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Sexual Harassment and Harassment on the Ground of Sex in EU Law: a Conceptual Clarification

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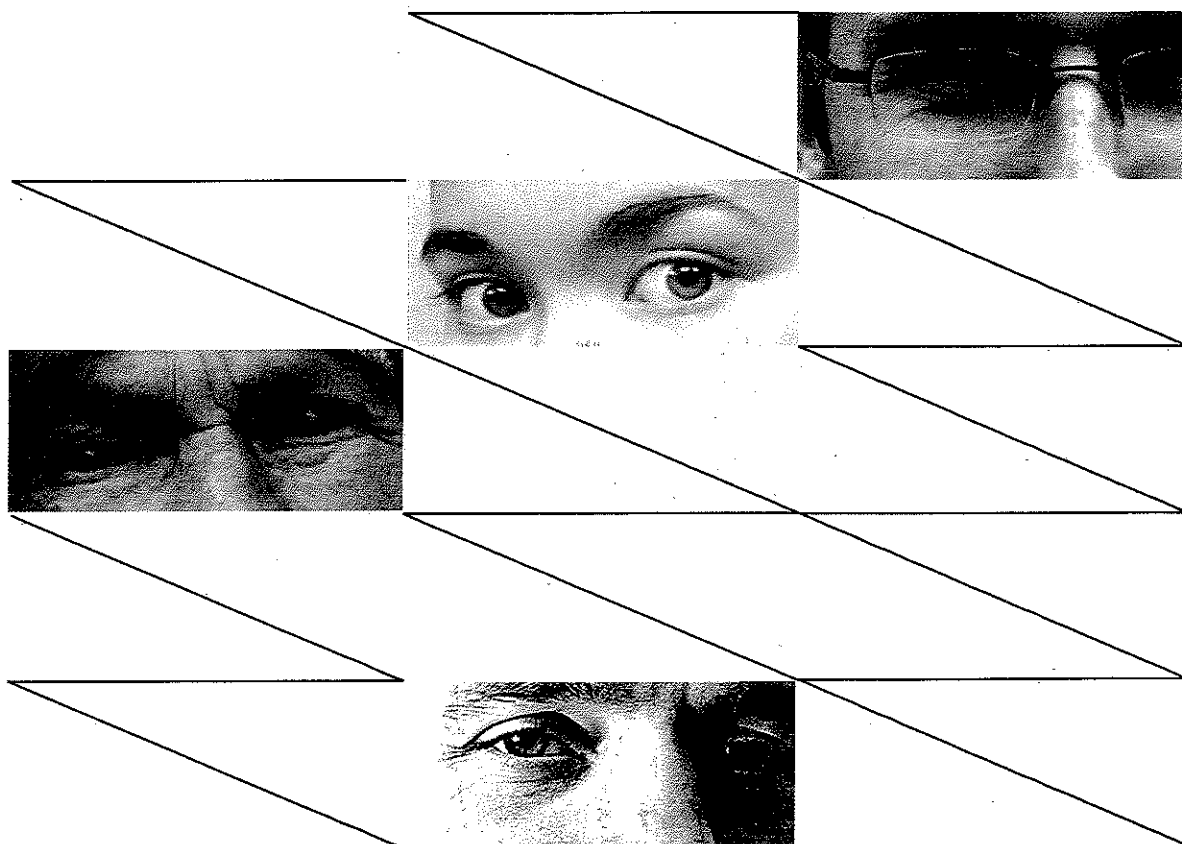
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Sexual Harassment and Harassment on the Ground of Sex in EU Law: a Conceptual Clarification

