

# De-gendering of Sexual Harassment

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**Abstract.** The purpose of this paper is to discuss the development of the definition of sexual harassment in China and its gendering. Initially, China's definition of sexual harassment was mainly based on the Western model, with women as the subject of harassment. However, with the progress of relevant legislation, there is still inconsistency in judicial practice despite the gradual de-gendering at the law-making level. At the beginning of this paper, we analyzed the significance of de-gendering sexual harassment and explored the causes of the differences in the definition of sexual harassment in theory and judicial practice, concluding that the lack of a clear definition of what constitutes sexual harassment and the solidification of social awareness are the key factors hindering the de-gendering of sexual harassment. To this end, this paper proposes a method for redefining what constitutes sexual harassment, which takes into account a combination of factors such as rights, against one's will, intentional behaviors of a sexual nature, and specifically directed objects, as a basis for determining sexual harassment. Through this approach, we aim to comprehensively de-genderize sexual harassment, further promote gender equality, and emancipate women's social status.

**Keywords:** Sexual harassment; De-sexualization; Constituent elements; Feminism.

## 1. Introduction

As far as the origin of the concept of sexual harassment is concerned, the gender factor is the main reason why sexual harassment first gained widespread attention and why the concept of sexual harassment and the legal regulation of sexual harassment emerged as a social cause. Sex occurs universally between genders, and sex itself has a gender dimension. As the vast majority of research literature on sexual harassment in China points out, the term "sexual harassment" originated in the feminist movement of the 1960s and 1970s in the West, and was proposed on the basis of theories of gender discrimination and gender control. In China, in the nearly ten years since the term "sexual harassment" first appeared in the legal text, the laws at that time basically centered on the protection of women's rights and interests and made provisions on sexual harassment, such as Articles 40 and 58 of the Law on the Protection of the Rights and Interests of Women amended in August 2005, and the Law on the Labor Rights of Female Workers and Employees issued in April 2012, which stipulates that the term "sexual harassment" shall not be used as a term of discrimination against women. Article 11 of the Special Provisions on Labor Protection for Female Workers and Employees issued in April 2012 provides for sexual harassment of female workers, and the Measures for the Implementation of the Law on the Protection of Rights and Interests of Women enacted by local legislative bodies at the provincial level provides for sexual harassment of women, while the Measures for the Implementation of the Law on the Protection of Rights and Interests of Women enacted by local legislative bodies at the municipal level provide for sexual harassment of women. Sexual harassment is also referred to as "sexual harassment of women" in the "regulations or provisions on the protection of women's rights and interests" enacted by local legislative bodies at the municipal level, such as the Provisions on the Protection of Women's Rights and Interests of Guangzhou Municipality (2010) and the Regulations on the Protection of Women's Rights and Interests of Chengdu Municipality (2011), among others. ". Therefore, in the origins of sexual harassment legislation in the West as well as in China, women have been widely recognized as an important gender factor in sexual harassment legislation.

## **2. Reasons for the Legislative Model of Taking Women as the Main Body of Protection in China**

Since the birth of New China, the construction of the gender legal order has been centered on the two core principles of "the basic principle of equality between men and women" and "special protection for women". The principle of equality between men and women, as the essence and core value of the gender legal order, aims to rectify the oppressive and discriminatory structure of gender relations that has existed throughout history. The special protection for women, on the other hand, is to face up to biological gender differences and real-life differences in the status of men and women, with the aim of compensating for the inequalities that may be brought about by biological differences and traditional customs between men and women, so as to realize substantive gender equality.

In a legal order that upholds the value of equality between men and women, the legal regulation of sexual harassment emphasizes the special protection of women. First of all, this stems from the fact that the term "sexual harassment" itself is foreign and a product of Western feminist jurisprudence. When the term was introduced into China in the early 1990s, the link between sexual harassment and gender discrimination had already been recognized by international conventions, such as the Convention on the Elimination of All Forms of Discrimination against Women, which classifies sexual harassment as gender-based violence and discriminatory behaviour. Therefore, at the time of its introduction, sexual harassment was often understood to mean "sexual harassment of women by men," and laws and regulations often contained provisions prohibiting "sexual harassment of women."

