

SEXUAL HARASSMENT LAW IN ISRAEL*

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ABSTRACT

The 1998 Israeli sexual harassment law prohibits sexual harassment as a discriminatory practice, a restriction of liberty, an offence to human dignity, a violation of every person's right to elementary respect, and an infringement of the right to privacy. Additionally, the law prohibits intimidation or retaliation that accommodates sexual harassment, referred to as 'prejudicial treatment'.

Sexual harassment and prejudicial treatment are each both a crime and a tort under the Israeli sexual harassment law. The law makes harassers, as well as persons involved in prejudicial treatment, potentially personally liable for either the crime or tort of sexual harassment, or both. The law awards punitive damages to victims¹ of sexual harassment or prejudicial treatment – whether or not actual damage of any sort is claimed or proved. Sexual harassment and prejudicial treatment are prohibited in *all* social settings and contexts.

In the workplace, an employer is vicariously liable for the civil consequences of sexual harassment or prejudicial treatment perpetrated by anyone in his or her employ. The employer's civil liability is in addition to the harasser's individual civil and criminal liability. In order to avoid liability, an employer must take all the measures prescribed by the sexual harassment law (including, *inter alia*, establishment of policy and serious, prompt and efficient treatment of a victim's complaint).

INTRODUCTION

Late bloomers may usefully benefit from others' hard-earned experiences. I like to think of Israel's 1998 sexual harassment law as a case in point. Technically, some legal reference to sexual harassment in the workplace had already been made a decade before the Knesset (the Israeli parliament) enacted this law. Under the Equal Employment Opportunity (EEO) Law, 5738–1988², it was a crime for an employer³ to retaliate against an employee who rejected sexual advances made by her employer directly or by her supervisor.⁴ But sexual harassment *per se* was not prohibited.⁵ A decade later, very few retaliation cases had been initiated and fewer still had resulted in judicial decisions; the courts had little opportunity, and perhaps little motivation, to develop a sexual harassment doctrine.⁶ As a

practical matter, Israel had no sexual harassment law until 1998, when the Knesset finally enacted the comprehensive 'Prevention of Sexual Harassment Law'.⁷ By 1998, of course, scholarly feminist analysis of sexual harassment was two decades old and legal systems around the world, especially in the common law world, had already developed sexual harassment positive law.⁸

In a rare, combined effort, the Israeli Justice Department, in cooperation with Israeli feminist legal academia and the legal department of the Israeli Women's Network, studied the vast international materials on sexual harassment and presented the Knesset with an informed and comprehensive draft statute law.⁹ The final version of the statute is unique, specifically tailored to suit Israeli society and culture, but also, importantly, draws on the practice and theory of sexual harassment laws worldwide. In this respect, Israel's sexual harassment law speaks in its own voice, but within an international context and community.

OVERVIEW OF THE LAW

The 1998 Israeli sexual harassment law prohibits sexual harassment as a discriminatory practice, a restriction of liberty, an offence to human dignity, a violation of every person's right to elementary respect, and an infringement of the right to privacy.¹⁰ Additionally, the law prohibits intimidation or retaliation that accommodates sexual harassment. Intimidation or retaliation, thus related to sexual harassment, is defined by the law as 'prejudicial treatment'. 'Prejudicial treatment' is a close cousin of 'retaliation', a more familiar concept to those acquainted with other legal regimes that prohibit sexual harassment. Israel's 'prejudicial treatment' is broader than 'retaliation' in that it may occur simultaneously with sexual harassment and before unwelcome sexual advances have been rebuffed.¹¹

Sexual harassment and prejudicial treatment are each both a crime and a tort under the Israeli sexual harassment law.¹² The law makes harassers, as well as persons involved in prejudicial treatment, potentially personally liable for either the crime or tort of sexual harassment, or both. The law awards punitive damages to victims¹³ of sexual harassment or prejudicial treatment – whether or not actual damage of any sort is claimed or proved. Sexual harassment and prejudicial treatment are prohibited in *all* social settings and contexts. Sexual harassment in the workplace is but one type of sexual harassment under the law; *quid pro quo* and hostile environment sexual harassment in the workplace are prohibited, but so are sexual stalking and degradation based on sexual orientation in all social settings.

In the workplace, an employer is vicariously liable for the civil consequences of sexual harassment or prejudicial treatment perpetrated by anyone in his or her employ. The employer's civil liability is in addition to the harasser's individual civil and criminal liability. In order to avoid liability, an employer must take all the measures prescribed by the sexual harassment law (including, *inter alia*, establishment of policy and serious, prompt and efficient treatment of a victim's complaint). Under the Israeli law, sexual harassment does not depend upon an individual victim's emotional response to the harassment; such a response is not a constitutive element of either civil or criminal definitions of sexual harassment, and its absence does not offer a harasser (or his employer) a defence against a charge of harassment. Nor must an individual who is harassed (or treated prejudicially) plead or prove that her response to the harassment (or prejudicial treatment) was that of the 'reasonable person's'; a harasser (or his employer) may not defeat harassment on the ground that a 'reasonable person' would have responded differently than the specific victim actually did. In Israeli sexual harassment law, the 'reasonable person' does not mediate an otherwise demonstrable claim.¹⁴

As the Israeli law does not distinguish between sexual harassment in the workplace and sexual harassment elsewhere, any presentation of the law governing sexual harassment in the workplace must first lay out the principles that animate the Israeli legal treatment of sexual harassment at large. In the following pages, therefore, I briefly present some of the fundamental features and themes of Israel's 1998 legislation, particularly those that differ from the more familiar US formulations. Next I detail, more specifically, the unique features of its legal treatment of sexual harassment in the workplace, i.e., employer duties and liabilities.

Before turning to this discussion, I should observe that these views of the Israeli sexual harassment law are my own, borne in part of the role I played in all stages of its enactment. The law, which relatively recently came into effect, has not yet been litigated in detail, and courts have not had occasion to articulate the meaning of its provisions. My discussion in the pages that follow is constitutive, I hope, as well as interpretive.

