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Sexual Harassment, status and reasons of contemporary legal recognition

Comparing international, regional, and domestic legal frameworks: focus on Italy and Japan

Supervisor:
Ch. Prof. Sara De Vido

Assistant Supervisor:
Ch. Prof. Rosa Caroli

Graduand:
Giulia Valenti
Matricolation Number 846100

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Abstract

Il concetto di molestai sessuale, *sexual harassment*, nasce nei tardi anni ’70 per opera di un gruppo di femministe statunitensi, le quali si resero conto che molte donne erano soggette ad attenzioni non gradite e ricatti di natura sessuale sul luogo di lavoro. La prima immagine di molestia riguardava dunque prettamente la soddisfazione di istinti sessuali a scapito delle donne nel mondo lavorativo, ma diffondendosi oltre i confini americani, le interpretazioni di questo concetto assunsero nuovi connotati. La molestia sessuale fu gradualmente riconosciuta come discriminazione di genere incentrata sulla conservazione delle tradizionali strutture di potere tra uomo e donna, e, sebbene sia riconosciuto che essa possa, in percentuali di molto inferiori, interessare anche vittime di genere maschile, è ampiamente condivisa l’idea che essa si manifesti come abuso di potere verso coloro che meno aderiscono agli stereotipi di genere.

Il dibattito filosofico ha però visto molte figure, anche femministe, opporsi a determinate frange interpretative della questione, in particolare in merito a quella che in inglese viene chiamata *“hostile environment” harassment.* Questo tipo di molestia si manifesterebbe nell’utilizzo di linguaggio ed atteggiamenti sessisti, non di natura sessuale, che influirebbero negativamente sulla pacifica fruibilità del luogo di lavoro, ma chi si oppone a tale dottrina affermerebbe che regolare questo tipo di scambi interpersonale finirebbe per interferire inevitabilmente con le normali interazioni e la libertà di parola di ciascun individuo. È forse interessante osservare come, sulla base di statistiche e questionari, appaia evidente che siano principalmente uomini coloro a temere di vedere limitata la propria libertà di espressione, al fronte di donne più propense ad esprimere dubbi in merito a questi provvedimenti poiché, là dove estremizzati, potrebbe portare all’ingiusta colpevolizzazione di atti “giocosi e innocenti”.

La discussione riguardo alle discriminazioni che influiscono sull’ambiente lavorativo resta ad oggi un terreno molto acceso e controverso, ma è indubbio che questo generale clima, volto a valutare come più grave l’impossibilità di esprimersi in termini svilenti e discriminatori verso una persona in virtù del suo genere, piuttosto che il dover subire continue aggressioni, sebbene indirette, alla propria identità, cela complicate questioni di trivializzazione e minimizzazione di un fenomeno considerato tuttalpiù lievemente invadente e fastidioso dalla maggior parte della popolazione.

Infine, solo recentemente le politiche contrarie alla molestia sessuale hanno iniziato a considerare ed affrontare anche la delicata questione delle molestie perpetrate fuori dall’ambiente lavorativo, in particolare quelle commesse in luoghi pubblici, mezzi di trasporto in primis, che erano state fino a poco tempo fa ignorate, o almeno trattate con superficialità e banalizzate come atti normalmente appartenenti all’interazione tra i sessi.

Ad oggi, è possibile osservare come la molestia sessuale sia un problema largamente diffuso in tutto il mondo. Il movimento #MeToo ed il recente dibattito scatenatosi sui social media italiani in merito al cat-calling ne sono una mera testimonianza, ma l'incidenza del problema è tale che la maggior parte delle donne si è trovata nei panni di una vittima di molestia almeno una volta nella vita. Le statistiche pubblicate dal Consiglio di Europa a livello regionale indicano che almeno una donna su tre ha subito violenza sessuale almeno una volta nella vita, e nel 55% dei casi si trattava di molestia sessuale[1]. Sfortunatamente le stesse statistiche indicano che soltanto il 14% delle vittime sceglie di denunciare quanto accaduto ed il fenomeno resta dunque fuori dal mirino dell'attenzione pubblica[2].
Dietro a questi elevati numeri e alla bassa propensione alla denuncia si celano moltissimi meccanismi che possiamo in larga parte ricollegare ad una serie di norme sociali, gender bias e stereotipi, i quali operano attivamente nell'impedire una corretta implementazione degli esistenti provvedimenti legali. Tuttavia, non è solo la mancata implementazione di tali provvedimenti a preoccupare, ma anche, e soprattutto, la totale mancanza di consapevolezza in merito.
Il grande pubblico non solo sembra giustificare e trivializzare la molestia non riconoscendola come forma di violenza sessuale, ma in larga parte non è nemmeno consapevole dell'esistenza o meno della sopracitata normativa, tanto che tra i vari motivi riportati dalle vittime come giustificazione alla non denuncia spicca in modo allarmante l'ignoranza sulle esistenti misure cui fare appello e il timore che, anche potendo teoricamente intervenire, la legge non sarebbe in grado di trovare applicazione pratica.
Questa tesi intende dunque operare una ricerca che sia in grado di rispondere alla domanda "Quale è lo stato attuale dello sviluppo normativo in merito alle molestie sessuale?" e da ciò dedurre se il livello raggiunto sia effettivamente in grado di contrastare questa vile pratica e tutelare le eventuali vittime. Per farlo, l'indagine è stata sviluppata su più livelli di diritto, a partire da quello internazionale, per poi passare a quello regionale, analizzando la situazione di Asia e Europa, e concludere con quello nazionale, portando Italia e Giappone come casi di studio. La scelta è ricaduta su questi due paesi in virtù della loro opposta posizione geografica a contrasto con molte similitudini di tipo storico-sociale, quali una forte tradizione ancora molto radicata nella mentalità comune e una similare storia successiva al secondo dopo guerra che ha visto questi due paesi, entrambi sconfitti, effettuare una crescita economica senza precedenti.
In una prima parentesi linguistica abbiamo osservato come l'interazione tra diverse interpretazioni filosofiche, modellatesi anche sotto l'influenza di tradizioni politiche nazionali, e diverso sviluppo ed accettazione linguistica assunta da tutta una serie di termini in uso su scala locale per indicare la

[1] RUBIO-MARIN Ruth, "Women in Europe and in the world: The state of the Union 2016", *International Journal of Constitutional Law,* 01 July 2016, Vol.14(3), p.547-548.
[2] *Ibidem.*

molestia sessuale abbiano direttamente influito sulla vastità di azioni legalmente riconosciute come appartenenti allo spettro della molestia.

Fatta questa doverosa premessa, sono stati dunque esaminati i vari attori e strumenti giuridici coinvolti nella lotta a questo fenomeno e ciò che ne è emerso conferma una situazione normativa in costante sviluppo, ma che ancora presenta svariati ritardi e debolezze.

Affrontata sempre nell'ambito della violenza di genere sul luogo di lavoro, la molestia sessuale si è raramente erta ad argomento tale da essere trattato nella sua singolarità, eccezione fatta per la *Convenzione C190 dell'OIL contro la violenza e la molestia*, che tratta questo argomento proprio in virtù del suo diretto impatto sulle normative in ambiente lavorativo. Una serie di dichiarazioni e raccomandazioni generali hanno fornito ampia interpretazione del fenomeno e pratici modelli di prevenzione e di sanzione a cui fare riferimento, ma il loro impatto non è stato tale da provocare un'internazionale conformazione a standard comuni di sicurezza. A livello regionale, infatti, le organizzazioni ASEAN da una parte e Consiglio d'Europa ed Unione Europea dall'altra hanno intrapreso percorsi di regolarizzazione diametralmente opposti. Da un lato quello estremamente permissivo dell'ASEAN, dall'altro quello estremamente innovativo del Consiglio d'Europa e quello autorevole e dettagliato dell'Unione Europea. Inoltre, quelle stesse sopracitate dichiarazioni e raccomandazioni hanno reso possibile l'estensione dell'impegno vincolante preso con la *Convenzione sull'eliminazione di ogni forma di discriminazione della donna* in merito alla discriminazione, a nuovi campi di applicazione, tra cui la violenza di genere, inclusa di molestia.

Tutta questa agitazione normativa su piano internazionale e regionale, ha positivamente influito sullo sviluppo dei provvedimenti interni, ma la situazione è lungi dal raggiungimento di uno stato ideale. In primis, si può osservare sia in Italia che in Giappone, una grande confusione data dall'impiego di disposizioni provenienti da differenti campi di legalità. Inoltre, possiamo constatare da un lato, in Italia, un mancato esplicito riconoscimento giuridico della questione, e dall'altro, in Giappone, un'assenza di provvedimenti pratici.

In conclusione, questa mancata implementazione giuridica delle esistenti misure legali e questo allarmante ritardo normativo si sono rivelati essere direttamente collegati ad una serie di questioni socioculturali, tra cui spicca l'esistenza di contrastanti aspettative legate a ruoli sociali. Ciò crea vari fenomeni di opposizione tra quello che è il comportamento legalmente previsto di fronte ad un evento, e quella che è invece l'aspettativa del gruppo sociale di appartenenza. Questa tesi può offrire solo un limitato numero di suggerimenti su come limitare, tramite ordinamento giuridico, l'influenza di tali strutture sociali, ma è evidente che per quanto doverosamente implementabile e perfezionabile, la legge da sola non potrà eradicare questo comportamento se non supportata da profondi cambiamenti sociali.

Table of Abbreviations

ACW – ASEAN Committee on Women

ACWC – ASEAN Commission of the Promotion and Protection of the Rights of Women and Children

AICHR – ASEAN Intergovernmental Commission on Human Rights

AJET – Association for Japan Exchange and Teaching

AMMW – ASEAN Ministerial Meeting on Women

AMS – ASEAN Member State

APA – ASEAN Plan of Action

ASEAN – Association of South-East Asian Nations

CEDAW – Convention on the Elimination of All Forms of Discrimination against Women

CoE – Council of Europe

CRC – Convention on the Rights of the Child

CSO – Civil Society Organization

CSW – Commission on the Status of Women

DAW – Division for the Advancement of Women

DEVAW – Declaration on the Elimination of Violence Against Women

ECHR – European Convention on Human Rights

ECtHR – European Court of Human Rights

ECOSOC – Economic and Social Council

EU – European Union

FAO – Food and Agriculture Organization

GA – General Assembly

GBV – Gender-based Violence

GR – General Recommendation

HDI – Human Development Index

HRC – Human Rights Committee

IAIE – International Association for Intercultural Education

ICC – International Criminal Court

ICCPR – International Covenant on Civil and Political Rights

ICESCR – International Covenant of Economic, Social and Cultural Rights

ILO – International Labour Organisation

INSTRAW – International Research and Training Institute for the Advancement of Women

ISTAT – Istituto Nazionale di Statistica

LSH – Likelihood to Sexual Harass

NGO – Non-Governmental Organization

OHCHR – Office of the High Commissioner for Human Rights

OP-CEDAW – Optional Protocol CEDAW

OSAGI – Office of the Special Adviser on Gender Issues and Advancement of Women

PACE- Parliamentary Assembly of Council of Europe

RPA EVAW –ASEAN Regional Plan of Action on Elimination of Violence Against Women

SHMA – Sexual Harassment Myth Acceptance

UDHR – Universal Declaration of Human Rights

UN – United Nations

UNDP – United Nations Development Programme

UNESCO – United Nations Educational, Scientific and Cultural Organization

UNHCR – United Nations High Commissioner for Refugees

UNICEF – United Nations International Children Emergency Fund

UNIFEM – United Nations Development Fund for Women

UN Women – United Nations Entity for Gender Equality and Empowerment of Women

VAW – Violence Against Women

Women Committee – Committee on the Elimination of Discrimination Against Women

WHO – World Health Organization

WIPO – World Intellectual Property Organization

INTRODUCTION

Did someone ever scream petty sexual comments at you while walking on the street? Have you ever heard a friend saying, "He touched me, and I was uncomfortable, but it's not such a big deal", or "Someone grope me on the train, but this kind of things happen"? Have you ever been followed by an unknow individual while walking back home? These events are not rare, they affected me personally and, in the same way, they affect millions of women, and not only women, every day.

Just a couple of days ago, a friend communicated me the decision of resigning. That person was working as a pizza chef but was combined with a male colleague whose favourite entertainment was continuously sharing sexual jokes and comments with the target. After weeks of asking about the witness's sexual interests and practices, and episodes in which he had also arbitrarily exposed himself, the last drop was his attempt to raise the target's shirt way over the breast line, allegedly without malicious intents but simply as a joke. The decision of resigning was enforced by the target's father commenting: "You're not the first one. Everyone know he is like this; you should simply stay away from him. Probably he has some mental issues." and by the employers neutral answer: "I'm sorry for your decision. Catering industry can be complicated." Even the attempt to submit an official complaint to the police was met with the policeman's trivialisation of the event: "He barely touched you and you never received any threats. Your denunciation will be pointless" and ended up with no complaint's submission and a deep sense of debasement.

If direct witnesses are not enough, we should maybe consider the #MeToo campaign. Started in 2017, this movement was meant to denounce sexual violence and the general forgiving or overlooking social clime surrounding this topic, especially in the working field. These events were so common that the first reports had a knock-off effect, obtaining a worldwide response and acknowledgement[3].

While #MeToo denounced, and after years is still denouncing, the phenomenon of sexual violence at work, in the last months in Italy, the tweet of a notorious singer set off a heated debate about cat-calling and other kinds of sexual harassment on the street, that encountered much support and opposition at the same time by an enormous number of people online, reaching the level of a national media debate[4].

All these widely discussed acts, justified by people's ignorance and by social trivialization, would be defined by the literature as "sexual harassment". Feminist philosophers, jurists, sociologists and

[3] PIZZINGRILLI Nataly, "#MeToo: evoluzione e rivoluzione", 08 March 2021, https://www.treccani.it/magazine/atlante/societa/MeToo_evoluzione_rivoluzione.html (consulted on 10 May 2021).

[4] N.a., "Cos'è il catcalling, il significato del termine e perché è importante parlarne", *SkyTg24*, 02 April 2021, https://tg24.sky.it/cronaca/approfondimenti/catcalling-significato (consulted on 10 May 2021).

psychologists have investigated this topic from the most dissimilar points of view, but to the general public it still appears as an extremely nebulous concept.

1. Discourse on gender-based discrimination: the origins of sexual harassment

Sexual harassment became a socially important topic of debate during '80s, when it was interpretated as regarding only the working field, but to the present day it still remains a controversial theme. Theory has produced different interpretations, meanings and definitions of the term and for this reason researches on the incidence and characteristics of the problem have created different outcomes, both about data collection and about the most proper measures to counter the phenomenon. Feminist philosophers have conceived different categorizations of sexual harassment in the workplace[5]. Catherine MacKinnon has divided the forms of aggression between *quid pro quo* and conditions of work, Till has preferred a division on 5 levels (gender harassment, seductive behaviour, sexual bribery, threat and sexual imposition), while Fitzgerald, through her Sexual Experiences Questionnaire meant to provide validity and reliability, has directly categorized those subgroups on the base of severity, type of harassment and form of coercion. What she found out was that usually gender harassment, harassment that creates an uncomfortable and distressful working environment through sexist remarks or display of sexist outputs, though not oriented to a sexual satisfaction, was considered as a different type of issue that does not share the same perceptual space of other kinds of sexual harassment. At the same time, comparing Till and MacKinnon's works, she equated sexual bribery and threat to *quid pro quo* harassment, and seduction and sexual imposition to conditions of work. Threats and sexual imposition were perceived as more severe, and, while sexual bribery was considered a form of psychological coercion and sexual imposition a form of physical coercion, threat and seduction could usually take both shapes[6].

These results clarify how sexual harassment is a multidimensional problem, and how sexual harassment in all its forms, the more and the less severe, including gender harassment, should be properly challenged as a grave type of sex discrimination creating a barrier to women's career development and, more widely, enjoyment of life[7].

[5] FITZGERALD Louise F. and HESSON-MCINNIS Matthew, "The dimensions of sexual harassment: A structural analysis", *Journal of Vocational Behaviour,* December 1989, Vol.35(3), p.309-311.
[6] *Ibid.* p.316-322.
[7] *Ibid.* p.322-35.

In fact, the original debate on sexual harassment began with the consideration that not only it was a problem that affected mostly women (even though there can be male victims), but also that it was not only related to sexual desire, as most people initially thought, but to power and sex-related social interactions as well. Schwartz calls it the "*sex per se*" notion, meaning that it affects victims as a consequence of their sex, and it is therefore a clear form of sex discrimination[8].

Accordingly, Catherine MacKinnon states sexual harassment is not a matter of sexuality, but a problem of power[9], and Katherine Franke describes sexual harassment as the "technology of sexism" through which men police the boundaries of gender. Briefly, sexual harassment is one of the methods men employ to perpetrate gender stereotypes and exclude women from certain privileges. It is in fact not by chance that men suffering sexual harassment are usually those whose masculinity is considered unsuitable for their privileged hierarchical position[10].

Sexual harassment is based on an abuse of power or authority that interferes with work performance and creates a hostile environment. The intentions of the perpetrator are not relevant as long as the behaviour is perceived as threatening[11]. Moreover, the kind of abused power can be of different typologies. Cleveland and Kerst identify biological power (physical strength that makes men naturally stronger than women), societal power (since society considers men as having more value than women) and formal organizational power (hierarchical role inside the company). French and Raven prefer instead a subdivision between: legitimate power (when one has the authority to influence social agencies), coercive power (when one has the authority to provide punishment), reward power (one has the ability to promote positive enforcement), referent power (the victim identifies and subdues to social agents), expert power (when the agent has more knowledge so is expected to act more wisely), informational power (derived from the content of certain information). All these kinds of power could contrast with each other creating "contrapower", and result in extremely intrusive level of "counterproductive work behaviour"[12], that negatively affects victims' work conditions.

Indeed, the abuse of these forms of authorities contribute to women segregation. Sex discrimination in employment is already explicated by a working field where, despite legal bans, women have lower wages, work mainly in low income working sectors and are underrepresented at the managerial level. In this situation it appears increasingly clear that sexual harassment is a form of discrimination as

[8] SCHWARTZ David S., "When is Sex Because of Sex? The Causation Problem in Sexual Harassment Law", *University of Pennsylvania Law Review,* June 2002, Vol.150(6), p.1699-1705.

[9] COOPER Cristine G., "Review of Sexual Harassment of Working Women by Catharine A. Mackinnon", *University of Chicago Law Review*, 1981, p. 185.

[10] GOLDSMITH E. and SCHULTZ V., "Sexual harassment: Legal Perspectives", *International Encyclopedia of the Social & Behavioral Sciences,* Elsevier Ldt, 2001, p.13983-13984.

[11] POPOVICH Paula M. and WARREN Michael A., "The role of power in sexual harassment as a counterproductive behavior in organizations", *Human Resource Management Review,* March 2010, Vol.20(1), p.47-48.

[12] *Ibid.* p.49-52.

well. Traditionally gendered occupation, low status and low income are directly correlated to higher level of harassment. Overt discrimination and sexual harassment are intercorrelated and together they contribute to enforce women's impossibility to freely enjoy their working life[13]. Moreover, sexual harassment, stimulating women's withdrawal, contributes to enforce the "glass ceiling", an invisible barrier that prevents women from advancing in their careers over a certain point. The reasons are a lot, from gender stereotypes, to lack of opportunity for job experience and growth, and lack of managerial commitment. However, the augmentation of women executives, obstructed by sexual harassment, would be indeed useful in preventing sexual harassment itself. Firstly, harassment is more common and tolerated under men supervisors. Usually, men are more tolerant of co-workers' behaviour and often within unfair settings people feel more entitled to act unfairly. In addition, women are less frequently perpetrators and could even had previous experiences, since sexual harassment is unfortunately more frequent and more severe for women in higher hierarchical positions, considered as threats to traditional gender roles. Finally, female executives could interpret harassing behaviours differently from men, since they share women's perspective of how pervasiveness and persistency of behaviours make them threatening and offensive[14].

Despite all these considerations, as Popovich and Warren say, organizational behaviours mirror organization's culture[15]. Sexual harassment is not only about power in the workplace; it is a symptom of a culture of power, that consequently manifests its characteristics even outside the working field. That is why the discourse on sexual harassment can be easily moved in public spaces, where once again harassment can be employed to belittle women to mere objects of attention by power-holding men. Intrusive and intimidating male's behaviours in public have the role of not allowing women to feel at ease in an environment of which they are traditionally not part of[16].

Practically speaking, sexual harassment encompasses a heterogenous set of behaviours: unwanted sexual comments, propositions or requests, non-verbal sexual gestures, sexual assault and actions sexual in nature. It is extremely complicate to define which actions are or are not sexual harassment, but we can instead easily recognize its consequences. Sexual harassment can cause decreased job dissatisfaction, high level of withdrawal, physical and mental illness, and low organizational

[13] BELL Myrtle P., MCLAUGHLIN Mary E. and SEQUEIRA Jennifer M., "Discrimination, Harassment, and the Glass Ceiling: Women Executives as Change Agents", *Journal of Business Ethics*, April 2002, Vol.37(1), p. 65-68.
[14] *Ibid.* p. 68-70.
[15] POPOVICH Paula M. and WARREN Michael A., "The role of power in sexual harassment as a counterproductive behavior in organizations", *Human Resource Management Review,* March 2010, Vol.20(1), p.53.
[16] LARKIN June, "Sexual terrorism on the street: the moulding of young women into subordination", in THOMAS Allison M. and KITZINGER Celia (ed), *Sexual Harassment: Contemporary Feminist Perspectives*, Philadelphia, Buckingham: Open University Press, 1997, p.116-119.

commitment[17]. People who perpetrate such conducts commonly present some common individual characteristics like low level of honesty and humility and even lower level of openness, and at the same time high level of narcissism, psychopathy and Machiavellianism. They also share a general sexist and hostile attitude especially toward those women not adhering to gender norms. However, this personality traits are emphasized by perceived social norms. When the surrounding environment accepts sexual harassment, the number of incidents increase, while condemning settings decrease the number of episodes[18].

Therefore, to fight sexual harassment we would need to build a culture that reinforces respect and condemns potentially harassing behaviour, but this will not be possible until people will keep on reasoning on the base of stereotyped gender biases[19]. Biases manifest themselves in various way. For example, in Japan women's abilities are still often considered as inferior to men's one. Consequently, they are still relegated to auxiliary occupations, despite their level of education, and they often do not get the opportunity to undertake specific company's trainings that could allow them to reach managerial positions, remaining at the contrary relegated to low income and part-time not fundamental jobs[20]. Furthermore, in Japan income increase is directly linked to time of service, but to keep on increasing the wage of auxiliary workers, the majority of which women, who cannot implement their productivity over a certain level, would be a loss for the company. For this reason, they are often obliged to retire, and they came back at an advanced age, with low income and no working securities[21].

People that experience strong gender bias in their workplace usually express strong job dissatisfaction. Men who experienced sexual harassment appears to be more likely to quit a job than women, who are instead more influenced by gender harassment, but both conducts trigger a high level of discontent that can cause more absenteeism, more turnover, more physical and mental health problem and less productivity. Briefly, gender biases are directly linked to economic productivity's loss[22].

The reality of this situation is gaining attention in popular consciousness and it is consequently causing development in law. The first legal perspective was shaped in USA, but through years sexual

[17] HARDIES Kris, "Personality, social norms, and sexual harassment in the workplace", *Personality and Individual Difficulties,* December 2019, Vol.151, p.1-2.

[18] *Ibid.* 3-4.

[19] ANTECOLA Heather, BARCUS Vanessa E. and COBB-CLARK Deborah, "Gender-biased behavior at work: Exploring the relationship between sexual harassment and sex discrimination", *Journal of Economic Psychology,* October 2009, Vol.30(5), p.782-783.

[20] COOK Alice H. and HAYASHI Hiroko, *Working Women in Japan. Discrimination, Resistance and Reform*, Cornell University, Ilr Press, 1980, p.1-10.

[21] *Ibid.* p.56-59.

[22] ANTECOLA Heather, BARCUS Vanessa E. and COBB-CLARK Deborah, "Gender-biased behavior at work: Exploring the relationship between sexual harassment and sex discrimination", *Journal of Economic Psychology,* October 2009, Vol.30(5), p.790-791.

harassment law has advanced in other places and other ways[23]. All around the world flourished guidelines outlawing sexual harassment, each with dissimilar level of stringency and application, but until now these policies have not been strong enough for deconstructing social norms on which sexual harassment is standing. Many organizations produced sexual harassment policies that unfortunately are not integrated within a wide anti-harassment program and, consequently, turn out to be useless. Women are still afraid to officially complaint for fear of not being believed or of worsening their situation or even not being taken seriously. Strong sexual harassment policies with stronger prohibiting and sanctioning measures are in need to change the situation, and awareness campaigns should complement them[24]. In fact, an additional problem is that while in same countries anti-harassment law has widely developed to cover many kinds of aggression, in other countries no law is in place. Some domestic legal frameworks have adopted a right-based approach, other a worker-safety approach. Some countries have drafted specific law, while others still rely on pre-existing criminal, tort, civil, labour law[25].

Finally, the general situation appears extremely confused. Law has developed in a variety of dissimilar ways in different states and on many levels, and it had different degrees of impact on people and institutions, but the witnesses and comments resulted from the initially mentioned campaigns and media debates suggest the awareness and knowledge regarding these standing norms is far from being digested, or even just known, by common people.

2. Purpose of the thesis

Literature about sexual harassment has widely discussed the problem from a philosophical point of view, debating for example the role of power, a social point of view, with surveys on the impact of the harassing behaviour, and a psychological point of view, with research regarding individual characteristics and mental processes of the perpetrators, but few authors have investigated sexual harassment from a juridical perspective. By searching specific materials, it appears clearly that existing pieces of regulation are limitedly examined and discussed, while the topic is often debated only as a part of women rights and sexual violence policies. As a result, on a lower level of specificity, between common people and experts of other sectors as well, the knowledge about sexual harassment

[23] GOLDSMITH E. and SCHULTZ V., "Sexual harassment: Legal Perspectives", *International Encyclopedia of the Social & Behavioral Sciences,* Elsevier Ldt, 2001, p.13982.

[24] BELL Myrtle P., MCLAUGHLIN Mary E. and SEQUEIRA Jennifer M., "Discrimination, Harassment, and the Glass Ceiling: Women Executives as Change Agents", *Journal of Business Ethics*, April 2002, Vol.37(1), p.70-73.

[25] TAHMINDJIS Phillip, "From Disclosure to Disgrace! Lessons from a Comparative Approach to Sexual Harassment Law", *International Journal of Discrimination and the Law*, 2005, Vol.7, p.358-363.

from a legal perspective is nearly nullified. Victims at all levels of education and employment growth affirm one of the reason for which they decide to not complaint is that they are no aware of standing provisions and mechanisms they could refer to in these situations, and if mechanisms are in place they think law enforcement will fail[26].

This thesis has the exact purpose of investigating the state of the contemporary legal frameworks around the world. By analysing existing instruments and regulations, the essay means to understand how much has been done from a juridical perspective to fight the issue of sexual harassment, and if the standing norms have reached a satisfactory level of commitment and protection against this problem or if they still present evident weaknesses. The investigation will firstly examine existing international instruments and provisions and it will proceed through more localized regions. A worldwide research, country by country, would be prohibitive, therefore the thesis will focus the research on two particular areas of interest, Europe and Asia, two continents with a long history of legal traditions. Accordingly, ASEAN, Council of Europe and European Union will represent the regional normative level of investigation. Finally, two case studies, Italy and Japan, will be our sample regarding domestic law. The choice is not accidental, since Italy and Japan, despite extremely different traditions and origins, do share extremely similar features, especially due to their after 2WW's history. Firstly, both these countries have very strong traditional and cultural values, still extremely rooted in popular thinking. They both experienced the *price of defeat* and, consequently, the handling of war memory and of post war destruction. Finally, the maybe more unique similarity they share is the economic boom these states experienced after the war. Italy and Japan for many years represented an unmatched model of economic growth, that brough them to extremely high degrees of economic development and life standard in a very short time[27]. Investigating how traditional countries have responded to international pressure for updating regulations on some specific internal human rights issues, could produce unexpected outcomes or considerations.

Consequently, the thesis will be divided in 5 chapters. *Chapter 1* will furtherly investigate the philosophical debate just superficially treated in this introduction and it will widely investigate its link with local language and legal interpretations. In fact, as we will see, the adoption of different philosophical perspectives and the employment of unmatching linguistic expressions have directly influenced local legal development and legal definitions of the phenomenon. *Chapter 2* will analyse the international situation, starting from the investigation of UN agencies dedicated to women rights,

[26] LONSWAY Kimberly A., CORTINA Lilia M. and MAGLEY Vicki J., "Sexual Harassment Mythology: Definition, Conceptualization, and Measurement", *Sex Roles*, January 2008, Vol.58, p.199-203.

[27] POGGIOLINI Ilaria, "Italy and Japan: The Price of Defeat in Post WWII International Relations" in BERETTA Silvio, BERKOSKY Axel and RUGGE Fabio (ed.), *Italy and Japan: How Similar Are They? A Comparative Analysis of Politics, Economics, and International Relations*, Springer Nature, 2014, p.277-285.

the Commission on Status of Women and UN Women. Legal instruments' research will encompass the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the CEDAW Committee's General Recommendations, the Declaration on the Elimination of Violence Against Women (DEVAW), the Beijing Declaration and Platform for Action and ILO Convention C190 on Violence and Harassment. This chapter will also include the analysis of internal application of anti-harassment regulations in autonomous UN agencies as a case study. *Chapter 3* will be focused on regional organizations, ASEAN in Asia and Council of Europe and European Union in Europe. For each organization we will investigate the most relevant existing theorical and practical instruments, and due to the lack of documents detected in ASEAN's activities it will also analyse the role and commitment of existing regional commissions dedicated to women rights' implementation. *Chapter 4* will address the domestic level of application of norms, analysing how, through penal law, civil law, labour law, tort law etc., anti-harassment policies have been applied inside Italian and Japanese national legislations. Finally, *Chapter 5* will draw conclusions on previous investigated legal provisions to offer a comparative analysis of the legal situation. Moreover, once highlighted strong and weak points of the situation, it will consider some potential social reasons behind the status of legal implementation and it will propose some practical solutions to enforce standing legislation.

CHAPTER 1: DEBATE ON TERMINOLOGY: LINK BETWEEN PHILOSOPHICAL ANALYSIS, LOCAL LANGUAGE AND LEGAL PARLANCE

The first question we should ask ourselves to properly investigate the research topic is, what is the meaning of the word "sexual harassment"?

Sexual harassment was analysed and researched in a variety of fields, therefore we face several different outcomes when confronting philosophical positions, to legal parlance or to cultural interpretations. Even the terms employed to refer to this issue developed in unusual ways. Where an autochthone term already culturally recognized could not be found, it has been translated, but along this process it sometimes lost its original significance. As a result, if we investigate current words used to transport the allegedly same meaning, we will often find out they do not share the same significance and, consequently, this influenced domestic law in unique ways.

Therefore, though often ignored, the unexpected answer to our initial question is "There is not a unique meaning". Or maybe it would be more correct to say it is impossible to arbitrarily decide which one of the many argued meanings should be the most appropriate one.

Starting from a philosophical ground, different interpretations had developed divergent legal definitions in different countries, since from "sexual violence" to "sexual harassment", locally adopted expressions are not always completely overlapping.

The first appearance of the term "sexual harassment" dates 1975 in USA when the feminists Lin Farley, Susan Meyer, and Karen Sauvigné, founders of Working Women's Institute, created this expression to act in favour of Carmita Wood, a woman employee of Cornell University forced to resign because unable to furtherly avoid the unwanted sexual attentions of a senior colleague[28]. Farley had no longer before realized that this kind of situations were common to a majority of women, preventing them from freely perform their working duties[29].

The term was meant to embrace a variety of subtle, persistent and unacceptable behaviours that needed official countermeasure and its invention contributed to the complicated task undertaken by many feminists to include women's experience and interpretation of the world in cultural and social systems[30]. The labelling of this behaviour enabled many people, especially feminists arguing each

[28] THOMAS Allison M. and KITZINGER Celia (ed), *Sexual Harassment: Contemporary Feminist Perspectives*, Philadelphia, Buckingham: Open University Press, 1997, p.2-3.

[29] *Ibidem.*

[30] A process that we'll furtherly investigate in the second chapter, but that today is commonly defined *gender mainstreaming.*

other's interpretation, to develop new theories rooted in this initial quite objective consideration of inequality[31].

Catherine MacKinnon, giving probably the major contribution to the discourse and displaying the magnitude of the issue to public attention[32], defined sexual harassment as: *"the unwanted imposition of sexual requirements in the context of a relationship of unequal power"*[33]. Coherently with this definition she furtherly describes sexual harassment as a matter of power, namely economic one, not of attraction, implying a kind of behaviour meant to target women alone[34]. This final remark expressed what is commonly known as "male as perpetrator, woman as victim" stereotype, but it was proved to be false, since the number of cases reporting harassment of women against men, women on women or men against men is steadily increasing and it reached nearly the 15% of submitted sexual harassment complaints received by the American Equal Employment Opportunity Commission in 2012[35].

Many philosophers, even feminists, exposed critics about the absolutism of this stereotype, even by distancing themselves from the numerous controversial excesses reached in the purchase of those standards. One of them was Daphne Patai, who writes:

> *<<…there has been little feminist complaint about its excesses, about the tense environment it creates, or about the many ways in which it infringes on freedom of expression and association. But as is becoming increasingly clear, the charge of sexual harassment can be levelled against anyone. Women (both heterosexual and lesbian) are suddenly finding themselves on the defendant's end of legislation they thought could apply only to men…. >>*[36].

Jane Gallup described this occurrence as *"feminists accused of sexual harassment",* often interpreted as a flaw in the sexual harassment law[37], but, like in the case of rape, the mere account sexual harassment is not limited to women's victimization does not imply it cannot be enlisted between sexual violence typology or sex discrimination forms. Especially, when considering cases of sexual

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[31] THOMAS Allison M. and KITZINGER Celia (ed), *Sexual Harassment: Contemporary Feminist Perspectives*, Philadelphia, Buckingham: Open University Press, 1997, p.5.

[32] Together with Lin Farley's "*Sexual Shakedown".*

[33] MACKINNON Catherine, *Sexual Harassment of Working Women. A Case of Sex Discrimination*, Yale University Press, 1979 quoted in COOPER Cristine G., "Review of Sexual Harassment of Working Women by Catharine A. Mackinnon", *University of Chicago Law Review*, 1981, p. 185.

[34] *Ibidem.*

[35] WEST Richmond P., "Hostility Toward the Unattractive: A Critique Of "Sexual Harassment" Law", Purdue University*, ProQuest Dissertations Publishing*, May 2012, p.33.

[36] PATAI Daphne, *Heterophobia: Sexual Harassment and the Future of Feminism*, Rowman & Littlefield Publishers Inc., New York, 1998, quoted in WEST Richmond P., "Hostility Toward the Unattractive: A Critique Of "Sexual Harassment" Law", Purdue University*, ProQuest Dissertations Publishing*, May 2012, p.36-37

[37] *Ibidem.*

harassment not falling under the spectrum of "male as perpetrator, woman as victim stereotype", we cannot deny the role of power, since these situations mostly imply cases of gender harassment due to nonadherence to gender stereotypes, that consequently perpetrators proceed to "adjust" by force, or a certain kind of power relationship. Moreover, the problem of sexual harassment still burdens women in a totally unequal proportion, therefore it should rightly be confronted in terms of gender discrimination[38].

The above-mentioned analysis and interpretations, though not explicitly, originate from considerations regarding sexual harassment in the workplace. Thereby, they are structured to apply to a working environment, or at least to an environment with defined hierarchical relations. However, MacKinnon's discourse of power and control is not necessarily relegated to workplace, but it can be applied to a variety of situations.

Consequently, if in the American scenario it is extremely common to find definitions of sexual harassment linked to workplace, as Kathleen Gallivan's one: *"any type of unwanted sexual or gender oriented behaviour that has adverse job-related effects"*[39], recently new approaches are starting to properly consider even harassment carried out in different settings, especially the public space. For example, Women Watch definition lack a direct reference to employment and, instead, it stands as follow: *"SEXUAL HARASSMENT is a behavior. It is defined as unwelcome behavior of a sexual nature. For example, a man whistles at a woman when she walks by. Or a woman looks a man up and down when he walks towards her"*[40].

The definition originates in the realization that majority of intimidating and intrusive experiences lived by women usually take place out of the workplace, favouring instead public transportations and public spaces, like streets, restaurants, or parks. This kind of sexual harassment is commonly known as "Street harassment", a shorthand of "sexual harassment in public", as Thompson defines it, but unfortunately it has been often ignored in the legal field[41].

This is a relevant absence since, as highlighted by June Larkin, working on awareness' raising simply in employment and education related situations is insufficient due to harassment having a role in every space of women's life. Moving from the private set to the public one, sexual harassment is

[38] SOUCEK Brian, "Queering Sexual Harassment Law", *The Yale Law Journal Forum,* June 2018, p.76-77.

[39] GALLIVAN Kathleen (1991), "Sexual Harassment after Janzen v. Platy: The Transformation Possibilities", 49 U, *Toronto Faculty of Law Review,* Vol.27, quoted in SRIVASTAVA S.C., "Sexual Harassment of Women at Work Place: Law and Policy", *Indian Journal of Industrial Relations*, January 2004, Vol.19(3), p.366.

[40] WomenWatch, "What is Sexual Harassment", https://www.un.org/womenwatch/osagi/pdf/whatissh.pdf (consulted on 21 October 2020).

