

THE RELATIONSHIP BETWEEN THE PROHIBITION OF DISCRIMINATION AND THE PROHIBITION OF HARASSMENT AT WORK AND DURING RECRUITMENT

ABSTRACT: This paper analyzes the relationship between the prohibition of discrimination and the prohibition of harassment at work and during recruitment within the framework of contemporary labor law. Since the prohibition of discrimination is broadly conceived from a legal perspective, and must be applied across all areas of the socio-political and economic system, the paper examines certain aspects of the prohibition of discrimination and some of the possible grounds for unequal treatment of particular categories of persons, namely employees and job applicants. It is precisely in this area that the prohibition of discrimination and the prohibition of harassment significantly overlap, and although they constitute distinct legal institutions, they share a common objective—the protection of employees’ dignity at work and in connection with work, as well as the principle of equal treatment for all. The paper provides an overview of the relevant legislation of the Republic of Serbia, theoretical interpretations, and a comparative legal analysis of solutions adopted in European Union law and international law. Special emphasis is placed on the practical aspects of the overlap between discriminatory and harassing conduct, as well as on the importance of addressing these issues and implementing preventive mechanisms by employers in order to create a safe and dignified working environment.

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1. Introduction

The relationship between the prohibition of discrimination and the prohibition of workplace harassment can be viewed from several aspects. One and the initial one is certainly the relationship between the general and special legal institute. Namely, the prohibition of discrimination in the Republic of Serbia is set much more broadly than the prohibition of workplace harassment and as such has been raised to the level of a constitutional principle, within the framework of “Human and Minority Rights” (Article 21 of the Constitution of the Republic of Serbia, 2006), while the prohibition of workplace harassment is not, but through a systematic interpretation of constitutional provisions, especially those within the framework of “Human Rights and Freedoms” – dignified and free development of the personality, the right to work, etc., a basis can be found for the prohibition of workplace harassment and harassment in connection with work (Article 23, 60 of the Constitution of the Republic of Serbia, 2006).

In addition of the above, i.e. the relationship between the general and the particular, it is similarly legally regulated in the highest legal act of the Republic of Croatia, with certain differences in relation to the Constitution of the Republic of Serbia. Namely, the Constitution of the Republic of Croatia also raises the prohibition of discrimination to the level of a constitutional principle, but does not use the term “discrimination”, but the provision itself defines equality: “Citizens of the Republic of Croatia have the same rights and freedoms, regardless of their work, skin color, sex, language, religion, political or other beliefs, national or social origin, property, birth, education, social status or other characteristics. All are equal before the law.” (Article 14 of the Constitution of the Republic of Croatia, 1990) The cited provision is followed by the one concerning national minorities, who are guaranteed equality. The difference compared to the Constitution of the Republic of Serbia is that the provisions related to labor are listed within the framework of “Economic, social and cultural rights”, and not in human rights and freedoms, behind the provisions that guarantee the right to entrepreneurship and market freedoms, the right to work, freedom of labor, the right to strike, the right to minimum wage and vacation, etc. (Articles 55-61, Constitution of the Republic of Croatia, 1990).

In EU law, the general prohibition of discrimination is also contained in the provisions of Article 13 of the Treaty establishing the European Community (Đukić, Petrušić & Janković, 2020, p. 28). In the consolidated version of the Treaty on European Union and the Treaty on the Functioning of the European Union, the prohibition of discrimination is already mentioned in Article 2 and further, in a large number of provisions of the treaties (Consolidated version of the Treaty on European Union and the Treaty on the Functioning of the European Union).

Therefore, after the above, when it comes to the relationship between the prohibition of discrimination and the prohibition of workplace harassment, one can hypothesize that they are different, but that their distinction in practice is sometimes difficult and that this fluid difference actually tends to a kind of encounter in the concept of personal dignity, which must legally exist in all spheres of life, including at work and in connection with work. Therefore, the relationship implies both differences and similarities, and the encounter of both with the same goal – the protection of the dignity of a person at work and in connection with work.

