Sexual Harassment as Sex Discrimination: A Logical Step in the Evolution of EU Sex Discrimination Law or a Step Too Far?

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KLUWER LAW INTERNATIONAL

Views of European Law from the Mountain

Liber Amicorum Piet Jan Slot

Edited by

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Wolters Kluwer
Law & Business

AUSTIN BOSTON CHICAGO NEW YORK THE NETHERLANDS

Published by:
Kluwer Law International
PO Box 316
2400 AH Alphen aan den Rijn
The Netherlands
Website: www.kluwerlaw.com

Sold and distributed in North, Central and South America by:
Aspen Publishers, Inc.
7201 McKinney Circle
Frederick, MD 21704
United States of America
Email: customer.care@aspenpubl.com

Sold and distributed in all other countries by:
Turpin Distribution Services Ltd.
Stratton Business Park
Pegasus Drive, Biggleswade
Bedfordshire SG18 8TQ
United Kingdom
Email: kluwerlaw@turpin-distribution.com

Printed on acid-free paper.

ISBN 978-90-411-2862-1

Printed in Great Britain.

Summary of Contents

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3.
Sexual Harassment as Sex Discrimination: A Logical Step in the Evolution of EU Sex Discrimination Law or a Step Too Far?

*Rikki Holtmaat**

1. INTRODUCTION

One of the most frequently recounted anecdotes about European Union sex equality law is that the ''mother'' of anti-sex discrimination legislation, Article 119 of the Treaty of Rome, came into being because of the necessity of fair and open economic competition between the Member States.[1] The amended Sex Equality Directive of 2002 provides that sexual harassment in the workplace is a form of sex discrimination.[2] Sexual harassment, thereby being acknowledged as a serious

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1. See e.g. C. Hoskyns, *Integrating Gender. Women, Law and Politics in the European Union* (Verso, London/New York,1996); A. van der Vleuten, *The Price of Gender Equality. Member States and Governance in the European Union* (Ashgate, Hampshire, 2007), and E. Ellis, *EC Sex Equality Law*, 2nd ed. (Clarendon Press, Oxford, 1998). Cf. W.-H. Roth, ''Economic justifications and the internal market''in this volume, at section 2.2. and D. Edward, ''Quality Control of Competition Decisions'' in this volume.
2. Directive 2002/73/EC of the European Parliament and of the Council of 23 Sept. 2002 amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men

Bulterman, Hancher, McDonnell and Sevenster (eds),
Views of European Law from the Mountain, pp. 27–39.

offence against a worker (m/f), can now in theory lead to (punitive) damages to be paid by the perpetrator or by the management or owner of the company where such an offence takes place. Sex equality certainly can have a serious economic impact. For that reason, it seems appropriate to include a contribution about the evolution of EU Sex Discrimination Law in a *Liber Amicorum* for Piet Jan Slot – a colleague who has dedicated his academic life to issues of economic law and European competition law.

In this contribution, I will examine on a conceptual level whether sexual harassment fits neatly into the existing construction of the prohibition of sex discrimination. As a consequence of this choice of perspective, I will not discuss some urgent practical legal issues concerning this legislation, like for instance the issue of who exactly is the norm-addressee of the prohibition (the offender and/or management?),[3] or the socio-legal question whether this approach to combating sexual harassment is the most effective one, in terms of offering individual victims of such conduct the best possible protection thereto. Also, I will not repeat or summarize the extensive feminist debates about the (in)correctness of conceptualizing sexual harassment as sex discrimination.[4] The starting point for my discussion is that the EU has finally bowed its head to strong pressures to prohibit sexual harassment as a form of sex discrimination.[5] I will discuss the conceptual problems that result from this capitulation by first describing how discrimination is defined in the EU context and how this definition was extended to harassment. Next, I will analyse what sexual harassment is and how this phenomenon is defined in the Sex Equality

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and women as regards access to employment, vocational training and promotion, and working conditions, O.J. 2002, L 269/15. After that it was also taken up in Council Directive 2004/113/EC of 13 Dec. 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, O.J. 2004, L 373/37, and in Recast Directive 2006/54/EC of the European Parliament and of the Council of 5 Jul. 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, O.J. 2006, L 204/23.