[41] THOMPSON Deborah M., "The Woman in the Street: Reclaiming the Public Space from Sexual Harassment", *Yale Journal of Law and Feminism*, 1993, Vol.6:313-348, p.315.

structured to not allow women to feel at ease, operating to limit one's freedom and reminding the role of power[42].

Once again, as expressed by MacKinnon, the role of power is decisive. Thompson describes harassment as "doing power", and she quotes Robin West's affirmation: *"If they haven't learned it anywhere else, street hassling teaches girls that their sexuality implies their vulnerability"* [43]. This kind of normalized behaviour develops in young girls the awareness of their constant vulnerability and of their role as an object of males' sexual interest. It is, in fact, indicative the finding that harassment is extremely rare in presence of an accompanying man and often the assessment of ownership: "I have a boyfriend", is used as an escaping method[44].

As a result of this ambivalence, legal approaches inspired by different wideness of interpretation have produced dissimilar legal orders whose main decisive variant is the workplace. When we consider legal parlance in United States domestic jurisdictions, and in USA inspired ones, like the Japanese one, sexual harassment has to take place in a working, or working-like, related relationship or environment to be legally classifiable as "sexual harassment". Certainly, in USA as well, victims could be sexually harassed also by unknow people and in a variety of public and private places[45], and some of these events could be prosecuted as civil offences or criminal acts, but they are never pursued as cases of sexual harassment; instead they are criminalized by referring to different kind of misconducts or by using a different kind of terminology. For this reason, in American English, we face a proliferation of terms, each one used to identify a different action that would be legally interpreted as "sexual harassment crime" if collocated in the proper place or in the proper set of power implying relations[46].

On the contrary, investigating the jurisprudence of other countries, like Italy, it appears clearly that the words usually employed to convey to idea of "sexual harassment", hold an alternative valence. As Robert Husbands affirms, while some countries (like USA and Japan) have adopted different kinds of Equal Opportunity Laws and Labour Laws specifically meant to address sexual harassment, others

[42] LARKIN June, "Sexual terrorism on the street: the moulding of young women into subordination", in THOMAS Allison M. and KITZINGER Celia (ed), *Sexual Harassment: Contemporary Feminist Perspectives*, Philadelphia, Buckingham: Open University Press, 1997, p.115-119.

[43] WEST Robin L., "The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory", 3 WIS. WOMEN'S L.J. 81, 106-08 (1987) quoted in THOMPSON Deborah M., "The Woman in the Street: Reclaiming the Public Space from Sexual Harassment", *Yale Journal of Law and Feminism*, 1993, Vol.6:313-348, p.319.

[44] LARKIN June, "Sexual terrorism on the street: the moulding of young women into subordination", in THOMAS Allison M. and KITZINGER Celia (ed), *Sexual Harassment: Contemporary Feminist Perspectives*, Philadelphia, Buckingham: Open University Press, 1997, p.120-128.

[45] Stop Street Harassment Website, https://stopstreetharassment.org/resources/definitions/ (consulted on 15 February 2021).

[46] CROUCH Margaret, "Sexual Harassment in Public Places", *Social Philosophy Today*, January 2009, Vol.25.

have preferred different kinds of Tort Laws or even Criminal Laws, therefore applying an interpretation of the concept extremely wider, though maybe less specific[47].

In the Italian case, as well as in others *civil law* countries, sexual harassment as a general matter, is addressed inside the Penal Code, but at the same time, measures against sexual harassment in the workplace were implemented through the "Equal Opportunity Code" and the "Civil Code"[48].

Obviously, the above-mentioned legal and linguistic-cultural approaches are the outcome of the adoption of different philosophical interpretations and the discrepancy of viewpoints is so developed that it has caused a series of troubles in situations where the applicable jurisdiction was not so easily identified[49]. For example this is want happens on board of ships with multicultural crews, where the ship's flag state identifies the primary jurisdiction of reference, but it is not always the only one enforceable, and different legal and cultural interpretations of what is considerable as sexual harassment have caused an alarming high number of complaints[50].

To line up all domestic law on sexual harassment would be overly complicated and it would even interfere in each country's self-determination power, but on an international level a common point has already been reached and we can observe sexual harassment being discussed in the field of violence against women, despite a general tendency to adopt the North American interpretation, therefore quoting sexual harassment especially in relation to workplace[51]. For example, in the General Recommendation No.19 on Violence against Women adopted in 1992 by the Committee on the Elimination of Discrimination Against Women, sexual harassment, in one of its first official appearance in an international instrument, is described as discriminatory when the women have the ground to believe refusing such sexual attention will influence her employment position[52]. Unfortunately, this approach leaves a terribly vast section of sexual offences uncovered by international law, those related to sexual harassment in public space. To make up for this lack, since November 2010 UN Women has launched the "*Safe Cities Free of Violence against Women and Girls*"

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[47] HUSBANDS Robert, "Sexual Harassment Law in employment: An international perspective", *International Labour Review*, 1992, Vol.131(6), p.546-549.

[48] BAGOTTO Claudia, "Molestie Sessuali sul Luogo di Lavoro: Normativa Penale e Giuslavoristica", *Salvis Juribus*, http://www.salvisjuribus.it/molestie-sessuali-sul-luogo-di-lavoro-normativa-penale-e-giuslavoristica/ (consulted on 20 February 2021).

[49] TIMMERMAN Greetje and BAJEMA Cristien, "Sexual Harassment in Northwest Europe: A Cross-Cultural Comparison", *The European Journal of Women's Studies*, Vol.6(4), p.420-421.

[50] CARBALLO PIÑEIRO Laura and KITADA Momoko, "Sexual harassment and women seafarers: The role of laws and policies to ensure occupational safety & health", *Marine Policy,* July 2020, Vol.117, p.4.

[51] HUSBANDS Robert, "Sexual Harassment Law in employment: An international perspective", *International Labour Review*, 1992, Vol.131(6), p.543.

[52] COMMITTEE ON THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN, "General Recommendation No.19: Violence against Women", *General Recommendations Adopted by the Committee on the Elimination of Discrimination against Women*, 11th Session, 1992, https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1_Global/INT_CEDAW_GEC_3731_E.pdf (consulted on 20 February 2021).

Global Programme, in collaboration with governments, UN agencies and women's organizations all the around the world[53]. The Commission on Status of Women as well has expressed concern on this topic and *"the elimination of all forms of violence against all women and girls in public and private spheres"* has finally became the target 5.2 of the 2030 Agenda for Sustainable Development[54].

In this chapter we will not explore specific legal instruments yet, but we will start by analysing the terms and definitions commonly employed in our case studies' languages, namely English (the most common international language), Italian and Japanese. By doing so, in the subsequent chapters it should become easier to understand why law regarding this topic has developed in such incongruous and disparate ways.

Obviously, we do not intend to determinate in such a location which actions are or are not considered sexual harassment - each nation can display an expressly trained and prepared judicial system to decide on each single case- but we would like to convey which categories of actions could be eligible to be considered cases of "sexual harassment crime", depending on the nation whose jurisdiction we are investigating.

1.1. Sexual violence, sexual assault, sexual harassment: roots of internationally employed terms

Through years, American English language has produced a variety of terms used to describe sexual offences, and all these terms have invaded domestic law and inspired international one[55].

The problem is people usually use those expressions in an improper way and consider most of them as interchangeable, even though they are not. Especially with the raise of #MeToo campaign, the correct use of each word should be extremely clear in order to not belittle the real significance of each of them.

Professors Sarah Cook, Lilia Cortina and Mary Koss, in a psychological prospective, describe "sexual violence", or "violence against women", or again "gender-based violence", as the broader term used to label all those sex related actions that could be harmful or traumatic to the victim[56]. Some of these

[53] UN Women- Virtual Knowledge Centre to End Violence Against Women and Girls, https://www.endvawnow.org/en/initiatives-articles/42-safe-cities-and-safe-public-spaces-programme-overview.html#:~:text=UN%20Women's%20Global%20Flagship%20Initiative,70%20global%20and%20local%20partners (consulted on 03 January 2021).

[54] UN Women, "Safe Cities and Safe Public Spaces", *Flagship Programme*, November 2020.

[55] In quoting domestic legislation in American English, in this House, we obviously refer to the USA's one, since the American standard set the international one for a long period of time.

[56] COOK Sarah L., CORTINA Lilia M. and KOSS Mary P., "What's the difference between sexual abuse, sexual assault, sexual harassment and rape?", *The Conversation*, 07 February 2018,

actions are considered crimes, while others are not. Some include a physical contact, while others do not. But all of them, from the lightest to the most severe ones, cause in the subject a sense of objectification and victimization. In virtue of its vastness, this term includes many other concepts like sexual assault, rape, and sexual harassment itself[57].

"Sexual Abuse" is the word used to describe some behaviours of sexual nature, often addressed to children, that imply an abuse of power or trust, while "Sexual Assault" is a physical invasion of one's body and a criminal act, sexual in nature, that could go from kissing or touching to rape. Basically, sexual assault is often used as synonymous of rape, but in fact it includes the concept of rape, describing instead all those sexual actions imposed without consent[58].

International instruments usually refer to the combination of all these crimes as "sexual violence". In fact, in these documents, it is easy to find many specific references to sexual abuse, especially against female children or women in particularly disadvantage positions, as those plagued by poverty[59], but sexual assault is rarely quoted between the more allocated kinds of sexual violence. Only a few instruments include the term "sexual assault", preferring instead "rape", even though, as mentioned, they are not properly synonymous[60]. However, even where not mentioned, we cannot say sexual assault is not considered by international standards, as usually the definitions are presented as follow: *"Violence against women shall be understood to encompass, but not be limited to, the following…."*[61], consequently leaving spaces for interpretation.

As anticipated by Husbands, the only crime often analysed as of different nature, is "sexual harassment", that, even though included in the list of violence against women, is indeed valuated as crime in virtue of the above-mentioned relation to workplace[62]. For example, in CEDAW General Recommendation No.19, we can find a dedicated article, Article 11, meant to portray sexual harassment as a crime linked to working environments[63].

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https://theconversation.com/whats-the-difference-between-sexual-abuse-sexual-assault-sexual-harassment-and-rape-88218 (consulted on 21 October 2020).

[57] *Ibidem.*

[58] Equal Rights Advocates, "Sexual Assault & Sexual Harassment", https://www.equalrights.org/issue/equality-in-schools-universities/sexual-harassment/ (consulted on 18 December 2020).

[59] COMMITTEE ON THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN, "General Recommendation No.19: Violence against Women", *General Recommendations Adopted by the Committee on the Elimination of Discrimination against Women*, 11th Session, 1992, Article 6.

[60] In 2012, FBI defined rape as the penetration, with body part or object, without the victim consent. The description is neutral in nature, nothing is said about the kind of relationship in place between the victim and the perpetrator.

[61] UNITED NATIONS GENERAL ASSEMBLY, "Resolution 48/104: Declaration on the Elimination of Violence against Women", 20 December 1993, Article 2.

[62] HUSBANDS Robert, "Sexual Harassment Law in employment: An international perspective", International Labour Review, 1992, Vol.131(6), p.543.

[63] COMMITTEE ON THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN, "General Recommendation No.19: Violence against Women", *General Recommendations Adopted by the Committee on the Elimination of Discrimination against Women*, 11th Session, 1992.

"Sexual Harassment", sometimes called "eve-teasing", is a very breadth term, encompassing touching, groping, teasing, catcalling, gesturing but also in more severe cases, sexual assault and rape or attempt of rape. It is essentially a kind of harassment sexual, sex-based or gender-based in nature[64]. If we consider the philosophical interpretation, researchers have shaped three level of sexual harassment:

- Sexual coercion: also known *as quid pro quo*, it indicates a request for sexual performances under the threat of repercussions of one's employment or to bribe job related benefits. Despite being the most known one, it is also the less common;
- Unwanted sexual attention: it can be verbal or physical, and it goes from repeated and unwelcomed requests for date to touching and groping, from expression of sexual remarks to even sexual assault. It lacks a relation to job-benefits, but it is still a coercive and intimidating behaviour;
- Gender harassment: also known by the name "hostile environment", it is not meant to obtain sexual compensation, but it includes a series of behaviours, verbal and non-verbal one, with the purpose of degrading an individual on the base of that person's sex, gender or sexual orientation. It covers not simply sexist remarks or jokes, but also display of pornographic or obscene materials, intimidating actions and gestures. Basically, gender harassment is everything that could create an abusive working environment[65].

This classification is rooted in MacKinnon's division of sexual harassment typology between "quid pro quo" and "condition of work". While the first point perfectly overlaps with the above-mentioned cataloguing, the second is characterized by continuous sexual insults and sexual invitations without the link to employment benefits and it outlines the origins of what will be divided between "unwanted sexual attention" and "gender-harassment"[66].

In virtue of her contribution, MacKinnon is considered the first opponent by those thinkers who criticize "hostile environment" describing it as expression of extreme feminism and will of control against freedom of speech. One of those is Richmond West, who accuses "sexual harassment" of having become an instrument of feminists' excesses and a way to act on the base of personal feelings of retaliation or against "social awkward" individuals. The researcher proposes an analysis of "hostile environment" by distinguishing "Sexual Intimidation with Hostile Intent" from "Sexual Discomfort".

[64] Equal Rights Advocates, "Sexual Assault & Sexual Harassment", https://www.equalrights.org/issue/equality-in-schools-universities/sexual-harassment/ (consulted on 18 December 2020).
[65] GELFAND Michelle J., FITZGERALD Louise F. and DRASGOW Fritz, "The Structure of Sexual Harassment: A Confirmatory Analysis across Cultures and Settings", *Journal of Vocational Behaviour*, October 1995, Vol.47(2):164-177, p.5.
[66] COOPER Christine G., "Review of Sexual Harassment of Working Women by Catharine A. Mackinnon", *University of Chicago Law Review*, 1981, p. 185-186.

He affirms that while sexual intimidation should be considered a form of aggression, there cannot be guilt in sexual discomfort being it a neutral form of communication whose fault of interpretation is up to those individuals too sensitive[67] or bothered by the other part's unattractiveness [68]. West's conclusion is *"What is ultimately to prevent "hostile environment" law from being a weapon for those with hurt feelings?"*[69], interpreting sexual harassment as a weapon against men more than a protective measure for everyone. The existence of the "reasonable person" standard, possibly soon adaptable to the "reasonable women" standard, should be a sufficient answer to these criticisms, but the dispute on "hostile environment" is still proceeding[70].

Although the discussion regarding different categorizations of sexual harassment is surely remarkable, once again it can be properly applied only if we consider sexual harassment as limited to work and education, but what about unrelated settings? How does the American standard, and the English language itself, describe sexual harassment in public space?

As previously mentioned, some scholars have recently started to include this kind of actions in the philosophical and legal official debate, but for the time being the creation of new terms, like the above analysed "street harassment", was fostered above the simple expansion of the boundaries of sexual harassment.

Street harassment occurs in public spaces, when an unfamiliar individual addresses unrequested and unwelcomed attentions of sexual nature to a victim. This could include catcalling, solicitation for sex, sexual appreciations, pinching, or even following the victim or throwing things[71]. The lack of jurisdiction about this issue in a significant number of states is a grave problem, since street harassment strongly affects women's ability to freely live their life and to make free choices, in a similar way to sexual harassment in the workplace. Moreover, official non-governmental organizations' statics in a variety of nations all around the world report extremely alarming numbers; Plan international UK highlights that in 2018, the 66% of girls between 14 and 21 years old in England had experienced sexual harassment in a public place[72].

Another recently shaped term used to describe a different typology of sexual harassment in public space is "sexual bravery". This is a not so common word and it has been just recently recognized as

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[67] The author even affirms reticence is a part of interpersonal relations, where girls are socially expected at first to refuse suitors' attentions. Therefore, from his point of view a "No" doesn't always imply a real refusal, even though many researchers, like Dana Vetterhoffer, have already cleared out that *"No Means No".*

[68] WEST Richmond P., "Hostility Toward the Unattractive: A Critique Of "Sexual Harassment" Law", Purdue University*, ProQuest Dissertations Publishing*, May 2012, p.34-42.

[69] *Ibid*. p.34.

[70] ERLE Beverley H. and MADEK Gerald A., "An International Perspective on Sexual Harassment Law", *Minnesota Journal of Law & Inequality*, June 1994, Vol.12(1), p.57-61.

[71] BOWMAN Cyntia Grant, "Street Harassment and the Informal Ghettoization of Women", Harvard Law Review, January 1993, Vol.106(3):517-580, p.523-527.

[72] Plan International UK Website, , https://plan-uk.org/ (consulted on 20 December 2020).

crime in some American states, like Florida and Georgia[73]. It is characterized by the research of an intentional physical contact of sexual nature, excluding penetration, and it is usually defined as touching an intimate body part or forcing another person to touch intimate body part of the offender with the intent of obtaining sexual arousal and pleasure, without the victim's consent. This obviously includes unwanted touching, commonly called groping, especially in public spaces and public transportations[74].

Since the international law's terminology sticks to the employment related interpretation, all these acts, generally regarded as expressions of sexual harassment, cannot be covered by the legal definition employed by UN. Consequently, the proliferation of terms, the majority of which is not globally adopted, could appear as useless on an international level. Still, thanks to the implementation of projects as *"Safe Cities and Safe Public Spaces",* it looks like something is moving and thing could change soon.

1.2. *Violenza sessuale* and *molestia sessuale:* Italian terms

In the Italian panorama instead, the linguistic situation is extremely different. On general terms, a variety of terms actually do exist, like "*violenza sessuale*" (literally sexual violence) or "*aggressione sessuale*" (literally sexual assault), but these words, unlike English ones, are in fact synonymous. Legally speaking the only recognized crime is *"violenza sessuale"* a kind of crime that, if analysed in its specifical features, appears to hold the same meaning held by the term sexual assault, criminalizing rape and indecent assault, but not the same wide significance held by the English "sexual violence", although it should corresponds to its literal translation[75].

Criminalized under the Article 609-bis of the Criminal Code, Italian concept of sexual assault includes all those actions sexual in nature that are inflicted without the other person's consent or that the victim is obliged to perform by the use of coercive means. This crime does not pose any limitation in matter of gender, location, relationship between the offender and the victim or even sexual satisfaction of the perpetrator, but it is mostly, though not always, recognized the need for a physical contact[76]. This means offences like groping, touching, intimate parts frictions, and also unwanted kisses or hugs -all of them described as "*molestia sessuale*", sexual harassment, in the collective imaginary- could actually be persecuted as crime of sexual assault, even if of minor entity, when the

[73] *The 2020 Florida Statute,* "Chapter 794: Sexual Battery", 2020.
[74] *Ibidem.*
[75] BALLONI Augusto, BISI Roberta and SETTE Raffaella, "Gender-based Violence, Stalking and Fear of CrimEU-Project 2009-2011", *Alma Mater Studiorum Univerisità di Bologna*, January 2012, p.7-12.
[76] POLICARPIO Isabella, "Differenza tra violenza e molestia sessuale: facciamo chiarezza", Money.it, 30 January 2020.

"sex act" was perpetrated without the victim's approval or by the use of threats, coercion, abuse of power or trust, or even in a rush, without giving the victim the space for refusing the approach[77]. Even "*Stupro*", the Italian word for "rape", is criminalized under these same terms of sexual assault.

Recently, in Italy as well, it is getting easier to find documents that refer to and analyse the above mentioned expressions in a North American key of lecture, therefore interpreting for example the term *"violenza sessuale"* with the same values held by the English sexual violence, but even if socially acceptable, this meaning would not stick to Italian legal standard. The carelessness repeats itself in the interpretation of what can be considered "*molestia sessuale*", the Italian sexual harassment, since the general sense attributed to *"molestia sessuale"* differs both from the Italian legal meaning both from the English one.

In fact, with *"crimine di molestia",* crime of harassment, included in the Italian Criminal Code, we defines those acts of molestation or disturbance carried out for reprehensible causes and unwelcomed by the victim, and even if expressed in unspecific terms it has the relevant value of including all those acts sex in nature. Even if part of the Criminal Code, it is considered less severe than any kind of *violenza sessuale* and it never includes a physical intercourse. This means catcalling, sexual remarks, insistent courting and flirting or continuous calls, sex jokes and sometimes even stalking (women to be tailed while getting home by unknow individuals is not uncommon), especially if occurred in public spaces, are all considered *molestie*[78], but in contrast with the general popular standard, pinching and touching in a sexual manner would not be *molestie* anymore, but *violenza sessuale* instead.

At the same time, the actual expression *"molestia sessuale"* appears only inside the Code of Equal Opportunities between men and women, that portrays the concept of sexual harassment in terms nearly identical to the American interpretation since strictly linked to the workplace: <<*Any form of unwanted verbal, non-verbal or physical conduct of a sexual nature, with the purpose or effect of violating a person's dignity, or by creating an intimidating, hostile, degrading, humiliating or offensive environment. Sexual harassment is a form of discrimination.*>>[79].

The direct application of this code appears obvious when we consider internal regulations of institutions and enterprises. For example, Ca'Foscari University in its internal regulation Art.2, describes what is *molestia sessuale*, exactly in the same term shared by USA[80], and the very Italian

[77] As was specifically stated by the Italian Supreme Court of Cassation (Corte Suprema di Cassazione) in several occasions.
[78] POLICARPIO Isabella, "Differenza tra violenza e molestia sessuale: facciamo chiarezza", Money.it, 30 January 2020
[79] Berkley Center on Comparative Equality and Sex Discrimination Law, "Italy – legislation on sexual violence and sexual harassment ", *Berkley Law*, May 2018.
[80] Università Ca' Foscari di Venezia, "Codice di condotta contro le molestie sessuali: Art 2- Definizione e criteri di valutazione di molestie sessuali", https://www.unive.it/pag/8163/ (consulted on 27 February 2021).

Institute of Statics (ISTAT) in its recent investigations on sexual harassment quotes the percentage of reported "physical sexual harassment" and "exhibitionism"[81] episodes.

Finally, exhibitionism, since it does not include a physical contact, cannot be enlisted as *violenza sessuale*, but it is commonly criminalized under the crime of "*violenza privata*" (private violence) or "*atti osceni*" (obscene acts or lewd behaviour). This is a notable lack in the legal efficiency, cause private violence is punishable only if the act (in this case, the compulsion to watch the obscenity act) is imposed by the use of force and threats, while unfortunately, "obscene act" was decriminalized in 2016, reducing the penalty to the mere payment of a fine, this rendering extremely severe aggressions enable to be prosecuted[82].

1.3. *Seitekiboko, gokan, sekuhara*: Japanese words

Japanese framework is peculiar since, as it was for many terms of Japanese contemporary language, where an autochthonous expression was lacking, the corresponding English one was imported, together with its sometimes-unknown actual meaning[83]. Actually, the majority of notions could be conveyed by the use of local expressions, but occasionally the society itself tried to avoid the recognition of domestic problems by deciding to not independently name them. This was the case with many laws and legal approaches imported from the USA after the American Occupation, but it was also the case of sexual harassment, an issue already widely diffused in Japan, but officially arrived from USA only during 1980s, by the name セクハラ(*sekuhara*)[84].

In virtue of its American origins, Japanese has basically maintained the USA's standard of what should legally considered sexual harassment, therefore all those sexual offences strictly connected to working and educational environment. Yet, a part of the original idea is missing. Although, an extremely used and fashionable word, nowadays *sekuhara* is strictly linked to the workplace also in the collective interpretation.

While in the USA we can see a gap between what is commonly regarded as sexual harassment and what is legally defined as sexual harassment, fundamental reason for the existence of expressions as

[81] Istituto Nazionale di Statistica, "Le Molestie e i Ricatti Sessuali sul Lavoro", Istat.it, 13 February 2018.

[82] Corte Suprema di Cassazione, Sez. IV Penale- sentenza 04 maggio 2018- 31 luglio 2018, n. 36742, https://www.studiocataldi.it/articoli/31434-masturbarsi-di-fronte-a-una-donna-non-e-violenza-sessuale.asp (consulted on 27 Febraury 2021).

[83] This kind of terms are commonly known as *wasei eigo* and *gairaigo,* MILLER Laura, "*Wasei eigo*: English 'loanwords' coined in Japan", in HILL J., MISTRY P.J., CAMPBELL L. (ed.)*The Life of Language: Papers in Linguistics in Honor of William Bright*, January 2017, Mouton/De Gruyter: The Hague, p. 123-139.

[84] DALTON Emma, "A feminist critical discourse analysis of sexual harassment in the Japanese political and media worlds", *Women's Studies International Forum*, November 2019, Vol.77: 10227, p.2-3.

street harassment or sexual battery, in Japan we do not assist to such an evaluation. The actions commonly defined as *sekuhara* can only happen in the workplace, and when they happen in public place or by the hands of unknow individuals, they are not *sekuhara* anymore, but something else. Something unfortunately often not even worth a definition[85].

In fact, when we come down to acts as groping, catcalling, sexual jokes or exhibitionism (and many others) these are not really included as crimes in the Japanese Criminal Code. In extremely grave case, they can sometimes be encompassed as forms of *kyōsei waisetsuzai* (Crime of Forced Indecency), otherwise they are simply recognized as nuisance, and as such introduced in some, not all, local ordinances. Consequently, these forms of sexual harassment are not considered as such by Japanese collectivity and, though extremely common and with an impressive impact on women's everyday life, they are not even considered as particularly severe acts[86].

About sexual violence, *seiteki bōryoku* (性的暴力), Japan officially recognizes the same wide definition expressed by WHO of *"Any sexual act, attempt to obtain a sexual act, unwanted sexual comments or advances, or acts to traffic or otherwise directed against a person's sexuality using coercion, by any person regardless of their relationship to the victim, in any setting, including but not limited to home and work"* [87], but legally speaking on a practical level this topic is not so seriously considered. Before 2016, the only sexual violence related crime was *gokan* (強姦), rape, but to be defined as such it had to refer to an episode of objective penetration of the female genitalia and an explicit use of force was essential to be prosecutable. Everything else was not considered rape and, for sure, not sexual violence. Recently, this definition slightly changed to include also male rape and anal or oral penetration, but it still remains quite limited in its inclusivity. Moreover, the clause of force is still applicable. The victim had to be found unable to resist the aggression, otherwise the crime will be described as *seiteki bōko* (性的暴行), sexual assault, commonly considered as less severe[88].

Still, generally speaking, Japanese can offer a total of 17 different words to describe different kind of rape, from 輪姦 (*rinkan*) gang rape, to デートレイプ (*deeto reipu*) date rape, from 見返り強姦 (*mikaeri gokan*) revenge rape, to 大学構内強姦 (*daigaku kōnai gokan*) campus rape and 近親姦

[85] *Ibidem.*

[86] KITAGAWA Kayoko, *Noticeable Judicial Precedents No.2018-3 "The Judgment of the Supreme Court related to Criminal Indecency ",* 27 December 2018, https://www.waseda.jp/folaw/icl/news-en/2019/03/19/6575/ (consulted on 27 February 2021).

[87] WORLD HEALTH ORGANIZATION, Understanding and addressing violence against women, 2012.

[88] DALTON Emma, "A feminist critical discourse analysis of sexual harassment in the Japanese political and media worlds", *Women's Studies International Forum*, November 2019, Vol.77: 102276, p.6.

(*kinshinkan*) incest rape; most of them are inspired and translatable in American English terms, but two of them are not. 淫行 (*Inkō*), a sexual act performed by tempting, arousing, confusing, or deceiving young victims and with the intent of using them as sexual objects, and 姦淫 (*Kan'in*), that refers to sexual intercourse performed through the partial penetration of female genitalia and that does not terminate with ejaculation (consequently excluding male rape and rape by women). These two terms are sometimes juridically employed, but they are less common and refer to precise acts that are even inexplicable in different context from the Japanese one, even if directly related to the rape crime[89].

Essentially, what we can deduct is that Japan not only refers to a limited set of criminal acts, since the only officially recognized expression is rape and its various conjugations, but also that Japanese people prefer to approach these crimes as a foreign problem. Japanese common language, by preferring the use of English terms as レイプ (reipu) above all the native ones, indirectly describes this kind of actions and crimes as something foreign to Japanese culture, and therefore justifies its extremely low level of awareness of sexual violence issues[90].

[89] TRZASKAWKA Paula, "Rape-related Terminology in Japanese and its Translation into English and Polish", *Studies in Logic*, June 2019, Vol.58(1):195-209, p. 197-207.
[90] *Ibidem.*

CHAPTER 2: SEXUAL HARASSMENT IN INTERNATIONAL LAW: ACTORS AND ACHIEVEMENTS WITHIN THE FRAMEWORK OF THE UNITED NATIONS

In the last decades international law has expressed an increasing interest in women's human rights, but sexual harassment, maybe due to its late emergence as an independent concept, is still partially ignored as a problem. From various points of view, United Nations has kept silent regarding sexual harassment, never going into the depth of the problem or the causes and consequences of it, and never considering how it can threaten women in nearly all moments and places of their life. On the base of the principles included in subscribed covenants and conventions[91], each State Member should implement its legislation to guarantee prevention and protection from gender-based discrimination, especially with respect to employment, but among these binding instruments "sexual harassment" is just barely mentioned, if mentioned at all. Indeed, the only binding documents directly discussing sexual harassment is ILO's Convention, in virtue of its strict connection to workplace[92].

This represents simply one of the many lacunae of international law, but we can here perceive an ulterior problem: the lack of a unified understanding of sexual harassment. The existence of this form of discrimination was neglected for a long time under the attack of anti-feminist researchers[93], and now a globally common definition is still lacking; this could probably be another cause of the delay in the establishment of specific measures against sexual harassment, because law is essential in shaping the social approach to the phenomenon, but, at the same time, it is deeply shaped by related social standards.

Relying on various examples of "soft law", like the conventions' recommendations or declarations, sexual harassment is nowadays outlawed at the international level both in the form of *quid pro quo*, and in relation to "hostile environment" harassment. In fact, due to CEDAW General Recommendation n.19, that will be furtherly analysed in this chapter, it is now fully considered as a form of discrimination meant to cause physical, mental or sexual harm or directed against a woman as consequence of her gender. Furthermore, sexual harassment as severe issue is expressly included in the 1993 Declaration on the Elimination of Violence Against Women, as well as in the 1995 Beijing

[91] The ICCPR, the ICESCR, the CEDAW and the ILO Convention on Violence and Harassment.

[92] TAHMINDJIS Phillip, "From Disclosure to Disgrace! Lessons from a Comparative Approach to Sexual Harassment Law", *International Journal of Discrimination and the Law*, 2005, Vol.7, p.338-339.

[93] See for example WEST Richmond's "Hostility Toward the Unattractive: A Critique Of "Sexual Harassment" Law".

Declaration and Platform of Action, definitely assessing international law's commitment toward fighting sexual harassment, even if by employing mainly "soft law" instruments[94].

In 2017, only 40% of the 193 UN countries had provisions against sexual harassment in education and merely a 18% had legislative measure against sexual harassment in public places[95]. As it often happens with international human rights law, in some countries, like Australia, the sexual harassment-related provisions have been included in the domestic law, heavily influencing it, in some countries they have been rejected, and in some other they have been ignored. For example, while Greece or USA neglected them[96], in the Canadian law, as Anne Bayefsky affirms, *"Where courts are inclined to come to conclusions incompatible with the Convention[97], they will simply ignore it"*[98]. Briefly, international law has always been introduced in domestic legislations on the base of local interpretations and will to cooperate. Still, this chapter intends to analyse the objective steps made by the UN to reach contemporary provisions, and, even more, the contemporary level of agreement achieved on sexual harassment[99].

2.1. UN actors in charge of fighting gender-based discrimination

The first step to address sexual harassment within the United Nations framework is understanding which actors are involved in the different committees protecting women's rights. The UN is not a single, blurred entity, but a big ensemble of many essential specialized organs operating together to achieve relevant common successes. As such, not all agencies are directly involved in women rights, but at same time, this means women rights are not approached from a single point of view or by a single agency alone while ignored by the others.

Falling under the wide spectrum of human rights themselves, women rights permeate all aspects of our existence and UN's agencies cannot ignore their essential role in every aspect of humans involving activities. For example, while International Labour Organization (ILO) faces women rights related to equality and non-discrimination under work conditions, the United Nations High

[94] *Ibidem.*

[95] GARCIA-MORENO Claudia and AMIN Avni, "Violence against women: where are we 25 years after ICPD and where do we need to go?", *Sexual and Reproductive Health Matters*, 2019, Vol.27(1), p.347.

[96] TAHMINDJIS Phillip, "From Disclosure to Disgrace! Lessons from a Comparative Approach to Sexual Harassment Law", *International Journal of Discrimination and the Law*, 2005, Vol.7, p.363.

[97] The author here is referring to CEDAW Convention.

[98] BAYEFSKY Anne F., "General Approaches to Domestic Application of Women's International Human Rights Law", in *Human Rights of Women: National and International Perspectives* edited by COOK Rebecca, Philadelphia: University of Pennsylvania, 1994 quoted in MCCRUDDEN Christopher, "Why Do National Court Judges Refer to Human Rights Treaties? A Comparative International Law Analysis of CEDAW", *The American Journal of International Law*, 2015, Vol.109, p.539.

[99] MCCRUDDEN Christopher, "Why Do National Court Judges Refer to Human Rights Treaties? A Comparative International Law Analysis of CEDAW", *The American Journal of International Law*, 2015, Vol.109, p.537-539.

Commissioner for Refugees (UNHCR) confronts additional difficulties met by women refugees when confronted to men. These are mere examples of an extremely pervading topic, the disadvantaged role of women in contemporary society, who constantly need a focus on their specific, and often denied, rights.

Obviously, due to the nature of the discriminations we are bond to fight, tied to the patriarchal roots of modern culture, a series of specific agencies have been created through years. The purpose was to offer a wide spectrum of entities able to face and to manage all the above mentioned and differentiated aspects of women rights. We could quote here organs as the Commission on Status of Women (CSW), performing its role since 1946, and the United Nations Entity for Gender Equality and Empowerment of Women (UN Women), the agency created to reunite tasks of all the pre-existing independent groups; namely, these represent the two first great agencies especially committed to fight gender-based discrimination and to obtain girls' empowerment all around the world.

Hereafter, we will investigate the role and duties of the major actors performing this fight, but this research will not be limited to the dedicated bodies; it will also include those subjects of international law who are at the very core of United Nations itself, State Parties.

In fact, unified in the General Assembly, Member States are the leading actors who, starting from the Universal Declaration of Human Rights (UDHR), gradually recognized not simply human rights, but women specific rights as well.

2.1.1. United Nations General Assembly and State parties

In June 1945, 51 willing states adopted the UN Charter and, a few months later, the United Nations began its operations. This initial number raised considerably and, nowadays, with Sudan joint in 2011, the General Assembly consists of 193 members. This core organ is the main plenary consultative entity in the UN, where each State Member can express its own vote regarding all issues related to peace, security, and cooperation as equal. There is not a vote that has more value than another and, in virtue of this prerogative it is essentially the most important representative board[100]. The reason for the General Assembly's relevance in this essay is that it was this plenary organ that in 1948, expressing the will of State parties, approved the "Universal Declaration of Human Rights", the first globally recognized instrument on human rights, and became the driving body behind all the UN actions related to human rights. Without its commitment, representing the commitment of all Member States, nothing would have been possible[101].

[100] United Nations General Assembly, https://www.un.org/en/ga/ (consulted on 12 January 2021).

[101] TAHMINDJIS Phillip, "From Disclosure to Disgrace! Lessons from a Comparative Approach to Sexual Harassment Law", *International Journal of Discrimination and the Law*, 2005, Vol.7, p.338-339.

If we consider the Universal Declaration, the document was based on pre-existent values, expressed for example in the French "Declaration of Rights of Man and of the Citizen" or within the Fourteen Points of President Woodrow Wilson, and it was accepted after a long debate that ended with 48 votes in favour and 8 abstentions, coming especially from the Communist countries and the Arab world. Despite its not-binding power, most legal experts nowadays recognize it has acquired quasi-binding value in virtue of customary international law[102]. In fact, after years of universal employment and recognition of human rights' basic principles, after the persistent invocation of human rights in international and domestic law and the condemnation of other states' violations, and after the general acceptance of UN Charter's humanitarian obligations, the original values expressed in the Universal Declaration are nowadays virtually considered universal and potentially binding even in those countries that had originally abstained, therefore bearing the power of customary law[103].

Among the numerous fundamental rights recognized by this enlightening charter, Article 2 affirms the equality between each individual, without distinction on the base of race, colour, religious belief, political position or sex, and the free access of all these individuals to every and each right outlined in the declaration[104].

Through these valuable affirmations, the UDHR represents the first UN's document recognizing some sort of right to women, especially, but not directly, all the rights recognized to men as well. Still, unfortunately, due to the circumstances and time of adoption of this first decisive agreement, those rights do not include abuses directed mainly to women, considered at the time of signature, as the former US vice presidential candidate Geraldine Ferraro stated, excessively common and therefore "private" problems, not of primary relevance in international law[105]. It is obvious on a practical level, equality was, and often it still is, a lengthy and complicate path, but despite these considerations, the relevance of this starting point is undeniable, since it also embodies the first step, led by the one organ representing all State parties, of a long process of production of gender rights related declarations and conventions that is currently still developing.

