Issues on Verbal Sexual Harassment

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Introduction and Overview

The Prevention of Sexual Harassment Law, which was enacted in 1998, sought to revolutionize Israeli awareness and legal attitudes on this issue. The Law places several conducts under the rubric of "sexual harassment"; some of them were already defined as criminal or disciplinary offenses prior to the legislation (for example, indecent acts or blackmail by way of threats where the act demanded to be performed is of a sexual nature), while others were never addressed by any set of statutes, much less by criminal law (verbal sexual harassment). All of the conducts enumerated in the Law constitute civil wrongs and criminal offenses carrying penalties of imprisonment. Hence, the Law's novelty lies in prohibiting verbal behaviors of a sexual nature, and in conjoining this element with the existing group of sexual offenses, within a new conceptual framework.

The impact of the Law is plain to see. The concept of sexual harassment has become well known, and the need to address it is recognized by both the public and law enforcement authorities. Nonetheless, an examination of the cases of sexual harassment is startling: While the prohibitions against conducts that have always been considered criminal are more strictly enforced, the new prohibitions against verbal harassment are almost never applied, certainly not when they stand alone (as opposed to being enforced in conjunction with the traditional prohibitions). In only a scant number of cases, for

* Translated by Karen Gold

example, have indictments been issued solely for repeated comments of a sexual nature.

The purpose of the present collection of articles is to generate discussion of the new criminal prohibitions against verbal sexual harassment. It should be emphasized that our discussion addresses only instances of verbal (as opposed to physical) harassment and criminal (rather than civil) prohibitions. The question at the heart of this work is: Are we speaking of justified prohibitions that are not enforced solely due to the conservatism of the legal system, or does the lack of enforcement stem from the absence of sufficient legal justification for these prohibitions – and it is this absence that causes these laws to be a "dead letter"? If the prohibitions are justified, we would gain by enforcing them. But if they are not justified, it would be to our benefit to annul them, for there is no room for empty prohibitions in a democratic state.

I have already expressed my position on these questions in an article co-authored with Mordechai Kremnitzer, which appears in full in this volume. Although my views remain unchanged, the objective here is not to persuade but to provide a platform for constructive discussion and to assist the reader in formulating a position. Accordingly, I have endeavored to the best of my ability to assemble a balanced collection that presents a variety of positions and highlights the many facets of this complex issue.

For purposes of our discussion, I have chosen to begin with an overview of sexual harassment and of Israel's Prevention of Sexual Harassment Law and its underlying theory, and to gradually narrow the focus and sharpen the resolution, so to speak.

In the first section of the book, we attempt to identify and describe the phenomenon of sexual harassment (primarily verbal) as experienced by its victims; to assess its scope; and to engage in a preliminary classification. Orna Pitussi aptly describes a case of verbal harassment

that she experienced and the severe emotional harm that it caused. Orna Sasson-Levy analyzes cases of sexual harassment in the Israel Defense Forces, and explains how each of these establishes a gender hierarchy in the military system. In addition, she presents and assesses the reactions of those who experienced the harassment, which range from trivialization to ambivalence; in general, there is a lack of acknowledgment of the sexual harassment, which would entail adopting the status of victim – a status liable to hinder the victim's ability to "fit in" in the army in the short term. In the long term, however, Sasson-Levy believes that this response on the part of those subject to harassment allows the incidents to continue in the army setting.

The article by Dafna Hacker, which was presented to the Knesset when the Prevention of Sexual Harassment Law was drafted, assembles statistics on sexual harassment in several countries. These figures indicate that the rate of occurrence differs from place to place, and is dependent on existing attitudes regarding the types of behavior that constitute sexual harassment. Thus, for example, only ten percent of men and women in France reported being sexually harassed, compared with eighty-four percent of working women in Spain. In all of the countries surveyed, the harasser is generally a man, who often (though not always) has greater power than the party being harassed. For the most part, the person suffering the harassment is a woman, generally young and not married. The consequences of the harassment are emotional distress (which is liable to be accompanied by physical symptoms); impaired functioning at work (to the point of leaving the workplace); financial damage; and perpetuation of women's inferior status in society. This article served to clarify the notion of sexual harassment when it was still unfamiliar in Israel.

