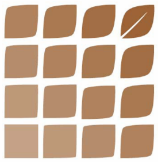

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SEXUAL HARASSMENT IN THE WORKPLACE IN KENYA

Patricia Kameri-Mbote, Sarah Kinyanjui** & Yohana Gadaffi****

ABSTRACT

Sexual harassment in the workplace in Kenya continues to be an issue of concern. This paper discusses it with a particular focus on universities. It specifically interrogates the legal and policy in Kenya with a view to highlighting various factors which have made such legal interventions less effective in achieving the desired results. While the legal and policy frameworks generally seek to create clear contours in defining and understanding sexual harassment, the factors underlying sexual harassment, as discussed in the paper's conceptual framework, demonstrate that this vice in the work place is often a complex issue. Thus, while the law remains a critical tool to proscribe unwarranted conduct, there may be need to rethink approaches to tackle the vice. This is particularly the case within the context of universities which presents power dynamics where lecturers and students are concerned, in addition to the traditional employer-employee sexual harassment nomenclature. Using the case studies of four universities, the paper reviews institutional sexual harassment policies and assesses the efficacy of the approaches employed towards tackling the vice.

I. INTRODUCTION AND BACKGROUND

A. Introduction

Sexual harassment has been pervasive in and out of the work place but it was not until 1980 that the United States of America (USA) became the first country to define sexual harassment in the work place as unlawful behaviour.[1] This was after the US Equal Employment Opportunity Commission (EEOC) issued guidelines in 1980 defining sexual harassment in the work place as unlawful discriminatory conduct which could attract sanctions under Title VII of the Civil Rights Act 1964.[2] The proscribing of sexual harassment in the workplace in the USA followed the influential work of Catharine

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1 Christopher Uggen and Chika Shinohara, 'SEXUAL HARASSMENT COMES OF AGE: A Comparative Analysis of the United States and Japan' [2009] The Sociology Quarterly 201, 202 <http://users.soc.umn.edu/~uggen/Uggen_Shinohara_TSQ_09.pdf> accessed 29 January 2018.

2 ibid.

Mackinnon who argued that sexual harassment should be approached as an equal rights issue.[3] The EEOC Guidelines defined sexual harassment in the workplace as unlawful conduct that would attract both individual and institutional sanctions.[4]

Following the USA's definition of sexual harassment in the work place as a discrimination issue, the CEDAW Committee took a similar approach by defining gender violence, including sexual harassment, as a gender equality issue.[5] To date, over one hundred countries have enacted laws addressing sexual harassment in the work place.[6] This includes Kenya and 25 other sub-Sahara African countries.

The enactment of legislation addressing sexual harassment in various countries is an appreciation of the fact that sexual harassment is harmful to individuals, organisations and the society at large. Victims of sexual harassment in the work place suffer various adverse effects, which include psychological and health issues and these in turn affect their productivity at work. Ultimately, such victims may opt out of employment if the harassment does not stop. Alternatively, the victims' employment may be terminated because of low productivity without necessarily establishing the cause of the low productivity. Such eventualities have a snowball effect on both the organisation and the society.[7] Organisations that have an environment that tolerates sexual harassment may experience high staff turnover as employees seek to avoid or stop sexual harassment.

While it is a welcome development that many countries have taken legal measures to address sexual harassment in the work place, it is worth noting that the existence of legislative provisions has not resulted in a drop in sexual harassment incidences. Various reports indicate that sexual harassment persists in many organisations.[8] Additionally, there is still under reporting of incidents of sexual harassment in the work place.[9] The recent revelations of sexual harassment in the movie industry and the number of women[10] who have come out and shared their experiences points to the magnitude of

3 Catharine Mackinnon, *Sexual Harassment of Working Women: A Case of Sex Discrimination* (Yale University Press 1979)77-81.

4 Joni Hersch, 'Sexual Harassment in the Work Place' (*IZA World of Labour: Evidence Based Policy Making*, 2015) 2.

5 Frances Raday, 'Article 11' in Marsha Freeman;, Beate Rudolf; and Christine Chinkin (eds), *The UN Convention on the Elimination of All Forms of Discrimination Against Women: A Commentary Oxford Commentaries on International Law* (Oxford University Press 2012) 290.

6 The World Bank Group, *Women, Business and the Law 2016: Getting to Equal* (The World Bank Group 2016) 23.

7 See for instance: Angela Lawson, Caroline Wright and Louise Fitzgerald, 'The Evaluation of Sexual Harassment Litigants: Reducing Discrepancies in the Diagnosis of Posttraumatic Stress Disorder' (2013) 37 Law and Human Behaviour 337-347; see also Patricia Leighton, 'Harassment at Work: Isn't It Really a Matter for Health, Well Being and Safety Law' (2014) 15 Business Law Review 15, 16.

8 Regina Karega, 'Violence Aginst Women in the Work Place in Kenya: Assessment of Work Place Sexual Harassment in the Commercial, Agriculture and Textile Manuafacturing Sectors in Kenya' (*International Labour Rights Fund*, 2002) 1; Hersch (n4).

9 Adejoke Oyewunmi, 'Criminalization of Sexual Harassment in the Nigerian Work Place: Is It an Adequate Response' (2012) 25 International Journal of Comparative Labour Law and Industrial Relations 365.

10 See for instance: Sandee LaMotte, 'For Some, #MeToo Sexual Assault Stories Trigger Trauma Not Empowerment' (*CNN*, 2017) <http://edition.cnn.com/2017/10/19/health/me-too-sexual-assault-stories-trigger-trauma/index.html> accessed 16 December 2017; Rozina Sini, 'How "MeToo" Is Exposing the Scale of Sexual Abuse' (*BBC*, 2017) <http://www.bbc.com/news/blogs-trending-41633857> accessed

the problem.

The prevalence of is sexual harassment despite clear laws, points to the inadequacy of laws in dealing with the problem. Our argument is that when law seeks to regulate relations in absolute terms where the nature of interactions in the relations are not as clear, the outcomes are likely to be less than satisfactory. Such is the nature of male-female relationships. They are embedded within social and cultural contexts, which nuance the interactions. The challenge for law is how to define the purview of actions that go beyond the acceptable limits. This is not an easy line to draw as discussions over time have revealed.[11]

This paper seeks to investigate the underlying issues that have enabled sexual harassment in the work place to thrive despite legislative and policy interventions that seek to eradicate it. It highlights social and cultural stereotypes that inform and uphold unequal power relations between men and women, particularly norms that legitimate male sexual abuse and exploitation of women. It focuses on sexual harassment in the work place and does not delve into sexual harassment in other spaces. Secondly, while the definition of gender has been expanded in several countries and within human rights discourse and practice, this paper adopts the traditional conception of gender as male and female and addresses sexual harassment involving persons of the opposite sex. It is predicated on human rights broadly and specifically their universal applicability which bestows duties to respect, promote and fulfil on diverse actors but designates the state as a primary duty bearer.[12]

We also note that sexual harassment is an affront to the notion of human dignity, which underpins the human rights' system.[13] Indeed, the CEDAW Committee was at the forefront of addressing sexual harassment as a human rights issue.[14] In General Recommendation 19, the Committee characterised sexual harassment as one of the manifestations of violence against women.[15] The Committee further noted that violence against women in its various manifestations including sexual harassment, falls under

16 December 2017.

11 See for instance Anita Hill's Testimony to the U.S Senate Judiciary Committee on October 11, 1991 available at <http://www.speeches-usa.com/Transcripts/anita_hill-testimony.html> accessed 16 December 2017; l; See also the allegations against former Minnesota Senator Al Franken who resigned from office after he was accused of sexual harassment Cathleen Decker, 'Sen. Al Franken, Accused of Sexual Harassment from 2006, Apologizes and Agrees to an Ethics Investigation' (*Los Angeles Times*, 2017) <http://www.latimes.com/politics/la-na-pol-franken-harassment-20171116-story.html> accessed 16 December 2017.

