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Strengthening legislations as a way to combat sexual harassment at workplace and in universities in Zimbabwe.

By R. Matsikidze¹

Introduction

Sexual harassment may easily be put in the same category with rape but in our society the legal system seems to treat it as a light offence. The public service and the private sector lack the mechanisms in the legal framework to deal with sexual harassment as a scourge in our country. This paper seeks to discuss the extent of the *lacunae* in the Zimbabwean legislation meant to protect the female and male employee who may be victims of sexual harassment. It further explores possible ways of filling those gaps and, more importantly, seeks to stimulate debate on how to combat this blight.

Defining sexual harassment

The International Labour Organisation (ILO) has defined sexual harassment as a sex-based behaviour that is unwelcome and offensive to its recipient.² The ILO further notes that sexual harassment may take two forms, namely, *quid pro quo* or hostile working environment in which the conduct creates conditions that are intimidating or humiliating for the victim.³ ILO further notes that the behaviour that qualifies as sexual harassment may be physical violence, touching, unnecessary close proximity, verbal comments and questions about appearance, lifestyle, sexual orientation, offensive phone calls and non-verbal behaviour like whistling, sexually suggestive gestures, and display of sexual materials.⁴ The definition is wide and covers all ranges of possible sexual harassment scenarios.⁵ In addition, Convention No 111 on Discrimination (Employment and Occupation) Convention, 1958 provides that one cause of discrimination the national legislations ought to combat is sexual harassment as it erodes equal opportunity and treatment in employment and occupations.

There are also a number of international instruments that define sexual harassment. United Declaration on Violence against Women, 1993, article 2 provides that 'violence against women shall be understood to encompass, but not limited to, physical, sexual and psychological violence

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² See www.ilo.org/ declaration on fundamental principles and rights at work accessed 19 March 2017- sexual harassment at work.

³.*Supra*

⁴.*Supra*

⁵ See also M. Rubenstein, 'Dealing with sexual harassment at work: The experience of industrialised countries' in *Conditions of Work Digest: Combating sexual harassment at work*, Vol 11, No, 1992, p11. See also Deirdre McCann, 'Sexual harassment at work: National and International Response, 'Conditions of Work and Employment Series No 2, International Labour Office, Geneva,2005, p18

...including ...sexual harassment and intimidation at work.⁶ Women have been silent victims of sexual harassment. They find it difficult to report.⁷ In addition there is also fear to lose employment, and fear of the repercussions of rejecting unwelcome advances by the superiors or employer.

The Universal Declaration of Human Rights, 1948, also in its preamble, provides against discrimination but recognises the inherent equality, dignity and inalienable rights of all members of the human family.

Poverty, high levels of unemployment, lack of mechanisms to identify or detect sexual harassment, and networks to help victims of sexual harassment are some of the factors that allow the proliferation of sexual harassment in Zimbabwe.⁸ Perpetrators are taking advantage of these factors to pounce on women. Women, married and unmarried, students, graduates and non graduates, house maids and gardeners all are all potential victims of sexual harassment.

The major problem in Zimbabwe is that the Labour Laws are inadequate in terms of the content of the law and they lack clear policy and special procedure for detecting and resolving sexual harassment cases. The Constitution, the Labour Act, the Public Service Act and all labour regulations lack clarity or specificity with regard to sexual harassment and how to deal with it.

The Constitution of Zimbabwe No 20 of 2013

The Supreme law in the country is the Constitution of Zimbabwe No 20 of 2013.⁹ However, the Constitution does not expressly provide for the right to be protected against sexual harassment, although there are provisions which can be relied upon to protect women against sexual harassment. The Constitution in section 14 makes it an obligation for Zimbabwe to promote full gender balance in society and, in particular, that the State must promote the full participation of women in all spheres of Zimbabwean society on the basis of equality with men.¹⁰ This entails further that the State must take all measures, including legislative measures, needed to ensure that both genders are equally represented in all institutions and agencies of government at every level and women constitute at least half the membership of all commissions and other elective and appointed governmental bodies established by or under the Constitution or any Act of Parliament. It is critical to note that the provisions cited above can be interpreted broadly to include eradicating all prohibitive practices against equality and non-discrimination, including sexual harassment.

Section 14 of the Constitution further provides that 'the State and all institutions and agencies of government at every level must take practical measures to ensure that women have access to

⁶ See also section 3.4 of the UN Handbook for Legislation on Violence Against Women (UN Division for the Advancement of Women)

⁷ Deirdre McCann, 'Sexual harassment at work: National and International Response' Conditions of Work and Employment Series No2, International Labour Office, Geneva,2005, p4-6, see Malawi's Gender Equality Act, sections 6, 7 as discussed by Ruth Kanyongolo in her unpublished PowerPoint presentation at University of Zimbabwe 's SEARCWL Centre, March 2017.

