
A Study on the Concept of Power Relation in Sexual Harassment

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Abstract

In Korea sexual harassment has attracted public attention, ever since Ms. Woo, a professor's assistant lecturer, sued her senior professor for sexual harassment in 1994. At that time it was debated whether sexual harassment could be an act of tort and whether the victim should be compensated. After this case, the notion of sexual harassment was described in the relevant Korean legislation, in particular, the National Human Rights Commission Act and the Equal Employment Act.

The conceptual elements of sexual harassment in above mentioned two acts are very similar. ① The sexual harasser should be an employer or an employee of a public institution standing in a business or labor or other relationship (Art 2. Nr. 5 of National Human Rights Commission Act) ② A sexual harasser has to use high status at work (Art. 2 sec. 2 Equal Employment Act : art 2 sec. 5 National Human Rights Commission Act).

Therefore, sexually related speeches and conducts constitute sexual harassment under Art. 750 Korean Civil Law, only if they satisfy the condition of power relation between the sexual harasser and victim. The extent of legal protection against sexual harassment depends on how the power relation in concept of sexual harassment is to be interpreted. This paper argues that the core of this power relation is connected with gender power. However, the Korean court neither recognize nor accept the notion of gender power. As a result, the scope of protection afforded to the victims is narrow under the present system.

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I. Introduction

In Korea sexual harassment has attracted public attention, ever since Ms. Woo, a professor's assistant lecturer, sued her senior professor for sexual harassment in 1994.¹⁾ That was the first legal action that had been taken against sexual harassment; at that time the definition of sexual harassment itself was being considered. It was debated whether sexual harassment could be a type of tort and whether the victim should be compensated.

Of course, this does not mean that there had not been cases of sexual harassment in Korea prior to this date. Korea exemplifies a traditional, patriarchal society, which has been subject to strict Confucian ideas. Many people in Korea still think that specific division of labor by gender is valid. As a result, females in the Korean labor market are usually recognized as being subordinates; female workers are often regarded not as a colleague with equal status, but as special beings, "like flowers on show in the office". Under such circumstances, it is possible to deduce that sexual remarks made by men about female colleagues may sometimes lead to sexual harassment.

Prior to Ms. Woo's case in 1994, there was no precedent on imposing legal controls on an act which is not classified as rape (Art. 297 Korean Criminal Law) or sexual abuse (Art. 298), but constituted sexual harassment for women. This was because the concept of sexual harassment was not distinguished from that of sexual abuse or violence.

For this reason, Ms. Woo's legal action is extremely significant. After Ms. Woo's case, Korean legal institutions have regarded sexual harassment as a type of tort, as defined by Art. 750 of the Korean Civil Law. Art. 7, sec. 4 of the Gender Discrimination Prohibition and Relief Act, which was enacted in 1999,²⁾ had been regarded as providing for compensation for acts of discrimination based on gender; this has also been mentioned in the Equal Employment Act which has had a prescription about sexual harassment since 1999. On the other hand, the Equal Employment Act of 1987 had no regulation about sexual harassment. In this way,

1) Korean Supreme Court, 1998. 2. 10., 95Da39533.

2) The Gender Discrimination Prohibition and Relief Act was enacted in 1999 and repealed in 2005. The regulation relating to the concept of sexual harassment was transferred to Art. 2, nr. 5 of the revised National Human Rights Commission Act.

we can definitely say the legal system against sexual harassment has certainly improved.

But it does not mean that all speech and behavior which may be interpreted as sexual harassment is controlled by law system. Therefore, not all the victims of sexual harassment may be compensated by the law. That reason is because of the differences between the definition of sexual harassment by law and public opinion on the matter. In this paper, I would like to discuss where such conceptual discrepancies lie and whether these differences are justifiable for the control of sexual harassment by law.

II. Methodology

Since sexual harassment had been at first considered an illegal sexual action constituting an type of sex discrimination based on the work of American feminist lawyer, Catharine MacKinnon.³⁾ Now not only in America but also in Korea sexual harassment is described as a form of unlawful civil tort. As a result, the sexual harasser has to compensate damages suffered by the victim.

Yet, because sexual harassment has for a long time been treated not as legal concept but as a personal sexual intention, and now such a tendency has been maintained somewhat in subsequent cases and in different cultural conditions about sexual advances, the most difficult problem with regard to the concept of sexual harassment is that sexual harassment, which is generally recognized as such in society, is different from the one defined by the legal system and the conceptual arguments about sexual harassment have not ended in either country.

While the traditional legal concepts in the Korean legal system came from continental law, especially from German law, legal definitions about the concept of sexual harassment have been derived from American law. As a result, conceptual arguments about sexual harassment in Korea have been influenced by discussions of it in America.