12 Laura Valentini, 'Human Rights, Freedom, and Political Authority' (2012) 40 Political Theory 573-601.

13 See Rikki Holtmaat, 'THE CEDAW: A Holistic Approach to Women's Equality and Freedom' (2017) 3, 5 <https://openaccess.leidenuniv.nl/bitstream/handle/1887/35151/CEDAW. A Holistic Approach to Womens Equality and Freedom.pdf?sequence=1> accessed 29 January 2018; Conor O'Mahony, 'There Is No Such Thing as Right to Dignity' (2012) 10 Journal of International Constitutional Law 551-574.

14 Christine Chinkin, 'Article 16' in Marsha Freeman;, Christine Chinkin and Beate Rudolf (eds), *The UN Convention on the Elimination of All Forms of Discrimination Against Women* (Oxford University Press 2012) 447.

15 ibid p 452.

the ambit of sex-based discrimination under Article 1 of CEDAW.[16]

The Universalist view is juxtaposed against the views of relativists[17] who view rights as embedded in cultural and societal contexts. This context is, in our view, the paradox that bedevils legal interventions seeking to address sexual harassment. The gendered context in which law operates where some roles are ascribed to males and others to females permeates the relationships and behaviour of men and women in the work place. Indeed, as Kennedy argues, our male and female sexualities evolve through 'fantasy, play, invention and experiment'[18] and this makes the delineation of permissible bounds critical. Whether law is the best instrument and its capacity to intersperse what is permissible and what is impermissible remains the challenge.

Closely related to cultural relativism is legal pluralism which refers to a societal set up where various laws operate side by side.[19] While legal pluralism has its benefits, it may pose a challenge to efforts to address sexual harassment. This is because state law is not the only normative order in operation in a legal pluralist context such as Kenya. The state laws that prohibit sexual harassment interact and operate simultaneously with a wide range of social and cultural norms, which though not necessarily state sanctioned, are embedded in gender stereotypes that inform and legitimate sexual harassment of women. Often, such norms are counterproductive in the efforts to effect state laws which seek to curtail sexual harassment.

The paper is divided into six main parts. Part I comprises of the introduction and background which contextualise sexual harassment in the work place. Part II provides the conceptual framework, against which sexual harassment in the work place is discussed while Part III examines the international, regional and national legal framework on the issue identifying strengths and weaknesses of the legal framework. The discussion on the national legal framework weaves in case law on sexual harassment with a view to establishing how Kenyan courts have dealt with cases brought before them. Part IV analyses sexual harassment policies of four universities in Kenya to evaluate their efficacy and Part V concludes.

B. Background

Sexual harassment can be broken down into two categories: harassment aimed at 'rewarding' the intended victim if they acquiesce to the demands of the harasser or *quid pro quo* sexual harassment[20] and harassment involving conduct that creates a hostile,

16 ibid.

17 See for instance Ann-Belinda Preis, 'Human Rights as Cultural Practice: An Anthropological Critique' (1996) 18 Human Rights Quarterly; Michael Jacobsen and Stehanie Lawson, 'Between Globalization and Localization: A Case Study of Human Rights versus State Sovereignty' (1999) 5 Global Governance 203-219.

18 Duncan Kennedy, *Sexy Dressing Etc* (Harvard University Press 1995) 209.

19 Brian Tamanaha, 'Understanding Legal Pluralism: Past to Present, Local and Global' (2007) 30 Sydney Law Review 375.

20 Fred Lunenburg, 'Sexual Harassment: An Abuse of Power' (2010) 13 International Journal of Management, Business and Administration 1, 3.

intimidating or uncomfortable environment for the victims making it difficult for the victims to effectively perform their duties.[21] *Quid pro quo* harassment occurs where an individual, usually a superior, seeks sexual favours or coerces an employee to grant them sexual favours in return for the employee getting an employment related benefit such as securing employment, a promotion or even a pay rise.[22] This kind of harassment usually occurs in hierarchical work place relationships where individuals who occupy senior positions harass their juniors for sexual favours in return for their juniors 'getting ahead' in their careers.[23]

In the second category, conduct that creates a hostile, intimidating or uncomfortable environment for the victims includes making offensive remarks on the victim's sexuality or with sexual undertones, sharing inappropriate images and inappropriate and unwelcome touching of an individual.[24] Such conduct does not necessarily involve demands of a sexual nature and is often intended to create or inadvertently creates a hostile working environment for the victim.[25]

The laws on sexual harassment in many countries and the sexual harassment policies of many organisations focus more on the *quid pro quo* sexual harassment. [26] Franks argues that because of this biased focus, many employees are usually only aware of *quid pro quo* sexual harassment but not of other forms of sexual harassment.[27]

Relatedly, scholars have argued that the standard of proof required to establish sexual harassment that creates or is intended to create a hostile working environment is significantly higher than the standard of proof required to establish *quid pro quo* sexual harassment.[28] This scenario arguably also obtains in Kenya where most sexual harassment cases that are successfully prosecuted before the courts are those that involve *quid pro quo* sexual harassment. While the higher standard of proof may be necessary to guard against spurious accusations and lodging of malicious sexual harassment claims, it is also counter-productive as it has contributed to under reporting of sexual harassment by victims out of fear that their claims will be dismissed.[29]

II. CONCEPTUAL FRAMEWORK

This section discusses the conceptual framework of the paper under five key concepts namely: equality and non-discrimination; power; gender politics; culture; and labour. It is important to note that these concepts are not necessarily mutually exclusive. Often, a sexual harassment case is nuanced by two or more of the concepts.

21 The World Bank (n 9) Chapter 1.
22 Eugene Scalia, 'Strange Career of Quid Pro Quo Sexual Harassment' (1998) 21 Harvard Journal of Law and Policy 307, 308.
23 ibid.
24 UNHCR (n 23) 3.
25 ibid.
26 Mary Franks, 'Sexual Harassment 2.0' (2012) 71 Maryland Law Review 655.
27 ibid.
28 ibid
29 ibid.

A. Equality and Non-Discrimination

Both CEDAW and the Maputo Protocol regard sexual harassment against women as an equality issue.[30] This approach is similar to Mackinnon's characterisation of sexual harassment.[31] Equality and non-discrimination require that similarly situated individuals in a given sphere be treated in the same way unless there are reasons permitted in law to treat them differently.[32] In the context of employment, equality and non-discrimination require that individuals in the organisation should be treated equally except to the extent that law permits differential treatment. [33]

As already indicated above, most victims of sexual harassment are women. This may be explained by various reasons, which include patriarchy or the rule of fathers.[34] Patriarchy continues to thrive in many countries despite the gains, made in efforts to promote gender equality and non-discrimination.[35] It reinforces the gender division of labour, which relegates women to the domestic sphere and privileges men's engagement in the public sphere.[36] It is noteworthy that key decision makers in many organisations are men.[37]

Unscrupulous decision makers sexually harass their juniors, with most victims being female.[38] Such conduct is tantamount to gender discrimination as the female employees are victimised solely due to their gender. Additionally, CEDAW defines sexual harassment as a form of gender violence that constitutes discrimination under Article 1 of CEDAW.[39] While female employees are entitled to equal treatment with their male counterparts, their gender becomes the basis of sexual harassment by their male superiors.[40] Such victims' productivity at work could suffer and thus disadvantage them when compared to their male colleagues.[41] Accordingly, early pioneers of the campaign against sexual harassment in the work place characterised it as a gender discrimination issue as the victims were mainly targeted and suffered the effects of sexual harassment because of their gender.[42] Sexual harassment creates an intimidating, uncomfortable and hostile working environment, which negatively affects work output and jeopardizes

30 Raday (n 8) 284; Chinkin (n 17) 447.
31 Mackinnon (n 6)
32 See generally Article 2 of CEDAW.
33 Adejoke Oyewunmi, 'The Promotion of Sexual Equality and Non-Discrimination in the Workplace: A Nigerian Perspective' (2013) 13 International Journal of Discrimination and Law 324, 325.
34 Patricia Kameri-Mbote, 'The Quest for Equal Gender Representation in Kenya's Parliament: Past and Present Challenges' in Japhet Biegon (ed), *Gender Equality and Political Processes in Kenya: Challenges and Prospects* (Strathmore University Press 2016)39, 45 .
35 See also Holtmaat (n 16) 7
36 ibid.
37 Karega (n 11).
38 ibid.
39 See generally Article 1 of CEDAW.
40 The World Bank (n 9).
41 Chinkin (n 17) 459
42 Mackinnon (n 6).

the career progression or even employment.[43] Male employees do not necessarily face similar challenges.