3. See Holtmaat, ''Het verbod op seksuele intimidatie in de WGB: een koekoeksei in het nest van de gelijkebehandelingswetgeving'' in J.H. Gerards (Ed.), *Gelijke behandeling: oordelen en commentaar 2007* (Wolf Legal Publishers, Nijmegen, 2008), pp. 261-278.
4. In an influential branch of (American) feminism, sexual harassment is seen *per definition* as a form of sex discrimination – see e.g. C.A. McKinnon and T.I. Emerson, *Sexual Harassment of Working Women: A Case of Discrimination* (Yale University Press, New haven, Ct, 1979); S. Brownmiller, *Against Our Will: Men, Women, and Rape* (Simon & Schuster, New York, 1975). A comparison with the European approach can be found in A. Saguy, ''Employment Discrimination or sexual violence? Defining sexual harassment in American and French Law'', 34 *Law and Society Review* (2000), 1091-1128 and G. Friedman and J. Whitman, ''The European Transformation of Harassment Law: Discrimination versus Dignity'', 2003 *Colombia Journal of European Law*, 241-274. The legal discussions around this issue are summarized in McColgan, ''Harassment'', in D. Schiek, L. Waddington and M. Bell (Eds.), *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law* (Hart Publishing, Oxford and Portland, Oregon, 2007), pp. 477-560.
5. This process and the influence of the women's lobby is described by K.S. Zippel, *The Politics of Sexual Harassment. A Comparative Study of the United States, the European Union, and Germany* (Cambridge University Press, 2006).

Directives. Thirdly, I will arrive at the analysis of the level of fit between the two concepts. I will conclude that sex discrimination and sexual harassment are two very different legal concepts that are oddly put together in the Sex Equality Directives.

2. THE CONCEPT OF SEX DISCRIMINATION IN EU LAW, INCLUDING HARASSMENT

Article 119 EEC (now 141 EC) simply stated that there should be no *unequal pay* between men and women; there was no definition of discrimination included in this first anti-sex discrimination provision in EU law. This under-determination was gradually repaired by the ECJ and the European legislature. The *acquis communitaire* on this point is clearly reflected in the latest directives in the field of sex equality.[6]

The definition of direct sex discrimination,[7] as defined in the 2002 Amended Equal Treatment Directive, reads as follows:

> Article 2 (1): ''For the purpose of the following provisions, the principle of equal treatment shall mean that there shall be no discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to marital or family status.''
> Article 2 (2): ''For the purpose of this Directive, the following definitions shall apply:
>
> – direct discrimination: where one person is treated less favourably on grounds of sex than another is, has been or would be treated in a comparable situation.
> – . . . ''

It can be observed that discrimination thereby is defined as unequal treatment and vice versa.[8] Three elements are crucial: there needs to be (1) a treatment *based on* or *related to the ground of sex*, which is (2) *unfavourable* (3) in *comparison* to the other sex. In the course of time, it was acknowledged by the international

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6. This included both the concepts of direct and indirect discrimination. These definitions – through the Burden of Proof Directive (Council Dir. 97/80/EC of 15 Dec. 1997 on the burden of proof in cases of discrimination based on sex, O.J. 1998, L 14/6) – have also been copied in the Race Equality Directive (Council Dir. 2000/43/EC of 29 Jun. 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, O.J. 2000, L 180/22) and the Framework Equality Directive (Council Dir. 2000/78/EC of 27 Nov. 2000 establishing a general framework for equal treatment in employment and occupation, O.J. 2000, L 303/16).
7. I only discuss the concept of direct discrimination here. Much of what is said below is also applicable to indirect discrimination.
8. Close reading of these two provisions reveals that in fact the European definitions of the principle of equal treatment and non-discrimination are tautological or circular (and therefore quite unsatisfactory!). First it is stated that equal treatment means that there is no discrimination, and discrimination is next defined as unequal treatment.

community that it is not enough to prohibit only *unfavourable* treatment on certain grounds, but that it is necessary also to prohibit other forms of behaviour or conduct that may lead to ''impairing or nullifying the recognition, enjoyment or exercise by some groups of people of their human rights.''[9] Women often are not only being treated *differently* (as compared to men) but are also being *abused, intimidated, bullied or mobbed, harassed, stereotyped or stigmatized, treated as non-human*, et cetera. The comparison-element is not important in such prohibitions: the treatment is deemed *bad* in itself. Many European States (on the basis of the International Covenants concerning the elimination of *all forms* of discrimination) had already adopted legislation that prohibited various kinds of discriminatory conduct, often in the context of their criminal laws, prohibiting such behaviours as mobbing, harassment, discrimination-based violence, and hate speech.

