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Sexual Harassment And The Law: Manifest Social Trajectories In The Nigerian Organisational Environment

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ABSTRACT

The growing dilemma of sexual harassment is becoming more threatening to sustainable high work commitment and performance in the Nigerian organizational environment. Currently, Nigeria has no federal legislation dedicated to eviscerate the dehumanizing debacle. This paper examined the manifest social trajectories in the Nigerian organizational environment as well as the various laws in place to assist the victim in redressing abuse. The paper recommends amongst others that, the growing dilemma could be stemmed if the Labour Standards Bill, is passed by the Nigerian Parliament and also legislative measures allowed to go hand in hand with well documented advertised policies informing workers of the problems, implications and consequences of sexual harassment which is a phenomenon with severe effect on workforce morale and ultimately optimum productivity, if not combated head on. In addition,| effective machineries that will encourage harassed employees to report without victimization or reprisals must be established. Organisations should also maintain transparency so that justice is not delayed and efforts to remediate yield acceptable results.

INTRODUCTION

Concerns about sexual harassment have been topical over the ages and seemingly unebbing. It has in fact been the concern of the work place, academic environment, relaxation centers and even homes. As a nuanced psycho-social risk and unethical conduct at work it is regrettable however in Nigeria that there is no federal legislation dedicated to eviscerating this social menace. The first attempt at legislating on it was in the form of a sectoral bill annexed to a Labour Standards Bill submitted to the National Assembly in 2008, but which is yet to be passed into Law. In 2006, the Sexual Harassment Prohibition Act, otherwise known as the Sexual Harassment Act was passed by the National Assembly. This law was meant to protect students in Nigerian educational institutions who fall victim to sexual harassment by lecturers, teachers and educators who use their fiduciary positions of authority, dependency and trust to exploit despondent students. This may be an encouraging start at stemming the malfeasance of sexual harassment at least in higher institutions in Nigeria, but the coverage of the law is limited, because it effectively excludes secondary school students as well as employees in industrial; agricultural, health institutions and others in the non-tertiary education workplace environment.

However, the government of Lagos State seems to have responded to the challenge by including in its criminal law code, a section on prohibition of harassment. The code described

harassment as unwelcomed sexual advances, requests for sexual favour and other visual, verbal or physical conduct of a sexual nature which when submitted to or rejected: (a) implicitly or explicitly affects a person's employment or education opportunity or unreasonably interferes with the person's work or educational performance; (b) implicitly or explicitly suggests that submission to or rejection of the conduct will be a factor in academic or employment decisions; or (c) create an intimidating, hostile or offensive learning or working environment. The punishment for transgressors is three years imprisonment.[1] The steps taken by the Lagos State Government which is heartwarming may yield the desired results if replicated in other states of the Federation. The Lagos State Law protects the academic, secondary school students as well as those harassed at the workplace.

Presently, the growing dilemma of sexual harassment is becoming more threatening to sustainable high work commitment and performance in the Nigerian organizational-environment. The extent at which this problem is aggravating in work organizations is endemic.[2] As such, its stakes are getting higher as a pernicious complex phenomenon that is devoid of any personal status, educational attainment, religious background or development of any nation. In the Nigerian work domain, the aggregate of sexual harassment that is reared in the organizational work setting is of high magnitude.

Sexual harassment is not just a violation of human dignity and equality guaranteed to human beings in every civilised social system, but, it is also a violation of right to life and peaceful existence guaranteed by the constitution.[3] However, it is acknowledged that the unwholesome misbehavior is not only peculiar to Nigeria. Even in developed nations, despite stringent legislative protection, sexual harassment is very prevalent. For instance in New Zealand the unwanton conduct remains an impediment to the full achievement of women's human rights as well as undermining the mental and physical well-being of women[4]. This is not to say that sexual harassment is only a feminist problem, and male exclusive. It is the sociological perspective of it that asserts men to be biologically programmed and to be sexually aggressive than women, which situates sexual harassment within the frame work of sexism-supremacist ideology.

The unclear meaning and non-enactment of a comprehensive federal legislation dedicated to the protection against sexual harassment in non-tertiary educational work-environment could be attributed as one of the plausible reasons for the prevalent of this social ordeal in the Nigeria work-place setting. The magnitude is to say the least, very worrisome, more so, that the social malfeasance remains the least understood, documented and focused upon, in all forms of sex violence in the Nigerian workplace environment. Although, the phenomenon of sexual harassment in the context of workplace employment has received considerable attention in the legal and sociological scenario in the past one decade, the trajectories in the Nigeria organisational environment have not been given much concern. Thus, this paper is an attempt to impart insight on the stance of law and unlock the sociological trajectories of sexual harassment in the Nigeria workplace environment.

[1] Criminal Code Law 2011. s. 262.
[2] Roberts B., and Mann R., (2006): Sexual Harassment in the workplace. A primes; University of Akron. Retrieved from yahoosearchhttp://www3.uakron.edu/lawrev/robert1.html July 22.
[3] Chapter 4 Constitution of the Federal Republic of Nigeria, 1999 as amended.
[4] Jones S., Boocock K. and Uuderhill-sem, (2013) "Accessing Information about Sexual harassment in New Zealand's Universities," *Women's Studies Journal* 27 (1) pp 36-48

CONCEPT OF SEXUAL HARASSMENT

Systematic review of the literature has revealed that sexual harassment is an amorphous phenomenon, that lends itself to no universally agreed definition. Like most social constructs, sexual harassment is not easy to define, nor does it involve a homogeneous set of behaviour.[5] The meaning and interpretation of sexual harassment depend on the context, but it is based on the victims' perception and not the intention. In most nations, sexual harassment provisions can be in criminal codes, labour codes, health and safety legislation, anti-discrimination and equal opportunity laws, as well as education and licensing statutes.[6] Specifically, countries like United States, the United Kingdom, Australia and New Zealand have legislations and policies that prohibit sexual harassment in educational institutions, but in most developing nations the scope of their legislation covered the tertiary education only.