B. Power

Sexual harassment can also be viewed as a function of power. We analyse power in the context of the power-powerlessness dichotomy and the paradox of power. The power-powerlessness dichotomy as applied in the context of the work place posits that there are two categories of individuals in any organisation. These are individuals with power and those who are powerless.[44] Individuals who have power include superiors and key decision makers in the organization. Their power derives from the formal legal authority that accrues to the positions they occupy.[45] By dint of this authority, they wield the carrot and the stick, which they choose whom to dish out to and when. [46] They determine who gets ahead in their career in the organisation and who does not. Where well utilised, the power possessed by this category of individuals serves the interest of the organisation. However, this power is also prone to abuse in furtherance of sexual harassment against junior employees, the powerless.[47]

Junior employees or any employee who reports to a superior wields less power than the superior and stands higher chances of bearing the brunt of abuse of power by their superior. Sexual harassment occurs more in organisations where there is significant difference in the hierarchical power relationship between the harasser and the victim.[48] This is made possible by, as already stated, the formal authority of the superior, which enables them to confer some benefits or equally take adverse action against their junior. Superiors who sexually harass their juniors take advantage of the relationship with the promise of conferring some benefit to their juniors if the junior acquiesces to the superior's sexual harassment.[49]

Simultaneously, such superiors overtly or covertly ensure their target victims know that they will face adverse consequences should they decline their advances or report the sexual harassment to anyone.[50] In organisations with weak institutional structures for addressing sexual harassment, superiors can easily get away with sexual harassment because of the power they wield. Most victims comply because they either fear the results of failing to accept the inappropriate overtures or because the superior has the power to determine their fate in the organisation. To many victims, reporting the harassment is a zero-sum game. [51]

43 The World Bank (n 9).
44 Lunenburg (n 28).
45 ibid.
46 ibid.
47 ibid.
48 ibid.
49 Karega (n 11).
50 Mohamed Chicktay, 'Sexual Harassment and Employer Liability: A Critical Analysis of the South African Legal Position' (2010) 54 Journal of African Law 283-297.
51 ibid.

Sexual harassment in the work place as a function of power is further compounded by the fact that in many instances, victims are supposed to report the sexual harassment to the superiors who may themselves be perpetrators of sexual harassment.[52] Often, the superiors will shield each other or depending on their positions in the organisation, may even be deemed as 'untouchable'.[53] Additionally, the positions that the harassers occupy in the organisation may make it impossible to undertake any meaningful inquiry into complaints of sexual harassment against them.[54]

Organisations with weak institutional structures to address sexual harassment may be characterised by widespread cases of sexual harassment of the junior employees by their superiors due to the power differentials and the difficulty of holding the superiors to account.[55] It also follows that reporting of sexual harassment in such organisations will be low as victims would rather keep the harassment to themselves than report and risk losing their employment in the organisation.[56] This is closely related with the argument advanced by Gaventa that powerlessness makes individuals incapable of taking actions, which are beneficial to them.[57] While many victims of sexual harassment suffer the adverse effects of the harassment, and therefore should ideally take advantage of any opportunity to stop the harassment, their powerlessness makes them incapable of taking action to stop the harassment and its attendant harmful effects.[58] Powerlessness makes them act contrary to their best interests that ideally would be to stop the harassment. Powerlessness disables and victims by limiting their ability to take remedial action against sexual harassment.[59]

C. Gender Politics

McLaughlin et al allude to sexual harassment as a function of gender politics by referring to it as the 'paradox of power'.[60] As applied to sexual harassment in the work place, the paradox of power arises in situations where there is a female superior in charge of male employees. The traditional formulation of sexual harassment has always contemplated a circumstance where it is the superior who sexually harasses their junior. However, the paradox of power departs from this general assumption as it posits that it is the juniors, often male, who sexually harass their superior, often female with a view of 'cutting them to size'.[61]

52 Franks (n 34).
53 Paramita Chaudhuri, 'Sexual Harassment at the Workplace: Experiences with Complaints Committees' (2008) 43 Ecomonic and Political Weekly 99-106.
54 ibid.
55 Karega (n 11).
56 ibid.
57 John Gaventa, *Power and Powerlessnes: Quiscence and Rebellion in an Appalachian Valley* (University of Illinois Press 1980) 263.
58 Jennie Kihnley, 'Unraveling the Ivory Fabric: Institutional Obstacles to the Handling of Sexual Harassment Complaints' (2000) 25 Law and Social Inquiry 69-90.
59 ibid.
60 Heather McLaughlin, Christopher Ugen and Amy Blackstone, 'Sexual Harassment, Workplace Authority, and the Paradox of Power' (2012) 77 Americal Sociological Review 625, 627.
61 ibid.

The form of sexual harassment prevalent under the paradox of power usually entails uttering inappropriate words touching on the female superior's sexuality with a view to making the working environment intolerable and uncomfortable for her.[62] Consequently, such a superior would rather not oversee the juniors or supervise them and have to put up with their inappropriate conduct. As such, the sexual harassment that characterizes gender politics is not necessarily the quid pro quo type of sexual harassment. Rather, it is sexual harassment that is aimed at creating a hostile working environment for a female superior by her male juniors who do not view her as capable of leading them simply on account of her being female.[63]

The use of gender politics to advance sexual harassment is particularly prevalent in hitherto male dominated industries but which more women are increasingly joining and occupying leadership positions.[64] The female superior's gender is used as a tool to sexually harass her. This type of harassment presents its own unique challenges. As noted above, the sexual harassment policies of most organisations focus on the quid pro quo sexual harassment giving little, if any regard other types of sexual harassment. Individuals who are subjected to other types of sexual harassment such as those contemplated under the 'paradox of power' typology face institutional barriers in seeking redress.

A further challenge in addressing sexual harassment under the paradox of power typology is that as persons holding senior positions which of necessity come with some power, victims find themselves in the unusual position of having power but at the same time being powerless to the extent that they need to seek protection against the conduct of their juniors.[65] Most sexual harassment policies contemplate a situation where it is the juniors who seek redress for sexual harassment. Accordingly, a 'powerful' victim of sexual harassment in an organisation must go against the grain and seek redress against a junior employee. To do so, the senior employees must first overcome the potential mental barrier that posits that it is an absurdity for a person in a powerful position to seek redress against a relatively junior and, therefore powerless employee. For women in the hitherto male dominated professions, this challenge is further compounded by the societal pressures to persevere a particular working environment to be seen as being as capable as a man of handling the 'pressures of the job'.[66] Thus, many female victims of this type of sexual harassment fail to report the sexual harassment by their juniors and instead opt to seek their own mechanisms of dealing with the harassment.