The first time the EU legislature recognized this broader way of conceptualizing discrimination was in the Racial Equality Directive 2000/43/EC where, in Article 2, it was added that:[10]

> Harassment shall be deemed to be discrimination within the meaning of paragraph 1, when an unwanted conduct related to racial or ethnic origin takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment. In this context the concept of harassment may be defined in accordance with the national laws and practices of the Member States.

In 2002, a similar provision concerning harassment on the ground of sex was adopted in the Amended Sex Equality Directive.[11] The definition is the same as in the Race Equality Directive, but speaks of a *conduct related to sex*.

It is important to note that both in the original definition of discrimination as unequal treatment and in the added definition of the specific form of discrimination which is called harassment, it is expressly required that there is a relationship between the ''less favourable treatment'' or ''conduct'' and the sex of the person who is affected by it. This close connection between a discrimination ground (in our case sex) and the unequal treatment or harassment is crucial for our understanding of what discrimination is. What is always needed is a causal relationship (*causation)* between the action taken by the perpetrator, the effects that this has (a particular *harm*) for the victim and a particular non-discrimination *ground*.[12] This means that, although it is not necessary that (subjective) *intent*

9. See Arts. 1 of the UN General Assembly International Convention on the Elimination of All Forms of Racial Discrimination (CERD), and Convention on the Elimination on all Forms of Discrimination of Women (CEDAW).
10. A similar provision was included in the Framework Equality Directive (2000/78/EC).
11. See Friedman and Whitman, op. cit. *supra* note 4, and Zippel, op. cit. *supra* note 5, Chapter 3.
12. See E. Ellis, *EU Anti-Discrimination Law* (Oxford University Press, Oxford, 2005), p. 103 and p. 239.

to discriminate on a particular ground is proven, we only call something discrimination when (objectively) there is a connection between a certain discrimination ground and a certain consequence, in terms of getting a less favourable treatment or getting a "bad" treatment which is violating the dignity of the person and is able to create a humiliating, etc. (see the definition of harassment) effect.

Conceptually speaking it is very good to bring these two forms of discrimination together. It makes clear (at last!) that discrimination of women is not only a matter of *unequal* treatment (as compared to men) but that it also may occur in the form of simply *bad* or even *unworthy* treatment of women *because* they are women.[13] This means that (consciously or subconsciously; with or without intent) the *reason* why women get this treatment has to do with certain views and beliefs about women being "different", "inferior", "unworthy", "difficult", "expensive", "irrational", "not-trustworthy", "emotional", or, in sum: about women being "the other". This, in the old days, we simply used to call "sexism".

Sexual harassment, as a specific form of "bad conduct" that negatively affects the daily life of many women,[14] at the same time was also brought under the equal treatment legislation by the EU legislature. Sexual harassment, however, was only prohibited in the context of EU sex discrimination law, not in any of the other Equal Treatment Directives that concern the other non-discrimination grounds that are mentioned in Article 13 EC. Now, let's examine how this was done.[15]

