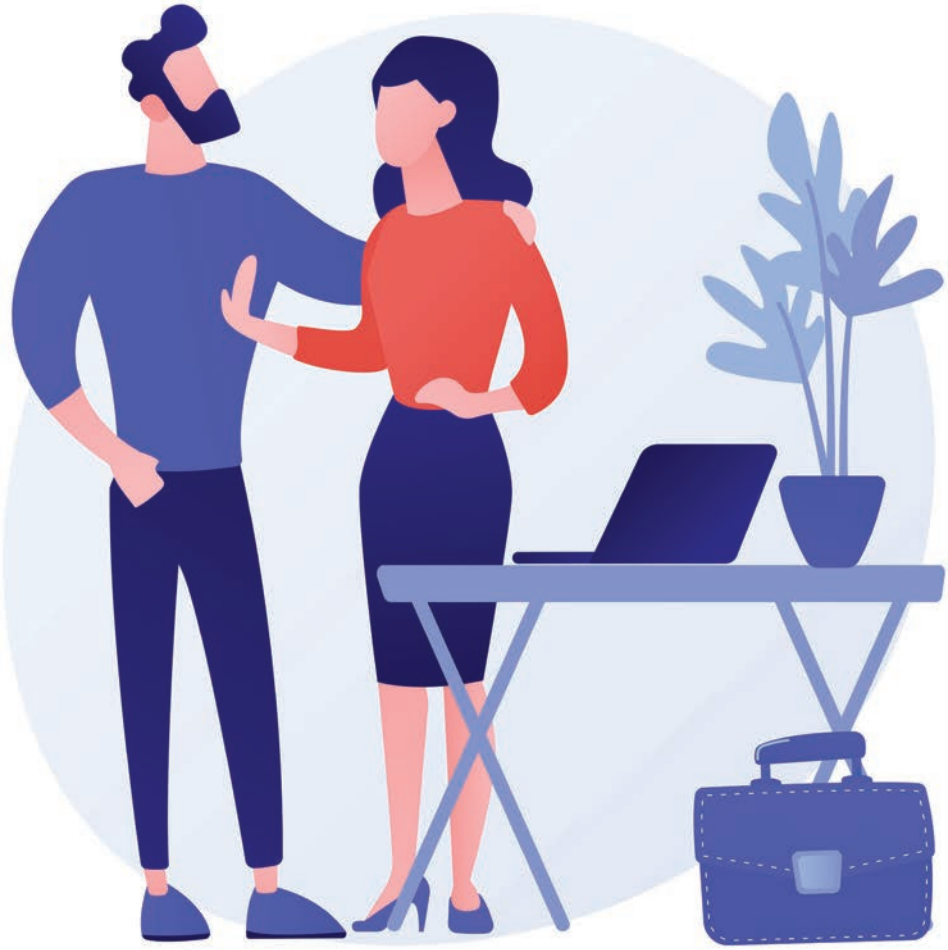
ANNALES

Anali za istrske in mediteranske študije
Annali di Studi istriani e mediterranei
Annals for Istrian and Mediterranean Studies
Series Historia et Sociologia, 34, 2024, 3



UDK 009 Annales, Ser. hist. sociol., 34, 2024, 3, pp. 263-394, Koper 2024 ISSN1408-5348

UDK 009

ISSN 1408-5348
e-ISSN 2591-1775

ANNALES

Anali za istrske in mediteranske študije
Annali di Studi istriani e mediterranei
Annals for Istrian and Mediterranean Studies

Series Historia et Sociologia, 34, 2024, 3

KOPER 2024

ISSN 1408-5348
e-ISSN 2591-1775

UDK 009

Letnik 34, leto 2024, številka 3

Redakcija te številke je bila zaključena 30. 09. 2024.

Sofinancirajo/*Supporto finanziario/*
Financially supported by: Javna agencija za znanstvenoraziskovalno in inovacijsko dejavnost Republike Slovenije (ARIS)

Annales - Series Historia et Sociologia izhaja štirikrat letno.

Maloprodajna cena tega zvezka je 11 EUR.

Naklada/*Tiratura/Circulation:* 300 izvodov/copie/copies

Revija Annales, Series Historia et Sociologia je vključena v naslednje podatkovne baze / *La rivista Annales, Series Historia et Sociologia è inserita nei seguenti data base / Articles appearing in this journal are abstracted and indexed in*: Clarivate Analytics (USA): Arts and Humanities Citation Index (A&HCI) in/and Current Contents / Arts & Humanities; IBZ, Internationale Bibliographie der Zeitschriftenliteratur (GER); Sociological Abstracts (USA); Referativnyi Zhurnal Viniti (RUS); European Reference Index for the Humanities and Social Sciences (ERIH PLUS); Elsevier B. V.: SCOPUS (NL); Directory of Open Access Journals (DOAJ).

ANNALES · Ser. hist. sociol. · 34 · 2024 · 3

Anali za istrske in mediteranske študije - Annali di Studi istriani e mediterranei - Annals for Istrian and Mediterranean Studies

UDK 009 Volume 34, Koper 2024, issue 3 ISSN 1408-5348
e-ISSN 2591-1775

VSEBINA / *INDICE GENERALE / CONTENTS*

received: 2024-02-13 DOI 10.19233/ASHS.2024.23

REGULATION OF SEXUAL HARASSMENT IN THE ACADEMIC ENVIRONMENT – BETWEEN LEGAL REGULATIONS AND ETHICAL CODES

Katja FILIPČIČ
University of Ljubljana, Faculty of Law, and Institute of Criminology at the Faculty of Law, Ljubljana, Poljanski nasip 2, 1000 Ljubljana, Slovenia
e-mail: katja.filipcic@pf.uni-lj.si

Manja SKOČIR
Institute of Criminology at the Faculty of Law, Ljubljana and University of Ljubljana, Faculty of Law, Poljanski nasip 2, 1000 Ljubljana, Slovenia
e-mail: manja.skocir@inst-krim.si

ABSTRACT

This article analyses the regulation of sexual harassment within the academic environment. It highlights that sexual harassment is addressed not only by legal regulations but also through codes of ethics. It demonstrates that sexual harassment is recognised as a violation of ethical norms and public ethics in the codes of many professional associations, yet it is also regulated by statutory laws, bylaws, and other general acts. The article examines the distinctions between the regulation of sexual harassment by codes of ethics and legal acts, and identifies the challenges in defining sexual harassment in accordance with the fundamental principles of criminal law. It further explores various forms of accountability relevant to members of the academic community. Finally, it discusses the role of internal regulations, providing insights into their structure and the regulation of sexual harassment within Slovenian higher education organisations.

Keywords: sexual harassment, codes of ethics, academia, criminal liability, liability under employment law, disciplinary liability, internal regulations

REGOLAMENTAZIONE DELLE MOLESTIE SESSUALI NELL'AMBIENTE ACCADEMICO – TRA NORME GIURIDICHE E CODICI ETICI

SINTESI

L'articolo analizza la regolamentazione delle molestie sessuali nell'ambiente accademico. Sottolinea che le molestie sessuali non vengono affrontate solo attraverso norme giuridiche, ma anche con codici etici. Evidenzia che le molestie sessuali sono riconosciute come violazioni delle norme etiche e dell'etica pubblica nei codici di molte associazioni professionali, ed è inoltre regolamentato giuridicamente – sia tramite leggi e regolamenti, sia attraverso altri atti generali. L'articolo discute le differenze tra la regolamentazione tramite codici etici e atti giuridici, e sottolinea le sfide nella definizione delle molestie sessuali dalla prospettiva dei principi fondamentali del diritto penale, esplorando varie forme di responsabilità rilevanti per i membri della comunità accademica. Concludendo con un'analisi del ruolo dei regolamenti interni, offre un'idea della loro struttura e della regolamentazione delle molestie sessuali nelle organizzazioni universitarie slovene.

