁵³ and the Disclosure Act¹⁵⁴ as the last one.¹⁵⁵ This rule applies not only to office workers, but also to students, volunteers, job seekers, artists, suppliers, project workers and clients. The safety of all workers is a priority in the workplace. The Code also provides guidance to employers on how to deal with allegations of bullying.¹⁵⁶ This shows the importance of privacy and providing sick leave to victims.

3.5. Case law discussion

3.5.1. *Amathole District Municipality v CCMA*¹⁵⁷

This case revolves around allegations of sexual harassment by an employee against her manager. Initially, the grievance outcome yielded no evidence of harassment, but the CCMA later ruled in favor of the complainant, granting her compensation. The subsequent legal journey saw the LC upholding the CCMA's decision, while the LAP overturned it, citing concerns about the complainant's credibility. This case emphasizes the need for a balanced evaluation of evidence in sexual harassment claims, with a focus on credibility and consistency. It stresses that credibility should be determined on a balance of probabilities rather than assumed. Furthermore, it highlights the importance of a meticulous assessment of witness credibility, considering demeanor and surrounding circumstances to avoid undue bias. Notably, the case clarifies that for employer liability to arise, alleged harassment must be promptly reported, and the employer must fail to take measures to protect the employee. Thus, the key principles emerging from this case encompass balanced evidence evaluation, careful witness assessment, and employer accountability.

¹⁵¹ Act 4 of 2000.

¹⁵² Act 66 of 1995.

¹⁵³ Act 85 of 1993.

¹⁵⁴ Act 26 of 2000.

¹⁵⁵ De Rebus. (2023) Supra note 73.

¹⁵⁶ D De Rebus. (2023) supra note 73.

¹⁵⁷ *Amathole District Municipality v CCMA (PA9/2018) [2022] ZALAC 119.*

3.5.2. *PE v Dr Beyers Naude Local Municipality and Another*¹⁵⁸

This case centers on a female employee who endured sexual assault by her immediate supervisor. The municipality was found to have failed to protect the employee, and the court's ruling underscored the employer's duty to ensure a safe workplace, especially in cases involving sexual harassment. Furthermore, the case rejected the use of the Compensation for Occupational Injuries and Diseases Act (COIDA) as a defense, firmly asserting that sexual harassment is not an inherent risk of employment. This case highlights that employers bear a duty to ensure safe and respectful working conditions, and negligence in protection may lead to legal liability. It also brings to light the inadequacies in existing legislative mechanisms for addressing sexual harassment, prompting a call for comprehensive reforms and effective remedies. Additionally, it advocates for a victim-centric approach, incorporating a subjective test based on the victim's perception, along with an objective assessment to establish the presence of harassment. Ultimately, this case highlights the potential for corporate criminal liability and encourages employers to proactively address and prevent sexual harassment. Thus, the key principles from this case encompass employer duty, legislative gaps, a victim-centric approach, and corporate accountability.

3.5.3. *Ekurhuleni Metropolitan Municipality v South African Local Government Bargaining Council and Others*¹⁵⁹

Lastly, *Ekurhuleni Metropolitan Municipality v South African Local Government Bargaining Council and Others* case transcends the workplace to delve into the broader societal context, highlighting the significance of power dynamics and gender inequality.¹⁶⁰ The Labour Appeal Court's ruling emphasizes the imperative of respecting the principles of equality and human dignity entrenched in the Constitution

¹⁵⁸ *PE v Dr Beyers* supra note 79.

¹⁵⁹ (2022) 43 ILJ 825 (LAC).

¹⁶⁰ Jose J and Taryn Y, "The harshest penalty: Sexual harassment in the public sector" (2022) Cliffe Dekker Hofmeyr [online] "cliffedekkerhofmeyr.com. <https://www.cliffedekkerhofmeyr.com/en/news/publications/2022/Practice/Employment/employment-law-alert-14-march-the-harshest-penalty-sexual-harassment-in-the-public-sector-.html>" (accessed December 2, 2023).

to attain substantive equality and eradicate unfair discrimination in a non-racial, non-sexist society.¹⁶¹ This case reinforces the ongoing battle against sexual harassment and gender inequality in society and workplaces. It emphasizes the importance of imposing severe penalties for such misconduct, irrespective of an employee's service record. By upholding the values of the Constitution, this case contributes significantly to the ongoing fight against sexual harassment in the workplace.

