

SEXUAL HARASSMENT IN INTERNATIONAL DOCUMENTS, AND COMPARATIVE OVERVIEW OF GOOD PRACTICES

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Abstract

Sexual harassment is a form of gender-based violence as well as a complex social issue that every society faces today. The United Nations and other international and regional organizations have recognized sexual harassment as a form of discrimination and violence against women. By adopting international documents and delegating principles, they provided an important starting point in the drafting of legislation that, at the national level, prohibits sexual harassment.

This paper aims to analyze international legal standards on sexual harassment, as well as through a comparative analysis of legal practices, to point out the fact that although the domestic legal framework, in general, is in line with international standards, inconsistencies can still be determined in several areas, but also to point out certain good examples of incrimination of this phenomenon.

Keywords: *sexual harassment, law, discrimination, crime*

1. Introduction

Sexual harassment is one of the forms of gender-based violence. It is a worldwide phenomenon and a complex social problem that people in every society face.

Efforts to define sexual harassment in theory have existed for more than thirty years, but unfortunately, there is no universally accepted definition in all contexts. The existing definitions are categorized based on a subjective-objective prism, through which hypothetically two directions of a possible definition of sexual harassment are distinguished. One is defined by objective characteristics that are predetermined and the second is defined by the subjective inner feelings of the harassed person. However, at its core, sexual harassment is unwanted, and threatening, and often involves the exploitation of power differentials. It is a form of abusive behaviour. Sexual harassment is not about physical attraction or emotional need. It is about power or control and how that power is abused. Usually, such behaviour is designed to humiliate and control someone. In many countries, sexual harassment has been treated for several decades as a form of discrimination, as gender-based violence. Despite the relatively long history of dealing with this problem, through international and national legal annals, it is still problematic to find a single definition that would cover all the forms through which it manifests itself.

The Republic of North Macedonia signed the pact of the Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention) in 2011, with ratification following seven years later. The Convention entered into force on July 1, 2018.

The Istanbul Convention requires the state to criminally prosecute and sanction sexual harassment in everyday life and in the internet space. With the amendments to the criminal code, the crime of rape was changed by adding sexual assault in the incrimination and new crimes were introduced, including stalking and sexual harassment. Sexual harassment over the internet is not covered by the criminal code amendments, although it is recognized as a specific form of violence in the law on prevention and protection from violence against women and domestic violence.

The analysis of international standards and part of the existing national laws, in this paper, represents an attempt to approximate the experiences of several countries, to systematize the standards, and to offer material for choosing the most appropriate approach in the overall development of the legal regulation of sexual harassment even in the Republic of North Macedonia.

2. International legal regulation

International law has built a very clear position on the promotion and protection of equality and on the condemnation of any form of discrimination. Today, the fight against discrimination continues at a high level due to its

prevalence, the variety and depth of the roots of various discriminatory behaviors, also due to the severity and complexity of the consequences of acts of discrimination on the realization of human rights and freedoms and the complexity of achieving equality between people. International and regional organizations recognize sexual harassment as a form of discrimination and violence against women. The analysis of international documents and the principles that emerge from their work represents an important starting point in determining the positions in the definition, as well as in determining the best and most acceptable model of legislation written to prohibit sexual harassment at the national level.

2.1. United Nations

The Convention on the elimination of all forms of discrimination against women (CEDAW), was adopted by the UN General Assembly in 1979. This Convention acts as an international bill of rights for women and provides guidance to States on how to implement these rights. Apart from the strength inherent in the Convention's status as a human rights treaty, its existence has special significance since it focuses on eliminating discrimination against women by surpassing conventional approaches. The Convention unravels the structural and dynamic processes of discrimination that underpin the perpetual phenomenon of gender-based inequality across the globe. "As a result of the Convention's treaty status, it demands the practical realisation of rights, and compels each and every State Party to eliminate all forms of discrimination, intended or unintended, through law, policy, practice and custom on their own territories." (Rana and Perrie, 2019:112). Unfortunately this Convention arrived when awareness of sexual harassment was only beginning to emerge. As such there is no specific prohibition of sexual harassment against women. It was rather seen to be a form of violence against women and its prevention was interpreted to be covered under the prevention of all forms of violence under the Convention.