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13. With this extension, a rather weird legal discussion in the UK was ended, where defendants in harassment cases (which were brought under the Equal Treatment Law) claimed that they were not discriminating against anybody as long as they treated employees of a different sex in a similar (harassing) way. This became known as the "I am a real bastard defence". See McColgan, in Schiek et al., op. cit. *supra* note 4, at p. 530.
14. Although there are also men who suffer from sexual harassment, empirical data show that mainly women are the victims of such conduct. From the most recent report (2007) it appears that 1% of the male and 6% of the female workers have experienced "unwanted sexual attention" and resp. 3% and 6% have experienced "bullying/harassment". Another 1% resp. 3% have experienced "sex or gender discrimination". From the perspective of the argument made in this contribution (namely that sexual harassment and sex discrimination are to some extent different issues) it is interesting to see that the researchers indeed did deal with these issues separately. See European Foundation of the Improvement of Living and Working Conditions, *Working conditions in the European Union: The gender perspective*, European Working Conditions Survey, (Luxembourg, Office for official Publications of the European Communities, 2007) at p. 33. Available at: www.eurofound.europa.eu/publications/htmlfiles/ef07108.htm See also European Commission, *Sexual Harassment in the Workplace in the European Union* (1998), p. 5, and and A. McGolgan & FGS Consulting: *Report on Sexual Harassment in the Workplace in EU Member States* (Report drafted during The Irish Presidency of the European Union in 2004); Department of Justice, Equality and law Reform, Government of Ireland. Available at: www.justice.ie/en/JELR/Pages/Sexual_harrassment_in_workplace
15. I.e. how this was done conceptually; we do not deal with the actual history of the political and legal process of the coming into being of this particular provision in the Amended Equal Treatment Directive. See Zippel, op. cit. *supra* note 5, Chapter 3.

3. SEXUAL HARASSMENT AND SEX DISCRIMINATION: THE DIFFERENCE IT MAKES

3.1. A Provisional Phenomenological Definition of Sexual Harassment

There is a long history of fierce debate about the nature of sexual harassment and its relationship to the issue of sex equality. As said in the Introduction, I will not repeat this discussion here, but instead I will simply describe (in a non-legal, i.e. phenomenological way) what I see as sexual harassment. Very briefly phrased, I would say that sexual harassment is *exposure to sexualized conduct or expressions in an institutional context*.

The component ''sexualized conduct'' in this provisional definition means that the conduct that someone (the perpetrator) displays is in any way connected to sexuality.[16] This means that the conduct is explicitly or implicitly aimed at or referring to sexual activities, and entails unwanted physical contact, showing nudeness, using sexual language, etc. In other words: everything that in a given society or culture is associated with sexuality or sexual behaviour, which may differ widely from one country to another. In addition to that, I speak of ''sexualized expressions'', meaning that it is not necessary that this sexual behaviour is directed at a specific person / victim. Making dirty jokes in the company canteen, putting up pin-up posters in a shared office space, or playing adult (porno) videos while being on watch as a fireman, all of that could also amount to a sexualized atmosphere that is experienced as offensive or intimidating by some people (and may not be experienced as such by others).

In today's Western World, people (m/f) are exposed to sexualized conduct and expressions almost every minute of the day, in any possible public or private place. Think of TV commercials, advertisements in newspapers and magazines, billboards along the high way, being pinched in the bottom in an overloaded bus, etc. I do not include all that in the notion of sexual harassment. For that, it is necessary that the sexualized conduct or expression takes place / is situated in an institutional setting. By this I mean that the victim or receiver of the sexualized conduct or expression is somehow ''trapped'' in a certain situation and can not freely choose not to be exposed to the sexualized conduct or expression. Being at work, in school, in hospital, in prison, or in the army[17] there is no escape from the sexual harassment, unless you want to give up your job, quit school, give up medical treatment, escape from prison, or desert the army. All of these actions to prevent yourself from being exposed to the sexual conduct or expressions, could (and most probably will) have severe consequences for your economic, social or legal position. This may cause you to endure the sexual harassment without protesting against it too loudly, because protesting in itself might further damage your

16. N.b. sexuality is *not* the same thing as a person's biological sex!
17. This is not an extensive enumeration of institutions but provides examples of the most important ones.

position within the institution. For this reason, it is necessary to protect people who are in any such institutional settings from any kind of exposure to sexual harassment by means of *inter alia* taking effective legal measures.

The second pressing reason why we deem it necessary to take measures against sexual harassment is that in most of the institutional settings in which people may have to put / find themselves in order to live in our modern world, they are facing relationships of inequality. People within these institutions who are in a position of power can require that the subordinate person (e.g. the worker, pupil or patient) endures the sexual harassment or they can ask for ''sexual favours'' in return for e.g. better working conditions, good grades or even medical treatment (like an abortion).