3.6. Conclusion

In conclusion, these cases collectively highlight the significance of imposing appropriate sanctions for sexual harassment while highlighting the persistent struggle to achieve substantive equality. They call for a reimagining of gender power dynamics in society and workplaces, ultimately aiming to create a society founded on human dignity and equality for all.

¹⁶¹ Ibid.

CHAPTER 4 – COMPARATIVE STUDIES

4.1. Introduction

Sexual harassment is a pervasive issue that transcends cultural, geographical, and socio-economic boundaries.¹⁶² In recent years, the spotlight has turned to its prevalence in the workplace, shedding light on the need for comprehensive legal frameworks to address and prevent such incidents. This study aims to highlight the importance of tackling sexual harassment in professional settings and delves into a comparative analysis of the legal approaches taken by South Africa and India.

The workplace is a space where individuals invest a significant portion of their time and energy. A safe and inclusive work environment is essential for employees to thrive, contribute effectively, and achieve their full potential.¹⁶³ Sexual harassment undermines these principles, creating an atmosphere of fear, intimidation, and vulnerability. Beyond the immediate emotional and psychological toll on victims, it also negatively impacts productivity, job satisfaction, and organizational reputation. Therefore, addressing sexual harassment is not just a moral imperative but also an essential step towards fostering a healthy and productive work environment.

The rationale for this comparative analysis between South Africa and India is because these two countries have emerging economies with diverse populations. Furthermore, these countries have taken steps to establish legal frameworks aimed at preventing sexual harassment at work.

South Africa's legal approach to addressing sexual harassment in the workplace is embodied in the Employment Equity.¹⁶⁴ This legislation not only defines and prohibits sexual harassment but also mandates employers to implement measures for prevention and recourse. The Act emphasizes the importance of promoting equal opportunity, diversity, and fairness within organizations. By placing the onus on

¹⁶² Doble, Niharika, et al. "PoSH Archives - Prevention of Sexual Harassment, Inclusive Diversity, Employee Assistance Program: CecureUs: Chennai. CecureUs, cecureus.com/category/blogs/prevention-of-sexual-harassment/" Accessed 19 Sept. 2023.

¹⁶³ Ibid.

¹⁶⁴ Act of 1998.

employers to create an environment free from harassment, South Africa's legal framework encourages proactive engagement and prevention.

India's legal framework for combating sexual harassment is enshrined in the Sexual Harassment of Women at Workplace (Prevention, Prohibition, and Redressal) Act of 2013.¹⁶⁵ The legislation requires the creation of Internal Complaints Committees (ICCs) in companies and provides a comprehensive definition of sexual harassment.¹⁶⁶ The Act imposes obligations on employers to sensitize employees, conduct awareness programs, and establish a mechanism for complaints. India's approach combines legal enforcement with awareness-building, aiming to empower victims and change cultural attitudes.

Addressing sexual harassment in the workplace is of paramount importance for creating a conducive and equitable work environment. By comparing the legal frameworks of South Africa and India, we can gain valuable insights into the various strategies employed to prevent and redress such incidents. Both countries' efforts reflect a commitment to eradicating sexual harassment and promoting a culture of respect, dignity, and equality. As the global community continues to strive for safer workplaces, these comparative analyses contribute to the collective pursuit of meaningful change.

4.2. Key legislative act(s) in South Africa that regulate sexual harassment in the workplace.

Sexual harassment at work is a severe problem that compromises people's safety, dignity, and general well-being. The legislative framework pertaining to sexual harassment in South Africa is intended to shield workers from this type of discrimination and provide a secure workplace.

¹⁶⁵ M, Kaunain Sheriff. "Explained: What Is POSH, the Law against Sexual Harassment in India?" *The Indian Express*, 19 Mar. 2022, indianexpress.com/article/explained/everyday-explainers/explained-posh-law-against-sexual-harassment-in-india-7825733/.

¹⁶⁶ Post, Promoted. "Legal Actions Against Mental Health Harassment By Companies In India." *The Daily Iowan*, dailyiowan.com/2023/06/12/legal-actions-against-mental-health-harassment-by-companies-in-india/. Accessed 19 Sept. 2023.

This study while examining the key legislative acts that regulate sexual harassment will also go further to define sexual harassment under South African law, outline the obligations of employers and employees, describe reporting and investigation procedures, and lastly highlight case law.