⁸ See section 14 of the Constitution of Zimbabwe and section 24 of Malawi's Constitution.

⁹ Later referred to as the Constitution

¹⁰ Compare with Malawi Constitution section 20 and Malawi's Employment Act section 20.

resources, including land, on the basis of equality with men.’ In ensuring an inclusive approach, it is obvious that oppressive vices like sexual harassment ought to be excluded. Section 14 prohibits all forms of discrimination against women.¹¹ Like CEDAW, section 14 of the Constitution requires the State to take positive measures to rectify gender discrimination and imbalances resulting from past practices and policies. Hence the broad constitutional framework to strengthen specific statutes dealing directly with sexual harassment is available. What is lacking is alignment of those statutes to the Constitution.

Further, section 24 reinforces section 14 of the Constitution, in extending the equality and non-discrimination of women to the workplace. In section, 24 it is provided that ‘the State and all institutions and agencies of government at every level must adopt reasonable policies and measures, within the limits of the resources available to them, to provide everyone with an opportunity to work in a freely chosen activity, in order to secure a decent living for themselves and their families.’ The Constitution further requires that the State and all institutions and agencies of government at every level must endeavour to secure full employment, the removal of restrictions that unnecessarily inhibit or prevent people from working and otherwise engaging in gainful economic activities, vocational guidance and the development of vocational and training programmes, including those for persons with disabilities and the implementation of measures such as family care that enable women to enjoy a real opportunity to work.¹² These are essential provisions that can help in the creation of a conducive environment that eradicates sexual harassment at the workplace.

More instructive is section 80 of the Constitution which provides for the rights of women. In section 80 (1), it is provided that every woman has full and equal dignity of the person as with men and this includes equal opportunities in political, economic and social activities. This is specific to women’s rights and empowerment. With hindsight, the legislature could have expressly inserted the provisions specific to sexual harassment in this section. In section 80 (3) of the Constitution there is a clear outlaw or bar against all laws, customs, traditions and cultural practices that infringe on the rights of women conferred by this Constitution. What is therefore apparent from the provisions of the Constitution is that is inclined towards complete eradication of sexual harassment. However, its biggest deficiency is that it lacks the specific provisions of complaint procedures, remedies for victims of discrimination, and sanctions for perpetrators of discrimination.¹³

The Labour Act (28:01)

The Labour Act is the most comprehensive piece of legislation in Zimbabwe that covers the employee-employer relationship. It is more comprehensive than the Public Service Act although

¹¹ Compare with The Convention on the Elimination of All Forms of Discrimination against Women, 1979, ratified by Zimbabwe without reservations.

¹² See section 24 of the Constitution of Zimbabwe and compare with Beijing Declaration and Platform for Action, 1995.

¹³ See article 2 of CEDAW (1995), see also SADC Protocol on Gender and Development (1997) and The Protocol to the African Charter on Human Rights and People’s Rights on the Rights of Women in Africa (2003).

it has also its deficiencies. There is no definition of sexual harassment in the Labour Act (28:01). Sexual harassment is narrowly defined under section 8 as an unfair labour practice. It is defined in 58 (h) of the Labour Act (28:01) as:

“Any employer or for the purpose of paragraphs (g) and (h), an employee or any other person, commits an unfair labour practice if, by act or omission, he –
(h) engages in unwelcome sexually-determined behaviour towards any employee, whether verbal or otherwise, such as making physical contact or advances, sexually coloured remarks, or displaying pornographic materials in the workplace.”

This definition does not explicitly provide for sexual harassment definition, but the conduct it defines as unfair labour practice is actually sexual harassment. That lack of explicitness on its own is a cause of concern. However, the draft Labour Bill has the definition of sexual harassment.¹⁴

The penalties for unfair labour practices in terms of section 6(1)(2) as read together with section 89 of the Labour Act are cessation of the unfair labour practice, compensation, and criminal sanction. These remedies are clearly general and applicable to all unfair labour practices. The challenge that exists in generalising remedies is that the underlying rationale will be that all unfair labour practices are the same, which is not correct. Sexual harassment on its own is a huge monster to which general remedies may not suffice. The generalisation of these remedies could be the answer to why, despite those remedies being available in our jurisdiction, the cases of victims seeking compensation or criminal sanction recorded are very low. Again, like the constitutional provisions, the Labour Act does not provide mechanisms for complaint procedures, for counselling, and procedures for compensation. It lags behind the laws of other jurisdictions.

