

Sexual Harassment – Discrimination versus Dignity

A COMMENT IN THE WAKE OF THE #METOO MOVEMENT
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Introduction

- The #metoo movement has brought our attention to the widespread prevalence of sexual assault and harassment of women in the workplace.
- Sexual harassment is qualified as a form of discrimination in EU-law and in its member states.
- Yet, legislators and social partners take an ambivalent approach to sexual harassment in working life.
- This ambivalent approach threatens to disguise ongoing gender discrimination and postpone the necessary shift towards gender equality!
- **SEXUAL HARASSMENT SHOULD BE DEALT WITH IN TERMS OF DISCRIMINATION**

EU

- The Equal Treatment (recast) Directive 2006/54/EC
- Article 2.1(c) defines harassment as 'where unwanted conduct related to the sex of a person occurs with the purpose or effect of violating the dignity of a person, and of creating an intimidating, hostile, degrading, humiliating or offensive environment'
- Article. 2.1(d) defines sexual harassment as 'where any form of unwanted verbal, non-verbal or physical conduct of a sexual nature occurs, with the purpose or effect of violating the dignity of a person, in particular when creating a intimidating, hostile, degrading, humiliating or offensive environment'
- In article 2.2.a it is stipulated *discrimination* includes harassment and sexual harassment, as well as any less favourable treatment based on a person's rejection of or submission to such conduct.



EU

- Article 26 contains a rule on Member States to encourage employers and those responsible for access to vocational training to take effective measures to prevent all forms of discrimination on grounds of sex, in particular harassment and sexual harassment in the workplace.
- I.e. the Directive reflects a '**Discriminatory Approach**'



EU

- Already in 2011* a great majority of member states had implemented the Recast Directive and its rules on harassment in terms of discrimination.
- However, harassment as a form of discrimination is more or less 'hidden' behind more general regulations against victimization or violence at work. The phenomenon thus often competes with mobbing or bullying more generally and often in a working environment context.
- Focuses the perpetrator in terms of a criminal misdemeanour rather than in terms of alleged discrimination proper on behalf of the employer.

* A. Numhauser-Henning & S. Laulom, Harassment related to Sex and Sexual Harassment Law in 33 European Countries, European Commission, Directorate-General for Justice 2013 – <https://www.equalitylaw.eu/downloads/4541-harassment-related-to-sex-and-sexual-harassment-law-in-33-european-countries>



EU

- A tradition of a '**Dignity Harm Approach**'
- Now, an ambiguous or '**Double Approach**', such as in Belgium, France, FYROM, Portugal and Slovenia
- An exponent of the Dignity Harm Approach is the 'Framework Agreement on harassment and violence at work' entered into by the European social partners ETUC, BusinessEurope, CEEP and UEAPME within the context of the social dialogue on 26 April 2007
- sexual harassment is mentioned along with bullying and physical violence, and, said to 'potentially affect any workplace and any worker'
- harassment occurs 'when one or more worker or manager are repeatedly and deliberately abused, threatened and/or humiliated in circumstances related to work' and it can be committed by one or more managers or workers
- This definition – in contrast with the Directive's – requires intention and repeated conduct and the actions of fellow workers are explicitly included



Sweden

- EU law is implemented by the (2008:567) Discrimination Act.
- This is a 'Single Act' designed to cover all discrimination grounds – sex, transgender identity or expression, ethnicity, religion or other belief, disability, sexual orientation and age – and areas regulated, including working life
- The Discrimination Act has been given a 'horizontal' design so that the areas of society covered are regulated one at the time, whereas the respective ban on discrimination covers all grounds and forms of discrimination simultaneously.