In a groundbreaking step in its 1992 General Recommendation No. 19, the Committee interpreted the definition of discrimination in CEDAW and provided an overview of what is meant by gender-based violence and what the Convention actually stipulates as an obligation for states to provide adequate protection to victims. This general recommendation provides a definition of sexual harassment, although it limits it to acts that take place in the workplace. Sexual harassment is defined as an unwelcome sexually determined behaviour as physical contact and advances, sexually coloured remarks, showing pornography and making sexual demands, whether by words or actions. Such conduct can be humiliating and may constitute a health and safety problem; it is discriminatory when the woman has reasonable ground to believe that her objection would disadvantage her in connection with her employment,

including recruitment or promotion, or when it creates a hostile working environment. (CEDAW, 1992, Article 18)¹

The 1993 General Assembly Declaration on the elimination of violence against women affirmed that violence against women constitutes a violation of women's rights and fundamental freedoms and calls on States to condemn it and pursue a policy to eliminate it. This document does not define sexual harassment, but still recognizes it as a type of violence against women, 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. Among other things, physical, sexual, and psychological violence that occurs in the community is included under the term, including rape, sexual abuse, sexual harassment and intimidation at work, in educational institutions and elsewhere, trafficking in women and forced prostitution. (UNGA, 1993, Article 1,2)

The Beijing Platform for action (1995), adopted at The United Nations Fourth World Conference on Women, includes provisions on sexual harassment. It calls on governments, trade unions, employers, community and youth organizations, and NGOs to eliminate sexual harassment. More specifically, governments are urged to enact and enforce laws and administrative measures on sexual and other forms of harassment and employers to develop non-harassment policies and prevention strategies. (Asmat and Mehboob, 2016). But again we have protection that is limited to the workplace.

2.2. Council of Europe

The Parliamentary Assembly of the Council of Europe demonstrated its strong political will for the elimination of all forms of gender-based violence through resolutions and recommendations calling for the adoption of a legally binding standard for its prevention, protection from, and prosecution of the most serious and widespread forms of this offence. Finally, on April 7, 2011, the Committee of Ministers of the Council of Europe adopted the Convention on preventing and combating violence against women, including domestic violence (known as the Istanbul Convention). This became the first comprehensive legal instrument on violence against women. States that choose to join the Convention must bring their national laws in line with its provisions, and make sure that it is applied in their countries in a way that benefits all women. By joining the Istanbul Convention, states are agreeing to binding

¹ The CEDAW Committee in General Recommendation No. 35 (2017) on gender-based violence against women, updating general recommendation No. 19, at paragraph 14 affirmed that harassment is a form of gender-based violence and, at paragraph 24 (b), that "States will be responsible if they fail to take all appropriate measures to prevent as well as to investigate, prosecute, punish and provide reparation for acts or omissions by non-State actors which result in gender-based violence against women". (UNGA, 2017)

standards on preventing violence against women, protecting survivors and punishing perpetrators, and, most importantly, allocating adequate resources to effectively respond to violence against women and domestic violence. In addition, states must involve all relevant actors in the implementation of the Istanbul Convention, including national parliaments and institutions and non-governmental and civil society organizations.

Sexual harassment is regulated by Article 40 of the Istanbul Convention, in which countries are called upon "to take the necessary legislative or other measures to criminalize any form of the unwanted verbal, non-verbal or physical behavior of a sexual nature, with the aim or consequence of violating the dignity of the person, especially when an intimidating, hostile, degrading, humiliating or offensive environment is created" (CE, 2014)

2.3. European Union

Equality is considered as a fundamental principle recognized as such by the EU. Its legitimacy is generally reinforced by the EU Charter on fundamental rights which, in Article 23, obliged states to ensure equality between women and men in all areas, including employment, work and pay. (EU, 2016).