The primary legislative acts that address sexual harassment in the workplace in South Africa include the EEA and the Code of Good Practice on the Prevention and Elimination of Violence and Harassment in the World of Work.¹⁶⁷ The forbids unlawful discrimination in the workplace, including sexual harassment, and encourages equality.¹⁶⁸ It applies to all employers, employees, and job applicants, regardless of the size of the organization.

Sexual harassment is defined as any inappropriate sexual conduct that degrades someone's dignity and fosters an environment that is insulting, frightening, or unfriendly.¹⁶⁹ This conduct can take various forms, including unwanted approaches, solicitations for sexual favours, or any other undesirable physical, verbal, or nonverbal behaviour and of a sexual nature.

Under the EEA, Employers are required to provide a sexual harassment-free workplace.¹⁷⁰ They are required to formulate and put into effect guidelines and policies aimed at stopping and dealing with sexual harassment.¹⁷¹ Employers must also provide training to employees on their rights and responsibilities related to sexual harassment. Employees, on the other hand, are obligated to comply with workplace

¹⁶⁷ IOE-EMP. (2022). "South Africa: new Code of Good Practice on the Prevention and Elimination on Harassment in the Workplace. [online] Available at: <https://industrialrelationsnews.ioe-emp.org/industrial-relations-and-labour-law-may-2022/news/article/south-africa-new-code-of-good-practice-on-the-prevention-and-elimination-on-harassment-in-the-workplace>" [Accessed 3 Dec. 2023].

¹⁶⁸ Section 5 of the EEA.

¹⁶⁹ Bell, L. (2021). "Sexual harassment law changes: What you need to know. [online] Tell Jane. Available at: <https://www.telljane.co.uk/sexual-harassment-law-changes>" [Accessed 3 Dec. 2023].

¹⁷⁰ EEA (see also its preamble).

¹⁷¹ Studocu. (2023). "BUS-FPX-3040 Smith Latasha Assessment 5-1 Presentation. [online] Available at: <https://www.studocu.com/en-us/document/capella-university/fundamentals-of-human-resource-management/bus-fpx-3040-smith-latasha-assessment-5-1-presentation/60539622>" [Accessed 3 Dec. 2023].

policies, refrain from engaging in sexual harassment, and report any incidents they experience or witness.

South African law emphasizes the importance of establishing clear and accessible reporting mechanisms for sexual harassment cases. Employers are required to have procedures in place for reporting and investigating complaints. These procedures should ensure confidentiality, impartiality, and a timely resolution. Complainants have the right to choose whether to report internally, externally, or both, and they should not face retaliation for making a complaint.

The legislative framework in South Africa provides a robust foundation for addressing sexual harassment in the workplace. Through acts like the EEA and the Code of Good Practice, the country seeks to create a work environment that respects individuals' dignity and ensures their safety. By understanding the definition of sexual harassment, the obligations of employers and employees, and the reporting and investigation procedures, it is possible to foster a culture of inclusivity, respect, and equality in South African workplaces

4.3. The key legislative act(s) in India that regulate workplace sexual harassment.

The Indian legal system acknowledges the significance of ensuring a safe and respectful working environment for women. In line with this, the Sexual Harassment of Women at Workplace (Prevention, Prohibition, and Redressal) Act was enacted in 2013 Act.¹⁷² The goal of this extensive legislation is to stop and deal with workplace sexual harassment and it outlines the duties and responsibilities of employers and employees in India.¹⁷³ This study while examining the key legislative acts that regulate sexual harassment will also go further to define sexual harassment under Indian law, Compare the Legal Obligations in India and South Africa, Redressal Mechanisms and Reporting Procedures, and lastly highlight case law.

¹⁷²Act No. 14 of 2013.

¹⁷³ Studocu. (2013). "*Laws for Working Women, Part II*. [online] Available at: <https://www.studocu.com/in/document/pondicherry-university/women-and-law/laws-for-working-women-part-ii/49109153> [Accessed 2 Dec. 2023].

As per Indian law, sexual harassment includes unwelcome acts, gestures, remarks, or any behavior of a sexual nature, either directly or indirectly. It involves making sexual demands, implying favoritism or hostility based on sexual approaches, or establishing a frightening, unpleasant, or disrespectful workplace for women. The Act recognizes various forms of harassment, ensuring an inclusive approach to protect all women in different workplace settings.