D. Culture

Cultural norms that regulate male and female behaviour have a bearing on sexual harassment in the workplace. In the interactions between men and women, there are accepted standards of behaviour. Many cultures are also characterised by gender

62 ibid.
63 See also Para 19 of the General Recommendation No 35 of the CEDAW Committee.
64 ibid.
65 ibid.
66 Emily Leskinen; Lilia Cortina and Dana Kabat, 'Gender Harassment: Broadening Our Understanding of Sex Based Harassment at Work' (2011) 35 Law and Human Behaviour 25-39.

hierarchy and gender stereotypes. In many cultures, men are the hunters in the game of seduction. There are no defined boundaries and the likelihood of offending is great.

Despite the various legislative and other measures taken to combat sexual harassment in the work place, there is often a disconnect between such laws and culture because for many individuals, conduct that is defined as sexual harassment would easily pass as part of culture.[67] For instance, it is often difficult for legislative intervention to delineate sexual harassment and wooing, which is part of culture. Consequently, many individuals may knowingly or unknowingly condone sexual harassment due to their cultural background and upbringing.[68] Such individuals may only report if they fall victims to more aggressive forms of sexual harassment.[69] They may not take action for conduct, which they perceive as wooing but which laws and regulations define as sexual harassment.[70] This is against the background of workplaces which increasingly have both statute backed regulations that prohibit any form of unwarranted inappropriate sexual conduct by granting employees certain rights. Such an environment often causes tension between culture and rights. Often, the right of the 'target' not to be sexually harassed confronts conduct that would pass as culture in wooing a prospective partner, thus creating the culture-rights tension as advanced by Tamale.[71]

Closely related to this is the issue of dressing in the work place. Duncan Kennedy notes that for some men, sexy dressing by women in the work place is an invitation to sexually harass such women.[72] He defines a sexy dresser as one who in a given setting, dresses in a way that 'has a greater sexual charge than the setting she is actually in'.[73] In the context of the work place, some men may view sexy dressers as persons who deliberately dressed so with certain ends in mind.[74] For such men, sexy dressing is an invitation to sexually harass a woman on the misguided notion that her dressing warrants the harassment.

67 Susan Flske and Peter Glick, 'Ambivalence and Stereotypes Cuase Sexual Harassment: A Theory with Implications for Organisational Change' (1995) 51 Journal of Social Issues 97-115; Stockdale Margaret, 'The Role of Sexual Misperceptions of Women's Friendliness in an Emerging Theory of Sexual Harassment' (1993) 42 Journal of Vocational Behaviour 84-101.

68 ibid.

69 ibid.

70 ibid.

71 Sylvia Tamale, 'The Right to Culture and the Culture of Rights: A Critical Perspective on Women's Sexual Rights in Africa' (2006) 148-165.

72 Duncan Kennedy, 'Sexual Abuse, Sexy Dressing and the Eroticization of Domination' (1992) 26 New England Law Review 1310, 1350.

73 ibid.

74 ibid.

E. Labour

The labour market in many countries, particularly in sub-Saharan Africa, is distorted.[75] The supply of labour far exceeds the demand, leading to high unemployment rates.[76] Consequently, for many individuals securing employment is almost akin to winning the lottery. Once a person secures employment, they want to keep it at all costs. This distorted labour market has contributed to sexual harassment in the work place as well as none or under reporting of sexual harassment.[77] Unscrupulous individuals who hold the power to hire and fire often take advantage of the distorted labour market to sexually harass prospective or current employees in return for the victim securing employment or where the victim is an employee, to secure an employment related benefit or avoid being demoted or altogether dismissed from employment.[78] Consequently, many employees and prospective employees often have no option but to keep the sexual harassment to themselves to avoid any adverse effects they may face if they decline or report the harassment.[79]

The overall effect of sexual harassment is to stifle the voices of the victims who would rather keep quiet about the abuse and put up with it rather than reject or report the harassment and risk dealing with the attendant adverse consequences or either rejecting or reporting the harassment.[80] It is an unpleasant and unnecessary dilemma which many victims face but opt for the 'safer' route of putting up with the harassment rather than standing up to the harasser and risk being losing employment. This is further compounded by the fact that many organisations treat their human resource as a commodity, which is easily disposable and replaceable, and would therefore opt for the easier route of dealing with a 'troublesome' employee rather than address the complaints raised by such employee.[81]

75 International Labour Organisation, 'Facing the Growing Unemployment Challenges in Africa' (*International Labour Organisation*, 2016) <http://www.ilo.org/addisababa/media-centre/pr/WCMS_444474/lang--en/index.htm> accessed 16 December 2017c; . Njiraini Muchira, 'Sub-Saharan Africa Fast Becoming Hotbed of Unemployment' *The East African* (Nairobi, 11 February 2017) <http://www.theeastafrican.co.ke/business/SubSaharan-Africa-unemployment/2560-3808378-bp8m5g/index.html> accessed 16 December 2017.

76 According to the UNDP, female participation in the Kenyan labour market is 62.1 percent compared to male participation which is 72.1% , see UNDP, 'Human Development Report 2016' (2017); Neville Otuki, 'UN Report Shows Kenya's Jobs Crisis the Worst in Region' *The East African* (Nairobi, 3 May 2017) <http://www.theeastafrican.co.ke/business/UN-report-exposes-Kenya-jobs-crisis/2560-3912118-t4brkj/index.html> accessed 16 December 2017; Raday also notes that women's level of employment is higher than that of men, See Raday (n 39)286.

77 Brenda Grant, 'Beyond Beijing: Women's Rights in the Workplace' [2005] Agenda: Empowering Women for Gender Equality 90-98.

78 Ibid.

79 Pradhan-Malla (n 26).

80 Ibid.

81 Pradhan-Malla (n 26).

III. THE LEGAL FRAMEWORK ON SEXUAL HARASSMENT

A. The International Legal Framework

The discussion in this section is limited to international legal instruments addressing sexual harassment in the workplace that Kenya has ratified and which therefore form part of Kenya's laws by dint of article 2(4) of the Constitution of Kenya 2010.

1. Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), 1981[82]

Kenya ratified CEDAW in 1985. As already stated, sexual harassment is a gender discrimination issue. Accordingly, CEDAW's provisions on discrimination are applicable to sexual harassment. CEDAW's definition of discrimination against women contemplates any act or omission whose effect is to deny women the full enjoyment of their fundamental rights in various spheres including the economic sphere. [83] To the extent that sexual harassment against women in the work place is a form of discrimination, which impairs women in the work place from the full enjoyment of their fundamental rights and freedoms, it falls under the ambit of discrimination as defined in CEDAW.[84]

CEDAW condemns all forms of discrimination against women and requires State Parties to take appropriate measures, including enactment of legislation to prohibit all forms of discrimination against women and to protect the rights of women on an equal basis with those of men.[85] Further, State Parties have an obligation to take appropriate measures to eliminate discrimination against women by any person or entity. [86]

2. General Recommendation No 35 on Gender Based Violence Against Women, updating General Recommendation 19

General Recommendation 35 goes beyond characterizing gender-based violence as an equality issue to further characterize it as a human rights issue. It specifically states that women's right to a life free from gender-based violence is indivisible from and interdependent with human rights.[87] Accordingly, subjecting women to sexual harassment, which is a form of gender-based violence, is tantamount to violating the human rights of such victims.