2. Legal framework

Legal regulations regulating the prohibition of discrimination and the prohibition of harassment at work can be divided into domestic and international. The Republic of Serbia has ratified most of the international regulations, and domestic regulations in this area are in line with international standards and obligations that our country has assumed by signing numerous international treaties and ratifying international conventions.

Of the large number of declarations, conventions, directives and international agreements, only the most important and those that are considered fundamental in international circles in the areas of prohibition of discrimination and prohibition of work at work will be mentioned.

- 1) United Nations Charter, in Article 55, point c, obliges all articles to “respect for human rights and fundamental freedoms for all, without distinction as to race, sex or religion, language (1945).
- 2) The Universal Declaration of Human Rights, in Articles 1 and 2, guarantees freedom and equality in dignity and rights to all people, regardless of “any distinction, whether such as sex, religion, political or other opinion, national or social origin, property, birth or other status”. One, within it, the right to work is included in the basic human rights, Article 23. (Škorić, 2016).

- 3) The UN Convention on the Elimination of All Forms of Racial Discrimination is the basic UN document in the fight against racism and discrimination (Law on the Ratification of the UN Convention on the Elimination of All Forms of Racial Discrimination, 1967).
- 4) International Covenant on Civil and Political Rights (Law on the Ratification of the International Covenant on Civil and Political Rights, 1971).
- 5) International Covenant on Economic, Social and Cultural Rights (Law on the Ratification of the International Covenant on Economic, Social and Cultural Rights, 1971).
- 6) Convention on the Rights of the Child (Law on the Ratification of the United Nations Convention on the Rights of the Child, 1990).
- 7) The International Convention on the Elimination of All Forms of Discrimination against Women (1979) prescribes the responsibility of member states to eliminate all forms of discrimination against women in the exercise of civil, political, economic, social, and cultural rights, not only in public, but also in private life, including the family (Law on the Ratification of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, 2002).
- 8) UN Convention on the Rights of Persons with Disabilities (Law on Ratification of the Convention on the Rights of Persons with Disabilities, 2009).

In the field of protection against discrimination, secondary sources of law are also important – EU directives, the most important of which are: Directive 2000/43/EC, implementing the principle of equal treatment between persons irrespective of racial and ethnic origin; Directive 2000/78/EC, establishing a general framework for equal treatment in employment and occupation; Directive 2002/73/EC implementing the principle of equal treatment for women and men as regards employment, vocational training and promotion, and working conditions; Directive 2004/113/EC implementing the principle of equal opportunities and equal treatment of men and women in access to goods and services; Directive 2006/54/EC of the European Union on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation; Directive 2010/41/EU of the European Union on the application of the principle of equal treatment between men and women engaged in a self-employed activity, etc. (Đukić, Petrušić & Janković, 2020, p. 29).

In the international context, and especially for the topic of this paper, the conventions and recommendations of the International Labour Organization (ILO) are also very important. Of the conventions that have been adopted more recently, C190 stands out, the Convention against Violence and Harassment, adopted in 2019, with entry into force in 2021, which the Republic of Serbia has not yet ratified (International Labour Organization). As far as the prohibition of discrimination is concerned, the most significant is Convention C111 from 1958, which entered into force in 1960 and has been ratified by all ILO member states (Singh, 2025).

Based on the international legal framework, the Republic of Serbia has adopted a set of legal regulations concerning the prohibition of discrimination and the prohibition of harassment at work. Although the sets of laws for both institutes are independent and at first glance different, in a large number of articles of the law, they are intertwined. To begin with, the Labor Law (2005, Articles 18–23) contains a standard prohibition outlined as a general regulatory provision. It, under the section entitled “Prohibition of Discrimination”, legally treats both discrimination of employees and persons seeking employment, but also the prohibition of harassment and sexual harassment of the same institutes, which would be – the prohibition of harassment at work (Kulić & Škorić, 2020, pp. 89–92).

