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REVIEW PAPER

GUARANTEE OF PROHIBITION OF SEXUAL HARASSMENT

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ABSTRACT

The paper is dedicated to guaranteeing the prohibition of discrimination on the grounds of sex and gender. The guarantee of non-discriminatory harassment is one of the separate instruments of anti-discrimination law. According to its formal structure, it represents a special form of prohibition of direct discrimination. The paper is written by the method from general to individual. In addition to the theoretical (where we explained the concept of sexual violence and the concrete differences between gender and sexual harassment) and comparative review. The positive legal definition of the guarantee of prohibition of sexual harassment is especially presented. We also analyzed the scarce judicial and legal practice in Bosnia and Herzegovina.

Keywords: discrimination, equality, harassment, sexual, gender, violence



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Introduction

We are faced with having too much shaming of women today. We have too much silencing women, especially in public spaces. Also, when we look at gender, we come to research in various countries – where we have some conclusions that men get a lot of insults in the online world, just like women, and in some places even more. However, targeted women are more likely than targeted men to become more cautious in expressing their opinions publicly (Nadim & Fladmoe, 2019, p. 255). Men have more courage to express their views on social networks, and with that comes much more risk, as well as humiliation. There are many forms of sexual harassment and a difference between sexual harassment and gender-based harassment. We have informal and formal ways to combat sexual harassment. We will need to work on the education of people. This is a fight with the world, which will be difficult for all of us, but it is necessary for everyone's good.

Types of sexual violence

"No" means "NO". Without the other party's consent, any act or attempted act related to sexual activity is punishable by sexual violence. In many cases, coercion and intimidation of the other party occur to reach that goal. The goal is to humiliate a person morally and physically to satisfy the need for the sexual act of the person initiating it.

Sexual violence is defined as: 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. (World Health Organisation, 2011).

There is no specific rule regarding sexual violence because it is experienced by women and men in various situations, both privately and professionally. Sexual violence against the female population is also more pronounced and much more frequent, without a human understanding of the reason why it happens, but we have several factors that can influence it. Some of them are related to the environment in which they live, the economic situation and organization of the state, education, and the relationship of the individual to the environment in which he resides. We do not need to generalize people, so we will focus on individuals who are ready, for some reason, to do such a thing.

There is no accurate data on sexual violence because it is still a taboo topic, and people are afraid to report such an act of abuse to the police so that it would not continue in the future. People do not trust the protection provided by the police, because it is very possible for a person who is an abuser to remain at large due to insufficient evidence, and then do much worse to the victim and the victim's family. As this is particularly pronounced in less developed countries, where the rule of law is on a low level, we will never get accurate data on victims who have been sexually abused. However, many victims are unaware of sexual harassment, which is also one of the reasons why many cases are not reported to the police.

The most severe form of sexual violence is rape. It is an act that leaves consequences on the victim for a lifetime. The consequences are both physical and psychological. It is the greatest humiliation of human life. Such situations can occur from an unknown person, as well as from a friend/someone you know, but also from a boyfriend or spouse. The same can happen for men because such situations happen during kidnappings, war events, and also in prison. Men rarely admit such humiliation, which is why we do not have enough information about them.

Women very rarely report sexual violence by the person they are intimate with because they are a boyfriend or husband. They go through physical and psychological torture without feeling that they can admit to someone that they have an intimate relationship with a guy or that someone doesn't think they have marital problems, which is a particularly aggravating circumstance for a woman and her status. Not everyone knows the factors that make a woman choose to remain silent about marital rape. Some of the reasons may be related to divorce, they are ashamed to return to their parents, some of the reasons may be financial (if the woman is not financially independent), and some of the reasons may be family preservation for the sake of the children.

There are other forms of sexual violence, some of which are trafficking in human beings and children, then contracted child marriages and pedophilia. These are powerful lobbies in the world, and it is very difficult to prevent them. Here we can also list some of the factors that facilitate the establishment of such a system. These factors are linked with the state system and economy, because we have situations where parents sell their

children because of poverty, situations where parents arrange marriages of children with adults for financial support and it is a small paradise for this world lobby that can do its activities in such countries with weak economic power.