Secondly, this tendency is also in line with China's legal policy orientation of emphasizing the protection of women's rights and interests and upgrading women's legal status after China's reform and opening up. Since China signed the United Nations Convention on the Elimination of All Forms of Discrimination against Women, it has conducted research and formulated laws on women and passed the Law on the Protection of Rights and Interests of Women. In addition, China has hosted the World Conference on Women and issued a number of programmes for the development of women, establishing gender equality as a basic national policy for the promotion of social development in China. During this period, in view of the actual differences in the social and family status of men and women, as well as the shortcomings of traditional attitudes, legal policies implemented special protection for women's rights and interests.

Furthermore, from the point of view of sexual concepts, some traditional concepts with gender bias and discrimination still exist in the consciousness of some people and are even reflected in certain legal norms. For example, the impact of traditional sexual concepts on the reality of the law is reflected in the notion that women are regarded as sex objects, and in the belief that increased sexual experience lowers a woman's "value". Based on the unfavorable position of women in traditional sexual concepts, the focus of sexual harassment prevention and treatment naturally focuses on "sexual harassment of women."

## **3. The Definition of Sexual Harassment Should be De-gendered**

### **3.1. Reasons for De-gendering**

At the legal level, treating women as mere victims of sexual harassment does not actually go beyond the scope of discrimination against women, but rather deepens the prejudice against women to a certain extent. This logic of positioning women only as victims of sexual harassment essentially denies women the possibility of being the active initiators and perpetrators of sexual behavior, and this denial further restricts women's rights and puts them under the shackles of sexual taboos, thus reinforcing women's status as "sexual objects" and preventing men and women from realizing true equality in sexuality. This reinforces women's status as "sexual objects" and prevents men and women from realizing true sexual equality [1].

The roots of gender discrimination, such as society's general view of men as the dominant party in terms of sexual rights and women as "sexual objects" and "sexual tools", are deeply rooted in the current social and cultural context. In the modern context, the term "female" often does not simply refer to biological sex, but is given a specific social and cultural connotation. This notion stems from the process of gender socialization. By analyzing cultural definitions of gender, we can see that women are often expected to display characteristics of weakness, passivity, motherhood, and infantilism, that their dress and behavior are often seen as a means of deliberately arousing male sexuality, and that women are assumed to be naturally desirous of attracting men. For example, we often hear that women should not wear excessively revealing clothing, and that they should be quiet, elegant and sensible. In this cultural definition, women are given the qualities of being aggressive, controllable, feminine, and welcoming of sexuality. As a result, women begin to self-identify as sexual beings under this definition, seeing themselves as objects that exist for men. In the process, women unconsciously internalize male sexual fantasies as their own female identity. Gender and sexuality define each other in this cultural context, but it is often sexuality, not gender itself, that determines gender roles. Gender, as a socio-cultural product, becomes an acquired and assigned status [2]. Therefore, the principle of sexual autonomy is of great significance in restoring women's status as equal sexual subjects. However, in legislative practice, many countries, including China, do not recognize that women can be the subject of the crime of rape. In judicial practice, it is widely recognized that sexual harassment violates women's right to reputation, resulting in damage to their reputation, all of which reflects the profound influence of traditional sexual concepts on modern law. Women are still placed in the position of unequal objects in the law, which is a reality we need to deeply reflect on and change.

It can be found that if we narrow the scope of sexual harassment to men against women, it will make the issue of sexual harassment detached from its substance and become a sensitive male-female issue in traditional culture without being given real attention. The pattern of sexual harassment is not a single male-to-female harassment, but may be male-to-female, male-to-male, female-to-male, and female-to-female harassment.