Parole chiave: molestie sessuali, codici etici, ambiente accademico, responsabilità penale, responsabilità lavorativa, responsabilità disciplinare, regolamenti interni

INTRODUCTION TO SEXUAL HARASSMENT AS A VIOLATION OF ETHICAL CODES AND LEGAL NORMS

Sexual harassment, considered a less invasive form of unwanted sexual behaviour compared to rape and sexual violence (which are more serious infringements of sexual self-determination) and as a more serious form of sex-based discrimination, has only recently been incorporated into legal regulations.[1] Prior to states and supranational bodies legally prohibiting sexual harassment, this form of sex discrimination was considered morally undesirable. It was recognised as a violation of the ethical commitments adopted by professional associations and private organisations, thus constituting a breach of so-called public ethics (cf. Pribac, 2012).[2] It is not surprising, therefore, that the legal regulation of sexual harassment has been significantly influenced by the moral evaluation of this phenomenon. Sexual harassment is addressed not only by legal regulations (laws, bylaws, other general legal instruments, and internal regulations), but also by non-legally binding documents such as ethical codes, recommendations, guidelines, and commitments.

This article first briefly explains the relationship between morality and law. It then illustrates the relationship between ethical codes and legal regulations, using sexual harassment as an example. It demonstrates that while broad definitions of unwanted behaviour, framed with open-ended terms, are acceptable in ethical codes and activist texts, they require precise delineation in legal regulations to prevent arbitrary interpretations. This necessity is especially pronounced in the field of criminal law, where the (constitutional) principle of legality, which includes the requirement for certainty in criminal law norms, must be strictly respected (Ambrož, 2007, 42–47). The article then outlines the various forms of liability for sexual harassment (and other violations of sexual self-determination) among members of the academic community. Finally, the article analyses the role of internal regulations in addressing sexual harassment within the academic environment.

In this text, the term 'ethics' is used synonymously with 'moral philosophy' and is distinguished from 'morality'. Unlike morality, which comprises a largely comprehensive and internally consistent set of unwritten rules of behaviour and conduct that govern the life of a community over time, ethics is a philosophical discipline centred around the question 'what should I do?'. Its primary task is to reflect on morality. Ethical reflection, therefore, is not concerned with identifying and justifying what is acceptable and desirable in a given society or community, but rather with reflecting on such rules and prohibitions and attempting to construct universal, universally valid, and unchanging standards. The distinction between morality and ethics lies in morality's dogmatic, unreflective, and uncritical dimension, which demands obedience from its subjects and prevents or at least discourages the initiation of thought processes aimed at verifying the validity of the accepted morality, problematising it or (re)justifying it in any way (Pribac, 2012). This distinction is crucial because we argue that the substance of any code of ethics—contrary to its name—is moral, not ethical. Indeed, codes canonise moral precepts that have become sufficiently established within a professional association or organisation to demand compliance from all members of that group. In this sense, the term 'moral codes' appears more appropriate.

Law and Morality

The question of the relationship between morality and law is one of the fundamental problems in legal philosophy (Novak, 2008, 44–50). The sheer number of debates attempting to clarify their relationship underscore the complexity of the issue. Legal philosophy explores not the historical developed of law in relation to morality[3] but also debates whether law should act as a means to reinforce morality, the appropriateness of moral approaches and sanctions over legal procedures and penalties, and the status of legislation that contradicts moral principles. We can argue that law and morality are two co-existing systems that function effectively only when they support each other; however, the differences between them as pronounced as their similarities. Unlike law, morality is not uniform but

1 In Slovenia, the prohibition of sexual harassment was introduced in the Labour Relations Act (ZDR, Official Gazette of the Republic of Slovenia, No. 42/02, as amended) in 2007. In 2008, it became an enforceable offence under Article 197 of the Criminal Code (KZ-1, Official Gazette of the Republic of Slovenia, No. 50/12, as amended), and as of 2022, it is also a matter of the Higher Education Act (ZViS, Official Gazette of the Republic of Slovenia, No. 67/93, as amended).

2 This is also the case with sexual harassment in academia, which was first brought to the attention of various professional organisations and victims of sexual harassment. The response was the legal regulation of sexual harassment. In 2015, the Association of American Universities conducted a survey of more than 150,000 students (Cantor et al., 2015), and in 2017, the American Academy of Science, Engineering and Medicine published a report on the impact of sexual harassment in higher education institutions (Tenbrunsel et al., 2019). Later that same year, as part of the broader #MeToo social movement, a survey appeared online, accompanied by the hashtag #MeTooPhd, which sought to explore the prevalence of sexual harassment in academia. In one month, this survey collected over 2000 testimonies from victims of sexual harassment in higher education and research institutions (Kelsky, 2017).

3 Theorists seem to agree in this sense; they acknowledge that the law, as a normative system, developed under the influence of religious and moral normative beliefs (Cerar, 2001, 129).

socially dispersed, arises not through formalised, predetermined procedures but spontaneously, and is characterised by its flexibility, variability, and somewhat elusive nature. A fundamental distinction between moral and legal norms is also that only the latter are backed by the possibility of legal sanction as a secondary legal consequence (Pavčnik, 2013, 108). Thus, the law can be defined as a normative system, endowed with such social validity and support that violations of this system result in legal (formal) sanctions. The consequences of violating moral norms vary; although legal theorists emphasise that moral sanctions are primarily psychological, they also encompass a range of social responses to morally undesirable behaviour. However, unlike legal sanctions, moral sanctions are not strictly formalised and, though usually predictable, are not clearly defined in advance (Novak, 2001, 1087).

Despite the challenges in defining morality and its role in the formation of law, it is evident that law must be underpinned by social morality to ensure compliance by its addressees (Pavčnik, 2013, 256–260). For addressees of the law to autonomously accept and internalise legal rules, these rules must also hold moral value. A law devoid of moral support risks losing its legitimacy, becoming increasingly reliant on coercion and force. Law can only serve its mission if its target is essentially morality (Novak, 2008, 45).[4]

The central issue addresses in this text is not the relationship between morality and law *per se*, but rather the interplay between codified morality (ethical codes) and legal rules. While the relationship between law and morality has been extensively examined, the interaction between legal rules and ethical codes remains relatively underexplored. The scarcity of discussion on this topic might imply that the role of ethical codes within the legal system is negligible, despite the potential benefits of such regulations in specific social domains.[5] However, given that ethical codes frequently regulate social relationships that are also subject to legal rules, it is crucial to explore the differences and similarities between these two distinct normative systems. This exploration should consider where their boundaries are delineated and why some approaches may be permissible within ethical codes but not within legal rules.

Ethical Codes and Legal Regulation

The legal lexicon defines ethical codes as "codes adopted by individual professional associations, some of which go beyond legal rules and intersect with the morality of the specific profession" (Bavcon et al., 2020, 84). The content of these ethical codes can be viewed as codified morality that has either already been established within a particular professional group over a prolonged period and hence may be incorporated into the code, or is aimed at becoming the prevailing morality within a particular social or professional group. These codes establish standards of behaviour and conduct that are expected of members of a particular social subsystem and concurrently inform the public about the standards they can anticipate from these individuals.[6]

Since ethical codes are not legal statutes, they reflect the specific morality of a particular, narrower social group—often termed 'partial' social morality (cf. Novak, 2001). Their validity and application are confined to the scope of the specific profession they govern. The non-legal nature of these codes is advantageous because it maintains the flexibility and conceptual openness of morality, which can sometimes regulate certain social relationships more effectively than rigid legal rules and procedures. However, a significant drawback is that ethical codes lack the authority to enforce binding legal norms or legally sanction violators, casting doubt on their practical value. Consequently, it is not surprising that many ethical codes are beginning to increasingly resemble legal rules (Novak, 2001, 1087–1089), both in substance and form. As they do so, they systematise moral guidelines into a coherent structure and establish mechanisms to address. This shift causes ethical codes to lose their distinctiveness and added value, even when they potentially gain relevance and begin to parallel legal statutes in their hierarchy.

However, because they are not legal rules, the approaches and procedures that are permissible in ethical codes may not be acceptable in legal acts. Ethical codes may prohibit or restrict certain behaviours that cannot be regulated by (criminal) law, where excessive moralism and paternalism are deemed undesirable. Moreover, even for legally regulated forms of behaviour, it is acceptable to use more open and less precise definitions and descriptions within ethical codes. In the context of an ethical code, a conceptually open and controversial regulation of relationships is expected and, to some extent, even desirable. The problem arises when conceptually undefined definitions from codes are used to fill in legal rules. Some authors recognise the added value of codes in helping to interpret legal rules (Brumec, 2010, 141–142); however, it is

4 The relationship between morality and law has many more dimensions than are covered in this article. This article is not intended to be a comprehensive analysis of this complex relationship, about which there are many conflicting interpretations (cf., for example, Fuller, 2015; Hart, 2018). We limit ourselves to a few aspects that are particularly relevant to the topic at hand.