In addition, in this process, we cannot forget the indirect, still fundamental role, held by the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights. The ICCPR and ICESCR are two treaties, both adopted in 1966, operating under the supervision of specific international treaty bodies, commonly defined as

[102] HANNUM Hurst, "The Status of the Universal Declaration of Human Rights in National and International Law", *Georgia Journal of International & Comparative Law*, 1995, Vol.25:287, p.352-354.
[103] Ibid. p.317-326.
[104] UNITED NATIONS, "Universal Declaration of Human Rights", 10 December 1948, https://www.ohchr.org/en/udhr/pages/Language.aspx?LangID=itn (consulted on 13 January 2021).
[105] ERLE Beverley H. and MADEK Gerald A., "An International Perspective on Sexual Harassment Law", *Minnesota Journal of Law & Inequality*, June 1994, Vol.12(1), p.71-72.

Committees, supervised by the Office of the United Nations High Commissioner for Human Rights (OHCHR). Over time, the General Assembly realised the following step after the UDHR had to be the commutation of its principles in hard law, but due to the iconic contrasting positions typical of the Cold War, the progress regarding human rights had to accept a fragmentated normative approach in order to gradually improve without finding excessive oppositions[106]. For this reason, after the adoption of the fundamental triptych composed of UDHR, ICCPR, ICESCR and their Optional Protocols, and since others aspects of human rights had to be directly addressed, as time went on, a series of new documents was approved and, currently, we can count a total of nine main human rights treaties[107], whose signing and ratification processes are still proceeding[108]. The two above mentioned covenants are part of those nine main human rights treaties, and at the same time they are between the first international conventions on human rights to ever be adopted.

While the ICCPR and its Human Rights Committee, are in charge of ensuring equality in front of the state, therefore right to life, bodily integrity of the individual (protection from torture, slavery, unjustified detention), impartiality of law, freedom of expression and of belief, equality and political participation[109], the ICESCR and the Committee on Economic, Social and Cultural Rights provide a different set of rights meant to improve people's life conditions, consequently related to the general self-realization of each individual, right to work and to form trade unions, right of free access to science and cultural progresses, right of family, right of education and right of freedom from hunger. While the first set was the specific focus of Western countries, Socialist states supported the second group of rights[110].

These instruments were drawn up in parallel because State parties were divided upon which set of rights was the most relevant one, and because some governments were not in favour of according certain categories of rights to their citizens. They were revolutionary, not simply for the kind of rights they were meant to recognize, but also for the subjects to which those rights were recognized. While Article 2 of both covenants ensures the free exercise of corresponding enunciated rights without any

[106] CARREAU Dominique and MARRELLA Fabrizio, *Diritto Internazionale*, Giuffrè Editori, 2016, p.428-429.

[107] International Convention on the Elimination of All Forms of Racial Discrimination, International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights, Convention on the Elimination of All Forms of Discrimination against Women, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Convention on the Rights of the Child, International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, International Convention for the Protection of All Persons from Enforced Disappearance, Convention on the Rights of Persons with Disabilities.

[108] EDWARDS Alice, *Violence against Women under International Human Rights Law*, Cambridge University Press, 2011, p. 88-94.

[109] UNITED NATIONS, "International Covenant on Civil and Political Rights", 16 December 1966, https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx (consulted on 13 January 2021).

[110] UNITED NATIONS, "International Covenant on Economic, Social and Cultural Rights", 16 December 1966, https://www.ohchr.org/en/professionalinterest/pages/cescr.aspx (consulted on 03 January 2021).

discrimination on the base of *"race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status*"[111], Article 3 takes a further step, stating: *"The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant"* [112] in the ICESCR and: *"The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant."* [113] in the ICCPR[114]. Gender equality is mentioned again a number of times across the two documents, and Article 7 of ICESCR even specifies equality of men and women on the workplace: *"(i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work*;"[115].

Today, the UN Declaration on Human Rights, as mentioned before, is commonly recognized as customary international law, while the ICCPR and the ICESCR are still waiting for some countries, a minority, to adopt their principles. The few missing countries usually present some peculiar reasons, like religious or ideological one, for their reluctance[116]. For example, dictatorial regimes, like Myanmar, are obviously not in favour of granting political and civil rights to citizens. Communist countries, as well as the Islamic fundamentalist ones, refused to ratify ICCPR until recently, and some of them, like Saudi Arabia or United Arab Emirates, are still refusing to. Finally, the nonratification of ICESCR on the part of USA is remarkable, due to its strong opposition despite being one of the most committed countries to human rights' implementation[117].

The significance of the two covenants is undeniable, not just in relation to the variety of fundamental rights recognized, but also because, although presented in a very generic and casual way, the statements regarding gender equality represent the first official assessments of the General Assembly designed to directly acknowledge women's special condition and needs in the field of rights. Moreover, in 1966 sexual harassment was not even shaped yet as a term, but the ICESCR's Article 7, when guaranteeing equal work condition, looks like a prequel of what will be this fight.

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[111] *Ibidem.*

[112] *Ibidem*, Article 3.

[113] UNITED NATIONS, "International Covenant on Civil and Political Rights", 16 December 1966, Article 3, https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx (consulted on 03 January 2021).

[114] MAFTEI Jana, "Aspects of UN Activities on the International Protection of Women's Rights", *EIRP Proceedings: Legal Sciences in the New Millennium*, 2015, Vol.10(1), p.217-218.

[115] UNITED NATIONS, "International Covenant on Economic, Social and Cultural Rights", 16 December 1966, Article 7, https://www.ohchr.org/en/professionalinterest/pages/cescr.aspx (consulted on 03 January 2021).

[116] Brunei Darussalam, Bhutan, Malaysia, Oman, Saudi Arabia, South Sudan, United Arab Emirates, Myanmar, Singapore and some micro countries like Cook Islands and Micronesia.

[117] United Nations Human Rights- Office of High Commissioner: Status of Ratification Interactive Dashboard, https://indicators.ohchr.org/ (consulted on 04 January 2021).

In conclusion, the three above mentioned documents testify State parties' commitment to fight for human rights and they represent the kick start of women rights, without which UN's member states would have not been able to proceed along the process until drafting what will became the Convention on the Elimination of All Forms of Discrimination Against Women, the CEDAW, and others inspired Declarations[118].

2.1.2. UN Bodies focused on Women's Rights: The Commission on the Status of Women and United Nations Entity for Gender Equality and Empowerment of Women

The first-born entity devoted to women rights is the Commission on the Status of Women, a functional commission of the UN Social and Economic Council as well as the principal intergovernmental body dedicated especially to the condition of women. Founded in 1946[119], it is responsible for promoting gender equality and empowerment of women and it is also one of the leading entities behind UN Women, whose role in its regards is basically a secretariat one. UN Women takes part in the annual two-week session of the Commission, supporting its work and facilitating civil society representatives' participation in the debate. Inevitably, they share a wide range of objectives and cooperate strictly to reach those goals[120].

The Commission, thanks to its great international relevance, fosters the protection of women's human rights, it establishes global standards and programmes for reaching those standards, and it monitors women's actual condition all around the world. Since 1996, its mandate includes the promotion, implementation and monitoring of the Beijing Declaration and Platform for Action. This decision was not actually a first for the CSW, that had already played a key role in the drafting of well-known legal instruments, like the CEDAW Convention and the very Universal Declaration of Human Rights (that owes its incredible gender-inclusive vocabulary to the efforts of the new-born Commission) and in the establishment of new gender-oriented organizations, like UNIFEM and UN-INSTRAW. Nevertheless, it probably represents a real milestone for this body's history. In fact, the Beijing Declaration was the product of the Fourth World Conference on Women, a kind of event called upon by the Commission itself, and the first practical statement of intents about women rights, that kept up in the following years with Beijing +5, meant to review the previous declaration. Once again, in this

[118] ERLE Beverley H. and MADEK Gerald A., "An International Perspective on Sexual Harassment Law", *Minnesota Journal of Law & Inequality*, June 1994, Vol.12(1), p.71-72.
[119] ECOSOC resolution 11(II) of 21 June 1946.
[120] MAFTEI Jana, "Aspects of UN Activities on the International Protection of Women's Rights", *EIRP Proceedings: Legal Sciences in the New Millennium*, 2015, Vol.10(1), p.221.

occasion, the implementation and monitoring of the document drawn after the adjustments emerged during Beijing+5, was entrusted to the CSW's managing abilities[121].

The Commission is composed of several UN State parties' representatives, elected by ECOSOC. The Council designs 45 states (in 1946, they were 15) on a geographical basis and each state can chose one representative who will be in charge for the following four years. The Body is led by a Bureau of five members, each one elected every two years, that plays a crucial role in the preparation of the annual session[122]. However, what characterizes the added value of the Commission is that NGOs, other UN bodies and alternative civil societies' representatives can take part in the annual session. Participation is not limited to State Members and this offers a great opportunity to those countries that are not officially recognized, like Taiwan, to actively participate in the outlining activities. In addition, NGOs' participation offers a higher realistic view of the entity of the problems and the occurred (or not) progresses on a domestic level[123]. Nowadays, the working method, structured on multi-year programme of work, is delineated by ECOSOC Resolution 2015/6, on the base of which at each session the Commission has to: ensure its commitment in realizing gender equality and empowerment of women, broadly discuss current status and new challenges and issues, facilitate the implementation of gender mainstreaming [124] policies, as called for in Beijing Declaration and Platform for Action, and contribute to other organizations and bodies' activities by offering a gendered perspective[125]. The current multi-year programme in place is the one voted on July 2020, that covers the years from 2021 to 2024[126].

Though founded more recently, the second main body of United Nations regarding gender-related topics is the United Nations Entity for Gender Equality and Empowerment of Women, commonly known as the UN Women. This is the UN Entity dedicated to gender equality and empowerment, whose goal is accelerating the progress regarding women and girls' condition. Its birth is a recent one, dating back to July 2010, when General Assembly took a decisive step choosing to unify under a single strong body all duties previously held by minor agencies of the UN system. UN Women was

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[121] *Ibidem.*

[122] UNITED NATIONS ECONOMIC AND SOCIAL COUNCIL, "Resolution 11(II) of 21 June 1946: Commission on the Status of Women", 21 June 1946, https://undocs.org/en/E/RES/11(II) (consulted on 10 January 2021).

[123] UN Women, "Commission on the Status of Women", https://www.unwomen.org/en/csw (consulted on 14 September 2020).

[124] The gender-mainstreaming strategy recognizes women's singular needs and it reinterprets existing law in this perspective.

[125] UNITED NATIONS ECONOMIC AND SOCIAL COUNCIL, "Resolution 2015/6. Future organization and methods of work of the Commission on the Status of Women", 08 June 2015, https://undocs.org/en/E/RES/2015/6 (consulted on 10 January 2021).

[126] UNITED NATIONS ECONOMIC AND SOCIAL COUNCIL, "Resolution 2020/15: Multi-year programme of work of the Commission on the Status of Women", 27 July 2020, https://undocs.org/en/E/RES/2020/15 (consulted on 11 January 2021).

created to rectify the fragmentation of responsibilities and budget implied in the former system; in fact, the independence of those different bodies made it hard to actually implement a proper and organized set of actions for gender equality and the fragmented budget could not be fully exploited[127]. Consequently, the final reform of women dedicated organizations merged inside UN Women the following entities: the Division for the Advancement of Women (DAW)[128], the International Research and Training Institute for the Advancement of Women (INSTRAW)[129], the Office of the Special Adviser on Gender Issues and Advancement of Women (OSAGI)[130] and the United Nations Development Fund for Women (UNIFEM)[131].

Nowadays, UN Women, after incorporating all the previous bodies' duties, cooperates with UN State Members' governments for setting international standards of gender equality and outlining new programmes, policies and actions fundamental to reach those standards. Between its tasks, we can also include the support of inter-governmental bodies (like the Commission on Status of Women) and the assistance of UN Member States' actions for implementation even by means of financial and technical aids[132].

The organization is led by an intergovernmental governance structure in which UN General Assembly, the Economic and Social Council and the Commission on Status of Women are in charge of providing normative guiding principles, while General Assembly, the ECOSOC and the Executive Board develop operational policy guidelines. The composition of the Executive Board, newly elected every three years, applies a territorial distribution of its forty-one seats, but, among these, six members are chosen between voluntarily contributing countries (4 between the ten major contributors and 2 between the contributing developing countries)[133].

Moreover, the actions of the whole organization are also inspired by guidelines and standards settled through a series of international instruments, among which one of the most significant ones is the UN Women's Strategic Plan 2018-2021[134], drafted by the Executive Board of UN Women on August 2017 and put in charge in place of the Strategic Plan 2014-2017. The document essentially outlines

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[127] MAFTEI Jana, "Aspects of UN Activities on the International Protection of Women's Rights", *EIRP Proceedings: Legal Sciences in the New Millennium*, 2015, Vol.10(1), p.222-223.

[128] Established in 1946, substantive support to the Commission on Status of Women's activities and to the Women Committee's ones since 1982.

[129] Established in 1979 with the purpose of improving women's life conditions all around the world through research, trainings, statics, and seminars.

[130] Requested after the Fourth World Conference on Women in Beijing, organ meant to act as Secretary-General's advisory office for the implementation of the Platform for Action.

[131] Voluntary fund founded in 1976, whose objective was to support projects and strategies for gender equality and women political participation.

[132] *Ibidem.*

[133] UNITED NATIONS GENERAL ASSEMBLY, "Resolution 64/289. System-wide coherence", 02 July 2010, https://undocs.org/en/A/RES/64/289 (consulted on 15 January 2021).

[134] UN Women, https://www.unwomen.org/en (consulted on 23 December 2020).

the organization's strategic direction and approach to accelerate the achievement of concrete results regarding gender equality and women empowerment, and it highlights the purposes of contribution given by UN Women to the practical implementation of the appraisals of Beijing Declaration and, most importantly, of the 2030 Agenda for Sustainable Development[135]. The mentioned gender equality and women empowerment are not approached as simply goals *per se*, but they are instead the two concepts standing behind a series of critical situations: limited access to political life, inadequate representation and distinct levels of law application on the base of gender, work uncertainty and insufficient economic autonomy, limited admittance to education, vocational training and adequate level of personal fulfilment, and narrowed space of freedom from violence and control. Basically, these two terms hide a variety of concerns related to gender discrimination that are the real and main object of action of UN Women. For this reason, the UN Women Strategic Plan 2018-2021 highlights the above-mentioned critical areas as the five strategic priorities of its actions[136].

In the setting of 2030 Agenda for Sustainable Development, the resolution of the above-mentioned priorities would not affect only the Goal N.5, "Gender Equality", of the17 Sustainable Development Goals , but also a wide group of directly (Goal 3: "Good Health and Well-Being", Goal 10: "Reduced Inequalities", Goal 16: "Peace, Justice and Strong Institutions") and apparently less directly (Goal 6: "Clean Water and Sanitation", Goal 9: "Industry Innovation and Infrastructure", Goal 11: "Sustainable Cities and Communities"[137]) related objectives[138].

Essentially, the two examined bodies are the main entities in the United Nations, created especially to protect and implement women rights and we cannot ignore their fundamental contribution in all the achievements reached until now. All the international conventions, conferences and projects held for opposing gender discrimination were deeply influenced by their work, and often they have been the very promoters of many of them. Obviously, the path was a long and slow one, and sexual harassment was not even a concept in the first place, but their contribution to women rights enabled the international community to start by fighting the most known and severe forms of discrimination until reaching the contemporary level of sensibility. Without their practical involvement, probably international law, with its lacks and achievements, would have not developed to the point where it is now[139].

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[135] EXECUTIVE BOARD OF THE UNITED NATIONS ENTITY FOR GENDER EQUALITY AND THE EMPOWERMENT OF WOMEN, "Strategic Plan 2018-2021", 30 August 2017, http://undocs.org/en/UNW/2017/6/Rev.1 (consulted on 15 January 2021).

[136] *Ibidem.*

[137] For example, on the base of Outcome 3 women's commitment in entrepreneurship could radically increase, promoting Goal 9, while Outcome 4 could influence cities' development, favouring Goal 11.

[138] United Nations-Sustainable Development Goals, https://www.un.org/sustainabledevelopment/sustainable-development-goals/ (consulted on 24 December 2020).

[139] MAFTEI Jana, "Aspects of UN Activities on the International Protection of Women's Rights", EIRP Proceedings: Legal Sciences in the New Millennium, 2015, Vol.10(1), p.223.

2.2. Sexual Harassment in International Law

After investigating the actors of the international community, we can finally dig into the breadth of international instruments related to gender issues. In the following paragraph, we will analyse the most meaningful multilateral agreements that through their contribution have gradually created the existing international legal framework on sexual harassment.

We will start with the Convention for the Elimination of All Form of Discrimination Against Women (CEDAW) and its Optional Protocol (OP-CEDAW) and we will investigate the role of the Women Committee in charge of it. The CEDAW and its Optional Protocol do not mention in their texts "sexual harassment", not even violence against women (VAW), but they represent probably the most important existing universal binding documents in relation to gender equality and women empowerment, and without their original drafting and subsequential interpretation, nowadays we would not have any international binding instruments about violence against women, sexual harassment included. Indeed, these two documents are at the core of a wide proliferation of other non-binding instruments, like the General Recommendations adopted by the Committee on the Elimination of Discrimination Against Women (Women Committee), the Declaration on the Elimination of Violence Against Women (DEVAW) and the empowering Beijing Declaration and Platform for Action, fundamental for the practical adoption of anti-VAW provisions[140].

While the 38 General Recommendations of the Women Committee offer a higher level of commitment and reinterpretation of the terms of the Convention, in order to make it more inclusive of different kind of rights, the Beijing Declaration is a statement of intentions and of practical proposals. Finally, the Declaration on the Elimination of Violence thoroughly defines the problem of gender-based violence and its decisive link to gender discrimination.

None of these documents investigate sexual harassment as an independent issue, but they offer provisions on gender-based violence (GBV) that are expected to be applied to sexual harassment as well, through States' efforts toward punitive measures, awareness raising campaigns and data collection. The only exception is the ILO' Convention against violence and harassment in the workplace, not simply a binding treaty, but also unique since it includes specific considerations about sexual harassment[141].

Consequently, in this paragraph we will try to analyse sexual harassment both as strictly related to workplace, an approach inspired by North American legislations, and in a wider sense, as a kind of

[140] *Ibid.* p.218-220.

[141] JAŠAREVIĆ Senad R. and BOŽIČIĆ Darko M., "Protection from Violence and Harassment at Work in International Legal Standards", *Zbornik Radova: Pravni Fakultet u Novom Sadu*, 2019, Vol.53(3), p.794.

gender-based violence that could affect women's enjoyment of freedoms wherever they are, a line recently adopted by international organizations.

Finally, the following paragraph will consider only those instruments which include international provisions about sexual harassment, but we are not denying the decisive contribution held by other agreements, like the Vienna Declaration of Human Rights in 1993. Specifically, the Vienna Declaration did not just set gender-based violence, sexual harassment, and exploitation as incompatible with human dignity, but it finally stated probably one of the most relevant acknowledgment of our century, women's rights as *"inalienable, integral and indivisible*" human rights[142].

2.2.1. Safeguard from Sexual Harassment in the CEDAW Convention

I. CEDAW Convention and the Optional Protocol

The Convention on the Elimination of All Forms of Discrimination against Women was adopted on December 18th, 1979, and, despite its binding power, it obtained a positive feedback already in its first 10 years of action, counting today a total of 182 signatory countries. At the time of its entering into force, the CEDAW had the purpose of unifying all the precedent efforts, made firstly by the Commission on Status of Women and many other agencies, to develop a practical focus on gender issues by claiming the dignity and worth of each individual and by highlighting all the aspects in which equality was denied and women consequently could not enjoy their true and total freedom of will and action[143].

The Convention's monitoring and implementation is even today under the supervision of the Committee on the Elimination of Discrimination Against Women (also known as the Women Committee) composed of 23 *"experts of high moral standing and competence in the field covered by the Convention"* [144] elected for a term of four years. The experts are proposed by State Members on a regional basis, but they are not expected to represent their country, while instead to use their competences for analysing and valuating the reports both states and agencies are required to submit on a periodical basis[145].

[142] WORLD CONFERENCE ON HUMAN RIGHTS IN VIENNA, "Vienna Declaration and Programme of Action", 25 June 1993, https://www.ohchr.org/EN/ProfessionalInterest/Pages/Vienna.aspx (consulted on 15 January 2021).

[143] MAFTEI Jana, "Aspects of UN Activities on the International Protection of Women's Rights", *EIRP Proceedings: Legal Sciences in the New Millennium*, 2015, Vol.10(1), p.218-221.

[144] UNITED NATIONS, "Convention on the Elimination of All Forms of Discrimination against Women-Article 7", New York, 18 December 1979, https://www.ohchr.org/EN/ProfessionalInterest/Pages/CEDAW.aspx (consulted on 16 January 2021).

[145] MAFTEI Jana, "Aspects of UN Activities on the International Protection of Women's Rights", *EIRP Proceedings: Legal Sciences in the New Millennium,* 2015, Vol.10(1), p.222.

The CEDAW's practical agenda originates in the Convention's preamble, where three major considerations are immediately exposed.

Firstly, all forms of discrimination should be deemed inadmissible, since, despite UN's efforts, discrimination is still influencing women's ability to improve their condition on a variety of levels. The first Article offers a proper definition of the concept of "discrimination against women":

> *<<…the term "discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.>>*[146]

Secondly, women's equality should be recognized in its diversity, since physical predisposition should not interfere in sharing equal responsibilities and duties.

Thirdly, in this occasion, for the first time, a treaty denies culture, tradition and society the ability to influence equal rights' recognition and it describes how the above-mentioned factors lead to the crafting of stereotypes appositely meant to perpetrate discriminations.

Basically, the very initial steps of the CEDAW already highlights some important issues that will be vastly investigated in the whole body of the agreement. Especially, Articles from 1 to 16 declare women equality in international representation, education, employment, economic and social activities (including women's full capability in business and legal matters) and Article 2 require State parties' full commitment in practically obtaining women's equality and recognizing their civil rights[147].

Unfortunately, despite the high number of ratifications, some members have adopted such reservations that could hardly be integrated with the core principles of the Convention without undermining its main purpose. These State Parties have expressed reservation regarding various articles. For example, the two Koreas, most Middle Eastern countries (like Bahrain, Jordan, Kuwait, Lebanon Qatar, Saudi Arabia etc.) and Monaco refused the contents of Article 9, paragraph 2, meant to accept citizenship's inheritance by the part of the mother, and Algeria, Egypt, India, Iraq, Maldives, Niger, Singapore plus most Islamic Countries have expressed reservations on Article 16, intended to recognize men and women equality inside the family. Finally, nearly the totality of Islamic countries decided to not consider Article 2, regarding women's legal protection from discriminations and

[146] UNITED NATIONS, "Convention on the Elimination of All Forms of Discrimination against Women", New York, 18 December 1979, https://www.ohchr.org/EN/ProfessionalInterest/Pages/CEDAW.aspx (consulted on 16 January 2021).
[147] *Ibidem.*

actions for equality, in virtue of its contrariety to Islamic Shariah and a couple of countries, namely Oman and Saudi Arabia, directly rejected all the obligations that could be contrary to the local Islamic law[148].

Reservations against Article 16, Article 2 and especially those not properly specified, whose power could be potentially extended upon the whole Convention's body, have been cause of many objections by the part of Western Countries, with the main objection having its roots in the Vienna Convention on the Law of Treaties, that defines reservations contrary to core values of a treaty as not acceptable[149]. Being these articles expression of the core values of the CEDAW Convention to refuse them would basically means denying the entire significance of the treaty. Even the Women Committee expressed concern about reservations to these articles. As the Committee itself states, by entering a reservation the State declares its unwillingness to accept some norms and the related rights, and if those reservations regard core articles of a treaty this means refusing the entire treaty. Furthermore, some reservations breach customary international law, under which is considered inadmissible to invoke domestic law as a justification for failure in performing one state's obligations. Therefore, the Committee has asked those States to withdraw their reservations, to adapt and make them compatible with the terms of the Convention or, instead, to renounce to their partnership in the treaty[150]. In 1998, 45 of the 161 ratifying countries had expressed reservations on the CEDAW Conventions and even though some countries have now withdrawn them, Committee recognized State Parties, in comparison, seems to avoid entering reservations in conventions related to other sets of human rights[151]. For example, confronting the few reservations on the Convention on the Elimination of All Forms of Racial Discrimination to the high numbers of CEDAW, some feminists commented discrimination against women appears to be somehow considered more natural than discrimination on the base of race[152].

The same not satisfying level of commitment can be deduced by the fact that only 114 signatory states decided to enter also the CEDAW's Optional Protocol, the international treaties that can offer a judicial form of implementation of women rights. Adopted in 1999, the Optional Protocol is an international treaty which sets mechanisms of inquiry and complaints for the CEDAW Convention.

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[148] United Nations Treaty Collection Website, "CEDAW Convention- Declaration and Reservations" https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&clang=_en (consulted on 03 January 2021).

[149] UNITED NATIONS, "Vienna Convention on the Law of the Treaties", 23 May 1969, Article 19(c) https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf (consulted on 30 March 2021).

[150] UNITED NATIONS, "Report of the Committee on the Elimination of Discrimination against Women (18th-19th sessions)", *General Assembly Official Records Fifty-third Session Supplement No. 38 (A/53/38/Rev.1),* 1998, p.47-50, https://www.un.org/womenwatch/daw/cedaw/reports/18report.pdf (consulted on 30 March 2021).

[151] *Ibidem.*

[152] ERLE Beverley H. and MADEK Gerald A., "An International Perspective on Sexual Harassment Law", *Minnesota Journal of Law & Inequality*, June 1994, Vol.12(1), p.72-73.

Direct complaints can be presented by individuals or group of individuals[153] that perceive a violation of their right by part of a State Party (only one of those who have signed the Optional Protocol) and, if accepted, they will be analysed be the CEDAW Committee. The complaints cannot be anonymous and can be accepted only when all the domestic remedies have already been exhausted without satisfactory response and only if there is no other kind of international remedies in action[154]. Moreover, the OP-CEDAW is not prepared to face a complaint against more than one state, and it lacks an interstate complaints mechanism, suggesting women rights not be worthy for two states to start a conflict about. Finally, the complaint can be directed only to States and not towards individual perpetrators[155].

Still, the CEDAW Committee recognizes the significant contribution offered under the OP-CEDAW to affirm women and girls' human rights. Indeed, as of 31 December 2020, the Committee registers a total of 155 communications. Of these, in 38 cases, six in the course of 2020, a violation of the treaty was actually detected, while 50 cases of discrimination are still pending before the Committee, half of which regards gender-based violence[156]. Between these cases, we can also find some complaints about sexual harassment. For example, in August 2015, the Committee found a violation of the Convention's provisions in the *Anna Belousova v Kazakhstan* case on sexual harassment in the workplace[157]. The State was accused of breaching principles of human equality and dignity, equal employment opportunity, health, and safety. The Committee's views, though with not binding power, has followed the usual pattern requiring a monetary compensation (both for physical and moral injuries) and, above all, some legal updates, necessary to avoid the perpetration of detected violations[158].

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[153] The Optional Protocol of CEDAW does accept complaints by groups of individuals, but this is not a common measure in Optional Protocols, and it represents a notable flaw in the system since, for accessing those mechanisms, all individuals are expected to be free to act (which women often are not).

[154] UNITED NATIONS, "Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women", 6 October 1999, https://www.ohchr.org/en/professionalinterest/pages/opcedaw.aspx (consulted on 16 January 2021).

[155] EDWARDS Alice, *Violence against Women under International Human Rights Law*, Cambridge University Press, 2011, p.119-134.

[156] COMMITTEE ON THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN, "20 years from the entry into force of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (OP-CEDAW): A universal instrument for upholding the rights of women and girls and for their effective access to justice", 10 December 2020, https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26592&LangID=E (consulted on 16 January 2021).

[157] COMMITTEE ON THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN, "Views of the Committee on the Elimination of Discrimination against Women under article 7 (3) of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (sixty-first session) concerning Communication No. 45/2012", 13 July 2015, http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsujVF1NesLff7bP5A183yazPxL2bwmgtTnSAbOmLofyFwspHNj4wXgLUUnCFV4fmslEI7w3ljfxemy32yvcDN1tkjo75VBg23vnapi48FEQTWaRBrNCO2Qn8Z3QmkW5BqcNqlZjtjrOqwrMgREknZ3c%3d (consulted on 31 March 2021).

[158] *Ibidem.*

The relevance of this dissertation about discrimination in CEDAW could be hardly comprehensible if we think about the stated purpose of investigating sexual harassment, especially considering the little international attention that CEDAW brought even on more severe forms of sexual violence, but it instead becomes extremely clear if we consider what was stated at the beginning of this chapter. Thanks to the contribution of a series of "soft law" instruments, sexual harassment, like other forms of violence against women, became a fully-fledged expression of sex discrimination contrary to the terms of CEDAW Convention. It is in virtue of this interpretation of Article 1 that cases like *Anna Belousova v Kazakhstan* can be today object of the OP-CEDAW procedures[159]. Therefore, we will now investigate how, thanks to the inclusive approach of these instruments, the CEDAW Convention enlarged its focus of influence from general gender discrimination until becoming an entire treaty fighting against gender-based violence[160].

II. Interpreting the CEDAW Convention to include Sexual Harassment: The Declaration on the Elimination of Violence Against Women and CEDAW Committee's General Recommendations

Practically speaking, the CEDAW Convention does not mention the concept of violence against women not even once. However, thanks to the contribution of a series of other posthumous agreements, it nowadays represents one of the most valuable instruments fighting gender-based violence. How did it happen?

To understand the process, the first document we should take into account is the Declaration on the Elimination of Violence Against Women. In 1993, UN General Assembly officially recognized violence against women (VAW) as a terrible form of gender discrimination able to confine women's potentialities and enjoyment of rights and freedom[161]. Many feminist movements were detecting the gravity of consequences related to VAW and for this reason in 1992 the General Recommendation No.19 adopted by the Committee on the Elimination of Discrimination against Women had finally required State Members to include monitoring systems and statical data about violence in their reports[162]. The DEVAW was purposely drawn in response to these drives for implementing CEDAW's coverage against gender related violence. Obviously, the declaration is not a binding

[159] RADAY Frances, "An Urgent Appeal for Structural Measures against Sexual Harassment at Work", *International Labour Rights Case Law*, 2016, Vol.2, p.369-374.

[160] EDWARDS Alice, *Violence against Women under International Human Rights Law*, Cambridge University Press, 2011, p.179-185.

[161] UNITED NATIONS GENERAL ASSEMBLY, "Resolution 48/104: Declaration on the Elimination of Violence against Women", 20 December 1993, https://www.ohchr.org/EN/ProfessionalInterest/Pages/ViolenceAgainstWomen.aspx (consulted 18 January 2021).

[162] MAFTEI Jana, "Aspects of UN Activities on the International Protection of Women's Rights", *EIRP Proceedings: Legal Sciences in the New Millennium,* 2015, Vol.10(1), p.222.

document and it can employ only recommendatory language, still it is the first international instrument to offer an official definition of what should be identified as violence against women[163]. The definition it adopts recites as follow:

> *<<For the purposes of this Declaration, the term "violence against women" means any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, […] whether occurring in public or in private life.>>* [164]

But in virtue of its practical value, the DEVAW is not satisfied by a general definition, and it digs furtherly into practical examples of gender-based violence:

> *<< (a) Physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation;*
>
> *(b) Physical, sexual and psychological violence occurring within the general community, including rape, sexual abuse,* ***sexual harassment*** *and intimidation at work, in educational institutions and elsewhere, trafficking in women and forced prostitution;*
>
> *(c) Physical, sexual and psychological violence perpetrated or condoned by the State, wherever it occurs.>>* [165]

This is the first international document mentioning "sexual harassment", and it especially mentions it within the variety of forms that VAW can take. Therefore, even sexual harassment is officially defined as one of those acts that could cause physical, sexual or psychological harm and suffering to the woman, arising to a real threat for women's safety and dismissing the previous social minimizing approach.

Unfortunately, the instrument uses the term "gender" as a synonymous of "sex", even though gender should actually refer to the socially constructed role, made also of attributes, opportunities and responsibilities, considered appropriate for a woman or a man in virtue of their being a woman or a man[166]. Consequently, DEVAW requires a component of sex discrimination to recognize a gender-

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[163] EDWARDS Alice, *Violence against Women under International Human Rights Law*, Cambridge University Press, 2011, p.20-25.

[164] UNITED NATIONS GENERAL ASSEMBLY, "Resolution 48/104: Declaration on the Elimination of Violence against Women", 20 December 1993, Article 1 https://www.ohchr.org/EN/ProfessionalInterest/Pages/ViolenceAgainstWomen.aspx (consulted 18 January 2021).

[165] MAFTEI Jana, "Aspects of UN Activities on the International Protection of Women's Rights", *EIRP Proceedings: Legal Sciences in the New Millennium,* 2015, Vol.10(1), p.220.

[166] UN Women-"Concepts and definitions", https://www.un.org/womenwatch/osagi/conceptsandefinitions.htm (consulted on 30 March 2021).

based crime as such. For example, in the case of sexual harassment, the provision could apply to sexual extortion, but not to "hostile environment" harassment caused by the victim's nonadherence to gender stereotypes. For the same reason, the Declaration does not include even economical violence in its explanation, since a kind of violence linked to the role of economic interdependence that women live due to traditional gender roles. Finally, even though it requests proper legal measures to punish violence and protect victims, and it asks to adopt appropriate actions to modify social and cultural patterns, core of prejudices and stereotyped roles, it is still limited in its affirmatory language precisely by the influence of those countries not willing to give up on their patriarchal traditions, officially recognized in the DEVAW as instruments of domination and control over women[167].

This role officially assigned to patriarchy is a huge acknowledgment of responsibilities. Despite MacKinnon and other feminists' philosophical debate on power in the context of sexual harassment[168], no instruments before the DEVAW had openly stated the responsibility of patriarchy in maintaining women in a subordinate position. Nonetheless, some other documents had already reached relevant acknowledgments regarding gender-based violence, and sexual harassment on a lesser degree.

Since the signature of CEDAW Convention, the Women Committee proceeded in its commitment to women's rights by adopting a series of General Recommendations. Thought not binding, these instruments widened the Convention's subjects of interest and its influence and demands on State Members, allowing a remarkable increase in protection of women rights. We currently have 38 recommendations, the last of which, adopted in 2020. They relate to discrimination from different perspectives: from discrimination in conflict to equality in education and employment conditions, from discrimination against disadvantage groups (like rural women and elder ones) to equal access to justice; but for the purpose of this dissertation we will subsequently take into account only those agreements especially fostered against gender-based violence that had an impact on sexual harassment debate[169].

Since the reports were not adequately reflecting the link between discrimination, violence toward women and violation of human rights, the 1992 General Recommendation No.19 affirmed gender-based violence had to be included between forms of discrimination and it should be understood as: "*violence that is directed against a woman because she is a woman or that affects women disproportionately. It includes acts that inflict physical, mental or sexual harm or suffering, threats*

[167] EDWARDS Alice*, Violence against Women under International Human Rights Law*, Cambridge University Press, 2011, p.20-25.

[168] LARKIN June, "Sexual terrorism on the street: the moulding of young women into subordination", in THOMAS Allison M. and KITZINGER Celia (ed), *Sexual Harassment: Contemporary Feminist Perspectives*, Philadelphia, Buckingham: Open University Press, 1997, p.116-119.

[169] United Nations Human Rights- Office of High Commissioner: Committee on the Elimination of Discrimination Against Women, https://www.ohchr.org/EN/HRBodies/CEDAW/pages/cedawindex.aspx (consulted on 03 October 2020).

of such acts, coercion and other deprivations of liberty"[170]. From that point on the recommendation develops in the form of a special commentary, article by article, of the reason why violence against women would impact on women's ability to enjoy their rights, and in Article 11, paragraph 17 and 18, it also comments the main risks linked to sexual harassment[171].

When a woman is subjected to sexual harassment in the workplace, her equality in employment could be seriously damaged because of the threats of social outcomes that results from such an act. The Recommendation defines these actions as discriminatory when the victim perceive that a refusal could have consequences on her employment[172]. The document even identifies some practical expressions of "sexual harassment", including:

> *<< …unwelcome sexually determined behaviour as physical contact and advances, sexually coloured remarks, showing pornography and sexual demands, whether by words or actions….>>*[173]

This comment is probably one of the first and most relevant section of an international document related to sexual harassment, but the general work carried on by the CEDAW Committee continued with other recommendations, like the General Recommendation No.28, requiring State parties to fight and punish *"all forms"* of discrimination by employing all the appropriate measures in *"all fields"*[174], and in 2017, 25 years later the adoption of General Recommendation No.19, the General Recommendation No.35. This last document recognizes the by then customary value of CEDAW Convention's principles and it acknowledges the important progresses obtained through years thanks to increasingly detailed reports and the decisive action of non-governmental organizations. Still, it

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[170] COMMITTEE ON THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN, "General Recommendation No.19: Violence against Women", *General Recommendations Adopted by the Committee on the Elimination of Discrimination against Women*, 11th Session, 1992, https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1_Global/INT_CEDAW_GEC_3731_E.pdf (consulted on 20 January 2021).

[171] RADAY Frances, "An Urgent Appeal for Structural Measures against Sexual Harassment at Work", *International Labour Rights Case Law*, 2016, Vol.2, p.371.

[172] *Ibidem.*

[173] COMMITTEE ON THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN, "General Recommendation No.19: Violence against Women", *General Recommendations Adopted by the Committee on the Elimination of Discrimination against Women*, 11th Session, 1992, https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1_Global/INT_CEDAW_GEC_3731_E.pdf (consulted on 20 January 2021).