EQUALITY, HUMAN DIGNITY, RESPECT, LIBERTY AND PRIVACY

In Israel, as elsewhere, sexual harassment is most often performed by men against women. Sexual harassment reflects and reinforces degrading patriarchal stereotypes of women and womanhood,

often resulting in the victim feeling socially punished for being a woman. Sexual harassment in Israel, as elsewhere, is, therefore, a form of sex discrimination, and thus an issue of inequality. At the same time, sexual harassment is also an offence against the basic value of human dignity and a breach of every person's (and particularly every woman's) right to minimal social respect. It is also a violation of liberty and the right to privacy.¹⁵ In the Israeli context it is especially helpful to recognise that sexual harassment is *all* these things. In Israel, human dignity, the right to respect and liberty are fundamental human rights recognised as such by law. Privacy is not as fundamental as human dignity, respect and liberty within the Israeli legal system, yet it is more explicitly protected in Israeli legislation than equality. Let me clarify this point.

Lacking a formal constitution, and due to the significant political influence of Orthodox Jewish parties in the Knesset, the Israeli legislature does not treat equality as a fundamental constitutional right or operational constitutional principle. The Knesset has so far expressly refused to recognise equality in constitutional legislation, i.e., in Israel's Basic Laws. The 1951 Law of Women's Equal Rights, 5711–1951¹⁶ clearly states that women are equal to men in all legal matters – but not in those regarding family law. Moreover, the law of women's rights is not a Basic Law, and as such, its terms can be ignored or overruled by legislation. The judiciary has long viewed equality as a basic right, but can only develop equality law within the scope of parliamentary legislation.

But whereas equality is not a fundamental legal right, the combined concept of 'right to human dignity, respect and liberty' has recently been defined as a fundamental human right in Israel's 1992 Basic Law: Human Dignity and Liberty,¹⁷ widely regarded as the country's bill of human rights.¹⁸ Since the enactment of the Basic Law, the Supreme Court has assigned the right to dignity, respect and liberty a major role in human rights law, and the Israeli public is coming to understand that right as the legal foundation for all human rights. Some human rights, such as the right to privacy, are explicitly defined in the Basic Law as deriving from the right to human dignity, respect and liberty. Other human rights, including some aspects of the right to equality, are interpreted by the Supreme Court as aspects of the right to human dignity, respect and liberty. It is in this context that sexual harassment was legally defined as violating human dignity, liberty and the basic right to respect.

Conceptualising sexual harassment in terms of dignity, respect, liberty and privacy could put sexual harassment at odds with equality norms. But dignity, respect, liberty, privacy and equality are not inherently mutually exclusive values; on the contrary, in the context of sexual harassment law, the Knesset rightly recognised and

determined that they can and should be read as complementary. The Israeli sexual harassment law acknowledges that sexual harassment discriminates against women by not respecting them as women and as human beings, by violating their dignity, by restricting their liberty and self-determination and right to lead lives free of fear for their physical and psychological safety and integrity, unconstrained by patriarchal stereotypes.¹⁹ At the same time, sexual harassment disrespects women and violates their dignity by mirroring and perpetuating a social reality which does not treat them as equals. Further, the law implies that by violating women's privacy, sexual harassment discriminates against them and violates their broader right to dignity, respect and liberty.²⁰

Article 1 of Israel's sexual harassment law, the 'Purpose' clause, declares the law's objective 'to prohibit sexual harassment in order to protect *the right to respect, human dignity, liberty and privacy* and to promote *equality between the sexes*'. The official explanatory notes stress this ideological point, condemning sexual harassment as 'a widespread social phenomenon injuring many, and women in particular'. The notes state that, *inter alia*, sexual harassment humiliates its victims, degrades them and invades their privacy, undermining their right to self-determination, autonomy, and control over self and sexuality; it is, therefore, an act of discrimination. The explanatory notes specifically emphasise that 'sexual harassment aimed at women humiliates them with respect to their sex/gender²¹ or sexuality and inhibits them from integrating fully into the professional realm and into other aspects of life as equal participants, thus denying them equality'.

The statute, therefore, expressly combines the familiar approach of defining sexual harassment as an infringement of the right to equality, with the less familiar approach of defining sexual harassment as an injury to human dignity and an infringement of the right to respect in general, and of women's right to respect in particular. The law's explanatory notes declare that the set of values enumerated in Article 1 'shall guide the courts when required to construct the provisions of the proposed law'. The courts are thus instructed to interpret the law as part of the protection afforded by the Israeli legal system to human dignity and the right to respect, as well as to draw from international judicial experience and legal academic scholarship in treating sexual harassment as an issue of equality and discrimination, particularly sex discrimination.

The jurisprudence of sexual harassment law in countries such as the US, growing out of the general prohibition against sex discrimination contained in Title VII of the Civil Rights Act of 1964, has developed largely in the context of employment opportunities and labour law. While sexual harassment of working women is an issue

of major social and political dimensions, it is part of a much larger range of sexual harassment in the family, in the schools, in the military and in the street.²² Sexual harassment is no less sexually harassing when it does not take place in the workplace. Let me illustrate this point with an example. In Israel, the military is not considered a 'workplace', but rather a place where one fulfils one's duty to one's country. Most Israeli (Jewish) women and men are drafted into the army at the age of 18 and spend at least 18 months in a 'masculine' environment, most often under male supervisors. In this context, sexual harassment in the military is at least as harmful as in the workplace; it is also a training ground for sexual harassment in the workplace, in schools and universities, at home and in the street.²³

Israel's sexual harassment law does not distinguish sexual harassment in the workplace from sexual harassment anywhere else. Sexual harassment is prohibited everywhere: in the street, in the family, in the military, in educational settings and in the context of professional relationships (such as doctor-patient). Sexual harassment in the workplace is defined as one of many manifestations of a wider social phenomenon.