In this paper, first the concept of sexual harassment is examined, comparing the definition of it in American literature with the Korean one. Second, as mentioned

3) Catharine MacKinnon, *Sexual Harassment of Working Women: A Case of Sex Discrimination*, Yale University Press, 1979.

above, sexual harassment is a type of civil tort in America and Korea; therefore, the legal concept of sexual harassment in both countries has to be compared. In concrete terms, the concept of sexual harassment in judgments by Korean and American courts as well as other relevant provisions on the definition of sexual harassment in related Acts are examined. In the end, I would like to suggest how the concept of sexual harassment should be defined in both the society and legal system.

III. Status of sexual harassment in general

A. Status of sexual harassment in Society

From 1999 to 2004, the Korean Ministry of Gender Equality officially counted 512 cases of sexual harassment. However cases reported by various phone counselors or internet help-sites amount to about 3000 cases. Furthermore, 49.8% of male university students conceded that they had committed sexual harassment in the last year (2004); and 39.2% of female students have experienced sexual harassment as victims.⁴⁾

As we know by this official reported number of sexual harassment cases, sexual harassment is a daily occurrence not only in the workplace but also in school and in all organizations.

Even though sexual harassment is happening daily, generally the sexual harassment is very differently perceived according to gender. Generally, for women sexual harassment is described as a very troublesome thing to deal with and such an environment results in a decline of working conditions. However, 67.3% of men express the view that harmless sexual jokes improve the group environment. Thus, about 46.8 % of men give the opinion that solely sexual violence should be punishable.⁵⁾

Such a divergence in the recognition of sexual harassment sometimes causes emotional discussions between men and women since, for the most part, the victims are women and the offenders are men.

4) <http://www.moge.go.kr/moge/detail.jsp?vIndex=04020100&no=420&co>.

5) Sim, Younng Hee, *Dangerous Society and Sexual Harassment*, Nanam : Seoul, 1998, P. 34-35.

One day a female student told me that she felt she had been sexually harassed when male students were talking to each other about sex oriented themes in front of her face. She asked me whether such conduct could be regarded as sexual harassment. Even if the male students did not talk about such a thing directly to her, could such conduct be considered as sexual harassment?

At that time as a jurist only I could answer “yes but no”. The reasons that I could but answer in this way, were as follows:

First, because the concept of sexual harassment has been in the formulation process, we have not had a unified notion about sexual harassment in society.

Second, since the notion of sexual harassment has not been clear, the degree to which legal control of all sex-related speech and conduct is possible remains unclear also.

B. Status of legal control against sexual harassment

Despite such conceptual unclearness, as mentioned above, in many countries sexual harassment is classified as an object of legal control.⁶⁾ For example, in America it was 1977 when sexual harassment was first recognized by a federal court of appeals as legally actionable as a form of sex discrimination at work under the sex discrimination prohibition of Title VII of the Civil Rights Act of 1964.⁷⁾

In Korea, since the above mentioned Ms. Woo’s case, there have been a few cases decided by the courts on the basis of sexual harassment. In most cases, the court regarded sexual harassment as an type of tort under Art. 750 of the Korean Civil Law, because it violated the sexual decisive power. Thus the victim was paid damages.⁸⁾

Besides, legal control against sexual harassment had been imposed by the abolished Gender Discrimination Prohibition and Relief Act. According to Art. 7 sec. 4 of this Act, sexual harassment was described as constituting an act of gender

6) In Germany, “Beschäftigtenschutzgesetz” was enacted in 1994 as a special act to protect victims from sexual harassers.

7) Mackinnon, *Sex Equality : Sexual Harassment*, Foundation Press, 2003, P. 909 Barnes v. Costle, 561 F. 2d 983 (D.C. Cir. 1977) ; Williams v. Saxbe, 413 F. Supp. 654 (D.D.C. 1976).

8) Seoul District Court, 1998. 4. 30, 87Na51543 ; Seoul District Court, 2002. 11. 26, GaHab 57462.

discrimination.⁹⁾ Therefore, if someone had insisted that she or he had been sexually harassed, it became a gender discrimination case under that legislation. The victim of gender discrimination could file a motion for reparation to the Commission (Art. 21 Nr. 1 Gender Discrimination Prohibition and Relief Act). It had been possible that a motion for reparation in gender discrimination could be made not only in a written statement but also orally containing the ① name and address of the mover, ② purpose and reason of the motion and the facts supporting a case of gender discrimination, and ③ other matters prescribed by presidential decree (Art. 21 Nr. 2 Gender Discrimination Prohibition and Relief Act). Receiving a motion for reparation in gender discrimination cases, the Commission had to immediately investigate the facts of the alleged gender discrimination.