5 For a discussion on how codes of ethics are completely marginalised in the legal profession, cf. Novak (2001, 1089).

6 The purpose of the Code is taken from the European Code of Conduct for the Political Integrity of Local and Regional Elected Representatives adopted by the Council of Europe in 1999.

important to note that legal rules must be formulated such that the addressee of the rights and obligations can relatively easily understand how to, or how not to, behave (Pavčnik, 2013, 96). The law requires that legal sanctions be linked to predefined behaviour, as predictability of behaviour and conduct is one of the essential elements of the rule of law. It also seems contrary to fundamental legal principles for a subordinate regulation to become the primary means of interpreting a law. This does not mean, however, that the morality canonised in codes does not flow into public ethics on the one hand and legal regulation on the other.

The regulation of sexual harassment illustrates that definitions in legal acts must differ from those in ethical codes, guidelines, and recommendations, and highlights the potential dangers of incorporating open definitions from codes into legal regulations. Sexual harassment, recognised as a form of discrimination based on sex, initially emerged as a moral issue closely associated with the workplace or educational settings. Consequently, the first documents defining sexual harassment as unacceptable were professional codes or guidelines.[7] These definitions were conceptually broad and open-ended, inspired by activist language (Crosthwaite & Priest, 2006), which poses no legal issues as they are not statutory. We will explore how these definitions were integrated into legal regulations and examine whether fundamental legal principles were upheld in this process. The definition of sexual harassment is an intriguing and under-researched dimension of this topic.

DIFFICULTY IN DEFINING SEXUAL HARASSMENT (HOW TO UNDERSTAND 'UNWANTED CONDUCT'?)

Definition of Sexual Harassment in Activist Movements

An important role of civil society[8] is to highlight phenomena that are overlooked or inadequately addressed. In a democratic society, this stimulates public debate on particular issues and encourages the state or individual institutions to respond more appropriately. To achieve this goal, activism[9] uses general definitions of a phenomenon, often emphasising only its basic characteristics, since considering more precise (narrower) definitions could relativise the criticised phenomenon and reduce the chances of achieving the desired changes. However, the state cannot directly translate such general definitions into legal regulations, as this would misunderstand their purpose. The dilemma, however, is that the general public, especially if these definitions are frequently repeated, may not distinguish them from legal definitions, or may perceive narrower legal definitions as unrealistic. This can be illustrated by awareness-raising campaigns on sexual violence and harassment in the Slovenian academic environment.

As part of the 'Stop Sexual Violence' campaign, posters displayed in early 2021 at the University of Ljubljana's faculties stated, "Sexual violence is any behaviour that a person experiences as an invasion of his or her physical integrity and that limits his or her right to decide about his or her own body". This message was also shared on the Facebook page of the Faculty of Arts student organisation (Študentska organizacija Filozofske fakultete UL, 2024). This definition underscores the subjectivity of experiencing violence: "Violence is what I experience as violence". This perspective is understandable in efforts to ensure safety and well-being in the academic environment, to raise awareness of the importance of privacy, and to remind us to consider the impact of our actions on others. However, it would be inappropriate to demand decisive (legal) action from the institution based on such a definition: "The institution must protect me with effective and concrete measures whenever I am subjected to unwanted behaviour!" Such expectations are unrealistic and unreasonable. Legal rules requiring the institution to take specific action against violators cannot base the definition of violations on the subjective experiences of individuals. The dilemma of 'undesirability' as a potential part of the legal definition lies in the practical difficulty of distinguishing between desired and undesired behaviour, especially because the distinction between desired and undesired sexual behaviour cannot rely on solid objective criteria; the desirability of behaviour and the existence of sexual harassment depend on the subjective judgement of the parties involved. This is particularly problematic in cases where "what is a compliment to one person is hate speech to another" (Zaviršek, 1998, 37). The vagueness of the "undesirability of conduct" criterion makes it impossible to determine in advance what conduct is inappropriate and therefore legally impermissible, which is contrary to the principle of legal certainty as the foundation of the rule of law. We will now explore how the undesirability of behaviour, as an essential element of activist efforts against sexual harassment, has been incorporated into the legal definition of sexual harassment, with reference to the definition from the Employment Relationships Act (ZDR-1, Official Gazette of the RS, No. 21/13, as amended). The problematic definition of sexual harassment in criminal law is more complex than just the question of the undesirability of the behaviour and will be addressed separately.

7 In the United States, the first significant document addressing sexual harassment was the Guidelines on Sexual Harassment adopted by the Equal Employment Opportunity Commission in 1980.

8 Civil society is "a group of like-minded people who, in opposition to the authorities and political parties, publicly represent their interests, proposals and ideas. They make demands in opposition to the state and are autonomous from it. They represent the common consciousness of a narrower or broader group of people" (Kokalj Kampuš, 2015, 24).

9 "Activism means being active in society. Activists use their knowledge to address social problems and strive for social action through various strategies" (Senčar Mrdaković et al., 2019).

Legal Definition of Sexual Harassment

ZDR-1 prohibits sexual harassment in the workplace. Article 7 states: "Sexual harassment is any form of unwanted verbal, non-verbal or physical conduct or behaviour of a sexual nature which has the effect or purpose of violating the dignity of a person, in particular when it creates an intimidating, hostile, degrading, humiliating or offensive environment". In this legal definition, the term 'unwanted' is essential, complemented by the impact of the conduct on the victim; primarily, the unwanted nature of the behaviour is manifested mainly (but not exclusively) in the creation of an "intimidating, hostile, degrading, humiliating, or offensive environment". Establishing such an environment is essential for the behaviour to be deemed unwelcome. This same definition of sexual harassment is echoed in the Higher Education Act (ZVis, Official Gazette of the Republic of Slovenia, No. 32/12, as amended) in Article 7b, which seeks to protect students from sexual harassment. The central question is how to translate the subjective assessment of the undesirability of behaviour (as advocated by activist movements) into an objective criterion that adheres to the principle of legal certainty, and to examine the challenges that the law encounters in this process.

Slovenian academic literature highlights a viewpoint that prioritises the victim's perspective, which must be known to the perpetrator. According to Robnik (2007, 14), behaviours are "sexual harassment if they are repeated when the victim has already indicated that they do not want such behaviour." Similarly, Kanduč (1998, 17) defines sexual harassment as sexually connoted behaviour that is uncomfortable for the victim but adds that in cases of sexual harassment "the decisive factor is the man's [perpetrator's] reaction to the woman's [victim's] expressed disapproval of the initial act". Kanduč thus emphasises that an act "by which a person initiates an interactive process of courtship" is unproblematic as long as it does not continue despite the recipient's expressed disapproval (Kanduč, 1998, 17).[10] This definition of sexual harassment, while still relying on the subjective marker of 'unpleasantness', is significantly more restrictive and legally implies that behaviour known by the perpetrator to be unwanted is legally impermissible.[11] The challenge remains, however, in legally assessing behaviour before the other person's attitude has been clearly expressed.