DEFINITION: SEXUAL HARASSMENT INCLUDES SEXUAL STALKING AND DEGRADATION BASED ON SEXUAL ORIENTATION

The core of the Israeli sexual harassment law is Article 3, which enumerates eight different kinds of conduct that the law regards as sexual harassment, as well as defining conduct that constitutes 'prejudicial treatment' under the law. Due to its importance, I quote it in full:

Sexual Harassment and Prejudicial Treatment

3(a) Each of the following acts constitutes sexual harassment:

- (1) Blackmail by way of threats, as defined in Article 428 of the Penal Law, where the act demanded to be performed by the person is of a sexual character;
- (2) Indecent acts, as defined in Articles 348 and 349 of the Penal Law;²⁴
- (3) Repeated propositions of a sexual character to a person, where that person has shown to the harasser that he is not interested in the said propositions;
- (4) Repeated references directed towards a person, which focus on his sexuality, where that person has shown the harasser that he is not interested in the said references;
- (5) An intimidating²⁵ or humiliating reference directed towards a person concerning his sex/gender or his sexuality, including his sexual tendencies;²⁶

- (6) Propositions or references as described in subsections (3) or (4), directed towards one of those enumerated in paragraphs (a) to (c), in such circumstances as specified in such subsections, even where the person harassed has not shown the harasser that he is not interested in the said propositions or references:
- (a) a minor or helpless person,²⁷ where a relationship of authority, dependence, education or treatment is being exploited;
 - (b) a patient undergoing mental or medical treatment, where a relationship of authority between the patient and the person treating him is being exploited;
 - (c) an employee in the labour relations sphere and a person in service, within the framework of such service, where a position of authority in a work relationship or in service is being exploited.
- (b) Prejudicial treatment is any harmful act, the source of which is sexual harassment or a complaint or court action filed in relation to sexual harassment.

Article 2, the 'definitions clause', determines that a 'reference' means 'in writing, orally, by way of a visual or vocal medium, including computer or computer material, or by conduct'.

I find it useful to think of Article 3 as distinguishing between three categories of sexually harassing behaviours:

- 1 Behaviours which are categorically defined as sexually harassing and are, therefore, prohibited under all circumstances: sexual blackmail by way of threats (3(a)(1)), 'indecent acts' (3(a)(2)) and sexual intimidation or humiliation (3(a)(5)); (prejudicial treatment is similarly prohibited under all circumstances);
- 2 Behaviours which, in themselves, are neutral, such as repeated sexual propositions (3(a)(3)) and repeated references to a person's sexuality (3(a)(4)) and which become sexual harassment only when unwelcome to their recipient;
- 3 Harassing conduct which involves extreme power relations and explicit abuse of authority (3(a)(6)).

Category (1). As is apparent from Article 3, some conduct defined as sexual harassment is already prohibited by the Israeli Penal Law under different titles ('blackmail', and 'indecent acts'). Such conduct has nevertheless been specifically defined as types of sexual harassment in the new law for two reasons. First, the new sexual harassment law aims to provide a broad and clear definition of the new norm prohibiting sexual harassment. Accordingly, its drafters decided to include a wide variety of behaviour in the definition of sexual harassment, including actions already classified as unlawful elsewhere under Israeli law, and prohibited there as offending other protected social values.²⁸ The second reason is that, unlike the Penal Law, which merely penalises the modes of

conduct it prohibits, the new statute also condemns the modes of conduct prohibited by it as tortious wrongs; as such they also serve as grounds for employer liability. Defining the criminal offences of 'sexual extortion by threats' and 'indecent acts' as 'sexual harassment' enables victims of such acts to complain civilly against the perpetrator, and/or to sue the employer both for the harassment and for prejudicial treatment accompanying or resulting from such acts, if the sexual harassment occurred in the workplace.

Sexually harassing behaviours that are also prohibited by the Penal Law are categorically prohibited by the Sexual Harassment Prevention Law, regardless of whether the harassed person voices objection or refusal. Sexual harassment amounting to 'blackmail by way of threats' or to 'indecent acts' (as defined by the Penal Law) cannot legally be consented to or welcomed.

Sexual intimidation and humiliation (defined as sexual harassment in Article 3(a)(5) of the statute) are not prohibited, *per se*, by Israeli Penal Law. Nevertheless, the severity of such acts imposes a duty on all persons to realise that they are prohibited. Thus the new law does not require that the harassed person indicate to the harasser that sexual intimidation or humiliation are undesirable to him or her. Let me emphasise that prohibited intimidation and humiliation are defined in the statute as relating to the victim's *sex, gender, sexuality, or sexual tendencies*.²⁹ A person may not, therefore, be degraded regarding his or her 'masculinity' or 'femininity', however defined, due to any sexual activity or due to a sexual tendency (imputed or real) attributed to him or her. Impudent sexist remarks or behaviour addressed to a woman may degrade her as a woman and constitute sexual harassment; pornographic pictures may, under certain circumstances, and most certainly if targeting a certain person, constitute 'a degrading or humiliating reference addressed to a person with respect to his gender or sexuality'. A reference attaching degrading meanings to a person's actual or perceived sexuality may amount to sexual harassment, whether the sexuality is heterosexual, homosexual or bisexual. 'Gay bashing' or 'lesbian bashing' is, therefore, sexual harassment prohibited by Israeli law.

Category (2). This category includes types of behaviour allowed, and perhaps even desirable, when welcome and performed with mutual consent; 'recurrent proposals bearing a sexual nature' is a case in point. Such conduct may be perceived as neutral or as having positive social value, and is not socially condemned in itself. It becomes sexual harassment only when undesirable to the person at whom such behaviour is aimed. Therefore, in order for such conduct to constitute sexual harassment, the recipient must communicate a lack of interest to the person making the proposals. The official explanatory notes emphasise that 'the law does not

purport to enforce a moral code or to intervene in voluntary social relations, but to prevent people from forcing themselves on others, who are not interested in such contact, especially when such coercion takes place while abusing an authoritative position’.