CONCEPTUAL AND BEHAVIOURAL DEFINITIONS

Many scholars have offered conceptually and behaviourally based definitions of sexual harassment. On conceptual level, Farley [7] referred to sexual harassment as unsolicited non reprociprocal male behaviour that asserts a woman's sex role over the function as worker of sexual requirements in the context of a relationship of unequal power. As such, the misbehaviour may not necessarily be related to sexual desire, but can be a practice of defending or maintaining a dominant measure of masculinity. In this perspective, sexual harassment is thus exercised in order to maintain male power within male groups.[8] Also, within an unequal gender system, it has been asserted that sexual harassment can be thought of as a behaviour which enforces the appropriate ways of acting and behaving in line with the accepted dominant gender norms.[9]

At the behavioural level, Henry and Noon,[10] posited that sexual harassment is not defined in terms of the intentions of the harassers, but rather in terms of whether it includes harm to the victim and behavior that is regarded as unaccepted by normal standard. As such, it is seen as any unwanted sexual behavior or comment which has a negative effect on the recipient. Sexual harassment can also be considered as any non-consensual sexual contact or sexual threat.[11] Sexual contact includes but not limited to unwelcome sexual behaviour like kissing, and intentional touching of another person's sensitive parts. Thus, behaviour has to be sexual in nature to connote sexual harassment and such behaviour, has to be deliberate and repetitive and also it must be unwelcome by the victim and also established as unacceptable to the victim.

LEGAL DEFINITION

Although concerns surrounding sexual harassment had existed in Nigeria for a longtime, contextualizing it legally is recent. Sexual harassment is subject to various interpretations, depending on the context in which the court is called upon to interpret the term. It is generally described as unwanted and unsolicited physical advances and conduct of a sexual nature, such as touching, robbing and groping, and sexual, demeaning, derogating and or offensive comments and activity that may or may not carry the implication that the individual being

[5] Joseph, S. (2015.) Sexual Harassment in Tertiary Institutions: A comparative Perspective; Temida Ostale Teme, 1,(1) June, 2015, pp 125-144.
[6] Cobb, Advocates for Human Rights, 2010.
[7] Farley, L (1978) *Sexual Shakedown: The Sexual Harassment of Women on the Job*. Mc Graw Hill
[8] Robinson, K,(2005) "Reinforcing Hegemonic Masculinities through Sexual Harassment: Issues of Identity, Power and Popularity in Secondary Schools". *Gender and Education* 17(1) 19-37.
[9] McLaughlin, Vggen & Blackstone, A, (2012) Sexual Harassment, Workplace Authority and the Paradox of Power. *American Sociological Review.* 77(4) pp. 625-647
[10] Henry and Noon, (2006). *A Dictionary of Human Resource Management*, Oxford University Press.
[11] Ogunbameru, O. (2006) Sexual Harassment in Nigeria Tertiary, Institution, Ibadan, Nigeria Spectrums Books Limited p1.

subjected to these advances may suffer job-related or school-related retribution if he or she rejects them.[12] It has also been defined as unwelcome sexual advances, requests for sexual favours and other verbal or physical conduct of a sexual nature which conduct explicitly or implicitly affects an individual employment, unreasonably interferes with an individual's work performance or crates an intimidating hostile, or offensive work environment.[13]

ELEMENTS OF SEXUAL HARASSMENT

There are general two types of sexual harassment cases: *Quid pro quo* and Hostile environment.[14] *Quid pro quo* refers to an individual in a position of power demanding sexual favours or acts in return for action or inaction, such as a promotion or promising not to terminate the employee or person of lesser power who is the subject of the harassment. It is the more overt form and also includes promise of employment in return for sex favours by an employer or agent. Hostile environment which is the more common type of sexual harassment exists where an employee is made to feel uncomfortable and suffers emotional or mental strain due to frequent exposure to offensive sexual talk and jokes, pornographic images and repeated unwelcome sexual advances, although there is no threat to the employee's advancement in the workplace or continued employment. The difficulty of proving this type of harassment makes such sexual harassment a subject of regular and continuous interpretation by case law and legislative actions.[15]

PROOF OF SEXUAL HARASSMENT

Whether it is a *quid pro quo* claim or a hostile work environment claim, there are two general categories of evidence that can be used to support a sexual harassment case or counter the version provided by the harasser.

Direct evidence of sexual harassment

This is the most straight forward means of proving a sexual harassment claim because such evidence goes directly to prove an element of the claim. For example, a statement by an employer or a boss that the victim will not be promoted until she gives in to or consents to a sexual act, will amount to direct evidence of *quid pro quo* harassment. In this vein, sms messages or emails, containing sexually explicit jokes sent to the claimant by her boss could be direct evidence of a hostile work environment. Even if the statements supplying the claim was made verbally, they can be used to support the claim.