Rikki Holtmaat*

Introduction

Sex discrimination can take various forms. It may be the consequence of legal rules, regulations or agreements (e.g. collective labour agreements), or regular or incidental practices which directly or indirectly grant *different rights and duties* to male and female (legal) subjects. In other words, sex discrimination often takes the form of *unequal treatment between men and women*. The prohibition of unequal treatment therefore is the central norm in all sex equality directives of the European Union. But sex discrimination may also be actual behaviour through which some persons receive '*bad treatment*' on the ground of their sex. Harassment, hate speech, mobbing, (sexual) violence, stalking, all of these forms of 'bad treatment' may relate to sex discrimination. It is therefore a positive development that two new provisions were included in the Amended Equal Treatment Directive 2002/73/EC and were later incorporated in other directives as well: the prohibition of 'harassment on the ground of sex' and 'sexual harassment'. It is my aim to clarify these two provisions and to investigate whether their placement in the context of EU sex equality directives is logical and sufficient to combat these forms of discrimination on the ground of sex.³

To begin with, I will describe how sex discrimination is defined in the EU sex equality directives and why and how this definition was extended to both 'harassment on the ground of sex' and 'sexual harassment'. Although sounding very similar, these two concepts are in fact very differently constructed in EU law. I will therefore compare their content and scope in a detailed way.

In order to understand that a regulation of sexual harassment outside the scope of sex equality law is (also) necessary, a further clarification of the phenomenon of sexual harassment is necessary. What kind of conduct are we talking about? In which context does this take place? And which 'actors' are involved in it? What does all of this mean for the construction of legal norms to combat sexual harassment?

To conclude, I will discuss whether the inclusion of the concept of sexual harassment in the EU sex equality directives is sufficient to combat this particular form of 'bad behaviour'.

Sex discrimination, harassment on ground of sex and sexual harassment as defined by EU law

Since 1976, Directive 76/207/EEC has prohibited unequal treatment on the ground of sex in the area of employment relations. This was followed by a great number of other directives.⁴

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³ An earlier, more extended publication on this topic, from which I derived some text for this contribution, is: R. Holtmaat 'Sexual Harassment as Sex Discrimination: A Logical Step in the Evolution of EU Sex Discrimination Law or a Step Too Far?' in: M. Bulterman et al. (eds.) *Views of European Law from the Mountain: Liber Amicorum Piet Jan Slot* pp. 27-40 Alphen aan den Rijn, Kluwer Law International 2009. Other recent publications (in Dutch) are, inter alia, R. Holtmaat *Seksuele intimidatie: De Juridische Gids* Nijmegen, Ars Aequi Libri 2009; R. Holtmaat '25 jaar bestrijding van seksuele intimidatie. Naar een adequate juridische benadering van een hardnekkig probleem?' *Nederlands Juristenblad* 20 (2010) pp. 1280-1286.

⁴ A brief description of these directives may be found in S. Burri & S. Prechal 'EU Gender Equality Law. Update 2010', European Commission 2010, available at: http://ec.europa.eu/justice/gender-equality/files/dgjustice_eugenderequalitylaw_update_2010_final24february2011_en.pdf, accessed 8 November 2011.

The definition of direct sex discrimination, as defined in the Recast Directive 2006/54/EC, reads as follows:

- Article 2 (1) 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.

Three elements are crucial in this definition:⁵ there needs to be (1) a *treatment based on or related to the ground of sex*, which is (2) *unfavourable* (3) in *comparison* with the other sex. As was said in the introduction, women often are not only being *treated differently* as compared with men, but are also being *treated badly*. This was gradually recognised by EU legislators, who in 2002 also prohibited harassment on the ground of sex and sexual harassment as a form of sex discrimination. The element of comparison is not important in both these prohibitions: the (sexual) harassment is deemed '*bad*' *in itself* and should be prohibited per se.

Harassment on the ground of inter alia race, religion, disability and sexual orientation was first included in Racial Equality Directive 2000/43/EC and in the Framework Equality Directive 2000/78/EC. After that, a similar provision concerning harassment on the ground of sex was included in the Amended Equal Treatment Directive 2002/73/EC, where it is stated that harassment is discrimination within the meaning of the Directive, and where this is defined as 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.”