Regarding this second category, let me further clarify that the phrase ‘references directed towards a person, which focus on his sexuality’ (in clause 3(a)(4)) has replaced the phrase ‘references to a person as a sexual object’ which originally appeared in the draft law as adopted in the first parliamentary vote. The final version of the legislation, which is the broader of the two, determines that a recurrent reference to certain aspects of a person’s appearance, to his or her attractiveness, for example, or to his or her sexual behaviour (actual or imagined), or to sexual desires which they arouse in the speaker (or in others) may all be acceptable and even complimentary in certain contexts, and undesirable, harassing and threatening in others. The person at whom such conduct is aimed must communicate to the perpetrator whether this conduct is perceived by him or her as one or the other.

As for a person’s duty to ‘indicate’ that proposals or references are ‘undesirable’ to him or her, the statute pronounces (in Article 2) that a harassed person must ‘indicate’ his or her position ‘whether verbally or behaviourally, provided that the meaning of such behaviour leaves no room for reasonable doubt’. The person at whom the conduct is aimed, therefore, is encouraged to be active in the expression of his or her position with respect to the conduct in question. It is, however, sufficient that such a position be expressed ‘in a reasonable manner’ under the circumstances; the victim has no duty to ensure that the perpetrator actually comprehends the message expressed. The perpetrator may be impervious to messages relayed to him by the victim, but the victim is not required to employ any extraordinary measures in order to ‘affect’ the perpetrator. It should be noted that the criterion of reasonableness is only applied to *doubt* which might taint the reaction of the harassed person; it is not an invocation of any judicial use of the ‘reasonable person’. In the event that the court elects to call on the comprehension abilities of the ‘reasonable person’ in order to examine the reasonableness of the doubt (regarding the victim’s reaction to harassment), it shall be the comprehension of the *harasser*, and *not of the victim*, which shall be measured in comparison to that of the ‘reasonable person’.

Clauses 3(a)(3) and 3(a)(4) stress the repetitive element of the prohibited behaviours and thus cover much of what could be described as ‘sexual stalking’. Legal systems that criminalise stalking tend to distinguish stalking from sexual harassment, often treating sexual harassment as sex discrimination (in the workplace) and

stalking as a 'gender neutral' criminal offence.³⁰ The broad Israeli definition of sexual harassment is meant to capture certain types of stalking which contain 'sexual' aspects. Such stalking behaviour is understood to be both 'sexual' and 'harassing', and, therefore, a sub-category of sexual harassment, discriminating against women and offensive to human dignity.³¹

Category (3). This category of prohibited conduct contains sexual harassment that takes place in the context of extreme power relations between harasser and victim. Sub-paragraph 6 of Article 3(a) establishes that a minor or a 'helpless person', a patient or an employee, when sexually propositioned or referred to within a hierarchical relationship, is not required to express any position towards the sexual proposals or references; such acts may, nevertheless, be deemed sexually harassing. This approach takes into account the inherent weakness of such harassed persons in relation to their harassers, a weakness which may deny them the possibility of expressing 'free will' or even the mere possession of such free will regarding the sexual advances. In these situations, the person in position of authority is required to develop the necessary sensitivity and respectful attitude to identify which forms of conduct may be perceived by his subordinates as sexually harassing and to refrain from them. Let me point out that this category does not challenge the idea that any sexual harassment of women by a man involves an abuse of hierarchical power. It merely recognises that in certain circumstances hierarchical relations can be of such moment that they require specific, explicit attention in sexual harassment law.

Article 3(b), which defines prejudicial treatment related to sexual harassment, provides that such treatment does not necessarily follow an objection to sexual harassment. According to the wording of the article, prejudicial treatment may also occur when the harassed person submits to the harassment (and cooperates in the sexual relationship required of her), or even prior to any refusal or submission to the advances. Prejudicial treatment may accompany the harassment: it may be a means of applying pressure on the harassed person in order to cause her or him to submit to the harassment.³² Prejudicial treatment may also be inflicted on a person not directly sexually harassed, but who assists a harassed person to confront harassment, for instance, by helping the person to file a complaint or an action against it.

In conclusion, let me point out that, although neither '*quid pro quo* sexual behaviour' nor 'hostile environment sexual harassment' is specifically delineated as such, behaviour belonging to both these categories is covered by the various definitions in Article 3. Judicial application of the strict US distinction between *quid pro quo* and 'hostile environment' has become more burdensome than useful; in

light of that experience, the Israeli legislature chose to try and save the Israeli courts from falling into a similar trap.

PERSONAL LIABILITY, CIVIL AND CRIMINAL

As sexual harassment is often associated with the workplace, liability is often associated with the employer. Under Israeli law, however, a sexual harasser (as well as anyone engaging in prejudicial treatment) is legally accountable directly for his or her actions. Article 4, titled 'Prohibition of Sexual Harassment and of Prejudicial Treatment', postulates that 'a person may not sexually harass another or subject him to prejudicial treatment'. Articles 5 and 6 establish that every type of conduct defined by Article 3 as sexual harassment or prejudicial treatment is both a criminal offence and a civil wrong; they read as follows:

Sexual Harassment and Prejudicial Treatment are Offences

5. (a) A person who sexually harasses another, as defined in section 3(a) (3) to (6), shall be liable to imprisonment for a term of two years.³³
- (b) A person subjecting another to prejudicial treatment, as defined in section 3(b), is liable to imprisonment for a term of three years.
- (c) A person who sexually harasses another, as defined in subsection (a), and subjects him to prejudicial treatment, as stated in subsection (b), is liable to imprisonment for a term of four years.