Circumstantial evidence of sexual harassment

It is not often that harassment may be as blatant as the examples given above, but rather an element of the harassment may be inferred from the circumstance surrounding the claimant and the harasser. This type of evidence is regarded as circumstantial evidence, although very difficult to prove and usually not admissible to prove a sexual harassment claim, can still be effective, if from the example given earlier, the boss or supervisor propositioned the claimant, but instead assuming the boss did not make an explicit threat not to promote the claimant if she did not consent, nevertheless, the employee refused to participate in the sexual act and a week later she was not promoted when her colleagues were promoted. The proximity of the promotion to the boss's proposition could be circumstantial evidence of a link between the proposition and the decision to exclude the claimant, from the promotion list. Another example of circumstantial evidence that could help support the claimant is evidence that other

[12] www.lg.org
[13] facts about sexual harassment//www.eeoc.gov/eeoc/publications/fs-sex.efm
[14] www.org.legal resources
[15] Ibid

employees were similarly treated in the past by the same boss or supervisor. This is known as similar facts evidence at common law. Section 12 of the Evidence Act, 2011[16] which codifies the English common law rule as to the admissibility of similar facts evidence, provides that:

> *When there is a question whether, an act was accidental or intentional, or done with a particular knowledge or intention or to rebut any defence that may otherwise be open to the defendant, the fact that such formed part of a series of similar circumstances, in each of which the person doing the act was concerned is relevant.*

Thus, under this section, evidence of the improper conduct of the accused harasser similar to the harassment complained of may be relevant to rebut the defences of accident; lack of intention and lack of knowledge. Evidence of the bad character of the accused could also be let in through this section, although, character evidence is not generally admissible, but in criminal proceedings evidence of bad character becomes relevant when the bad character of the accused person is a fact in issue and also when the accused person has given evidence of his good character.[17] In civil cases evidence of the fact that the character of any person concerned is such as to render probable or improbable any conduct imputed to him is inadmissible, except in so far as such character appears from facts otherwise relevant.[18]

SCOPE OF SEXUAL HARASSMENT LAW IN NIGERIA

Sexual Harassment in the Tertiary Educational Institutions (Prohibition Act, 2016.)

The starting point of this discourse, is this Act which as earlier stated is meant to rescue students in Nigerian tertiary education institutions from sexual harassment by predating lecturers, teachers and educators. The Act defines sexual harassment to include:

a. sexual intercourse between an educator and a student where the student is below the age of 18 years or is an imbecile or of generally low mental capacity or physical challenged.
b. any unwelcome sexual attention from an educator who knows or ought reasonably to know that such attention is unwelcome to the student; or
c. any unwelcome implicitly or explicitly behaviour, suggestions, messages or remarks of a sexual individual that have effect of offending, intimidating or humiliating the student or a related person in circumstances which a reasonable person having regard to all the circumstances would have anticipated that the student or such related person would be offended, intimidated or humiliated;
d. any implied or expressed promise of reward by an educator to a student or related person for complying with a sexually oriented request or demand; or
e. any implied or expressed threat of reprisal or actual reprisal from an educator to a student or related person for refusal to comply with a sexually oriented request or demand.[19]

According to the act, a lecturer, educator or a lecturer is said to have had sexual intercourse with a student, when there is a penetration of a sexual nature of the vagina or anus or mouth of the student, by the penis or finger of the educator or any instrument or toy by the educator and for this purpose, a male student can be sexually harassed by a female educator. [20]A major drawback of this act is its restriction to only tertiary institutions, such as public or private,

[16] The Act repealed the Evidence Act Cap. E14 LFN.
[17] Section 82 (a&b); *Chukweke v State* [1991] 7 NWLR (pt 205) at 618.
[18] Section 78.
[19] This Law was promulgated to protect students in Nigerian tertiary institutions who fall victim to sexual harassment by lecturers, teachers and educators who use their fiduciary positions of authority, dependency and trust to exploit vulnerable students.
[20] Sexual Harassment Law in Nigeria Universities. Adedunmade Onibokun www.legalnaija.com.visited (1/09/17)

post-secondary educational institutions in Nigeria, such as universities, polytechnics and colleges of education and thereby exempting students in secondary schools.[21]

In addition, the Act does not give protection to the following persons who are either employees, students or who have legitimate business with the educational institution:

i. Employees are not protected from harassment by employers and by their co-workers.
ii. Applicants for jobs, potential students and their parents are not afforded any protection.
iii. Concerns about student by student sexual harassment is real, but students and potential students are not protected against sexual harassment by other students.
iv. Contract workers, casual workers and agents are not within the protected sphere of the law, when they are sexually harassed by staff and students and vice versa.

Labour Standards Bill, 2008

In 2008, the National Assembly set to repeal, the Labour Act, 1990 and made comprehensive provisions on minimum Labour Standards for Nigeria. One of the innovations in this bill, was a provision on sexual harassment in the workplace environment. The Labour Act, 1990 has no provision for sexual harassment or any other kind of harassment in the workplace environment. Although this bill is yet to be passed as law, it is being x-rayed in this paper with a view to revealing its workability and shortcomings.

The relevant provision of bill for the purpose of this discussion is section 20 which provides thus:

i. Any person who engages in sexual harassment during the process of recruitment or in the course of work which is not limited to the physical premises of the employer, commits an offence under this Act and shall be liable to a fine as prescribed in the first schedule to this Act.
ii. Notwithstanding anything to the contrary in other enactments or law, any aggrieved person who brings a complaint under section 55 of this Act shall show a prima facie case, following which the burden of proving that sexual harassment did not occur shall shift to the person against whom the complaint is made.

Sexual harassment is defined in section 60 of the bill as:

> *any unwelcome sexual advance, conduct or request made by an employer, manager, supervisor or a co-employee to an employee, whether the employee is a man or woman and includes any conduct of a sexual nature which creates an intimidating hostile, degrading or offensive environment.*

From this definition two types of sexual harassment prohibition could be identified. First is what is commonly referred to as *quid pro quo* harassment as expressed in the definition as "any unwelcome sexual advance, conduct or request made by an employer, manager, supervisor or a co-employee to an employee…" The second is referred to as "hostile work environment harassment" which is expressed as "…includes any conduct of a sexual nature which creates an intimidating, hostile, degrading or offensive environment."