### **3.2. How to De-sexualize**

In the decades of development of sexual harassment research, Chinese legislation has gradually realized a tendency to de-genderize victims of sexual harassment. For example, in the Civil Code promulgated in 2021, Article 1010, as a provision on sexual harassment, explicitly states that "if a person commits sexual harassment against another person's will by means of speech, writing, images, or physical behavior, the victim shall have the right to request that the perpetrator be held civilly liable in accordance with the law." However, despite the continuous improvement of sexual harassment legislation in recent years, especially in the field of criminal law and administrative law, the gender restriction of the object of molestation has been gradually broken, and the academic community generally agrees that sexual harassment may also constitute sexual harassment between people of the same sex, but in judicial practice, there are still conflicts and difficulties in determining the gender of the object of sexual harassment. Taking the case of Yang Yong and Liu Ming's dispute over the right to life, health and body in 2019 as an example, Liu Ming touched and scratched the lower body of the plaintiff, who was unknown to him, in the bathtub, which should be recognized as sexual harassment according to common sense and the plaintiff also claimed that Liu Ming sexually harassed him. However, the court only found that Liu Ming harassment of the plaintiff, did not explicitly recognized as sexual harassment, only based on the fact that the two sides grabbed the plaintiff fell and injured Liu Ming was ordered to assume responsibility for the infringement of rights [3]. This reflects that although Chinese academics and legislation tend to abolish the gender definition of sexual harassment, in judicial practice, many courts still avoid responding positively to and determining same-sex sexual harassment, with a limited number of relevant precedents, a conservative attitude on the part of the courts, and a lack of maturity in judicial practice.

Two key factors contributing to the disconnect between theory and judicial practice are that, on the one hand, the elements of sexual harassment have not yet been clearly defined in China's legislation; on the other hand, women are still generally viewed as a sexually vulnerable group by the general public, and this psychological stereotype has not yet been fundamentally changed. Therefore, if China's sexual harassment system is to be fully de-gendered from theory to practice, these two factors should be a top priority for reform. So what exactly is sexual harassment?

### **3.2.1. The Power Structure**

Before exploring the definition of sexual harassment, one central element - power - cannot be ignored. Sexual harassment is often closely linked to the abuse of power, with the harasser utilizing his or her position of power to sexually harass others. There are differences in the understanding of power between China and the West. In the West, power is usually defined as the ability to have influence, as long as one party has some influence over another party, it can be regarded as having power. In China, on the other hand, the understanding of power is often closely linked to position, i.e., it is considered to be possessed only in a specific position, which is a narrow understanding. However, with the development of theories, the understanding of power has been gradually broadened, and some articles have argued that in the context of sexual harassment, power is not only limited to position and authority, but also includes power gained through numerical superiority or gender superiority [4].

It is crucial to recognize that power is not the same as position, because simply equating power with position in the system tends to overlook the important role of socio-cultural and psychological factors in the abuse of power. The complexity of the issue of sexual harassment lies in the fact that the concept of power behind it is rooted in socio-cultural and socio-psychological aspects of society, rather than being determined solely by position [5]. In China, a social culture long influenced by Confucianism, the behavior of male sexual harassers is often based on prejudice that men are superior to women, rather than purely on job or status advantages. Although some women in modern society have been able to achieve comparable or even higher status than men, the cultural thinking of many men remains unchanged, and they tend to believe that women should serve the sexual needs of men. At the same time, when confronted with incidents of sexual harassment, the general public often unconsciously blames women, believing that it is the sexiness of women that sends misleading signals to men, and ignoring the fact that sexiness is not a dominated object directed solely at men. The Chinese traditional culture has a strong influence on the sexual harassment of men and women.

To sum up, traditional Chinese culture has, to a certain extent, endowed men with the mentality of ignoring women's actual rights and identities, leading to frequent disrespectful behaviors. Therefore, power is a central factor in defining sexual harassment, and sexual harassment is difficult to solve because the influence of the powerful over the weak makes refusal or resistance difficult and costly. Therefore, when exploring the nature of sexual harassment, it is important to analyze it closely around power relations.

In addition to the subject matter factor, the definition of sexual harassment also needs to take into account the specific manifestations of the behavior. So, what kind of behavior can be recognized as sexual harassment?