Since then, a prohibition of harassment on the ground of sex was also included in the Goods and Services Directive 2004/113/EC and in the Recast Directive 2006/54/EC, which repealed some older directives. It is important to note that both in the original definition of sex discrimination as unequal treatment and in the added definition of the specific form of sex discrimination which is called *harassment on the ground of sex*, it is expressly required that there is a *causal 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 this case sex) and the unequal treatment or harassment is crucial for our general understanding of what discrimination is. A causal relationship (*causation*) is always needed between the action taken by the perpetrator, the effects that this action has (a particular *harm* or *disadvantage*) for the victim, and a particular *non-discrimination ground*. Causation does not mean that proof of intent is required, but it does mean that somehow (objectively) there is a connection between a certain discrimination ground and getting a certain *unfavourable* or *bad* treatment.

Conceptually speaking, it was correct to bring unequal treatment and harassment together in the EU non-discrimination legal framework. It makes clear that discrimination against women is not only a matter of *unequal* treatment (as compared with men) but that it also may occur in the form of simply *bad* or even *unworthy* treatment of women *because they are women*.

Sexual harassment, as a specific form of ‘bad treatment’ that negatively affects the daily life of many women in many situations, was also brought under the equal treatment legislation by the EU legislature at the same time. Sexual harassment, however, was only prohibited in the context of EU sex discrimination law, not in any of the EU equal treatment directives that concern the other non-discrimination grounds that are mentioned in Article 19 TEU. Not only does it exist exclusively in the sex equality directives, the norm that sexual harassment is prohibited was also constructed in a different way.

⁵ I only discuss the concept of direct discrimination here. Much of what is said below is also applicable to indirect discrimination.

In the Amended Equal Treatment Directive 2002/73/EC sexual harassment was defined 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 an intimidating, hostile, degrading, humiliating or offensive environment.

Whilst paragraph 3 of Article 2 of the 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.

The difference between harassment on the ground of sex and sexual harassment

A comparison of the two legal definitions reveals the following differences:

	Relationship with non-discrimination ground required	It concerns conduct of a sexualised nature
Harassment on the ground of sex	Yes	No
Sexual harassment	No	Yes

On the one hand, the definition of harassment does not require that the 'bad conduct' is of a sexualised nature; on the other hand the definition of sexual harassment does not require that there exists a causal relationship between the sexual harassment and the sex of the person who is thus being harassed.

It is correct that the Directive's definition of harassment on the ground of sex does not require that the conduct is of a sexualised nature. There are many forms of harassment that are non-sexual in nature, but that are clearly related to the ground of sex. Like, for instance, in the case where the only woman in a team of workers is always assigned to the most dirty or difficult tasks or is denied any serious tasks and instead is asked to make coffee for all of them, while she is never invited to come along to the pub after work, is not greeted when she comes to work in the morning, and so on.⁶ This kind of 'mobbing' becomes extra humiliating and threatening when the conduct of the perpetrators is somehow linked to sexuality. Like, for instance, when the female worker in our example also receives pornographic emails from her male colleagues, or when they openly start betting which of them will be the first to succeed to sleep with her. Sexual harassment, therefore, is a serious offence that should be prohibited.

The directive's definition of sexual harassment, I would say, in itself correctly reflects social reality in which often no causal relationship between the sexual harassment and the prohibited ground of sex can be established in a clear and unambiguous way. The following examples may illustrate this. Sexual harassment (i.e. harassment of a sexualised nature) may or may not be clearly related to a particular non-discrimination ground.

Related A senior male doctor sexually harasses all of his young female colleagues *because* (consciously or subconsciously) he wants to undermine their position in the health institute in order to stay 'the boss'. 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.

⁶ This kind of harassment on the ground of sex is what 'old style feminists' would simply call 'sexism'.

Not related 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 of whatever power play may be going on in the prison. Or male soldiers pick on a fellow male soldier because they think he is a coward. Or a male teacher is stalking a female colleague with whom, for a period of time, he has had a relationship, but he refuses to accept the fact that she wants to end that relationship. Or female pupils put nude pictures of a female class mate on You Tube 'just for fun'.

The examples show that sexual harassment is not always related to the ground of sex. It may instead relate to another non-discrimination ground or may not relate to any discrimination ground at all. This means that the EU definition of sexual harassment, in which the element of the necessary causal relationship with the non-discrimination ground of sex has not been included, is in itself correct. 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.