[174] COMMITTEE ON THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN, "General recommendation No. 28 on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women", *General Recommendations Adopted by the Committee on the Elimination of Discrimination against Women*, 47th Session, 16 December 2010, https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CEDAW/C/GC/28&Lang=en (consulted 21 January 2021).

also notices how women human rights are still violated in many countries by the recourse to justifications related to tradition, religion or reductions in public spending for financial reasons[175].
The agreement states which acts of States, non-governmental groups or private entities and which State omissions may engage the international responsibility of the Member State. Legally speaking, governments are asked to harmonizing national law with the Convention by producing age-sensitive and gender-sensitive legislation and including proper sanctions for the perpetrators plus protection and reparations for the victims. This obviously apply even to sexual harassment that should be eradicated on public and private spheres of employment by resorting to comprehensive legislations, measures for raising public concern and gender-sensitive trainings against stereotyped thinking[176].
In conclusion, thanks to a long process of interpretations inspired by subsequential soft law instruments, CEDAW Convention has come to include sexual harassment in the set of rights it is in charge of protecting. Through its authority, the CEDAW has provided the fundamental incentive for implementation of women rights on a domestic level, but various research observed that if the recognition of women's political and social rights substantially increased the same does not apply to economic ones of which sexual harassment in the workplace unfortunately is part. Therefore, we can conclude that the CEDAW Convention influenced the normative on sexual harassment as a kind of VAW, extending to it all progresses made on sex discrimination, but for the time being its influence has not been sufficient to cause a proper assimilation of those principles on a domestic level[177].

2.2.2. Beijing Declaration and Platform for Action and Beijing +5: practical strategies against sexual harassment

Thought unique as binding document concerning women rights, the CEDAW Convention is not the only international instrument that had an extreme impact on the international community regarding gender equality. Another fundamental document contributed to the assessment of a shared international framework on sexual harassment: the Beijing Declaration and Platform for Action.
In 1995, during the Fourth World Conference on Women[178], a new agreement was signed under request of various international and domestic agencies, an agreement named the Beijing Declaration

[175] COMMITTEE ON THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN, "General recommendation No. 35 on gender-based violence against women, updating general recommendation No.19", *General Recommendations Adopted by the Committee on the Elimination of Discrimination against Women*, 67th Session, 26 July 2017, https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CEDAW/C/GC/35&Lang=en (consulted on 21 January 2021).
[176] RADAY Frances, "An Urgent Appeal for Structural Measures against Sexual Harassment at Work", *International Labour Rights Case Law*, 2016, Vol.2, p.372.
[177] ENGLEHART Neil A. and MILLER Melissa K., "The CEDAW Effect: International Law's Impact on Women's Rights", *Journal of Human Rights*, 2014, Vol.13(1), p.38-41.
[178] The previous ones were Mexico City in 1975, Copenhagen 1980 and Nairobi 1985.

and Platform for Action. This document was expected to adopt a gender sensitive perspective, by applying a gendered point of view, technically called *mainstreaming*[179]. In the event that led to the drafting of the Platform for Action took part delegates from 189 governments and 2600 representatives from NGOs, while the parallel forum, held in Huairou, was attended by more than 30,000 people[180].

The preparatory process was developed in a series of regional conferences, where governmental delegates, UN experts and NGOs' representatives could work together in drafting a coherent regional priority list of actions. The five inter-governmental regional conferences (Europe and North America, Latin America and Caribbean, Asia and Pacific, Sub-Saharan Africa and Middle East with North Africa) produced five set of priorities, that became the base for negotiation. The final declaration was structured with six chapters of which the forth one "Strategic Objectives and Actions" was divided in 12 critical areas of concern: Women and poverty, Education and training of women, Women and health, Violence against women, Women and armed conflict, Women and the economy, Women in power and decision-making, Institutional mechanism for the advancement of women, Human rights of women, Women and the media, Women and the environment, The girl-child. Each of these paragraphs presents an initial part describing the area's problems and a following one on practical actions to be taken by local governments, NGOs, community organizations, private and public entities[181].

The Platform for Action, meant to practically deal with the unequal situation, was set to rely mainly on international cooperation and shared involvement by women and men, combined with sustainable development, social justice and practical commitment on behalf of international and domestic institutions on every levels[182].

Moreover, it heavily refers to a couple of new strategical terms: *empowerment* and *gender mainstreaming*. Both were new concepts introduced as decisive measures for the assimilation of women human rights. Especially *mainstreaming* was the new approach adopted by UN for interpreting pre-existing law and producing new piece of legislature by including a gendered perspective[183]. This approach seems to share MacKinnon's "inequality approach", that explains how,

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[179] EDWARDS Alice, *Violence against Women under International Human Rights Law*, Cambridge University Press, 2011, p.1-6.

[180] MARAN Rita, "After the Beijing Women's Conference: What Will Be Done?", *Social Justice*, 1996, Vol.23(1/2), p.352-353.

[181] *Ibid.* p.354-355.

[182] UNITED NATIONS, "Beijing Declaration and Platform for Action", *The Fourth World Convention on Women*, 15 September 1995, https://www.un.org/en/events/pastevents/pdfs/Beijing_Declaration_and_Platform_for_Action.pdf (consulted on 21 January 2021).

[183] *Ibidem.*

due to social conditioning, women and men are socially instructed to observe and read similar acts with different standards that should be considered when approaching cases of sexual harassment. The "inequality approach" is in fact directly linked to "reasonable women" standard, a standard that despite criticisms is still the internationally employed one[184].

In this context, violence against women, main topic of chapter 4 paragraph D, was once again faced as a product of years of patriarchal society and defined as a terrible tool employed to maintain women in a subordinate position. The text of the Declaration reads as follow:

<< Acts or threats of violence, whether occurring within the home or in the community, or perpetrated or condoned by the State, instil fear and insecurity in women's lives and are obstacles to the achievement of equality and for development and peace. The fear of violence, including ***harassment****, is a permanent constraint on the mobility of women and limits their access to resources and basic activities. >>*[185]

The Declaration basically states one of the core reasons for women's trouble in standing up against discrimination: fear. Violence is often used to instil fear in victims preventing them from respond and from trying to overturn the system. The fear hinders women from freely take part in society and in its evolution[186].

Obviously, violence is approached from a variety of points of view and a rough list of specific actions and of counteractions[187] for each form of VAW are included in the document. Sexual harassment is here mentioned both when referring to general violence against women both in some strategical areas, like "Women and the economy". It is primarily considered as one of those expressions of violence meant to instil fear in victims and remember them their place out of a public space where women's presence was raising in those years. "Harassment" is sometimes mentioned in general terms, but again it is meanly related to work environment where it is described as *"an affront to a worker's dignity […] prevents women from making a contribution commensurate with their abilities"* [188]. Still, despite

[184] COPER Cristine G., "Review of Sexual Harassment of Working Women by Catharine A. Mackinnon", *University of Chicago Law Review*, 1981, Vol.48, p.191-193.

[185] UNITED NATIONS, "Beijing Declaration and Platform for Action", *The Fourth World Convention on Women*, 15 September 1995, https://www.un.org/en/events/pastevents/pdfs/Beijing_Declaration_and_Platform_for_Action.pdf (consulted on 21 January 2021).

[186] LARKIN June, "Sexual terrorism on the street: the moulding of young women into subordination", in THOMAS Allison M. and KITZINGER Celia (ed), *Sexual Harassment: Contemporary Feminist Perspectives*, Philadelphia, Buckingham: Open University Press, 1997, p.124-128.

[187] For example, stricter punishments for perpetrators or more structured statistics and research methodology or creating confidential environments for victims' comfort.

[188] UNITED NATIONS, "Beijing Declaration and Platform for Action", *The Fourth World Convention on Women*, 15 September 1995,

its definition, we should not forget that in virtue of the practical approach of the Platform for Action, the document is the first one to require practical actions even to implement measures against this kind of discrimination, and that all measures addressed to the prevention and punishment of VAW should be considered as covering sexual harassment as well.

All UN agencies were expected to join the effort of Beijing Platform for Action: CEDAW Committee was asked to consider Beijing Declaration's outcomes when judging States Members' annual reports, INSTRAW had to implement the most appropriate research methodologies exploitable in studies on women, UNIFEM was demanded a major commitment by providing financial and technological assistance in developing countries and the Commission on Status of Women had the mandate to monitoring implementation of the Platform for Action itself. From 1996 to 2000, the CSW investigated the 12 critical areas submitting to State Parties operative indications regarding application of the Declaration's contents. Moreover, the Commission developed also the working program 1996-2000 and it performed as Preparatory Committee (PrepCom) for the 23rd Special Session of the General Assembly entitled ""Women 2000: gender equality, development and peace for the twenty-first century", commonly known as "Beijing +5" [189].

Beijing +5 was not the last review of Beijing Declaration and Platform of Action, at the contrary a new session is held every 5 years, the last one in March 2020 (Beijing +25), but it was probably the most symbolic and it stated the unquestionability of Beijing Declaration and Platform for Action's principles. Its main purpose was to appraise the previous instrument and, bearing in mind the obstacles highlighted by the Commission, to develop new levels of actions. Even in this case sexual harassment is regarded as a form of sex discrimination linked to women's role in economy, and it is in fact described as a "right of women workers".

In conclusion of the special session, the General Assembly adopted a "Political Declaration", stating basically the continuous involvement in Beijing Declaration's principles and "further Actions and Initiatives to Implement the Beijing Platform for Action"[190].

https://www.un.org/en/events/pastevents/pdfs/Beijing_Declaration_and_Platform_for_Action.pdf (consulted on 22 January 2021).

[189] *Ibidem.*

[190] UNITED NATIONS, "Beijing+5 Political Declaration and Outcome", *23rd Special Session General Assembly*, 5-9 June 2000, https://www.unwomen.org/-/media/headquarters/attachments/sections/csw/pfa_e_final_web.pdf?la=en&vs=1203 (consulted on 22 January 2021).

2.2.3. International Labour Organization C190- Violence and Harassment Convention

As previously stated, all UN's agencies were asked to take steps for including equality principles in their field of operation and under their mandate, but due to the obvious International Labour Organization's interest in the working field, ILO was especially efficient in taking into consideration the obstacles linked to sexual harassment. It is in fact the first UN body to ever adopt an entire Convention related to violence and harassment, namely "C190 - Violence and Harassment Convention". We cannot ignore that the term "harassment" is here used as a much more encompassing word than the mere significance of "sexual harassment", including even mobbing, bullying and other forms of discrimination, still gender-based harassment is constantly and repeatedly mentioned through the entire Convention as one of the most common expressions of inequalities[191].
The Violence and Harassment Convention was not the first step undertaken by ILO for fighting discrimination. At the contrary it is part of an extremely long-lasting process, started in 1951 with the "C100 - Equal Remuneration Convention"[192], supplemented by a recommendation, "R090 - Equal Remuneration Recommendation" [193], and followed in 1958 by the "C111 - Discrimination (Employment and Occupation) Convention"[194]. The original reason behind all these provisions was that the paying gap represented a hindrance to the expression of women's full economic potential, therefore a loss for domestic economies, and a limit to women's unrestricted enjoyment of freedom[195].
Consequently, the 2019 Convention was not the first expression of commitment on behalf of the ILO, but it definitely was the first document precisely concerning violence and harassment in the working field. The "C190 - Violence and Harassment Convention" was structured following Beijing Declaration's principles of gender mainstreaming. The body of the Convention in fact is written in gender neutral fashion, but despite safeguarding all individuals without relation to sex, the continuous reference to women and their special conditions are evident. The preface in fact reads as follow:

> <<*Acknowledging that gender-based violence and* ***harassment*** *disproportionately affects women and girls, and recognizing that an inclusive, integrated and gender-responsive approach, which tackles underlying causes and risk factors, including gender stereotypes,*

[191] JAŠAREVIĆ Senad R. and BOŽIČIĆ Darko M., "Protection from Violence and Harassment at Work in International Legal Standards", *Zbornik Radova: Pravni Fakultet u Novom Sadu*, 2019, Vol.53(3), p.785-788.
[192] Calling upon state parties to set equal remuneration for men and women workers for work of equal value.
[193] Proposing previous developed efficient patterns on how to unlock women's potential, like a classification of jobs without regard of sex.
[194] Drafted to ensure equal employment opportunities and treatment since, if men were awarded with higher level of occupation, the gap of salary would have continued.
[195] MAFTEI Jana, "Aspects of UN Activities on the International Protection of Women's Rights", *EIRP Proceedings: Legal Sciences in the New Millennium,* 2015, Vol.10(1), p.222.

multiple and intersecting forms of discrimination, and unequal gender-based power relations, is essential to ending violence and ***harassment*** *in the world of work…>>*[196]

The document therefore recognizes that these kinds of aggressions could affect everyone, but it also recognizes that they are more often addressed to women, as a mean to define their subordination in society. This could lead to the creation of uncomfortable environments, it could affect victims', especially women, ability to access, to remain and to progress in the labour market and it could be a hindrance to productivity. As an attack to human dignity able to impact on psychological, physical and sexual health, violence and harassment should be confronted with zero tolerance policies to prevent such behaviours and practices[197].

The first article of the Convention defines the term "violence and harassment" in workplace as "*…a range of unacceptable behaviours and practices, or threats thereof, whether a single occurrence or repeated, that aim at, result in, or are likely to result in physical, psychological, sexual or economic harm, and includes gender-based violence and* ***harassment***" and it furtherly describes "gender-based violence and harassment" as "*violence and* ***harassment*** *directed at persons because of their sex or gender, or affecting persons of a particular sex or gender disproportionately, and includes* ***sexual harassment***"[198]. We can immediately detect a high consideration for the concept of "gender-based harassment", including sexual harassment. The presented provisions cover employments in all sectors, private and public, in formal or informal economy or in any other related kind of interaction. The worker does not need a particular contractual status, also internes and apprentices are safeguarded[199]; at the contrary, the harassment can take place not only in the workplace, but also in case of working related situations (working events, working trips, employer-provided accommodations or through work-related communications, due to cyber harassment). Strategies include law and policies prohibiting violence and harassment, systems of monitoring and enforcement, access to remedies, prevention and support for victims, and sanctions for prosecutors. Workers' representatives as well are highly considered because able to easily collect individual bargains (often silenced by the victim's fear and shame), unify them and present them as official collective complaints. Finally, the

[196] INTERNATIONAL LABOUR ORGANIZATION, "C190 - Violence and Harassment Convention, 2019 (No. 190)", Geneva, 21 June 2019, https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C190 (consulted on 23 January 2021).

[197] JAŠAREVIĆ Senad R. and BOŽIČIĆ Darko M., "Protection from Violence and Harassment at Work in International Legal Standards", *Zbornik Radova: Pravni Fakultet u Novom Sadu*, 2019, Vol.53(3), p.794-796.

[198] INTERNATIONAL LABOUR ORGANIZATION, "C190 - Violence and Harassment Convention, 2019 (No. 190)", Geneva, 21 June 2019, https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C190 (consulted on 23 January 2021).

[199] *Ibidem.*

Convention requires effective reporting methods or dispute resolution mechanisms at workplace level or even external to the workplace and in form of dedicated tribunals and courts. In fact, without these assurances and without a proper protection of the victim's interests and wellbeing after the submission of the complaint, victims will never feel at safe and, again, they will probably avoid stand up for their rights[200].

To implement this treaty, ILO also adopted the "R206 - Violence and Harassment Recommendation, 2019" a not binding agreement meant to offer more practical advices; the most basic one an increasing involvement of workers. By taking part in training and prevention programmes, workers will not simply be able to discern harassing and violent actions, but they will probably avoid inflict them (due to a higher sensibility about psychological consequences), when assisting they will be able to recognize them and they will be not afraid of identifying a situation as harassment when it occurs to them. Alongside, governments and private stakeholders should consider the role of third parts, since clients, customers and service providers could be perpetrators as well and these situations cannot be neglected. Moreover, some peculiar employments, like night work, work in isolation, in public transportation or social services, are particularly at risk and, consequently, focused measures are in need for both granting a safe environment and not denying women access to these positions. Finally, the Recommendation sets attention on enforcing mechanisms and remedies. Complainants and victims should be properly protected from perpetual risks. They should have access to an appropriate compensation, be able to require immediate intervention for stopping a certain behaviour and they should be assisted by professionals and experts both in the complain process (with a court of experts in cases of gender-based violence and harassment, proper legal advice and adequate timing) both in the afterward needs for reintegration and psychological health support[201].

Considering all these obligations, sexual harassment is unquestionably a widely discussed topic in International Labour Organization. Unfortunately, it is exactly in virtue of the workplace centred approach to this matter that ILO was one of the few agencies seriously dealing with the topic, while others barely mentioned the issue[202]. It is clear the road to a balanced confront of the problem by the totality of international organs and domestic bodies of law is still a very long one.

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[200] JAŠAREVIĆ Senad R. and BOŽIČIĆ Darko M., "Protection from Violence and Harassment at Work in International Legal Standards", *Zbornik Radova: Pravni Fakultet u Novom Sadu*, 2019, Vol.53(3), p.792-794.

[201] INTERNATIONAL LABOUR ORGANIZATION, "R206 - Violence and Harassment Recommendation, 2019 (No. 206)", Geneva, 21 June 2019, https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:R206 (consulted on 22 January 2021).

[202] JAŠAREVIĆ Senad R. and BOŽIČIĆ Darko M., "Protection from Violence and Harassment at Work in International Legal Standards", *Zbornik Radova: Pravni Fakultet u Novom Sadu*, 2019, Vol.53(3), p.799.

2.3. Principles of non-discrimination applied: the case study of *"SGBs on prohibition of discrimination, harassment, including sexual harassment, and abuse of authority"*

Following ILO conventions' directives, UN agencies had to develop internal regulations against harassment in the workplace. The first directives came from the UN Secretariat. Obviously, as the main administrative organ of the UN, the internal regulations are submitted to the Secretariat's directives at least partially. For this reason, in 2003, the Secretary-General's Bulletin published "Special measures for protection from sexual exploitation and sexual abuse", a document addressed to all the staff of UN Organization for prohibiting unacceptable behaviours. These approaches could be directed to colleagues as well as to third parties (like beneficiaries of assistance) and they had to be considered intolerable in any case. Even now, reporting misconducts is mandatory and United Nations staff are required to create enjoyable environment free from this kind of threats. The transgressors should be subject to disciplinary sanctions, but to protect the right of privacy of people involved, the reports should be handled discreetly[203].

Following this former example, in January 2004, the Secretariat created the Information Circular ST/IC/2004/4, a globally valid document that set common rules for the resolution of conflicts, and asked each agency to create internal regulations especially meant to deal with harassment. The direct commitment of each agency was not novelty, because in 1992 the Secretariat had already adopted a Secretary General's Bulletin (ST/SGB/253) and an administrative instruction (ST/AI/379) meant to promote equal treatment, to prevent sexual harassment and to shape detailed procedures for dealing with those situations. Inspired by Beijing Declaration and Platform for Actions, the 1992's bulletin had been the first official call upon UN agencies for taking appropriate internal measure for fighting and preventing gender-based harassment[204].

Still, in this case all UN's bodies responded by producing internal guidelines to regulate the specific misconduct. Policy documents and administrative circulars flourished in each agency: FAO, UNESCO, WHO, UNICEF, UNHCR, IAIE, UNDP and many others. ILO established not simply

[203] UNITED NATIONS SECRETARIAT, "Special measures for protection from sexual exploitation and sexual abuse", *Secretary-General's Bulletin*, 09 October 2003, https://documents-dds-ny.un.org/doc/UNDOC/GEN/N03/550/40/PDF/N0355040.pdf?OpenElement (consulted on 25 January 2021).

[204] UNITED NATIONS SECRETARIAT, "Conflict resolution in the United Nations Secretariat", *Information circular,* 23 January 2004, https://documents-dds-ny.un.org/doc/UNDOC/GEN/N04/206/44/PDF/N0420644.pdf?OpenElement (consulted on 25 January 2021).

policies and guidelines, with particular attention on the role of prevention, but also a series of Action Plans and projects in cooperation with the staff union. The World Intellectual Property Organization (WIPO) followed the same path, producing a high number of documents concerning the proper way to submit a complaint for harassment. Even the World Bank drafted guidelines for implementation and prevention, with the declared intent of erasing harassment from the agency[205].

Obviously, in 2005 the Secretariat as well announced its new programme called "Prevention of workplace harassment, sexual harassment and abuse of authority". This programme was developed in collaboration with a series of other UN subjects, like UNDP, UNHCR or the United Nations Children's Fund, as an addition to pre-existing procedures, with the intent of including learning programmes meant to raise awareness regarding the UN's zero tolerance of harassment's policies and procedures[206].

In 2008 a new, more complete, piece of work was published in the Secretary General's Bulletin, called "Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority". This paper is the revised and renewed version of the Secretariat's internal regulations and guidelines written in 1992 and it accurately explain how to act in every situation that involves harassment or discrimination. The first part reports important definitions of the terms in use, particularly significant since being established by Secretariat they held a quite decisive relevance inside the totality of UN. Paragraph 1.2 describes harassment as:

> *<<Any improper and unwelcome conduct that might reasonably be expected or be perceived to cause offence or humiliation to another person.* ***Harassment*** *may take the form of words, gestures or actions which tend to annoy, alarm, abuse, demean, intimidate, belittle, humiliate or embarrass another or which create an intimidating, hostile or offensive work environment.* ***Harassment*** *normally implies a series of incidents.>>*[207]

We should notice how harassment is defined as to imply or a physical component or simply a vocal one, therefore including a variety of actions with the only limit of being conceived as offending and humiliating.

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[205] United Nations Entity for Gender Equality and the Empowerment of Women, "Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority", UN Women, https://www.un.org/womenwatch/uncoordination/antiharassment.html (consulted on 23 October 2020).

[206] UNITED NATIONS SECRETARIAT, "Prevention of workplace harassment, sexual harassment and abuse of authority", *Secretary-General's bulletin,* 28 November 2005, https://documents-dds-ny.un.org/doc/UNDOC/GEN/N05/619/45/PDF/N0561945.pdf?OpenElement (consulted on 24 January 2021).

[207] UNITED NATIONS SECRETARIAT, "Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority", *Secretary-General's bulletin,* 11 February 2008, https://www.un.org/womenwatch/uncoordination/antiharassment.html (consulted on 25 January 2021).

The paragraph 1.3 furtherly gives a precise meaning to "sexual harassment":

> *<<**Sexual harassment** is any unwelcome sexual advance, request for sexual favour, verbal or physical conduct or gesture of a sexual nature, or any other behaviour of a sexual nature that might reasonably be expected or be perceived to cause offence or humiliation to another, when such conduct interferes with work, is made a condition of employment or creates an intimidating, hostile or offensive work environment. While typically involving a pattern of behaviour, it can take the form of a single incident >>*[208]

Harassment and violence are once again prohibited to all staff members of the Secretariat, but managers are required higher level of attention, since in charge of directly handling all complaints fairly and without delay.

To prevent prohibited conducts, the Organization is expected to hold regular mandatory awareness programmes, to enforce the zero-tolerance policy, and training on responsibility, all of them under a regime of open communication for welcoming eventual criticisms without fear of retaliation. Staff members that feel they are experiencing a case of prohibited conduct should encounter an attentive environment ready to handle the procedures with discretion and sensitivity. The submitted report could be object of informal resolution, but in some cases, due to difference of authority between the parts, this path could not be possible, or the aggrieved individual could not wish to resort to informal means. Therefore, the victims are also always encouraged to seek assistance and advice of a third party, like a member of the staff representatives, that could substantially assist the victim for the whole time of the fact-finding investigation. An investigation is in fact needed in case of formal complaint, at the end of which, after no more than 3 months from the submission, the results could be the end of the investigations or some punishments, that could go from disciplinary sanctions or mandatory corrective measures to suspension[209].

Basically, sexual harassment here is not treated as a topic that should simply be discussed between State Members on an international level, but also inside international autonomous agencies as the UN's ones. Should the United Nations have not considered its internal problems, or should it have not been able to properly face those problems, it could not be seen as a role-model, inspiring state parties and private enterprises all around the world. Sexual harassment should be fought not only on a general, wide and abstract level, but also in every small action in our everyday life.

[208] *Ibidem.*
[209] *Ibidem.*

CHAPTER 3: PROVISIONS ON SEXUAL HARASSMENT BY REGIONAL LEGAL INSTRUMENTS: ASIA AND EUROPE

After analysing the international common line adopted by United Nations, we will now dig into the variety of reginal approaches. Regional organizations and platforms for cooperation are extremely diffused but characterized by different purposes and structures, therefore an inclusive research would be too complicate, but we will here confront different action lines employed by three major regional organizations in Asia and Europe: the non-interference attitude of ASEAN's states, based on a fundamental principle of the organisation which will be explained in the following paragraphs, the binding and effort taking commitment developed by the Council of Europe and the state-like authority held by provisions adopted inside the European Union.

As a matter of fact, neither Europe nor Asia were pioneering examples in the recognition of women rights; the first two regional instruments ever developed were indeed the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women, known as Convention of Belém do Pará, in 1994, and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, known as Maputo Protocol, in 2003. However, those previously drafted documents surely represented relevant inspirations for the extremely detailed Council of Europe's Istanbul Convention subscribed in 2011 and they are still examples of work for the ASEAN's state members' actions, despite for the time being a series of cooperative challenges have prevented the drafting of a binding document. The path adopted by European Union (EU) was indeed quite unusual, especially due to the unique entity represented by EU itself, but we cannot deny its gradually implementing process and stricter directives and resolutions too were inspired by the international framework.

Therefore, the following chapter will firstly investigate ASEAN's position on sexual violence, represented by the most permissive instruments ever adopted by a regional organization[210], barely mentioning sexual harassment at all, due to an orientation meant to implement economic growth and avoid interference in other AMS (ASEAN Member States)'s policies regarding human rights[211]. It will then analyse the Council of Europe's work, in virtue of its active role in fighting gender-based

[210] At least, women can vaunt a dedicated Declaration regarding their human rights, the ASEAN Declaration on the Elimination of Violence Against Women, something not extremely common in ASEAN's countries.

[211] PHAN Hao Duy, *"A selective approach to establishing a human rights mechanism in South East Asia: The case for a Southeast Asian court of human rights",* ProQuest Dissertations Publishing, 2009, p.109-114.

discrimination, even by juridically defining for the first time the concept of "gender" [212], relevant in highlighting how sexual harassment can afflict someone also on the base of sexual orientation or gender expression. Finally, it will examine European Union's actions, based on accurate definitions and the attempt of approaching the issue from multiple points of view.

3.1. Association of South-East Asian Nations (ASEAN)

ASEAN countries' path toward the establishment of a human rights body devoted to women and the drafting of a significant document was a long and a complex one. It started with Vienna Conference on Human Rights in 1993 where ASEAN's representatives took part after adopting the Bangkok Declaration, the regional instrument containing all common interests and actions meant to be presented at the actual international conference. In a worldwide *scenario* inspired by the 1993 DEVAW and the subsequential Women Conferences, Vienna Declaration granted a relevant space to women rights and strategies of empowerment, expressing values incorporated also in Article 22 of Bangkok Declaration, like the promotion and protection of women rights and the commitment to eradicate all forms of discrimination and gender-based violence[213].

At the end of the Vienna Conference, the drawn agreement did not place an official obligation regarding women rights, but it established the *"need to consider the possibility of establishing sub-regional and regional arrangements for the promotion and protection of human rights where they do not already exist*"[214], therefore it directly addressed ASEAN countries to include women rights in their region's set of interests. In fact, despite the creation in 1976 of an ASEAN Sub-Committee on Women and the formal commitment expressed by the Bangkok Declaration on the Advancement of Women in the ASEAN Region in 1988, meant to promote women integration in future development, practically speaking women rights had been previously vastly ignored[215].

Moreover, the ASEAN's structure itself created essential difficulties to actual cooperation regarding human rights since the Association's cooperative structure is basically rooted in the principle of non-interference and in the "ASEAN Way".

Since its creation in 1967, ASEAN has held the principle of non-interference as one of its central one. State members have always taken position against international organizations, NGOs or external

[212] RISTIK Jelena, "Protection from Gender-Based Violence Before the European Court of Human Rights", *Journal of Liberty and International Affairs*, August 2020, Vol.6(2), p.71-73.

[213] PISANO' Attilio, "Towards an ASEAN human rights mechanism: the ASEAN Commission on the Promotion and Protection of the Rights of Women and Children", *The International Journal of Human Rights*, 2016, Vol.20(3), p.321-324.

[214] *Ibid.* p.324.

[215] *Ibidem.*

countries, stating that human rights, therefore domestic management of economic, racial, cultural, religious and other problems, were outside its purposes as a collective body[216]. Recently it looks like something is changing, since some less-conservative states, Thailand and Philippines in the first place, are gradually proposing a "flexible engagement" stating: *"if domestic events in one member's territory impact adversely on another member's internal affairs, not to mention regional peace and prosperity, ASEAN [...] may, on occasion, find it necessary to recommend certain course of action on specific issues that affect us all, directly or indirectly.*" [217] This could appear as a very bland statement, but if we consider the purpose behind the birth of the organization, mainly linked to cooperation in the economic field and international peace, this is the first position openly stating the possibility and the duty to interfere in internal humanitarian issues when they influence the interests of the entire region[218].

At the same time, with the term "ASEAN Way" we refer to a code of conduct and procedural norms based on respect of other countries internal policies and non-confrontations, non-critics and non-use of force, plus the "decision making through consensus"[219]. Consequently, even if 100% agreement is not required, ASEAN's countries will not adopt a decision strongly opposed by one of their members. This constrictive system causes a general inefficiency, that, through recent years, many governments inside the organization have tried various efforts to undermine[220], but until now all those attempts ended up enforcing it[221].

Obviously, in this perspective, reaching an agreement on women (or even simply human) rights, especially one including the use of binding documents, is extremely challenging. Consequently, the empowerment and creation of dedicated regional bodies too has been quite complex. In the next pages, we will investigate these bodies and, in addition, we will analysis the few existing instruments fighting sex discrimination and violence against women, being aware that the path toward recognition of more subtle expressions of discrimination, included sexual harassment, has just begun and it will still need lots of efforts to reach a satisfactory coverage of the issue.

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[216] PHAN Hao Duy, "A selective approach to establishing a human rights mechanism in South East Asia: The case for a Southeast Asian court of human rights*", ProQuest Dissertations Publishing,* 2009, p.147-152.

[217] PITSUWAN Surin, *Currency Turmoil in Asia: The Strategic Impact*, Remarks at the 12th Asia-Pacific Roundtable, Kuala Lumpur, 01 June 1998 quoted in PHAN Hao Duy, "A selective approach to establishing a human rights mechanism in South East Asia: The case for a Southeast Asian court of human rights*", ProQuest Dissertations Publishing*, 2009, p.151.

[218] PHAN Hao Duy, *"*A selective approach to establishing a human rights mechanism in South East Asia: The case for a Southeast Asian court of human rights", *ProQuest Dissertations Publishing*, 2009, p.151-152.

[219] *Ibid.* p.154-156.

[220] For example, Thailand proposed an ASEAN Troika, permanent and on a ministerial level, but due to Myanmar opposition the body was reconceptualized to be an "ad-hoc" body without decision-making power and based on consensus principle.

[221] *Ibid.* p.156-158.

3.1.1. ACW and ACWC, the Asian supranational bodies fighting violence against women. The ACWC Work Plan 2016-2020

The first kind of supranational body dedicated to women rights was the ASEAN Sub-Committee on Women, established in 1976 to implement and coordinate regional efforts related to women's issues. However, this sub-committee remained quite futile until 2001, when it was elevated to a full committee, called the ASEAN Committee on Women (ACW)[222]. Its foundation as subsidiary body was part of a process of restructuration, held in 2002, meant to create the ASEAN Ministerial Meeting on Women (AMMW), an organ, meeting on a yearly basis, with the purpose of coordinating and monitoring ASEAN cooperation regarding women rights[223]. From 2001 on, ACW's duties included: promoting intergovernmental cooperation and capacity building based on best practices, producing reports and research on the status of women in ASEAN countries and monitoring the Declaration of the Advancement of Women in the ASEAN Region's implementation by publishing a report every three years[224]. All while collaborating with the AMMW for offering seminars, trainings and sessions about gender issues. To pursue its effort toward the Bangkok Declaration on the Advancement of Women (1988) one of its main contribution was the development of the Work Plan for Women's Advancement and Gender Equality (2011-2015)[225].

This Work Plan is an operational document meant to carry on the directives for women's empowerment and gender equality. In fact, following the example of various previous plans of action, like the Work Plan on Women's Advancement and Gender Equality (WAGE 2005-2010), even financially supported by the contribution of a variety of international stakeholders like UNIFEM, the document shares those same priority areas expressed in the Bangkok Declaration, as women integration and promotion of employability, but contextualized in recent achievements, like the foundation of ACWC and, finally, of the ASEAN Intergovernmental Commission on Human Rights (AICHR)[226]. Some of the main enlisted challenges included the promotion of equitable participation in cultural, political, social and economic life and the implementation of women as active agents in development. This discourse is quite relevant if we consider another main purpose is fighting violence against women and the increase of women's awareness regarding their rights. Through gender-

[222] PISANO' Attilio, "Towards an ASEAN human rights mechanism: the ASEAN Commission on the Promotion and Protection of the Rights of Women and Children", *The International Journal of Human Rights*, 2016, Vol.20(3), p.324.
[223] Association of Southeast Asian Nations- ASEAN Ministerial Meeting on Women (AMMW), https://asean.org/asean-socio-cultural/asean-ministerial-meeting-on-women-ammw/ (consulted on 19 February 2021).
[224] LSE, Center for Women, Peace + Security, "ASEAN Committee on Women", https://blogs.lse.ac.uk/vaw/regional/southeast-asia/asean-committee-on-women/ (consulted on 21 February 2021).
[225] *Ibidem.*
[226] ACW, "The ASEAN Committee on Women (ACW). Work Plan 2011-2015", ASEAN Secretariat: Jakarta, October 2012, https://asean.org/?static_post=asean-committee-on-women-acw-work-plan-2011-2015 (consulted on 19 February 2021).

responsive policies, new programmes and projects have been developed for eradicating violence against women, but, in an intersectional perspective, since this work plan considers women's contribution as extremely valuable in the economic field, we cannot ignore how much, on a practical level, all those efforts should end up influencing especially those kinds of violence directly interfering with women's participation in economy, like sexual harassment in the workplace and in public space. Quite indicative is the fact that while "Women's labour force participation" is enlisted between the achievements, "Cultural attitudes and educational systems", concerning gender stereotypes, and "Violence against women" are still considered core challenges[227].

At the same time one of ACW's great contribute was its role in the establishment of the ASEAN Commission of the Promotion and Protection of the Rights of Women and Children (ACWC). In ASEAN's plan of action, children and women rights have always been strictly linked in virtue of how childhood violence and witness of violence could affect the infants' growth. Therefore, it is not unexpected that the first consultative human rights body was one devoted to both groups' interests[228]. In 1998, during the 31st meeting of ASEAN Foreign Ministers, recognizing the potential relevance of women and children in development processes and highlighting CEDAW and CRC's commitments, governments' representatives finally accepted to work together for implementing local efforts. Still, it took more than ten years, in occasion of the 16th summit of ASEAN heads of state and/or government held in Ha Noi, to formally establish the "ASEAN Commission of the Promotion and Protection of the Rights of Women and Children" (ACWC). It was April 7th, 2010[229].

The goal of this organization, composed of two representatives for each AMS (ASEAN Member State), was to reach a stronger cooperation between nations for promoting rights of women and children, especially of those living in extremely disadvantage conditions, but it is also important to emphasise the essential link between the ACWC's creation and the implementation of CEDAW and CRC's commitments. In fact, by ratifying those conventions, ASEAN Member States generally recognized the annexed values (something they are still avoiding if we consider instead the ICCPR and ICESCR on general human rights) but a common line of action was still missing. Consequently, the ACWC had the duty to unify general efforts and attitudes for strengthening previous actions and implement the feeblest ones. It is remarkable how this organ, like the AICHR, was instituted without a previous regional definition of the discussed rights, and therefore it is structured to act

[227] *Ibid*. p.5-13.

[228] ASEAN, Australia Aid and UN Women, "ASEAN Regional Guidelines on Violence against Women and Girls Data Collection and Use", Asean.org, April 2018, p.9, https://asean.org/storage/2018/11/ASEAN-VAWG-Data-Guidelines.pdf (consulted on 25 February 2021).

[229] PISANO' Attilio, "Towards an ASEAN human rights mechanism: the ASEAN Commission on the Promotion and Protection of the Rights of Women and Children", *The International Journal of Human Rights*, 2016, Vol.20(3), p.325.

complementing the CEDAW and CRC's Committees and inside those Conventions' legal framework[230].

Basically, ACWC's role is to uphold human rights expressed in international law instruments but by taking into account the fundamental principle of ASEAN's relations, the non-interference. In fact, on the base of Article 3 of Terms of reference, the ACWC must take into consideration and respect each state member's sovereignty, independence and National identity. Not coincidentally, the commission is designed to promote the dialogue between states, without taking decisions but through fostering collegial and consensual confront and cooperation between members. To find balance between protection of human rights and respect of national sovereignty is surely a complicated and strenuous task, but at least it can be translated into common development policies and programmes inside the whole ASEAN Community, promotion of public awareness and a direct support of each nation in its relations with international institutions (for example support in preparing periodical review and reports for CEDAW and CRC's Committees)[231].