### **3.2.2. The Behavior Elements for Determining Sexual Harassment**

#### **3.2.3. Against the Will of Others**

The central characteristic of sexual harassment is that it is against the will of the victim. When the victim expresses disgust, revulsion, explicit refusal, or resists, it is a clear sign that his or her will has been violated. Even if the victim was previously willing to engage in communication or contact related to the content of the sexes, but then expressed her unwillingness to continue, the harasser's persistence also constitutes a breach of will. In addition, behavior that the victim is pressured to accommodate or tolerate should also be considered a breach of will. Sexual harassment in any form is considered to be against the will of an incapacitated or restricted individual. The U.S. Supreme

Court's opinion in *Meritor Saving Bank v. Vinson* states that the key to sexual harassment is not whether or not the behavior is consensual, but whether or not the behavior is welcome [6]. This paper argues that "against the will" is used to describe the victim's subjective resistance, while "unwelcome" is merely an external perspective that does not accurately reflect the essence of sexual harassment. For example, when a victim displays seemingly positive behavior due to pressure, although it appears to be welcome, it is actually against his or her will. Therefore, whether or not it is against one's will is a key factor in recognizing sexual harassment, especially in the case of sexual harassment that is based on the element of rights.

#### **3.2.4. Intentional Behavior of a Sexual Nature**

The determination of sexual harassment also requires consideration of whether the behavior is subjectively intentional in relation to sex. This element consists of two aspects: first, the behavior must be sexually related, and second, the perpetrator must have subjective intent. Sexually relevant behavior refers to behavior based on personal desires, while subjective intent means that the behavior has a clear purpose, aimed at obtaining physical or psychological satisfaction of a sexual nature. On the other hand, unintentional physical contact, or mistakenly sending communication messages containing content of both genders do not constitute sexual harassment due to the lack of sexual intent.

#### **3.2.5. Clearly Directed at a Specific Target**

The determination of sexual harassment requires that the behavior must be directed at a specific target, whether it is physical contact, verbal offense, or other forms of behavior, the key is whether the behavior is directed at a specific individual. Clear targeting is the basis for civil liability for the perpetrator, so the object of sexual harassment must be specific and identifiable. If the sex-related behavior is not clearly targeted, but only causes offense to individuals or certain people, it is not appropriate to recognize it as sexual harassment. Scholars such as Wang Liming, in interpreting article 1011 of the Civil Code of China, also pointed out that the reference in that article to "inflicting it on another person" embodies the connotation of targeting a specific object in defining the object of sexual harassment.

To summarize, sexual harassment is a sexually related act intentionally committed by a powerful person against the will of a specific and particular vulnerable person under conditions of unequal power.

### **4. Conclusion**

The concept of sexual harassment, as an expression of gender discrimination, has its roots in gender studies in feminist jurisprudence. In the long course of history, sex has been specifically gendered in the ethical and legal system, and is usually regarded as an act of men against women, which has led to the loss of women's subjectivity in the sexual order. The anti-sexual harassment movement based on sexist theories aims to re-establish women's subjectivity in the sexual order. However, understanding sexual harassment as simply "sexual harassment of women" is not only inconsistent with reality, but also logically ignores the initiative and legitimacy of women's sexual behavior, which is contrary to the goal of women's overall autonomy. Just as the concept of gender aims to eliminate gender stereotypes, the legal concept of sexual harassment also needs to be de-gendered.

Based on the development of sexual harassment legislation in China, this paper discusses in depth the necessity of de-gendering sexual harassment, and points out the shortcomings of China's theory and practice in this area. At present, China still lacks clear elements of sexual harassment, and there are many deficiencies in judicial practice. In this regard, this paper puts forward suggestions on how to correctly define sexual harassment in order to promote the development of judicial practice. Firstly, the role of the right element in sexual harassment should be correctly recognized. Secondly, it is clear that the constituent elements of sexual harassment should cover against the victim's will, sexually related, with subjective intent, and committed against a specific person. By improving the theoretical framework and promoting the development of judicial practice, the all-round de-gendering of sexual

harassment from theory to practice has been realized. This will not only help to effectively regulate sexual harassment and ensure that victims receive the compensation they deserve, but will also further consolidate the status of women as the mainstay of society and promote the development of feminism.

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