When the Commission determined that, during the investigation of a reparation motion, a concerned case was a gender discrimination case, a mutual agreement between the mover and the person against whom the motion had been filed could be recommended (Art. 25 Gender Discrimination Prohibition and Relief Act). A mover and a person against whom a motion has been filed could, when they fail to reach a mutual agreement recommended under Art. 25, file a motion for arbitration with the commission (Art. 26 Nr. 2 Gender Discrimination Prohibition and Relief Act). As a result of an investigation under Art. 22, when a concerned case was acknowledged as a gender discrimination case, the Commission could recommend ① cessation of all acts of gender discrimination, ② restoration of original state, ③ compensation

9) In this part I explain the legal standards on the basis of the abolished Gender Discrimination Prohibition and Relief Act, because statistics about legal control of sexual harassment cases by the National Human Rights Committee under the new act have not been given. For reference, Art. 2, Nr. 4, (Ra) of the National Human Rights Committee Act provides that sexual harassment constitutes an act of gender discrimination violating equal rights. In the case of sexual harassment, the Commission may propose to both parties concerned a remedy necessary for the fair resolution of the case concerning the petition and recommend a compromise (Art. 40, National Human Rights Commission Act). However, the committee can refer the parties to the relevant conciliation procedure at the request of a party concerned or ex officio (Art. 42 of the National Human Rights Commission Act). If both parties concerned fail to reach a compromise in the course of the procedures for conciliation, the conciliation committee may make a decision instead of the conciliation in order to fairly settle the case. The decision in lieu of conciliation may include ① stoppage of an act of violating human rights, ② restitution and compensation for damage or other necessary remedies (Art. 42, sec. 3, sec. 4, nr. 1, 2 National Human Rights Commission Act). The conciliation under the provision of Art. 42 Sec. 2 and the decision in lieu of conciliation have the same effect as a court settlement (Art. 43, National Human Rights Commission Act).

for damage ④ education and development of countermeasures to prevent recurrence, and ⑤ publication in the advertisement section of daily newspapers as reparation measures.

By this procedure, since 1999, the Commission has dealt with 490 sexual harassment cases. It recommended restoration of the original state in 112 cases, mutual agreement in 7 cases, and compensation for damage in 51 cases.¹⁰⁾

While Korea imposes the legal controls on sexual harassment in this way, the types of conduct identified as sexual harassment are very concretely described, even if the meaning of the general concept is not exactly defined yet. For instance, constant catcalls, sexual gestures, actual touching of a part of co-worker's body, sexual comparisons of appearance, and enforcing sexual relations, etc., are regarded as stereotypical forms of sexual harassment.¹¹⁾ By regulating these typical types of conduct under an ambiguous definition sexual harassment has been controlled by the Civil Law and Gender Discrimination Prohibition and Relief Act in conjunction with the Equal Employment Act.

Such conditions make it difficult to understand sexual harassment as a legal conception, and that sometimes a victim of sexual harassment is protected by legal reparation for damage.

IV. Conceptual debate about sexual harassment in America

A. Concept of sexual harassment in American literature

What can we understand as falling under sexual harassment? As outlined above, even by enumerating the typical types of conduct regarded as sexual harassment, the definition is not clear and it is not easy to define or delineate. Nevertheless, many texts offer different definitions.

In America too, there are different definitions of sexual harassment. First, for instance, sexual harassment may be relatively simply defined as unwanted sexual attention while at work. This definition would appear to limit harassment to actions

10) http://www.moge.go.kr/moge/moge04/news_data/detail.jsp?vIndex=04020100&no=765&co.

11) Ministry of Gender Equality, *A Manual about Prevention against Sexual Harassment in Official Institutions*, 2003, P. 8.

that are repeated.¹²⁾ However, in actuality it is not adequate, that only repeated, unwanted sexual actions constitute sexual harassment, because the substantial character of the conduct, which is sexually harassment, does not depend on the frequency but on the quality of the sexual action.

Second, sexual harassment may be regarded as conduct, typically experienced as offensive in nature, in which unwanted sexual advances are made in the context of a relationship of unequal power or authority.¹³⁾

Under this definition, sexual harassment is focused on unequal power relationships that typically form part of a harassing situation. By this definition, wherever the relation between an offender and a victim is unequal in power, for example between a senior official and a mere clerk or between professor and student, etc, we can examine if it constitutes sexual harassment.