Inna Levy, Sarah Ben-David, and Sarit Amram-Katz shed light on the frequency of sexual harassment in the army. It emerges that eighty

percent of female soldiers are exposed to sexual harassment over the course of their army service, but many of them do not identify it as such. Only one fifth of the women soldiers who reported being sexually harassed approached a formal body as a result of the harassment.

After describing the phenomenon and assessing its scale, we move on to conceptualizing it. Catharine MacKinnon proposes dividing sexual harassment into two categories: In the first group is *quid pro quo* harassment – placing the victim in a position in which she must choose between cooperating sexually and a penalty of some sort in the workplace (i.e., being fired or receiving a poor assessment), or alternatively, sexual cooperation in exchange for a promotion, a favorable report, etc. The second group of "hostile environment" harassment consists of behaviors that make the work environment intolerable, such as sexually suggestive glances, crude remarks, and unwanted physical contact. Those exposed to the second type of harassment are primarily women who fill traditional feminine roles as service providers (for example, preparing coffee or doing laundry) and are consequently perceived as offering services in all areas, including the sexual. The subjects of this harassment are expected to "play the game" and maintain an appearance of responsiveness and openness.

Orit Kamir proposes several distinctions that she considers useful in differentiating between various forms of sexual harassment; at the same time, she criticizes other distinctions that have been proposed in the professional literature and in case law. The key differences posited by Kamir are between sexual harassment that is prohibited under the Prevention of Sexual Harassment Law and harassing behaviors that are not prohibited; between "random harassment" (that takes place between persons who meet by chance) and "entrapping harassment" (that takes place between persons in an ongoing relationship); and between "grounding harassment" (intended to force women in traditionally female occupations to provide sexual services) and "exclusionary

harassment" (that keeps women out of traditionally male occupations). Among the distinctions that Kamir criticizes are the ones between the *quid pro quo* and "hostile environment" types of harassment, and between verbal and physical harassment.

In the second section, we turn to a more comprehensive legal-theoretical discussion of sexual harassment and the prohibition against it. It is not possible to discuss the prohibitions against verbal sexual harassment without understanding the theoretical basis of the prohibition against all forms of sexual harassment. Accordingly, in this section we offer a theory that conceptualizes and elucidates the phenomenon of sexual harassment as a whole.

The legal-theoretical foundation of the laws for the prevention of sexual harassment originated in the United States. Catharine MacKinnon was the first to propose a legal analysis of sexual harassment. As posited by her, sexual harassment is discrimination in employment (which is prohibited in the U.S. under Title VII of the Civil Rights Act of 1964). Harassment committed by an individual who is not the employee's superior is also considered discrimination, and the workplace is considered responsible. MacKinnon also explores the relationship between the concept of equality and her proposed analysis of sexual harassment as well as the connection between such harassment and the inferior economic and social status of women. Further, she comes out strongly against approaches that treat sexual offenses as "regular" violent crimes, thereby ignoring their sexual aspect. In so doing, she suggests, they negate the possibility of viewing sexual offenses as a form of discrimination on the basis of sex.

Orit Kamir presents, and then critiques, American legal theory and practice in the area of sexual harassment. She opens with the theory proposed by Catharine MacKinnon and moves on to a detailed discussion of American jurisprudence, which has incorporated some

of the concepts proposed by MacKinnon and added others of its own. In Kamir's view, the conceptual analysis of sexual harassment, and the American rulings derived from it, are clearly the product of specific American philosophical and legal contexts. They do not fit the Israeli situation, and even in the U.S. they have led, in her opinion, to undesirable results. Kamir's article posits an alternative theoretical and legal foundation that served as the basis for the Prevention of Sexual Harassment Law as it was ultimately enacted in 1998. Her approach rests on the concepts of "human dignity" and "human liberty" – two central values in the cultural and legal ethos of Israel. She seeks to ban sexual harassment in every sphere of life, proposing that this be accomplished through a variety of legal means: criminal law, civil law, and labor law.