There is no definitive guidance in the decisions of Slovenian courts[12] regarding the criterion of undesirability of behaviour in the context of sexual harassment. However, drawing from case law related to workplace bullying, it appears that courts consider a social consensus on the unacceptability (and thus undesirability) of behaviour as an objective criterion. An individual's subjective perception may differ from the prevailing understanding of the unacceptability of certain behaviours. Consequently, relying solely on subjective perception as the primary criterion for determining the unacceptability of behaviour would violate the principle of legal certainty, leaving individuals uncertain about what behaviour is prohibited. The Supreme Court of the Republic of Slovenia, in its judgments and decisions VIII Ips 198/2015 and VIII Ips 271/2015 of 21 June 2016, emphasised that while the subjective criterion cannot be entirely disregarded, it should assume a secondary role:

> *The assessment of when conduct or behaviour is reprehensible or manifestly negative and offensive is primarily objective and is determined on the basis of what is considered as such behaviour by general social standards. Secondarily, the perception of the affected person, who must subjectively experience the behaviour in the same way, is also assessed, otherwise he or she cannot be considered to have been subjected to harassment.*[13]

It should be noted that the position of the Supreme Court of the Republic of Slovenia relates to the interpretation of harassment under the ZDR-1. This definition does not explicitly include undesirability but introduces it indirectly through the requirement that the behaviour must be "reprehensible or manifestly negative and offensive". The perception of such behaviour also hinges on the subjective assessment of its undesirability. Therefore, we can deduce that the requirement to apply an objective criterion when assessing offensive behaviour implies the need for an objective criterion to gauge the undesirability of sexual behaviour within the context of sexual harassment. However, a shortcoming of this position, from the

10 Slovenian sociologist Jasna Podreka expressed a similar view in an interview with Slovenian weekly Mladina: "*I am often asked if every remark is sexual harassment nowadays. Of course, it is not, if it is said once and if the person who says it knows how to respect the boundaries set for him and from then on treats me as an equal and agrees to a collegial relationship. However, if he does not stop and continues with 'compliments' or even touches me against my will and makes me feel uncomfortable, we can already speak of sexual harassment*" (translated by authors) (Jager, 2018).

11 Let us compare with the current definition of the core form of rape, which essentially consists of sexual intercourse without the consent of the other person (Article 170 of the Criminal Code). This means that the "yes means yes" model (consent to sexual intercourse must be given explicitly or at least implicitly) was adopted in the legislation, instead of the "no means no" model (it is rape if the victim explicitly or implicitly expresses her disagreement with sexual intercourse).

12 The analysis of case law is based on decisions of the labour and social courts dealing with sexual harassment in the workplace, where an employee who has been subjected to such behaviour seeks compensation from the employer (Article 47 of the Employment Relationships Act) or where a person who has been subjected to certain measures (such as termination of the employment contract) as a result of sexual harassment seeks judicial protection.

13 Translation by authors.

perspective of clarity and predictability, is that it leaves unanswered the question of how to substantively fill the standard of 'general social standards' regarding a particular phenomenon.

Let us examine the positions formed on this issue abroad. For instance, in the 1980s, U.S. courts established the 'reasonable woman' standard to recognise a hostile environment created by sexual harassment.[14] This was based on data indicating that the majority of sexual harassment victims are women, with most perpetrators being men. Consequently, they considered the perspective of women relevant to recognising a hostile environment resulting from unwanted behaviours. This standard has been controversial since its inception. Among the arguments supporting the reasonable woman standard is the belief that men and women perceive interpersonal relationships or behaviours differently; men may see some behaviours as harmless or even complimentary, whereas women may view the same behaviours as offensive. Even minor intrusions into their sexual inviolability can cause fear that such behaviour will escalate to sexual assault. Opponents of the reasonable woman standard argue that the standard should be gender-neutral and based on a societal consensus regarding specific behaviours; hence, they advocate for the 'reasonable person' standard. Some feminists also oppose the reasonable woman standard because it implies that women are a homogeneous group and reinforces stereotypes about women being more sensitive and vulnerable, rather than promoting gender equality. They believe that this approach forces women to conform (Newman, 2007; Perry et al., 2004; Adler & Peirce, 1993; Cahn, 1992). Consequently, Hoffmann (2004) advocates for the 'reasonable victim' standard.

LIABILITY FOR SEXUAL HARASSMENT IN THE ACADEMIC ENVIRONMENT

For the purposes of this discussion, we define the academic environment as one consisting of employees and students in higher education institutions. We will explore various forms of responsibility for sexual harassment and other intrusions into sexual self-determination within the academic community. The emphasis will be on the premise that, according to criminal and labour legislation, subjective (culpable) responsibility of an individual is required. It would contravene fundamental legal principles to rely solely on objective responsibility, where an individual could be held accountable for the consequences of their actions without any proof of intent or were at least negligence in foreseeing those consequences. Therefore, the perpetrator's responsibility cannot be based solely on the victim's subjective perception that their sexual self-determination is being violated.

Criminal Liability

As already emphasised, criminal law adheres to the principle of legality, which mandates several conditions for criminal repression, including the prohibition of defining offences and penalties using vague, indeterminate, or unclear concepts, encapsulated in the Latin phrase: *lex certa*.[15] This principle is particularly important in relation to sexual offences, where descriptions often include acts not explicitly defined by the law, such as sexual intercourse, equivalent sexual acts, other sexual acts, and sexual harassment. The principle of *lex certa* does permit the use of indeterminate concepts in exceptional cases, but these must at least be determinable by established methods of interpretation. "The question is whether an average addressee of the norm can be expected to know what behaviour is expected of him"[16] (Constitutional Court of the Republic of Slovenia, 2021). This means that the judiciary must develop clear interpretations of these concepts.

The Criminal Code of Republic of Slovenia (hereinafter referred to as 'KZ-1'; Official Gazette of the Republic of Slovenia, No. 50/12 with amendments) enumerates several so-called sexual offences that constitute interference with the sexual self-determination of individuals. In this discussion, we will focus on those offences that are more likely to occur within an academic environment and outline their basic characteristics.

Liability for Offences Protecting the Sexual Self-determination of Employees and Students

The fundamental sexual offences are rape (Article 170 of KZ-1) and sexual violence (Article 171 of KZ-1). Traditionally, sexual criminal law has based these offences on coercion; the perpetrator has interfered with another person's sexual self-determination by using physical force or the threat thereof. This approach followed the so-called

14 In the US, sexual harassment is recognised in two forms: (1) *quid pro quo* sexual harassment in exchange for some benefit (in an academic setting, an example of *quid pro quo* sexual harassment is when a professor offers a student a higher grade on an exam in exchange for sexual intercourse); and (2) the creation of a hostile environment that prevents the victim from fully participating in work activities (in an academic setting, this would mean, for example, that a professor's repeated sending of sexually explicit messages reduces a student's ability to participate in her studies) (Klein & Martin, 2021).

15 Constitutional Court of the Republic of Slovenia, decision U-I-335/02 of 24 March 2005:
The principle of legality establishes several conditions for the application of criminal repression, namely:
– the prohibition of determining offences and penalties by means of statutes or customary law;
– the prohibition of analogy in determining the existence of offences and imposing penalties;
– The prohibition of defining offences and penalties in terms that are empty, indefinite or vague;
– Prohibition of retroactive application of provisions defining offences and penalties.

16 Translation by authors.

coercion model. Influenced by developments in some other countries and largely due to pressure from civil society,[17] both offences underwent significant changes in 2021 (KZ-1H; Official Gazette of the Republic of Slovenia, No 95/21). The coercion model was replaced by the consent model, where rape and sexual violence are now offences if the perpetrator acts without the victim's consent, with the use of force or threats no longer being essential elements. This model has been publicly termed "only yes means yes". Linking this to earlier discussion of the undesirability of actions, we can conclude that the absence of consent is synonymous with the undesirability of actions. All of the above dilemmas are exacerbated in criminal law, where meeting the substantive requirements of an offence results is punishment as an expression of state repression against an individual. Activist efforts to incorporate consent (the desirability of actions) into the legal definition of an offence have ignored fundamental questions crucial to the clarity of the description of the offence, such as: What constitutes consent? What kind of consent is legally valid? When is consent freely given? These questions must be addressed by legal theory and case law, which poses challenges for legal certainty. Case law on this matter remains scarce, and theoretical discussions are also limited (cf., for example, Korošec et al., 2023, 1018; Korošec, 2021a; 2021b).

While presenting the common characteristic of both offences, we emphasise the fundamental difference between them, which lies in the different acts constituting the offences. Rape, under Article 170 of KZ-1, requires sexual intercourse or equivalent sexual acts, whereas sexual violence under Article 171 of KZ-1 can be constituted by other sexual acts. Acts qualifying as rape are known to be sexual in nature, while what constitutes a sexual act under Article 171 of KZ-1 raises the question of when an act is of a sexual nature. This determination depends on the context, and it is crucial to consider the perspective of an objective observer, i.e. "an average member of the cultural circle in which the disputed behaviour occurs". These are acts that are objectively sexual in nature. The motive of the perpetrator is irrelevant.[18] Acts that are not objectively sexual (sexually neutral acts) do not become sexual even if the perpetrator has a subjective interest in sexual arousal or gratification. For example, physical contact during a common greeting (hug, kiss) is not considered a sexual act, regardless of the perpetrator's motive. In addition, criminal law theory holds that sexual acts require physicality; only acts involving the bodies of the perpetrator or the victim and involving touching are considered. Therefore, even highly obscene language, showing pornographic images or exposing one's naked body are not deemed sexual acts under Article 171 of the Criminal Code (Korošec et al., 2023, 1110–1112; Deisinger, 2002, 244).