In spite of such merits, however, this definition of sexual harassment brings problems. In relations of unequal power it raises a question in cases where the conductor offers a benefit in exchange for fulfillment of his or her own sexual request and the victim is willing to go along with this and furthermore she or he intends this in order to get such a benefit; under this circumstance sexual conduct is acknowledged as sexual harassment. In concrete terms, for instance, if a professor approaches a student with an offer of an automatic top mark in a test as recompense for having sexual relations with him or her, this is sexual harassment, even if she was interested and even if she acted willingly at the time.¹⁴⁾

How about the sexual bothering of one student by another student? To be regarded as sexual harassment, must it satisfy the condition of unequal power? For this conduct to fall within this definition of sexual harassment, it demands terms covering not only relationships of unequal power or authority but also of unwanted sexual advances. Therefore, here we have to clarify: first, how “unequal power” in law is understood; and second, when consent exists in sexual relations.

Because the above mentioned definition of sexual harassment does not clarify whether sexual conduct in a relationship not characterized by unequal power should be looked upon as sexual harassment, a definition based on common sense is

12) Lebacqz, Justice and Sexual Harassment, *Capital University Law Review* vol. 22, Summer 1993, P. 605.

13) Friedman / Boumil / Taylor, *Sexual Harassment: What it is, what it isn't, what it does to you, and what you can do about it*, Deerfield Beach, Fla. : Health Communications, c1992, P. 9.

14) Lebacqz, *Ibid.*, P. 606.

offered. By this definition, sexual harassment is bothering someone in a sexual way.¹⁵⁾

This definition lacks the specific attention to the power difference between the parties, although this generally accompanies sexual harassment. Such a simple common sense definition of sexual harassment has, however, an advantage in cases where it is even possible to be harassed by people with less power in the organization. For instance, with this definition we can consider it as sexual harassment that “several women ministers told stories of being harassed by their parishioners”.¹⁶⁾

This definition of sexual harassment leaves open the question of exactly what behaviors constitute harassment, because “bothersome” behavior will differ from person to person. The dubious meaning of “bothersome” behavior causes difficulties in accepting sexual harassment as a legal conception.

In this circumstance, the Equal Employment Opportunity Commission (“EEOC”) has provided a very comprehensive and helpful definition of sexual harassment. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when: (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual’s employment; (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual; or (3) such conduct has the purpose or effect of unreasonably interfering with an individual’s work or academic performance or creating an intimidating, hostile, or offensive working environment.¹⁷⁾

As described above, in America the definition of sexual harassment is not clear at present. Yet in Korea, to decide whether a conduct constitutes sexual harassment, we have to examine the following three elements, i. e. sexually bothersome behavior, unequal power, and subjective consent.

B. Concept of sexual harassment in American courts

In America, legal control of sexual harassment is based on section 703 (a) (1) of Title VII, 42 U.S.C. § 2000e-2 (a) : It shall be an unlawful employment practice for

15) Friedman / Boumil / Taylor, *Ibid.*, P. 15.

16) Lebacqz, *Ibid.*, P. 608.

17) 29 C. F. R. § 1604. 11(a) (1) (2) (3).

an employer — (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms conditions or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

By this provision, sexual harassment is regarded as discrimination because of sex. However, not all conduct of a sexual nature constitutes sexual harassment. In *Meritor Savings Bank v. Vinson* of 1986, Vinson, an employee of Meritor Savings Bank, left her job for an indefinite period because of her sickness in September 1978. On November 1, 1978, the bank discharged her for excessive use of that leave, and Vinson brought an action against her supervisor, Taylor, and the bank, claiming that during her four years at the bank she had constantly been subjected to sexual harassment by him in violation of Title VII. The Supreme Court for the first time recognized that the claim of hostile environment sexual harassment was a form of sex discrimination actionable under the Title VII employment discrimination statute and that the correct inquiry for issues of sexual harassment was whether sexual advances were unwelcome, not whether employee's participation in them was voluntary.¹⁸⁾

As a result, sexual conduct becomes unlawful only when it is unwelcome, and in concrete what 'unwelcomeness in sexual harassment' means was established in the case of *Henson v. City of Dundee*. Henson was a dispatcher in the five-officer Dundee Police Department. She tried to prove that she had been sexually harassed by the chief of the Dundee Police Department, John Sellgren, by giving a statement of three facts. First, she had been placed in a hostile and offensive working environment for women in the police station; throughout the course of two years during which Henson had worked for the police department, Sellgren had been subjecting her to numerous tirades involving demeaning sexual inquiries and vulgarities.

Furthermore, Sellgren repeatedly requested that she have sexual relations with him. Finally, Henson claimed that Sellgren prevented her from attending the local police academy because of her refusing to have sexual relations with him.¹⁹⁾ In the reasons of the Court of Appeals, Eleventh Circuit, it was pointed out that Title VII prohibited employment discrimination on the basis of gender, and sought to remove

18) *Meritor Sav. Bank, FSB v. Vinson*, 477 U. S. 57, 106 S. Ct.