Sexual Harassment and Prejudicial Treatment are Civil Wrongs

6. (a) Sexual harassment and prejudicial treatment are civil wrongs, and the Civil Wrongs Ordinance [New Version] shall apply to such acts, subject to the provisions of this Law.

Punitive Damages

Article 6(b) of the Israeli sexual harassment law determines that

"A court may award compensation for sexual harassment and for prejudicial treatment to an amount which shall not exceed IS 50,000 [roughly \$15,000] without damage having to be proved; this amount shall be updated on the 16th of each month in accordance with the rate of excess of the new index; . . ."

This is a unique provision, unprecedented in Israeli law. The explanatory notes of this article explain:

"The receipt of compensation for such wrongs usually entails the proof of damage caused to the claimant. In a sexual harassment context, the damage is often inflicted on the harassed person's dignity,

self-confidence and his rights to respect and to a reasonable quality of life within the work and any other environment. Since these injuries are inherent in the nature of the harassing behaviour, the proof of conduct embodies the proof of damage. It is therefore suggested that the claimant not be burdened with the need to prove any damage as a prerequisite for the adjudication of compensation. In order to balance the harassed person's protection with the defendant's rights, it is suggested that a ceiling be set for the compensation adjudicated without proof of damage."

The law, therefore, clearly proclaims that a harassed person need not wait for an emotional breakdown or for any other 'quantifiable' injury in order to demand the harassment stop and to sue for sexual harassment. The law further guides courts not to impose on victims any burdens of proof which might deter them from filing actions. Thus a claimant is not to be required to prove a 'social position', a 'good reputation' or other special life circumstance that makes her particular dignity or right to respect 'worth' a certain amount. On the contrary, the article provides that sexual harassment injures both 'esteemed' and 'ordinary' persons alike, whether or not injury resulting from harassment is assessable by any professional tools. In Israel, by law, any incident of sexual harassment injures the harassed person's dignity and her rights to respect, equality, freedom and privacy, thus damaging her.

Indeed, the Israeli sexual harassment law goes further. Article 6(b) shows concern for 'strong' harassed persons who were not devastated by the harassment – emotionally, financially or otherwise. Even these individuals, according to the law, are damaged by sexual harassment and deserve the law's protection and support. The harassment itself infringes on their dignity, right to respect and joy of life, even though their stamina did not allow the harasser to inflict 'tangible' injuries on them.

A harassed person proving damages beyond the *per se* infringement of his or her human rights (such as loss of earning capacity) may, of course, claim more than the \$15,000 ceiling.

EMPLOYER DUTIES AND LIABILITY

Having presented the general themes of the sexual harassment law, let me now turn to the specific treatment of workplace harassment, i.e., employer duties and liability.

Articles 7–9 and 11 of the sexual harassment law define and regulate employers' responsibility and liability for sexual harassment and prejudicial treatment in the workplace, or, as the statute puts it – 'within a labour relations sphere'. This expression is defined broadly

to include 'the workplace, another place where an activity on behalf of the employer takes place, in the course of employment or where, in any place whatsoever, a position of authority in a work relationship is being exploited'. The 'labour relations sphere', therefore, includes (among other things) a vacation organised by an employer, a trip to a place where work-related activity takes place, or 'social' relations, even after working hours, in which a person in an authoritative position harasses an employee subordinate to him or her. A salesperson selling from door to door also acts within the 'labour relations sphere'.

'Employer' is similarly defined in the broadest possible fashion. Articles 9 and 11 clarify that employers' duties and liabilities apply to the State and to the civil service, to the Israeli Defence Forces (IDF), the Israeli Police Force, the Prison Service and to anyone employing a worker also employed by a personnel agency. Therefore, soldiers, inmates and persons under arrest may all sue the army, the police force, or the prison service for sexual harassment and/or prejudicial treatment committed against them by soldiers, policemen or wardens. Any citizen harassed by a public official in a work-related context may sue the State.

The statute offers a clear, general provision regarding employer liability. The terms of the statute uniformly apply to all employers, regarding all types of harassment (including *quid pro quo* and hostile environment) towards anyone (employee or client³⁴) harassed by anyone in the employer's employ (or by a person appointed on behalf of the employer, not being his or her 'employee' under the labour law). The employer's responsibility for an employee's sexual harassment is civil in nature; importantly, an employer's civil liability is *in addition* to the perpetrator's personal (civil and criminal) liability. A harassing employee does not get off the liability hook just because his employer is on it too.

An employer's liability, however, is not strict; it only arises when an employer fails to meet the requirements explicitly imposed by law. These requirements are outlined in broad terms in Article 7, and read as follows:

7. (a) An employer has a duty to take such steps as are reasonable in the circumstances, so as to prevent sexual harassment or adverse treatment in the labour relations sphere, on the part of his employee or on the part of a person in charge on the employer's behalf, even where such a person is not his employee; an employer is also obliged to deal with cases of sexual harassment and adverse treatment. To this end, an employer is obliged to:
 - (1) prescribe an efficient procedure for filing a complaint in respect of sexual harassment and for the examination of the complaint;

- (2) deal efficiently with a case of sexual harassment or of adverse treatment which has come to his notice and do everything within his power to prevent the recurrence of the said acts and to rectify the harm caused to the complainant as a result of sexual harassment or adverse treatment.

Having control over acts committed by its employees, employers must do everything in their power to prevent employees from harassing any person (employee or other person) within the work environment. In order to prevent sexual harassment, employers must clarify that complaints of sexual harassment committed by their employees may be addressed to the employer, and that if such complaints are filed, they will be handled with the utmost effectiveness. It should be noted that according to the wording of Article 7, employers must attend to harassment or prejudicial treatment *even if no complaint is filed*, once they become aware of the harassment or prejudicial treatment. 'Remedy of harm' means returning the injured person, to the extent possible, to her personal, economic and professional position prior to the harassment or the prejudicial treatment. In certain circumstances, this could be achieved by indemnifying her for expenses incurred by the harassment or the prejudicial treatment (such as expenses incurred in psychotherapy). Furthermore, 'efficient' treatment, aimed at preventing the recurrence of harassment or continued injury inflicted on a harassed employee or client, may call for removal of the harasser from duties or transferring him elsewhere. Clearly, 'efficient' treatment does not entail making a victim of harassment or prejudicial treatment pay the price of stopping the unlawful conduct.