In May 2002, the European Union Parliament passed legislation that, for the first time, provides a legal definition of sexual harassment applicable throughout the European Union (EU). In addition, this 2002 Directive establishes guidelines for sanctions, legal action, and potentially unlimited compensation for sexual harassment victims. Pursuant to the directive, member states must establish agencies to promote equality and enforce anti-discrimination laws. Although this legal document is not limited to addressing abuse against women, focus has been placed on its effects on sexual harassment against women. (Tsekos, 2003) The Directive defines sexual harassment broadly as 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. (Zippel, 2006)

This concept is further elaborated through several other directives that also deal with sexual harassment. Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), which defines harassment and sexual harassment as discriminations on the grounds of sex (Directive 2006/54/EC, Article 6), and Directive 2004/113/EC on implementing the principle of equal treatment between men and women in the access to and supply of goods and services. These directives use the formulation from the 2002 Directive, but they play a significant role in shaping the types of violence against women and preventing violence against women in its different forms.

2.4. Organization of American States

The Convention on the prevention, punishment and eradication of violence against women (Convention of Belém do Pará) adopted in 1994 represents an important milestone in the area of responsibility to address violence against women. The convention defines violence against women as "any act or conduct, based on gender, which causes death or physical, sexual or psychological harm or suffering to women, whether in the public or private sphere". Article 2 expressly recognises sexual harassment in the workplace, educational institutions, health facilities or any other place, as one form of violence against women, thus treating sexual harassment as a matter of violence against women, rather than a matter of discrimination. (OAS, 1994, Article 1, 2)

3. Comparative experiences

3.1. Republic of Croatia

Sexual harassment is behavior unacceptable and prohibited by law that violates a person's dignity, and can also be a form of discrimination.

In the Republic of Croatia, there is a complete legal framework that defines and prohibits sexual harassment on three levels, as a misdemeanor, as a crime, or as an act of violation of rights and obligations from employment.

According to the Anti-discrimination act, sexual harassment is any verbal, non-verbal, or physically unwanted behavior of a sexual nature that is aimed at or actually violates the dignity of a person, especially if it creates an intimidating, hostile, humiliating, belittling, or offensive environment. (Anti-discrimination act of RC, Article 3).

The Gender Equality Act prescribes an identical definition. According to the provisions of this law, a person who sexually harasses another person commits an offense punishable by a fine of 5,000 to 40,000 HRK. The law provides for a more severe sanction for legal entities, craftsmen, and other persons who perform independent activities. (Gender Equality Act of RC, Article 8).

Sexual harassment of a more serious nature is considered a criminal offense and is regulated by the criminal code. This offense is committed by anyone who sexually harasses another person who is their subordinate or who is in a situation of dependence with respect to them or who is especially vulnerable due to age, illness, disability, addiction, pregnancy, a severe physical or mental disability. The act of committing harassment, as a criminal act, is equated with the act of offenses defined in the Anti-discrimination act and the Gender equality act, with the fact that the more serious form of incrimination in relation to the offense is associated with a special relationship between the perpetrators and the harassed person (relationship of subordination or dependence), the status of the harassed person (special vulnerability due to one of the enumerated

reasons). Perpetrators of sexual harassment as a crime face up to two years in prison. (Criminal Code of RC, Article 156). In cases of sexual harassment at work, which is categorized accordingly as a misdemeanor or a crime, there is a violation of the rights of employment, which, according to the law, can trigger the mechanisms to protect the dignity of the worker. (Labor Act of RC, Article 134).

3.2. Republic of Serbia

Sexual harassment in the Republic of Serbia is one of the most common forms of gender-based violence against women. (OEBS, 2019) The confusion that has been present for many years in Serbian legislation certainly has a certain contribution to that, which is an expression of the essential absence of the need to distinguish sexual harassment from other similar phenomena, as well as the spontaneous formation of legislation in areas directly or indirectly related to sexual harassment.

When it comes to the terminology used, some of the previous remarks should be kept in mind. First of all, it is quite clear that different laws use several different terms, whose mutual relations (sameness or difference) are not explicitly defined.