In many existing legal definitions of sexual harassment, these two aspects of the institutional context have been translated into the requirements that the sexualized conduct or expression

- leads to a negative impact on the conditions under which one has to function in an institution, and /or
- is being used as a condition to get ''favours'' from the person who is exercising some kind of power in the particular institution.[18]

What follows from the foregoing is that there are compelling reasons for any legislature to somehow combat sexual harassment, either by providing victims with effective legal remedies or by forcing the people who are in charge of crucial institutions to take protective and preventive action against it (or both). These reasons do exist regardless whether in some way or another *discrimination* against the victim plays a role in a particular sexual harassment case. There is no reason to restrict the prohibition of sexual harassment to situations where there is (also) sex discrimination and there is no reason to restrict it to the institutionalized context of employment relations or to expand it to goods and services.[19] However, this is

18. In the context of sexual harassment in the workplace these two conditions are known as ''hostile work environment'' and ''*quid pro quo*'' harassment. See Schiek et al., op. cit. *supra* note 5, at p. 478.
19. The problem with applying this norm in the sphere of providing goods and services (as is done in Dir. 2004/113/EC), is that here in most instances we do not have an institutional context in the sense described in this contribution. Women can choose not to go to the pub where there are nude posters on the wall, and women can walk away from the shop where they are approached in a sexualized way (while women cannot walk out of a hospital when they are ill, so that kind of service indeed is ''institutionalized''). If many women object to such things, the ''free market mechanism'' will make sure that perpetrators start to behave themselves! Of course: if this amounts to activities that are penalized in criminal law (like sexual assault or rape), they should be prohibited, but that has already been done in all the legal systems in the EU. Applying the sexual harassment norm, as defined in the directives, in the area of goods and services can easily lead to ''morality policing'' against expressions that by some are seen as undignified. It will lead to all kinds of difficult issues like what prevails in a particular situation: the constitutional right to freedom of expression or the right not to be exposed to sexualized expressions. Outside the institutional contexts and outside the context of criminal behaviour, there is no compelling legal reason (a *Rechtsgrund)* for intervening (by government) and restricting the freedoms of people to express themselves, even if they express themselves in a sexualized way.

exactly what the European Union legislature did when it regulated sexual harassment (only) in the sphere of its sex discrimination legislation.

3.2. The Definition by the EU Legislature

As we have seen in the previous paragraph, in the case of ("simple") harassment the European legislature has made it clear that somehow there must be a causal relationship between the harassment and a (recognized) non-discrimination ground. This, according to the same legislature, is not necessary in the case of sexual harassment. In Article 2(2) of the Amended Equal Treatment Directive sexual harassment was defined as:

> – sexual harassment: 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 an intimidating, hostile, degrading, humiliating or offensive environment.

Whereby Article 3 of the Amended Directive adds:

> Harassment and sexual harassment within the meaning of this Directive shall be deemed to be discrimination on the ground of sex and therefore prohibited. A person's rejection of, or submission to, such conduct may not be used as a basis for a decision affecting this person.

There is nothing in the definition of sexual harassment itself that requires that there exists a causal relationship between the sexual harassment and the sex of the person who is thus being harassed. This definition, I would say, in itself correctly reflects social reality in which often no such relationship can be established in a clear and unambiguous way. The following scheme illustrates this.

	(a) Related to a non-discrimination ground	*(b) Not related to a non-discrimination ground*
(1) Sexual harassment	1a	1b
(2) (''simple'') Harassment (i.e. not sexualized)	2a	2b

Sub 1a: A male doctor harasses female colleagues and patients *because* (somehow, perhaps even on a subconscious level) he disrespects women or *because* (in the case of his colleagues) he wants to undermine women's position in the health institute. Or: a group of football players sexually harasses a co-player *because* they know or presume that he is gay. Or: a Jewish pupil is being sexually harassed by his fellow pupils *because* of the fact that his penis has been circumcised. The three non-discrimination grounds involved in these examples are sex, sexual orientation and religion.