There is sexual harassment in public spaces, and we do not have enough information about this. We have one research of general information and attitudes of the citizens of Banja Luka on sexual violence and harassment in public space was conducted by an online survey in the period August–September 2021 on a total sample of 494 respondents. The survey was promoted via the social network Facebook. The total reach of the publication reached 15,507 people. (Bašić-Tomić & Markotić, 2021, p. 10). The shaming and silencing of women today is spreading more and more in public spaces.

In addition to all this, we have wars. There have always been rapes in wars, for humiliating people and spread offspring on both sides to the warring parties. It is one of the most immoral acts that take place, in addition to civilian casualties and killings. History has told us about it, but it repeats itself today. Many victims spoke about their experiences from the war, and even today they are asking for help so that there are no more people going through such traumatic experiences. Rapes happen individually and in groups (the opposite side in the war). The goal is to exterminate one nation and spread the descendants of the one who is the attacker. One example is Srebrenica (Bosnia and Herzegovina) where the extermination of a people took place, rape, and what we can call only one name: genocide.

We can give various reasons why victims of sexual violence do not report to the police. Some of these reasons are fear of the perpetrators, fear of the environment, fear that they will not have adequate protection if they report, fear that they will not have enough evidence, fear for their family, and fear of not being blamed for that situation even they are a victim.

The difference between sexual harassment and gender-based harassment

Gender and sexual harassment can be explained as a form of violence that includes unwanted activities of verbal and non-verbal behavior

towards a person, all because of a certain gender. How this takes place leads to one goal: to belittle a person and lower their self-confidence and hurt them through inappropriate comments, jokes, invitations, or sexual suggestions.

We have verbal harassment, which contains sexual comments or suggestions that go in that direction. We have non-verbal harassment, which can include sending photos of sexual organs or sending content that is pornographic, as well as some descriptions of what we would like to happen to that person. We can also mention physical harassment of a sexual nature, where a person does not want to have contact with the opposite party, while the abuser does everything he wants – and that is touching, and persuasion to have sex.

As we have already mentioned, many forms of such violence against victims are not known to be valid and sufficient to report to the competent authorities, so it happens that the victim keeps silent about what happened, hoping that one day it will stop.

The era of the pandemic from March 2020 until today has led to an increase in the use of social networks and thus cyber violence where we have many examples of sexual cyber violence. People experienced reporting by fake profiles without real pictures and names with disturbing sexual content or comments without the person's consent, intimidation of knowing who they were, and looking for photos of explicit content, otherwise, something bad would happen.

One of the biggest examples in the past 2 years of gender sexual violence was groups on the social network Telegram, where tens of thousands of users were present, who shared intimate pictures of girls and their names, as well as social networks.¹

Unfortunately, the current situation is such that in many government and educational institutions, as well as private companies, we have a huge amount of tolerance for sexual harassment, gender-based violence, and gender-based harassment. Such cases lead to consequences that are immeasurable, especially for victims of sexual violence because it is not easy to prove that sexual violence occurred if someone did not record it, or if there are no witnesses.

¹ Telegram: Where women's nudes are shared without consent. Retrieved: 29. May 2022, from <https://www.bbc.com/news/world-60303769>

However, there is a fear of losing a job, or if someone is a student: there is a fear of not passing exams.

Informal ways to combat sexual harassment

In the modern legal context, sexual harassment is illegal. However, often before initiating legal proceedings, sexual harassment is sought to be stopped by some other, not so legally rigid means and mechanisms. Certain jurisdictions have informal solutions to this issue. Some parties prefer informal resolution instruments because they are flexible. Often the same results are achieved as a formal process, but it is done much faster. Also in disciplinary proceedings or criminal proceedings, outcomes (acquittal/conviction) can be determined by external members. On the other hand, internal processes of conflict management within the organization could depoliticize the matter, remove any aspect of sex discrimination or sexual harassment, and narrow it into a personality conflict between the two parties, thus transforming an issue of public law into a private dispute (Edelman et al., 1993)

Examples include the University of New York's Sexual Misconduct Policy (2020) and the University of New York's Policy on Equal Opportunities and Non-Discrimination (2012). These acts are the basis for the "Informal Resolution", an alternative way of resolving disputes related to harassment, discrimination, or retaliation. According to these acts, the parties can agree on several possible consequences. However, for sexual harassment, an informal resolution is only possible after a formal complaint. The results are diverse - ordering one party to participate in certain training, mediation by a third party, administrative resolution, plea agreement, and sanctions, mediation or other alternative ways of resolving disputes, modification of work tasks, or apology.