The first reason for my position is that this inclusion was not necessary since any kind of sexual harassment that indeed is clearly related to the sex of the victim can also 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, apart from naming the sexualised nature of the harassing conduct, does not really add much to the definition of harassment as such. Both definitions stress the fact that the behaviour may lead to an undignified and unsafe environment. The second reason for my objection is more serious and concerns the conceptual confusions that result from this EU legislation. Judges are now facing a difficult question: do they or do they not need to take the fact that the prohibition of sexual harassment is placed in the context of sex equality law into account in their dealings with such cases? If they answer this question in the affirmative, the victims face the very difficult problem of how to prove that there indeed is a causal connection between the sexual harassment and their sex. If, however, judges state that it is not important to prove such a causal connection, because the definition does not require it, they may bring any case of sexual harassment (also between males or between females, and no matter which discrimination ground may be involved) under the scope of sex equality law. This approach, in my view, would overstretch the concept of sex discrimination.

In fact, I think that there are many more objections against including sexual harassment in the EU equal treatment legislation.⁷ One of them is that the EU legislature chose to prohibit sexual harassment as an offence, however leaving it quite unclear who is the actual norm-addressee of this prohibition: the perpetrator(s) or e.g. the employer or person/institution that provides goods and services? It appears at first sight that it is indeed the employer/provider who must refrain from sexual harassment. Can an employer/provider under EU law (also) be held accountable for the sexual harassing behaviour of any other persons who are present in his/her organisation? The latter, in my view, is a necessary legal tool in order to combat sexual harassment effectively.

To clarify my criticism of the inclusion of sexual harassment under the sex discrimination law, it is necessary to have a closer look at this phenomenon. I will do so initially from a non-legal perspective, after which I will return to the question why and how the legislature should address this problem.

Sexual harassment: what is it and why and how should the legislature react to it?

A provisional sociological definition of sexual harassment

Sexual harassment came 'out of the shadow of shame' in most European countries during the second feminist wave in the 1970s and 1980s. It was revealed that especially women at the workplace endured a lot of 'trouble' of this kind of behaviour, mostly by their male superiors or colleagues. There is a long history of fierce debate about the causes and nature of sexual

⁷ The same objections, to some extent, may also be raised against the way in which the European legislature chooses to regulate the issue of harassment on the ground of sex.

harassment and its relationship to the issue of sex equality.⁸ I will not repeat this discussion here, but instead I will describe (in a non-legal, i.e. sociological way) what I consider as sexual harassment. Very briefly phrased, I would say that sexual harassment is *exposure to sexualised conduct or expressions in an institutional context*.

(1) Sexualised conduct or expressions

The component 'sexualised conduct' in this provisional definition means that the behaviour that someone (the perpetrator) displays is, in some way, connected to sexuality or is somehow perceived as erotic or sexualised. It may entail physical contact, showing nudity, using sexual language, making proposals of a sexual nature, etc. In other words, it may be everything that in a given society or culture is associated with sexuality. In addition to this, I need to mention 'sexualised expressions', meaning that it is not necessary that this sexual conduct is directed at a specific person/victim. Constantly making 'dirty' jokes in the company canteen, putting up pin-up posters in a shared office space, or playing adult (pornographic) videos while being on night watch in the fire station, all of that could also amount to a sexualised or eroticised atmosphere that is experienced as offensive or intimidating by some people (and may not be experienced as such by others).

Sexualised conduct or expressions touch upon an aspect of people's lives that is deemed to be very 'private' and is intensely connected to people's self-esteem and dignity. Therefore, it is commonly held that exposure to any such behaviour should always be experienced on a voluntary basis, persons having complete freedom to reject any such activities when they are unwanted. The fundamental human right of (bodily) integrity lies at the basis of this normative evaluation of *unwanted* or *compulsory exposure to sexualised conduct or expressions*. Sexual offences, for the same reason, are not only seen as an intrusion on bodily and mental personal integrity, but also as violating human dignity.