Recommendation 29 of the General Recommendation 35 requires state parties to CEDAW to enact legislation to criminalise all forms of gender-based violence against women in

82 Adopted and opened for signature, ratification and accession by GA Resolution 34/180 of 18 December 1989, entry into force 3 September 1981.
83 See article 1 of CEDAW.
84 Karega (n 11).
85 See article 2 of CEDAW.
86 ibid.
87 Para 15 of General Recommendation No 35.

all spheres. Additionally, Recommendation 29 requires state parties to strengthen legal sanctions against all forms of gender-based violence which are commensurate to the offence and also introduce civil remedies. Section 6 of the Employment Act in Kenya is the principal Act which addresses sexual harassment in the work place in Kenya. As the discussion in Part IV of the paper illustrates, Kenyan courts have given effect to Section 6 of the Act by awarding victims of sexual harassment relatively significant damages. While Recommendation 29 calls for criminalisation, it remains to be seen if criminalisation of sexual harassment in the work place in Kenya, as proposed under Recommendation 29, will yield better results in deterring sexual harassment in the work place.

Recommendation 30 requires State Parties to ensure that victims of gender-based violence, which includes sexual harassment, have access to justice. This is closely related to Recommendation 40 (c) which requires states to ensure victims of gender-based violence have access to low cost high quality legal aid. This is an important provision given the fact that many victims of sexual harassment face challenges in seeking legal redress for the sexual harassment. State Parties should seek to fully effectuate Recommendation 30 by ensuring that their legal aid schemes adequately provide for victims of sexual harassment. This may go a long way in enhancing reporting and resolution of sexual harassment complaints as well as upping the ante to ensure that organisations further increase their efforts to ensure that workplaces are free from sexual harassment.

3. General Recommendation No 19 on Gender Based Violence

General Recommendation No 19 (hereinafter, 'the Recommendation) by The Committee on the Elimination of all forms of Discrimination against Women addresses Gender Based Violence (GBV). The Recommendation notes that GBV, which includes sexual harassment, is discrimination covered under the definition in CEDAW.[88]

General Comment 17 of the Recommendation notes that sexual harassment in the work place is a form of GBV, which can impair equality in employment as provided for under Article 11 of CEDAW. General Comment 18 defines sexual harassment to include 'unwelcome sexually determined behaviour such as physical contact and advances, sexually coloured remarks, showing pornography and sexual demand whether by word or action.' [89] It notes that in addition to the adverse effects of sexual harassment on the victim, sexual harassment also amounts to discrimination where the victim of sexual harassment reasonably believes that rejecting the inappropriate sexual conduct will adversely affect her employment as manifested through unfair denial of employment related benefits or an uncomfortable working environment.

The upshot of the General Comment number 17 and 18 as read with Article 11 of CEDAW is that sexual harassment in the work place hampers the realisation of equality

88 See General Comment 6.
89 See General Comment 18.

in employment between men and women. Accordingly, State Parties have an obligation to enact measures to deal with sexual harassment in the work place to ensure that there is equality in employment between men and women. This is encapsulated in the specific recommendations of the committee. The Recommendations, inter alia, include: the need for State Parties to take appropriate and effective measures to address all forms of sexual violence.[90] A further recommendation is the need for State Parties ensure that their annual reports on the implementation of CEDAW capture information on sexual harassment and of measures to protect women from sexual harassment in the work place.[91] CEDAW Committee, in responding to Kenya's eighth periodic report recommended that Kenya should revise the Employment Act of 2007 in order to address sexual harassment in employment at all levels.[92]

4. International Labour Organisation (ILO) Convention No 111: Discrimination (Employment and Occupation) Convention 1958

The Discrimination (Employment and Occupation) Convention (Hereinafter "Convention 111") addresses discrimination in employment. It defines discrimination to include any differential treatment of individuals on grounds such as sex, which is calculated to prevent equality of opportunity or treatment in employment.[93] It also defines discrimination to include such differential treatment, which may be agreed upon by the concerned stakeholders in a member states being calculated to frustrate equality of opportunity or treatment in employment.[94]

In its 2017 report, the CEDAW Committee of Experts on the Application of Conventions and Recommendations (CEACR) noted that sexual harassment is a form of discrimination, which falls under the ambit of Convention 111.[95] Accordingly measures taken by member state to eliminate discrimination in the work place must also include measures aimed at eradicating sexual harassment in the work place, as sexual harassment by itself is a form of discrimination.

Convention 111 requires each member state to develop a national policy aimed at eradicating discrimination in employment through ensuring equality of opportunity or treatment in employment.[96] Further, member states have an obligation to enact legislation in furtherance of the policy.

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90 ibid.

91 See generally General Comment 24 on specific recommendations.

92 Committee on the Elimination of Discrimination against Women Sixty-eighth session 23 October-17 November 2017 Item 4 of the provisional agenda Consideration of reports submitted by States parties under article 18 of the Convention on the Elimination of All Forms of Discrimination against Women. List of issues and questions in relation to the eighth periodic report of Kenya Para 16

93 Article 1 of ILO Convention No 111.

94 ibid.

95 International Labour Office, 'Ending Violence and Harassment against Women and Men in the World of Work' (2017) 34.

96 Article 2 of ILO Convention No 111.

5. International Labour Organisation (ILO) Convention No. 155: Occupational Safety and Health Convention, 1981

While the Occupational Safety and Health Convention (hereinafter "Convention 155) does not specifically address sexual harassment, its provisions are applicable to sexual harassment in the work place. This is because sexual harassment in the work place has adverse effects of the health and safety of the victims. Accordingly, sexual harassment in the work place can be termed as an occupational health issue.

Convention 155 requires Member States to work in collaboration with relevant stakeholders to develop national policies on occupational health and safety.[97] As per Recommendation Number 164 of 1981 on Occupational Safety and Health, one of the actions points in policies developed by member states pursuant to Article 4 of Convention 155 is the 'prevention of harmful physical or mental stress due to conditions of work'.[98] Both quid pro quo sexual harassment and sexual harassment, which creates or is calculated to create a hostile work environment, physically harms the victim and also causes them mental anguish. Therefore, sexual harassment is an occupational health issue, which needs to be captured in occupational health and safety policies of organisations.

B. The Regional Legal Framework

The Protocol requires member states to take various measures to safeguard the economic and social welfare rights of women. Key among these measures is the requirement for states to take measures to combat and punish sexual harassment in the work place.[99] Further, in order to promote and safeguard women's rights to education and training, the Protocol requires State Parties to take appropriate measures to protect women and girls from sexual harassment in educational institutions and to provide sanctions against perpetrators of sexual harassment in educational institutions.[100] State parties also have an obligation to take appropriate measures to provide access to counselling and rehabilitation services to women who are victims of sexual harassment.[101]

C. The National Legal Framework

Kenya's legal framework addressing sexual harassment is contained in various legislative instruments. These include various Constitutional provisions, provisions of the Sexual Offences Act, the Employment Act No 11 of 2007 and the Public Officers Ethics Act No 4 of 2003.

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97 Article 4 of ILO Convention No 155.

98 Para 3 (e) of Article 4 of the ILO Convention No 155.

99 Article 13 (c) of the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa.

100 Article 1 (c) of the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa.

101 Article 1 (d) of the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa.

The Constitution of Kenya, 2010 guarantees all citizens certain rights. Sexual harassment of an individual entails violation of one or more of these Constitutionally guaranteed rights.[102] Specifically, the Constitution provides for the right to fair labour practices which among others includes the right to reasonable working conditions.[103] Courts have held that sexual harassment amounts to a violation of these Constitutionally guaranteed rights.

In *P O v Board of Trustees, A F & 2 others* [2014] eKLR, the Environment and Labour Relations Court, in finding that the Claimant had been sexually harassed, stated that sexual harassment is a form of discrimination. Further, the court found that the sexual violence that the claimant had been subjected to and the subsequent termination of her contract of employment amounted to inhuman and degrading treatment. Ultimately, the court awarded the claimant general damages of KES 3,000, 000.00 for sexual harassment, unfair and wrongful termination in addition to the other monetary sums for dismissal without notice and one month's pay for the month she was terminated.