If the perpetrator exploits their superior position to coerce a victim into consenting to sexual acts (as described under Articles 170 and 171 of KZ-1) and the victim is dependent on the perpetrator, i.e. the victim agrees to sexual intercourse or a sexual act out of fear of the consequences of refusal (Deisinger, 2002), a special offence is committed. This is classified as a violation of sexual integrity by abuse of position under Article 174 of KZ-1. In an academic context, this could manifest as a mentor demanding or proposing a sexual relationship with a young researcher, or a professor doing the same with a student. This includes relationships of superiority between employees in the academic environment as well as the relationship of superiority of employees over students. Imagining such a relationship of superiority between students, where one student is subordinate to another, or a student holds a superior position over an employee, might be challenging but it is not inconceivable. However, the mutual relationship between the perpetrator and the victim is a factual issue that needs to be determined in each specific case, taking into account all circumstances.

Liability for Offences Protecting the Sexual Self-determination of Employees (and not Students)

In 2008, Slovenia introduced a specific offence of workplace bullying into its Criminal Code as Article 197 of KZ-1. This provision encompasses various overt conducts, including psychological violence, bullying, unequal treatment, and notably, sexual harassment. These acts are designed so that the perpetrator must either humiliate or intimidate another employee. KZ-1 does not provide a definition of sexual harassment. Before 2008, the Criminal Code did not recognise this concept. Legal theorists in Slovenia, such as Korošec (2008, 356), had previously highlighted the need for case law to clarify what constitutes sexual harassment within criminal law. They also raised concerns about the broad and ambiguous nature of the term 'humiliation' in this context.

If a statutory element of a criminal offence is not defined in KZ-1 but in another regulation, the judiciary may use this definition to interpret the concept. In the case of sexual harassment as an act constituting the offence under Article 197 of KZ-1, the definition provided in Article 7 of the Employment Relationships Act (ZDR-1) may be used. However, this serves only as an aid in interpreting sexual harassment under Article 197 of KZ-1. The

17 The change of the definition of rape is the result of a civil initiative that started with a petition by the 8th of March Institute in January 2019 with more than 6,000 signatures.

18 The older theory of criminal law, now considered obsolete, required for these crimes that the perpetrator act to satisfy their sexual needs or arousal (Deisinger, 2002, 244). Today, however, the prevailing view is that the perpetrator's eventual awareness of the sexual nature of the act is sufficient, and the underlying motive may vary, for example, it may be hatred of the victim (Korošec et al., 2023, 1018). The perpetrator's perception of the sexual nature of the act is not sufficient.

principle of legality also mandates that criminal offences be clearly distinguished from one another (the principle of distinctness).[19] The problem arises here; sexual harassment must be differentiated from other sexual offences, and the definition in ZDR-1 does not aid in this distinction. This is particularly important because different sexual offences are subject to different penalties.[20]

Jurisprudence thus faces the difficult task of defining 'sexual harassment'. In the explanatory memorandum to the proposal for KZ-1, the Ministry of Justice, as the proposer of the law, took a seemingly clear position: "Sexual harassment is distinguished from rape, sexual violence, sexual abuse, and other sexual offences based on the lower intensity of the acts". Employing the method of exclusion, we arrive at the following conclusions: sexual harassment does not involve sexual intercourse or equivalent behaviour (as covered by Article 170 of KZ-1), nor does it include sexual acts involving physical contact (as covered by Article 171 of KZ-1). Therefore, under Article 197 of KZ-1, sexual harassment encompasses the following sexual behaviours (Filipčič & Tičar 2023):

- Non-contact physical acts that do not require contact between the perpetrator and the victim, involving manipulation of the body (e.g., masturbating or undressing in front of another person or forcing the victim to do so in front of the perpetrator, and miming a kiss).
- Non-contact acts that are not physical (e.g., soliciting sexual relations, sending electronic messages with sexual content, describing dreams with sexual content, using obscene language, telling jokes with sexual content, and displaying pornographic images).
- Contact acts that do not reach the intensity of interference required to impact sexual self-determination as defined in offences against sexual integrity.

We revisit the aforementioned position on what constitutes sexual behaviour. This question can be particularly challenging, especially in cases involving less serious violations of sexual integrity.

From the perspective of sexual harassment in an academic environment, it is important to emphasise that this offence aims to protect dignity at work by safeguarding employees from inappropriate behaviour by their colleagues. Here, 'employees' are defined as those who are bound by an employment contract, excluding those who work under other types of contracts, such as copyright contracts, contracts for services, or student work contracts (Filipčič & Tičar, 2023). To comply with the principle of legality, it is not permissible to extend the definition of perpetrator and victim to these groups, and certainly not to students involved in, but not employed by, the academic environment. This would be contrary to the principle of legality and therefore a violation of the Constitution. For example, if a professor undresses in front of their assistant (employed by the faculty), they have committed an offence under Article 197 of KZ-1. If they do so in front of a student, they do not commit this or any other sexual offence, because the act does not sufficiently violate sexual self-determination.

Liability under Labour Law

The explicit prohibition of sexual, other forms of harassment, and bullying in the workplace was introduced into Slovenian legislation in 2007 through Article 7 of ZDR-1,[21] and this provision remains unchanged to this day. It is also important to mention that the law considers sexual harassment as a form of discrimination.[22]

The legal definition of sexual harassment as outlined in the ZDR-1 was previously discussed. Although a linguistic interpretation of the provision suggests that only employees are protected from sexual harassment, aimed primarily at safeguarding dignity at work, the European Committee of Social Rights advocates for a broader understanding. According to their interpretation, protected persons should also include those individuals working under different legal arrangements with the employer, such as copyright contracts or student work contracts, as well as clients and visitors, if they are harassed by an employee (Council of Europe, 2008, 157). Given that the principle of legality in labour law is not as strictly understood as in criminal law, such an interpretation is permissible. In an academic context, the prohibition of sexual harassment under the ZDR-1 should therefore be understood to extend not only to university employees harassed by colleagues but also as to all those engaged with higher education institutions on various legal bases, including students, provided the harassment originates from an employee.

19 Judgement of the Slovenian Constitutional Court U-I-88/07 of 8 January 2009: "*If, in addition to a legal rule which otherwise has a clear and definite content, there is another legal rule in the legal system which has the same or very similar content, the definiteness of both the legal rule and the other legal rule is lost. The existence of two such legal rules leads to confusion as to which legal rule is to be applied. [...] The principle of certainty, therefore, requires that rules of law be mutually separable. To do otherwise would create legal uncertainty and allow arbitrary or capricious application of the law*" (Translated by authors).

20 The offence of rape under Article 170 of the Criminal Code is punishable by imprisonment from six months to 15 years, the offence of sexual violence under Article 171 is punishable by imprisonment from 30 days to 15 years, and the offence of workplace bullying under Article 197 is punishable by imprisonment from 30 days to three years (depending on the form of the offence).

21 Act amending and supplementing the Employment Relationships Act (ZDR-A), Official Gazette, No. 103/07.

22 The European Committee of Social Rights has not yet adopted a definitive interpretative principle on whether all sexual harassment can in fact be considered discrimination (Končar, 2017a).

The next section will examine how labour law holds employers and employees responsible for sexual harassment. Particular attention will be paid to the aspect of the definition of sexual harassment that describes it as conduct "with the effect or intent of harming the dignity of a person." We will explore the implications of responsibility when the perpetrator may not intend to harm the dignity of a person—possibly due to unawareness that the conduct is undesirable—yet still achieves such an effect.