19) *Henson v. City of Dundee*, 682 F. 2d 897 (11. Cir. 1982).

arbitrary barriers to sexual equality at the workplace with respect to “compensation, terms, conditions, or privileges of employment”. Thus, here “terms, conditions, or privileges of employment” included not only the tangible benefits concerning the job, but also the state of psychological well being at the workplace. In order to constitute harassment, sexual conduct had to be unwelcome in the sense that the employee had not solicited or incited it, and in the sense that the employee had regarded the conduct as undesirable or offensive.²⁰⁾ That means, as mentioned above (see above IV. 1.), that if the perpetrator did not receive consent for his sexual action, such conduct is unwelcome and it is unlawful. In this process, whether the victim’s consent exists or not, had to be decided without any pressure, as the Court of Appeal, Eleventh Circuit, described, that unwelcome in sexual conduct had to be decided in the sense that the employee did not solicit or incite it, and in the sense that the employee regarded the conduct as undesirable or offensive.²¹⁾

Such subjective conditions like victim’s consent or unwelcome are not everything as standards in deciding if sexual conduct constitutes unlawful sexual harassment. As an objective standard, it must be examined whether sexual conduct was bothersome with respect to the level of behavior.

In order to conclude which sexual conduct was objectively bothersome, the court had the applied ‘reasonable man standard’, but in *Ellison v. Brady*, the U. S. Court of Appeals for the Ninth Circuit created a new standard for determining what behavior might be bothersome. Female employee, Ellison, insisted that she was sexually harassed by her co-worker, Gray, on the ground that he had pestered her with unnecessary questions, telephone calls, and e-mail messages. Ellison filed a complaint in September of 1987 in the Federal District Court, which held that Ellison had failed to state a prima facie case of sexual harassment due to a hostile working environment. Ellison appealed and the Court of Appeals held that the female plaintiff had made a prima facie case of hostile environment sexual harassment when she alleged conduct which a reasonable woman considered “sufficiently severe or pervasive to alter conditions of employment and create an abusive working environment”, by reason that “the harasser’s conduct which must be pervasive or severe, is not the alteration in the conditions of employment and

20) *Henson v. City of Dundee*, 682 F. 2d 897 (11. Cir. 1982) ; see also, Equal Employment Opportunity Commission Enforcement Guidance : Policy Guidance on current issues of sexual harassment, 4.

21) *Gan v. Kepro Circuit Systems, Inc.*, 27 Empl. Prac. Dec. (CCH) P 32, 379, at 23, 648.

employee need not endure sexual harassment until their psychological well-being is seriously affected to the extent that they suffer anxiety and debilitation”. On this ground the Court of Appeals adopted the perspective of the reasonable woman primarily because a sex-blind reasonable person standard tends to be male-biased and tends to systematically ignore the experience of women.²²⁾

The other important question with regard to constituting sexual harassment is about unequal power between harasser and victim. That means the harasser has an authority over the victim. For instance, in *Fragher v. City of Boca Raton*, the Supreme Court qualified the individual who was authorized to undertake tangible employment decisions affecting the employee as a supervisor.²³⁾

However, the Supreme Court in the case of *Frager v. City of Boca Raton* has understood the conceptual meaning of supervisory authority in a broad sense. As a term to applied vicarious liability, the sexual conductor has to use supervisory power, in this case one of the harassers was authorized to hire, supervise, counsel, and discipline lifeguards, while the other harasser was responsible for making the lifeguard’s daily work assignments and supervising their work or fitness training. The Court qualified them both as supervisors, although one of them apparently lacked authority regarding tangible job decisions.²⁴⁾

V. Conceptual debate about sexual harassment in Korea

A. Concept of sexual harassment in Korean literature

Conceptual uncertainty about sexual harassment and related discussions have developed in Korea in the same way. Shin, Seong-Ja understood that sexual harassment was described as a similar concept with sexual violence, sexual abuse, and sexual flirtation; was expressed by language or physical conduct; and was involved matters from small sexual jokes to rape. This definition of sexual harassment does not makes reference to the level of sexual joke, unequal power or

22) *Ellison v. Brady*, 924 F. 2d 872 (9th Cir. 1991).

23) *Frager v. City of Boca Raton*, U. S. 775, 118 S. Ct. 2275.

