Sexual Harassment at Work – Discrimination versus Dignity Harm A Comment in the Wake of the #metoo Movement

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The global #metoo movement – coined by the activist Tarana Burke in 2006, and tweeted by the American actor Alyssa Milano in October 2017 – has on a massive scale brought our attention to the widespread prevalence of sexual assault and harassment of women, especially in the workplace.[1]

Earlier in 2011, together with Sylvaine Laulom, I undertook a comparative legal study within the European Commission's Network of Legal Experts in the Field of Gender Equality of the law concerning 'harassment related to sex' and 'sexual harassment' in 33 European countries.[2] Harassment based on sex and other grounds as well as sexual harassment are regulated in the EU by way of directives and defined as forms of discrimination in themselves.[3] This 'Discriminatory Approach' has also long been applied in the US. What came to the fore – both where EU law is concerned and when it came to the results of the 2011 study – however was rather a 'Double' or a 'Blurred Approach' in the EU.[4] This Double Approach is reflected already in EU law with the inclusion in the respective definitions of the wording 'with the purpose or effect of violating *the dignity* of a person' (emphasis added). The great majority of EU Member States had implemented the Recast Directive and its rules on harassment in terms of discrimination already by 2011. Nevertheless, to say that the provisions of harassment related to sex and sexual harassment are generally implemented in an anti-discrimination context is a misconception.[5] By tradition, sexual harassment in the EU/Europe has been perceived as an aggression towards the dignity of the individual woman applying what has been labelled a 'Dignity Harm Approach'.[6] And, harassment as a form of discrimination is to a greater or lesser extent still 'hidden' behind more general regulations against victimization

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1 The #metoo movement was re-ignited on 15 October 2017 by the American actor Alyssa Milano following the accusations against Hollywood producer Harvey Weinstein, starting a chain reaction on a global scale. For statistics concerning sexual harassment, see for instance European Union Agency for Fundamental Rights, *Violence Against Women: An EU-wide Survey, Main Results* (European Publications Office of the European Union, Luxemburg, 2014). Those most exposed to sexual harassment are young women and well-educated women in higher positions.

2 Ann Numhauser-Henning and Sylvaine 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, accessed 24.5.2021.

3 See, for instance, Directive 2006/54/EC of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), [2006] OJ L 204 26.4.2006, Articles 2(1)(c-d) and (2a).

4 This blurred approach is also well reflected by the global report on sexual harassment to the XXth International Congress of Labour and Social Security Law, held in Santiago de Chile 2012, see Sergio Gamonal and José Luís Ugarte, *General Report Theme II, Sexual and Moral Harassment in the Workplace*, XX World Congress of Labour and Social Security Law, Santiago de Chile (2012).

5 Ann Numhauser-Henning, Executive Summary, in Numhauser-Henning and Laulom (n 2).

6 Gabrielle S Friedman and James Q Whitman, 'The European Transformation of Harassment Law: Discrimination versus Dignity', (2003) 9 Columbia Journal of European Law 241; Laura Clarke, 'Sexual Harassment Law in the United States, the United Kingdom and the European Union: Discriminatory Wrongs and Dignity Harms', (2007) Comm L World Rev 79; and Antoine Sagay, 'Employment Discrimination or Sexual Violence? Defining Sexual Harassment in American and French Law', (2000) 34(4) Law & Society Review 1091.

or violence at work. The phenomenon thus often competes with mobbing or bullying more generally, and often in a working environment context. The addressee scope of the ban on sexual harassment (also discriminatory) frequently focuses on the perpetrator in terms of a criminal misdemeanour. This is instead of focusing in terms of alleged discrimination proper on behalf of the employer/company. Moreover, agreements between the social partners do seem to play a relatively significant role in the alleged transformation process towards an even more accentuated Dignity Harm Approach. The tradition of stable – i.e., protected – employment in Europe as compared to the US may have made way for a focus on the quality of life in the workplace. However, in the 'Flexicurity Era', the Discriminatory Approach – to another extent also focusing on access to employment, vocational training and promotion – becomes increasingly relevant. The double approach adds an ambiguity to EU law. This ambiguity is to a certain extent accentuated by the adoption of the recent International Labour Organization (ILO) Convention 190 concerning the Elimination of Violence and Harassment at Work. Consequently, the question can be posed whether there is then an added-value of combating harassment related to sex and sexual harassment as a form of discrimination?

Despite a notorious share of shaming and blaming, the #metoo movement has made it obvious that sexual harassment is not mainly about criminal assaults and 'bad manners', it reflects and reinforces societal gender hierarchies. In Sweden, the movement brought about a number of different hashtag-campaigns in a great number of different professions in the autumn 2017.[7] An approach that tends to concentrate on individual dignity – and therefore also triggers the dignity of harassers allegedly wrongfully accused – risks missing the goal of coming to terms with structural and systemic gender discrimination, making such discrimination invisible. The Discriminatory Approach – consequently implemented – provides us with an opportunity to really address those 'empowered' to take responsibility for the work culture, i.e., employers and companies, without obscuring its discriminatory dimension.