Both India and South Africa have legislation addressing sexual harassment at work. In India, the Sexual Harassment Act mandates employers to establish ICCs in organizations with ten or more employees. Additionally, employers are required to implement preventive measures and provide a secure environment for employees. On the other hand, South Africa's EEA also tackles sexual harassment. Employers in South Africa must have policies and procedures in place to address such issues, and they are responsible for preventing and resolving cases of sexual harassment.

The Indian Act provides an internal redressal mechanism by establishing ICCs in organizations. Employees can approach the ICC to file complaints and seek resolutions. If the complaint is not resolved internally, the aggrieved woman can file a complaint with the Local Complaints Committee (LCC) if the organization does not have an ICC, or the matter is related to a public servant.¹⁷⁴ Alternatively, if the incident involves higher authorities, the complaint can be filed directly with the LCC.

Since the enactment of the Act, several cases have been reported and adjudicated. One significant development was the case of *Vishaka v. State of Rajasthan in 1997*.¹⁷⁵ The Supreme Court, in the absence of specific legislation at that time, laid down guidelines to prevent sexual harassment at workplaces. This case played a crucial role in shaping subsequent legal developments, ultimately leading to the enactment of the current Sexual Harassment Act in 2013.

The Sexual Harassment of Women at Workplace Act in India has been a significant step towards promoting gender equality and providing women with a safe and dignified

¹⁷⁴ Supriya Bamne (2023). "Issue 7 www.jetir.org (ISSN-2349-5162). *JETIR2307486 Journal of Emerging Technologies and Innovative Research* 10. Available at: <https://www.jetir.org/papers/JETIR2307486.pdf>" [Accessed 2 Dec. 2023].

¹⁷⁵ (1997) 6 SCC 241.

work environment.¹⁷⁶ Employers and employees have specific responsibilities under this Act, and the redressal mechanisms ensure that cases of sexual harassment are addressed efficiently. While there are differences in legal obligations between India and South Africa, both countries recognize the importance of combating workplace sexual harassment and fostering an inclusive and respectful workplace culture.

4.4. Comparative analysis between South African and Indian law.

Sexual harassment is a pervasive issue affecting workplaces globally, leading many nations to establish legal frameworks to combat this problem. The definitions of sexual harassment, the advantages and disadvantages of the legal frameworks, and the efficiency of the reporting and investigation processes are all compared in this study, and the cultural and societal factors influencing the implementation of these laws in South Africa and India.

I. Definitions of Sexual Harassment:

Sexual harassment is acknowledged as a violation of fundamental human rights in both South Africa and India. According to the EEA, South Africa's definition includes unwanted sexual behaviour that obstructs someone's ability to do their job or fosters an intimidating, hostile, or unpleasant work environment. The Sexual Harassment of Women at Workplace (Prevention, Prohibition, and Redressal) Act of India defined the term,¹⁷⁷ similarly includes unwelcome conduct of a sexual nature that has the purpose or effect of violating a woman's dignity, creating an intimidating, hostile, or offensive environment.

II. Strengths and Weaknesses of Legal Frameworks:

Both countries have commendably recognized the importance of addressing sexual harassment. South Africa's legislation applies to all employers, fostering a comprehensive approach. However, weaknesses include a lack of mandatory training and penalties that may not serve as a sufficient deterrent. In India, the law provides a

¹⁷⁶ Corpbiz. (2023). "What Is POSH, the Law against Sexual Harassment in India?" [online] Available at: <https://corpbiz.io/learning/what-is-posh-the-law-against-sexual-harassment-in-india> [Accessed 2 Dec. 2023].

¹⁷⁷ Act of 2013.

detailed mechanism for addressing complaints, but there are concerns regarding awareness, inadequate employer compliance, and limited coverage for informal sectors.

III. Effectiveness of Reporting and Investigation Procedures:

South Africa has established designated structures for receiving and investigating complaints, promoting transparency. Nonetheless, the efficacy of these procedures may be compromised by challenges such as fear of retaliation and limited awareness. India's law mandates ICCs and LCCs for organizations, aiming to provide a safe platform for reporting. However, the effectiveness varies due to factors like inadequate training and limited understanding of the process.

IV. Cultural and Societal Factors:

The application of legislation against sexual harassment is heavily influenced by cultural norms and society views. In South Africa, the legacy of apartheid and gender inequality may contribute to power imbalances, affecting reporting and enforcement. In India, deeply ingrained patriarchal values and the stigma associated with reporting may deter victims from coming forward. Both countries need to address these deeply rooted issues to ensure effective implementation.