Similarly, in *N M L v Peter Petrausch* [2015] eKLR¸ the Environment and Labour Realations Court found that by dint of the sexual harassment, the Respondent had violated a number the Claimant's Constitutionally guaranteed rights. These included the right of inherent dignity and the right to have that dignity protected; the right not to be subjected to any violence whether from public or private sources; the right not to be subjected to inhuman, degrading or cruel treatment and the right to fair labour practices which encompasses the right to reasonable working conditions.

The Sexual Offences Act No 3 of 2006[104] and the Public Officers Ethics Act, No 4 of 2003[105] also contain provisions addressing sexual harassment though not necessarily targeted at the work place. The Employment Act, No 11 of 2007 builds on the provisions in the above named statutes to make more robust provisions specifically addressing sexual harassment in the work place.[106] In addition to broadly defining sexual harassment to capture both quid pro quo and sexual harassment that creates or is intended to create a hostile work environment,[107] the Employment Act also requires any employer who has at least twenty employees to issue a policy statement on sexual harassment.[108] Such a

102 Such rights include the right to dignity and to have that dignity respected and protected (Article 28); the right to freedom and security of the person which includes the right not to be, *inter alia,* subjected to torture in any manner whether physical or psychological or t be treated or punished in a cruel, inhuman or degrading manner (Article 29); the right to privacy (Article 31).

103 Article 41 of the Constitution of Kenya, 2010.

104 See for instance sections 11 and 23 of the Sexual Offences Act. The former proscribes indecent acts which would generally fall under sexual harassment while section 23 proscribes sexual harassment by a person in a position of authority or holding public office.

105 See generally section 22 of the Act which defines sexual harassment and prohibits public officers from harassing members of the public or fellow public officers.

106 See generally section 6 of the Employment Act, No 11 of 2007 which solely addresses sexual harassment.

107 See generally section 6(1) of the Employment Act, No 11 of 2007.

108 ibid.

policy statement must contain certain core provisions which include the definition of sexual harassment as stated in section 6 of the Employment Act, the right of employees to an environment that is free from sexual harassment, the measures that the employer will take to ensure that no employee is subjected to sexual harassment. Additionally, the statement must state the disciplinary measures that an employer will take against perpetrators of sexual harassment in the organisation. The Policy statement must also provide for confidentiality in investigating sexual harassment complaints as well as how employees can report such complaints. The Policy statement must also state how the policy will be disseminated.

Many organisations in Kenya, universities included have complied with requirement to come up with policy statements as required under Section 6 of the Employment Act. However, it remains to be seen whether the various policy statements are effective in the institutional contexts that they are meant to operate in. The next part of the paper evaluates sexual harassment policies of four universities in Kenya with a view of identifying any shortcomings that may make them inadequate in addressing sexual harassment in universities.

In terms of the policy framework, the Kenya National Policy for Prevention and Response to Gender Based Violence requires employers to put in place sexual harassment policies to guide conduct in the workplace. Further, while the draft National Gender Policy does not directly address sexual harassment, it however requires the rights of women in employment to be respected. The right to an environment that is free from sexual harassment therefore falls under its ambit.

Courts have applied the above provisions in various sexual harassment cases. The cases of *P O v Board of Trustees, A F & 2 others* [2014] eKLR, *N M L v Peter Petrausch* [2015] eKLR and *S R M v G S S (K) Limited & another* [2017] eKLR are used illustratively. First, all the three cases illustrate that sexual harassment in the work place is often a function of the power relations in the employment relationship. An individual is more prone to sexual harassment where there is a significant hierarchical power difference between such individual and the harasser. Additionally, the cases demonstrate that harassers usually engage in the inappropriate conduct with a view to obtaining sexual favours from their intended victims. The harassment is usually accompanied by promises of 'reward' for compliance or threats of 'punishment' for rejection or reporting the overtures of the harasser. There is confluence between quid pro quo harassment and harassment that makes the work environment hostile.

Second, the cases, particularly *P O v Board of Trustees, A F & 2 others* [2014] eKLR and *S R M v G S S (K) Limited & another* [2017] eKLR also demonstrate the institutional challenges that victims of sexual harassment face in their efforts to seek redress for the harassment. These range from absence of institutional sexual harassment policies to instances where complaints of sexual harassment are casually dismissed by those meant to investigate them. Additionally, both cases demonstrate the influence of patriarchy in the casual

treatment of sexual harassment cases where the persons to whom a female victim reports to about the sexual abuse are invariably male.

However, the cases, particularly *S R M v G S S (K) Limited & another* [2017] eKLR also illustrate that courts will readily hold accountable organizations that are found culpable of condoning sexual harassment and failing to put in place appropriate mechanisms to address sexual harassment as required under the Employment Act. Despite courts' willingness to hold perpetrators of sexual harassment accountable, there is generally none or under reporting of sexual harassment cases in many organisations. This is significant because courts do not act on their own motion and cannot proceed on their own motion to impose sanctions on institutions that fail to adhere to the requirements of the law dealing with sexual harassment in the work place. Cases must be lodged before the courts for them to intervene. Many non-compliant institutions may therefore get away with the failure to put in place appropriate measures to address sexual harassment.

Third and perhaps most importantly, all the three cases demonstrate that where sexual harassment has been established, courts will exercise their discretion under Section 6 of the Employment Act to impose stiff penalties on both the harasser and where applicable, the harasser's organisation if it is established that the organisation failed to take appropriate action to remedy the sexual harassment. Unlike other unlawful acts in the Employment Act, which have prescribed remedies, the sanction for sexual harassment is left to the court's discretion as far as awarding damages is concerned. Exercise of this discretion is perhaps best illustrated in the case of ***N M L v Peter Petrausch (supra)*** where the court awarded KES 1, 200, 000.00 as damages for sexual harassment to a domestic helper who used to earn a salary of KES 8,000.00 per month and a further KES 60, 000 as damages for unfair termination.

P.O v Board of Trustees, A F & 2 others (supra) where the court stated that sexual harassment is an occupation health and safety issue under section 8 of the Occupational Health and Safety Act is also illustrative of the courts' finding of the impact of sexual harassment in the work place.[109]

IV. CASE STUDY: UNIVERSITIES IN KENYA

Sexual harassment in institutions of higher learning such as universities differs from sexual harassment in other types of organisations in the sense that while in many organisations sexual harassment will usually involve only employees, sexual harassment in universities may involve staff sexually harassing other members of staff or staff sexually harassing students. The power dynamics in in the case of the latter are characterised by a different reward-punishment nomenclature where students risk being

109 Raday notes that sexual harassment pollutes the working environment and can have devastating effect upon the health and safety of those affected by it. See Raday (n 8) 297; see also Chinkin (n 39) 459.

unfairly awarded bad grades if they fail to acquiesce to the sexual harassment or seek redress for the harassment.[110] This differs from general sexual harassment in the work place where the reward-punishment currency usually revolves around employment related benefits.

Sexual harassment involving students presents a further challenge when students assert that they have consensual romantic, sexual or amorous relationships with their lecturers. This points to the problem raised by Kennedy above where people may generally be expressing themselves as human beings and the notion of abuses burdens their interactions with perceptions of guilt, risks and fears.[111] Indeed there are instances where lecturers have married their students. The question is how one defines student-lecturer relationships in the courtship that leads to marriage. Arguably, given the significant power differential between the student and the lecturer, whether such relationships are perceived as consensual or not depends on the circumstances. While most would define it under the power-powerlessness dichotomy advanced by John Gaventa,[112] it is not as simple as that. In the classic case, the student would be taken as a powerless party in the 'relationship' and consequently as ignorantly in the 'relationship' which in their mind is consensual. It is a circumstance where students act contrary to their best interests in the mistaken belief that they are freely entering a relationship which would serve their best interests, best interest in this case being synonymous with good grades. It could also be the case that the student hopes for a more long-term relationship with the lecturer and in some cases such relationships result. It is only when one of the parties is unhappy and moves to report the matter that the issue of sexual harassment arises.