I argue here that for the future, we should make sure to stress the structural and power dimensions of sexual harassment in terms of gender discrimination – i.e., make real use of the Discriminatory Approach. Following a background presentation of EU regulations and Swedish domestic law as well as some international documents of relevance, this chapter concludes with a short discussion of the pros and cons of the Discriminatory Approach.[8]

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[7] For a list, see https://sv.wikipedia.org/wiki/Metoo, accessed 24.5.2021. See also Laura Carlson, 'Over 75,000 Voices Raised in Sweden' in: Ann M. Noel and David B. Oppenheimer, *The Global #MeToo Movement*, (2020) Berkeley Center on Comparative Equality and Anti-Discrimination Law, 171-180.

[8] An earlier Swedish version of this chapter was published as Ann Numhauser-Henning, 'Sexuella trakasserier – hederskränkning eller diskriminering? En kommentar i #metoo uppropets kölvatten' in Ruth Mannelqvist, Staffan Ingmanson and Carin Ulander-Wänman (eds), *Festskrift till Örjan Edström*, (Skrifter från juridiska institutionen vid Umeå universitet nr 41, Umeå, 2015) 361.

1 The Legal Regulations

1.1 EU Law

Following the adoption of Directive 2002/73/EC[9] amending the Equal Treatment Directive, harassment related to sex and sexual harassment are defined as discrimination in EU law and therefore prohibited in employment, including access to employment, occupational training and promotion. This was to be implemented by October 2005. Later, the Recast Directive 2006/54/EC repealed Directive 2002/73/EC, while containing the very same definitions of harassment related to sex and sexual harassment, respectively:

> 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 (art. 2.1.c).
>
> 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 (art.2.1.d).

Article 2.2.a stipulates that the Directive by 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. The Directive has a broader scope than earlier equal treatment directives and was to be implemented by August 2015.[10] Furthermore, the Equal Treatment Directive includes in Article 26 that Member States are 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. This Article can be said to draw our attention to the structural and power-related aspects of harassment and sexual harassment.

The question is thus whether there are any specific implications of harassment and sexual harassment now being defined as discrimination. This reform in EU law was clearly influenced by North American law. In the US, harassment has always been perceived as a form of discrimination. It started with Title VII of the Civil Rights Act 1964 and the discriminatory harassment of racial minorities. The Civil Rights Act, however, included as protected grounds not only race, but also colour, religion, sex and national origin. Nowadays, sexual harassment is the most frequently addressed form of harassment. The term 'sexual harassment'

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9 [2002] OJ L 269, 5.10.2002, p 15. Harassment was already declared a form of discrimination in Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L 180 p 22 and Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L 303 p 16.

10 Similar obligations and definitions apply to the access and supply of goods and services, according to Directive 2004/113/EC [2004] OJ L373 p 37. The Commission's proposal for a directive to strengthen the application of the principle of equal pay for equal work or work of equal value between men and women through pay transparency and enforcement mechanisms, COM(2021) 93 final, art 3(2.a) contains a reference to the definition of sexual harassment in the Recast Directive art. 2(2), reminding us that this, too, amounts to discrimination when applying the proposed directive.

was coined in the 1960s.[11] And, in 1979 Catherine MacKinnon published her influential book 'Sexual Harassment of Working Women',[12] where she forcefully argued that sexual harassment was discrimination under Title VII of the Civil Rights Act, perpetuating 'the interlocked structure by which women have been kept sexually in thrall to men and at the bottom of the labour market'. In 1986 the Supreme Court confirmed that sexual harassment was actionable sex discrimination.[13] First, discrimination meant *quid pro quo* situations (i.e. in exchange for sexual favours, the victim gets a better treatment), but in the early eighties hostile environment cases were also regarded as discrimination.[14]

The European tradition is different. Here 'dignity' or honour are crucial when talking about sexual harassment – to start with the dignity of women and later of workers more generally. This has thus been called the 'Dignity Harm Approach', in contrast to the American 'Discriminatory Approach'.[15] The question is thus whether the reform, turning sexual harassment into a form of discrimination, has made its mark in Europe. As indicated above, what came to the fore in the 2011 report describing national law in 33 European countries was rather a 'Double' or 'Blurred Approach'.[16]

Already the Recast Directive's definition of sex harassment and sexual harassment refers to occurrences with 'the purpose or effect of violating the dignity of a person', at the same time as stating that such occurrences now amount to discrimination. A continued double standard is thus confirmed in the 2011 report. Already by 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 – i.e., discrimination is not the 'main target' in practice. The phenomenon thus often competes with mobbing or bullying more generally and often in a working environment context. This was especially true with regard to Belgium, France, the former Yugoslav Republic of Macedonia, Portugal and Slovenia, but also a number of other countries can be mentioned in this context.[17] Many

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11 Carol Jones, *Sexual Harassment* (New York: Facts on File, 1996) 3-90.