Sub 1b: Female inmates in a prison are sexually harassing a fellow female inmate just because . . . they pick on her like hens in a chicken run, or because . . . they have to find an outlet for their sexual frustrations, or . . . whatever power play may be going on in the prison. Even in many instances of sexual harassment of men against women, I doubt that the victim is being seen by the offender *as a woman* in the sexist sense (as I pointed out above), or that the men somehow want to negatively affect the victim's position because they do not want women in general to have a good position within the institution where all this takes place. It may just as well be the (in his eyes) irresistible sexual attractiveness of the victim that causes his unwanted sexualized behaviour.[20]

Sub 2a: A Turkish worker is being called bad names by his colleagues *because* they don't like people of Turkish origin or they think that he takes away a job from a Dutch worker. Or: The only woman in a team of twenty five workers always is always assigned to the most dirty or difficult jobs, is not invited to come along to the pub after work, is not greeted when she comes to work in the morning, etc. Or: a group of pupils damage the car of their Jewish teacher because they do not like his faith. These forms of harassment are clearly related to a discrimination ground, but are not sexualized in any way.

Sub 2b: A girl with red hair is being kicked and torn at her hair by her fellow pupils at school because of the colour of her hair. A management assistant is constantly being "teased" at work because he is not dressed according to the latest fashion or because he has this weird or formal way of expressing himself. These forms of harassment are neither related to a discrimination ground, nor are sexualized forms of conduct or expressions.

With this scheme I have illustrated that the EU definition of sexual harassment, in which the element of the necessary causal relationship with the non-discrimination ground sex has not been included, is in itself correct. Sexual harassment does not in each and every case relate to the ground of sex. On the contrary. But this does not mean that I think that the inclusion of sexual harassment in the Sex Equality Directives was the correct thing to do.

A first argument for this position is that this inclusion was not necessary since any kind of sexual harassment that indeed is related to the sex of the victim can simply be held unlawful under the prohibition of ("simple") discriminatory harassment on the ground of sex. For that, we do not need a separate definition that does not really add much to the definition of harassment as such.[21] The second

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20. I here take stance against a particular strand in the feminist discussion about sexual harassment in which it is held that any form of sexual activity (especially between a man and a woman) is an instance of sexism or sex discrimination (in the sense of an unequal and violent activity that oppresses the other sex). This is the basic point of departure for some of the American feminists who have been engaged in the construction of sexual harassment law. See e.g. the works of McKinnon and Brownmiller, op. cit. *supra* note 4.
21. There are some minor differences in favour of the definition of sexual harassment. For example, the sexual harassment definition does not demand (cumulatively) that there is a "hostile environment" *and* a "violation of the dignity of the victim". I do not know the reason for this different drafting.

reason for my objection is more serious and concerns the conceptual confusions that result from this legal strategy of the EU legislature. As a consequence of this particular legal construction, judges now face a difficult question: do they or do they not need to take the fact that sexual harassment is placed in the context of sex discrimination law into account in their dealings with these cases?

3.3. The Causal Relationship Between the Sexual Harassment and the Sex of the Victim

A positive answer to this question can be constructed as follows: although the definition of sexual harassment in the context of sex discrimination legislation does not *literally* require that a causal relationship between the sexual harassment and the sex of the victim is established, in fact this must somehow be established when a sexual harassment case is being dealt with in the framework of sex discrimination law. As said above, in the legal construction of the concept of sex discrimination the causal relation between the harm done and a specific discrimination ground forms the *crux* of the whole concept. Article 3 of the Amended Equal Treatment Directive (cited above) explicitly links sexual harassment to discrimination and discrimination (earlier in the Directive) is defined in such a way that there should indeed be such a causal relationship. A second reason for presuming that judges will demand that some kind of connection with the ground of sex must be established is that otherwise they would have no ground to reject sexual harassment claims that are obviously not in any way connected to the sex of the victim. *All* of the cases in category 1a and 1b would have to be prohibited under *sex discrimination* law, even when obviously another non-discrimination ground than sex is at stake, or even when no officially recognized non-discrimination ground at all is at stake. Or put the other way around: if judges did *not* require that the connection with sex needs to be established, this would stretch the legal concept of sex discrimination and the concept of discrimination as such far beyond the everyday understanding of these concepts. Which could, in the end, lead to a serious inflation (or even an implosion) of the prohibition of (sex) discrimination.