(2) The institutional context

In today's Western world, people are exposed to sexualised conduct or expressions almost every minute of the day, in any possible private or public environment. Think of TV commercials, advertisements in newspapers and magazines, hoardings along the roadside, erotic videos being displayed on the wall of a discotheque, being pinched on the bottom in an overcrowded bus, erotic spam in the email box, etc. I do not include all these 'activities' in the notion of sexual harassment. For that, it is necessary that the sexualised conduct or expression takes place/is situated *in an institutional context*. By this I mean that the victim or 'receiver' of the sexualised conduct or expression is somehow 'trapped' in a certain situation and cannot freely choose not to be exposed to the sexualised conduct or expression (or run away from it). When you are at work, in school, in a hospital, or in prison (just to name the most important amongst such institutional contexts) there is no escape from the sexual harassment, unless you want to give up your job, quit school, abstain from medical or psychiatric treatment, or escape from prison. All of these actions could (and most probably will) have severe consequences for your economic, social, mental or physical, or legal position. This may drive you to endure the sexual harassment without protesting against it too loudly, because protesting in itself might further damage your position within the institution (victimisation).

The institutional context has the effect that persons (workers, pupils or students, patients, inmates) are in a situation of 'dependence', meaning that they are dependent on the 'supervisors' (owner/director or board/management) in that institution to make/keep this environment safe for them and to prevent their position being badly affected by the

⁸ The legal discussions around this issue are summarised in A. McColgan, 'Harassment' in: D. Schiek et al. (eds.), *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law* pp. 477-560 Oxford and Portland, Oregon, Hart Publishing 2007. See also A. Saguy 'Employment discrimination or sexual violence? Defining sexual harassment in American and French law', *Law and Society Review* 34 No. 4 (2000) pp. 1091-1128 and G. Friedman & J. Whitman 'The European Transformation of Harassment Law: Discrimination versus Dignity', *Columbia Journal of European Law* (Spring 2003) pp. 241-274. Of particular interest is K.S. Zippel *The Politics of Sexual Harassment. A Comparative Study of the United States, the European Union, and Germany* Cambridge University Press, 2006.

occurrence of sexual harassment. A second characteristic of the institutional contexts is that in most of these institutions people are facing relationships of inequality. Persons within these institutions who are in the position of power (e.g. a director or a higher ranked colleague, a teacher, a doctor, a prison officer) can require the subordinate person to endure sexual harassment, or these higher ranked persons can ask for 'sexual favours' in return for e.g. better working conditions, good grades, a medical treatment (like an abortion), or earlier release from prison.

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

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

In the context of sexual harassment in the workplace, these factors are known as 'hostile work environment' and 'quid pro quo' harassment.

The legal ground to take measures against sexual harassment and the form of the legal norms and actions

What follows from this is that there are three compelling reasons (*Rechtsgründe*) for any legislature to combat sexual harassment. First, it concerns a kind of conduct that may endanger or violate people's self-esteem or dignity and integrity. Second, this conduct takes place in an institutional context where people are not in a position to reject this kind of treatment or to protest against it or just run away. Third, being able to function properly and freely within this institution is of crucial importance in relation to the enjoyment of important social human rights (most importantly the right to work, education, mental and physical health care, and to dignified and safe prison conditions).

Different types of norms and different norm-addressees

Legal action against sexual harassment may take two main forms. First, it may provide victims with effective legal remedies, mainly by means of a (well-defined) prohibition of sexual harassment, including rules about the burden of proof and effective and dissuasive sanctions against the perpetrator. On the basis of such legislation, individual victims may seek redress in court, e.g. by demanding an injunction to stop the sexual harassment or to get damages. This type of norm is 'reactive' and 'negative': only when damage has already been done may the victim call upon the negative duty of the perpetrator to refrain from any such conduct. Second, the legislator may issue norms to oblige people who are in charge of important institutions to take protective and preventive measures against sexual harassment. These types of norms are 'proactive' and 'positive': they may have an effect before harm will be done and create positive obligations. I call the first type of norms 'prohibition norms', the second type 'instruction norms'.