In conclusion, the comparative analysis of South Africa and India reveals that while both nations have taken crucial steps towards addressing sexual harassment, challenges persist in terms of awareness, enforcement, and cultural factors. The effectiveness of these laws relies on a combination of robust legal frameworks, proactive reporting mechanisms, and a societal shift towards gender equality. The road to combating sexual harassment in the workplace requires continuous efforts, collaboration between stakeholders, and a deep commitment to creating safe and equitable environments for all employees.

4.5. Challenges and obligations on Comparative analysis between South African and Indian law

South Africa and India, two vibrant and diverse countries, share numerous commonalities and challenges in enforcing and implementing their legal frameworks. As both nations strive to maintain social order and justice, they encounter obstacles that hinder effective law enforcement. This study will identify the common challenges in both countries and propose recommendations for improving their legal systems, considering the cultural and contextual aspects unique to each nation.

Challenges in Enforcing and Implementing Laws:

i. Overburdened Legal Systems

Both South Africa and India grapple with large caseloads and limited resources within their legal systems. Overburdened courts lead to delays in resolving cases, causing frustration among citizens and perpetuating inefficiencies in the justice system.

ii. Corruption and Bribery

Corruption and bribery pose significant challenges to law enforcement efforts in both countries. These issues undermine the integrity of the legal system, obstruct justice, and foster a culture of impunity, eroding public trust in the institutions meant to protect them.

iii. Socio-Economic Disparities

Persistent socio-economic disparities contribute to a lack of access to justice for marginalized communities in both South Africa and India. Unequal opportunities and limited legal aid services hinder the ability of disadvantaged individuals to seek justice, perpetuating a cycle of inequality.

Recommendations for Improving Legal Frameworks:

I. Strengthen Judicial Infrastructure

Both countries must invest in strengthening their judicial infrastructure by increasing the number of courts, judges, and supporting staff. Additionally, the adoption of modern technologies can streamline court proceedings and reduce the backlog of cases.

II. Combat Corruption

To combat corruption and bribery, South Africa and India must establish independent anti-corruption bodies with adequate powers and resources. Strengthening internal oversight mechanisms and encouraging the reporting of corruption will help promote transparency and accountability.

III. Promote Legal Awareness

Enhancing legal awareness and literacy among citizens is essential. Governments should implement educational campaigns to inform people of their rights and how to access legal resources. This will empower individuals to seek justice and contribute to a more informed society.

Cultural and Contextual Considerations:

i. Respect for Indigenous Legal Systems

South Africa and India are rich in cultural diversity, and it is crucial to respect and recognize the traditional legal practices and customs of indigenous communities. Engaging with these communities to harmonize customary laws with national legal frameworks will foster a more inclusive and equitable legal system.

ii. Language Access

Given the linguistic diversity in both countries, providing language access in legal proceedings is paramount. Offering interpreters and translated legal documents will ensure that all individuals can effectively participate in the legal process, regardless of their language proficiency.

iii. Community Involvement

Engaging local communities in law enforcement efforts can lead to more effective outcomes. Encouraging community-based policing and dispute resolution mechanisms rooted in cultural norms can build trust and cooperation between citizens and law enforcement agencies.

In conclusion, South Africa and India face common challenges in enforcing and implementing laws, stemming from overburdened legal systems, corruption, and socio-economic disparities. To overcome these obstacles, both nations must strengthen their judicial infrastructure, combat corruption, and promote legal awareness among citizens. Additionally, cultural and contextual considerations play a crucial role in implementing these changes, necessitating respect for indigenous legal systems, language access, and community involvement. By addressing these challenges and embracing the recommended measures, South Africa and India can foster a more just and inclusive legal framework, ultimately enhancing the rule of law and societal harmony.

4.6. Conclusion.

The comparative analysis between South African and Indian laws on sexual harassment in the workplace highlights the global significance of addressing this pervasive issue. Both countries have made commendable strides in establishing legal frameworks in order to stop sexual harassment, recognizing the importance of creating safe and inclusive work environments.

While there are differences in the specifics of their legal approaches, such as the establishment of Internal Complaints Committees (ICCs) in India and the emphasis on proactive prevention in South Africa, both nations share common challenges. Overburdened legal systems, corruption, socio-economic disparities, and cultural nuances impact the enforcement and implementation of these laws.