Despite the absolute lack of powers for the actual protection of women and children rights, the ACWC worked on the definition of its Rules of Procedure and on the drafting of periodical Plans of Actions[232]. Each plan has a duration of five years and it states the role and involvement of each stakeholders in the Commission's work, the common intergovernmental concerns and the full participation of both women and children in the developing process. The plan of action is structured so that each state oversees the coordination of a particular set of responsibilities, that appear once again as being oriented toward promotion and not protection of women and children rights. However, since the issues remained strictly related to these two topics, without regarding general human rights or national sovereignty, governments accepted to involve NGOs and CSOs[233].

The most recent Work Plan was the 2016-2020 workplan, that included a prominent attention on the eradication of violence against women and children. While Indonesia was the country in charge of review new legislations and law enforcement by 2017, Thailand had the duty to develop a public campaign of awareness raising. The entire ASEAN Community cooperates for the 5 years-programme of priority actions to implement the Regional Plan of Action on Elimination of Violence Against Women (RPA EVAW). At the same time, the thematic area 11 and 14 regard respectively strengthening economic rights of women and gender mainstreaming. Therefore, exactly in the same way as it was with ACW Work Plan 2011-2015, the intersection between eradication of VAW and

[230] *Ibid.* p.329-330.
[231] *Ibid.* p.330-332.
[232] *Ibid.* p.336.
[233] *Ibid.* p.335-337

economic empowerment of women should emerge in new kind of measures regarding sexual harassment[234].

3.1.2. The ASEAN Declaration on the Elimination of Violence Against Women and the Regional Plan of Action on the Elimination of Violence Against Women

The 30th June 2004, after years of debate, the ASEAN's countries representatives adopted the Declaration on the Elimination of Violence against Women in the ASEAN Region, a regional instrument inspired by the CEDAW Convention, the Declaration on the Elimination of Violence Against Women of 1993 and the Beijing Declaration and Platform for Action, but adapted to the ASEAN context. The inspiring documents are all quoted in the Declaration preface, but their values are also expressed throughout the whole body of the document: a higher level of bilateral and international cooperation, a gender mainstream perspective, the development of appropriate legislative, social and educational measures to eradicate violence against women wherever on a social and behavioural level and the strengthening of women economic independence and enjoyment of freedom[235].

In October 2013, the previous 2004 Declaration was replaced by a new one, the Declaration on the Elimination of Violence Against Women and Elimination of Violence Against Children in ASEAN, that stresses the protection of victims/survivors and rehabilitation of perpetrators and the particular demeaning role of gender stereotypes[236]. Unfortunately, the Declaration does not mention sexual harassment even once, but sexual harassment is concretely approached by ASEAN's states through a decisive practical implementation drawn in 2016, the ASEAN Regional Plan of Action on the Elimination of Violence Against Women (ASEAN RPA on EVAW).

This plan is presented as a detailed document offering various topics and proposals for real actions in a linear way and by even highlighting critical area for each AMS. In the first section it applies the same definitions detected in the Beijing Declaration and Platform for Action and it mentions sexual harassment between the forms of sexual violence, but it goes enough into details to mention other

[234] ACWC, "The ASEAN Commission on the Promotion and Protection of the Rights of Women and Children (ACWC). Work Plan 2016-2020", ASEAN Secretariat: Jakarta, December 2018, https://asean.org/storage/2019/01/37.-December-2018-The-ASEAN-Commission-on-the-Promotion-and-Protection-of-the-Rights-of-Women-and-Children-ACWC-Work-Plan-2016-2020.pdf (consulted on 21 February 2021).

[235] PISANO' Attilio, "Towards an ASEAN human rights mechanism: the ASEAN Commission on the Promotion and Protection of the Rights of Women and Children", *The International Journal of Human Rights*, 2016, Vol.20(3), p.325-327.

[236] ASEAN POLITICAL-SECURITY COMMUNITY, "The Declaration on the Elimination of Violence Against Women and Elimination of Violence Against Children in ASEAN", 09 October 2013, https://www.asean.org/storage/images/archive/23rdASEANSummit/6.%20declaration%20on%20evawc%20in%20asean%20-%20final.pdf (consulted on 20 February 2021).

recent kinds of harassment, like cyber harassment. The document identifies international and regional commitments, and it reports some guideline principles, especially the human rights-based approach, referring to individuals' freedom from violence and discrimination. Moreover, it underlies inequal power relations and gender-based stereotypes as expression of gender inequalities. If we think back to the philosophical role of power in sexual harassment and about the above-mentioned "gender harassment", or "hostile environment", it is immediately obvious how this kind of debate could practically influence sexual harassment[237].

The Regional Plan's enlisted actions are structured as: prevention; protection and support services for victims/survivors; legal framework, prosecution and justice system; capacity building; research and data collection; management, coordination, monitoring and evaluation; partnership and collaboration; review and communications.

The distribution of information about different kinds of violence against women, their costs on a social and economic level and the regarding laws and policies are included among "preventive" actions, in order to undermine the stigma related to victims/survivors and to encourage reports. This is highly consistent in sexual harassment cases, since extremely rarely reported because of its social connotation as something futile. Moreover, the plan promotes the prevention and elimination of VAW through measures of implemented security in workplace, public spaces and transportation, deemed, according to statistics, as extremely risky environments due to their wide exposition and vulnerability[238].

We can even read: << *Create or strengthen accessible, effective and gender sensitive complaint mechanism with investigative and monitoring functions for workplace abuse and* ***harassment*** *in all workplace whether formal and informal sectors including domestic workers*>>[239] as a specific point of the plan regarding "protection and support services" actions. Since most women are hesitant in front of the idea of submitting an actual judicial complaint for sexual harassment, in fear of worsening their condition of life, a proper specific mechanism could be extremely useful to encourage women to take action against perpetrators[240].

Moreover, in response to the request for a stronger commitment to develop legal measures to address VAW, various countries are working toward a more victim-centred administration of justice by

[237] ASSOCIATION OF SOUTH-EAST ASIAN NATIONS, "ASEAN Regional Plan of Action on the Elimination of Violence against Women (ASEAN RPA on EVAW)", ASEAN Secretariat: Jakarta, February 2016, https://www.asean.org/wp-content/uploads/2012/05/Final-ASEAN-RPA-on-EVAW-IJP-11.02.2016-as-input-ASEC.pdf (consulted on 19 February 2021).

[238] *Ibidem.*

[239] *Ibid.* p.21.

[240] MACKINNON Catharine A. and MITRA Durba, "Ask a Feminist: Sexual Harassment in the Age of #MeToo", *Signs: Journal of Women in Culture and Society*, Vol.44(4), p.1030-1031.

including a gender mainstream approach and they are acting even against Sexual Harassment. For example, Malaysia is drafting a new framework against gender-based violence including a specific act against sexual harassment; the Philippines are planning to enlarge the Sexual Harassment Law to include online harassment; Singapore in 2014 passed the Protection from Harassment Act, which is especially meaningful since it applies wherever the act takes place, in and outside the workplace, and Viet Nam did the same in 2012[241].

Finally, together with an implemented intergovernmental collaboration, even the private sector has been recently more and more involved. In fact, in this perspective, the private sector should have a major role not simply in prevention and awareness raising, but also in data collecting for monitoring purposes. ASEAN members, in collaboration with UN Women and Australia Aid, set up a regional guideline on data collection, in which the necessity for more data and more specific and differentiated information is highlighted as fundamental to fight violence against women. Data are divided between administrative data (collected by service providers and handled by authorities or specific services), prevalence data (collected through surveys) and costing data (meant to calculate monetary costs of VAWG)[242]. Sexual harassment is not simply enlisted between the various kind of violence against women, but it is also mentioned as one of those forms of violence needing further study and data collected by setting more specific categories. Not without reason, since sexual harassment is in fact often analysed in virtue of its prominent monetary costs: <<***Sexual harassment*** *is a barrier to equal participation in paid work and undermines the equal participation of women in the workplace. It also reduces worker productivity which leads to decreased productivity for businesses.*>>[243]

3.2. The Council of Europe

Europe is probably the continent with the strongest human rights system, consistent of different organizations and bodies whose unified efforts, after years of commitment and implementation, gave relevant outcomes. Among the existing regional organisation one of the most long-standing ones is the Council of Europe (CoE), established in 1949. After the adoption of the Universal Declaration of Human Rights in 1948, the CoE opened up the signature for the European Convention for the

[241] ASSOCIATION OF SOUTH-EAST ASIAN NATIONS, "ASEAN Regional Plan of Action on the Elimination of Violence against Women (ASEAN RPA on EVAW)", ASEAN Secretariat: Jakarta, February 2016, https://www.asean.org/wp-content/uploads/2012/05/Final-ASEAN-RPA-on-EVAW-IJP-11.02.2016-as-input-ASEC.pdf (consulted on 19 February 2021).

[242] ASEAN, Australia Aid and UN Women, "ASEAN Regional Guidelines on Violence against Women and Girls Data Collection and Use", Asean.org, April 2018, https://asean.org/storage/2018/11/ASEAN-VAWG-Data-Guidelines.pdf (consulted on 21 February 2021).

[243] *Ibidem.*

Protection of Human Rights and Fundamental Freedoms (ECHR). It took some decades for all member countries to sign the Convention, but this caused their automatic adherence to the two human rights institutions set up as a direct consequence of the instrument, the European Commission of Human Rights and the European Court of Human Rights, both supervised by the Committee of Ministers of the Council of Europe [244].

In a first moment, the approach was in part compulsory, any contracting party charged of breaching the provisions of the Convention can be potentially sanctioned as a consequence, and in part optional, for being submitted to Commission's influence firstly each country had to accept the Commission's competence in receiving individual's complaints or petitions. Even the jurisdiction of the European Court of Human Rights (ECtHR), composed of one judge for each member of the CoE and in charge of evaluating all those cases submitted to it by the Commission, has to be previously accepted for its judgment to be legitimate. However, after years of collective commitment, in 1998, the Protocol No.11 came into force and, while the Commission dissolved, the ECtHR's judicial power became compulsory as provided in the Convention. Today, membership in the Council means accepting the ECHR, and if the judgments of the ECtHR are ignored the Committee of Ministers of the Council of Europe could decide to enforce the decision by even suspending the right of vote of the convicted country[245].

When we consider women's rights, we could believe the European situation has already reached a satisfactory level of equality, but, if we look into the actual statistics, reality appears different. According to European Fundamental Rights Agency's research, in 2016 one woman out of three, corresponding to 59.4 million women, had experience of physical or sexual violence. The 18% was victim of stalking, and between 45% and 55% of women had experienced sexual harassment at least once in their lives. Finally, even more alarming is the fact that only around the 14% of women reported these kinds of experiences[246]. Due to the recent financial crisis, women rights have been considered a minor priority and the development of related policies in Europe has slowed down[247]; still some kinds of severe women rights' violations have been subjected to ECtHR's judgements.

In fact, despite the absence of any particular reference concerning women rights in the European Convention of Human Rights, the European Court of Human Rights was able to apply a series of its principles to gender-based violence cases and, through their interpretation, to develop high standards

[244] PHAN Hao Duy, "A selective approach to establishing a human rights mechanism in South East Asia: The case for a Southeast Asian court of human rights", *ProQuest Dissertations Publishing*, 2009, p.215-216.
[245] *Ibid.* p.216-219.
[246] RUBIO-MARIN Ruth, "Women in Europe and in the world: The state of the Union 2016", *International Journal of Constitutional Law,* 01 July 2016, Vol.14(3), p.547-548.
[247] Ibid. p.551.

regarding violence against women and to offer effective protection[248]. The employed provisions are especially: Article 2-right to life (like in *Tërshana v. Albania*, 04 August 2020, case of violence by private individual), Article 3-prohibition of torture (common to most of rape and sexual abuse cases like in *B.V. v. Belgium*, 04 May 2017, or *M. and Others v. Italy and Bulgaria*, 31 July 2012), Article 4-prohibition of slavery and forced labor (recurring in all cases related to human trafficking like *S.M. v. Croatia*, 25 June 2020), Article 6-right to a fair trial (like in the case *L.E. v. Greece*, 21 January 2016, on human trafficking), Article 8-right to respect for private and family law (commonly employed in cases of rape and sexual abuse like the first ever *X and Y v. the Netherlands*, 26 March 1985), Article 13-right to an effective remedy (like in *I.P. v. the Republic of Moldova*, 28 April 2015) and Article 14-prohibition of discrimination (like in the latest *Sabalić v. Croatia*, 14 January 2021)[249]. Basically, state's responsibility is at stake every time women rights' protection is not properly guaranteed by local authorities, like in the *Opuz.vs. Turkey* case, in 2009, a leading case in this matter, when Turkey was found guilty of violating Article 2 and 3 due to authorities' inability in protecting the victim and her family's life[250].

Through decades, the European Convention on Human Rights did not remain the only instrument in charge of protecting women rights and ECtHR did not work alone. New specific conventions drafted by the Council of Europe provoked remarkable progress regarding violence against women and even sexism, bringing the CoE to be one of the most pioneering organisations regarding women and human rights.

3.2.1. The Istanbul Convention: defining the crime of sexual harassment

In virtue of its binding power, the most important document ever drafted by the Council of Europe regarding women rights is the Istanbul Convention, drawn up in 2011. This instrument is by far the most efficient international treaty to address VAW ever written, since it requests states to practically criminalize every form of violence against women, from domestic violence to genital mutilation, forced abortion and, obviously, sexual harassment[251]. It was not the first document ever written by the CoE on women rights, but none before had been so structured, and surely none binding.

[248] RISTIK Jelena, "Protection from Gender-Based Violence Before the European Court of Human Rights", *Journal of Liberty and International Affairs*, August 2020, Vol.6(2), p.71-72.

[249] EUROPEAN COURT OF HUMAN RIGHTS-PRESS UNIT, "Factsheet-Violence Against Women", January 2021, https://www.echr.coe.int/Documents/FS_Violence_Woman_ENG.pdf (consulted on 15 February 2021).

[250] TUMMINELLO Fabio, "Violenza contro le donne nella giurisprudenza della Corte EDU: da Opuz c. Turchia al caso Talpis", Ius in Itinere, 29 April 2018, https://www.iusinitinere.it/violenza-contro-le-donne-nella-giurisprudenza-della-corte-edu-da-opuz-c-turchia-al-caso-talpis-9768 (consulted on 17 February 2021).

[251] RISTIK Jelena, "Protection from Gender-Based Violence Before the European Court of Human Rights", *Journal of Liberty and International Affairs*, August 2020, Vol.6(2), p.81-82.

In 2002, the "Recommendation Rec (2002)5 of the Committee of Ministers to member states on the protection of women against violence" represented a first normative step taken by the Council regarding violence against women. On this occasion, VAW was described as:<<*any act of gender-based violence, which results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion, or arbitrary deprivation of liberty, whether occurring in public or private life*>>[252]. In the same way as it will later be with Istanbul Convention, the Recommendation describes violence against women as an expression of unequal power and as one of the most severe forms of violation of human rights in Europe. Therefore, it asks states to take measures for upgrading their legislation to include criminal and civil law against VAW, especially the most serious forms. It also suggests a campaign to increase public awareness and actions to include VAW as an issue in education and in specific training, both for employers and for specialists that will have to deal with victims and survivors. Furthermore, while media are identified as a useful tool to distribute the new values regarding violence against women and sexism, they are also summoned as tools for collecting relevant data, required to allocate resources and to detect improvements due to recent measures. Finally, local authorities are requested to structure new urban areas and renovations of existing ones to guarantee a higher level of security in public spaces and public transportations[253].

In this document, sexual harassment is described as a violence occurring in the general community, and it is understood as workplace related[254]. Calculating the statistics of harassing acts occurring in public places this is surely a significant provision for sexual harassment, but not the only one, since the Recommendation includes some topic related specific additional measures. For example, it requires to: <<*take steps to prohibit all conducts of a sexual nature, or other conduct based on sex affecting the dignity of women at work, including the behaviour of superiors and colleagues: all conduct of a sexual nature for which the perpetrator makes use of a position of authority…*>>. This provision does not simply cover the working environment, but it has also the added merit to mention relations external to the workplace, like *"neighbourhood relations*", as long as they are somehow influenced by an authority-inspired kind of connection[255]. In addition, the Recommendation also demands to <<*promote awareness, information and prevention of* ***sexual harassment*** *in the workplace or in relation to work or wherever it may occur and take the appropriate measures to*

[252] COUNCIL OF EUROPE- COMMITTEE OF MINISTERS, "Recommendation Rec(2002)5 of the Committee of Ministers to member states on the protection of women against violence", 30 April 2002, https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016805e2612 (consulted on 19 February 2021).

[253] *Ibid.*

[254] *Ibid.* Article 1(b).

[255] *Ibid.* Article 60.

protect women and men from such conduct.>>. Therefore, it includes in the terms of the provision even men and it applies these measures to whichever setting, public spaces included[256].

This document is mentioned as one of the founding documents of the Convention, and its provisions are surely included in the body of the binding document itself, however on a totally new level of commitment and detailing. Firstly, the Convention shares the same definition of VAW expressed by the recommendation of 2002 and by the UN Declaration on the Elimination of All Forms of Violence Against Women, but it also defines for the first time the term "gender-based violence against women" and, unexpectedly, "gender"[257].

In previous documents, GBV and VAW had been used roughly as synonymous even though gender-based violence holds a wider meaning, including violence against women. In the CEDAW Convention, "gender-based violence" is used in the same way "gender-based violence against women" is employed in the Istanbul Convention. Article 3 of the 2011 "Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence" in fact describes "gender-based violence against women" as :<< *violence that is directed against a woman because she is a woman or that affects women disproportionately;*>>. This obviously means general gender-based violence can affect other individuals on the base of their sex, gender identity or gender expression. "Gender" is consequently described as*:*<<*the socially constructed roles, behaviours, activities and attributes that a given society considers appropriate for women and men;*>>. This could explain why people discriminated in virtue of their gender identity or sexual orientation as well could be victims of gender-based violence, but still, the Explanatory Report of the Istanbul Convention, supported by the UN High Commission of Human Rights, states the need for special measures and resources toward women and girls in virtue of the disproportionate way in which they experience such kind of aggressions[258].

Even standards and principles developed by the case-law of the ECtHR regarding VAW cases are now incorporated into the Istanbul Convention, and they obtained a binding power on obligations likes the duty of the states to prevent and punish all perpetrated acts of violence, clearly expressed in Article 5. At the same time, while ECtHR influenced the Istanbul Convention, the Convention as well influences ECtHR's judgments, representing an important expression of international law[259].

Briefly, the Convention traces the same provisions expressed in the previous recommendation, including the role of media, the legal implementation and the awareness raising measures; it asks a

[256] *Ibid.* Article 61.

[257] RISTIK Jelena, "Protection from Gender-Based Violence Before the European Court of Human Rights", *Journal of Liberty and International Affairs*, August 2020, Vol.6(2), p.73-75.

[258] *Ibidem.*

[259] *Ibid.* p.81-82.

gender sensitive interpretation of policies and laws, and an active commitment to fight not simply violence, but also the social behaviour and stereotypes on which certain attitudes and actions are rooted. Article 16 also proposes programmes for supporting perpetrators' rehabilitation, not limited to punishment. Finally, Article 40, regarding sexual harassment, presents new levels of innovation apported by the Convention. In fact, it encourages states to:

> *<<take the necessary legislative or other measures to ensure that any form of unwanted verbal, non-verbal or physical conduct of a sexual nature with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment, is subject to criminal or other legal sanction.>>*

Therefore, it requires Member States to take action against any form of sexual harassment, but by including the precise expression "hostile environment" we could think it is meant to include a variety of offensive actions falling under the wide concept of sexism, and not simply those occurring in workplace or educational environment but everywhere. The definition in fact lacks any real mention of the employment setting, and it could consequently protect people also from those actions occurred in other environments[260].

3.2.2. Collaboration with the Inter-parliamentary Union: the first "Recommendation on Preventing and Combating Sexism"

In virtue of the previous philosophical discourse regarding "gender harassment" presented in chapter 1, we have undoubtedly recognized there is a strict link between sexual harassment and sexist behaviours. Through sexist remarks and jokes, a woman can directly perceive her unwelcomeness in a certain environment and feel harassed in virtue of her gender or sex[261].

While "hostile environment" harassment is recognized as a form of sexual harassment in the North American jurisdictions, European countries mostly do not include such interpretation, even though, as we have read in the Istanbul Convention, we can find references to a general sense of uneasiness[262].

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[260] COUNCIL OF EUROPE, "Council of Europe Convention on preventing and combating violence against women and domestic violence", Istanbul, 2011, https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/090000168008482e (consulted on 24 February 2021).

[261] GELFAND Michelle J., FITZGERALD Louise F. and DRASGOW Fritz, "The Structure of Sexual Harassment: A Confirmatory Analysis across Cultures and Settings", *Journal of Vocational Behaviour*, October 1995, Vol.47(2):164-177, p.5.

[262] COUNCIL OF EUROPE, "Council of Europe Convention on preventing and combating violence against women and domestic violence", Istanbul, 2011, https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/090000168008482e (consulted on 08 April 2021).

Nevertheless, the Ministers of Council of Europe adopted the "Recommendation CM/Rec (2019)1 on Preventing and Combating Sexism", a document meant to condemn and prevent sexism through a series of actions in specific areas: language and communication, internet and social media, media and advertising, workplace, public sector, judicial sector, education, sport and culture and private life[263]. The Recommendation was followed, in September 2019 by an informative campaign called *"Sexism: See it, Name it, Stop it!"* [264]. Both the campaign and the Recommendation were extremely innovative and detailed to face contemporary challenges.

As we have seen in the first chapter, the main criticism regarding "hostile environment" harassment is the claim that limitations, and especially zero tolerance policies, could become an obstacle to freedom of speech. Sexist hate speech and sexist harassing remarks have been object of many discussions, even on a judicial level. We can for example recall the case of the DVD's company's campaign *Rentawife.be*[265]. In 2007, the promotional video of the campaign was brought in front of the Brussels' Court of the Commerce by the Belgian Institute for the Equality of Women and Men for sexist contents, and the court recognized a violation of the harassment law and of the hate speech law. This could appear as a wonderful outcome, but the results were actually linked to a wrong and subjective interpretation of the above-mentioned laws by the Brussels' Court, that deformed the existing normative on harassment, strictly linked to workplace, in a general prohibition of hate-speeches and applied instead the provision on hate-speech ignoring its direct reference to "instigations to acts of hate", not feelings or attitudes. Consequently, this judgment left wide spaces of uncertainties and doubts on what could be perceived as a crime and what was acceptable, and it drastically endangered freedom of speech because of its vagueness[266].

The new extremely detailed Recommendation gave an answer to these doubts, even by presenting, thanks to the matched campaign, a list of prohibited actions. The preamble of the document states that sexism is an expression of the same kind of unequal power relations at the base of sexual harassment and gender-based violence, and that it legitimates discriminatory attitudes caused by gender stereotypes. Moreover, it recognized sexism affects disproportionally women, even if it could affect men and boys as well, especially when they do not conform to the traditional male stereotype, and that it is treated as a futile issue, just like sexual harassment. Despite this: <<*acts of "everyday"*

[263] COUNCIL OF EUROPE- COMMITTEE OF MINISTERS, "Preventing and Combating Sexism", 27 March 2019, https://rm.coe.int/cm-rec-2019-1-on-preventing-and-combating-sexism/168094d894 (consulted on 03 March 2021).
[264] Council of Europe, "Combating and preventing sexism", https://www.coe.int/en/web/genderequality/combating-and-preventing-sexism#{%2263531002%22:[2]} (consulted on 03 March 2021).
[265] VRIELINK Jogchum and SOTTIAUX Stefan, "Banning Sexism: How Harassment Law may Threaten Freedom of Expression and Undermine Antidiscrimination Policies", *International Journal of Discrimination and the Law*, 1 September 2008, Vol.9(4), p.264.
[266] *Ibid*. p.265-269.

sexism are part of a continuum of violence creating a climate of intimidation, fear, discrimination, exclusion and insecurity which limits opportunities and freedom; >>[267], therefore sexism is directly recognized as a hindrance to women empowerment. The Recommendation suggests working in the delineated targeted areas by preventing and combating sexism through the implementation of legal means and policies and by monitoring the advancement through awareness-raising measures, information spreading and data collection. Finally, the most concrete contribution is the agreement upon a shared definition of the notion of sexism.

WomenWatch as well has offered a definition of the term "sexism", describing it as *"... an attitude. It is an attitude of a person of one sex that he or she is superior to a person of the other sex."* [268], but never before a definition was recognized on a juridical level. This official instrument describes sexism as:

> *<< Any act, gesture, visual representation, spoken or written words, practice or behaviour based upon the idea that a person or a group of persons is inferior because of their sex, which occurs in the public or private sphere, whether online or offline, with the purpose or effect of:*
> *i. violating the inherent dignity or rights of a person or a group of persons; or*
> *ii. resulting in physical, sexual, psychological or socio-economic harm or suffering to a person or a group of persons; or*
> *iii. creating an intimidating, hostile, degrading, humiliating or offensive environment; or*
> *iv. constituting a barrier to the autonomy and full realisation of human rights by a person or a group of persons; or*
> *v. maintaining and reinforcing gender stereotypes. >>*[269]

If we consider especially, the point *iii* regarding the hostile, degrading and intimidating environment the definition perfectly matches with the concept of "gender harassment". Therefore, a connection with the problem of harassment is extremely evident, even more if we consider the instruments to which the Recommendation refers in its preamble.

Firstly, it recalls a series of Resolutions of the Council of Europe, including the "Resolution 2177 (2017) on Putting an end to sexual violence and harassment of women in public space" adopted in 2017 by the CoE Parliamentary Assembly (PACE). In this resolution, it is highlighted the fact that violence and harassment in public spaces are often treated with indifference by bystanders, consequently perpetrating the impunity of aggressors and legitimizing the trivialisation of certain

[267] COUNCIL OF EUROPE- COMMITTEE OF MINISTERS, "Preventing and Combating Sexism", 27 March 2019, https://rm.coe.int/cm-rec-2019-1-on-preventing-and-combating-sexism/168094d894 (consulted on 03 March 2021).
[268] WomenWatch, "What is Sexual Harassment", https://www.un.org/womenwatch/osagi/pdf/whatissh.pdf (consulted on 06 March 2021).
[269] COUNCIL OF EUROPE- COMMITTEE OF MINISTERS, "Preventing and Combating Sexism", 27 March 2019, https://rm.coe.int/cm-rec-2019-1-on-preventing-and-combating-sexism/168094d894 (consulted on 03 March 2021).

acts[270]. Obviously, this contributes to women's sense of helplessness and it normalize the perception of public spaces as threatening environments. The PACE encourages campaigns of awareness-raising between witnesses, particularly toward men since their contribution and involvement is considered fundamental to fight certain patterns. The initiatives include policies criminalizing harassment and violence in public spaces, inquiries to collect data on the real magnitude of the problem and specific education and re-education (especially for children, young people and parents) on harassment, violence and gender stereotypes[271].

Françoise Hetto-Gaasch in her report regarding this Regulation describes sexual harassment and violence as results of a sexist and patriarchal society that drastically influences women's life. The author's report also highlights that the Istanbul Convention, if properly implemented, should pose limits even to these kinds of action in public spaces, but for this purpose, the development of different typologies of awareness-raising campaigns is fundamental, especially those including the proper employment of media and those centred on the victims and the consequences of certain acts. The report underlines how sexual harassment and sexual violence occur in different forms, from exhibitionism to whistling and comments, and she expressly states*:<< **Harassment** is a form of violence against women that is often ignored or considered less serious than physical violence.>>* despite being a clear manifestation of a desire of dominance[272].

Another basic document linked to the Recommendation on Preventing and Combating Sexism is the regional study *"Sexism, harassment and violence against women in parliaments in Europe"* developed by the Council of Europe's Parliamentary Assembly in collaboration with the Inter-Parliament Union (IPU) in 2018. According to this research, the 85% of women parliamentarians had suffered psychological violence in parliaments and around the 25% of MPs and the 40% of staff members had experienced sexual harassment. Of this percentage only the 23,5% of parliamentarians and the 6% of staff members reported sexual harassment incidents, but between the 62,5% of cases reported through internal mechanisms no one of the perpetrators was held responsible for his actions[273].

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[270] PARLAMENTARY ASSEMBLY OF COUNCIL OF EUROPE, "Resolution 2177 (2017)1 Putting an end to sexual violence and harassment of women in public space", June 2017, https://pace.coe.int/pdf/047883156c2a1af915c7b03e836877c794580460332666 7a8259ffe25682ae848428feba12/resolution%202177.pdf (consulted on 07 March 2021).

[271] *Ibidem.*

[272] HETTO-GAASCH Françoise- COUNCIL OF EUROPE COMMITTEE ON EQUALITY AND NON-DISCRIMINATION, "Report-Putting an end to sexual violence and harassment of women in public space", June 2017, https://pace.coe.int/pdf/3b584c103a63d05467210f946d4fb272c4f9fd583326667a8259ffe25682ae848428feba12/doc.%2014337.pdf (consulted on 07 March 2021).

[273] INTER-PARLIAMENT UNION AND THE PARLIAMENT ASSEMBLY OF COUNCIL OF EUROPE, "Sexism, harassment and violence against women in parliaments in Europe", 2018, https://www.ipu.org/resources/publications/issue-

These are undoubtedly alarming numbers, that oblige European countries to reconsider their level of achievement in this field. Recognizing these problems are not limited to the European context, the PACE acted in collaboration with the Inter-Parliamentary Union to fight sexism and sexual harassment especially inside parliaments. While the IPU provides new *"Guidelines for the elimination of sexism, harassment and violence against women in parliament"* asking each national parliament to take appropriate measures to contrast sexism and harassment, the Council of Europe drew up the above-mentioned Recommendation and the "Resolution 2274 (2019) Promoting parliaments free of sexism and sexual harassment"[274].

To address the problem, the Resolution reaffirms sexism, sexual violence and sexual harassment's decisive role in preventing women from freely participating and expressing themselves in political field and in accessing to leadership positions[275]. Parliaments should consequently develop new policies, collect data and monitor the advancement of the situation. Furthermore, PACE requests parliaments to revise their internal regulations for prohibiting sexist and harassing acts and speeches, for suspending parliamentarians' immunity regarding sexual or gendered crimes and for including more efficient mechanisms of complaint, so that victims and survivors will be able to feel at safe and freely express their fears and ask for help; the #NotinMyParliament initiative, developed in collaboration with IPU, is a follow up of all these considerations and provisions[276].

Finally, the most important provision is a deep commitment, particularly at the highest political level, to eradicate gender stereotypes and achieve a change of mind set[277]. For the purpose of giving a definition to the term "gender stereotype", in the *Gender Equality Strategy 2018-2023*, a result-oriented document including all the above-mentioned Resolution's actions and instruments, the CoE defines "gender stereotypes" as:<< *preconceived social and cultural patterns or ideas whereby women and men are assigned characteristics and roles determined and limited by their sex.*>> consequently hindering women's and each individual's self-realization[278].

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briefs/2018-10/sexism-harassment-and-violence-against-women-in-parliaments-in-europe (consulted on 06 March 2021).

[274] PARLIAMENTARY ASSEMBLY OF COUNCIL OF EUROPE, "Resolution 2274-Promoting parliaments free of sexism and sexual harassment", 9 April 2019, http://www.assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=27614&lang=en (consulted on 06 March 2021).

[275] *Ibid.* Article 4.

[276] PARLIAMENTARY ASSEMBLY OF COUNCIL OF EUROPE, "Resolution 2274-Promoting parliaments free of sexism and sexual harassment", 9 April 2019, http://www.assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=27614&lang=en (consulted on 06 March 2021).

[277] *Ibid.* Article 6.

[278] COUNCIL OF EUROPE, "Sexism: See it, Name it, Stop it!", September 2020, https://rm.coe.int/brochure-sexism/16809fba84 (consulted on 06 March 2021).

3.3. European Union: A Double Approach to sexual harassment, discrimination and dignity

The Council of Europe is not the only organization operating on women rights in the European region. European Union (EU) is the other fundamental entity operating since 1957, originally by the name European Economic Community (EEC), whose original focus was the economic field but that gradually widened its topics of interest to human rights as well with a totally unique impact on domestic law. Sexual harassment has been a topic of debate in the EU since the beginning of '90s. Inspired by simultaneous research held in USA, Canada, Japan and many other countries, in 1987, under request of the European Commission, Michael Rubinstein, a distinguished law specialist, conducted a review study on the extent of the phenomenon in European countries and the alarming results testified the problem was widely diffused in the old continent as well[279]. From that moment on, EU's bodies produced a variety of documents regarding sexual harassment, each of them gradually adopted by each Member states, but the health and safety-based approach of the communitarian policies strongly influenced the form of those provisions. In fact, sexual harassment was handled as an offence to workers' and humans' dignity more than as an expression of discrimination. The European "Dignity Harm Approach" was opposed to the North American "Discriminatory Approach"[280], and it penalised those actions meant to violate "dignity", meaning the normal respect with which people should be constantly treated, and that, when lacking, could case the formation of an environment "intimidating, hostile, degrading, humiliating or offensive"[281].

The "Dignity Harm Approach" has not been ineffective, but by mixing a general sense of wrongful harassment, with bullying and mobbing, it sanctioned sexual harassment as a harm against the individual, lacking instead the fundamental merit of recognizing sexual harassment and harassment based on sex as structural discriminations rather than individual ones. The normative nationally introduced as an application of European law often lacks awareness and acceptance of the discriminatory value of harassing actions, and it enforces a constant stigma related to sexual behaviour on the base of which a complaint for general mobbing appears as less shaming than one for sex discrimination, considered a "women's issue". In addition, mobbing and general harassment

[279] TIMMERMAN Greetje and BAJEMA Cristien, "Sexual Harassment in Northwest Europe: A Cross-Cultural Comparison", *The European Journal of Women's Studies*, Vol.6(4), p.420.

[280] NUMHAUSER-HENNING Ann and LAULOM Sylvaine- EUROPEAN COMMISSION EUROPEAN NETWORK OF LEGAL EXPERTS IN THE FIELD OF GENDER EQUALITY, "Harassment related to Sex and Sexual Harassment Law in 33 European Countries-Discrimination versus Dignity", 2012, p.1.

[281] GOMES Glenn M., OWENS James M. and MORGAN James F., "Prohibiting sexual harassment in the European Union- An unfinished public policy agenda", *Employee Relations*, 01 June 2004, Vol.26(3), p.294-298.

are usually prosecuted simply through civil and administrative means, while discrimination would require criminal law instead[282].

European law has clearly included the "Discriminatory Approach" in its directives, trying to develop a fully efficient "Double Approach" able to evaluate each episode in virtue on its singularity by referring either to employment measures or to discriminatory provisions on the base of each situation, but, at the current state, the attempt failed. Not all countries have actually adopted the discriminatory interpretation, and, where it was implemented, it obtained little recognition and it stayed mainly unexploited despite its merits, like providing an inverted burden of proof, specialized bodies and no upper limits concerning the compensation. Therefore, the contemporary situation appears blurred at best. Still, recent provisions are concretely trying to improve the situation[283].

The following paragraph will analyse the most important documents produced in the framework of European Union concerning harassment, but we should not forget the unicity of EU's law, holding a level of authority similar to that of a federal state. Consequently, when approaching European Union's policies, we should consider the unique value and practical influence of these provisions on a domestic level, provisions that, some more than others, always produced practical outcomes.

3.3.1. Sexual harassment in EU resolutions and directives

As a consequence of Rubinstein's research, in 1990 the Council of EU adopted the "Resolution on the protection of the dignity of women and men at work" and the following year, 1991, the European Commission published a recommendation on the same topic with an annex Code of Practice providing guidelines for new dedicated policies[284].

These not binding instruments requested States Members to include sexual harassment in their normative bodies in virtue of its adverse effects on workers' dignity and women's integration and to set a precise definition of what the domestic legal framework intended with the term "sexual harassment". The Code of Practices also called upon employees and trade unions for taking practical actions against this issue in their spheres of interest, like enforcement procedures and trainings[285].

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[282] NUMHAUSER-HENNING Ann and LAULOM Sylvaine- EUROPEAN COMMISSION EUROPEAN NETWORK OF LEGAL EXPERTS IN THE FIELD OF GENDER EQUALITY, "Harassment related to Sex and Sexual Harassment Law in 33 European Countries-Discrimination versus Dignity", 2012, p.1-3.

[283] *Ibid. p.*32-34.

[284] TIMMERMAN Greetje and BAJEMA Cristien, "Sexual Harassment in Northwest Europe: A Cross-Cultural Comparison", *The European Journal of Women's Studies*, Vol.6(4), p.420-421.

[285] EUROPEAN COMMISSION, "Commission Recommendation 92/ 131 /EEC of 27 November 1991 on the protection of the dignity of women and men at work and annex", 27 November 1991, https://www.ripeers.com/sites/default/files/uploads/pages/collection_of_data/2020-05/Commission%20Recommendation%20of%2027%20November%201991%20on%20the%20protection%20of%20the%20dignity%20of%20women%20and%20men%20at%20work.pdf (consulted on 15 March 2021).

However, at the same time, the 1991 recommendation's annex also read *"This code, however, focuses on sexual harassment as a problem of sex discrimination."*. The statement was the first attempt toward the above-mentioned "Discriminatory Approach", but despite this, European Union continued to highlight harassment's criminalization in virtue of its impact on workers rather than of its discriminatory value[286].