The concept 'unwelcome' is defined in the Australian case of *Aldridge v Booth*[22] where the Federal Court of Australia stated that 'unwelcome' means that "the advance request or conduct was not solicited or invited by the employee and the employee regarded the conduct as undesirable or offensive". The question whether the employee regarded the conduct as undesirable or offensive is subjective was answered in the Hong Kong case of *Chen v Tamara*

[21] Ibid
[22] (1988) 80 ALR 1 at 5

Rus and Another[23], where a male former employee of IBM (HK) Ltd unsuccessfully sued for sexual harassment. The District Court found that the relationship he had with a co-worker was consensual and not 'unwelcome'. The plaintiff appealed and argued (in the notice of appeal) that the test for unwelcome should be an objective test. Although, this argument was apparently not pursued in the oral argument, the Court of Appeal took the opportunity to confirm that, the test is actually a mix of subjective and objective elements and that the plaintiff must first establish that, the conduct was subjectively unwelcome to that plaintiff. Although the test of 'unwelcome' is subjective, the employer must be careful not to assume that conduct was welcome just because it had become common place in the company or because most employees did not object to it.[24] However, in the *Aldridge v Booth* definition, there is indication that, there is an objective element as well, if the court finds that the plaintiff behaved (from an objective point of view) in a way that "solicited or invited",0 the conduct then may not be considered unwelcome.

Another term which needs interpretation is what constitutes a "hostile… environment." Hostile environment cases do generally depend upon a showing of a continued and pervasive atmosphere.[25] Whether an environment is hostile can be determined only by looking at the circumstances as a whole, which could include the frequency of the conduct, its severity, whether it is physically threatening or humiliating and the effect upon the plaintiff's working conditions.[26] This conclusion is well buttressed by the American case of *Harris v Forklift Systems Inc*.[27] where a magistrate found that the plaintiff had often been insulted because of her gender and was often the target of unwanted sexual innuendos. The plaintiff initially promised to stop "saying that he was only joking and that he did not realize that she was offended." However, he continued to make the sexual insults, including one as she was arranging a deal with a customer, "what did you promise the guy…some sex Saturday night?). She quit the job and sued. The District Court found for the defendant, on the ground that the conduct, while offensive, was not so severe as to be expected to seriously affect the plaintiff's psychological well-being. However, the Supreme Court rejected the test, holding that so long as the environment would be reasonably perceived, and is perceived, as hostile or abusive… there is no need for it also to be psychologically injurious. The American Courts have also weathered the storm as regards issues bothering on whether a victim must be aware of the harassment while it is occurring. Put differently, how can a person allege that an environment is hostile because of conduct that one is entirely unaware of? In *Liberty v Walt Disney World*,[28] a male employee had drilled holes in the walls of the female dancers' dressing area and videotaped them in various states of undress. The defendant argued (in a motion for summary judgment) that the plaintiffs' after-the-fact knowledge could serve as the basis for their perception that a hostile work environment existed.

Section 20 of the bill also provides that the person who engages in sexual harassment is liable to a fine when convicted of the offence. This type of penalty fails to acknowledge the serious and debilitating effect harassment has on victims. A victim of sexual harassment often feels hurt, humiliated and degraded. The more intimate and personal the nature of the harassment, the more injury to emotional well-being would be expected, so it is not enough to fine the harasser, the law should provide compensation for injury to feelings, take care of psychological impact of the harassment on the victim, ensure the victim is less vulnerable, compensate for

[23] (2001) 3 HKLRD 541
[24] Petersen C.J. (2002) "Sexual harassment in the workplace". Centre for Comparative and Public Law, The University of Hong Kong, Occasional Page No.4. pp 13, 14.
[25] Ibid
[26] Ibid
[27] 510 US 17 (1993)
[28] 912 F.Supp.1894, 1504 (MD Fla. 1995)

wages lost, consider re-instatement when necessary, and make up generally for lost employment opportunity.

Section 60 also expressly makes references to the term "conduct of sexual nature" made to the employee which creates an intimidating, hostile, degrading…" It is clear within the context of the provision that, it is the statement that needs to be sexual in nature not the motive for making the statement. Thus, sending or displaying unwelcome pornography to a woman can be considered "sexual conduct" regardless of whether the harasser sent the material for his own sexual gratification.[29] In similar vein, asking a woman explicit questions about her sexual life or her method of birth control, could also be considered conduct that is sexual in nature.[30] For example in *Hall & Ors v A & A Sheiban Pty Ltd & Ors,* [31] questions in pre-employment interviews as to whether applicants were having sex, with their boyfriends, using contraceptives, or had ever had an abortion, were held to constitute unlawful sexual harassment. In *Institu Cleaning Co. Ltd v Heads,* [32] it was held that, making insulting sexual comments about a woman's body can fall within the category of "conduct of a sexual nature", regardless of whether the defendant sought sexual gratification. In that case, the defendant had made insulting comments such as "…big tits" to the plaintiff at work. It was also held in the Hong Kong case of *Yuen Sha Sha v Tse Chi Pan,* [33] that acts of voyeurism, like secretly filming a woman while she undress, constitutes "conduct of a sexual nature" regardless of the motive of the defendant, because the court is not concerned with his motives at least, not for the purpose of determining liability. *In R v Court,* [34] the House of Lords stated that certain acts, such as removing a woman's cloths without her consent, are unambiguously indecent, regardless of whether the defendant acted out of sexual desire. We may add in this regard that, looking at an employee coquettishly can amount to conduct of sexual nature.

Apart from making provisions for sexual harassment in the workplace, the bill under its fundamental principles, abhors discrimination in the workplace, when it provides in its section 5 (1) as follows:

No employer or person acting on behalf of an employer shall discriminate against any employee or applicant for employment on the basis of his or her race, colour, sex, marital status, religion, political opinion, national extraction or tribe, social origin or real or perceived HIV/AIDS status by:

a. refusing to offer employment to an applicant;
b. not affording the employee access to opportunities for promotion, training or other benefits; dismissing the employee;
c. subjecting the employee to other detriment;
d. paying him or her at a rate of pay less than that payable to another employee, for work of equal value; or
e. screening for HIV status.