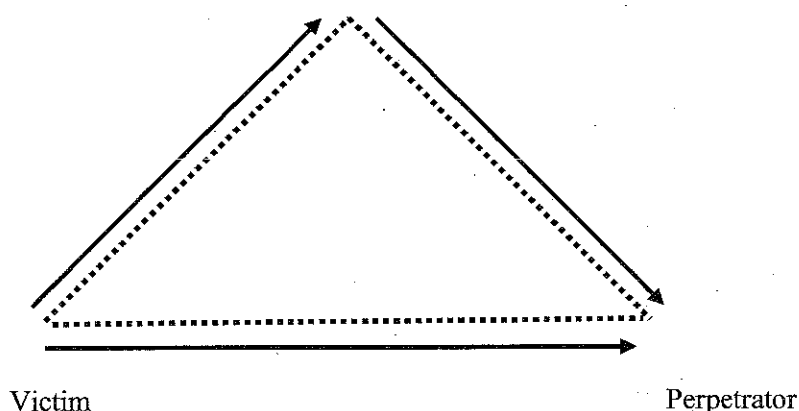
The norm-addressee of a prohibition norm should clearly be the perpetrator, the norm-addressee of an instruction norm should be the person/organisation that is in charge of the institution and has some kind of power or authority over all persons who function within that institution. An employer has authority over his/her employees and can take measures which prevent sexual harassment; i.e. he/she can explicitly prohibit sexual harassment and announce sanctions against anyone who violates this norm; he/she can also protect victims by means of a properly equipped complaints procedure, etc. The same goes for the board of a school, a hospital or a prison. The legal relationship with 'third persons' (e.g. the client of the firm, the parents of the pupils, the visitors of the patients) is more complicated, but nevertheless in most cases the institutional authority may also take some action against them when they violate the norm that sexual harassment is 'not done'.

Given the institutional context in which sexual harassment takes place, in my view the legal construction of the positive duty for the employer/board of the institution to prevent and protect is of crucial importance. Instruction norms are an effective and proactive instrument in the fight against sexual harassment because an employer/board is in a position of power to really change the 'culture' of an organisation. Prohibition norms (although necessary) are less effective, because it is much more difficult for a victim to take action directly against a perpetrator (who has already intimidated and abused her/him) than against an employer/board, which did not prevent the harassment or protect her/him from it.⁹ In order for the employer/board to implement their duties to prevent and protect, they need to have the legal possibility of taking appropriate action against an offender. This could be in the form of punishment of the offender (e.g. dismissal of an employee, expulsion of a pupil), or in the form of civil legal action (tort action against a 'third party'). At the basis of any such 'punishment' needs to lie a prohibition of sexual harassment, which therefore also needs to be in place within the legal system.

A further analysis of the liabilities involved in sexual harassment

In order to better understand the different kinds of legal actions that may be occasioned in a case of sexual harassment, the following triangle may be illuminating.

Employer/ Board of Institution



Between each of these 'parties' different responsibilities and liabilities, and thus also different legal actions, may be possible on the basis of the two types of norms that were described above. The victim may take action against the perpetrator (e.g. in a tort case) on the basis of the prohibition of sexual harassment. On the basis of the same prohibition, the employer/board may take measures against the perpetrator (e.g. dismiss him/her from the job); these sanctions may also be taken in order to implement the norm that an employer/board should effectively protect victims. The victim may also take action against the employer or the board, since they are obliged to provide a safe environment. Often, the employer himself is the perpetrator, especially in small companies; in that case he is doubly responsible: as a perpetrator and as a person who should have effectively protected the victim against sexual harassment. The employer/board could also be sanctioned by an inspectorate when there is a failure to implement the instruction norms correctly and effectively. Of course, all this leaves aside the possibility that the perpetrator will be brought to court by the public prosecutor in a case where the sexual harassment amounts to a criminal offence (indecent (sexual) assault or rape).

⁹ Although the burden of proof is also partly shifted in the case of sexual harassment, proof is often extremely difficult to provide since such conduct often takes place behind closed doors. It is much easier to show that the employer did not have a preventive programme in place or did not take any measures against the perpetrator.