As a separate institution, the prohibition of discrimination was later regulated by the Law on the Prohibition of Discrimination (2009), within which, again as a general regulation, the prohibition of discrimination in the field of labor is specifically highlighted (Article 16).

The law prohibiting harassment at work was passed in 2010 under the title of the Law on the Prevention of Harassment (or Abuse) at Work, as a separate law that treats this prohibition in more detail, which was originally prescribed by the Labor Law (2005), as part of the general prohibition of discrimination. In the Serbian legal system, there is a certain terminological inconsistency in the institute of prohibition of harassment at work, because different legal regulations are in force at the same time, which have different names for, one might say, the same institute (Škorić & Matijašević, 2018).

However, is it just terminological? Analyzing the provisions of the Labor Law (2005), where harassment and sexual harassment are treated within the framework of the prohibition of discrimination as “Harassment and sexual harassment are prohibited. Harassment, within the meaning of this law, is any unwanted behavior caused by any of the grounds set forth in Article 18 of this law that is intended to or constitutes a violation of the dignity of a person seeking employment, as well as an employee, and that causes fear or

creates a hostile, humiliating or offensive environment. Sexual harassment, within the meaning of this law, is any verbal, non-verbal or physical behavior that is intended to or constitutes a violation of the dignity of a person seeking employment, as well as an employee in the sphere of sexual life, and that causes fear or creates a hostile, humiliating or offensive environment” (Article 21 of the Labor Law 2005) in relation to the definition of the prohibition of abuse from the Law on the Prevention of Abuse at Work (2010) (Workplace harassment) “Abuse, within the meaning of this law, is any active or passive behavior towards an employee or a group of employees of an employer that is repeated, and which aims to or constitutes a violation of the dignity, reputation, personal and professional integrity, health, position of the employee and which causes fear or creates a hostile, humiliating or offensive environment, worsens working conditions or leads to the employee being isolated or causing him to terminate the employment relationship or cancel the employment contract or other contract on his own initiative. Abuse, within the meaning of this law, is also inciting or inducing others to behave as referred to in paragraph 1 of this article. The perpetrator of abuse is considered to be the employer with the status of a natural person or the responsible person of the employer with the status of a legal entity, the employee or group of employees of the employer who commits the abuse referred to in paragraphs 1 and 2 of this article.” (Article 6 of the Law on the Prevention of Abuse at Work (Workplace harassment) 2010), many similarities, but also differences, can be found. Namely, the first and mentioned difference is the term used, harassment, versus abuse. Then, the Law on the Prevention of Abuse at Work (2010) defines this behavior more precisely and introduces another type, which is “inciting or inducing others to behave...” Further, according to the systematization and definition from the Labor Law (2005), it follows that harassment is part of discrimination, because it is regulated in that part. Also, according to the Labor Law, from abuse, or harassment, as stated in the text, both employees and persons seeking employment are protected (Article 23 of the Labor Law, 2005), while in the Law on the Prevention of Abuse (2010) this is not the case, because this protection is enjoyed by employees and persons engaged in work on any basis with the employer, the basis on which they work, but not by persons seeking employment (Article 2 of the Law on the Prevention of Abuse (harassment) of the Republic of Serbia, 2010). What is common to both definitions is that the behavior is negative, undesirable and affects the dignity of employees or persons seeking employment. It is precisely in the term “dignity” and everything it represents, as a civilizational achievement, that the key that is the link between the prohibition of discrimination and

the prohibition of workplace harassment and in connection with work lies. The above-mentioned differences can be partially justified by the fact that the Labor Law (2005) was enacted earlier, in relation to the laws that prevent discrimination and abuse at work, but also by the fact that the current law and many of its provisions, the circumstances in which we live and the emergence of new forms of work and work flexibility, have made the current law and many of its provisions outdated and ready for changes, including for a completely new Labor Law (Gligorić & Škorić, 2021).