Discrimination in employment means being treated less fairly than someone else for reasons that are unrelated to one's ability to do a job. From the perspective of employees,

[29] See for example, *Robinson v Jacksonville Shipyards*, 760 F. sup. 1486 (MD Fla. 1990); *Horne & Anor v Press Clough Joint Venture & Anor* (1994) EOC 92-556 (Western Australian Equal Opportunity Tribunal)
[30] Peterson C.J. op. cit. 10
[31] 1989 EOC 92-50
[32] 1995 I RLR 4 at 5
[33] 1999 I HKC 731. For a more detailed discussion of this case, including the remedies awarded, see Petersen C.J. "Implementing Equality: An Analysis of two Recent Decisions under Hong Kong's Anti-Discrimination Lewis" (1999) 29 *Hong Kong Law Journal* 178 especially pp. 179-88)
[34] [1988]2 All ER 221

discrimination is a barrier to achievement of full potential and job satisfaction. For employers, failure to use employee's full potential means that the workplace will be less than fully productive and competitive.[35] It is therefore in the interest of all and sundry that workplaces are free of discrimination, with all decisions based on merit. Sexual harassment is one of the most subtle forms of discrimination.[36] Often victims of sexual harassment in the workplace do not receive lower pay, nor get passed over for promotions, not get fired because of their gender. Rather, sexual harassment discrimination occurs when someone can no longer do their job because their workplace has become permeated with sexual innuendo and other inappropriate behaviour.[37] It is therefore necessary to protect against this kind of discrimination which section 5(1) of the bill has taken care of. It is also without gainsaying that, section 5(1) echoes protections afforded under section 42(1) of the 1999 constitution [38] and in international instruments like CEDAW[39], Article 26 of the International Covenant on Civil and Political Rights as well as the African Charter on Human People's Rights .

As noted, Nigeria is yet to pass this bill into law. The bill represents a significant improvement on the previous labour legislation, and the earlier it is promulgated, the better to arrest the monster which over the years had and continue to threaten security and stability in the workplace environment.

Criminal Law of Lagos State, 2011

The Lagos State government's response to the challenge of sexual harassment is the inclusion in its criminal law code, a section devoted to the prohibition of harassment. The law prescribed three years imprisonment for transgressors.[40] The law protects everyone including people harassed in the workplace environment and imposes criminal sanctions. But this law cannot replace or provide remedies which a 'stand-alone' or a comprehensive dedicated legislation can offer. A dedicated legislation will not only define harassment or sexual harassment, but will also comprehensively touch on remedies available to the victim and even include the vicarious liability of the employer or master of the harasser. The other limitation of the Lagos law is that, it has territorial limitation, because it is not a federal act, and therefore limited in its application to Lagos State, which is one state out of the thirty-six states of the Federation of Nigeria and the Federal Capital Territory.

OTHER LAWS GUIDING AGAINST SEXUAL HARASSMENT AT THE WORKPLACE

Law of Trespass

Apart from laws enacted specifically to protect against sexual harassment, persons harassed in the workplace can seek protection under other laws. Sexual harassment in the workplace environment involves the use of words or gestures with a sexual undertone to another person in the workplace. Harassment may take the form of unwanted touches, starring, making of suggestive remarks, exposing oneself unduly, usually from one person to members of the opposite sex.[41]Although there is no common law tort of harassment, it could be brought under the torts of assault, where the act of the harasser constituted an act which put the claimant in reasonable apprehension of an immediate battery. In *Collins v Wilcock*,[42] an assault was defined as an act which causes another person to apprehend the infliction of immediate, unlawful force

[35] Discrimination and Sexual Harassment www. Professionalsausr…
[36]Sexual harassment employment. Findlaw.com
[37] ibid
[38] Constitution of The Federal Republic of Nigeria, 1999 as amended
[39] Convention on the elimination of all form of Discrimination Against Women , articles 1 &2
[40] Lagos State Criminal Code Law, 2011 section 262
[41] Nwogu M.I. "Violence Against Women and Sexual Harassment in the work place" *Unizik Law Journal* 7(1)
[42] [1984] 3 All ER 374

on his person. The victim could also make a claim for the tort of battery, which normally goes together with assault. Battery is committed if a person's body is interfered without consent, but such interference is differentiated from physical contact which is generally acceptable in the ordinary conduct of everyday life. Goff LJ succinctly, puts it that, the fundamental principle is that every person's body is inviolate. Interference with a person's body will generally be unlawful where they never consented to it, but there is also a broad exception to allow for exigencies of everyday life, such as jostlings in the street and social contact at parties.[43] Battery is only committed if there is some contact with the claimant and therefore merely obstructing the claimant's progress without any contract is not a battery. Such an act could be subsumed under the tort of false imprisonment. John Cooke defined false imprisonment, as the unlawful imposition of constraint on another's freedom of movement from a particular place.[44] Associated with trespass to person is the rule in *Wilkinson v Downton,*[45] under which a claimant is allowed to claim damages for physical damage or recognizable psychiatric injury if rudeness and unfriendliness in the workplace infringes on the claimant's right to personal safety.[46] The victim of sexual harassment may also opt to have the harasser charged with assault under criminal law. In criminal law the word assault is wider as revealed in its meaning under section 252 of the Criminal Code, as it covers the meanings of both assault and battery. The section provides as follows:

> *A person who strikes, touches or moves or otherwise applies force of any kind to the person of another, either directly or indirectly, without consent, or with his consent, if the consent is obtained by fraud, or who by any bodily act or gesture attempts or threatens to apply force of any kind to the person of another without his consent, in such circumstances that the person making the attempt or threat has actually or apparently a present ability to effect his purpose, is said to assault that other person and the act is called an assault…*[47]