In addition, any employer with 25 or more employees (such as the civil service, the IDF, or a university) must publish regulations that specify, to its employees and to anyone coming into contact with them in a working relationship, both (a) that sexual harassment and prejudicial treatment by employees within the working environment are prohibited and also (b) what the procedure is for making a complaint. These actions are intended to highlight the applicable norm and to convey and reinforce the message that the employer treats sexual harassment seriously.³⁵ Article 8 establishes that failure to publish such regulations is punishable by a fine, with an additional fine imposed for every week in which the offence continues.

An employer who fulfils all the legal duties described above bears no legal liability for an incident of sexual harassment by an employee. This approach is designed to encourage employers to handle complaints of sexual harassment with the utmost efficiency, since such action may shield them against legal liability for such harassment.

Article 10 confers sole jurisdiction for civil actions regarding sexual harassment or related prejudicial treatment of an employee

at work on the Labour Court. This jurisdictional provision applies whether an action is filed against the employer, against a person appointed by the employer, or against a harassing employee. In authorising the Labour Court to hear workplace sexual harassment cases, the Knesset assumed that the Labour Court was the most competent judicial authority in the sphere of employment and the most sympathetic to employees' distress. This is also the employees' cheapest and most accessible tribunal. The statute provides that the provisions of Articles 10, 10A, 12 and 13 of the Israeli EEO Law apply to sexual harassment proceedings before the Labour Court. Under those articles of the EEO Law, the Labour Court may issue injunctions, the plaintiff or the complainant may request that the hearing be held *in camera*, an employees' organisation may file an action without an individual plaintiff, and the Court may allow an interested organisation to voice its position.

Amended EEO Law Clauses

Article 15 of the Sexual Harassment Prevention Law supersedes Article 7 of the EEO Law, which had prohibited retaliation in the workplace. The new provision writes the prohibition against prejudicial treatment into the Equal Opportunities Law – with one important difference: under the Equal Opportunities Law, prejudicial treatment is actionable even when it relates only to a single, unwelcome sexual proposal or unwelcome sexual reference. (Under Article 3(a)(3) and (a)(4) of the sexual harassment law, by comparison, prejudicial treatment anywhere but the workplace is actionable only when there is more than a single proposal or sexual reference.) Moreover, the new sexual harassment law amends Article 9(b) of the EEO Law. Shifting the burden of proof, the amendment provides that, having proved sexual harassment, if an employee claims she suffered prejudicial treatment, it is the employer who must prove that no such treatment occurred. This procedural provision is of great significance and is likely to influence the outcomes of many complaints.

Employers' Duties Regulations

Israel's sexual harassment law was legislated in March 1998. By the time it came into effect six months later, the Ministry of Justice, together with the Ministry of Labour, had published detailed 'Employers' Duties Regulations', including a draft of model workplace regulations to be adopted by employers with 25 employees or more. The Employers' Duties Regulations contain detailed instructions providing employers with specific, clear, practical steps and procedures through which they can fulfil their legal obligations

under the new law. For example, Article 4 of the Regulations instructs employers to nominate a senior employee, preferably a woman, commissioner in charge of receiving sexual harassment complaints and handling them efficiently. Article 4 states that the commissioner (or commissioners, depending on the size of the workplace) must be qualified, and suitable for the position, and easily accessible. It also lists the commissioner's exact duties, responsibilities and powers. Article 5 of the Regulations specifies the procedure for filing a sexual harassment complaint in the workplace, and Articles 6 and 7 regulate the procedure governing receipt and treatment of such a complaint. The draft of model workplace regulations includes detailed explanations of the relevant legal terms, standards and principles, as well as illustrative examples of prohibited behaviour in the workplace. Employers are required to provide commissioners, employees and workers' unions with copies of their workplace regulations.

THE SUPREME COURT DECISION

One day before the new law was enacted, the Israeli Supreme Court handed down its first decision regarding sexual harassment, *The State v. Zohar Ben-Asher*. *Ben-Asher* involved the complaint of a first-year female college student. The student complained that a male professor had caressed her on two occasions, told her he had 'pleasant memories' of her scent and had given her his card, asking that she call him at home. The student did not explicitly reject her professor's advances, but avoided them as best she could, claiming to have been shocked and intimidated by them to a degree that interfered with her academic work.

Because the event in *Ben-Asher* took place before the enactment of the sexual harassment law, the accused professor was charged with 'unfit behaviour' under the civil service workplace regulations in effect at the time. Those regulations prohibited 'unfit behaviour', but did not offer any definition of it. The legal question addressed in *Ben-Asher* was, first, whether the professor's behaviour constituted sexual harassment, and, if so, whether such sexual harassment was 'unfit behaviour'. In a confused and badly written decision, the lower disciplinary tribunal had found that the professor's behaviour constituted neither sexual harassment nor unfit behaviour under the circumstances. The State appealed, and the Supreme Court reversed on both issues.

In a long decision, Supreme Court Justice Zamir (supported by Chief Justice Barak and Justice Dorner) determined that sexual harassment was an offence against human dignity as well as a sex

discriminatory practice that undermined women's right to equality. He mentioned that pornography may, in certain circumstances, constitute sexual harassment, referring, as an example, to pornography in the workplace. He suggested that conduct may be sexually harassing if it targets a specific individual, or if it contributes to the creation of a sexist, hostile environment, even when it does not target a specific individual. Justice Zamir declared that sexual harassment need not cause material damage in order for it to be legally prohibited. He went on to establish that prohibited sexual harassment need not be intentional; it would be enough for a reasonable person to perceive it as harassing. Justice Zamir declared that a victim could, in appropriate circumstances, effectively communicate her disinterest through silence. Justice Zamir also stressed that abuse of authority, though a factor that enhanced the behaviour's severity, was not a necessary element in the definition of sexual harassment; sexual harassment could occur even in the absence of power relations.