In fact, it is obviously true that sexual harassment is recognized as sex discrimination- through years, it was included as a form of sexual violence in the "European Parliament resolution of 25 February 2014 with recommendations to the Commission on combating Violence Against Women"[287] and it was highlighted, together with "harassment based on sex", as the most common expression of sex discrimination in "Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services"[288]- but as Crouch affirms, from a legal point of view, EU has always considered it as a violation of right of dignity of workers[289]. One of its main singularity is in fact that, though EU institutions recognize sexual harassment and harassment based on sex mainly affect women, the European norms on harassment could be also applied to men, ethnical minorities, and LGBTQ+ community, without distinction[290]. Basically, the "Discriminatory Approach" keeps falling behind, and the above-mentioned Double Approach is far from being practically achieved.

From 1991, all EU's countries adopted various domestic norms against sexual harassment, but those often resulted as extremely inconsistent[291]. The locally settled definitions were diverse, and they presented discrepancies between what should be considered forbidden or not as a form of sexual harassment. Therefore, when applied to practical research and data collection, they produced unequal and incomparable results on the magnitude of the problem on a national level. However, being inspired by that same EU's legislation based on the concept of dignity and respect of the worker rather

[286] GOMES Glenn M., OWENS James M. and MORGAN James F., "Prohibiting sexual harassment in the European Union- An unfinished public policy agenda", *Employee Relations*, 01 June 2004, Vol.26(3), p.292-294.

[287] EUROPEAN PARLIAMENT, "European Parliament resolution of 25 February 2014 with recommendations to the Commission on combating Violence Against Women", 25 February 2014, https://www.europarl.europa.eu/doceo/document/TA-7-2014-0126_EN.html (consulted on 15 March 2021).

[288] COUNCIL OF EUROPEAN UNION, "Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services", 21 December 2004, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32004L0113 (consulted on 15 March 2021).

[289] CROUCH, Margaret A., "Thinking about Sexual Harassment. A Guide for the Perplexed", *Oxford University Press*, 2001, quoted in FARNETI Alice, "Il concetto di molestia sessuale in Nord America ed Europa. Gli approcci teorici e il dibattito femminista", *Antropologia e Teatro*, Vol.11(12), p.143-144.

[290] FARNETI Alice, "Il concetto di molestia sessuale in Nord America ed Europa. Gli approcci teorici e il dibattito femminista", *Antropologia e Teatro*, Vol.11(12), p.144.

[291] GOMES Glenn M., OWENS James M. and MORGAN James F., "Prohibiting sexual harassment in the European Union- An unfinished public policy agenda", *Employee Relations*, 01 June 2004, Vol.26(3), p.294; p.299.

than on the gender-based debate, nearly the totality of those norms implemented that specific approach overshadowing sex discrimination[292].

In 2002, the inefficiency of the previous documents convinced the European Parliament and the Council to finally adopt a binding instrument, the "Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women regarding access to employment, vocational training and promotion, and working conditions". The main requirements were the establishment of procedures for enforcement, the adoption of criteria of compensation and the settlement of a common definition for workplace harassment[293]. Finally, the Directive settled probably one of the most significative aspect of the European legal framework on harassment, the difference between "sexual harassment and "harassment based on sex". Article 2, paragraph 2, of the Directive defines "harassment" and "sexual harassment" as two different offences on the ground of gender discrimination. "Harassment" is described as "*where an unwanted conduct related to the sex of a person occurs with the purpose or effect of violating the dignity of a person, and of creating an intimidating, hostile, degrading, humiliating or offensive environment…",* while "sexual harassment" is defined "*where any form of unwanted verbal, non-verbal or physical conduct of a sexual nature occurs, with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment.*[294] *".* In 1991 European Commission's recommendation, only "sexual harassment" was included, but in the new instrument the two terms share equal relevance and, even though "harassment" could be translated as "harassment based on sex", therefore linked to the gender of the victim, and "sexual harassment" is instead connected to the sphere of sexuality, they both share same common features[295]. Firstly, the conduct is "unwanted", similarly to the "unwelcomeness" expressed in USA's Title VII's provisions. Secondly, despite being fully accepted as forms of discrimination, even in this case the role of "dignity" is what sets the crime of workplace harassment. Harming one's dignity could case the formation of an environment "intimidating, hostile, degrading, humiliating or offensive". The limits of when such an environment is created are not explicated, but we can deduct it implies a high level of severity,

[292] TIMMERMAN Greetje and BAJEMA Cristien, "Sexual Harassment in Northwest Europe: A Cross-Cultural Comparison", *The European Journal of Women's Studies*, Vol.6(4), p.430-434.

[293] *Ibidem.*

[294] EUROPEAN PARLIAMENT AND COUNCIL OF EUROPEAN UNION, "Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions", 05 October 2002, https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32002L0073:EN:HTML (consulted on 15 March 2021).

[295] TIMMERMAN Greetje and BAJEMA Cristien, "Sexual Harassment in Northwest Europe: A Cross-Cultural Comparison", *The European Journal of Women's Studies*, Vol.6(4), p.423-424.

influenced case by case by the setting under examination, local attitude and different perspectives at stake[296]. For its characteristics, the definition of "harassment based on sex" recalls the American concept of "hostile environment" harassment, but the European measures differ regarding employee's liability, since the Directive does not include legal requirements to employees for preventive actions but merely encouraged them[297].

In 2006, this directive was recast through "Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast)" that maintains the same definitions and once again sets sexual harassment and harassment based on sex as expression of gender discrimination and violation of equal treatment principle, but that widens and updates the scope of the provision[298].

The implementation of these directives was expected to bring vast improvements, but it was not enough. For this reason, in 2017, we assisted to a new step forward with the "European Parliament Resolution of 26 October 2017 on combating sexual harassment and abuse in the EU". This is the first instrument, though not binding, that approach especially sexual harassment in all its expressions, not only in workplace, but also in public spaces, and particularly in political life and inside the European Parliament itself. Sexual harassment is here recognized as a sex discrimination interfering with women's access to public life and employment, a terrible risk for women's enjoyment of freedom, and a grave form of violence against women afflicting the 55% of women in Europe. The document, clear expression of the "Discriminatory Approach", highly condemns normalization of such acts, that are recognized in their sexist connotations and their inequal power-related roots. Therefore, it requires counter actions founded on awareness-raising campaigns, stricter legal procedures and preventive measures, and the deconstruction of gender stereotypes, summarized in a zero-tolerance approach to sexual abuse and sexual harassment in EU[299].

This new attitude on sexual harassment, finally recognizing it as an actual breach of individual freedoms, was furtherly proved through the survey "Bullying and sexual harassment at the workplace, in public spaces, and in political life in the EU", published in 2018. This is in fact the first European research including sexual harassment in workplace, in public spaces and in political settings all

[296] Once again, we refer to the "reasonable woman" approach in contrast to "reasonable person".

[297] GOMES Glenn M., OWENS James M. and MORGAN James F., "Prohibiting sexual harassment in the European Union-An unfinished public policy agenda", *Employee Relations*, 01 June 2004, Vol.26(3), p.294-298.

[298] NUMHAUSER-HENNING Ann and LAULOM Sylvaine- EUROPEAN COMMISSION EUROPEAN NETWORK OF LEGAL EXPERTS IN THE FIELD OF GENDER EQUALITY, "Harassment related to Sex and Sexual Harassment Law in 33 European Countries-Discrimination versus Dignity", 2012, p.3-4.

[299] EUROPEAN PARLIAMENT, "European Parliament resolution of 26 October 2017 on combating sexual harassment and abuse in the EU (2017/2897(RSP))", 26 October 2017, https://www.europarl.europa.eu/doceo/document/TA-8-2017-0417_EN.html (consulted on 16 March 2021).

together; it analyses the extent of the problem, its blind spots and it proposes remedies to all the highlighted situations. Regarding sexual harassment in public spaces, it emphasises its absence from common research despite being probably the most common kind of harassment, and it adds some statistics like the fact that it affects women especially under 24 years old and during night hour or in extremely crowded spaces, causing fear, psychological discomfort, change of habits and self-objectification[300].

In conclusion, we can see a serious commitment on behalf of the European Union to practically fight sexual harassment and harassment based on sex in all settings, a commitment that is in constant development, but that unfortunately is still relying mainly on the rights of workers rather than on the right on non-discrimination. EU's authorities are concretely trying to change this reality, but due to the central role of national government, that are in charge of adapting the communitarian policies to local settings, the path is developing at a really slow pace.

[300] HOEL Helge and VARTIA Maarit- DIRECTORATE-GENERAL FOR INTERNAL POLICIES OF THE UNION (EUROPEAN PARLIAMENT), "Bullying and sexual harassment at the workplace, in public spaces, and in political life in the EU", 14 May 2018, https://op.europa.eu/en/publication-detail/-/publication/8b1bb35a-5801-11e8-ab41-01aa75ed71a1 (consulted on 16 March 2021).

CHAPTER 4: DOMESTIC LAW: NORMS ON SEXUAL HARASSMENT IN ITALY AND JAPAN

We have seen how sexual harassment was historically identified as a social issue, how it entered the feminist debate and was introduced in international and regional legal frameworks, but we should now try to understand how it was applied and shaped at domestic level.

Domestic legislature has always distinguished itself from the international level in virtue of its complexity. Where international law presents enormous lacunae, or at least spaces of interpretation, domestic law has always been characterized by specific and detailed legal instruments. Even *common law* countries can rely on a series of codes and judicial judgments. However, international norms entered the domestic frameworks through different ways depending on the variety of readings. In the case of sexual harassment, some provisions were pre-existent, but the majority of juridical theories and regulations were inspired by international community. Therefore, interpretations played a substantial role regarding this topic.

Philosophical analysis, political approaches and legal initiatives were imported in each country following the spread of ideas on sexual harassment started in USA, and they were influenced by national feminist debates but also, fundamentally, by local political traditions. In fact, usually national legislations are shaped by international norms, but a real local social commitment to the contents of those norms is essential to cause an actual social change. Furthermore, especially in countries with a strong political tradition, even political figures could take a position against those imported norms, inducing a strong reaction in public debates[301].

Regarding sexual harassment, in many countries, in Europe as well, the American origins of the debate had a relevant role in constructing the juridical doctrine's counter discourse. Some researchers, for example in France, defined the concept of "hostile environment" harassment as an artefact of the American "puritan" tradition, consequently considering it an exaggeration and a form of control over human's normal courting attitude[302]. For this reason, nowadays sexual harassment, especially in workplace, has been introduced as a crime in the majority of domestic legislatures, but local political traditions influenced legal approaches adopted to criminalize this conduct; in some countries it appears as a gender-based discriminatory issue, in same countries it is confronted as an abuse of professional authority, in others as a crime against individual morality and public order[303].

[301] SAGUY Abigail C.," International Crossways: Traffic in Sexual Harassment Policy", *The European Journal of Women's Studies*, 2002, Vol.9(3), p.249-252.
[302] *Ibid.* p.256-259.
[303] *Ibidem*.

In this chapter, we will investigate how sexual harassment law was introduced in Italy and Japan, two case studies that, despite similar strong traditional values and a common history of the last century, have chosen extremely dissimilar, if not even opposing, models and approaches.

4.1. Italy

Sexual offences are part of the Italian Penal Code since the late XIX century, when they were catalogued in violent acts of libido, sexual assault, rape for purpose of sexual satisfaction and rape for marriage finalities. However, in these regulatory bodies, sexual offences had absolutely no link with the well-being and physical or psychological integrity of the woman as a human being, but they were defined as crimes against morality and family order. Women were basically identified as properties of the family, that if subjected to violence could become damaged bargaining tools[304].

It was only in 1996 that the "Legge 15 febbraio 1996, n. 66" was drafted to modify the previous standing legislation. The social ideology and cultural stigma related to sexual violence was drastically changing thanks to international influence and a correct employment of media in acts that had attracted public attention on the topic[305], but the old-fashioned norms were still standing. The new proposal, encouraged by feminist movements and female deputies, encountered much resistance from lawyers and other feminists, because poorly written and rich in flaws, but it was finally adopted unanimously[306]. It provided important changes, first it modified the entity of the protected right, shifting from a Crime against Public Morality to a Crime against Persons. Woman's individuality was recognized, and her sexual freedom preserved. Briefly, this norm is a net position against old patriarchal values, a position based on women's will power and self-determination ability[307].

Today, Article 609-bis of the *Criminal Code* unified sexual violence, sexual assault and violent acts of libido in the inclusive "Sexual Assault" crime[308], punishable with 5 to 10 years of reclusion[309] and with a provision time of 6 months, but violence and threat in those circumstances still maintain a legal value. Instead of linking sexual violence to actual consent, threats and the use of force are still considered key evidences of an episode of violence against women, that implies a coercion of the

[304] GOISIS Luciana, "La Violenza Sessuale: Profili Storici e Criminologici- Una storia di 'genere'", *Diritto Penale Contemporaneo,* 31 October 2012, p.12.

[305] For example, the notorious "*Massacro del Circeo*" (Circeo's massacre) and the documentary movie "*Processo per stupro"* (Trial for rape), that obtained great mediatic attention due to the brutality of the events.

[306] *Ibid.* p.13.

[307] *Ibid.* p.14.

[308] The original reason was to avoid an invasive investigative inquiry meant to identify the level of severity of the aggression and protect victims' privacy from a second victimization, but the outcome was a deeper colloquial investigation in the court of law for defining the details of the act.

[309] The Article 609-tris contains aggravating circumstances.

victim through the above mentioned means or through abuse of authority, a constant (even if maybe not initial) disagreement to take part in the action, and subtly a duty to resist (only exception are those cases in which the victim is not in condition to give her consent or has been deceived). Moreover, with the term "acts of libido" the norm includes all those acts meant to obtain sexual pleasure, therefore focused on sexuality, but not simply related to genitalia but to all erogenous zones[310].

In 2014, an ISTAT (Istituto Nazionale di Statistica) research reported nearly 7 million women, the 31,5%, in Italy had experienced sexual violence, of which the most common forms were rape, 62,7% of cases, when the aggressor was a partner, and sexual harassment, 76,8% of the cases, if the perpetrator was an unknown individual. Sexual harassment had a prominent role in this study, because under the Italian legislation, all physical forms of sexual harassment fall under the definition of "Sexual Assault Crime"[311]. Furthermore, a research of the Department of Equal Opportunity held in 2008 states that, including all kind of sexual harassments, from physical and verbal harassment to sexual extortion at work or exhibitionism and stalking in public spaces, nearly half of women between 16 and 65 years old had experienced such kind of aggression in their lives[312]. The numbers are alarming, even more if we consider only the 7,3% of victims reports cases of sexual violence, especially because in case of minor entity, like sexual harassment, acts are commonly minimized and not identified as sexual violence[313].

Still, on a practical level, in the Italian domestic law sexual harassment could be prosecuted following two different paths - the penal one, resorting to the *Criminal Code*, and the civil one, through a series of norms included in the *Code on Equal Opportunity between Men and Women*. Unfortunately, both paths present some substantial weaknesses and the choice to pursue a direction above the other is strictly linked to the Italian legal definition of those actions commonly regarded as sexual harassment and to the place where the incriminated action took place. Consequently, in this paragraph we will investigate the legal interpretation of "sexual harassment", exploring which acts are defined as "harassment" or "sexual assault" under domestic law.

4.1.1. Sanctioning sexual harassment through the *Codice Penale*

Talking about sexual harassment in the Italian framework is an extremely delicate issue since sexual harassment is not properly criminalized as a *per se* offence. Cases of harassment can be persecuted

[310] *Ibid*. p.14-18.

[311] ISTITUTO NAZIONALE DI STATISTICA, "Il Numero delle Vittime e le Forme della Violenza", *Istat.it*, 2014, https://www.istat.it/it/violenza-sulle-donne/il-fenomeno/violenza-dentro-e-fuori-la-famiglia/numero-delle-vittime-e-forme-di-violenza (consulted on 11 May 2021).

[312] GOISIS Luciana, "La Violenza Sessuale: Profili Storici e Criminologici- Una storia di 'genere'", *Diritto Penale Contemporaneo,* 31 October 2012, p.1-3.

[313] *Ibidem.*

by referring to a series of other provisions and norms, that can practically supply for the normative lack, but that fail to recognize the structural problem behind those kinds of aggressions.

In the *Criminal Code*, the Article 660 on "Harassment" recites *"Whoever, in a public space or in a space open to the public, also through the use of phone, for petulance or another deplorable reason, harass or disturb someone else, should be punish with up to 6 months imprisonment and an amend of 516 euros*[314]*"*[315]. This is the first aged norm created regarding "harassment", a norm extremely useful for addressing cases of sexual harassment in public spaces. This could seem peculiar due to the lack of attention street harassment has obtained until not long ago, but the reason for the existence of this article becomes clear if we consider that it was not created purposely for dealing with sexual harassment, but for all kind of disturbing behaviours in public places instead[316]. In fact, the crime is partially approached as an administrative offence and partially as a criminal offence, testified by the penalty requiring both a period of imprisonment and a pecuniary penalty. The private interest of the victim is protected as a mere consequence of the real subject of the law, public order, and the crime is prosecutable "*d'ufficio",* meaning automatically prosecutable by law, even without the victim's wish or consent[317].

In general terms, the Criminal Code intends "harassment" as every action able to painfully alter an individual's psychological well-being. Consequently, it can include a variety of acts like stalking, persistent courting, whistling, continues and insistent calls and messages, verbal and gestural behaviour, as long as they do not include physical contact. When the conduct encompasses direct contact between the victim and the perpetrator, at least those including erogenous zone like the breast, the bottom or the lips, those actions are prosecuted by the Italian law as "sexual assault", even if of minor entity, under Article 609-bis of the *Criminal Code*[318].

The illicit conduct can be composed of even one single episode and the original intention of the perpetrator has no value if the conduct is considerable inappropriate and disturbing from a neutral point of view. In addition, the action should be perpetrated deliberately even if for a "deplorable reason", therefore with a regrettable motive (Cass. n. 12251/1986) or for petulance, described by

[314] "Chiunque, in un luogo pubblico o aperto al pubblico, ovvero col mezzo del telefono (1), per petulanza o per altro biasimevole motivo, reca a taluno **molestia** o disturbo è punito con l'arresto fino a sei mesi o con l'ammenda fino a euro 516".

[315] *Codice Penale*, "Art.660: Molestia o disturbo alle persone", consulted on 16 March 2021.

[316] FLORIO Maria, "Violenze in famiglia e molestie sul lavoro: una ricerca comparata tra Italia e Francia", *Rivista di Criminologia, Vittimologia e Sicurezza*, 01 March 2013, Vol.VII(1), p.86.

[317] *Ibid.,* p.86-87.

[318] MENDUTO Tiziano, "I profili penalistici e le molestie sessuali", in Servizio Studi del Senato della Repubblica, *"Le molestie sessuali sul lavoro nell'ordinamento italiano e in Francia, Germania e Spagna",* Nota breve n.131, September 2019.

Supreme Court of Cassazione[319] in the sentence n. 6908/2011 as an attitude based on "arrogant intrusiveness and inappropriate and continuous interference"[320].

However, the aggression needs to be directed to an individual and it cannot be expressed in general terms. Therefore, it cannot include those harassing comments and actions directed to a group, something not uncommon if we consider "hostile environment" harassment. This is one of the numerous weaknesses of the norm, but not the only one. The harassing event has to take place in public, or with at least either the subject or the perpetrator being in a public space. Otherwise, it cannot be considered harassment if not happening through phone or internet and social media[321].

This means actions taking place in private places, or at work cannot make rely on this norm. Despite a proposal presented to the Parliament in 1996 meant to include harassment in the Criminal Law without relevance toward the setting of the occurrence, nothing changed[322] and now sexual extortion and sexual harassment in the workplace are not even covered by the terms of Article 660, but they are at best judged as "Crime of Private Violence" or attempted private violence[323]. Unfortunately, since those actions are not considered particularly severe forms of crime, they are usually sanctioned with no more than a small monetary fine[324].

Despite the flaws, the measures at stake have been useful to contrast the phenomenon of sexual harassment, still widely diffused in all the Italian territory. On the base of the ISTAT data, in 2002, physical harassment afflicted more than the 25% of women in Italy and the number raised to more than 30% if we consider verbal harassment[325]. It appeared to be more common in the regions of North and Centre Italy, but this could be due to an inferior propension to report aggressions within southern women or due to a lifestyle that exposes women in the North more easily. In fact, night out and the use of public transportations were indicators of a higher probability of aggression, together with covering roles of power. Metropolitan areas and big cities as well were settings where harassment took place more often, especially on the street or in public markets, if we consider "open" spaces, and

[319] *Corte di Cassazione*, the highest judicial tribunal in Italy.

[320] BAGOTTO Claudia, "Molestie Sessuali sul Luogo di Lavoro: Normativa Penale e Giuslavoristica", *Salvis Juribus*, http://www.salvisjuribus.it/molestie-sessuali-sul-luogo-di-lavoro-normativa-penale-e-giuslavoristica/ (consulted on 18 March 2021).

[321] FLORIO Maria, "Violenze in famiglia e molestie sul lavoro: una ricerca comparata tra Italia e Francia", *Rivista di Criminologia, Vittimologia e Sicurezza*, 01 March 2013, Vol.VII(1), p.86-87.

[322] FARNETI Alice, "Il concetto di molestia sessuale in Nord America ed Europa. Gli approcci teorici e il dibattito femminista", *Antropologia e Teatro*, Vol.11(12), p.145-146.

[323] MENDUTO Tiziano, "I profili penalistici e le molestie sessuali", in Servizio Studi del Senato della Repubblica, "Le molestie sessuali sul lavoro nell'ordinamento italiano e in Francia, Germania e Spagna", September 2019.

[324] FLORIO Maria, "Violenze in famiglia e molestie sul lavoro: una ricerca comparata tra Italia e Francia", *Rivista di Criminologia, Vittimologia e Sicurezza,* 01 March 2013, Vol.VII(1), p.86-87.

[325] ISTITUTO NAZIONALE DI STATISTICA, "Molestie e violenze sessuali. Indagine multiscopo sulle famiglie", Istat, 2002, p.63.

in pubs and clubs if we consider "closed" spaces. Aggressions came by the hand of unknow individuals (more than 55% of the cases), people known by sight, colleagues and friends[326].

At the contrary, recently, the number is decreasing. On the base of a recent study, held in 2018, women who had experienced harassment through the 3 years before the survey were still the 15,4% of the entire population, with the 24% of verbal harassment and 15,9% of physical one. The 60% of harassments still come from unknown people, but at least the statics on gravity have improved, passing from around the 65% of respondents describing those acts as extremely severe to the 76,4% and testifying a growing awareness level[327].

The statistics are still very high, but while the number of cases of verbal harassment decreased from 30% to 24%, the cases of physical harassment passed from 25% to 15,9%. An improvement is evident even if the problem is far from being solved. Basically, the domestic normative is still developing, but despite the practical expedients used to fight sexual harassment, penal normative is still missing and the actual law is still failing to recognize the power relation and abuse of authority that lies behind harassment. Normative needs a real practical reference to an anti-discrimination legislation, as required by European Union, but for the moment being this approach has been adopted only within labour law[328].

4.1.2. Sexual harassment in the *Codice delle Pari Opportunità tra uomo e donna*

The 2002 statistic of ISTAT pointed out sexual harassment strictly related to workplace was less common than street harassment, but still quite diffused[329]. Those kinds of harassment were characterized by their repetitiveness, taking place more than once a week or even daily, and for their horrific outcomes. An extremely high number of women living this kind of situations, up to 85% in women over 55 years old, had never asked for help to face the problem and the 55,6% had decided to renounce to their job and carrier[330].

In 2009, the same ISTAT survey on harassment in workplace stated that the number of harassed women workers were still the 8,5% of the totality of employed women, corresponding to the 19% of the global number of cases of sexual harassment in Italy. Most cases were concentrated in the south, a number heavily influenced by the recent raising of female employment in the region, but,

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[326] *Ibidem.,* p.63-68.

[327] Istituto Nazionale di Statistica, "Le Molestie e i Ricatti Sessuali sul Lavoro", *Istat.it*, 13 February 2018, https://www.istat.it/it/archivio/209107 (consulted on 17 March 2021).

[328] FLORIO Maria, "Violenze in famiglia e molestie sul lavoro: una ricerca comparata tra Italia e Francia", Rivista di Criminologia, Vittimologia e Sicurezza, 01 March 2013, Vol.VII(1), p.105.

[329] ISTITUTO NAZIONALE DI STATISTICA, "Molestie e violenze sessuali. Indagine multiscopo sulle famiglie", Istat, 2002, p.81-82.

[330] *Ibidem*., p.83-88.

unfortunately, the number of victims that decided to keep the situation for themselves was still an alarming 81,7%[331].

Therefore, the numbers suggest that while cases of severe physical sexual harassment, falling under the terms of Article 609-bis on "Sexual assault", have drastically diminished the same did not happen with other forms of workplace sexual harassment or harassment based on sex. The regulatory landscape surely had an influence on this situation since, to find norms able to prosecute these kinds of behaviour out of public spaces, it is necessary to leave criminal law in favour of labour and civil one.

The *Civil Code* Article 2087 expects employers to guarantee their employees' physical and psychological well-being and it is the most common provision employed to fight cases of sexual harassment in the workplace. Usually, this norm can confirm the responsibility of an employer that knew about harassment but did nothing to prevent it. However, rarely in case law the anti-discrimination legislation expressly developed for this purpose was actually employed[332].

In fact, inspired by European Union law, anti-discriminatory measures were developed and, starting from 2006, the Italian *Code of Equal Opportunity between Men and Women* was enhanced with new articles. To implement EU Directives 2006/54/EC and 2004/113/EC, the Legislative Decree 11 April 2006, n. 198 and the Decree 25 January 2010, n.5 established Article 26 on "Harassment and sexual harassment" and Article 55-bis and 55-ter in relation to goods and services. These articles openly equate harassment and sexual harassment to discriminations on the base of gender, and they employ a definition of the two behaviours that traces the definitions adopted by the European Union on "harassment based on sex" and "sexual harassment"[333]. Therefore, it is stated *"**Harassment**, that is unwanted conduct related to the sex of a worker with the purpose or effect of violating the dignity of a worker, and of creating an intimidating, hostile, degrading, humiliating or offensive environment, is regarded as discrimination on the ground of gender"* based either on sex or with sexual purposes[334]. If Article 26 refers to the dignity of "workers", the only distinction with the definition presented in Article 55-bis is the reference to dignity of "persons", while the Article 55-ter affirms *"The refusal of **harassment** or **sexual harassment** by a person cannot be the reason for a decision that is relevant*

[331] RENGA Simonetta, "Italy", in NUMHAUSER-HENNING Ann and LAULOM Sylvaine- EUROPEAN COMMISSION EUROPEAN NETWORK OF LEGAL EXPERTS IN THE FIELD OF GENDER EQUALITY, "Harassment related to Sex and Sexual Harassment Law in 33 European Countries-Discrimination versus Dignity", 2012, p.152-153.

[332] MENDUTO Tiziano, "Il diritto civile e le molestie sessuali", in Servizio Studi del Senato della Repubblica, "Le molestie sessuali sul lavoro nell'ordinamento italiano e in Francia, Germania e Spagna", Nota breve n.131, September 2019.

[333] RENGA Simonetta, "Italy", in NUMHAUSER-HENNING Ann and LAULOM Sylvaine- EUROPEAN COMMISSION EUROPEAN NETWORK OF LEGAL EXPERTS IN THE FIELD OF GENDER EQUALITY, "Harassment related to Sex and Sexual Harassment Law in 33 European Countries-Discrimination versus Dignity", 2012, p.153-154.

[334] *Codice delle Pari Opportunità tra uomo e donna*, Decreto Legislativo No.198/2006, "Art.26: Molestie e Molestie Sessuali", https://www.camera.it/parlam/leggi/deleghe/testi/06198dl.htm#:~:text=26.&text=e%202%2Dquater)-,1.,2. (consulted on 17 March 2021).

for that person"[335]. At the same time, even Article 26 of Directive 2006/54/EC was included in the Italian Code of equal opportunity through Article 50 that read *"Collective agreements can provide for specific measures, such as codes of conduct, guidelines and good practices, in order to prevent all forms of discrimination on the grounds of sex, in particular* ***harassment*** *and* ***sexual harassment*** *in the workplace, in access to employment, vocational training and promotion",* moving the burden of rule from employers to collective bargains[336]. The setting of measures meant to prevent harassment is consequently up to National and Local observatories and to Joint Equal Opportunities Commissions, that are in charge of defining specific Codes of Conduct about definitions, proceedings and active information processes to adopt in case of harassment and, in virtue of their prominent role, are also authorised to take part in official proceeding for supporting workers' behalf[337].

Unfortunately, all these norms stayed mainly unexploited or they had a small practical influence[338], therefore, in 2017, the Law 27 December 2017, n. 205 modified the above-mentioned Article 26 of the *Code of Equal Opportunities* adding 2 commas. The first one, "comma 3-bis", prohibits firing, sanctioning, and relocating workers that have submitted a complaint about harassment. The second one, "comma 3-tris", regards the collaboration with trade unions for an actual commitment to organize trainings and awareness-raising campaigns about harassment[339].

Finally, the most recent development was Law of 15 January 2021, n.4, that ratifies ILO Convention n.190 on the elimination of violence and harassment in the workplace. The provisions of the convention, for example the protection from sexual harassment also in work-related situations external to the usual workplace or the protection of workers employed under every kind of contract, are consequently adopted as part of the Italian normative[340].

In conclusion, we could affirm that the domestic normative is still developing, but despite the practical expedients used to fight sexual harassment, penal normative is still missing and the actual law is still failing to recognize the power relation that lies behind harassment[341]. Still, many provisions, like the substantial reverse burden of proof (meaning it is up to the defendant proving there had not been

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[335] RENGA Simonetta, "Italy", in NUMHAUSER-HENNING Ann and LAULOM Sylvaine- EUROPEAN COMMISSION EUROPEAN NETWORK OF LEGAL EXPERTS IN THE FIELD OF GENDER EQUALITY, "Harassment related to Sex and Sexual Harassment Law in 33 European Countries-Discrimination versus Dignity", 2012, p.154.

[336] *Ibid.* p.154.

[337] *Ibid.* p.154-155.

[338] FLORIO Maria, "Violenze in famiglia e molestie sul lavoro: una ricerca comparata tra Italia e Francia", Rivista di Criminologia, Vittimologia e Sicurezza, 01 March 2013, Vol.VII(1), p.87.

[339] MENDUTO Tiziano, "Il diritto civile e le molestie sessuali", in Servizio Studi del Senato della Repubblica, "Le molestie sessuali sul lavoro nell'ordinamento italiano e in Francia, Germania e Spagna", Nota breve n.131, September 2019.

[340] BAGOTTO Claudia, "Molestie Sessuali sul Luogo di Lavoro: Normativa Penale e Giuslavoristica", *Salvis Juribus,* http://www.salvisjuribus.it/molestie-sessuali-sul-luogo-di-lavoro-normativa-penale-e-giuslavoristica/ (consulted on 18 March 2021).

[341] FLORIO Maria, "Violenze in famiglia e molestie sul lavoro: una ricerca comparata tra Italia e Francia", Rivista di Criminologia, Vittimologia e Sicurezza, 01 March 2013, Vol.VII(1), p.105.

infringement of equal treatment principles) or remedies and sanctions that include positive measures and revocations of public benefits, do testify a national commitment in the recognition of the discriminatory value of sexual harassment and harassment based on sex, that are approached as fundamentally different from simple mobbing, lacking a factor of discrimination[342].

4.2. Japan

When we talk about Japan, we should start by considering a basically different tradition if compared to Western culture, despite strong American influences caused by the post-2WW American occupation. The criminalization of sexual violence is a recent notion in the Japanese juridical system, suffice it to say *Spousal Violence Law* was introduced in 2001[343], and even where previous written norms have been formally updated, their practical application is still falling behind.

The Japanese juridical and judicial system stand on extremely traditional and patriarchal foundations leading back to more than one hundred ten years ago, when during the Meiji period internal law was practically shaped for approaching western standards of a "modernized country" needing a precise Constitution and written specific Codes[344]. During Meiji era, the law was directed to men, and women appeared in it as mere accessories. For example, women were legally incapacitated in civil cases and the criminal law sanctioned women's adultery alone. The rape law was directly linked to this adultery provision since female chastity was interpreted as expression of the wife's loyalty toward her husband. Therefore, in rape cases, if the woman was not able to prove her substantial efforts in trying to escape or to resist to the aggression, she was considered guilty of complicity in adultery and the rape was understood as a normal case of sexual intercourse, harshly punishing only the incriminated victim[345].

In 1947, the new constitution, taking as model the American one, prohibited sex discrimination and consequently it deleted all those provisions regarding women's incapability, but the contemporary law is still somehow inspired by old legal traditions. Nowadays, the Japanese common mindset suggests use of force is still a natural part of sexual interactions between men and women, therefore, on a judicial level, judges do not consider women's assessments of their unwillingness as sufficient

[342] RENGA Simonetta, "Italy", in NUMHAUSER-HENNING Ann and LAULOM Sylvaine- EUROPEAN COMMISSION EUROPEAN NETWORK OF LEGAL EXPERTS IN THE FIELD OF GENDER EQUALITY, "Harassment related to Sex and Sexual Harassment Law in 33 European Countries-Discrimination versus Dignity", 2012, p.155-158.

[343] WORLD ORGANIZATION AGAINST TORTURE AND ASIA-JAPAN WOMEN'S RESOURCE CENTER, *Violations of Women's Rights in Japan. Alternative Report to the United Nations Committee Against Torture*, 38th Session, April 2007, p.11, https://www.refworld.org/pdfid/46af4d1f0.pdf (consulted on 19 March 2021).

[344] YATAGAWA Tomoe and NAKANO Mami, "Sexual Violence and the Japanese Criminal Judicial System", *Women Asia 21- Voices from Japan*, No.21, October 2008, p.4-5.

[345] *Ibid.,* p.8.

proves in sexual violence cases[346]. In tribunal, victims are questioned about their past sexual history and they are required to prove the employment of a consistent use of violence and threats by the perpetrator to the degree that their life was in danger. They are even expected to oppose desperate resistance and without the evidence of a physical strenuous opposition to the act, the violence will be considered not criminal, but a simple normal sexual intercourse. Moreover, police's behaviour during investigations and procedures are not led by any real binding rules, but by mere guidelines that suggest taking appropriate care of the victim's wellbeing. Finally, even prosecutors usually avoid taking to court cases with few proves that they are not sure to win. In these cases, often the victims' witness alone is not considered a sufficient proof because, due to the roughness of the entire proceeding of a public trial, they could fail to resist the pressure and be deemed unreliable[347].

This attitude is applied to all kinds of sexual violence, from the most severe ones to the more common ones, consequently, it is not unexpected many victims, the mere 4,3% according to a 2014's survey of the Gender Equality Bureau Cabinet Office, prefer to not submit any formal complaint[348]. If we additionally consider the Japanese value of "social harmony" and the still extremely strong stigma affecting victims' alleged responsibilities in provoking unwanted sexual attention, testified for example by the public response to Ito Shiori's case of rape in 2016[349], it appears evident some changes are definitely in need[350].

Thanks to the efforts and remonstrations of many women supporting associations, on June 16th, 2017, the *Penal Code* was amended. Article 177, known as "Crime of Rape", expressly referring to vaginal penetration, was renamed "Crime of forced sexual intercourse" (強制性交等罪 *kyōsei seikōtōzai*) to include also oral and anal rape and, consequently, male sexual assault. The minimum penalty was raised from three years to five, and all sexual offences became prosecutable even without the victim's complaint, fundamentally to protect privacy and honour of the survivors[351].

Moreover, from 2009, to implement citizens' participation in criminal court's proceedings regarding serious crimes, a new lay judge system was introduced. This system appears to be more open to new

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[346] A common Japanese expression is 嫌よ嫌よも好きのうち (*iyayo iyayo mo suki no uchi*) meaning "Even saying No does not always mean No", *Ibid.* p.10.

[347] *Ibid.* p.4-5; p.9-11.

[348] ITO Masami, "Shifting attitudes toward sexual violence in Japan", *The Japan Times*, 6 January 2018, https://www.japantimes.co.jp/news/2018/01/06/national/social-issues/shifting-attitudes-toward-sexual-violence-japan/ (consulted on 19 March 2021).

[349] In 2017 Ito Shiori, a Japanese journalist, denounced a colleague for having drugged and raped her. She was assailed by public opinion and received so many accusations and threats that finally she had to move to United Kingdom, but she did not back up on her statements and became a symbol of °MeToo" movement, inspiring various other women to denounce their assailants.

[350] *Ibidem.*

[351] KITAGAWA Kayoko, *Recent Legislation in Japan No.2 "Penal Code Amendment Pertaining to Sexual Offenses",* 23 January 2018, https://www.waseda.jp/folaw/icl/news-en/2018/02/06/6110/ (consulted on 19 March 2021).

social debates than the previous one, and it has finally assigned proper punishments for cases of sexual violence. This appears to create a more supportive environment for victims, that hopefully could be more incline to finally submit complaints without fear of suffering a second victimization[352].

Despite these slight improvements on a judicial and legal level, that managed to include a wider typology of aggressions and to create a more gender sensitive environment, women are still required to prove they opposed strenuously to the aggression and each kind of abuse is addressed under different normative clauses, that will be investigated in the next paragraphs, since a comprehensive legislation is still lacking[353].

Through recent years, a series of judicial judgments from different district courts overturned previous lower courts' verdicts. For example, one of the most grave and notorious cases was the one regarding the sexual abuse of a father on her daughter, abuse that the local court had found not so difficult to avoid and whose sentence was overturned by the Fukuoka District Court. In 2019, encouraged by this developing situation, a nationwide demonstration, called the "Flower Demonstration", took place for protesting against the still weak system in place to prevent and punish all kinds of sexual violence, granting new interest to related topics[354].