Thus, the Law on the prohibition of discrimination, emphasizes that harassment, humiliating treatment, and sexual and gender harassment, which aims at or constitutes a violation of the dignity of a person or a group of persons based on their personal characteristics, is prohibited, especially if it creates a frightening, a hostile, degrading, humiliating and abusive environment. A more detailed definition of the so-called sexual harassment is also given, defining it as any verbal, non-verbal, or physically unwanted behavior, which has the same ultimate goal, violation of the dignity and personal integrity of the person and creating a frightening, hostile, degrading, humiliating and offensive environment. (Law on the prohibition of discrimination of RS, Article 12).

On the other hand, sexual harassment is clearly defined as a form of discrimination by the Labor Code. This law contains definitions of harassment and sexual harassment, as well as direct and indirect discrimination. Sexual harassment, in this law, is any verbal, non-verbal, or physical behavior that aims at or constitutes a violation of the dignity in the sphere of the sexual life of a person employed or seeking employment, and that causes fear or creates a hostile, humiliating, or abusive environment. (Labor Code of RS, Article 21)

The Law on the prevention of harassment at the workplace characterizes sexual harassment as a form of workplace abuse, but it does not define it but refers to the definition and determination of sexual harassment as a form of discrimination from the Labor Code. (Law on the prevention of harassment at the workplace of RS, Article.3)

The Law on gender equality contains several definitions applicable in this context. First, it defines sexual harassment as "an unwanted verbal, non-verbal or physical act of a sexual nature, carried out with the intention or consequence of violating personal dignity, especially if it creates an intimidating, hostile, humiliating or offensive environment". Furthermore, this law also defines sexual blackmail, as *any behavior of a person who, intending to commit or not committing an act of a sexual nature, blackmails another that in case of refusal to give the request, for him or his close person will be put forward something that could harm her or his honor and reputation.* (Law on gender equality of RS, Article 6)

Finally, in the criminal code, the concept of "gender (sex) harassment" is used. This law stipulates that anyone who sexually harasses another person will be punished with a fine or imprisonment for up to six months, and if the crime is against a minor, it will be treated as a qualified form that threatens a prison sentence from three months to three years. Sexual harassment means any verbal, non-verbal, or physical behavior that aims at or constitutes a violation of a person's dignity in the sphere of sexual life and that causes fear or creates a hostile, humiliating, or offensive environment. (Criminal Code of RS, Article 182a)

3.3. Federal Republic of Germany

It can be said that the roots are laid in the Constitution of the Federal Republic of Germany, which proclaims that human dignity is inviolable and its respect and protection are the duty of all state authorities. Every person has the right to free development of his personality, the right to life and physical integrity as well as the inviolability of personal freedom, and these rights can be limited only by the law. (Grundgesetz, Articles 1,2)

According to the Law on equal treatment (Allgemeines Gleichbehandlungsgesetz, AGG), any type of discrimination based on race or ethnic origin, gender, religion or belief, disability, age, or sexual orientation is prohibited. This law defines harassment but also provides a separate definition for sexual harassment. A person's behavior is considered sexual harassment if it is unwanted behavior of a sexual nature and if this behavior has the purpose or effect of violating the dignity of another person. Such conduct includes unwanted sexual acts and requests to perform such acts, physical contact of a sexual nature, comments of a sexual nature, and unwanted display or public exposure of pornographic images. (AGG, Article 3(4). According to this law, those discriminated against have the right to submit a complaint to the competent department in the firm, company, or authority, and the complaint must be investigated and the complainant must be informed of the result of the investigation. When it comes to the burden of proof, the accused party is obliged to prove that there is no violation of the provisions prohibiting discrimination. (AGG, Article 22). Protection, according to this law, is not

limited only to the workplace and or during working hours. The law prohibits any form of sexual harassment, including during business trips, commutes, company parties, company outings, and breaks, as well as SMS, email, or phone calls (CEWS).