Sweden

- Harassment is defined as 'conduct that violates a person's dignity and that is associated with one of the grounds of discrimination' (Ch.1, Sec. 4.4).
- Sexual harassment is defined as 'conduct of a sexual nature that violates someone's dignity' (Ch. 1, Sec. 4.5).
- Sexual harassment may relate to any ground covered by the Discrimination Act and is thus not directly linked to sex/gender in section 4.4.5.
- Chapter 2 Section 1 contains the ban itself, (section 2 the exceptions), and finally, section 3 the obligation on the employer to investigate and take measures against any harassment coming to his knowledge.
- Represents the Discriminatory Approach



Sweden

- But, also in Sweden we come across the Double Approach to harassment and sexual harassment.
- These phenomena are also covered by the Work Environment Act (1977:1160)
- An employer must offer a good work environment (Ch. 2 Sec. 2a) and is obliged to undertake all measures necessary to prevent that an individual worker is put at risk, including psychosocial risks such as harassment and violence.
- AFS 2015:4 concerning organisational and social work environment covers psychosocial work environment in a very broad sense
- No explicit mentioning of either harassment or sexual harassment in the provisions...
- A 'numb' instrument



The Cedaw Convention of 1979

- General Recommendation No. 19 on violence against women from 1992 says, sexual harassment implies 'such unwelcome sexually determined behavior as physical contact and advances, sexually colored remarks, showing pornography and sexual demands, whether by words or action. Such conduct *can be* (my italics) humiliating and may constitute a health and safety problem; it is discriminatory when the woman has reasonable ground to believe that her objection would disadvantage her in connection with her employment, including recruitment or promotion, or when it creates a hostile working environment'.



ILO Convention 190 on Violence and Harassment at Work

- Recognizing the right of everyone to a world of work free from violence and harassment, including gender-based violence and harassment, setting a new labour standard
- Provides a very broad coverage in terms of both the definition of violence/harassment, the 'workers' covered, its relation to work and incorporating domestic work
- Imply a shift in state responsibility from a reactive approach to one of active precaution
- Efficiently monitored by the ILO supervisory bodies
- But, does it reflect the Discriminatory or the Dignity Harm Approach – or a more ambiguous Double Approach?



ILO Convention 190 ...

- Violence and harassment (Art. 1.1.a):
'unacceptable behaviours and practices, or threats thereof, whether a single occurrence or repeated, that aim at, result in, or are likely to result in physical, psychological, sexual or economic harm, and includes ...'
- ... Gender-based violence and harassment (Art. 1.1.b):
'means violence and harassment directed at persons because of their sex or gender, or affecting persons of a particular sex or gender disproportionately, and includes sexual harassment'



ILO Convention 190 ...

- National laws may provide for a single concept or separate concepts (Art. 1.2)
- Member States shall adopt 'an inclusive, integrated and gender-responsive approach for the prevention and elimination of violence and harassment in the world of work' (Art. 4.2)
- Acknowledging that gender-based violence and harassment disproportionately affects women and girls (preamble):
making a gender-responsive approach essential to tackle 'underlying causes and risk factors, including gender stereotypes, multiple and intersecting forms of discrimination, and unequal gender-based power relations



Discussion

- It would be too easy to say that whether to apply the Discriminatory Approach or the Dignity Harm Approach is just a matter of choice - it is interrelated with both the historical and the substantive context
- Anti-discrimination regulation is typically designed as complaints-led allegations at individual level
- Discriminatory harassment is special in that it does not call for a comparator – making dignity offence come to the fore
- Notwithstanding, the foundation of discrimination regulation is also to come to terms with structural and systemic unequal treatment of particular groups
- The Dignity Harm Approach tends to draw our attention to dignity in terms of honour's culture and patriarchy



Discussion

- In working life, the structural and systemic limitations and obstacles for women in a sexualised workplace are the target.
- It is not about dignity, but a workplace order presenting women with equal opportunities and conditions as men in terms of power and influence.
- An individual offence is an offence against all women.
- Covering-up group inequalities – in this case the oppression of women – and thus making sex discrimination invisible is a potential effect of the Dignity Harm Approach.
- THEREFORE, WE MUST INSTIST ON THE DISCRIMINATORY APPROACH AND DEVELOP IT FURTHER!



Thank you for your attention!