4.2.1. *Kyōsei waisetsu* and the local anti-nuisance ordinances

Japan does not present a specific law criminalizing sexual harassment. However, those actions regarded as sexual harassment in public spaces can be object of different pieces of normative, partially on a national level, partially on a prefectural[355] one.

The first law we could refer to is the Article 176 of *Penal Code* on "Forcible Indecency" (強制わいせつ *kyōsei waisetsu*). To define which specific acts could be considered indecencies is extremely complicated, but the article describes the crime as: *"A person who, through assault or intimidation, forcibly commits an indecent act upon a male or female of not less than thirteen years of age shall be punished by imprisonment with work for not less than 6 months but not more than 10 years*[356]*."*[357]

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[352] SUZUKI Yumi E., "Sexual Violence in Japan: Implications of the Lay Judge System on Victims of Sexual", *Journal of Law and Criminal Justice*, June 2016, Vol.4(1), p.76-79.

[353] WORLD ORGANIZATION AGAINST TORTURE AND ASIA-JAPAN WOMEN'S RESOURCE CENTER, *Violations of Women's Rights in Japan. Alternative Report to the United Nations Committee Against Torture*, 38th Session, April 2007, https://www.refworld.org/pdfid/46af4d1f0.pdf (consulted 19 March 2021).

[354] N.a., "Japan needs to improve legal system to punish all sexual crimes", *The Asahi Shimbun,* 3 April 2020, http://www.asahi.com/ajw/articles/13268301 (consulted 20 March 2021).

[355] Japan is divided in 47 territorial divisions called Prefectures, *Todōfuken* (都道府県).

[356] The same acts committed against people with less than 13 years old are always punishable because 13 years old is the age of consent in Japan.

[357] JAPANESE MINISTRY OF JUSTICE, "Penal Code Art. 176: Forcible Indecency", *Japanese Law Translation Database*, http://www.japaneselawtranslation.go.jp/law/detail/?id=1960&re=02&vm=04 (consulted on 20 March 2021).

Originally, despite not being officially stated in the body of law, the intent of satisfying a sexual urge or obtaining sexual satisfaction was a priority to recognize the conviction in this kind of crime. The legal precedent was a case[358] of 1970, when a man threatened for two hours to attack a female victim using acid because he was angry at her. The victim was obliged to undress, and the aggressor took pictures to embarrass and humiliate her. In this case, despite the contrary opinion of two out of five judges of the Supreme Courts, the man was found not chargeable because he had not acted to satisfy his sexual desire[359]. This verdict was strongly criticized until 2017, when the judgment of prior instance condemned a man accused of exploited a 7 years old child to produce pornographic material, even if for economic purposes and not sexual ones[360]. The judgment, confirmed by the Japanese Supreme Court, affirmed the purpose of satisfying one's sexual pleasure was not a necessary condition if the act represented an indecent act meant to violate the victim's sexual freedom. With this verdict, the previous 1970's interpretation was definitely invalidated, also in virtue, as the Supreme Court itself stated, of the new popular standard of what should be considered an indecent and harassing act[361].

Nowadays, on the base of Supreme Court's statements, this crime includes acts sexual in nature potentially leading to rape and acts whose nature can be investigated only by taking into account the specific situation[362]. Still, due to the severity of the penalty, it is also stated that not all acts, even if sexual in nature, should be punished by referring to this provision. The problem is therefore distinguishing which acts are or are not to be considered under this term, a distinction that is still under normative evaluation[363].

In general, the crime usually condemns only extremely severe actions, like exhibitionism, touching someone's intimate parts or oblige someone to touch the perpetrators' intimate parts without consent and kissing against one's will[364]. Unfortunately, even in these cases the victim rarely decides to

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[358] Sup. Ct. Jan. 29, 1970, Case No. 1968 (a) 95.

[359] UMEDA Sayuri, "Japan: Supreme Court Reverses View on Whether Obscene Intent Necessary for Crime of Forcible Indecency", Library of Congress Law, 05 December 2017, https://www.loc.gov/law/foreign-news/article/japan-supreme-court-reverses-view-on-whether-obscene-intent-necessary-for-crime-of-forcible-indecency/#:~:text=Article%20176%20of%20the%20Penal,not%20more%20than%2010%20years (consulted on 20 March 2021).

[360] Sup. Ct. 2016 (a) 1731.

[361] KITAGAWA Kayoko, *Noticeable Judicial Precedents No.2018-3 "The Judgment of the Supreme Court related to Criminal Indecency",* 27 December 2018, https://www.waseda.jp/folaw/icl/news-en/2019/03/19/6575/ (consulted on 20 March 2021).

[362] *Ibidem.*

[363] *Ibidem.*

[364] ベリーベスト法律事務所、"何をすると強制わいせつ事件になる？ 具体的行為や量刑、逮捕後の対応について"、
https://keiji.vbest.jp/columns/g_sex/3191/#:~:text=%E5%BC%B7%E5%88%B6%E3%82%8F%E3%81%84%E3%81%9B%E3%81%A4%E7%BD%AA%E3%81%A8%E3%81%AF%E3%80%81%E6%AC%A1%E3%81%AE%E8%A1%8C%E7%82%BA%E3%82%92%E3%81%99%E3%82%8B,%EF%BC%88%E5%88%91%E6%B3%95%E7%AC%AC176%E6%9D%A1%EF%BC%89

present an official complaint, with rates of report accounted around the 14,7% of the cases' totality[365]. Sexual harassment is an extremely popular and known issue in Japan since the problem of sexual harassment in public spaces has become increasingly evident. For example, through recent years, the problem of *chikan* (痴漢), commonly translated with "molester", escalated alarmingly, causing a general mobilization to find proper solutions. *Chikan* is the word usually employed to describe those men that harass women, or even other men, on public transportations and in public places mainly by touching the victims' bodies or exposing their own intimate parts. The problem is so common in Japan that in many cities, train companies have created wagons expressly dedicated to women to use during rush hour, the morning and afternoon time when train are full at their 150% capacity. In fact, trains are considered especially dangerous places, together with isolated parks and parking, since hidden by the extremely high number of people *chikan* are free to target and attack their victims without being noticed. The phenomenon is so well-known that even choosing the right place where to stand inside the wagon appears to be important. Standing right next to the entrance is considered the most dangerous position since it is a point easily isolated from other passengers' attention. Those chikan, that often target young girls and particularly vulnerable individuals, can either touch their victim's body, oblige them to touch their genitalia, take photos under the victims' skirts, pretend to sleep on their shoulders or even cutting their clothes with scissors[366]. These situations are extremely common and both inside trains and in stations it is easy to notice advertisements against chikan.
The kinds of action perpetrated by chikan, like groping or taking photos or many others, though often potentially prosecutable as crime of "Forcible Indecency", are more commonly considered "nuisance" and prosecuted through Prefecture Ordinances called "Anti-Nuisance Ordinances" (迷惑防止条例 *meiwakubōshi jōrei*)[367]. Since developed on local basis by each prefecture's government, these

%E3%80%82&text=%E9%81%95%E5%8F%8D%E3%81%99%E3%82%8B%E3%81%A6%E3%81%8B%E6%9C%88,%E6%87%B2%E5%BD%B9%E3%81%AB%E5%87%A6%E3%81%95%E3%82%8C%E3%81%BE%E3%81%99%E3%80%82&text=%E3%81%93%E3%81%93%E3%81%A7%E3%81%84%E3%81%86%E3%82%8F%E3%81%84%E3%81%9B%E3%81%A4%E3%81%AA,%E8%A1%8C%E7%82%BA%E3%81%A8%E3%81%95%E3%82%8C%E3%81%A6%E3%81%84%E3%81%BE%E3%81%99%E3%80%82 (consulted on 21 March 2021).

[365] SHIOTA Aya, "Many sexual violence victims in Japan do not report assaults to police, support groups: survey", *The Mainichi*, 24 November 2020, https://mainichi.jp/english/articles/20201123/p2a/00m/0na/024000c (consulted on =4 May 2021).

[366] Guidable, "Be aware of CHIKAN in Japan!", Guidabke.com, https://guidable.co/move_to_japan/be-aware-of-chikan-in-japan/ (consulted 21 March 2021).

[367] ベリーベスト法律事務所、"何をすると強制わいせつ事件になる？ 具体的行為や量刑、逮捕後の対応について"、
https://keiji.vbest.jp/columns/g_sex/3191/#:~:text=%E5%BC%B7%E5%88%B6%E3%82%8F%E3%81%84%E3%81%9B%E3%81%A4%E7%BD%AA%E3%81%A8%E3%81%AF%E3%80%81%E6%AC%A1%E3%81%AE%E8%A1%8C%E7%82%BA%E3%82%92%E3%81%99%E3%82%8B,%EF%BC%88%E5%88%91%E6%B3%95%E7%AC%AC176%E6%9D%A1%EF%BC%89%E3%80%82&text=%E9%81%95%E5%8F%8D%E3%81%99%E3%82%8B%E3%81%A6%E3%81%8B%E6%9C%88,%E6%87%B2%E5%BD%B9%E3%81%AB%E5%87%A6%E3%81%95%E3%82%8C%E3%81%BE%E3%81%99%E3%80%82&text=%E

ordinances can adopt different wideness of criminalization and include not simply sexual acts, but also other kinds of actions that, taking place in public spaces, could disturb public peacefulness. In the case of Tokyo prefecture's Anti-Nuisance Ordinance, harassing acts are called *tsukimatoi* (つきまとい) and they include those actions that without a proper reason or with the purpose of satisfying malicious or resentful intents cause someone else's uneasiness[368].

This ordinance, like in the 75% of Japanese prefectures, was strengthened in 2020 to include actions, especially sneaky photographs, undertaken in quasi-public and private places[369]. In fact, thanks to the increasing diffusion of technological devices, the problem of sneak photography has drastically increased reaching in 2019, as reported by the Justice Minister, a total of 3953 reported cases on which police acted all around the country. Previously, the simple application to public space of the anti-nuisance ordinances left uncovered all those actions, increasingly common, taking place in quasi-public spaces, like workplace and schools. Therefore, in 2014, the Kyoto prefecture was the first one to act upon this weakness for including in the terms of the ordinance those spaces. Tokyo prefecture, like other 20 prefectures, finally extended the roofing also to public bathrooms and private places, as residences[370].

Still, despite these progresses, anti-nuisance ordinances were developed to defend citizens' interests in public spaces, not specifically to act against sexual oriented actions. Moreover, ordinances, though sharing the same core values, are still extremely dissimilar, consequently, an amend adopted on a national level would be the only option to create a common point of view on these kinds of issues[371] and to potentially officially include those still considered "less severe actions" sexual in nature in the *Penal Code*.

4.2.2. Sexual harassment as a work environment related crime, *sekuhara*

The word *sekuhara* stands for *sekushuaru harasumento,* meaning sexual harassment, and it is a word imported from USA in the 1980s. Inspired by the US's definition, in Japan *sexuhara* mainly relates

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[368] 東京都 (Tokyo Prefecture), 迷惑防止条例全条文 (Anti-Nuisance Ordinance Full Body), 東京都条例第 103 号(Tokyo Prefecture Ordinance No.103), 11 October 1962, https://www.keishicho.metro.tokyo.jp/about_mpd/keiyaku_horei_kohyo/horei_jorei/meiwaku_jorei.files/meibou.pdf (consulted on 22 March 2021).

[369] MATSUZAWA Hiroki, "Ordinances widened to ban sneak photos at schools, office", *The Asahi Shimbun*, 07 November 2020, http://www.asahi.com/ajw/articles/13866723 (consulted on 22 March 2021).

[370] *Ibidem.*

[371] *Ibidem.*

to two kinds of situations: the adverse treatments due to the workers' response to unwanted sexual attentions and the creation, through sexual means, of a hostile environment hindering the ability to fulfil one's duties[372]. In 1989, this term was so employed and known all around the country that it won the Japanese "popular word award"[373]. Feminists often criticized this abbreviated expression since it could transmit the impression of a not important issue, but nowadays *sekuhara* is fully accepted as a Japanese word and everyone knows the meaning of it and is aware of its wrongness[374]. However, despite this apparent awareness, practically speaking most men in Japan seems to not really get the point of why should be inappropriate to touch or to express sexual remarks to a woman without her consent.

In 2018, the episode of public elected members of the Tokyo Metropolitan Assembly who yelled at a female colleague to hurry and have children[375], obtained a strong opposition by public opinion, but if this type of actions can still take place even in the public political debate, this is an alarming indicator of the contemporary situation. Common reactions suggest a gap between Japanese men, who are still stick to the ancient gender role that would expect women to be submissive and considerate, and Japanese women, who appear to oppose increasingly to a tradition that would require them to always act passively and in an accommodating manner. In virtue of this settled gender role, and of the commonly adopted values of cooperation and harmony shared throughout the society, an outspoken and opposing attitude is not considered positively. An assertive response, allegedly needed to refuse unwelcomed attention but totally uncommon for women used to an extremely passive gender-specific language, is not simply unusual, but it would obtain negative comments and would be accused of destabilizing social harmony, especially in a working environment[376].

By referring to these same principles, the problem of *sexuhara* is not limited to Japanese women. Official sources report high numbers of harassment cases even against female foreigners, whose situation is also often aggravated by an unstable legal position in the country[377]. The problem is so common that for example the official site of the Association for Japan Exchange and Teaching

[372] SHIGENORI Matsui, "Sexual Harassment in Japan" *Centre for Asian Legal Studies*, School of Law at the University of British Columbia, 5 December 2019, https://blogs.ubc.ca/cals/sexual-harassment-in-japan/ (consulted on 02 April 2021).
[373] IKEDA Richiko, Changing interpretations of gender relations in Japan, *ProQuest Dissertations Publishing*, 1995, p.1-3.
[374] *Ibidem.*
[375] MUTA Kazue, "Why Japanese Men Still Don't Get It: Structural Roots of Sexual Harassment", *Nippon.com*, 18 May 2015, https://www.nippon.com/en/currents/d00171/ (consulted on 01 April 2021).
[376] *Ibidem.*
[377] SILVER Steve, "Foreigners victims, perpetrators of *sekuhara*. Japan sees progress on sexual harassment, but stories suggest it still has a long way to go", *The Japan Times*, 20 October 2010, https://www.japantimes.co.jp/community/2010/10/26/issues/foreigners-victims-perpetrators-of-sekuhara/#.XByaIFwzZPY (consulted on 01 April 2021).

(AJET), representing the official platform of networking for JET Programme's participants[378], even uploaded official guidelines on how to act in case of sexual harassment. The guidelines, just recently adapted to new standards, currently suggest to not tolerate situations of discomfort merely in order to safeguard the harmony, but at the same time they recommend not to intervene in favour of other colleagues experiencing those same abuses, but to "respect their choice", despite those choices could be absolutely not free ones. Therefore, the Association, despite officially repudiating it, refers to that ancient abstract value of harmony to prevent people from acting against cases of objective abuse[379].
Despite the criticalities of the contemporary situation, there has been consistent improvement from the 1980s. When the first Equal Employment Opportunity Law (EEOL) was adopted, in 1985, neither sexual harassment not even sex discrimination in the workplace was prohibited. Before that time, the Labour Standard Law simply required equal treatment regarding wages. Out of this, the only socially recognized and prohibited forms of discrimination were those on the base of nationality, creed, and social status[380]. The EEOL was drafted in response to emerging international standards, but finally remained merely symbolic since the government tried to merge local customs with internationally required gender equality. The only provisions were protective measures that strengthened women's segregation posing limits to their participation in certain types of employment, like the access to night shifts, mine work and many other strength-requiring roles. Moreover, provisions regarding hiring, promotion, educational training, and recruitment were not mandatory, but simply based on employers' good faith ("moral duty provisions") to achieve gender equality. As would be expected, in 1991 women were still the 99% of *ippan shoku* (一般職 "general roles") and only the 3,7% of *kanri shoku* (管理職 "managerial roles") and they held mainly parttime jobs[381].

Finally, in 1997, the Diet amended the Equal Employment Opportunity Act and set as mandatory obligation the previous moral duty to avoid discrimination against women in hiring and promotion, unluckily forgetting to consider same sex sexual harassment. Moreover, the new provision required employers to apply all the proper measures to avoid *quid pro quo* and hostile environment sexual harassment, but at the same time it directly prohibited only those conducts falling under *quid pro quo*,

[378]The JET Programme is a specialized project developed by various Japanese Ministries (MIC, MOFA and MEXT) meant to promote international working (especially teaching) exchange experiences between Japan and many other countries around the world.
[379] The Association for Japan Exchange & Teaching, "Counselling: Sexual harassment", Ajet.com, https://ajet.net/jet-resources/counselling/sexual-harassment/ (consulted on 01 April 2021).
[380] GELB Joyce, *Gender Policies in Japan and the United States. Comparing Women's Movements, Rights and Politics*, New York, Palgrave MacMillan, 2003, p.49-50.
[381] *Ibid.* p.50-53.

since regarded as discrimination in recruitment, promotion and dismissal, but hardly those defined as hostile environment[382].

In fact, while the most severe cases, including rape, sexual assault or sexual battery, are penalized on the base of specifically dedicated provisions, sexual harassment *per se* is still not considered a violation of criminal law and it is prosecutable only when the act represents a tort on the base of civil law[383]. Therefore, due to the lack of direct and precise provisions, victims still find many difficulties in submitting official complaints against employers and co-workers.

Quid pro quo cases can be judged under Article 90 of the Civil Code, establishing as null those legal acts, including dismissal and transfer, violating "public order and morals" that take place as a consequence of the employee's gender, but this article can apply only to those acts corresponding to a tort, therefore the refusal to hire or to promote is not covered by this measure[384]. At the same time, in virtue of Article 709 of Civil Code, acts of hostile environment harassment have been prosecuted, where possible, as violation of individual rights, like the right of privacy in cases of defamation, but sometimes, like in the famous case *Fukuoka Sekuhara* in 1992, the court had to resort to a particular form of private right still not officially recognized, the right to "working in an environment that is conducive to working"[385]. This particular doctrine, still rarely employed, became lawful in virtue of the "personal interest" notion, that states the duty to protect not only already established rights, like the right of privacy, but also those interest that even if not yet recognized should be included in the tort law[386]. Finally, under Article 715 of the Civil Code, the employer is liable for any harm caused by employees "in the course of implementing their duties" to a third person. The forms of tortious conducts that could cause vicariously liability are mainly three: quid pro quo harassment actions, hostile environment harassing conducts carried out by supervisors or co-workers in the implementation of their duties and the managerial failure to take appropriate measures for adjusting wrongful situations[387].

In 2006, the law was amended to include the prohibition of discrimination on the base of sex, not just against women, and adverse treatments related to pregnancy, marriage or childbirth. Moreover, the Ministry of Health, Labour and Welfare published some official guidelines on sexual harassment,

[382] YAMAKAWA Ryuichi, "We've Only Just Begun: The Law of Sexual Harassment in Japan", *Hastings International and Comparative Law Review*, 1999, Vol.22(3), p.523-526.
[383] *Ibid.* p.528-529.
[384] *Ibid.* p.529-532.
[385] *Ibid.* p.532-535.
[386] *Ibid.* p.535-537.
[387] *Ibid.* p.545-547.

including a booklet on what kinds of actions could constitute sexual harassment and which measures should be adopted to contrast them[388].

The last update came in 2019, when the Diet furtherly amended the EEOL to avoid any action, like dismissal or transfer, against victims who have submitted a complaint and to set as mandatory for employers the obligation to develop specific training on sexual harassment.

Nowadays, nearly all the biggest companies in the country have adopted specific measures to recognize and punish sexual harassment, together with training programs and internal complaint mechanisms. The situation drastically improved, but a legally mandatory enforcement is still lacking, since in cases of not application of the government's directives on behalf of the employer, the only punishment will be the publication of the name of the convicted company. This is surely an extremely severe penalty for a Japanese company's honour, but practically speaking sexual harassment in workplace is still not banned in the domestic law and even if, finally, Japan ratified the 2019 ILO Convention on Violence and Harassment an official ban of the practice seems extremely unlikely in the short period[389].

[388] SHIGENORI Matsui, "Sexual Harassment in Japan" *Centre for Asian Legal Studies*, School of Law at the University of British Columbia, 5 December 2019, https://blogs.ubc.ca/cals/sexual-harassment-in-japan/ (consulted on 02 April 2021).
[389] *Ibidem.*

CHAPTER 5: DRAWING CONCLUSIONS AND THINKING SOLUTIONS

The previous chapters examined the status of normative on sexual harassment within the framework of regional and international organizations and in two specific domestic case studies, Italy and Japan. We have seen a variety of approaches and different levels of achievement about concrete victims' protection. Therefore, the comparative analysis will be the departing point of this chapter. Comparing such different kinds of legal instruments could be complicated and, maybe improper, if we consider the structural differences between domestic and international bodies of law, but it could be useful to understand the diverse paths of development undertaken by international and regional organizations and how they practically influence local normative. Moreover, it will highlight the strong and weak points of each legal framework and it will allow us to draw some final considerations on the actual level of legal recognition of the problem.

As we have seen in the first chapter, the most concrete and diffused criticisms meant to interfere with a smooth normative development are also expression of a rooted social resistance to the detection of psychological implications of sexual harassment. The trivialisation and normalization of sexual abuse against women, the refusal of the power-related nature of sexual harassment and the denial of the intrinsic sexism of those behaviours are stances directly linked to social norms and gender-stereotypes that, when embraced, creates specific role expectations. Those expectations, by opposing legal and organizational standards, emerge as the main ideological hindrance to practical policies' implementation[390]. Therefore, in the second part of the chapter we will propose an analysis of those arguments that the author perceived as the most investigated expressions of these contrasting role expectations that arise as the major social reason behind legal delay. Namely, we will investigate three argumentations employed to question both the real magnitude of sexual harassment and victims' credibility: the trivialization of the severity of sexual harassment structural discrimination through the theory of "one bad apple" (disproved by statistics and research on diffusion and characteristics of sexual harassment condoning people and environments), the perpetrator's psychological process of objectification of the victim, and the threatening process of re-victimization that, by blaming the victims, intends to undermine their credibility.

[390] O'LEARY-KELLY Anne M., TIEDT Paul and BOWES-SPERRY Lynn, "Answering accountability questions in sexual harassment: Insights regarding harassers, targets, and observers", *Human Resource Management Review,* March 2004, Vol.14(1), p.93-94.

Finally, in the last part of the chapter, we will examine some potential solutions to contrast and confine the influence of those social obstacles, but, in virtue of our focus of interest- namely the role of legal framework- all proposed solutions will always be chargeable through law, and other forms of initiatives or campaigns will not be investigated.

5.1. Comparing different levels of legal recognition regarding sexual harassment

The previous chapters have proved heterogeneity of sexual harassment policies is unquestionable. Not only domestic norms differ in structure from international ones, but also same level regulations produce extremely dissimilar outcomes.

Firstly, on the international level, UN provisions have approached the topic of sexual harassment from distance. With the exclusion of ILO Convention C190 on Violence and Harassment, a binding instrument which directly mentions sexual harassment does not exist. Therefore, the most significant document at the current time is still the CEDAW Convention, that set gender discrimination as unacceptable and deny to traditions a power able to question the absoluteness of women equality. Despite the reluctancy of a limited number of states, thanks to Member States, CSW and UN Women's commitment, the subsequential non-binding agreements gave a practical interpretation of the CEDAW's values and they extended its protections to previously unexpected fields. Women Committee's General Recommendation N.19, in 1992, officially defined gender-based violence as a form of discrimination against women in virtue of their sex, and openly required Member States to engage in data collection on the phenomenon. Moreover, in Article 11 paragraph 17 and 18, it finally quotes the problem of sexual harassment as linked to working environment, since a kind of sexual violence that directly impact on women's ability to enjoy freedom. Following this line of argument, the DEVAW, after describing violence against women, sexual harassment included, as every action that causes or could potentially cause psychological, sexual or physical harm, defines sexual harassment as violence perpetrated in the working field, but due to the use of gender as synonymous of "sex", it implicitly requires episodes to have an intent sexual in nature. Moreover, the DEVAW for the first time, constrained by its recommendatory language, suggests the adoption of legal measures to punish perpetrators, protect victims and challenge social patterns. The practical aspect of international instruments is furtherly extended through Beijing Declaration and Platform for Action's work. Chapter 4 of the Declaration assesses 12 critical areas of concern to be approached for obtaining women empowerment and the adoption of gender-mainstreaming policies. For each of these areas, it

proposes a series of preventive and punitive measures to be adopted and implemented. Sexual harassment is here approached both as a general form of sexual violence, affected by patriarchy's control, and as directly connected to the economic field in the "Women and economy" section, where it is understood as a kind of discrimination affecting female workers' dignity.

Even CEDAW Committee's General Recommendation N.35 proposes practical anti-harassment measures, like public awareness increasing campaigns and training for deconstructing stereotyped thinking.

The influence of Beijing Declaration positively affected the work of private organizations and of all other autonomous UN agencies that, inspired by its values, and by internal directives, gradually adopted specific regulations on harassment related to their fields of interest. In virtue of its direct link with the working environment, the most reactive agency was obviously ILO, that adopted both a focused Recommendation (R206) and a real binding Convention (C190). The Convention actually deals with all kinds of harassment, like bullying and mobbing, but it recognizes a particular relevance to sexual harassment and gender-based harassment and encourage a zero-tolerance policy to counter it. This policy includes measures of prevention, support and sanction, like effective reporting methods, dedicated resolution mechanisms and appropriate monitoring.

In ASEAN, women rights found a complicated setting, not properly fertile ground for anti-harassment policies' implementation. We should remember that ASEAN is an organization born mainly for economic and peaceful purposes, consequently the creation of ACW in 2001, meant to promote international cooperation about women rights and capacity building based on best practice, was already a valuable step. Therefore, the only instrument adopted about women rights on a regional level is the ASEAN DEVAW, that inspired by the UN's DEVAW, promote cooperation, gender-mainstream, deconstruction of gender stereotypes and the adoption of legislative and social measures to eradicate VAW. Unfortunately, this agreement does not directly mention sexual harassment, but the annex RPA on EVAW fills the gap by proposing practical actions to confront this kind of discrimination based on inequal power relations and gender-based stereotypes. The Regional Plan suggests the creation of dedicated legal frameworks in each country, data collection and management, and measures to implement security both in workplace and public spaces, like public transportation. Where the UN's instruments never mention public spaces the limited ASEAN's plan of action does recognize sexual harassment should be faced in various settings.

Still, despite the lack of any binding instrument, an effort to implement CEDAW and CRC's provisions was officially conveyed when, in 2010, the ACWC entered the field. Without a definition of the protected rights, therefore directly referring to CEDAW's definitions, the Commission tried to unify the regional humanitarian policy by setting common legal objectives, promoting public

awareness campaigns and building common mechanisms of action, through a series of Work Plans for Advancement and Gender Equality, the last being WAGE 2016-2020, structured to entrust different sets of responsibilities to each AMS.

Opposite of the ASEAN's overlooking system, is the European one, enforced by more than one organization at the same time. Firstly, the Council of Europe, with its documents that reached a never seen before level of protection of women rights. The Istanbul Convention, in fact, is the first binding instrument directly condemning VAW and, as such, requiring its criminalization. In this document, gender-based violence against women is a key word. The Convention demands a series of practical actions that members of the CoE should enforce to practically fight GBV: campaigns of public awareness, specific trainings, resources to detect eventual improvements and revaluation of cities' environments to make the general setting safer. Art.40 of the Convention directly addresses the topic of sexual harassment, that is described as any unwanted conduct -physical, verbal or non-verbal- that could cause any harm to the dignity of a person. Extremely innovative is the absolute lack of any reference to the workplace, that consequently includes in this definition sexual harassment independently from where it takes place. However, CoE did not stop with the Istanbul Convention, but it proved to be even more innovative.

Art. 40 of the Convention does refer to a general sense of hostile, intimidating or degrading environment, but it does not properly include "hostile environment" harassment in its definition. This particular kind of harassment has been often neglected by many states even part of the CoE, consequently, to fill those gaps, in 2019 the Ministers of Council of Europe adopted the "Recommendation CM/Rec (2019)1 on Preventing and Combating Sexism". No instrument before had ever considered the issue of sexism, despite its being the main foundation hidden behind nearly all forms of gender discrimination. This document, accused of being an obstacle to freedom of speech, condemns sexism, it offers the first legal definition of this phenomenon and also an indicative list of prohibited actions. The document was drafted also because of PACE's 2017 "Resolution on putting an end to sexual violence and harassment in public spaces", that recognizes as sexual harassment and gender stereotypes heavily affect women's enjoyment of life. Once again, the main suggested preventive measures were awareness-raising campaigns and topic-related trainings.

The other main organization operating in Europe is the European Union, whose instruments have directly impacted European countries' domestic law. In analysing EU directives and resolutions, we should firstly highlight the typology of approach. Thanks to CEDAW Convention, sexual harassment has always been interpretated as a form of gender discrimination on the international level. Both the Beijing Declaration and Platform for Action and the Istanbul Convention asses sexual harassment as a violation of dignity of the person, but always in the optic of a structural discrimination. Due to the

concretely practical value of EU regulations and its welfare policies oriented to guarantee wellbeing of the workers, European Union instead adopted a practical approach called "Dignity Approach". This means that the EU does recognizes sexual harassment as a form of discrimination, but its countering policies are all developed starting from the impact it has on workers' lives. EU has tried to enforce a "Discriminatory Harm Approach", but for the time being its efforts have been pointless. Therefore, the "Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women regarding access to employment, vocational training and promotion, and working conditions", recasted in 2006, and the "Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services" successfully implemented protection and prevention of sexual harassment, but only in virtue of dignity of the person, in the case of 2002 Directive, and of the worker, in 2004 one. Obviously, these directives have many merits, like officially including both sexual harassment and harassment based on sex in the terms of their provisions and assessing shared definitions and criteria of compensation, but they fail to recognize the structural discrimination internal to sexual harassment. To fix this situation, in 2017 the EU Parliament subscribed a resolution for combating harassment and abuse in the EU. This resolution describes sexual harassment as a sex discrimination that interferes with women free access to public life and that occurs in workplace, public spaces and parliaments as well. It condemns normalization of this conduct and defines it as a breach of individual freedom.

Briefly, binding documents are a few (the CEDAW, the OP-CEDAW, the ILO Convention C190 and the Istanbul Convention), but the authority of other instruments was enough for recognizing their fundamental contributions. On the international level, sexual harassment main debate started from its recognition as a form of violence against women, therefore of sex discrimination, but all UN instruments have approached it as a workplace discrimination ignoring, until recently, the impact that this conduct can have in different settings. The ASEAN's provisions about violence against women, and even more directly about sexual harassment, have been a few and fundamentally inspired by UN actions, particularly as a consequence of the CEDAW provisions' implementation, while European ones have been extremely consistent. CoE's Istanbul Convention was the first binding document to recognize sexual harassment's influence out of workplace and to adopt a Recommendation against sexism, portrayed as strictly linked to "hostile environment" harassment, while European Union directives directly assessed both sexual harassment and harassment base on sex (meaning "hostile environment" harassment perpetrated in virtue of the target's sex) as form of discrimination.

On a practical level, nearly all international and regional documents suggested the same anti-harassment measures; in particular: legal anti-harassment regulations, social measures to deconstruct gender stereotypes, awareness-raising campaigns, specific trainings, and dedicated complaint mechanisms.

Finally, the OP-CEDAW and the ECtHR offered judicial (or quasi-judicial) mechanisms of complaint for safeguarding and evaluating cases of gender discrimination, sexual harassment included, in which the state was not able to guarantee protection of women rights.

In conclusion, how all these norms influenced national law?

In Italy, actions commonly treated as sexual harassment that include physical interaction are punished through Art.609-bis of the Criminal Code, while actions committed in public spaces for "deplorable reasons", not including physical contact, are object of evaluation through Art.660 "Crime of Harassment". These two penal norms, together with the Crime of "Private Violence" employed for situations taking place in private settings, can cover the majority of situations, but they obviously lack the ability to recognize the structural discrimination value of sexual harassment as an independent crime. Civil Code's contribution, through Art.2087, regards the defence of employees' well-being in workplace, and though useful, it shares the same weakness of the Criminal Code. Therefore, it was only thanks to the two above-mentioned EU directives of 2006 and 2004 that the Code of Equal Opportunity was enriched with two Articles, Art.26 and Art.55-bis, expressly dealing with the problem of sexual harassment. These articles adopt the same definition employed in EU directives on dignity and adhere to the same standards, but through Art.50, Italy unexpectedly allocates the duty of drafting proper Codes of Conduct to trade unions and local observatories. Finally, to implement measures, like awareness-raising campaigns and the prohibition of taking actions against victims after the submission of a complaint, with Law 15/01/2021 n.4, in 2021 Italy ratified ILO Convention C190.

At the contrary, Japan adopted an extremely different set of norms. Firstly, the crime of "Forcible Sexual Intercourse" includes a very limited set of actions, mainly different forms of rape, therefore the only employable penal norm is Art.176 of the Penal Code, "Forcible Indecency". Under international pressure, the norm was modified and now the disciplined indecent acts do not require a purpose of sexual satisfaction to be prosecuted and they can include any action, sexual in nature, potentially leading to rape. Unfortunately, it is not clear which acts should be considered "forcible indecencies" and which not. For example, forced touching of intimate parts, exhibitionism or forced kiss could potentially be included in the limits of this provision, being extremely severe aggressions, but commonly they are not, preferring instead to resort to local Anti-Nuisance Ordinances, that sanction all kind of actions disturbing public peacefulness, but not only when sexual in nature. These

ordinances usually applied only to public spaces, but recently the settings have been widened to include quasi-public and private places as well.

However, sexual harassment in Japan is conceived only as related to workplace. In 1997, the Diet amended the Equal Employment Opportunity Act to set as mandatory the prohibition of discrimination against women, therefore excluding same sex discrimination. Consequently, the Civil Code was enriched with a series of articles. Art. 90 nullifies actions adopted as consequence of refusal of sexual unwanted attention, punishing basically only quid pro quo harassment. "Hostile environment" harassment is instead more complicate to penalize. Art.709 punishes violation of individual rights, like rights of privacy, and some judicial courts have also employed the "personal interest" notion for assessing as unacceptable "working in an environment that is conducive to working", but these regulations are rarely employed. Instead, the only concretely enforced norm is Art.715 about employers' liability. Employers are required to set all possible measures to prevent sexual harassment in their private companies, and when they fail responsibility befall on them. Still, in these cases the sanction corresponds to the mere publication of the convicted agency's name, that, though considered extremely severe in Japanese culture, is not enough to avenge victims.

In 2019, just like Italy, Japan ratified ILO Convention C190, and consequently prohibited any counteractions taken against victims after official reporting.

Basically, both our case studies were pressured by international community's influence. Italy adopted norms that, though practically effective and able to intervene in most of the situations, are still failing to recognize the power-related issues about sexual harassment, while Japan did recognize sexual harassment as a workplace related discriminatory matter, but practically did little to discourage such conducts, both in the workplace, where the only regulations are expected to be adopted on an internal organizational level inside companies, both in public spaces, where the existing penal provisions cover an extremely limited and severe set of acts. However, something that these two case-studies share is the fact that, with or without legal norms at place, victims, afflicted by the strong traditional stigma of sexual harassment and used to minimize and normalize certain kind of actions, do not employ those resolution mechanisms and sexual harassment remains, as a consequence, unpunished.

In conclusion, we have seen how different approaches and interpretations have produced different typologies of documents. It is obvious sexual harassment is recently receiving increasing attention, on every level of analysis, but the weaknesses are still a lot. Sexual harassment is still mostly considered as limited to the working field, the definition of which actions are or not sexual harassment is still unclear, and often sanctions are not rigid enough to properly limit the diffusion of this socially spread and accepted phenomenon. Social resistance and trivialization have been relevant obstacles in legal implementation, and they incredibly slowed down the process of legal development causing a

general normative delay if compared to other set of universally recognized women rights. Especially through the last 10 years, the situation is gradually improving, but many steps are still needed, because no other form of sexual violence is so extremely socially and legally belittled as sexual harassment is. Social resistance is still strong, and it will probably be definitely defeated only when gender stereotypes on which it is constructed, will be nullified.

5.2. Potential reasons of the delay

Sexual harassment has been a topic of debate for many years, but on every and each level practical provisions for implementing anti-harassment policies have been a recent achievement and many other steps should still be taken for reaching an all-round protection. The process of legal implementation has been a slow one and consequently regulatory vacuums and weakness are still a lot. Is it possible to detect some structural reasons?

As we have seen in the first chapter, the main counter-debate topics have been connected to social remonstrances due to freedom of speech, scepticism about discriminatory value of harassment and vagueness on definition of which actions could be potentially interpreted as sexual harassment. Still, even after those objections were overcome and anti-harassment policies were formally adopted, concrete practice is falling behind.