In no legal system in Bosnia and Herzegovina in disciplinary proceedings against civil servants, there is a possibility of mediation or another form of alternative dispute resolution that would be informal. The situation is the same as for other categories of professionals (authorized officials) or private companies. The closest to an informal way to address sexual harassment in the workplace would be the procedure introduced by the Guidelines for the prevention of sexual and gender-based harassment, adopted by the High Judicial and prosecuto-

rial council of BiH in 2015, as a set of procedures for action in judicial institutions to prevent sexual and gender-based harassment. This procedure belongs to the so-called "Soft law", and prescribes the existence of counselors for gender and sexual harassment. She/he is appointed by the chief of the prosecutorial office/ president of the court and is a person who enjoys respect within the judicial body. The counselor will inform the person who shows unwanted behavior that such behavior is undesirable for the person who asked for help and provide feedback to the person who asked for help without delay, and no later than 30 days from the date of receipt of the request for help. The counselor will inform the person exhibiting the unwanted conduct of the following: the conduct in question is undesirable from the perspective of the person to whom it is directed, and he or she is therefore required to stop such conduct. Also, a person who exhibits unwanted behavior will be informed about keeping confidential records, ie documenting the implementation of internal procedures. In addition, the person who exhibits the unwanted behavior will be informed that he/she has the opportunity to state his / her opinion, ie explain the behavior in question. The HJPC BiH also has a counselor for the prevention of sexual harassment and gender-based harassment. The Agency for Gender Equality has produced a Guide to taking effective measures to prevent gender-based harassment and sexual harassment at the workplace in the institutions of Bosnia and Herzegovina. According to this document, informal ways of protection are: talking to a person who behaves in an unwanted way, recommendations for talking to a person who behaves in an unwanted way, talking to a superior and/or counselor for sexual harassment and gender-based harassment, and recommendations for interviewing a superior and/or counselor. This document also envisages the function of a counselor for gender-based and sex-based harassment. At the entity level, there is no "soft law" in the Brčko District of BiH to combat sexual harassment. Sarajevo Canton also has such an act, the Protocol on the action in cases of sexual and sex-based harassment, as a form of violence in administrative bodies, public companies, public institutions, and legal entities founded by Sarajevo Canton. This act regulates the internal procedure for solving the problem of unwanted behavior before it reaches the level of illegal behavior.

Legal framework for combating sexual harassment in Bosnia and Herzegovina

In this and the previous two decades, the issue of sexual and gender-based harassment has been particularly recognized in Bosnia and Herzegovina. This applies in particular to the adoption of a legal framework to combat sexual harassment and two systemic laws regulating sexual harassment as a tort. It is a far more common occurrence than reports, initiated proceedings, and court decisions as an epilogue show. Unfortunately, in our country, it is understood more as a socially acceptable cultural standard than as a negative social phenomenon.

Sexual harassment in our country was regulated for the first time in 2003 with the entry into force of the Law on gender equality, which was subsequently revised in 2009, and later by the Law on the prohibition of discrimination from 2009 (amendments in 2016). Definitions of discriminatory harassment can be found in EU directives (Directive 2006/54 – article 2. paragraph 1.; Directive 2004/113 – article 2.; Directive 2000/43 – article 2. paragraph 2. and Directive 2000/78 – article 2. paragraph 2.), from which they have been transposed into the above two BiH regulations. Sexual harassment as a disciplinary offense is provided by the Law on civil service in BiH institutions. Despite the quality of the legal framework, the case law is very weak, and there is not much sanctioning as an epilogue of court proceedings.

In Bosnia and Herzegovina, acts of sexual harassment can be prosecuted criminally, civilly, and disciplinary. Criminal liability is provided by the Law on Gender Equality in BiH, while civil liability is provided by the Law on Prohibition of Discrimination in BiH. The first law that defined sexual harassment was the Law on Gender Equality in BiH, whose provision in Article 5, paragraph 2. sexual harassment is defined as any unwanted form of the verbal, non-verbal, or physical behavior of a sexual nature which seeks to violate the dignity of a person or group of persons, or which achieves such an effect, especially when such behavior creates a frightening, hostile, degrading, degrading or abusive environment.