Also, terminological differences are not only specific to domestic legislation. Namely, there are noticeable semantic differences in comparative law as well, and different terms are used to denote this phenomenon. For example, in Australia, the United Kingdom and the USA the term bullying is used (in the sense of persistent mistreatment of an employee that has consequences for the physical and mental health of that person), in France, Belgium and Spain the term psychological harassment is used, while in Germany, Italy, Norway and Denmark the term mobbing is used, which is also the case in the Republic of North Macedonia and the Republic of Montenegro. In Sweden, the term victimization at work has been used since 1993 (Gligorić & Stojković Zlatanović, 2020, p. 35). Of course, it should not be forgotten that the term “harassment” is used as a basic term for all behaviors that may constitute abuse, bullying or violence at work (De Stefano Durri, Stylogiannis, & Wouters, 2020, p.13).

In the legal system of the Republic of Serbia, there are a large number of special laws that primarily prohibit discrimination as a constitutional principle, and listing all of them would further burden the work and take us away from the main topics and hypotheses, which is the relationship between the prohibition of discrimination and the prohibition of workplace harassment and in connection with work.

3. Discussion

After reviewing the legal framework, both international and domestic, related to the prohibition of discrimination and the prohibition of workplace harassment, a historical and legal question arises, which is how the prohibition of discrimination was guaranteed at work, and especially the prohibition of workplace harassment? So, how was respect for the dignity of employees at work guaranteed in Serbia before the adoption of a set of laws that regulated it more precisely in 2009 and 2010? Also, in positive law, another dilemma rise up. Namely, if both the prohibition of discrimination and the prohibition

of work harassment primarily protect the dignity of the person, which law will individuals refer to if their right to dignified work is violated? What is the difference that distinguishes between these two legal institutions, when an analysis of the current labor law has determined that this distinction is not even made in it, but was made only a few years later, with the adoption of special laws?

If we go in order, from a historical and legal perspective, before the current Labor Law of 2005, according to Reljanović and Petrović (2011): “The Serbian (and previously Yugoslav) legal system has long been devoid of regulations that would sanction discriminatory behavior” (p. 186). The same authors state that both discrimination and harassment existed before the adoption of the currently valid legal regulations, but their sanctioning was “limited by the interpretation of criminal law provisions, i.e. by subsuming various criminal acts under this type of prohibited behavior. Workplace harassment was also “wrapped” under the institute of “chicanopic behavior”, which has been developing exclusively in court practice for decades, without explicit legal support” (Reljanović & Petrović, 2011, p. 187). If we look at the current criminal law solutions and provisions of the Criminal Code of the Republic of Serbia, it can be determined that within Chapter 14 Criminal Acts Against Freedom and Rights of Human and Citizen, there is a prescribed criminal part Violation of equality and thus protection of all from discriminatory behavior (Article 128 of the Criminal Code of the Republic of Serbia, 2005).

Further analysis of the same law revealed that there is no criminal offense that sanctions harassment at work and in connection with work, but that there is a criminal offense within the same chapter, “Abuse and Torture”, whose essence is human dignity, which is protected by the prohibition of abuse of another person. (Article 137, Criminal Code of the Republic of Serbia, 2005). However, neither abuse (harassment) at work nor other rights based on work enjoy criminal law protection. In the neighboring Republic of Croatia, for example, this is not the case. Namely, the Criminal Code has a special Chapter 12 dedicated to criminal offenses against employment relations and social security, which lists several criminal offenses, such as: violation of the right to work, non-payment of wages, harassment at work, violation of the right to social security and illegal employment (Articles 131-134 of the Criminal Code of the Republic of Croatia, 2011). Also, in Chapter 11, within the framework of criminal offenses against human rights and fundamental freedoms, the criminal offense of violation of equality is prescribed (Article 125 of the Criminal Code, RH), similar to what exists in the Criminal Code of the Republic of Serbia, with the same penalty – imprisonment for up to 3

years, with the difference that in Serbian code there is another form of this criminal offense, namely if the perpetrator is an official in the performance of his duties.