The section requires that where a person attempts or threatens to apply force on another person, he shall have actually or apparently a present ability to effect his purpose. Okonkwo and Naish[48] illustrate this point thus:

> *If A points a loaded gun at B this is an assault because A has actually a present ability to effects his purpose. If unknown to B the gun is not loaded, but A purports it to be loaded, this is an assault because A has apparently a present ability to effect his purpose.*

Although section 252 is silent and says nothing about the victim's, state of mind, Okonkwo and Nais, submit that Nigerian courts will follow English law in holding that there must be caused in the victim's mind some expectation of immediate force. The English courts have often given a fairly generous interpretation of the concept of immediacy in this context.[49] In *Smith v Chief Superintendent, Woking Police Station*[50] the victim was at home in her ground floor bedsit dressed only in her night dress. She was terrified when she suddenly saw the defendant standing in her garden, staring at her through the window. He was found liable for assault, on the ground that the victim feared the immediate infliction of force, even though she was safely locked inside. The requirement of immediacy was further weakened by the Court of Appeal

[43] Ibid
[44] *Law of Tort* (2005), 7th Edition. Pearson Education Ltd. 365 see also *Angoro v Anebuwa* (1966) NNLR 87.
[45] [1897] 2QB 57
[46] *Wong v Parkside Health NHS Trust* 9 (2001)3 All ER 932.
[47] Criminal Code Act, cap C38 LFN section 252.
[48] Okonkwo Cyprian & Michael Naish (1992) *Criminal Law of Nigeria (excluding the North)* 2nd ed. Sweet & Maxwell p20
[49] Catherin Elliott and Frances Quin (2004) *Criminal Law* 5th Ed. Pearson Education Ltd, p108.
[50] [1993] Crim L R 323

decision in R v Ireland[51]. In that case the defendant had made numerous unwanted telephone calls to three different women, remaining silent when they answered the phone. All three victims suffered significant psychological symptoms such as palpitations, cold sweats, anxiety, inability to sleep, dizziness and stress as a result of the repeated calls. He was convicted under section 47 of the Offences Against the Person Act, 1861.

The gravamen of this offence is that, for the accused to be liable there must have been an assault. Ireland appealed against his conviction on the ground that, there was no assault since the requirement of immediacy had not been satisfied. In dismissing his appeal, the English Court of Appeal stated that the requirement of immediacy was in fact satisfied as, by using the telephone the appellant had put himself in immediate contact with the victims and when the victims lifted the telephone they were placed in immediate fear and suffered psychological damage and that it was not necessary for there to be physical proximity between the defendant and the victim. In another stalking case, *R v Constanza*,[52] the concept of immediacy was further weakened, where the victim had been stalked over a prolonged period of time, the English Court of Appeal stated that, in order to incur liability for assault, it is enough for the prosecution to prove a fear of violence at some time and not excluding the immediate future. The further implication of the *Constanza case* is that, there would be no need to fear the immediate infliction of force in the sense of a battery; the offence would include fearing some other type of injury, notably psychological damage.[53]This generous interpretation, as shown the way by the English Courts discussed will alleviate the burden of proof placed on victims of assault and battery.

Criminal Law

Although false imprisonment is also a crime at common law, section 365 of the Criminal Code Act codifies the common law, by providing that any person who unlawfully confines or detains another in any place against his will, or otherwise unlawfully deprives another of his personal liberty is guilty of a misdemeanour, and is liable to imprisonment for two years. Thus a person restrained unlawfully at a workplace can have the restrainer convicted under section 365 of the Criminal Code Act. A harasser could also be convicted and given a more severe punishment if an assault results in grievous harm to the victim. The harasser risks a term of seven years in prison by virtue of section 335 of the CCA.

The Criminal Code also prescribes punishment for sexual offences. Rape is the most serious sexual offence and is punishable with imprisonment for life with or without whipping by virtue of section 358 of Criminal Code Act. The offence is defined in section 357 of the Criminal Code Act as:

> *Any person who has unlawful carnal knowledge of a woman or girl, without her consent, or with her consent, if the consent is obtained by force or by means of threat or intimidation of any kind, or by fear of harm, or by means of false and fraudulent representation as to the nature of the act…*

From this definition, only a man can be a defendant to a charge of rape, a woman can not commit rape. However a woman may be charged with the offence by virtue of section 7 of the Criminal Code Act for aiding, counseling or procuring the commission of the offence. For example in *R v Ram, [54]* the wife of a man who raped a maid was convicted as principal in the

[51] [1998] AC 147
[52] [1997] 2 Cr App. R 492.
[53] Catherin Elliot and Frances Quin op. cit. p.110
[54] (1893) 17 Cox 609

second degree. Lately in *DPP v K&C,*[55] two teenage girls were convicted as accomplices to a rape. Thus an employer or an employee who rapes a fellow employee could be charged with rape as well as other employees identified as accomplices to the crime. The Criminal Code Act also envisages that for the purpose of rape there must be penetration of the virgina by the penis and therefore excludes anal penetration or even oral intercourse. The law of rape must be extended so that, men as well as women could be victims of rape and further extended to cover oral intercourse.