Doctrinally, *Ben-Asher* is of uncertain precedential status. On the one hand, it is a weak precedent, as most of the decision is judicial *dictum* and therefore not legally binding. Moreover, the decision was handed down before the enactment of the new law. On the other hand, Justice Zamir did refer to the new law, almost as if the decision were based on it. The court was familiar with the then draft law, explicitly embracing its principles (most notably the broad definition of sexual harassment, the combined 'discrimination-offence to human dignity' terminology and the position that no substantial damage need be claimed or proved). In this respect the decision seemed to be, and was so perceived by the judiciary, a strong, clear indication of the Supreme Court's unreserved support of the new legislation. (The concurrence by Chief Justice Barak in Justice Zamir's opinion should not be overlooked; it has considerable weight in the Israeli legal system).

Despite its problematic doctrinal status, the *Ben-Asher* decision was embraced by the judicial system. It was interpreted as attesting to the Israeli Supreme Court's expressed, firm support of the sexual harassment law, and to its fierce condemnation of the social practice of sexual harassment. In the five years that followed, this judicial attitude has been reinforced in the cases tried by the lower courts under the new law.

CONCLUSION

Israel's sexual harassment law came into effect only several years ago. It is too early to estimate the extent to which its implementation

will eradicate sexual harassment, or how the legal doctrine of sexual harassment will evolve. The first signs have been encouraging.

The civil service and the IDF were the first to adopt workplace regulations and nominate commissioners, followed by universities and many businesses in the public and private sectors. Prominent workplaces, such as hospitals and banks, have begun to display sexual harassment workplace regulations. Highly committed women in the civil service and the army have been organising public lectures and circulating written materials, encouraging female employees and soldiers to use the new legislation to promote feminist consciousness and women's rights.

Within the first weeks after the law came into effect, dozens of sexual harassment complaints were filed with the newly nominated commissioners in the civil service. In the following months, media reports of sexual harassment attracted much public attention. In March 2000, a prominent minister resigned office and political life following severe accusations of sexual harassment. (He was eventually convicted of sexual assault). This widely publicised case brought the existence of the new law and its meaning to the awareness of the wide Israeli public.

Since the law's enactment, dozens of civil, as well as criminal cases have been decided by lower courts, all pretty much in line with the legislative intent as described in the previous sections of this paper and with the Supreme Court's *Ben Asher* decision. Many more such cases are still pending, and even more are regularly negotiated and settled by the parties. As this new legislation is becoming judicious reality, the legal system, as well as the wide public, is quickly coming to terms with the law's logic and rhetoric. Precedents are beginning to accumulate, and a body of law is developing. These first signs allow for cautious optimism.

NOTES

* I am grateful to my friend and colleague, Marc Spindelman, for his enormous help in thinking this chapter through, and to my friend Nita Schechet for editing.

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1 I use the term 'victim' for lack of a better one and certainly not as a statement referring to harassed individuals' 'helplessness'. The Israeli law refrains from using the term 'victim' (using 'injured person' instead).

2 SH 38, SH 166 (SH = Sefer Hachukim, i.e., 'Book of (Israel's) Statutes').

- 3 An employer can be a person or an organisation; therefore, I sometimes refer to the employer as a 'he' or 'she' and sometimes as an 'it'.
- 4 The prohibition of sexual harassment was initiated by the legal department of the Israeli Women's Network. It was highly influenced by US law and jurisprudence, and particularly by Prof. Catharine MacKinnon's writing.
- 5 Certain conduct has for a long time been prohibited by the Penal Law, including behaviours which are now considered and defined as 'sexual harassment'. So, for example, the crime of 'blackmail' implicitly includes 'sexual blackmail', i.e., *quid pro quo* sexual harassment. But these crimes did not address the sexually harassing elements of the offences, and it would be a stretch to consider them as prohibiting sexual harassment *per se*. See further discussion below.
- 6 Of the very few actions initiated, most were settled out of court, and less than a handful resulted in low courts' judicial decisions, mostly uninspiring. The first and only Supreme Court decision regarding sexual harassment (*The State of Israel v. Zohar Ben-Asher*, unpublished), occurred in 1998, one day before the new law was legislated; the decision cited the forthcoming law, relying on its conceptualisation of the issue. I discuss *Ben-Asher* at the end of this chapter.
- 7 *Prevention of Sexual Harassment Law*, 5758–1998, SH 166.
- 8 In February 1998 a conference, sponsored by the Yale Law School together with the University of Michigan Law School, celebrated the 20th anniversary of Catharine MacKinnon's *Sexual Harassment of Working Women* (Yale University Press, 1979). This chapter grows out of my presentation of the Israeli law at that conference.
- 9 In the Ministry of Justice, the project was embraced, defended and advanced by Gloria Wiseman, Head of the Criminal Division, and Dan Ornstein, Head of the Labour Division. In the Knesset, MK Yael Dayan of the Labour Party, Chairperson of the Knesset Committee for the Empowerment of Women, was the major force behind the advancement of the new legislation; MKs Tamar Gujanski of the Israeli Communist Party, and Anat Maor of Meretz played a major role as well. Rachel Benziman, Legal Advisor to the Israeli Women's Network, represented feminist activism. Prof. Ruth Ben Israel, expert on labour law, represented the Law Faculty of the Tel Aviv University, and I am a member of the Law Faculty of the Hebrew University in Jerusalem. The first draft, which served as the basis for the legislation, together with theoretical analysis, was published in my 'Rethinking Sexual Harassment in Terms of Human Dignity–Respect', *Mishpatim* 29, 1998, 317–88.
- 10 The combined right to dignity, respect and liberty has been at the heart of Israel's human rights law since 1992; the right to privacy derives from this combined, fundamental right. See discussion below.
- 11 The law defines prejudicial treatment as 'any harmful act, the source of which is sexual harassment . . .'. In Hebrew, 'the source of which' has a wider connotation than does the English translation. See discussion below.