After answering several previously asked questions concerning the historical-legal element and additional analysis of positive criminal legislation, the turn came to practical issues concerning the application of regulations regulating the prohibition of discrimination and the prohibition of harassment at work. Certain inconsistencies in domestic positive legislation have been discussed above, while one of the basic rules in the application of regulations will be highlighted here – *Lex specialis derogat legi generali*. Namely, in accordance with this, the Labor Law of the Republic of Serbia (2005) is to be considered a general law, while the Law on the Prohibition of Discrimination (2009) and the Law on the Prevention of Abuse (Harassment) at Work (2010) are special laws. Special laws have priority over the general law, and issues that one of them does not regulate, the one that regulates the given issues is applied, provided that if both general and special laws regulate the same matter in a different way, the special law has priority. Therefore, the fact that the Labor Law regulates the matter of the prohibition of discrimination and the prohibition of harassment (abuse) in such a way that it can be concluded that they are one institution, by enacting separate laws on discrimination and on the prohibition of harassment, resolves this dilemma and confirms one of the initial hypotheses, which is that these two institutions are separate and different, but that this difference is often fluid and difficult to notice. As another argument that supports the above, there are numerous reports from the Commissioner for the Protection of Equality¹ in which the most common area of discrimination is listed as race and employment, and in a table, for the period 2022-2024, the area of discrimination in labor and employment in relation to other areas of discrimination (Commissioner for the Protection of Equality), as follows:

¹ Specifically established by the Law on the Prohibition of Discrimination in 2009, which law also determined the conditions for its selection, mandate, competences, etc., Articles 28-34, as well as the procedure before the Commissioner, Articles 35-40b of the Law on the Prohibition of Discrimination.

Table 1. Participation in % according to different areas of discrimination²

Area of discrimination	2022	2023	2024
Work and employment	20,7%	26,8%	20,3%
Proceedings before public authorities	23%	23%	23%
When providing public services or when using facilities and areas	16,1%	10,5%	8%
Public sphere / general public	11,4%	1,3%	2,7%
Health care	7%	7%	7%
Education and vocational training	7,8%	13%	8%
Public information and media	4,0%	4,5%	2,5%
Other areas (Social protection, Private relations, Housing, Justice, Culture, Art, Sports, Other relations)	10%	13,9%	28,5%

Source: Annual reports of the Commissioner for the Protection of Equality for 2022, 2023 and 2024

Based on the table, it can be concluded that the field of work and employment is, unfortunately, one of the fields where discrimination is present. The trend from the latest annual reports is that it is either the first in terms of share or the second, right after the Field of Proceedings before Public Authorities, with the highest percentage being in 2023, with a certain drop in 2024. However, since for the correct interpretation of all reports, numbers and statistics, it is necessary to have a broader social picture, the conditions that exist in a society, the data that will be found in the Annual Report of the Commissioner for 2025 will be very interesting. For now, based on the available data, it is clear why work and employment are inseparable from the institute of prohibition of discrimination, and therefore with the prohibition of work harassment.

Considering that work harassment, in addition to judicial proceedings, can be established, but also resolved in an out-of-court procedure, or in: proceedings before the employer³, mediation, arbitration before the Republic Agency for Peaceful Resolution of Labor Disputes. Since proceedings before the employer and mediation are confidential, it is impossible to determine their number and content. However, interesting information is published on the official website of the Agency for Peaceful Resolution of Labor Disputes, and it concerns

² The table was prepared by the author based on data contained in the Annual Reports of the Commissioner for the Protection of Equality.