In addition, Article 29 of the Law prescribes criminal liability for conduct contrary to Article 5, which provides for imprisonment from 6 months to 5 years for sexual violence, harassment, or sexual harassment which endangers peace, mental health, and physical integrity. Jurisdiction to deal

with sexual harassment cases belongs to the Court of BiH and the Prosecutor's Office of BiH.

As one of the forms of discrimination, Article 4 stipulates in paragraph 2: "Sexual harassment is any form of unwanted verbal, non-verbal or physical behavior of a sexual nature aimed at or affecting the dignity of persons, especially when they create intimidating, hostile, degrading, degrading or abusive environment." Sexual harassment is unwanted behavior of a sexual nature that makes a person feel offended, humiliated, or intimidated, and unwanted behavior must contain a sexual element, connotation, or implication to qualify as sexual behavior. The action of behavior that bears the epithet of sexual, can be manifested through various manifestations: verbal (words orally and in writing or sounds), nonverbal (facial expression, body movement, or symbol), and physical (contact with a person exposed to unwanted behavior).

As can be seen from the cited, legal definitions distinguish two forms of discrimination and harassment. A more severe form of discriminatory harassment is sexual harassment. A somewhat "milder" form of discriminatory harassment is conditioned harassment. While the guarantee of the prohibition of conditional harassment defines unfavorable treatment by the cumulative allegation of violation of dignity and creation of the enemy environment, sexual harassment is focused primarily on the violation of dignity emphasizing that the hostile environment has only the role of an aggravating circumstance. In the case of conditional harassment it has been established it is necessary to determine both the violation of dignity and the creation of a hostile environment. On the other hand, it is "enough" to establish a violation of dignity to determine sexual harassment. To determine sexual harassment, it is enough to determine that the conduct was "sexual", ie. of a sexual nature. This is a fact that in no way requires a comparator. Sexual harassment is a specific form of guarantee of the prohibition of direct discrimination given that prohibits conduct that is: conditioned by gender (about the very fact that it is sexual) and unfavorable (given that this type of secularized treatment has particularly degrading effects on the dignity of the person).

The condition of violations of dignity is a legal standard that is extremely vague in its content and as such, it depends on concretization through concrete decisions made based on the concrete facts of each item separately. At present, there is

no developed practice at the level of the Court of Justice of the European Union that would specify the condition of the violation of dignity. There is, however, to a lesser extent, case law in some EU countries. Given the principle of inviolability of human dignity is a fundamental and irrevocable right guaranteed by the German Constitution we can point to the judgment of the German Constitutional Court BVerfGE 45, 187. If we apply the criteria from the reasoning of this decision, we can conclude that the humiliation is aimed at: humiliation, objectification, degradation, and dehumanization. But in determining the justification for allegations of sexual harassment it would certainly be useful to consider the following characteristics of the disputed procedure: type of disputed conduct, the intensity of injury, type of dependence, and unwillingness of the disputed conduct. Judicial practice in the region has many decisions, which show that forms of sexual harassment are diverse, and range from physical assault to verbal humiliation (so e.g. The Judgment of the Supreme Court of the Republic of Croatia Kzz 43 / 2015-3 identified a wide range of acts of a sexual nature - from verbal harassment to coercion to attend masturbation - by which the perpetrator sexually harassed the victim).

Legal definitions of sexual harassment explicitly emphasize how acts of a sexual nature can be a physical (neck or shoulder massage, hugging, masturbation in front of another person...) or verbal conduct of a sexual nature (sexualized teasing, jokes, remarks, or questions, addressing an adult by names such as a baby, heart, kitty-cat...) and non-verbal conduct of a sexual nature (whistling for a person, sending kisses, staring...). Sexual harassment can traverse a wide range of behaviors from suggestive comments, lewd looks or gestures, explicit jokes, innuendo, and belittling, to sexual assault, indecent exposure, and rape (Cates & Machin, 2012, p. 134). The US Equal Employment Opportunity Commission (EEOC) recognizes two types of sexual harassment. This transferred into other jurisdictions, including Bosnia and Herzegovina. They are: *quid pro quo* and sexualization of the work environment. *Quid pro quo* ("this for that") sexual harassment refers to situations within professional relationships, above all workplace relationships, in which decisions about a person's interests (employment, salary increase...) are conditioned by acceptance of sexual suggestions, demands or behaviors made to her by her professional superior according to which it is in a relationship of dependence. Also, as a type of sexual harassment, there is the sexualization of the work environment. This type of sexual ha-

arrassment does not necessarily include requests for sexual services by engaging in sexual intercourse. It is focused on various forms of verbal or non-verbal actions sexual nature by which the victim, directly or indirectly or intentionally or not, is reduced to a sexual object which diminishes her reputation, professional status, or the possibility of professional development (sharing pornographic material with colleagues, sending suggestive e-mails, obscene jokes ...).