Employer Responsibility

The responsibility of the employer for protecting employees against sexual harassment is addressed in Article 47 of ZDR-1:

> *The employer shall be obliged to create a working environment in which no worker is subjected to sexual or other forms of harassment or bullying by the employer, superiors, or colleagues. To fulfil this obligation, the employer must implement appropriate measures to protect workers from sexual and other harassment or bullying in the workplace.*[23]

The adoption of appropriate measures to protect workers from sexual harassment is considered "a central element of the employer's duty" (Končar, 2017b). The specific nature of these measures is not defined by the law, thus leaving their content at the discretion of the employer. According to Končar (2017b), these measures should be both preventive and responsive in cases where sexual harassment has already occurred. If sexual harassment does occur, it signifies that the employer has failed to provide a safe working environment, and the victim may claim damages from the employer in court. In disputes over the payment of damages, the decision does not concern the perpetrator's liability for damages, but rather the employer's liability for damages. Therefore, it is irrelevant whether the perpetrator was aware of the unlawfulness of their actions or the nature of the fault with which they acted (whether the act was intentional or not) (Vukovič, 2020). In the European continental context, the primary purpose of compensation under non-contractual liability law is to reimburse the damage incurred, aiming to satisfy or compensate the injured party (Mežnar, 2010). In contrast, American law extends the purpose of compensation to include punishing the perpetrator, reflected in substantial punitive damages. In the continental systems, punishment is relegated to criminal law, strictly adhering to the principle of legality. The accused is afforded numerous rights throughout the process, which serve to protect their position (Možina, 2016). ZDR-1 adopts a different concept of compensation in cases of sexual harassment as a form of discrimination. The law stipulates that compensation should be awarded in such a way as to deter the employer from committing further violations (Article 8 (1) of ZDR-1). This provision aims to deter the specific employer from future violations and to exert a general preventive effect, encouraging all employers to respect their obligations under ZDR-1.

Liability of the Employee Who Commits Sexual Harassment

In accordance with relevant labour legislation, employees who engage in sexual harassment may face various disciplinary measures, the most severe of which is the termination of the employment contract. In instances where the employer determines that cooperation with the employee is still possible despite the harassment, they may impose a disciplinary sanction.

- Termination of an employment contract

An employee who commits sexual harassment violates their employment obligations, as set out in Article 8 of ZDR-1, which explicitly prohibits such conduct. This can be grounds for an employer to terminate the employment contract (if other legal conditions are met). The termination can be either ordinary or extraordinary. The main difference is that ordinary termination requires adherence to a notice period, whereas extraordinary termination allows for immediate dismissal. This section elaborates on the legal justifications for terminating an employment contract in cases of sexual harassment.

1). Termination of Employment Contract if Sexual Harassment Meets All Statutory Elements of a Criminal Offence (Article 110 (1) (1) of ZDR-1 for Extraordinary Termination and Article 89 (1) (3) of ZDR-1 for Ordinary Termination).

Terminating a contract on the grounds set out above requires the employer to establish, through an internal procedure, the existence of one of the criminal offences discussed previously. This is task is challenging for the employer,[24] as it involves determining the perpetrator's subjective relationship, i.e., the form of culpability in the criminal sense, given that the Criminal Code (KZ-1) requires intent for all sexual offences (including sexual harassment under the criminal offence of workplace bullying under Article 197 of KZ-1).

If a criminal proceeding has been conducted and results in a conviction for the employee, the employer may terminate the employment contract based on the

23 Translation by authors.

24 The interplay between labour and criminal law is recognised by the academics as problematic, particularly in the case of sexual harassment. Consequently, it is proposed that this ground for extraordinary termination of the employment contract be removed from ZDR-1 (Janko, 2010; Filipčič, 2021).

provisions of ZDR-1. In such instances, there is no need for the employer to independently establish the harassment through an internal procedure.

2). Extraordinary termination of the employment contract if the employee intentionally or with gross negligence seriously violates contractual or other obligations from the employment relationship (Article 110 (1) (2) of ZDR-1) or ordinary termination for breach of obligations from the employment relationship (Article 89 (1) (3) of ZDR-1).

Unlike the aforementioned reason for terminating the employment contract, the employer does not need to determine in an internal procedure that the sexual harassment constitutes a criminal offence. Instead, the employer must establish that the sexual harassment, as defined in ZDR-1, constitutes a serious violation of the employee's obligations, rendering further cooperation impossible. Additionally, the employer must ascertain the subjective relationship of the perpetrator to the act, specifically whether it involves intent or gross negligence. As previously stated, intent must be established for sexual harassment as a criminal offence. However, gross negligence, judged against the standard of an ordinarily careful worker, is sufficient in this context.[25] Thus, the subjective relationship to sexual harassment is broader and, from a liability perspective, constitutes stricter liability compared to liability for sexual harassment as a criminal offence, since gross negligence suffices. It is more common for employers to terminate the employment contract in cases of criminal offences, despite the longer internal procedures required. This is because ZDR-1 prescribes significantly longer deadlines for termination in such cases.

Returning to the definition of sexual harassment as conduct "with the effect or intent of harming the dignity of a person", we find that the perpetrator's liability can be established by demonstrating gross negligence regarding the impact of their actions. The manner in which this is understood in cases of sexual harassment, particularly concerning the requirement that such actions be undesirable, is not evident from available court decisions, as the courts have not directly addressed this issue.[26]

- **Disciplinary Liability**

It is not always the case that sexual harassment constitutes a serious violation of work obligations, thus justifying the termination of an employment contract. A spectrum of behaviours, representing varying degrees of intrusion on sexual self-determination, can be observed. Consequently, in certain instances, it may be sufficient for the perpetrator of sexual harassment to be held accountable in accordance with Article 172 of ZDR-1.

ZDR-1 prescribes only a warning as a disciplinary sanction. Other sanctions, such as a monetary fine or withdrawal of benefits, are presented merely as examples and are contingent upon their inclusion in a collective agreement at the industry level. In the context of higher education, the relevant collective agreement is the Collective Agreement for the Education Sector of the Republic of Slovenia (Official Gazette of the RS, No. 52/94 with amendments), which does not specify disciplinary sanctions. Consequently, employees at higher education institutions who engage in sexual harassment may only be subject to a warning.

The legislation does not stipulate that the employee's culpability is a prerequisite for disciplinary responsibility. However, it can be deduced from the general principles of law that disciplinary responsibility can only be based on culpability. For an employee to be held responsible, there must be a culpable relationship between the employee and the conduct in question, as well as its consequences. This raises a challenging question regarding the subjective relationship between the perpetrator and the victim's perception of the undesirability of their actions, taking into account the aforementioned difficulties.

THE ROLE OF INTERNAL REGULATIONS

Institutions implement a range of internal policies and procedures pertaining to sexual harassment, including ethical codes, guidelines, protocols, and regulations. The inclusion of sexual harassment in internal acts indicates that the institution recognises the significance and potential harm of normalising such behaviour. It aims to highlight its unacceptability and obligates those responsible to address and sanction offenders through more detailed commitments, both ethical and legal. Analyses have demonstrated that the implementation of anti-sexual harassment policies—measures for prevention and handling—is associated with a reduction in sexual harassment (Mani, 2004).

The following section will focus on regulations as internal legal acts. Internal regulations must comply with statutory provisions. They cannot deviate from statutory obligations, nor can they infringe upon the statutory rights of the employees. In the context of handling sexual harassment, this implies that such regulations cannot set longer deadlines for the termination of employment contracts or the imposition of disciplinary sanctions than those set forth in ZDR-1. Furthermore, they cannot stipulate that instances of sexual harassment meeting the

25 In the Judgment of the Higher Labour and Social Court Pdp 998/2004 of 1 December 2005, it was determined that: "*The legal definition of 'gross negligence' is not explicitly delineated in the relevant legislation. However, the case law has established that gross negligence occurs when a person fails to act with the same degree of care as an ordinary person*" (Translation by authors).