³ It is also an obligation for the employee to first initiate a procedure for protection against abuse before the employer, if the employer, or the authorized person at the legal entity, is not the one who committed the acts of abuse (Article 13 of the Law on the Prevention of Abuse (Harassment) at Work, 2010)

harassment at work: “Since the entry into force of the Law on Prevention of Abuse (Harassment) at Work, the Agency has had the most Proposals for initiating an individual labor dispute procedure regarding mobbing. A good indicator is the fact that in the first 2 months of 2015, all 20 Proposals related to mobbing. The employer’s consent is obtained for 1/5 of the proposals, which is proportional to obtaining consent in other labor disputes. Interesting information is that in 30% of cases, mobbing was determined, in 50% it is a violation of other labor rights, and in 20% there is suspicion that it is an abuse of the right to protection” (Republic Agency for Peaceful Resolution of Labor Disputes). Therefore, from the above, it can be concluded that employee work harassment is interpreted much more broadly than is prescribed by theory, law and practice, and other violations of labor rights that cannot be considered harassment in the sense of the legal regulations of the Republic of Serbia are also classified under this act. Previously, it could be attributed to inadequate business policies of employers, which could greatly contribute to the elimination or at least reduction of such phenomena in the workplace if they were clearly defined, not only by state legal regulations, but also by the internal regulations of employers (Saram, Hasan & Aburumman, 2024).

4. Conclusion

In accordance with all of the above, and with the hypothesis set out in the introductory part of this paper, the following can undoubtedly be concluded: the prohibition of discrimination at work and in connection with work and the prohibition of workplace harassment represent two complementary institutes of labor rights protection. Their distinction has theoretical significance, legal distinction, but in practice they are often intertwined. Effective protection of employees, which requires clear procedures, institutional support and continuous harmonization of domestic legislation with the labor standards of the European Union, but also of the International Labor Organization, can greatly contribute to improving the position of employees and people seeking employment. The application of the principles of decent work and equal opportunities are key prerequisites for the development of modern and fair labor relations in the Republic of Serbia. The legal framework exists and is in line with all internationally recognized standards that prevent both discrimination and workplace harassment, but it is necessary to consistently and continuously implement the regulations in practice, to speed up the procedure for resolving such disputes, and above all, to continue educating employees and job seekers about their labor rights and the fundamental right to decent work and respect

for human dignity. The aforementioned education is also needed by employers, almost as much as a decisive stance by the state in severely punishing those who do not comply with the prohibitions prescribed by law.

Conflict of Interest

The author declare no conflict of interest.

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Data availability statement

The original contributions presented in the study are included in the article and/or supplementary material. Further inquiries may be directed to the corresponding author(s).

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ODNOS ZABRANE DISKRIMINACIJE I ZABRANE ZLOSTAVLJANJA NA RADU I PRI ZAPOŠLJAVANJU

APSTRAKT: Ovaj rad analizira odnos između zabrane diskriminacije i zabrane zlostavljanja na radu i pri zapošljavanju u okviru savremenog radnog prava. Kako je zabrana diskriminacije, pravno posmatrano, široko postavljena i nužno ju je primenjivati u svim oblastima društveno-političkog

i ekonomskog sistema, u radu se analizira deo zabrane diskriminacije i deo mogućih razloga nejednakog tretmana određenih kategorija lica, i to zaposlenih lica i lica koja traže zaposlenje. Upravo na tom mestu dolazi do značajnog preplitanja zabrane diskriminacije i zabrane zlostavljanja i, iako predstavljaju različite pravne institute, oba instituta imaju zajednički cilj, a to je zaštita dostojanstva zaposlenih na radu i u vezi s radom, kao i jednako postupanje prema svima. Rad sadrži pregled relevantnog zakonodavstva Republike Srbije, teorijska tumačenja, kao i uporednopravnu analizu rešenja u pravu Evropske unije i u međunarodnom pravu. Poseban akcenat stavljen je na praktične aspekte preklapanja diskriminatorskih i zlostavljачkih ponašanja, kao i na značaj bavljenja ovim temama i sprovođenje preventivnih mehanizama poslodavca u stvaranju bezbednog i dostojanstvenog radnog okruženja.

Ključne reči: *diskriminacija, zlostavljanje na radu, mobing, dostojanstvo zaposlenih.*

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