Conclusion

Sexual harassment is unwanted behavior that leaves profound harmful consequences for the victim and is very morally unacceptable. On the other hand, care must be taken to what extent certain conduct is by legal norms, so as not to set limits on freedom of speech. Women's groups mobilized to expand federal law against sex discrimination in employment (Title VII of the Civil Rights Act) to add the newly named category for such grievances: 'sexual harassment (MacKinnon, 1979). Also, there was a shift in the focus of the study of sexual harassment. Firstly it focussed on whether or not sexual harassment is a social problem worthy of study and on a descriptive analysis of its prevalence, but in recent years it shifted to more sophisticated empirical and theoretical analyses of the causes and consequences of this phenomenon (Welsh, 1999, p. 169). Sexual harassment remains a problem in various industries and jobs. It affects the lives, health, finances ... of the victims. It is a relationship of power and gender, where the victim is usually subordinate, while the perpetrators are usually men of more powerful status. It can be different, from *quid pro quo* to sexualization of the work environment. All employees have rights, and superiors must point out to their subordinates the channels of prevention and fight against sexual harassment. Also, all investigations of reported sexual harassment must be reported objectively and impartially. There have been more and more legal mechanisms against sexual harassment lately. The same is the case in Bosnia and Herzegovina, but the results are not adequate, ie verdicts establishing sexual harassment are few, and research shows that in practice this type of discrimination occurs frequently. The fact is that the education of legal and other professionals must be worked on (not in terms of quantity but the quality of training) since it is noticeable that in the last few years there have been no verdicts in which sexual harassment has been established. Victims must also be made aware of their rights. There must be more education on gender equality,

and it is especially proposed to include the subject "Gender and Law" in universities, and certain summer schools in which sexual and gender-based harassment would be analyzed.

Bibliography

Bašić-Tomić & Markotić (2021). *Seksualno uznemiravanje u javnom prostoru*. Fondacija Udružene žene, Banja Luka.

Cates & Machin (2012). The State of Sexual Harassment in America: What is the Status of Sexual Harassment in the US Workplace Today? *The Journal of Global Business Management* Volume 8. Retrieved: 29. May 2022, from <http://www.jgbm.org/page/18%20Steven%20Cates.pdf>

Edelman et. al. (1993). Internal dispute resolution: the transformation of civil rights in the workplace. *Law Soc. Rev.* 27.

Nadim & Fladmoe (2021). Silencing Women? Gender and Online Harassment. *Social Science Computer Review*. Vol. 39(2).

MacKinnon (1979). *Sexual Harassment of Working Women: A Case of Sex Discrimination*. Yale University Press, New Haven.

Telegram: Where women's nudes are shared without consent. Retrieved: 29. May 2022, from <https://www.bbc.com/news/world-60303769>

The Civil Rights Act (1964).

The City of New York Policy on Sexual Misconduct (2020). Retrieved: 29 May 2022, from http://www.jjay.cuny.edu/sites/default/files/compliance_diversity/Equal_Employment_Opportunity_Policy_CUNY.pdf

University of New York's Policy on Equal Opportunities and Non-Discrimination (2012). Retrieved: 29 May 2022, from: <https://www.cuny.edu/about/administration/offices/legal-affairs/policies-resources/equal-opportunity-and-non-discrimination-policy/#::~text=New%20York%20State%20Human%20Rights,prior%20arrest%20or%20conviction%20record>.

Welsh (1999). Gender and Sexual Harassment. *Annual Review of Sociology*. Vol. 25.

World Health Organization (2011). *Violence against women – Intimate partner and sexual violence against women*. World Health Organization. Retrieved 29 May 2022, from http://apps.who.int/iris/bitstream/handle/10665/77434/WHO_RHR_12.37_eng.pdf