- 12 I should stress that *every type* of sexual harassment and prejudicial treatment under the law is both a tort and an offence.
- 13 I use the term 'victim' for lack of a better one and certainly not as a statement referring to harassed individuals' 'helplessness'. The Israeli law refrains from using the term 'victim' (using 'injured person' instead).
- 14 This point was explicitly discussed and deliberated in the legislative procedure. The Knesset deliberately refrained from mentioning the 'reasonable person' in the law, thus acknowledging the concept's potentially harmful implications for individuals, and especially women, bringing sexual harassment claims.
- 15 Indeed, some European approaches have defined sexual harassment as offensive to human dignity. Privacy has traditionally been used to maintain men's dominance over women in their 'private sphere'. But it can and should be used to protect women from unwelcome violation of *their* private sphere.
- 16 SH 248.
- 17 SH for the year 5752, p. 150.
- 18 The basic law's Hebrew title is *hok yesod kvod ha-adam ve-heruto*. In the official translation, the phrase *kvod ha-adam* has been translated as 'human dignity', but the accurate translation would be 'dignity-respect-honour'. This linguistic association of diverse values is a topic in its own right. As I believe 'honour' is not and should not be relevant to the legal conceptualisation of sexual harassment, I translate *kvod ha-adam* as human dignity and respect. The relationship between human dignity and respect is also a topic in its own right, as is the relationship between dignity, respect and liberty. None of these issues has been resolved within Israeli law.
- 19 I am grateful to Catharine MacKinnon and Rachel Benziman who helped me work out this point while preparing the first draft of the sexual harassment legislation. This theoretical point deserves richer analysis and I intend to address it elsewhere. For an interesting US feminist analysis of respect, liberty and equality see Robin West, 'Toward a First Amendment Jurisprudence of Respect: A Comment on George Fletcher's Constitutional Identity', 14 *Cardozo Law Review* 759 (1993).
- 20 Using 'gender neutral language' (i.e., male pronoun), Israel's sexual harassment law also applies to men, protecting every individual's right to dignity, respect, liberty and privacy. But as sexual harassment is often used to target women as women, the law, through its official explanatory notes, acknowledges the unique need to protect women's dignity, respect, liberty and privacy. Official explanatory notes are drafted by the Ministry of Justice and are attached to the Draft Law for the first call in the Knesset. The notes offer courts guidelines in interpreting the provisions of the statute.
- 21 The Hebrew language does not distinguish between 'sex' and 'gender'. The Hebrew *min* is used to denote both these concepts. (Recently a new Hebrew word, *migdar*, was created to denote 'gender', but it is not yet

- widely used.) The official translation of the law translates *min* into 'sex'; the Knesset expressly meant both 'sex' and 'gender' and I therefore translate *min* into both.
- 22 For a US feminist analysis of sexual harassment on the street see Cynthia Grant Bowman, 'Street Harassment and the Informal Ghettoization of Women', 106 *Harvard Law Review* 517 (1993).
 - 23 This example also demonstrates how 'the workplace' is understood to mean different things in different social and cultural contexts.
 - 24 'Indecent acts' are unwelcome acts committed for sexual gratification or for sexual humiliation.
 - 25 This is the language of the official translation. I would have translated the Hebrew into 'degradation'.
 - 26 I would have chosen the English 'orientation' to capture the Hebrew phrase.
 - 27 'Helpless person' is defined elsewhere in Israeli law. I prefer the term 'defenceless'.
 - 28 After deliberating the issue of rape, the Knesset Committee for the Empowerment of Women decided that although rape constitutes sexual harassment of the most severe kind, it already receives sufficient legal treatment and public attention, and need not be included in the scope of the new law.
 - 29 I believe that the Israeli law can, potentially, address some of the issues addressed by Vicki Schultz in 'Reconceptualising Sexual Harassment', 107 *Yale Law Journal* 1683 (1998). Schultz argues that more effort should be made to extend sexual harassment law to discrimination based on gender. The Knesset explicitly had this concern in mind when drafting the law.
 - 30 For a full discussion see Orit Kamir, 2000, *Every Breath You Take: Stalking Narratives and the Law*, Ann Arbor: Michigan University Press.
 - 31 The Israeli sexual harassment law does not cover all forms of stalking. Israel's privacy law, however, does prohibit several more forms of stalking behaviour.
 - 32 Think of the supervisor who makes sexual advances to an employee while, at the same time, posing difficult work-related demands. The employee well understands that submission to the unwelcome sexual advances would stop the burdensome work-related demands.
 - 33 Sexual harassment as defined in Article 3(a)(1) and (2) is already prohibited in the Penal Law. It is therefore not mentioned here.
 - 34 By 'client' I mean any person coming into contact with any of the employer's employees within a working relationship, including students.
 - 35 An institution such as a university must, according to the employer liability clauses, publish regulations prohibiting the harassment of employees, students and any other person by any university employee. The responsibility of the institution does not extend only to its employees, but also to any person harassed by an employee of the institution within his or her work at the institution. Furthermore, the provisions of article 7(g), adopted by the legislature as a reservation to the

proposed law, specifically requires that educational institutions take reasonable measures in order to prevent sexual harassment of any person by students. Educational institutions must refer to harassment of this kind in their regulations and handle complaints of harassment committed by students. This provision, not approved by the committee, is, in my view, far-fetched.