From section 357 of the Criminal Code Act, it is the absence of the victim's consent that transforms sexual intercourse into rape. Consent obtained by force or by means of threats or intimidation or fear of harm is no consent. Consent given because of exhaustion after persistent struggle and resistance would appear to be no consent.[56] A victim's consent must be real and not a mere submission given under pressure. In R v Olugboja[57] the defendant threatened to keep a girl in his bungalow overnight. He made no explicit threat of violence and she did not resist sexual intercourse. The court said that on the evidence, she had not given a genuine consent, but had merely submitted under pressure of his threat. In practice, the line between a mere submission and consent is not an easy one to draw.[58] It used to be that, it had to be shown that the sexual intercourse had been obtained by force, but this is no longer a requirement. The sole question is whether the victim gave a genuine consent. In *R v Larfer and Castleton*[59], the defendant had sexual intercourse with a woman while she was asleep. The court of Appeal upheld his conviction for rape, emphasizing that the key issue was whether or not the victim had consented to sexual intercourse, if not, the fact that no force was used would not prevent the act being rape.[60]

Incidence of rape is still high but the rate of conviction is low. This is no thanks to the trial process which has a tendency to cause the victim a lot of distress. A major obstacle in getting convictions especially in a workplace incident is that, prosecution has to prove that the complainant did not consent to sexual intercourse. Frequently the purported attack will have taken place in a locked office, sometimes during closing hours and the attacker will argue that sexual intercourse took place, but that the complainant consented. It will then be the defendant's word against the complainant's. It may also be that, they were sexual partners before and thus allowing the defendant to argue that consent was given willy nilly. Thus, the focus of the trial will then move from the defendant to the complainant to determine whether or not she consented. The resultant effect of all these is that, the trial becomes a gruesome experience for the complainant, as her past sexual history is discussed in open court and the complaint feeling as if she had been put on trial rather than the defendant. With such a scenario, the court will find it difficult to convict, because evidence of a woman's past history may give the court a bad impression of the victim and make it appear that she is not a credible witness. The insinuation being that a woman who has had an active sex life with men other than a husband is immoral and cannot be trusted generally. [61]

Another perplexing issue is how to classify intercourse obtained by promising to employ or not to retrench the victim. With regards to retrenchment or disengagement from employment, submission obtained from such threat or intimidation can be subsumed under section 357

[55] (1997) 1 Cr. App. R. 36
[56] Okonkwo & Naish op. cit. p.267
[57] [1981] l WLR 1382 (HL)
[58] Catherine Elliot and Frances Quin, op. cit. p 129.
[59] (1995) Crime LR 129
[60] The latter case of *R v Malone*, (1998) 2 Cr. App. R. 447 took the same approach.
[61] Elliot & Quin, op. cit. 134.

Criminal Code Act, which states that consent obtained through threats or intimidation is no consent. Currently there still remain problems with the law's focus on whether the victim consented and a writer S.Box,[62] has suggested that a way out of this imbroglio is that coercion and not consent should be the central issue. For example, where a man or in this case an employer or supervisor is in position to impose sanctions for refusal, his ability to coerce the victim should be the key question, and not her consent. Box points out that the law currently focuses on the man's physical superiority, but ignores his social, economic and organizational superiority.

DEFAMATION

Publication of defamatory matter is both a civil wrong and a criminal offence because of its tendency to arouse angry passion, provocative revenge and thus endanger the public peace.[63] The offence is not often prosecuted because it is usually treated as a tort. Defamation is defined as the publication of a statement which tends to lower a person in the estimation of right-thinking members of society generally; or which tends to make them shun or avoid that person.[64] Thus an employee whose reputation is damaged or who is exposed to hatred, ridicule or is shun by reasonable members of the public by a perjured communication of any information concerning such as employee can seek redress in the law court. In *Atoyebi v Odudu*[65] the defendants/respondents published a disclaimer notice in a newspaper in respect of the plaintiff appellant, a former employee alleging misconduct. The plaintiff/appellant brought action for defamation. The Supreme Court held that, the defendants/respondents were liable for defamation as the allegation was written.

TRAJECTORIES OF SEXUAL HARASSMENT

The phenomenon of sexual harassment is complex, not always unidirectional and most often down played by all concerned, and rarely reported, but considered as a serious social problem in the organizational environment. As such, its trajectories have become thorny issues in most workplace relations particularly in Nigeria. They are also part of what shapes a negative institutional climate and negative outcomes in the workplace environment. The negative impacts are experienced alike by victims, perpetrators and the workplace. However, the consequences of sexual harassment vary from person to person and are contingent upon the gravity, seriousness and duration of the act. These trajectories in the workplace could bring reactions which may be emotional, physiological and behavioural. Emotionally, the reactions may result in anxiety, fear, anger, panic attacks and even depression. Physiologically, affected individuals may develop difficulty in concentration, illness and have problems with sleeping. Behaviourally, some victims may resort into isolation and withdrawal, have overall loss of trust in people, loss of self-esteem, makes attempt to quit the environment or attempt suicidal thought. These reactions are significant barriers to workforce commitment and optimum performance in most Nigerian work organization.

Today, sexual harassment is prevalent not only in the workplace, but in educational institutions as well. [66] It occurs across gender lines and across sexual orientation line in the Nigerian organisational environment. This horrendous unethical conduct which is a crime has now actively moved from the realm of mystery to an outburst of emotional immorality in the workplace. Its array of behavioural forms are many and include verbal acts such as: lewd or

[62] In his book *Power, Crime and Mystification* (1983) cited by Elliot & Quin op. cit. at p.138.
[63] Per Lush J. in *R v Holbrook* (1878) 4 Q B 42 at 46
[64] Winfield & Jolowicz (1950) *Law of Tort,* 5th ed. p. 242; Ese Malemi (2008) *Law of Tort* 1st ed. Princeton Publishing Co. p. 409.
[65] [1990] 6 NWLR (pt157) p. 384 SC.
[66] Joseph, S. op. cit.

suggestive remarks, name calling, verbal sexual teasing and sexually suggestive jokes, comments or questions. The non-verbal forms are flirtatious eye contact, staring at somebody, visual leering, liking lips, unwanted sexual favour or date and displaying pornography. The physical acts amongst others include physical assault, unwanted touching or pinching, unwanted pressures for sexual favours with implied threats or job related consequences for noncooperation standing closer than appropriate or necessary and rape.[67] Thus, these unwanton act highly influence the lives of victims in many negative ways. They are not only physical abuse, but also an emotional mental torture which often walks with them through their lives.