The German penal code (Strafgesetzbuch / StGB) regulates sexual offenses in Chapter 13. On 10 November 2016, the reform of the penal code came into force, revising Article 177 and adding 184i and 184j. After the amendment of the law entered into force, sexual harassment was officially a criminal offense. The law only provides for physical contact with a sexual connotation that causes harassment, as a basis for imposing a prison sentence of up to two years or a fine, unless the offense is subject to a more severe punishment according to other provisions. If the crime is committed by more than one person, it is considered to be a particularly serious case, and in that case, the punishment with which can be meted out from three months to five years. It is specified that the crime is prosecuted only on the motion unless the prosecuting authority considers that there is a special public interest in the prosecution that requires ex officio intervention (StGB, Article 184i).

3.4. Republic of North Macedonia

Due to the fragmented nature of national legislation dealing with equality and non-discrimination, provisions on sexual harassment in the Republic of North Macedonia can be found across multiple laws.

The definition of sexual harassment is provided in art. 10, paragraph 2 of the Law on prevention and Protection against discrimination. According to this law, harassment is the unwanted treatment of a person or group of persons on discriminatory grounds that has the purpose or effect of violating dignity or creating a threatening, hostile, humiliating, or intimidating environment, approach, or practice. Sexual harassment, on the other hand, is any form of unwanted verbal, non-verbal, or physical behavior of a sexual nature, which has the same purpose. (Law on prevention and protection against discrimination of RNM, Article 10)

According to the legal provisions, any person who believes that he has been discriminated against can submit a complaint to the Commission for protection against discrimination, which acts by its legal powers. The Law contains misdemeanor provisions for violating the provisions of the law and provides for fines.

Sexual harassment (which creates a "hostile work atmosphere") is also regulated by the Labor relation law. By Article 9, paragraph 4, gender (sex) harassment is defined as "any verbal, non-verbal or physical behavior of a gendered nature that aims at or represents a violation of the dignity of the candidate for employment or the worker, and that causes fear or creates a hostile, humiliating or offensive behavior". (Labour relation law of RNM)

Regarding the definition of gender harassment, it is worth mentioning that the use of the term "gender", instead of "sexual" harassment and behavior of "gender character", instead of the behavior of "sexual character" (nature), although for some it may be a lack of linguistic character, it contributes to a misunderstanding of what kinds of behaviors this type of harassment implies. It is interesting to mention that despite the definition and regulation of this type of harassment as discrimination, the labor legislation also overlooks a guarantee for the prevention of this type of harassment. In addition to judicial protection in cases of discrimination, the Labor relation law also provides for misdemeanor sanctions for legal entities and the responsible person in the legal entity, for the purpose of NOT ensuring that no worker is a victim of harassment and sexual harassment. Additional protection for victims in the proceedings is the fact that the burden of proof, that no discrimination or harassment occurred, falls on the defendant(s). (Labor relation law of RNM, Article 11)

The subject and purpose of the Law on protection against harassment in the workplace is to define the obligations and responsibilities of employers and employees in relation to the prevention of psychological and gender (sex) harassment at the workplace. The terminology again remains the same as in the Labor relation law, so this law also defines gender harassment as "any verbal, non-verbal or physical behavior of a gendered nature, which aims at or represents a violation of the dignity of the candidate for employment or the employee, and which causes a feeling of fear or creates discomfort, humiliation" (Law on protection against harassment in the workplace of RNM, Article 5). The law provides for the measures and procedures for the protection and prevention of harassment in the workplace and determines the place and time of possible psychological and sexual harassment.

Sexual harassment is also prohibited according to Article 3 of the Law on equal opportunities of men and women, and according to Article 4 it is defined as "any form of unwanted verbal, non-verbal or physical behavior of a sexual nature, the purpose or consequence of which is a violation of the dignity of a person, especially when a frightening, hostile, degrading, humiliating or offensive atmosphere is created" (Law on equal opportunities of man and women of RNM).

The law on prevention and protection from violence against women and domestic violence is written in accordance with European standards and the Istanbul Convention. The glossary of this law defines both sexual harassment and the realization of this behavior through the internet. Sexual harassment, according to this law, means any verbal, non-verbal, or physical behavior of a sexual nature that has the purpose or consequence of violating the dignity of the person, especially when it creates a threatening, hostile, degrading, humiliating, or insulting environment. Sexual harassment via the Internet is any verbal, non-verbal, or other behavior of a sexual nature, which has as its purpose or consequence, a violation of dignity or the creation of a threatening, hostile, humiliating, or intimidating environment, approach, or

practice, through electronic means of communication (Law on prevention and protection from violence against women and domestic violence of RNM, Article 3).