26 It is only in the event that the dismissed worker seeks judicial redress that the courts will review the appropriateness of the termination of the employment contract. To conduct our analysis, we consulted publicly available court decisions on the website www.sodnapraksa.si.

criteria for criminal offences should not be reported to the police, even if the victim objects.[27] With regard to the legal consequences for offenders, such as termination of employment contracts and disciplinary sanctions, higher education institutions are bound by statutory provisions. Should they stipulate disciplinary sanctions in internal regulations, they are obliged to adhere to the regulations pertaining to disciplinary responsibility, including the stipulation of culpable responsibility for sexual harassment. Here, the subjective experience of undesirability is of limited relevance, as previously outlined. This does not imply that institutions are unable to implement measures that are not sanctions but which significantly contribute to the prevention of sexual harassment or the protection of victims. Such could include changing a student's mentorship, rearranging the timetable, or relocating the perpetrator to another office. Furthermore, institutions may define a more detailed procedure for handling sexual harassment cases in their internal acts, as the relevant legislation does not currently specify this. Establishing clear procedural rules facilitates the decision of victims to report, particularly if the procedure is designed to minimise the risk of secondary victimisation.

In our study on sexual harassment in the Slovenian academic environment,[28] we analysed regulations addressing sexual harassment at five public and six private higher education institutions. The analysis highlighted that nine out of 11 higher education institutions have specific regulations to protect against various forms of harassment, yet these protections extend only to employees and not students. This oversight is clearly inadequate. A significant development occurred in 2022 with the amendment of the Higher Education Act (ZVIZ), which added Article 7b titled "Prohibition of Sexual and Other Harassment and Bullying in the Study Environment." This article represents a novel development in Slovenian legislation by enshrining students' right to a safe study environment. It defines sexual harassment in accordance with the definition set out in Article 7 of ZDR-1. The Minister responsible for higher education is required to adopt a regulation that defines the procedure for handling sexual harassment and other forms of harassment and bullying. The legislative framework for protecting students from sexual harassment in the academic environment is therefore inadequate. Furthermore, it is inappropriate for the regulation of this area to be contingent on the policies of individual institutions. The Minister will adopt a regulation based on the aforementioned provision of ZVis, which will apply to all higher education institutions. Although this regulation has not yet been adopted, its content will be crucial in determining whether it comprehensively addresses all significant issues or leaves some aspects to be regulated internally. The legislative changes represent a significant shift in the legal protection of students from sexual harassment in the academic environment, regardless of the scope of the forthcoming regulation.

CONCLUSION

The analysis of sexual harassment regulation reveals that it is addressed not only by legal instruments, but also by non-legally binding documents such as ethical codes, recommendations, and guidelines. The initial definitions of sexual harassment were established within these non-binding documents, which subsequently influenced the formulation of legal statutes. While it is acceptable to define sexual harassment in a conceptually open manner within non-binding documents, this approach is unsuitable for legal regulations that determine legal consequences for offenders.

The review of legal definitions of sexual harassment in Slovenian legislation reveals the problematic nature of the criterion "(un)desirability of behaviour". It is universally acknowledged that behaviours repeatedly perceived as undesirable by the victim constitute sexual harassment. However, defining initial behaviours that may straddle the boundary between desirability and undesirability presents challenges. Furthermore, their acceptability should not rely solely on subjective criteria. Implementing legal regulations based on such a criterion of prohibited behaviour could potentially breach the principle of legal certainty, which underpins the rule of law.

A review of the internal regulations at Slovenian higher education and research institutions revealed that most do not have specific regulations to protect students from various forms of harassment. Instead, they focus on safeguarding the dignity of employees. A significant shift occurred in 2022 with the amendment of the Higher Education Act (ZVIZ), which added Article 7b. This article stipulates students' right to a safe study environment. This represents a significant shift in the legal protection of students from sexual harassment within the academic environment. It is the responsibility of the Minister for Higher Education to adopt a regulation defining the procedure for handling sexual harassment and other forms of harassment and bullying. This regulation will address the legislative voids in student protection within the academic environment and ensure their equal protection across all higher education institutions.

27 Article 281 of KZ-1 makes failure to report a criminal offence a specific offence; officials must report criminal offences punishable by imprisonment for three years or more.

28 The research project "Institutional, legislative and awareness-raising solutions and activities to address sexual harassment and other forms of sexual violence in higher education and research organisations in Slovenia" was led by the Faculty of Arts in the period 2021–2023. The other participating organisations were: The Institute of Criminology at the Faculty of Law in Ljubljana, the Faculty of Arts at the University of Maribor and the Koper Science and Research Centre.

REGULACIJA SPOLNEGA NADLEGOVANJA V AKADEMSKEM OKOLJU – MED PRAVNIMI PREDPISI IN ETIČNIMI KODEKSI

Katja FILIPČIČ
Univerza v Ljubljani, Pravna fakulteta in Inštitut za kriminologijo pri Pravni fakulteti v Ljubljani, Poljanski nasip 2, 1000 Ljubljana, Slovenija
e-mail: katja.filipcic@pf.uni-lj.si

Manja SKOČIR
Inštitut za kriminologijo pri Pravni fakulteti v Ljubljani in Univerza v Ljubljani, Pravna fakulteta, Poljanski nasip 2, 1000 Ljubljana, Slovenija
e-mail: manja.skocir@inst-krim.si

POVZETEK

Članek analizira regulacijo spolnega nadlegovanja – kot oblike nezaželenega, vendar manj invazivnega spolnega vedenja (v primerjavi s posilstvom in spolnim nasiljem kot težjim posegom v spolno samoodločbo), hkrati pa kot težje oblike diskriminacije na podlagi spola – v akademskem okolju. Poudari, da se spolno nadlegovanje ne naslavlja zgolj s pravnimi predpisi, ampak tudi z etičnimi kodeksi. Prikaže, da je spolno nadlegovanje priznano kot kršitev etičnih norm in javne etike v kodeksih številnih stanovskih združenj, obenem pa je tudi pravno regulirano – tako z zakonskimi in podzakonskimi predpisi kot z drugimi splošnimi akti. Članek obravnava razlike med regulacijo z etičnimi kodeksi in pravnimi predpisi (ki so oprte na razlikovanje med moralo in pravom), ter opozarja na izzive opredelitve spolnega nadlegovanja iz perspektive temeljnih načel kazenskega prava. Članek obenem raziskuje različne oblike odgovornosti, ki so relevantne za člane akademske skupnosti. S sklepno obravnavo vloge internih pravilnikov ponudi vpogled v njihovo strukturo in regulacijo spolnega nadlegovanja v slovenskih visokošolskih organizacijah.

Ključne besede: spolno nadlegovanje, etični kodeksi, akademsko okolje, kazenska odgovornost, odgovornost po delovnem pravu, disciplinska odgovornost, interni pravilniki

SOURCES AND BIBLIOGRAPHY

Adler, Robert S. & Ellen R. Peirce (1993): The Legal, Ethical, and Social Implications of the "Reasonable Woman" Standard in Sexual Harassment Cases. Fordham Law Review, 61, 4, 773–827.

Ambrož, Matjaž (2007): Kaznivo dejanje in njegove vrednostne prvine. Ljubljana, Inštitut za kriminologijo pri Pravni fakulteti v Ljubljani.

Bavcon, Ljubo, Šelih, Alenka, Korošec, Damjan, Ambrož Matjaž & Katja Filipčič (2020): Kazensko pravo, splošni del, 6. izdaja. Ljubljana, Uradni list Republike Slovenije.

Brumec, Martin (2010): Etični kodeksi in pravo. Dialogi, 46, 1/2, 130–145.

Cahn, Naomi R. (1992): Looseness of Legal Language: The Reasonable Woman Standard in Theory and in Practice. Cornell Law Review, 77, 6, 1398–1446.

Cantor, David, Fisher, Bonnie, Chinbnall, Susan & Townsen Reanne (2015): Report on the AAU Campus Climate Survey on Sexual Assault and Sexual Misconduct. Philadelphia, University of Pennsylvania.

Cerar, Miro (2001): (I)racionalnost modernega prava. Ljubljana, Bonex.

Constitutional Court of the Republic of Slovenia (2021): Decision U-I-491/18-28 of 6 May 20021. https://pisrs.si/pregledPredpisa?id=ODLU1906 (last access: 2024-07-08).

Council of Europe (2008): Digest of the Case Law of the European Committee of Social Rights. https://www.refworld.org/jurisprudence/caselawcomp/coeecsr/2008/en/68165 (last access: 2023-12-22).