To overcome these challenges, both South Africa and India should focus on strengthening their judicial infrastructure, combating corruption, and promoting legal awareness among citizens. Embracing cultural and contextual considerations, such as respecting indigenous legal systems and ensuring language access, will contribute to a more inclusive and effective legal framework.

Ultimately, the road to eradicating sexual harassment in the workplace requires a concerted effort from governments, institutions, communities, and individuals. By addressing these challenges and building upon their existing legal frameworks, South Africa and India can foster workplaces that prioritize respect, equality, and the well-being of all employees, setting an example for positive change on a global scale.

CHAPTER 5 – CONCLUSION AND RECOMMENDATIONS

5.1. Conclusion

This study delved into the multifaceted issue of sexual harassment in workplaces, spanning historical contexts, legal frameworks, labour law cases, and international comparisons. It has illuminated several critical insights and principles that are essential for promoting safe, equitable, and respectful working environments. The overarching conclusion of this study is twofold: First, that workplace sexual harassment is a deeply rooted problem exacerbated by historical injustices, and second, that effective legal frameworks and proactive measures are imperative to combat this issue.

The historical analysis reveals that in South Africa, the legacy of apartheid perpetuated a culture of silence, allowing sexual harassment to thrive.¹⁷⁸ However, post-apartheid legislative measures, such as the Employment Equity Act¹⁷⁹ and the Code of Good Practice, have made significant strides in addressing workplace harassment. Similarly, India has seen progress with the Vishaka Guidelines and the Sexual Harassment of Women at Workplace (Prevention, Prohibition, and Redressal) Act,¹⁸⁰ demonstrating a commitment to addressing the issue.

The key labour law cases highlighted the importance of balanced evidence evaluation, employer accountability, legislative reforms, victim-centric approaches, corporate accountability, and the broader societal context in addressing workplace sexual harassment. These cases illuminated the need for robust legal frameworks, comprehensive reforms, and a cultural shift towards gender equality and inclusivity.

5.2. Recommendations

- **Strengthen Implementation and Enforcement:** Governments and organizations must ensure the effective implementation and enforcement of existing legal frameworks. Regular audits, training programs, and clear reporting procedures are essential components of this effort.

¹⁷⁸ Fernando, D., & Prasad, A. (2019) *Human Relations* 1567.

¹⁷⁹ Act No. 55 of 1998.

¹⁸⁰ Act No. 14 of 2013.

- **Promote Awareness and Education:** Prioritising education and awareness-raising programmes would help companies and employees understand their rights and duties. These programs should also highlight the consequences of workplace violence and harassment.
- **Legislative Reforms:** Advocating for legislative changes to strengthen legal frameworks, provide effective remedies for victims, and clearly defining sexual harassment is crucial. Awareness campaigns about the shortcomings of existing laws can drive this process.
- **Victim-Centric Approach:** Organizations should prioritize the well-being of victims and create a supportive environment for reporting. A victim-centric approach should be integrated into internal policies and procedures.
- **Corporate Accountability:** Employers should proactively address and prevent sexual harassment, recognizing that negligence may lead to legal consequences. Comprehensive anti-harassment policies, regular audits, and swift action against perpetrators are key steps.
- **Gender Equality:** Championing gender equality initiatives, promoting diversity and inclusion, and challenging gender stereotypes in the workplace are essential for creating equitable working environments.
- **Strengthening Legal Systems (South Africa and India):** Both South Africa and India should allocate additional resources to their legal systems to reduce caseloads and expedite case resolution. Independent anti-corruption bodies should be established to investigate and prosecute corruption cases within the legal system.
- **Legal Awareness Campaigns:** Governments should initiate extensive legal awareness campaigns to educate citizens about their rights, available legal resources, and the importance of reporting sexual harassment. These campaigns should be conducted in multiple languages to reach diverse populations.

- Respect for Cultural Diversity (India): Acknowledge and respect indigenous legal systems and customs, involving these communities in the process of harmonizing customary laws with national legal frameworks.
- Language Access (South Africa and India): Ensure language access in legal proceedings by providing interpreters and translating legal documents to enhance accessibility and understanding.
- Community Involvement (South Africa and India): Promote community-based policing and dispute resolution mechanisms that align with cultural norms. Engaging local communities can enhance trust and cooperation between citizens and law enforcement agencies.

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