Sexual harassment, although not explicitly, is also mentioned in the Law on Protection of children which stipulates that all forms of sexual exploitation and sexual abuse of children are prohibited, including harassment, child pornography, and child prostitution. Despite the mentioned forms, the Law does not provide for special measures for prevention and protection. (Law on the protection of children, Article 12).

Finally, with the amendments and additions to the criminal code, a Special Article 190-a was introduced, which defines "sexual [harassment]" as "gender harassment" and at the same time, defines the perpetrator as "the one who, with a verbal or physical action that has directly or indirectly, real or symbolic meaning of stating, indecent offer, luring, expression of sexual passion or other action that clearly reminds of sexual intercourse or other sexual acts equated with it, will disturb a person who is subordinate to him or is in a relationship of dependence with him, another person at work or in a public place or a person who is vulnerable due to age, illness, disability, drug addiction, pregnancy or severe physical or mental disability, and thereby will injure their dignity, causing a feeling of discomfort, annoyance, humiliation or fear ". It is envisaged that the prosecution of the crime will be undertaken on a proposal by the victim, not ex officio, and the punishment will be a fine or imprisonment for up to one year. (Criminal code of RNM).

The existing legal regulation indicates that the mentioned laws were adopted or amended spontaneously, without a strategic approach to the problem, hence the terminological confusion that follows as a result of the absence of a uniform term used in the laws – sexual harassment.

4. Conclusion

Sexual harassment is a problem that exists everywhere and for decades legal strategies designed to directly confront this problem have been developed. However, while many social and legal issues have been theoretically resolved, others, such as: Should it be criminalized? What should be the scope of sexual harassment? Should it be limited to the workplace, and universities, or should it be extended to the street and even cyberspace? Are still being researched and debated in practice.

Researchers around the world follow and participate in this dialogue and use the insights gained from this participation to influence perceptions and legal definitions of sexual harassment within their social cultures and legal systems. It has enabled a new conceptualization that responds to the needs, characteristics, and circumstances of each individual society and legal system.

From the analysis in the paper, we will agree that international and regional organizations through their documents and principles have provided an important starting point in the drafting of the norm related to sexual harassment. Perhaps the most important international document on which such a norm is generally based today is the Istanbul Convention, which has contributed to the current talk about sexual harassment as a phenomenon that is recognized and sanctioned in a large number of countries around the world, although there has always been and always will be a need for improvements to the regulation.

In the Republic of Croatia, there is a complete legal framework that defines and prohibits sexual harassment, defining it as a misdemeanor, as a crime, or as an act of violation of rights and obligations within a working relationship. The situation is similar in the Republic of Serbia and the Republic of North Macedonia, in that both of these countries are characterized by the nontechnical problem arising from the fact that different laws use several different terms, whose mutual relations (sameness or difference) are not explicitly determined. However, in terms of the scope of the legal texts, it can be said that they are essential and more adapted to the definitions arising from the international legal framework.

As analyzed, the Balkan countries have better sexual harassment regulations when compared to Germany, which only provides for physical contact with a sexual connotation, as the basis for the existence of a crime.

The legal solutions in all analyzed legal texts is perhaps an additional topic for analysis because again the emphasis is placed on the will of the victim to decide to report and continue the process. Sexual harassment survivors struggle with a wide range of emotions that make coming forward difficult: fear of revictimization, distortion of allegations, and generally not being believed, and in such a way, these victims don't receive the necessary institutional support, which is only one aspect of the overall support that a person who has been victimized should receive. Serious commitments are needed to approach justice, first of all, strategic steps in the protection of victims, ex officio prosecution for these types of crimes, strict sanctioning of perpetrators, as well as serious work towards changing the social perception towards such criminal forms.

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