Research, law, debates, and public campaigns have, in the long run, produced social expectations on harassers, targets and observers. Each actor is expected to act in certain ways and when this does not happen its role is jeopardized. For example, employees are expected to not harass, managers are expected to condemn harassing behaviours, but on a practical level social science surveys prove this is not what happens, and harassers keep harassing while targets keep responding passively[391]. The consequent discrepancy created between what legal and organizational systems expect and how social practice works is the space we should investigate to find an answer to our initial question. The variables are a lot and they intertwined individual identity, behavioural prescriptions and many other, but above all the most challenging issue is the coexistence of "competing prescriptions". Basically, people, and the entire society, are concretely influenced by contrasting role expectations, and if law and organization require workers to not adopt sexist attitudes, the working/living group could instead transmit different values. In the same way, law could expect victims to denounce all suffered abuse, but social stigma and the ambiguity of prescriptions, lacking an "objective" definition of what is

[391] O'LEARY-KELLY Anne M., TIEDT Paul and BOWES-SPERRY Lynn, "Answering accountability questions in sexual harassment: Insights regarding harassers, targets, and observers", *Human Resource Management Review,* March 2004, Vol.14(1), p.85-86.

sexual harassment and what is not, could instead prevent them from submitting a formal complaint. Surrounding environment and culture could therefore tolerate and even encourage sexual harassment and instead blame the employment of official remedies, and, due to their proximity with the individual, their standards could appear way more concrete than abstract organizational- or legal, where organizational policies are missing- instructions[392].

Contrasting role expectations hinder the efficiency, acceptance and development of legal and organizational standards. Society set those role expectations. Consequently, we will here investigate three highly researched specific forms of psychological mechanisms originated by social assumptions and role expectations that are still obstructing practical implementation of anti-harassment policies: the "bad apple" theory- an assumption rooted on the abstract belief of a pure society disturbed by deviated individuals- the objectification of women- linked to a social expectation, perpetrated also through media, of men as dominant and women as object of sexual pleasure- and victim blaming- caused by effective contrast with the expected behaviour of the "proper" victim.

5.2.1. "One bad apple": Gap between reality and assumptions

One of the main criticisms when we deal with severity of structural gender discrimination in its various forms is the common assumption that acts of sexual violence are perpetrated by a few number of deviated individuals, generally known as the "Bad apple" theory. This theory pursues the stereotypical idea that abuses are committed by one rotten apple part of a clean barrel, meaning one moral corrupted individual acting independently from the surrounding pure society. In this way, punishing the perpetrator is enough to stop the wrongdoing and society can remain clean and untouched. Unfortunately, by denying the existence of a backup bad system, the responsibility of the surrounding accommodating society is nullified. The "bad apple" theory ignores how culture blames survivors and normalizes sexual violence and sex discrimination, to the point of anesthetizing bystanders' judgments and will of intervention[393].

Sexual harassment has been particularly afflicted by this interpretation. Belittled as a form of violence, treated as normal flirting exasperated by victim's sensitivity, ignored in its being expression of power, women today are still afraid of reporting cases of sexual harassment, especially due to the stigma that follows it, a stigma that portrays them as sexually available and provoking, too sensitive or too weak. Despite the concrete psychological harm that victims suffer every day, they are, even more than in

[392] *Ibid.* p.93-94.

[393] OPPENHEIMER Jacob, *Beyond Bad Apples: Assessing the Fight Against Sexual Violence*, Massachusetts Institute of Technology, available at https://cdn.ymaws.com/www.afa1976.org/resource/collection/85281FF1-F44B-40A8-A44A-696D3A7E9867/Oppenheimer%20July%20Essentials%20LEADER)[12].pdf (consulted on 20 April 2021).

cases of sexual assault, instructed to minimize their situation as not severe enough[394]. In the work setting, indicative of this stigma is the different reaction that the crime of moral harassment often obtained in front of public opinion. Where introduced in the domestic framework, like in France in 2005, moral harassment was structured to protect the psychological integrity of the workers from degrading conditions of work due to psychological pressure or abuse of authority that could compromise one's professional future. As long as there are moral consequences for the victim, measures are taken against the aggressor, despite the latter's intentions. Even with its obvious similarities with "hostile environment" harassment, moral harassment is not considered as a gender issues, therefore it has been commonly appreciated and welcomed. At the contrary, in cases of sexual harassment, psychological and physical harm of the victim rarely is considered enough of a reason for taking proper countermeasures[395].

Another marker of the stigma is the commonly stereotyped and presumptuous attitude of judicial courts that when judging cases of sexual harassment focus on victims' reactions and behaviour as a pointer of unwelcomeness instead than on harassers' actions, despite social science surveys demonstrate victims prefer to ignore and avoid their aggressors as long as possible and "reasonable judges" rarely share the same standards of the "reasonable person"[396].

To deconstruct the theory of "bad apple" is not a hard issue. Since the beginning of the debate on sexual harassment, a proliferation of researchers has investigated the existence of behavioural and environmental patterns that could predict or instigate higher probabilities of sexual harassing, and some common lines have actually been found. Usually, the influencing structures are mainly linked to perpetrators' psychology or to social settings in which the aggression takes place. Beiner defines the existence of five social science "fact finders" that could assess higher risks of sexual harassment in the workplace: a gender homogenous setting, the isolation from other people of the same gender, the employment in traditionally gendered occupations, a sexualized environment and the management attitude toward harassment[397].

In traditionally gendered working environment, with a high percentage of male employees, sexual harassment and harassment on the base of sex are detected with way higher frequency. For example, in Lonsway, Cortina and Magley's research on frequency of harassment in the law enforcement field, more than the 90% of female employees experienced at least one form of sexual harassment in their

[394] CROMER Sylvie, ''Le harcèlement sexuel, une violence méconnue, un débat subversif'' in CHETCUTI Natacha et JASPARD Maryse (sous la direction de), *Violences envers les femmes. Trois Pas en Avant Deux Pas en Arrière*, Paris, Editions L'Harmattan, 2007, p.169-174.

[395] *Ibid*. p.181-185.

[396] TAYLOR K.W., "Gender Myths v. Working Realities: Using Social Science to Reformulate Sexual Harassment Law by Theresa M. Beiner: Review", *Labour/Le Travail*, Spring 2006, Vol.57, p.256-257.

[397] *Ibid.* p.257.

life, unwanted sexual attention in more than the 70% of cases[398]. Estimates suggest that only the 25%, or fewer, of women decide to report through formal complaint, and only the 7,6% of denounced perpetrators had consequences while in the 12,9% of cases the complaint caused retaliation, extremely dangerous when translated with a failure to give immediate back-up in emergency situations[399]. The reason for this lack of reporting were mainly linked to the surrounding environments. Women feared retaliation or an impact on their career, or again they though it would have been useless. In addition, many of them, adhering to the sexual harassment stigma, minimized the events as "not severe enough" and normal in a traditionally manly environment, and they refused to appear as weak victims of sexual harassment preferring to avoid labelling the experience they suffered as such. Unfortunately, it is exactly this condoning environment the reason for such high number of aggressions, because in these conditions people feel entitled to use their power against another person to satisfy their desires[400].

However, occupations and stereotyped environments are not the only potential instigators. People's cultural background has a strong influence on their attitude toward sexual harassment. In fact, people who strongly adhere to traditional gender roles and, on a subconscious level, link sexuality with sexual dominance appear to engage more easily in harassing behaviour or, if women, to easily condone such actions. These men are said to strongly adhere to Villemez's "Macho" Scale, and they are proved to express higher level of gender discrimination and sexist attitude[401]. Usually, young men, due to the influence of media, family and friends, scores higher in masculinity and are more influenced by those stereotypes. They perceive more situations as sexual or potentially sexual- they could therefore view sexual harassing behaviours as normal and engage in inappropriate approaches- but it appears that, by aging, experiences influence people's attitude and older men are generally more conscious of appropriate and inappropriate behaviours[402].

Nevertheless, the worst scenarios arise when more than one factor is in place at the same time. Pryor, La Vite and Stoller, through their experiment, developed the "Person by situation interaction" theory, that argues the union of facilitating environments with people high in "Likelihood to Sexual Harass" Scale creates extremely risking settings. Firstly, they analysed the likelihood of a group of young men to engage in *quid pro quo* sexual coercion. People who score high in the LSH scale, like those high in the "Macho" Scale, hold adverse sexual beliefs and strongly adhere to sex role stereotypes. They

[398] LONSWAY Kimberly A., CORTINA Lilia M. and MAGLEY Vicki J., "Sexual Harassment Mythology: Definition, Conceptualization, and Measurement", *Sex Roles*, January 2008, Vol.58, p.184-187.
[399] *Ibid.* p. 196.-198.
[400] *Ibid.* p.199-203.
[401] VILLEMEZ Wayne J. and TOUHEY John C., "A Measure of Individual Differences in Sex Stereotyping and Sex Discrimination: The "Macho" Scale", *Psychological Report*, 1 October 1977, Vol.41(2), p.411-415.
[402] FOULIS Danielle and McCABE Marita P., "Sexual harassment: Factors affecting attitudes and perceptions". *Sex Roles*, 1997, Vol.37, p.785-788.

could find difficulties in empathizing with others' perspectives and are more authoritarian, therefore ready to use their social power for sexual exploitation. The role of managerial directives appears to be decisive for these persons. Indeed, where encountered with sexualized work environment and nonprofessional sexist behaviours, these men engaged in harassing actions with extreme easiness, while high standards of anti-harassing policies and attitudes positively influence their behaviours, nearly zeroing harassing approaches[403].

Finally, one last influential factor detected by Van der Linden and Panagopoulos is the moral foundations of individuals. People with a conservative political ideology, characterized by loyalty to a group and to a tradition, appears to be less condemning of sexual harassment, maybe in virtue of their willingness to maintain status quo, especially when perpetrators belong to their faction. The authors called this attitude the "O'Reilly factor", in memory of the media icon Bill O'Reilly, one of the first triggers of the #MeToo campaign in 2017[404].

In conclusion, a variety of social and psychological research have proved sexual harassment is not as peculiar and uncommon as the "bad apple" theory would try to imply. From cultural background to the role of gender stereotypes in perpetrators' psychology, to the kind of environment targets are acting in, the variables that influence the deployment of harassing behaviours are a lot and they all contribute to minimize and make sexual harassment socially acceptable.

5.2.2. Social stereotypes in perpetrators' psychology: Sexual Objectification

Another factor influencing social attitude, and by reflection legal implementation, about sexual abuse is the psychological process hidden behind perpetrators' actions, a process whose roots lie in the socially stereotyped relationship between men and women.

If we exclude Pryor's "Likelihood of Sexual Harass" Scale, for many years, perpetrators' psychology has been ignored by researchers who preferred investigating socio-cultural and organizational aspects of the issue. Psychology of perpetrators is not independent from the culture and ideological beliefs they grow up with, therefore understanding which mental process brought them to decide to act in certain unappropriated and violent ways could increase the comprehension of the effective social problem[405].

[403] PRYOR John B., LAVITE Christine M. and STOLLER Lynnette M., "A Social Psychological Analysis of Sexual Harassment: The Person/Situation Interaction", *Journal of Vocational Behaviour,* February 1993, Vol.42(1), p.75-80.

[404] VAN DER LINDEN Sander and PANAGOPOULOS Costas, "The O'Reilly factor: An ideological bias in judgments about sexual harassment", *Personality and Individual Differences*, March 2019, Vol.139(1), p.198-201.

[405] PINA Afroditi, GANNON Theresa A. and SAUNDERS Benjamin, "An overview of the literature on sexual harassment: Perpetrator, theory, and treatment issues", *Aggression and Violent Behavior,* March 2009, Vol.14(2), p.135.

Usually, perpetrators adopt various cognitive strategies to suspend self-regulatory process and facilitating harassment. Moral disengagement is possible as long as they are able to avoid public moral judgment and to do so they adopt various exonerating techniques, from cover-up – doing everything in secret, hidden from other people eyes- to devaluation -labelling the targets to belittle them- from reinterpretation -deny actions and sell them as benevolent or friendly - to threat and bribes[406]. Still, even more complicated are the psychological strategies adopted to cause selective disengage that avoid one's moral principles to apply in certain contexts. Page and Pina, through their moral disengagement theory, emphasise eight theoretical mechanisms:

- Moral justification: harassers justify themselves in virtue of a general sense of authority, fairness or loyalty that they should respect- for example, loyalty to a group that should allegedly benefit from the harassment;
- Euphemistic labelling: harassers' adoption of sanitized euphemistic labelling creates less engagement with the victim, while "humoristic" labels should cause a moral amnesty toward perpetrators;
- Advantageous comparison: perpetrators, comparing their actions with supposedly worse and more flagrant scenario, feel morally uncorrupted;
- Displacement of responsibility: the belief it was not personal agency but the society, workplace management and environmental conditions that caused a certain event;
- Diffusion of responsibility: in collective context where there is more than one perpetrator;
- Disregard and distortion of consequences: perpetrators feel uncorrupted by minimizing, distorting, and disbelieving the harmful consequences of their act, maybe by reading it as pleasurable and flattering for the victim;
- Attribution of blame: harassers blame the victim for forcible provocation or failure to discourage the unwanted attentions;
- Dehumanization: by devesting people of their human qualities, harassers avoid empathic concern[407].

Through dehumanization, women's bodies, body parts and sexual functions are disconnected from the person they belong to. Women are identified as animals or objects of beauty and worship, and by focusing on their physical appearance alone they are perceived as less warm, less competent and less

[406] PAGE Thomas E. and PINA Afroditi, "Moral disengagement as a self-regulatory process in sexual harassment perpetration at work: A preliminary conceptualization", *Aggression and Violent Behavoir*, March 2015, Vol.21, p.75-77.
[407] *Ibid.* p.78-81.

moral. Deprived of their humanhood, reduced to a mere instrument the risk of their sexual victimization drastically increases[408].

The process of objectification, that nullify women's identities, is not only a mechanism of moral disengagement. Objectification is embedded in a society where women are expected to grow modest, elegant, composed, to show off their weakness, to feel less able and less independent, while men are in right to be men and expected to fight their "natural sexual urge". Object of care and desire, woman's body is responsible of provoking male's reaction[409].

This approach is furtherly testified by the objectification of woman's body in tv programs and by the existence of sex trade and pornography. In pornography, women are depicted as objects meant to provoke sexual gratification. Sexual inter-subjectivity, with all the actors portrayed as human beings with human dignity, is rarely displayed in pornographic materials where the themes of "sexual urges" and "sexual compulsions" obtain way more success. Many studies have proved that sexually objectifying media negatively influence sexual perpetuation. In Japan, for example, "chikan theme" pornography have obtained gradually increasing levels of attention and, in parallel, from 1986 to 2003 "Forcible Indecency" episodes increased by 338%[410].

Briefly, if individual behaviour and psychology do influence attitude toward sexual harassment, indeed surrounding stereotyped role expectations about male-female interaction do affect psychology, for example by generating specific moral disengagement mechanisms such as objectification. Those expectations excuse and justify certain legally unacceptable actions, that consequently society practically continue to tolerate and perpetrate despite discording normative standards.

5.2.3. Blaming the victim: credibility and responsibility

The final impediment to social implementation of legal provisions we would like to investigate is probably the most striking typology of multilevel incongruence between legal standards, social expectation and simple reality highlighted through social science survey: the victim-blame practice. This unfortunately common approach probably presents an even higher level of difficulty of analysis since in this case if moral and legal expectations correspond the same does not apply to cultural expectations and real practice[411].

[408] *Ibid.* p.80.

[409] CAIRNS Kathleen V., "Femininity' and women's silence in response to sexual harassment and coercion", in THOMAS Allison M. and KITZINGER Celia (ed), *Sexual Harassment: Contemporary Feminist Perspectives*, Philadelphia, Buckingham: Open University Press, 1997, p.97-101.

[410] SHIBATA Tomo, *"Pornography", Sexual Objectification and Sexual Violence in Japan and in the World*, Working Paper 7, Center for East and South-East Asian Studies, Lund University, 2008, p.1-7.

[411] HEALICON Alison, *The Politics of Sexual Violence. Rape, Identity and Feminism,* Palgrave Pivot, 2016, p.28-29.

When thinking about the victim's role in aggression, society usually establishes a categorization. Basically, the female victim has to be found "pure" about her previous sexual practice, to appear traumatized, maybe bruised, and she should immediately report the abuse. Her experience is pathologized and the consequences should transpire in a so sensational way that if the survivor, in the effort of overcoming the hideous experience, does not adhere to this stereotype, usually called Sexual Harassment Myth, she will be usually not believed and her credibility will be highly at stake[412].

There are many reasons for this attitude, first a lack of empathy with the victim. As Dierkmann affirms, people expectation about their own reactions is way different from what practically happens. The fear of retaliation, of not being believed, of wronging someone for actions not severe enough are all obstacles in the process of presenting an official internal or legal complaint. When people lack sympathy with the victim, they are more likely to blame the targets for bringing a bad situation upon themselves. To break this bias, it would be useful in training to refer to motivations and reasons for adopting a passive attitude[413].

Unfortunately, most accusations lie with the targets' characteristics, especially when targets are women. In fact, credibility is strictly linked with power. Less power means less credibility, for this reason race, age and social background do contribute in making one's position unreliable. When a female victim does not adhere to the stereotype of purity or does not present the "proper" emotional response, she will be automatically labelled as "bad women" and expected to bring false accusation against an innocent man. Moreover, victims are expected to be emotionally instable or traumatized, but at the same time they are asked to be consistent, meaning to immediately report the episode and to be able to offer precise and detailed answers, forgetting how power imbalance and trauma could cause difficulties in disclosing and remembering. Lack of consistency could furtherly compromise the target's position[414]. Briefly, the harm story has to follow certain steps -sensationalization of long-term emotional damage, a role of total passivity, irreprehensible figure (avoiding sexualized clothes or too friendly interactions)- otherwise the standard of "ideal victim" is not matched and the target is considered a liar, or at least extremely suspicious, Women themselves, trivialized and belittle their experiences, blaming themselves for not being more assertive in refusing the perpetrator's sexual attention[415]. Actions are always considered in relation to the victim while the perpetrator does not have a relevance at all. It is her previous relation with the perpetrator, or her inability to manage the

[412] *Ibid.* p.1-21.

[413] DIEKMANN Kristina A., SILLITO WALKER Sheli D., GALINSKY Adam D. and TENBRUNSEL Ann E., "Double Victimization in the Workplace: Why Observers Condemn Passive Victims of Sexual Harassment", *Organization Science*, March-April 2013, Vol.24(2), p.624-625.

[414] EASTEAL Patricia and JUDD Keziah, "She Said, He Said': Credibility and sexual harassment cases in Australia", *Women's Studies International Forum*, September 2008, Vol.31(5), p.339-342.

[415] HEALICON Alison, *The Politics of Sexual Violence. Rape, Identity and Feminism,* Palgrave Pivot, 2016, p.44-55.

situation, that is constantly discussed, underling how the responsibility always falls upon the wronged part[416].

Recently, victims' dignity and rights have been increasingly investigated and supported, but the stigmatization and focus on victims is still testified by the grammatical use of expressions like "the victim was sexually harassed", perpetrating a sense of contamination befalling on the target. More a victim is viewed as contaminated, less the severity of wounds is recognized. Generally, conservative values express a stronger stigmatization, while liberal ideas, valuing individual rights, strongly blame the perpetrators, but the most relevant predictors are individual moral values that can overcome political orientations[417].

Finally, a widely discussed topic is "why didn't she just report?", especially if the report came with delay. As Patterson highlights the reasons are a lot: retaliation, uselessness, fear. The most common fear is in fact to worsen the situation by complaining, and, unfortunately, often this fear is well founded since retaliation affects nearly half of complaints. Fear of retaliation includes concern on economic income, like the fear of being fired, and labelling, that could furtherly exacerbate the working conditions. For all these reasons, usually victims complain only once they have already lost something, being it money, work, benefits, acceptable work environment, etc[418].

Social attitude will blame victims and normalize sexual abuse, while legal standards will require them to complain and be consistent with their witness. Again, social expectations will require a victim fully adhering to the myth of the "real victim", but finally none of these levels will confront reality of how psychological processes impact on victims both of sexual abuse and of double victimization they will experience once having denounced their experience. In conclusion, this enormous multilevel discrepancy creates substantial obstacles to targets' decision to report, finally assessing one of the most relevant hindrance in practical policies' implementation, victims' discomfort.

5.3. Solutions rooted in law

After investigating some of the main reasons of the practical delay in social adoption of legal norms, in this last paragraph we will see how to enforce standing counter measures. Both international and domestic institutions have proposed various actions to prevent and countering sexual harassment, especially in working environment, being it a kind of setting more easily controlled than the public

[416] *Ibid.* p.63-65.

[417] NIEMI Laura and YOUNG Liane, "When and Why We See Victims as Responsible: The Impact of Ideology on Attitudes Toward Victims", *Personality and Social Psychology Bulletin*, June 2016, Vol.42(9), p. 1238-1240.

[418] PATTERSON Sasha, "Chasing justice, challenging power: Legal consciousness and the mobilization of sexual harassment law", *ProQuest Dissertations Publishing*, 2008, p.67-77.

space, but unfortunately these measures, even where actuated, did not cause the expected practical changes. Therefore, the situation remains in a general *status quo*. To analyse each suggested measure would be a very long process, so this paragraph will limit its investigation to two particularly relevant provisions, namely "expressive value" of norms and anti-harassment trainings. The research will examine current situation, explain why these measures are so important and propose new improving adjustments.

5.3.1. The "expressive value" of normative

Sexual harassment, though contrary to the law, is still widely diffused and all around the world people still appears to strongly oppose normative enforcement. The problem is that anti-harassment policies regulate social norms rooted on gender hierarchy and, being harassment rarer for men, male workers usually perceive these provisions as threatening their privilege of freely interact with women through a lens of aggressive sexual approach more than protecting even their own interests. Ambiguity in law reflects that reluctance in changing gender norms and, in women's perspective, "taking it personally" still appears disempowering, linked to the stereotype of women as emotional or irrational. For this reason, victims find extremely hard to label their experiences with the term as it should be employed without fear, "sexual harassment"[419].

Naming is also a fundamental step of the psychological process needed to submit an official compliant, that usually results extremely twisted and can take some time. Firstly, the victim has to be able to name the experience as "sexual harassment". Since in our society women are constantly afraid of sexual assault, everyday violence is largely overlooked. We have social standards on harm, but due to the minimization of sexual harassment acts, people are ready to name those actions as harassment only once those standards are widely exceeded. Hostile environment is often considered normal, and usually only extremely severe actions finally trigger a response. Secondly, the target has to assess the blame of what happened and complaining can become extremely hard if the blame falls on one-self. Such condition can create grave states of depression, insomnia, anxiety and disorientation, still employers' responses often enforce the idea that the problem lies with the victim's excessive emotional reaction. Finally, once the fear of being in the wrong position disappears there is the claim for remedies. After claiming, victims expect something to be done and when nothing happens it once again raise doubts on the legitimacy of complaint[420].

[419] TINKLER Justine E., "Resisting the Enforcement of Sexual Harassment Law", *Journal of the American Bar Foundation-Law & Inquiry*, Winter 2012, Vol.37(1), p.3-5.

[420] PATTERSON Sasha, "Chasing justice, challenging power: Legal consciousness and the mobilization of sexual harassment law", *ProQuest Dissertations Publishing*, 2008. p.77-99.

All these doubts, all these obstacles are directly linked to the shame of labelling an experience as sexual harassment. Since it is not clearly stated which actions should be considered sexual harassment and which not, the stereotype of emotional women leads victims to doubt themselves and the same happens for everyone around them. Edwards argues the approach to violence against women could be especially influenced through legal "expressive value". Basically, she suggests the first step to furtherly improve contemporary law reaches and to implement anti-harassment policies is to name and define harms within existing normative, therefore directly expressing the harassing value of certain actions. The "expressive value" will offer increasing precision of statement and should consequently facilitate the creation of new norms and expand the limits of wrongful conducts[421].

5.3.2. Shaping society through topic-related training

The last examined measure is an extremely endorsed and fostered provision, topic-related training. As we have seen in the first paragraph of this chapter, nearly all international and regional instruments include between their suggested measures to fight sexual harassment through specific training.

Training are meant to confront employees' subjective definition of sexual harassment with real objective legal and organizational definitions. By offering objective knowledge, trainings should affect traditional behaviours and skills, make it easier to identify harassment and teach employees how to act should they found themselves in the role of the victim[422]. After training, men tend to be more sensitive in labelling, but the increased labelling does not necessarily make it more accurate, favouring instead false positives. Still, trainings have been found useful since long term incidence of sexual harassment appears to be positively influenced and even internal complaints seemingly increase where training is properly carried out[423].

However, different training methods appears to be more or less effective depending on the characteristics of the trainees. For example, standard trainings often employ video with factual information, like examples of appropriate and inappropriate behaviours and correlated legal issues, but this method displayed the most positive outcomes when matched with individuals high in the LSH scale. These persons manifested an increased knowledge and a reduced tendency to unproper behaviours, but, maybe due to the lack of face-to-face communication, the effects did not influence

[421] EDWARDS Alice, *Violence against Women under International Human Rights Law*, Cambridge University Press, 2011, p.1-6.

[422] ROEHLING Mark V. and HUANG Jason, "Sexual harassment training effectiveness: An interdisciplinary review and call for research", *Journal of Organizational Behavior,* January 2018, p.134-136.

[423] Ibid. p.142-145.

long term attitude. Therefore, adopting combined training methods for specific trainings, in this case on high LSH individuals, could be more effective[424].

To valuate trainings, Pilgram and Keyton use 4 levels of rating: agreeableness, knowledge test, employment of learned information and effects on institutions. The authors observe often organizations adopt bad structured trainings for the sole purpose of fulfilling their duty of providing internal measures and decreasing in this way their liability. Still, the investigation proves that each instructional strategy, when properly adopted, can be more efficient depending on the context. Usually synchronous delivery, face to face trainings with an instructor where people are together exchanging opinions, maybe for the passive structure of learning, can cause more confusion about the limits of what is sexual harassment creating oversensitive outcomes, but it appears to be way more efficient in the long run. At the contrary, asynchronous delivery, with individual trainings taken online or through video materials without interaction, immediately offers more objective knowledge, but its effects decrease over time. For this reason, the authors directly propose a multimodal approach to maintain the positive aspects of each strategies[425].

Unfortunately, we can generally observe a mixed attitude toward this educational measure by the part of workers. When law tries to provoke a social change people who do share those attitudes have to adapt their behaviour and values to the new standard and if the illegal act is customary the new provisions are perceived as a threat to normal socialization. Anti-harassment policies fall under this kind of interpretation. To reorientate entwined beliefs and norms, set on women as flirtatious and men as more sexually aggressive, they active but not challenge enough gender stereotypes. Women are still perceived as too emotional; men are still expected to adhere to the chivalry and assertiveness stereotype; sexual harassment is still no big deal[426]. Trainings, just like other measures, can trigger a negative attitude toward sexual harassment policies and their consequences. Sexually aggressive conducts, like sexual jokes or comments commonly employed by male workers, are vastly affected by anti-harassment law, therefore men fear being accused for what they interpret as innocent acts. This leads to a paranoia where female colleagues are perceived as "perpetrators". When women put men in trouble for non-malicious, still sexual, conducts, the hierarchy that favour men is undermined and even women, who are not concerned about potential limits to their behaviour, express instead sympathy for innocent colleagues. Basically, male do not consider how sexual harassment policies

[424] PERRY E. L., KULIK C. T. and SCHIMDTKE J. M., "Individual differences in the effectiveness of sexual harassment awareness training", *Journal of Applied Social Psychology*, 1998, Vol.28, p.715-720.

[425] PILGRAM Mary and KEYTON Joann, "Evaluation of Sexual Harassment Training Instructional Strategies", *NASPA Journal About Women in Higher Education*, January 2009, Vol.2(1), p.232-237.

[426] TINKLER Justine E., "Resisting the Enforcement of Sexual Harassment Law", *Journal of the American Bar Foundation-Law & Inquiry*, Winter 2012, Vol.37(1), p.3-5.

could protect them, while female do not consider how those policies could indeed limit their actions[427].
In the case of training, backlash happens when people adhere to gender stereotypes and they perceive norms for improving disadvantage groups' condition as a threat toward their interactional style. After training, those who strongly endorse gender stereotypes could consider women as even less competent and considerate. In this perspective, victimhood is feminized, consequently men often end up refusing to label their experiences as sexual harassment, considering it a disempowering act, while many female workers do express resentment against those "weak" women, not self-sufficient, that resorted to those official policies for protection. Briefly, while seeking to mitigate inequalities, the law may face significant social obstacles that could undermine its efficiency[428].
New legal provisions have impacted the situation and we can perceive a slow but stable social change, however, there could be ways to directly minimize adverse reactions to organizational trainings. Just like rape myth, Sexual Harassment Myth Acceptance (SHMA) scale is based on strongly biased perceptions of harassment that deny the event, belittling it to mere misunderstanding, downplay the consequences and apply a shift of guilt and responsibilities. The myth justifies male sexually aggressive behaviour, and at the same time, women's acceptance of it creates a subcategory of women prone to be victims because too provocative or too weak or too frivolous. By distinguishing themselves from this category, all other individuals feel automatically invulnerable[429].
However, just like with rape myth, when people know about consequences of aggressions and are in the position of emphasizing with the victim, they will be more willing to avoid second victimization, support legal measures and avoid unproper actions. Reading the situation from the victim point of view appears to have a strong impact in lowering the degree of LSH and SHMA scale, but at the same time adopting the perpetrator's point of view does not influence these scales, meaning the neutral perspective usually matches the perpetrator's one[430].
Consequently, topic related trainings have proven their utility, but negative attitudes are still extremely common and diffused. These negative approaches can reach the point of enforcing gender bias in men and women already subconsciously adhering to gender stereotypes and could consequently reduce and nullify positive outcomes. The adoption of the victim's perspective, together with an effort of empathy and a wider investigation on the consequences of sexual harassment, could

[427] *Ibid.* p.10-19.
[428] TINKLER Justine E., "How do sexual harassment policies shape gender beliefs? An exploration of the moderating effects of norm adherence and gender", *Social Science Research*, September 2013, Vol.42(5), p.1274-1277.
[429] DIEHL Charlotte, GLASER Tina and BOHNER Gerd, "Face the consequences: Learning about victim's suffering reduces sexual harassment myth acceptance and men's likelihood to sexually harass", *Aggressive Behavior*, July 2014, Vol.40(9), p.490-491.
[430] *Ibid.* p.498-500.

positively influence training's outcomes, eliminating all those potential negative attitudes rooted in gender bias and false myths.

CONCLUSION

We have seen how sexual harassment legal implementation has encountered many obstacles. The phenomenon should be regulated and eradicated through law, but social norms and gender bias cooperate in interfering and slowing down the flourishing of new specific provisions and regulations, and the problem is still widely underestimated in magnitude and negative impacts on the victims. The main flaw of existing norms is the lack of one common precise definition of what should be considered sexual harassment, a definition not object of interpretation or manipulation. Due to the lack of a common precise definition able to outline legal boundaries of the problem, all around the world standing sexual harassment law deals more easily with extreme cases, in which there is not much space of interpretation, than with more undistinguishable ones. Legal instruments are trying to simplify this complex discourse through comprehensible and easily applicable rules, but for the time being efforts were useless.

As highlighted in the first chapter, the lack of agreement on interpretations of sexual harassment has many reasons. Firstly, the philosophical discourse, that has seen confronting one position based on sexual harassment as an abuse of power rooted in sex discrimination, and one condemning anti-harassment policies as obstructive limitations to freedom of speech and normal intersexual courting. Oppositions have mainly focused on the concept of gender harassment, that in fact is still considered the most delicate aspect of the discourse on sexual harassment, often not included in legal provisions, and that even some feminists, as Daphne Patai, described as a mere exaggeration.

A second decisive element has been the language. Pre-existing autochthone terms, translated terms, newly created terms have indeed allocated the official same meaning to words whose actual significance does not match. For this reason, for example, *molestia sessuale* in Italy will always include sexual harassment wherever it takes place, especially in public spaces, while *sekuhara* will necessarily refer to workplace sexual harassment alone. In the same way, the English word *stalking* will cover the meaning of two different Italian words: *atti persecutori,* stalking, and *pedinamento*, when the victim is tailed by unknow individuals while walking on the street. Or even, if on a general level sexual harassment could potentially happens even outside the workplace, in English sexual harassment on the street will be more easily called *street harassment*. All these divergences of interpretation clearly display why language had a role in development of internal law, since a hypothetical Italian law against *molestia sessuale* and a Japanese one against *sekuhara* would obviously cover different kinds of situations.

Therefore, philosophical discourse, conjugated by domestic political traditions, and local language have cooperated in influencing legal parlance and, indirectly, legal development.

After assimilating these dutiful premises, we have analysed existing legal provisions starting from the international setting. Despite the limited number of binding documents, including CEDAW and ILO Convention C190, non-binding instruments have provided new fields of application that extended the protective power of CEDAW to other more specific areas of discrimination. General Recommendations have given new interpretation on how to apply the terms of sex discrimination to other fields of women rights, DEVAW has specifically investigated and outlined VAW, its consequences and some countermeasures, and Beijing Declaration has widened the practical approach of all these achievements by proposing concrete suggestions and methods of prevention, sanction and monitoring. Unfortunately, until the recent deployment of projects like *"Safe Cities and Safe Public Spaces",* UN instruments have always approached sexual harassment only as a workplace related issue.

Regional organizations have adopted dissimilar approaches. ASEAN has followed the UN model by drafting its own ASEAN DEVAW, but this Declaration on violence against women does not mention at all sexual harassment. The term is instead included in Regional Plan of Action on EVAW and various ACWC's Work Plans, that proposed practical actions to be adopted against sexual harassment, starting from dedicated domestic norms. ASEAN's approach has been feeble and permissive as a consequence of the organization's reluctance to engage in debate on human rights. On the contrary, the Council of Europe has employed a very consistent approach, drawing a binding document, the Istanbul Convention, that has the additional merit of being the first binding document recognizing sexual harassment even external to the working environment. Moreover, confirming its innovative position regarding human rights, CoE has also adopted the first ever document meant to combat sexism, portrayed as a topic strictly related to "hostile environment" harassment. Finally, the European Union, exploiting the favour of its unique nation-like authority, has employed its directives to distinguish sexual harassment from harassment based on sex, basically referring to "hostile environment" harassment, and it is currently trying to develop its strong anti-harassment regulations to include protection and prevention from sexual harassment not only in virtue of sexual harassment violation of workers' dignity, but also as a violation of individual integrity.

Regarding domestic law, Italy and Japan have proven their diversity. In Italy, norms against sexual harassment at work and in public spaces encompass the Criminal Code, the Code of Equal Opportunity and the Civil Code. Many of these were directly inspired by EU directives and other international instruments. The existing norms are practically useful to contrast most cases of harassment, but they lack a recognition of the issue as structural discrimination and, unfortunately,

practical enforce of the law is rare, both because of the victims' reluctancy to complaint and because social agents', like employers, police force, prosecutors and courts, reluctancy to accept complaints. Japan does share the same practical problem of law enforcement, but its approach is radically different. Extremely severe forms of physical harassment can be prosecuted through Penal Law, but, when acted upon, they are more easily minimized to forms of public nuisances. At the same time, following the USA pattern, sexual harassment incidence at work is recognized as a social issue, but anti-harassment regulations are left to employers' duty to enforce. Punishments appears therefore very mild, and the conduct keeps happening without serious legal resistance.

If international, regional and domestic norms have not been able to find a common definition, they were at least able to share common positions about anti-harassment policies. Main measures include the drafting of legal anti-harassment regulations, social initiatives to dispel gender stereotypes, awareness-raising campaigns, topic oriented-trainings, and participated monitoring.

Finally, we have explored how social resistance has practically hindered legal enforcement, and our conclusion is that the majority of legal delays originated in society is somehow caused by contrasting gender role expectations. Basically, while law expresses innovative values that people are expected to adhere to, surrounding society is still enshrined to traditional gender roles and stereotyped thinking. The contraposition of social expectations and legal expectations creates a system where organizational and legal policies are not able to be assimilated and to replace gender bias related attitudes. This contraposition expresses itself in various forms. The "Bad Apple" theory, for example, is structured on the belief that people perpetrating sexual harassment are few deviated individuals living in a pure society, but this theory clashes with actual statistical incidence of the issue and it denies the responsibility of a generally accommodating society despite its condoning attitude. Moreover, those legally inacceptable actions are instead incentivized by role expectations about male-female interactions, that can directly influence perpetrators' psychology, and that expect women to act as mere objects of men's interest and satisfaction, objectifying their individuality. The third investigated discrepancy of expectations regards stereotypes on the "pure" proper victim. This stereotype contributes to delegitimize all other experiences' that could include subjects, reactions, or episodes not covered by the "standard" ideological case of sexual harassment. The trivialization of all those episodes not adhering to basic role expectations discourages victims from utilising existing legal remedies and, consequently, it negatively affects legal enforcement.

To remedy all these frailties is surely overly complicated, but some useful actions could be for example to exploit "expressive value" of normative for defining one common formulation of what is sexual harassment, and to implement topic-related trainings' utility by including victim's perspectives

and points of view, or even objective consequences of victimization, to incentivize an empathetic attitude.

In conclusion, sexual harassment is receiving increasing attention, but as we have seen legal frameworks all around the world still show lots of weaknesses. Definitions are lacking, sexual harassment is still often considered and criminalized only in working field, preventive measures and sanctions are not rigid enough to contrast the phenomenon. This slow journey is far from reaching its full potential, but normative implementation alone, though fundamental departure point even just as positive model, cannot independently eradicate a problem whose roots are detected in social norms and expectations. Gender bias, stereotypes and local values enforce a tolerant environment, and the situation continues maintaining a status quo in which sometimes sexual harassment is still described as a "*stupid invention of hysterical American feminists*"[431]. Deconstruction of these biases and clarity of legislation should be important legal priorities to implement pre-existing regulations through community and to obtain equality through law.

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