24) *Frager v. City of Boca Raton*, U. S. 775, 118 S. Ct. 2275 ; see also, *Grozdanich v. Leisure Hills Health Center*, 25 F. Supp. 2d 953, 973 (D. Minn. 1998).

consent issues.²⁵⁾

Another definition of sexual harassment is given by Kim Jeong-In, who defines sexual harassment as unwanted sex related conduct evaluated as rude and threatening by a recipient in the workplace. Here it is also unclear what unwanted sex related conduct is evaluated as rude and threatening. Even though in his book he deals with sexual harassment cases where the offender of sexual harassment is limited to a senior official and professor, he accepts an unequal power difference as a main element of sexual harassment in other pages of the book. The relationship between his concept of sexual harassment and unequal power in sexual harassment has caused confusion.²⁶⁾ In Korea, conceptual debate about sexual harassment is ambiguous like that in America and it has continued in the field of jurisprudence.

B. Concept of sexual harassment in Korean courts

Ms Woo's case mentioned above was the first one in which the court acknowledged sexual behavior as unlawful sexual harassment. In this case Ms. Woo was Prof. Shin's assistant in laboratory work; her official appointer was not the harasser, Prof. Shin, but the president of the university as a proxy of the Republic of Korea, because the act happened in a national university. However, Prof. Shin had substantial power to nominate his assistant. Ms. Woo alleged that since Jun 5, 1992, Prof. Shin had attempted unwanted touching of her body 20 or 30 times, whenever he taught her how to use instruments in the laboratory. Because of this unwanted body contact, Ms. Woo worked in a thick winter jacket, even though it was summer, tried to express that she felt unpleasant, but never told him to stop engaging in such disgusting behavior. Furthermore, saying that she could change her uncomfortable clothes into jeans etc. in his office, he suggested they take a walk. Ms. Woo refused the suggestion clearly and said "no" immediately. After that Prof. Shin made her working conditions difficult, made negative comments about things she did in laboratory and ultimately dismissed her on June 25, 1993.

25) Shin, Seong-Ja(1993), A type of sexual harassment, negative effect and a victim's individual trait of character in working place, *Study of Social Science Bd.V*, Research Institute on Social Science in Kyungnam University, P.94

26) Kim, Jeong-In, *Understanding and reality of sexual conduct which constitute sexual harassment, - psychological approach -*, Kyoyookkwahaksa, 2000, P. 35

The Seoul District Court defined for the first time how to understand unlawful sexual harassment. In its reasons, the District Court of Seoul held as follows. First, sexual harassment was the act of giving another worker an unpleasant feeling through sex oriented speech and conduct or sexually humiliating them by someone who formally had the right of director or appointer or had active or passive authority to affect a worker's nomination, position in the workplace, or working conditions. Second, if a man with authority makes a sexual advance to another worker and they give advantages or disadvantages concerning employment or working conditions depending on whether or not they deny such a sexual suggestion, this violates the worker's individual dignity, the right of pursuit of happiness, the right to labor under conditions securing gender equality, and individual sexual freedom. This is described as unlawful conduct against the prohibition of discrimination on the basis of gender by the Equal Employment Act and Korean Constitution.²⁷⁾

The definition of sexual harassment by the Seoul District Court involved three elements, i. e. (1) unequal power relation between offender and a victim; (2) unpleasant and humiliated feeling, in other words unwelcome according to the victim's subjective terms; and (3) recognition of one of two forms of sexual harassment ('quid pro quo' or hostile working environment). Even if the Seoul District Court points to these three elements of sexual harassment, the concrete concepts are not defined clearly. The Seoul District Court recognizes not only someone who has the formal right of director or appointer, but also those who have active or passive authority to affect a worker's nomination, position in the workplace, and working conditions as a supervisor; therefore, offenders are relatively broadly recognized.

In the same case, however, the Seoul Court of Appeal expressed a somewhat different idea. The Court of Appeal recognized that sexual advances, which constitute sexual harassment and are protected by tort law in Art. 750 of the Korean Civil Law, had to fulfill the following conditions. First, sexual harassment had to be conducted in relation to employment. Second, even if sexual harassment involved sexual conduct, i.e. demands to accept unpleasant sexual access and every other sex oriented language and act, the implied sexual character had to be clearly open and sexual intent had to be obvious (therefore physical contact necessary for education,

27) The District Court of Seoul in Civil Relation, 1994. 4. 18, 93GaHab77840.