In consequence, sexual harassment undermines the integrity of the workplace environment in Nigerian and prevents its victims and their peers from achieving their maximum potential at work. This is simply because sexual harassment can result in mental, physical and social discomfort.[68] The creation of an intimidating, hostile or offensive workplace environment may present organisations from achieving their optimum productivity. Apart from this, the psychological effect of sexual harassment can also decrease employee job satisfaction, increase absenteeism at work and impair the entire workforce morale. As was put by some authors[69], sexual harassment can cause persons physiological and psychological harm, such as feeling of helplessness, decrease motivation, headache, sleep disturbances as well as decrease morale and lower grades. It also creates loss of trust in workplace environment. The victims and perpetrators may be objectified and humiliated by scrutiny and gossips which may even lead to loss of job or career. It may also be a subject of defamation of character and reputation in the law court if not well handled. Management in work organisations must therefore be responsive to cases of sexual harassment and be affirmative by not compromising or allowing it to thrive in the organizational environment. If the trajectories are ignored, organisations' image can suffer among employees, clients, potential customers as well as the general public. Health care costs can increase because of health consequences of harassment apart from the legal costs if the victims file law suit after complaints are ignored or mishandled.

Remediating Sexual Harassment in Work Organisations

Any attempt to address the issue of sexual harassment must take an all-inclusive and holistic approach to the problem by stakeholders in work-organisations. This would require an effective implementation of grievance redressing mechanism well documented in the sexual harassment policy. The policy must give a lucid explanation of what constitutes sexual harassment in the work-organisation, well defined complaint process, an efficient management system of intake and a body for conciliation and complaint investigation, legal aid cell and a psychological assistance center headed by experts.

The language of the policy and other relevant material on sexual harassment offered by the organization should be framed and adjusted to become more supportive towards the employees. It should be unambiguously documented that people matter more than institutions. Information about sexual harassment services and procedures should be clear and concise and provide the reader with the support and compliant procedures in a logical and transparent manner. High visibility and easy accessibility should also be the guiding principles of information provision for victims of sexual harassment. As such, effective machineries that will encourage harassed employees to make report without reprisals must be established.

[67] Imonikhe J., Aluede O. & J. Idogho, P. (2011). "A Survey of Teachers and Students' Perception of Sexual Harassment in Tertiary Institutions in Edo State, Nigeria" *African Research Review* 5(1) pp. 412-423.
[68] Ogunbameru, op. cit
[69] Paludi, et al op. cit.

Complaints procedures must also be free from decontextualizing particular sex in the work-organisation in order to create zero tolerance in sexual harassment cases.

Seminars, workshops and awareness programmes need to be well-organised to disseminate the sexual harassment policy to all the organizational members and to sensitize them on the problems and implications of the social malfeasance. These workshops and seminars which should be mandatory for all employees will send signals that the organization has zero tolerance for sexual harassment. Sexual harassment issues should be affirmatively discussed at management meeting, labour- management meeting and at all levels in the organizational hierarchy. Cases of sexual harassment must be treated as misconduct and disciplinary proceedings of the establishment must be invoked against the alleged person. However, the organization must not only give guarantee about confidentiality to either party, but measures must be taken to ensure that the investigation is confidential as possible. The organization must maintain transparency to ensure that justice is not delayed. If efforts to remediate sexual harassment is to be fruitful, organisations should see the act not as a personal problem, but a social one, hence its control must be jointly handled by all stakeholders in organisations.

CONCLUSION

Sexual Harassment is not just a violation of human dignity and equality guaranteed in every civilized societal setting, it is also a violation of the greatest of all rights, which is the right to life. This work acknowledges that the unwanton act is not only peculiar to Nigeria, but also prevalent in the developed nations. These nations however, have risen to challenges posed by the dehumanising debacle, by putting in place, policies and legislation aimed at containing the menace. The response of Nigeria, is by enacting the Sexual Harassment Prohibition Act, 2006 which as observed in this work, is restricted to the protection of students in tertiary institutions, against harassment by randy lecturers and other functionaries in the tertiary education sector. The paper acknowledges the tremendous advancement made by Lagos State with the inclusion in its Criminal Code, a section on prohibition of harassment, but regrets the restrictive application of the law, because of its limited sphere of jurisdiction to Lagos State.

The paper does not lose sight of the Labour Standards Bill, 2008 which is still in the works and which is meant to replace the Labour Act, 1990. The bill as noted in this paper, innovatively includes provisions on sexual harassment in the workplace environment as well as anti-discrimination in the workplace. No further movement should be spared in passing this bill into law. The paper also notes some aspects of Tort law and Criminal law which could be invoked, by victims of harassment to get the attention of the courts.

In addition, the paper traces the trajectories of the phenomenon of sexual harassment, which the authors admit is complex and noted its debilitating effect on the workplace environment and potential of undermining an organisations ability of achieving optimum productivity if unshackled and allowed to run amok. To address the phenomenon, the paper posits that, the issue of Sexual Harassment must be approached in an all-inclusive and holistic manner, through the adoption and articulation of well documented advertised policies in the workplace, sensitising workers on the problems and implications of the malaise in concise language and encourage harassed persons to make reports without fear of reprisal or intimidation and putting in place an effective implementation of grievances redress mechanism well documented in the sexual harassment policies. The cost and complex nature of litigation may be avoided if legislative measures are allowed to go hand in hand with employee awareness of the evil effect as well as the consequences of sexual harassment in the workplace.