The third section of the book focuses on Israel's Prevention of Sexual Harassment Law and the theoretical discussion that evolved in its wake. The first two articles in this section, also written by Orit Kamir, deal with the details of the Law: The first of these is devoted to presenting its objectives, the conducts that it prohibits, and the prosecutorial options that it provides. The second piece is an assessment of the situation ten years after the Law's enactment. Kamir catalogues its achievements: contribution to a change in consciousness regarding relations between the sexes; education of the public in the implications and damages of sexual harassment; espousal of the Law by female and male complainants; acceptance by the legal system; and deterrent effect on potential harassers. Similarly, she enumerates those objectives and instruments of the Law whose success is "partial or unclear," including the limited use of the compensation mechanisms offered by the Law; the deficient treatment of complex labor relations; the infrequent linkage between sexual harassment and various aspects of the right to human dignity; and the absence of the concept of human dignity in the

screening of complaints and litigation. In conclusion, Kamir relates to the goals that have not yet been achieved and the instruments that have proved to be unsuccessful, among them over-use by complainants of criminal proceedings, and the rejection by law enforcement authorities of the new prohibitions against verbal harassment.

The third section continues with a rethinking of the overall theory of sexual harassment that developed in the wake of the Law's enactment and the experience accumulated with its implementation. This discussion revolves primarily around the question of whether to anchor the protection against sexual harassment in the concept of equality or that of human dignity. Noya Rimalt offers an extensive examination of Israeli law (legislation as well as rulings by the Supreme Court and lower courts) on the subject of sexual harassment. The thrust of her criticism is the emphasis on the harm to human dignity caused by harassment, thereby obscuring the harm to the principle of equality. In Rimalt's view, the law's focus on human dignity has led to rulings that treat sexual harassment as a phenomenon that has only individual implications while ignoring its group/gender aspects. Moreover, the emphasis on harm to human dignity has led to a paternalistic-moralistic understanding of the prohibition against sexual harassment. The result, according to Rimalt, is a narrow definition of sexual harassment that includes only conducts with a sexual component, and excludes other forms of harassment of women that could be classified as harassment on the basis of sex or gender.

The uncertainty over whether to anchor the protection against sexual harassment in the concept of equality or that of human dignity demands that we look outside the parameters of Israeli law. Susanne Baer compares the American legal system – grounded on equality – and the German and pan-European ones (at least in the early stages of the latter) – which are grounded on dignity. In her opinion, these bodies of

law reflect a model of differentiation, even conflict, between the right to dignity and the right to equality. This model of conflict inevitably gives rise to shortcomings in the handling of sexual harassment. In particular, Baer emphasizes the failings in the German and European approaches, both of which focus on human dignity. In her opinion, these approaches consider behavior from the perspective of the individual, disregarding the social hierarchy and favoring the viewpoint of the harasser, in addition to ignoring the role of sexuality in gender discrimination.

Baer feels that reliance on the principle of equality can offer a response to these shortcomings. To this end, she believes, we must avoid a technical definition of equality as equal treatment of equals and instead characterize it as a fundamental, asymmetrical right to an absence of hierarchy. Sexual harassment would then be seen as enforcing the traditional hierarchy between men and women, and hence as a violation of the right to equality. What is more, the right to equality would not be severed from the right to human dignity; in fact, Baer proposes a model of interaction between the two. In keeping with her analysis, the system of laws that she deems appropriate for dealing with sexual harassment is not the civil or criminal system but the constitutional system of human rights.