demonstrations of close friendship, or formal conduct by custom of society did not amount to sexual harassment). Third, sexual harassment had to be unwanted conduct by a party. However, in deciding whether sexual conduct is unwanted or unwelcome, the court must consider both the victim's psychological attitude to the circumstances as well as the objective circumstances of that conduct. Furthermore, the damage both psychological and social suffered by the victim due to prejudice in the society has to be taken into consideration. Fourth, discrimination on the ground of sex in relation to employment conditions ("quid pro quo" case) and working environment ("hostile working environment" case) is to be implied in sexual harassment. If sexual conduct is composed of only simple speech or non-repeated behavior and the victim suffers no concrete disadvantages in employment position and other working conditions, the illegality of the act is denied. Illegality about sexual harassment is to be decided from the view point of ordinary people who understand the relationship between men and women as one of harmony, and not from the feminist's view point, in which the relationship between men and women is described as a combative and confrontational one.²⁸⁾ In this way, the Court of Appeal has suggested very difficult conditions be met for sexual conduct to constitute unlawful sexual harassment. Especially, while the Court of Appeal regarded the hostile working environment case as a form of sexual harassment, illegality of sex oriented speech or behavior is denied, if it is not repeated and the victim has no concrete disadvantages in employment position and other working conditions. Thus, in the case of hostile working environment, unlawful sexual harassment is understood in a narrow sense.

Especially, as the Court of Appeal characterized the feminists' viewpoints on gender relations as "combative and confrontational", the possibility for the adoption of a sex-sensitive standard like the "reasonable women standard" in deciding the level of sex oriented conduct which constitutes unlawful sexual harassment has been cut off.

On the contrary the Korean Supreme Court gave a different opinion about the definition of sexual harassment. The Supreme Court held that sexual harassment amounting to a tort in §750 Korean Civil Law need not be restricted to the case where there is a employment relationship between a victim and an offender.

28) The Court of Appeal in Seoul, 1995. 7. 25., 94 Na 5358.

In particular, the Supreme Court could not accept an analysis of sexual harassment that distinguished quid pro quo cases from hostile working environment cases or a view that especially in case of the latter the extent and level of sexual conduct had to be severe. Furthermore, the Korean Supreme Court rejected assertions that: (1) in order to satisfy the conditions for torts under § 750 of the Korean Civil Law, sexual conduct itself had to cause undue interference in the victim's execution of work; (2) the victim's working ability was really obstructed due to the hostile working circumstances; and (3) as a result the victims who claimed damages had to prove that they suffered not only anger, sorrow, or astonishment, but also mental pain due to the sexual harassment.²⁹⁾

In this suit Ms. Woo from the beginning of the litigation process in the Seoul District Court, had sought compensation for tort under Art. 750 Korean Civil Law against Prof. Shin and compensation from the Republic of Korea as Prof. Shin's employer. She won the case against Prof. Shin but failed in the action against the Republic of Korea as employer. The Korean Supreme Court judged that the Republic of Korea as an employer could not have known what sort of conduct happened in the laboratory. Furthermore, the conduct of the defendant, Prof. Shin, was a personal sexual inclination, so the Republic of Korea as employer could not have known about it.

However, in relation to the defendant, Prof. Shin, the Korean Supreme Court acknowledged his liability because his sexual harassment was a form of tort under Art. 750 of the Korean Civil Law. The Korean Supreme Court held that the classification of sexual harassment into quid pro quo cases and hostile working environment cases was unnecessary. Furthermore, the Supreme Court held, that such classification between quid pro quo cases and hostile working environment only had an effect as a standard of sum of compensation.

C. The definition of sexual harassment by Equal Employment Act and National Human Right Commission Act - with reference to abolished Gender Discrimination Prohibition and Relief Act -

In Korea the notion of sexual harassment in law was described for the first time

29) Korean Supreme Court, 1998. 2. 10., 95 Da 39533.

in Art. 2 sec. 2 and Art. 7 sec. 4 of the Gender Discrimination Prohibition and Relief Act, which was enacted after Ms. Woo won her case in the Korean Supreme Court. Under this legal definition, sexual harassment meant acts by employers and employees in business, employment, and other relations, including servants of public institutions who caused in the victim the sense of being sexually humiliated or insulted by using their positions or any sexual language or act in relation to business or gave a disadvantage in employment by reason of a refusal to respond to such a sexual language or act or other sexual demand. Art. 7 sec. 4 of the Act provided that sexual harassment was to be regarded as sexual discrimination.

Also, according to Art. 2 sec. 2 of the Equal Employment Act, sexual harassment at work refers to a situation where an employer, a senior or worker makes another worker feel sexually humiliated or offended by engaging in sexually charged behavior or language using their high status at work or in relation to work, or gives disadvantages in employment on account of no response to sexual gestures or other requests.

Of these two Acts mentioned above, the Gender Discrimination Prohibition and Relief Act is now abrogated because the Korean Ministry of Gender Equality was changed to the Ministry of Gender Equality and Family from June 1, 2005. Accordingly, due to the alteration of the responsible government organ, legal control of sexual harassment is regulated by the National Human Rights Commission Act instead of the Gender Discrimination Prohibition and Relief Act. Under the new Act, sexual harassment is regarded as a discriminatory act which violates the right of equality (Art. 2, Nr. 4, Ra). By Art. 2, Nr. 5 of the National Human Rights Commission Act, the notion of sexual harassment is described using the same wording as Art. 2 sec. 2 of the abolished Gender Discrimination Prohibition and Relief Act.