Now, if we presume that judges for this and/or other reasons take it that indeed some causal relationship needs to be established between the sex of the victim and the sexual harassment, how are they in fact going to establish this? And who bears the burden of proof for that?[22] I presume that some proof will be required from the victim, because how could you require from an offender to prove that what he/she did is *not* sex discrimination? Is proof of a subjective motive necessary, or can we just objectively deduce from the actual sexualized conduct or expression that there was a case of sex discrimination? In fact, this latter position would boil down to the argument that any sexualized behaviour or expression in itself disrespects

22. As to the facts of the case, in principle the (partly shifted) burden of proof rules in EU discrimination law are also applicable in (sexual) harassment cases. See Art. 19 of the Recast Directive 2006/54/EC.

the (m/f) victim or is harmful for him/her and therefore *per definition* is a case of sex discrimination. But is there any proof for that presupposition? What about a case where a man sexually harasses another man? Many minefields lie ahead of the judge who ventures on this path! The difficulty of proving the connection between the sexual harassment and sex discrimination means that answering "yes" to the above question would leave many victims of sexual harassment empty-handed. In many cases where women are the victim of sexual harassment by a man or men, it is already very difficult to prove that this happened *because* she is a women or that, as a *consequence* of that behaviour, she has suffered sex discrimination.[23] On top of that, other victims (like the homosexual football player, the Jewish schoolboy or the woman in the prison, in category 1 a) and 1 b) would also be void of any legal remedy against the sexual harassment that they encounter.

For all of these reasons, judges could try to construct a line of reasoning by which they can avoid digging into the causation issue and say (explicitly or implicitly) "no" to the above question. These judges could argue that the European legislature expressly left out the words "in relation to sex" in the sexual harassment definition as compared to the definition of "simple" discriminatory harassment. Another argument when interpreting this prohibition could be that there is no need to establish a causal relation with sex discrimination, since the provision can simply stand on its own. I doubt whether the judges at the European Court of Justice will accept this latter argument since, again, article 3 of the Amended Equal Treatment Directive explicitly links sexual harassment to discrimination and discrimination (earlier in the Directive) is defined in such a way that there should indeed be a causal relationship between treatment and ground.

4. TO CONCLUDE: SEXUAL HARASSMENT AS A FAKE EGG OR A CUCKOO'S EGG IN THE ANTI-DISCRIMINATION NEST?

The outcome of this analysis of the construction of sexual harassment as sex discrimination in EU law is that either too much can possibly be qualified as sexual harassment or sex discrimination, or that too little can qualify as such. *Too much*, in the sense that situations that have nothing to do with sex discrimination are placed under this law which might lead to a serious "conflation" (i.e. inflation + confusion) of the discrimination concept. *Too little*, in the sense that various kinds of sexual

23. Unless one wants to maintain the position that any kind of sexual harassment *per definition* leads to (relatively) bad (working or other) conditions for women and/or adds to the general situation of sex discrimination in society. In which case the causal relationship would be very abstract and general. This line of argument, however, is blocked as soon as you place sexual harassment in the context of a symmetrical sex discrimination law that equally prohibits discrimination against women and against men. It is hard to conceive how a case of sexual harassment in which a woman is the offender and a man is the victim, could on the basis of this generalization be qualified as sex discrimination since men, in general terms, are not at all in a bad position in society!

harassment cannot be combated through this law, since they do not take place on the ground of the sex of the victim and are therefore left unregulated because until now we have no ''general'' – i.e. non-sex related – prohibition of sexual harassment in EU law. However sympathetic and progressive the initiative of the European legislature may seem at first sight, on second sight it must be concluded that most probably it has thereby created a situation that does more harm than good to the problem of sexual harassment and the lack of legal remedies against this very objectionable kind of treatment. As I have argued in this contribution, sexual harassment deserves a strong legal framework that offers victims optimal protection. This protection should stretch beyond the sphere of labour relations[24] (to which the equality directives are mainly restricted) and should also include education, healthcare, etc.[25] What has been constructed, however, is a limited and seriously troubled and confused approach to the problem of sexual harassment.