Crosthwaite, Jan & Graham Priest (2006): The Definition of Sexual Harassment. Australasian Journal of Philosophy, 74, 1, 66–82.

Deisinger, Mitja (2002): Kazenski zakonik s komentarjem, posebni del. Ljubljana, GV Založba.

Filipčič, Katja (2021): Pomen znakov kaznivega dejanja pri izredni odpovedi pogodbe o zaposlitvi. Delavci in delodajalci – revija za delovno pravo in pravo socialne varnosti, 21, 1, 31–48.

Filipčič, Katja & Luka Tičar (2023): Šikaniranje na delovnem mestu: 197. člen. In: Korošec, Damjan, Filipčič, Katja & Helena Devetak (eds.): Veliki znanstveni komentar posebnega dela Kazenskega zakonika (KZ-1), posodobljena izdaja, 2. knjiga. Ljubljana, Uradni list Republike Slovenije in Pravna fakulteta Univerze v Ljubljani, 415–428.

Fuller, Lon L. (2015): Moralnost prava. Ljubljana, GV Založba.

Hart, Herbert L. A. (2018): Dve razpravi o pravu in morali. Ljubljana, GV Založba.

Hoffmann, Elizabeth A. (2004): Women Treated Differently: Why the "Reasonable Woman" Standard Might Not Be Reasonable. Equal Opportunities International, 23, 3/4/5, 67–79.

Jager, Vasja (**2018):** Jasna Podreka, sociologinja, ki daje glas ženskam, ki so molčale – intervju. Mladina. https://www.mladina.si/184414/dr-jasna-podreka-sociologinja-ki-daje-glas-zenskam-ki-so-molcale/ (last access: 2023-12-20).

Janko, Marija (2010): Kršitev obveznosti iz delovnega razmerja z znaki kaznivega dejanja. Podjetje in delo, 36, 5, 879–891.

Kanduč, Zoran (1998): Delovno mesto, seks, nadlegovanje. In: Spolno nadlegovanje. Ljubljana, Pravno-informacijski center nevladnih organizacij, 14–24.

Kelsky, Karen (2017): A Crowdsourced Survey of Sexual Harassment in the Academy. https://theprofessorisin.com/2017/12/01/a-crowdsourced-survey-of-sexual-harassment-in-theacademy/ (last access: 2023-12-20).

Klein, L. B. & Sandra L. Martin (2021): Sexual Harassment of College and University Students: A Systematic Review. Trauma, Violence, & Abuse, 22, 4, 777–792.

Kokalj Kampuš, Jasna (2015): Vloga civilne družbe pri varstvu človekovih pravic v Sloveniji in tujini. Diplomsko delo. Ljubljana, Fakulteta za upravo Univerze v Ljubljani.

Končar, Polonca (2017a): Komentar 7. člena ZDR-1. In: Delovna razmerja z e-komentarjem ZDR-1, sproti ažurirana Zakon o delovnih razmerjih ZDR-1 in njegov komentar v e-obliki. Ljubljana, Tax-Fin-Lex. https://www.tax-fin-lex.si/Dokument/Podrobnosti?rootEntityId=3ADBD57F-633F-4881-871D-A97DB13C4766&createDate=01%2F01%2F1900%2000%3A00%3A00&activeDate=09%2F01%2F2015%2000%3A00%3A00 (last access: 2023-12-20).

Končar, Polonca (2017b): Komentar 47. člena ZDR-1. In: Delovna razmerja z e-komentarjem ZDR-1, sproti ažurirana Zakon o delovnih razmerjih ZDR-1 in njegov komentar v e-obliki. Ljubljana, Tax-Fin-Lex. https://www.tax-fin-lex.si/Dokument/Podrobnosti?rootEntityId=2DB8C808-8645-49E0-943E-5B3B1705E62F&createDate=01%2F01%2F1900%2000%3A00%3A00&activeDate=09%2F01%2F2015%2000%3A00%3A00 (last access: 2023-12-20).

Korošec, Damjan (2008): Spolnost in kazensko pravo – od prazgodovine do t. i. modernega spolnega kazenskega prava. Ljubljana, Založba Uradni list Republike Slovenije.

Korošec Damjan (2021a): O potrebi po ogromnih reformah slovenskega spolnega kazenskega prava. Pravna praksa, 40, 12, ii–vii.

Korošec, Damjan (2021b): Fascinacija poseganja v spolno kazensko pravo. Pravna praksa, 40, 10, 3.

Korošec, Damjan, Novak, Barbara & Sabina Zgaga Markelj (2023): Posilstvo: 170. člen. In: Korošec, Damjan, Filipčič, Katja & Helena Devetak (eds.): Veliki znanstveni komentar posebnega dela Kazenskega zakonika (KZ-1), posodobljena izdaja, Vol. 1. Ljubljana, Uradni list Republike Slovenije, Pravna fakulteta Univerze v Ljubljani, 1047–1173.

Mani, Bonniee G. (2004): The Employer's Advantage in Sexual Harassment Cases: How the Courts Have Discouraged the Victims of Sexual Harassment. Review of Public Personnel Administration, 24, 1, 41–69.

Mežnar, Špelca (2010): Odškodnina v primeru kršitve prepovedi diskriminacije in mobinga. Delavci in delodajalci, 10, 2/3, 439–458.

Možina, Damjan (2016): Povrnitev škode zaradi diskriminacije in trpinčenja na delovnem mestu: nekaj misli ob 8. členu ZDR-1. In: Žnidaršič Skubic, Viktorija (ed.): Izbrani vidiki ustavnega, civilnega in gospodarskega prava: *Liber amicorum* Lojze Ude. Ljubljana, Pravna fakulteta, Inštitut za primerjalno pravo, 371–389.

Newman, Nicole (2007): The Reasonable Woman: Has She Made a Difference?. Boston College Third World Law Journal, 27, 2, 529–556.

Novak, Aleš (2001): Deontološki kodeksi pravniških poklicev – med moralo in pravom. Podjetje in delo, 6, 7, 1081–1090.

Novak, Aleš (2008): Pravo v iskanju morale. Dialogi, 1/2, 44–63.

Pavčnik, Marijan (2013): Teorija prava – prispevek k razumevanju prava, 4. pregledana in dopolnjena izdaja. Ljubljana, GV Založba.

Perry, Elissa L., Kulik, Carol T. & Anne C. Bourhis (2004): The Reasonable Woman Standard: Effects on Sexual Harassment Court Decisions. Law and Human Behavior, 28, 1, 9–27.

Pribac, Igor (2012): Javna etika. In: Kečanović, Bećir (ed.): Javna etika in integriteta – odgovornost za skupne vrednote: integriteta, odgovornost, vladavina prava, Ljubljana, Komisija za preprečevanje korupcije, 141–150.

Robnik, Sonja (2007): Spolno nadlegovanje na delovnem mestu – (so)odgovornost delodajalcev. Delo in varnost, 52, 1, 1–18.

Senčar Mrdaković, Marko, Zupanc, Simona & Kristina Rakinić (2019): Introduction. In: Perne, Tim Rihard, Senčar Mrdakovič, Marko & Simona Zupanc (eds.): Ideje, ideologije, ideali: aktivizem in nosilci alternativnih družbenih gibanj v Sloveniji – raziskovalni projekt skupine študentov Etnologije in kulturne antropologije in Psihologije Filozofske fakultete v Ljubljani. Piran, Založba KUD ESKO.

Študentska organizacija Filozofske fakultete UL (2024): Stop spolnemu nasilju. https://www.facebook.com/photo/?fbid=3278063232307370&set=a.732929846820734 (last access: 2024-01-05).

Tenbrunsel, Ann E., McKenzie, Rees R. & Kristina A. Diekmann (2019): Sexual Harassment in Academia: Ethical Climates and Bounded Ethicality. The Annual Reviews of Psychology, 4, 70, 245–270.

Vukovič, Borut (2020): Novejša sodna praksa VSRS glede trpinčenja na delovnem mestu. Delavci in delodajalci, 20, 2/3, 383–394.

Zaviršek, Darja (1998): Kompliment kot Hate Speech: Nekatere dileme ob vprašanju spolnega nadlegovanja na delovnem mestu. In: Spolno nadlegovanje. Ljubljana, Pravno-informacijski center nevladnih organizacij, 31–38.