Orit Kamir seeks to defend the notion of grounding protection against sexual harassment on the concept of human dignity against the above criticisms. In the chapter entitled "The Protected Interest: Sexual Harassment as Infringing on a Woman's Equality and/or Human Dignity," Kamir develops her criticism of the exercise of the right to equality, focusing on the extent to which the Aristotelian, symmetrical view of equality, and the perception of equality of freedoms as equality in the state's non-intervention in the affairs of the individual, have been assimilated. In her opinion, the attempt to inculcate an approach based on fundamental, asymmetrical equality, and to demand government

intervention to enforce it, is not sufficient theoretically, and moreover, is not practicable. Alongside her critique of the concept of equality, Kamir develops the concept of dignity (the common core shared by all mankind that contains within it the notion of equality) and of the respect (ensuring living conditions that allow every individual to realize his or her unique potential) as firmer theoretical foundations for protection against sexual harassment. Finally, she makes the point that the concept of human dignity to which she refers, which is enshrined in the Prevention of Sexual Harassment Law, is not the patriarchal notion of "honor," which is utterly and completely different.

Notwithstanding the importance of the general theory, one cannot discuss the criminal prohibitions against verbal harassment without addressing the unique questions that they raise. Thus, the remainder of the third section deals with these issues, in particular the justification of the use of criminal law in this context to achieve social change, and the justification of limiting free speech via the prohibitions against verbal sexual harassment. Conducts referred to as "verbal" include various forms of expression and transmission of messages, not necessarily in words but through pictures, gestures, and the like.

In the article by Mordechai Kremnitzer and myself, we direct criticism at the criminal prohibitions against verbal sexual harassment, which are unique to the Israeli legal system. Our argument is that these prohibitions, which seek to make use of criminal law to effect a change in values, undermine basic principles of criminal law, for example, the demand that the state provide a clear warning before imposing a legal penalty; the principle that an individual who acts without a negative mental position that establishes his guilt should not be punished; the demand for proportionality between the nature of the prohibited conduct and the severity of the sanction; the use of criminal law solely as a last resort, in the absence of "softer" methods of handling the

problem; and the use of criminal sanctions only for behaviors that the public considers negative and severe. We also indicate the problems of implementation raised by the law, in particular overcriminalization. Stated otherwise, in our opinion the law as formulated applies also to cases that should not be within its purview. Finally, we propose possible solutions, enumerating their key advantages and disadvantages. Our conclusion is that criminal law is not the proper instrument for handling verbal sexual harassment, and that the treatment of this offense should be left to civil law or disciplinary law.

Orit Kamir responds to this critique, taking issue with the perception of the prevailing morality presented in our article, and with the assumption that a behavior that the majority of the public does not consider immoral should not be prohibited. In her view, even if most men believe that the conducts enumerated in the law are not negative conducts, this does not justify revoking a criminal prohibition that challenges this perception. She further criticizes the treatment of verbal harassment as less grievous than physical harassment. She relies on the police and the prosecutor's office to refrain from conducting criminal proceedings for behaviors which are not sufficiently grave, and on the courts to not engage in extreme and unreasonable interpretations.

Orna Kazin also expresses criticism over the use of the Law to generate social change, but her critique is of a different nature. According to Kazin, the Law and the practice that developed around it are patronizing, and perpetuate the image of the weak, helpless, easily exploitable woman. Further, the Law, in her view, presents sexuality as a woman's most important asset. Kazin is also critical of the Law's inability to prevent severe consequences for the harassed woman, who frequently finds herself driven out of the workplace where the harassment occurred, suffering a financial loss, and without social support. In light of the above, Kazin argues that the Law is not a suitable

instrument for generating social reform. A better way of handling sexual harassment, in her opinion, would be to focus on education and social protest aimed, *inter alia*, at empowering women so that they can prevent harassment altogether or – if it does occur – can denounce it, without being condemned by society.