The Public Service Act

The Public Service Act covers all government employees and, in some cases, government agencies. All Zimbabwean government employees are regulated under this law. The frightening thing is that the Public Service Act does not have a provision on sexual harassment.

The Public Service Act though is yet to be aligned with the Zimbabwean Constitution Amendment No 20 of 2013. The Public Service Regulations, SI 1 of 2000 does not provide a definition and specific procedure for sexual harassment. However, SI 1 of 2000 tersely includes sexual harassment as a misconduct. In section 4, misconduct is defined as the following:

“Improper, threatening, insubordinate or discourteous behaviour, including sexual harassment, during the course of duty towards any member of the Public Service or any member of the public.”

That provision does not in any manner define what sexual harassment is. Furthermore it demeans the gravity of sexual harassment by expressing it as a species of improper behaviour, which it is,

¹⁴ See Rodgers Matsikidze and Caleb Muccheche's draft *Zero Labour Draft* crafted for the Republic of Zimbabwe in March 2017.

but more than that. Further, there are no specific procedures for investigations, hearings and counselling for the victim of sexual harassment.

Codes of Conduct for universities.

While a number of universities in Zimbabwe have developed workplace codes of conduct not so many have dedicated their codes of conduct to include mechanisms on how to deal with sexual harassment. The University of Zimbabwe Code of Conduct defines sexual harassment as unwarranted conduct of a sexual nature that affects the dignity of men and women at work. It includes physical, verbal and non-verbal conduct that is sexually coloured, offensive, intrusive, degrading or intimidating. The definition, just like the one in the Labour Act, is inadequate in that the content of the definition itself is insufficient and it does not include the mechanisms to detect and resolve the cases of sexual harassment, for example the boards of inquiry, counselling services, post-harassment support centre. The penalty that is available to the perpetrators is dismissal from employment. Some Zimbabwean universities seem to have such provisions in their codes of conduct.¹⁵

General deficiencies in the Labour Act, Public Service Act and Codes of Conduct in combating sexual harassment

The Labour Act provides for compensation to the victim but it does not state how the compensation is computed viz the act perpetrated. The other remedy available is cessation of the behavior but that does not address the injury caused or trauma the victim may be experiencing. The Labour Act also fails to place mechanisms that ensure that in future there are no retributive actions by the perpetrator and his/her sympathizers who may be still in authority. The Labour Act totally fails to provide any counselling, or protective mechanisms to the victim of sexual harassment.

The University of Zimbabwe Code of Conduct does not provide for any compensation, and specific counselling services to sexual harassment victims. There are no clear cut protection mechanisms for sexual harassment victims. There is no clear inclusion of students in the code of conduct as potential victims of sexual harassment at the University as a workplace. Lecturers and other employees can easily predate on the vulnerable innocent students. The University of Zimbabwe Students' Charter comprehensively provides for the combat of sexual harassment but what is needed still is to transform those noble intentions into satisfactory regulations.¹⁶ The other universities may derive their regulations from the University of Zimbabwe Students Charter.

Recommendations

The way forward for Zimbabwe will be to push for the amendment of the Labour Act to provide for a wider definition and mechanisms to prevent, detect and resolve sexual harassment cases

¹⁵ Evernice Munando, Director Female Students Network in her presentation at SEARCWL in March 2017 revealed startling statistics which showed that 98% of tertiary universities in Zimbabwe have students who face sexual harassment.

¹⁶ The University of Zimbabwe Students Charter in clauses 1.14 to 1.14.5 set the definition, the various undertakings to put in place mechanisms to detect, resolve and combat sexual harassment.

efficiently and promptly. The government should come up with a clear government policy on combating sexual harassment at workplaces, universities and colleges as workplaces.¹⁷ The way forward for the University of Zimbabwe and other universities will be to amend their codes of conduct and expressly provide for a wider definition of sexual harassment and put in place a policy and procedures for handling and compensating the victims of sexual harassment. What is clear is that Zimbabwe as a company needs to revamp its labour laws with regard to sexual harassment as a disempowering tool to all gains made by women in Zimbabwe. There is need for codes of conduct at workplaces forbidding sexual harassment, independent individual complaint procedure, legal and psychological counselling for sexual harassment victims, and reparation for victims and sanctions for perpetrators.¹⁸ There is further need to change both men and women's attitudes and integrate information about sexual harassment in curriculae.¹⁹

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Public Service Act

¹⁷ Already Zimbabwe is a member of ILO and is bound by all conventions, recommendations and opinions of the experts.

¹⁸ See also Professor Anne Hellum's recommendations in her presentation, Sexual Harassment as an equality and non-discrimination issue. The CEDAW approach, NORHED/SEARCWL seminar, 2017.

¹⁹ *Ibid.*

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