It is, therefore, incumbent that sexual harassment policies of institutions of higher learning robustly address sexual harassment involving students and staff as well as sexual harassment among staff. Institutions of higher learning must develop and implement policies that prohibit any amorous or sexual relationships between students and lecturers. The policies must also contemplate and address the unique challenges presented by sexual harassment cases involving staff and students. While it is difficult to regulate human relationships to a tee, universities should discourage relationships between students and their lecturers during the students' study.[113] This section discusses the sexual harassment policies of four universities in Kenya with a view to evaluating their adequacy in addressing sexual harassment in the respective institutions. These are the University of Nairobi Gender Policy (UoN Policy), Strathmore University

110 Juliet Muasya, 'Effects of Sexual Harassment on Women's Students Access to Opportunities and Facilities: A Case Study of the University of Nairobi' (2014) 3 Global Journal of Interdisciplinary Social Sciences 83-90.

111 Kennedy (n 68) 1393.

112 Gaventa (n 55).

113 For instance, Yale University's Policy on Teacher-Student Consensual Relations prohibits any sexual or amorous relationships between teachers and students regardless of whether the relationships are consensual. See Yale University, 'Policy on Teacher-Student Consensual Relations' (*Yale College Pblications 2017-2018*, 2017) <http://catalog.yale.edu/dus/university-policy-statements/teacher-student-consensual-relations/> accessed 15 January 2018.

Sexual Harassment Policy ("SU Policy", Jomo Kenyatta University of Agriculture and Technology Sexual Harassment Policy ("JKUAT SHP") and Kenyatta University Policy on Sexual and Gender Based Violence ("KUPSGBV").

A. Overall Institutional Approach to Sexual Harassment

The universities selected for the discussion have adopted different approaches for their sexual harassment policies. Strathmore University (hereinafter "SU) and Jomo Kenyatta University of Agriculture and Technology ("JKUAT") have stand-alone sexual harassment policies.[114] On the other hand, the University of Nairobi (hereinafter ÜoN") and Kenyatta University (hereinafter "KU") have general policies on gender which also address sexual harassment.[115]

The varied approaches by different universities arguably suggest different levels of appreciation by the various universities of the scale and seriousness of sexual harassment. It is plausible that some universities do not regard sexual harassment as such a serious issue to warrant a stand-alone policy. However, it may also be the case that some universities' stand-alone sexual harassment policies' provisions pale in comparison to general university policies on gender which also address sexual harassment. The common strand is that universities have some form of policies to address sexual harassment; perhaps underscoring the fact that sexual harassment is a common problem among the universities. Accordingly, if this is the position, there may be need to develop harmonised policy frameworks for addressing sexual harassment in universities. The frameworks must, however, be flexible enough to respond to unique circumstances of each university.

B. The Definition of Sexual Harassment

The policies of the four universities selected for the case study analysis generally adopt the definition of sexual harassment in Section 6 of the Employment Act. While most of the policies have expanded this definition to include other conduct not necessarily captured in Section 6 of the Employment Act, all the four policies reviewed fail to explicitly define what amounts to sexual harassment involving lecturers and students. While some of the policies address lecturer-student relationships, perhaps a good starting point would have been to further narrow down the general definitions of sexual harassment to specifically define sexual harassment involving lecturers and students. This would provide a sound anchorage for the other provisions addressing sexual harassment between lecturers and students in the respective university policies.

C. University Institutions to address Sexual Harassment

The policies of the four universities also reveal that the universities have adopted different institutional set ups to address sexual harassment. Two examples could

114 See the Strathmore University Policy on Sexual Harassment and the Jomo Kenyatta University of Agriculture and Technology Sexual Harassment Policy.

115 While the KU policy is titled the KU Policy on Sexual and Gender Based Violence, it differs from the stand-alone policies of SU and JKUAT in the sense that it does not exclusively focus on sexual harassment.

be used illustratively. First is the institutional mechanism of investigating sexual harassment complaints. The UoN Policy provides for the establishment of a Gender Mainstreaming Division among whose functions include receiving complaints of sexual harassment, investigating the complaints and making appropriate recommendations to the university. The Gender Mainstreaming Division also has the overall mandate of ensuring the implementation of the UoN Policy.

Strathmore University's sexual harassment policy adopts a different approach where the body that will handle a sexual harassment complaint is determined by the position of the victim of sexual harassment. Where the alleged harasser is a faculty or staff member, the SU Policy provides that the report is to be made to the alleged harasser's Head of Department/Dean or the Director of Legal Services while where the harasser is the Head of Department (HOD) or Dean, the SU Policy provides that the complaint should be made to the HOD's/Dean's superior or to the Director of Legal services.[116] Once a report is made to the above named persons, the SU policy provides that these individuals shall constitute ad hoc committees to investigate the complaint and make recommendations to the university. The SU Policy also provides that the Legal and Governance Services Office (LGSO) of the university has the overall mandate of exercising oversight over the implementation of the policy as well as the handling of complaints by the various offices designated in the policy.

The JKUAT SHP provides for various offices where victims of sexual harassment may seek help. It provides that students who are subjected to sexual harassment may report to the Sexual Harassment Information Liaisons, the Gender and Mentoring Centre, Class representatives, class advisors, the university's chaplains, deans, directors, deputy vice chancellors or the vice chancellor.[117] These university officers are in turn required to promptly report complaints made to them to the designated compliance coordinator, in this case the Dean of Students. [118] Once a report is made, the JKUAT SHP provides that the university will expeditiously investigate and determine the complaint and take any necessary remedial action, including taking measures to guard against retaliation against the student by the harasser.[119]

The KUPSGBV provides that victims of sexual harassment should report to the Confidential University Advisor or at the Centre of Gender and Equity Empowerment or to the Dean of Students.[120] The KUPSGBV commits the university to establishing a standing committee to rigorously investigate cases of SGBV.[121]

116 Clause 4.1 of the SU Policy.
117 See generally Clause 6.1 of the JKUAT SHP.
118 See generally Clause 6.1.1 of the JKUAT SHP.
119 ibid.
120 See generally Clause 4.2 of the KUPSGBV.
121 See generally Clause 4.3 of the KUPSGBV.

D. Investigations into Sexual Harassment Complaints

All the four policies reviewed provide require the relevant investigations to carry out investigations once a victim of sexual harassment reports the harassment. While the UoN Policy requires the relevant office to speedily conduct investigations into sexual harassment complaints, the JKUAT SHP requires the investigating body to conclude investigations within 30 days of the making of the complaint where the complaint is made by a member of staff. Curiously, the JKUAT SHP does not provide a specific timeline for conclusion of investigations where a student a student makes a sexual harassment complaint. The KUPSGBV and the SU Policy generally require the relevant university offices to investigate complaints of sexual harassment without any qualifier on the pace of the investigations.

A key shortcoming of the provisions on investigations into complaints of sexual harassment in the four policies reviewed is that none of the policies provides for specific timelines within which the investigating body should conclude and present the outcomes of the investigations. While the JKUAT SHP contains such a provision, it however limits it to investigations where a sexual harassment complaint is made by a member of staff. It is, however, silent on the expected duration of investigations where a student makes a complaint of sexual harassment. It is essential that this shortcoming is addressed to ensure that perpetrators of sexual harassment do not get away with such conduct on account of investigations which take an unnecessarily long duration. Long durations of investigations and conclusion of sexual harassment policies may be counterproductive in the sense that it may discourage victims of sexual harassment from reporting to the relevant university authorities due to the long duration that it takes to resolve the cases. Additionally, provision of specific timelines within which university investigating bodies should conclude investigations and submit their findings also provides a basis upon which the investigating bodies can be held accountable for their handling of sexual harassment policies.