The next issue raised by the prohibitions against verbal sexual harassment is that of infringement upon free speech. Frederick Schauer analyzes the transition from a perception of sexual harassment as a matter involving the abuse of authority in the workplace to an issue that touches on freedom of speech (as enshrined in the First Amendment to the U.S. Constitution). He argues that the invoking of the First Amendment is not the result of a formal legal doctrine or a philosophical theory of free speech but the result of political, cultural, economic, and social forces. An examination of American law leads Schauer to conclude that early claims of excessive limitations on freedom of speech involved cases where the harasser made use of a medium that was considered to require constitutional protection (in this case *Playboy* magazine), or where the venue in question was deemed to require such protection (schools and universities). From here, in his view, the arguments spilled over into other contexts (such as sexual slurs, expressions of contempt, or crude humor). Schauer deals extensively with the halting of this process by the U.S. Supreme Court, which conveys the message that in the workplace, the ability to worsen working conditions through verbal abuse is a more important aspect of speech than the freedom of expression of the abuser.

Jack Balkin focuses on the problem of indirect censorship that arises when the government threatens to consider the employer responsible for the speech of potential harassers among the employees. Balkin explains the general justifications for a system of indirect censorship that allows private bodies – which are in the best position to prevent the

damage – to censor speech that falls within their area of responsibility. He then demonstrates that in the case of sexual harassment, there are particularly strong justifications for such a system. Thus, for example, the employer is capable of seeing the overall picture of his employees' behavior, making it easier for him or her to prevent the creation of a hostile environment. Next, Balkin tries refuting the arguments that the prohibition against sexual harassment is vague and overly inclusive, and prohibits the expression of opinions. Among other points, he stresses that male and female employees in the workplace are a "captive audience," and American law facilitates the protection of such a group even when this entails establishing prohibitions based on the content of speech. In closing, he comments that more than prohibitions against harassment (supposedly) infringe on employees' rights of expression, they strengthen the employees as a whole, since they serve as an important counterweight to the power of the employer to shape the culture of the workplace as he or she sees fit.

Dorothy Roberts explores the collective harm caused by sexual harassment, as opposed to weighing the complaint of a lone woman against the right of others to express themselves. In her opinion, harassment generally harms not only the subject of the harassment but many of the women employed at the same workplace. She holds that harassment also perpetuates the inferior status of women in the labor market and in society in general, and that it carries a demeaning message for women as a whole. Roberts examines the analogy made in the U.S. between the issue of discrimination on the basis of race and the issue of sexual harassment. She argues that identifying sexual harassment as discrimination per se, much like racial discrimination, makes it clear that the constitutional protection of freedom of speech cannot be used to defend acts of harassment. According to Roberts, such a use would lay the groundwork for social injustice and establish

privileges for harassers rather than protecting the freedom of speech granted to all. She proposes utilizing the freedom of speech of women workers to come together and fight sexual harassment in a manner that promotes social justice.

Kingsley Browne, by contrast, is critical of American law, which has led, in his opinion, to employers imposing sanctions on speech due to the viewpoints expressed in it, for example, claims that women are unfit for certain positions. Brown argues that the ambiguity of the standard for imposing responsibility leads to excessive censorship on the part of employers, who in any case have no personal interest in the censured expression. He argues further that the constitutional protection of freedom of speech applies also to the workplace. Accordingly, he examines possible solutions to what he considers the excessive limitations on freedom of speech. He rejects the requirement that the speech be directed against a specific victim (as opposed to a conversation that takes place in the presence of the victim but is not directed against him or her). However, he supports eliminating the responsibility of the employer and placing individual responsibility for damages on the harasser for intentional infliction of emotional distress.

This collection contains original writing that reflects Israeli experience on the matter as well as translated material from abroad. It is easy to understand why I chose to present Israeli writing in a discussion of Israeli law. As for the articles from foreign sources, their importance lies in two areas: first, their past impact on Israeli thought and writing (whether as ideas that were adopted and imitated, or as a starting point for change and adaptation); and second, their potential to supplement Israeli writing on issues that have not yet been properly explored.

Of the plethora of sources – primarily from abroad – dealing with sexual harassment in general and verbal sexual harassment in particular,

only a small number were chosen. It is my hope that this introduction to the sources will lead the reader to a broader consideration of this issue, which will be accomplished, *inter alia*, through the use of many additional sources of the same high caliber.

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February 2011