The scope of legislation against sexual harassment

Legislation against sexual harassment may be *underinclusive* (not protecting all persons who need protection) or *overinclusive* (stretching the legal norms beyond what is reasonable, given the nature of sexual harassment and other rights that may be involved).

Underinclusiveness

The three compelling reasons outlined above to take effective legal measures against sexual harassment exist regardless of whether in some way or another sex discrimination against the victim (also) plays a role in a particular sexual harassment case, i.e. irrespective of whether the sexual harassment is related to sex discrimination. Of course, in some cases sexual harassment may be a specific way of showing disrespect or oppressing someone of the other sex (mostly a woman). However, there is no reason to restrict the prohibition of sexual harassment to the context of sex discrimination and forget about sexual harassment against persons of the same sex. Why should sexual harassment of homosexuals not be prohibited? However, this is exactly what the European Union legislature failed to do, when it regulated sexual harassment only in the sphere of the sex discrimination directives.¹⁰ There is also no reason to restrict the prohibition of sexual harassment to the institutionalised context of employment relations and only protect workers (and forget about pupils, patients or inmates). When a group of boys in the changing room of the school gym sexually harasses¹¹ one of their (male) classmates, for example because he is circumcised, this victim should be protected in exactly the same way as a female gym teacher being sexually harassed in the changing room by her male head of department would be protected. We will see that European (sex equality) law has little to offer to our maltreated schoolboy.¹²

Overinclusiveness

The inclusion of the institutional context in my sociological (non-legal) 'definition' of sexual harassment, means that sexualised conduct or expressions in contexts other than institutional ones (like on the bus, on the street, in the pub, or on the Internet) fall outside the scope of this concept. As we have seen, the institutional context means that 'dependent' persons in such a context cannot freely choose to 'get out' and thus avoid the sexualised conduct or expressions. When the same conduct or expressions occur in other contexts (e.g. a bus or a pub), this freedom does (at least in theory) exist. People can go elsewhere, although it may indeed be very inconvenient to be forced to take another form of transport or to have to go to another pub. Of course, when the sexualised conduct takes the form of sexual assault or even rape, in every European country there are criminal law provisions in place that prohibit any such conduct, no matter in which context this takes place. Leaving aside these severe forms of sexual harassment, I think that there are not enough pressing legal grounds to prohibit sexualised conduct or expressions outside the most important institutional contexts in which people have to function in our modern society in order to lead a full human life.

Another difference between the workplace and the pub (to take just two examples) is that in the first context there is a 'boss' who can control the behaviour of people who are working for him/her, while the pub owner has no formal authority over his/her clients. In other words, in the institutional context there is 'dependence' and there is someone in control who has the duty and the power to protect dependent persons against sexual harassment by taking protective and preventive measures (including punishment of the perpetrator). In such a context, effective proactive instruction norms, issued by the legislature and controlled by government agencies like the labour inspectorate or the medical or school inspectorate, are possible. It is hardly conceivable that the legislature will obligate all pub owners to effectively

¹⁰ Homosexuals who are sexually harassed may still claim that they are the victim of harassment on the ground of sexual orientation. They then need to show that there is a causal relationship between the harassment and their sexual orientation.

¹¹ E.g. by forcing him to masturbate or by taking pictures of his penis and posting them on the Internet.

¹² He may claim that the school did not sufficiently protect him against harassment on the ground of his religion; the perpetrators themselves are not norm-addressees under the EC equality directives.

ban any kind of sexualised conduct or expressions by/towards their clients from the pubs.¹³ (Of course, pub employees should be protected by their employers against sexual harassment by clients as far as possible.)