E. Approach to Lecturer-Student Relationships

The four policies have adopted different approaches to lecturer-student relationships even though such relationships have the potential of being sites of sexual harassment, particularly against the students. The UoN Policy lacks any specific provision prohibiting lecturer student relationships. The closest it comes to addressing lecturer-student relationships is by requiring the university to ensure fairness in examination and course work by putting in place measures to correct or prevent abuses based on the gender of a lecturer or a student.[122] One such measure is providing and enforcing clear guidelines on student-lecturer relationships.[123] The SU and KU Policies do not address lecturer-student relationships.

122 See generally Clause 4.9 of the UoN Policy.
123 ibid.

The JKUAT SHP prohibits consensual relationships within the instructional or and/or employment context.[124] Further, the JKUAT SHP also provides that consensual relationships occurring outside the instructional and/or employment context may lead to disciplinary action.[125]

Given the potential for student-lecturer relationships to become sites for sexual harassment especially against students, there is need for university policies on sexual harassment to address and possibly prohibit student-lecturer relationships. While university students may be adults under the law, there is need for university policies on sexual harassment to place a greater responsibility on lecturers to avoid getting into romantic, sexual or amorous relationships with their students. In this respect, universities may follow the examples of such universities as Yale University in the USA which have a specific policy prohibiting lecturer-student relationships.[126] Locally, it is also commendable that the JKUAT SHP prohibits consensual relationships within the instructional context.[127]

F. Dispute Resolution

The sexual harassment policies of Strathmore University, Kenyatta University and the University of Nairobi all have similar dispute resolution processes to the extent they require complaints of sexual harassment to be handled through a formal process. However, the JKUAT policy contains a unique provision in the sense that it provides that sexual harassment complaints can be handled through both formal and informal processes.[128]

The JKUAT Policy provides that the two methods are not mutually exclusive, and it is not a requirement that one uses the informal method before using the formal methods.[129] Additionally, informal methods should not be used in cases of serious forms of sexual harassment such as rape.[130] Participation in the informal method is wholly voluntary and the victim can withdraw at any point in the process.[131] Further, use of the informal process does not attract any disciplinary action against the perpetrator.[132] Instead, it may lead to such actions as: asking that someone speaks to the alleged harasser; meeting with the alleged harasser and a third party to explain the victim's feelings and the university's policy; asking that a workshop on sexual harassment awareness be conducted for the unit or division.[133] Where the complaint is not satisfactorily resolved through the informal process, the victim has the option of taking up the formal process of dispute resolution.[134]

124 See generally Clause 3.1 of the JKUAT SHP.
125 See generally Clause 3.2 of the JKUAT SHP.
126 Yale University (n 121).
127 See generally Clause 3.2 of the JKUA SHP.
128 See generally Clause 7.0 of the JKUAT SHP.
129 See generally Clause 7.1 of the JKUAT SHP.
130 ibid.
131 ibid.
132 ibid.
133 ibid.
134 ibid.

While the use of informal dispute resolution processes to address sexual harassment may be a welcome development, it remains to be seen how effective such an approach will be in tackling sexual harassment especially in cases involving lecturers and students. This is because unlike the formal processes which usually attract sanctions and thus may have a deterrent effect, the informal processes lack any sanctions and thus may be abused by perpetual harassers. A separate study may perhaps be necessary to investigate the effectiveness of formal versus informal methods of addressing sexual harassment cases.

It is also noteworthy that Recommendation 45 of General Recommendation No. 35 of the CEDAW Committee requires State Parties to CEDAW to ensure that gender-based violence against women is not mandatorily referred to alternative dispute resolution procedures. The Recommendation further provides that use of alternative dispute resolution procedures in handling gender-based violence should be strictly regulated. Additionally, the procedures should only be used when a previous evaluation by a specialised team ensures the victim's free and informed consent and that participation in the procedures will not expose the victim to further risks. While the JKUAT Policy contemplates use of informal processes to resolve sexual harassment complaints, the provisions in the JKUAT Policy fall short of the threshold of recommendation 45 of General Recommendation 35 of the CEDAW Committee. For instance, while the JKUAT Policy provides that the use of informal procedures is voluntary, it nevertheless fails to provide for a pre-screening process to ascertain that the victim gave their free and informed consent to use of informal process to address the sexual harassment complaint.

G. Implementation of the Policies

The four polices reviewed differently address the issue of implementation of the policies. All the four policies require the concerned respective university organs to take various measures to disseminate and sensitize the university community about the policies. Of the four policies reviewed, the KU Policy contains the most robust provisions for its dissemination while the UoN Policy has the leanest provisions for its dissemination. It must be remembered that dissemination and sensitisation of the various university communities about the policies is key to ensure the successful realisation of the aspirations of the policies. Where there is lack of or inadequate sensitisation, there is a risk that the policies may only be good on paper.

The KU Policy goes beyond providing for sensitisation and awareness campaigns. It incorporates an implementation matrix which assigns various tasks on the implementation of the policy to various university officials as well the monitorable indicators to assess the implementation of the particular activity.[135] Of the policies reviewed in this paper, only the KUPSGBV provides for an implementation matrix which is a critical tool in

135 See generally Clause 4.8 of the KUPSGBV.

assessing the effectiveness of the policy. This is an important innovation, which should be embraced by other institutions of higher learning in their efforts to address sexual harassment.

The case analysis of various university policies on sexual harassment reveals that different universities have adopted different approaches to addressing sexual harassment. While it remains to be seen which approaches are more effective in addressing the vice, there may be need for universities to develop a general harmonised framework to address sexual harassment which each university can then adapt to suit set up. In coming up with such a framework, universities may borrow best practices from each other and other universities in the world.

V. CONCLUSION AND RECOMMENDATIONS

While law may not be the best medium to address sexual harassment, it is the best tool we have to proscribe unwarranted conduct. Kenya's law and jurisprudence as well as the case studies demonstrate seriousness in addressing sexual harassment. The problems of non-reporting and under reporting persist pointing to the need for more work. First, organisations need to sensitise their staff and students on sexual harassment policies so that they are aware about the provisions of the policies especially regarding what amounts to sexual harassment and where to report if one is sexually harassed. Universities must also take preventive measures to forestall sexual harassment of students by their lecturers. One such preventive measure is to go beyond developing general sexual harassment policies to developing specific policies which prohibit amorous, romantic or sexual relationships between lecturers and their students. Such policies must place a greater responsibility on the lecturers and impose stiff penalties for lecturers who violate the policy.

Secondly, there is need to ensure that prompt and thorough investigations are conducted once a sexual harassment complaint is made. Coupled with this, organisations must have effective complaints' handling mechanisms that inspire confidence in victims of sexual harassment to seek redress.

Third, there is need to impose punitive sanctions against organisations that condone sexual harassment. This could be fashioned along the provisions of the Bribery Act 2016, which imposes stiff penalties on organisations that fail to put in place measures to prevent bribery. Fourth, there is need to give as much attention to sexual harassment intended to create a hostile working environment as has been given to quid pro quo sexual harassment. While the latter may be more prevalent, the former is just as harmful as the latter, yet it does not rank as high as the former.

Lastly, there is need to go beyond merely punishing the harasser to providing rehabilitation services for the victim of sexual harassment. Most current approaches to handling sexual harassment seemingly focus on the punishment of the harasser without recognising the fact that victims of the harassment may require rehabilitation to enable them to move on with their lives.