A further (political) problem is that it will be very hard to repair this situation. A general EU law, that offers protection to all victims of any kind of *sexualized conduct or expressions in an institutional context* that is based on any possible or conceivable motive or ground, is further away than ever before. The argument will be that in Europe we have already regulated sexual harassment since 2002 when we put it in the Amended Sex Equality Directive. It is a pity that the EU legislature did not take an alternative route. A more encompassing (but not complete)[26] approach could have been situated in the area of EU legislation concerning health and safety at work, for which Article 137 EC constitutes the legal basis. Building on the 1989 Framework Directive in this area,[27] a specific directive concerning sexual harassment at work could have been adopted, not only prohibiting sexual harassment as such – as was done in the Equal Treatment Directives – but also giving clear instructions to employers as to what their responsibilities are in this respect

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24. Earlier, see note 19 *supra*, I have argued that the EU legislator has stretched the scope of application of this norm too far where it has also prohibited sexual harassment in the sphere of goods and services (Directive 2004/113/EC), where the institutional setting in which the sexualized conduct or expressions take place often is lacking.
25. Of course, labour relations in the areas of healthcare and education are covered by the directives. What I mean here is that within these institutions not only workers but also pupils and patients are possible victims of sexual harassment. See also the next footnote.
26. More encompassing in the sense of covering all sorts of sexual harassment, not only those cases where a causal link with sex discrimination can be established. I realize that such legislation (again) would only protect workers. Pupils at school, patients in hospital or inmates in a prison would again not be covered by it. However, I see no legal (Treaty) basis for the EU legislator to prescribe Member States to construct a legal norm that prohibits and sanctions these forms of sexual harassment. This does not mean that EU Member States are not obliged to do so. There are other international legal standards who prescribe that States are under an obligation to take effective measures against all kinds of violence, especially of a sexual nature. See e.g. General Recommendation 19 of the CEDAW Committee, covering the area of gender based violence. To be found at: www.un.org/womenwatch/daw/cedaw
27. Council Directive 89/391/EC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work; O.J. 1989, L 183/1, as amended by Regulation 2003/1882, O.J. 2003, L 284/1.

and expressly stating that they are liable for any damages that follow from not complying with these rules.[28] Such (positive) instruction norms could have been drafted in accordance with the excellent recommendations, made by the European Council as early as 1990.[29] Such instruction norms would include the obligation to take preventive measures and the obligation to effectively protect victims of sexual harassment, i.e. by installing independent (expert) complaint committees and offering counselling to victims.[30]

It seems that we have to conclude that the EU legislature instead of taking this wider, and in my view far more effective approach, has either laid a fake egg (offering nothing substantial in terms of protection for victims of sexual harassment) or laid a cuckoo's egg (destroying the other little birds in the equal treatment legislation nest). I seriously don't know what's worse!

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28. I thank Yi (Mary) Chen, student of the Advanced LLM Studies in European Business Law 2006-2007 at Leiden University, for engaging into an investigation of the possibilities that EU Law in this area could offer to regulate sexual harassment at work.
29. Council Resolution of 27 June 1990 on the protection of the dignity of women and men at work. O.J. 1990 C, 157/3.
30. Indirectly, on the basis of these norms, also accountability and liability of the perpetrator of sexual harassment (who most often is not the employer himself but one of his employees or a ''third party'', e.g. a customer, a patient, a pupil) could be legally constructed. In the Netherlands I have done extensive research into the way in which, in this indirect or ''reflexive'' way, through the provision on sexual harassment in the Dutch Act on Labour Conditions (Arbeidsomstandighedenwet), judges in civil law cases have accepted that employers disciplined or fined perpetrators or even dismissed them. On the other hand the instruction norms offer the victim a possibility to sue not only the perpetrator, but also (or foremost) the employer where he/she has not taken enough action. See R. Holtmaat, *Seksuele Intimidatie; Een juridische gids* (Ars Aequi, Nijmegen 1999).