Including the whole area of goods and services under the scope of the prohibition of sexual harassment, is of questionable legitimacy. To a large degree, education or medical and psychiatric care may be seen as a (market) good or service. A victim of sexual harassment by a teacher or doctor cannot walk out of a school or hospital, so that kind of educational or medical service is indeed 'institutionalised'. In that respect, a prohibition of sexual harassment in this area is helpful. The problem with applying this norm very generally in the sphere of providing goods and services (as is done in Directive 2004/113/EC), is that there, in many instances, we do not have an institutional context in the sense described in this article. People can choose not to go to the pub where there are nude posters on the wall, and people can walk away from the shop where they are approached in a sexualised way. If many people object to such things, the 'free market mechanism' will prompt perpetrators to start to behave themselves.¹⁴ Of course, if this amounts to activities that are penalised in criminal law (like sexual assault or rape), they should be punishable, but that has already been taken care of in all of the legal systems in the EU.

There is one particular danger of overinclusiveness of the legal prohibition of sexual harassment. Applying the sexual harassment prohibition, as defined in the Goods and Services Directive, to all areas of 'marketing' of goods and services can easily lead to 'morality policing' against expressions that by some (e.g. religious fundamentalists) are seen as sexualised and/or undignified. It will lead to all kinds of difficult issues concerning what prevails in a particular situation: the constitutional right to freedom of expression (e.g. to hang a nude poster on the wall in a pub, or to show pictures of a particularly 'revealing' dress in a women's fashion shop) or the right not to be exposed to presumably sexualised expressions. Outside the institutional contexts and outside the context of criminal behaviour, there is no compelling legal reason for intervention by the Government and for restricting the freedom of people to express themselves, even if they express themselves in a sexualised way.

To conclude: a different approach to sexual harassment in EU law?

The outcome of this analysis of the construction of sexual harassment as sex discrimination in EU law is either that too much can be characterised as sexual harassment (i.e. as sex discrimination), or that too little can be characterised 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. Including the prohibition of sexual harassment in the Goods and Services Directive means that in many non-institutional situations (i.e. where there is no compulsory stay and no hierarchical relationship) this conduct is also prohibited. *Too little*, in the sense that various kinds of sexual harassment cannot be combated through this law, since there is no clear relationship with the (opposite) sex of the victim. These situations are therefore left unregulated because, until now, the prohibition of sexual harassment in EU law has only been included in the sex equality directives. However sympathetic and progressive the initiative of the European legislature may seem at first sight, on a second look it must be concluded that most probably it has thereby created a confusing situation. It has not really solved the problem of sexual harassment and the lack of legal remedies against this very objectionable kind of treatment. As I have argued in this article, sexual harassment deserves a strong legal

¹³ Most countries do have some criminal provisions that prohibit 'indecent exposure' or 'public indecency'. Such criminal legislation always balances the right to freedom of expression with the rights of others not to be confronted with e.g. nudity or pornographic material.

¹⁴ It becomes problematic when certain services, like public transport, are in fact a monopoly and people do not have a real choice as to whether or not to use the services. Still, in the example of public transport the problem remains that a bus or train driver does not have any official authority over the behaviour of the passengers towards other passengers. The company can only take general safety measures.

framework that offers victims optimal protection both by means of a prohibition and by means of instruction norms. The latter types of norms have until now been lacking in EU law. 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 *sexualised 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. A more encompassing (but not complete, because restricted to employment) approach could have been situated in the area of EU legislation concerning health and safety at work. Building on the 1989 Framework Directive (89/391/EC) in this area, a specific directive concerning sexual harassment at work could have been adopted,¹⁵ 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 and expressly stating that they are liable for any damages that follow from not complying with these rules. Such (positive) instruction norms could have been drafted in accordance with the excellent recommendations made by the European Council as early as 1990.¹⁶ Such instruction norms would include the obligation to take preventive measures and the obligation to protect victims of sexual harassment effectively, i.e. by installing independent (expert) complaint committees and offering counselling to victims. Although a sympathetic gesture was made by including sexual harassment in the sex equality directives, the EU legislature could and should move forward and provide for proactive and effective legal remedies in this area for every citizen of the EU.

¹⁵ A plea for such legislation had already been made in the 1980s; see the report by M. Rubenstein *The dignity of women at work. A report on the problem of sexual harassment in the member states of the European Communities* European Commission, V/412/1/87-EN déf. 1987.

¹⁶ European Council, OJ 1990 C 157/3.