As a result, the notion of sexual harassment under Art. 2 sec. 2 of the Equal Employment Act and Art. 2 Nr. 5 of the National Human Rights Commission Act is the generally accepted concept in the Korean legal system.

If we examine the regulations about sexual harassment in the two acts mentioned above, we can find the content is very similar. In concrete terms, the main points of both acts can be summarized as follows:

① The first sexual harasser should be employer and employee in business, employment and other relation or a servant of a public Institution under Art 2. Nr. 5 of National Human Rights Commission Act.

Who is such a person? We can count, for example, employers, supervisors and colleagues in a direct employment relationship and business acquaintances. As for public institutions in this Act, we can count government organs, local communal governments and schools etc., and servants of such a public institutes include the directors of public institutes, as well.

Also, Art. 2 sec. 2 of the Equal Employment Act provides that the necessary conditions of sexual harasser are no different in comparison with the definition of sexual harassment in Art. 2 sec. 5 of National Human Rights Commission Act. Only in art 2 sec. 5 of National Human Rights Commission Act, however, servants of public institutes are added as offenders. We can remark that in such a regulation about sexual harassment the law demands special conditions for qualification as a sexual harasser.

② A sexual harasser has to use their high status at work and the conduct must be in relation to work or their position (Art. 2 sec. 2 Equal Employment Act; art 2 sec. 5 National Human Rights Commission Act).

By this regulation we can be cognizant of the fact that in the law sexual harassment is based on a power relation. The sexual harasser, who uses his or her high status or position, has the power to victimize. If the sexual harasser need not always use the power relation, in this case the Equal Employment Act demand relation to work.

③ The sexual harasser can use not only direct physical contact but also only language.

④ To recognize as conduct sexual harassment, it is not necessary to give disadvantage in Employment on account of no response to sexual gesture or requests. It is also acknowledged that the victim is only sexually humiliated or offended by sexually charged speech or behavior.

So we may say that in cases where someone feels that she or he was sexually humiliated or offended by sexually charged language she or he is a victim of sexual harassment. But in order that such a conduct is recognized as sexual harassment by law, another two conditions need to be satisfied.

Namely, the offender must be an employer or employee in business employment or a servant or director of a government organ, local communal government or school and he or she has to have the chance to use his or her high position and to act in relation to work. For this reason not every conduct that is connected with sex and makes someone feel that she is sexually humiliated and offended is a sexual

harassment by prescription of related law.

As a result, in this situation, we can not give legal protection to a person who is sexually humiliated or offended by sexual charged behavior or language. Namely, sexual harassment in the law is not about the extent of such sex charged conduct, but about the parties concerned.

Clearly someone, that feels sexually humiliated and offended by by conduct can assert her or his right to civil suit under Art. 750 of the Korean Civil Law. However, in this case the notion of sexual harassment in the Equal Employment Act and National Human Right Commission Act applies to civil suit. Therefore, sexually related speeches and acts compose sexual harassment under Art. 750 of the Korean Civil Law, only if they satisfy the condition of power relation between sexual harasser and victim. That means, the person who is sexually humiliated can claim tort under Art. 750 of the Korean Civil Law, if such an act occurs in the context of a power relation. The extent of legal protection against sexual harassment depends on how the power relation in the concept of sexual harassment is to be interpreted.

Sexual harassment happens in a power relation. The core of this power relation is connected with gender power. In daily life men take this gender power and sexual harassment is a means to exercise it.³⁰⁾

VI. Conclusion

In Korea the restriction of sexual harassment is possible in two ways. The first is the control of sexual harassment by the National Human Rights Commission Act and Equal Employment Act. As stated above, in this case the sexual harassment is not about the extent of conduct but about the parties concerned. So the boundary of application of these acts is very limited.

The second, although the Korean Supreme Court recognizes sexual conduct which is violating the law, as a type of tort by Art. 750 Korean Civil Law and someone, who is sexually harassed, can charge compensation of damages. However, the Korean court neither recognize nor accept the notion of gender

30) Sim, Young Hee, *Dangerous Society and Sexual Harassment*, Nanam : Seoul, 1998, P. 169 ff.

power. The power relation in sexual harassment is very limited interpreted by Korean law system. As a result, it leads that the victim by sexual harassment is narrow protected.

KEYWORDS : sexual harassment, power relation, National Human Rights Commission, equal employment, gender discrimination