12 Catherine MacKinnon, *Sexual Harassment of Working Women* (Yale University Press, New Haven, 1979).

13 *Meritor Savings Bank v. Vinson* 477 U.S. 58 (1986). In fact, sexual harassment was acknowledged as discrimination by US courts already in the 1970s, see *Bundy v. Castle*, 561 F.2d 983 (D.C. Cir. 1977).

14 *Bundy v. Jackson*, 641 F2d 934 (D.C. Cir. 1981) and later *Harris v. Forklift Syst. Inc*., 510 U.S. 17 (1993), 114 S. Ct. 367 (1993).

15 Friedman and Whitman, Clarke and Sagay (n 6).

16 Numhauser-Henning and Laulom (n 2).

17 France is thus one of the countries characterized by the Discriminatory Harm Approach. For a comprehensive presentation of the complex legal situation also following the implementation of the Equal Treatment (recast) Directive and numerous reforms, see for instance L Camille Hébert, *Dignity and Discrimination in Sexual Harassment Law: A French Case Study*, working paper, Ohio State University, Moritz College of Law, August 27, 2018. For a presentation of the work environment regulation on mobbing more generally, see Loïc Lerouge, 'Workplace Bullying and Harassment in France and Few Comparisons with Belgium: A Legal Perspective, Workplace Bullying and Harassment', (2013) JILPT Seminar

countries even reported a very low level of awareness – and even a lack of acceptance – of the legal protection against discriminatory harassment related to sex and sexual harassment, and case law in this field is generally scarce.[18] This attitude is also often reflected in the addressee of the ban on sexual harassment. Focusing on the dignity dimension, this is often other workers, the perpetrator himself, and not – as regards discriminatory bans in general – employers and their representatives. A consequence is that disputes have come to concern eventually wrongful accusations as regards the perpetrator and not discriminatory action in the workplace as such.

A clear expression of the Dignity Harm Approach is the 'Framework Agreement on harassment and violence at work' entered into by the European social partners, ETUC, Business Europe, CEEP and UEAPME, within the context of the social dialogue on 26 April 2007.[19] In its introduction, the Agreement speaks of how 'mutual respect for the dignity of others at all levels within the workplace is one of the key characteristics of successful organisations'. The Agreement goes on to treat harassment and violence together – and with references both to EU rules on discrimination and on the working environment in terms of Directive 89/391/EEC.[20] In this context, sexual harassment is mentioned along with bullying and physical violence. Harassment and violence are said to 'potentially affect any workplace and any worker' with the addition: 'certain groups and sectors can be more at risk'. There is no mentioning of which groups these might be, nor of discrimination.[21] The aim of this Framework Agreement is to increase the awareness and understanding of workplace harassment and violence and to provide employers, workers and their representatives with an action-oriented framework to identify, prevent and manage problems of harassment and violence at work. According to the Agreement, harassment occurs when one or more workers or managers 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.

We can immediately discern how this definition – in contrast with the Recast Directive's definition – requires intention and repeated conduct and the actions of fellow workers are explicitly included. According to the Agreement, enterprises need to have clear statements outlining that harassment and violence will not be tolerated, and, specifying procedures to be followed where cases arise. The Agreement directly commits member organisations of the European partners to implement it.

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on Workplace Bullying and Harassment, JILPT Report No. 12, 2013 (The Japan Institute for Labour Policy and Training, Tokyo, 2013).

18 From the Court of Justice of the European Union there is one case on (disability) harassment, case C-303/06 *Coleman* ECLI:EU:C:2008:415.

19 COM(2007) 686 final.

20 Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work, [1989] OJ L 183, 29.6.1989, p 1.

21 Ibid., Sec 1, introduction.

An assessment of the Agreement was given in the report, *Implementation of the Autonomous Framework Agreement on Harassment and Violence at Work.*[22] According to the Report, the Framework Agreement has brought real added-value in terms of raising awareness and better equipping employers and workers to deal with situations of harassment and violence at the workplace. The Report also stresses, however, that there were some challenges related to the national frameworks and contexts in which the Agreement was implemented. This could concern social dialogue structures and processes within the national context as well as the challenge of tailoring the implementation of the Framework Agreement to the national contexts in terms of existing legal framework and agreements. There is no mention whatsoever of the particular relationship between the work environment and the discrimination regulations – at least not in the executive summary of the Report.

There also later has been an implementation study by the European Commission.[23] The fact that harassment/sexual harassment is defined as discrimination in the Equal Treatment Directives is highlighted in its executive summary – with the remark that there are significant differences between Member States regarding the guidance offered on how legislation is to be implemented, tending to be more prevalent in relation to health and safety issues than with regard to the Equal Treatment Directives. A directive on psycho-social work environment – possibly also covering harassment and violence at work and replacing hitherto autonomous framework agreements on psycho-social work environment more generally as well as the 2007 Framework Agreement described above – is now on the agenda in relation to the Commission's 'Roadmap Towards a New EU Strategic Framework on Health and Safety at Work (2021-2027)'.[24]

1.2 Swedish Law

The (2008:567) Discrimination Act implements the EU's non-discrimination directives – including harassment and sexual harassment. This is an umbrella act designed to cover all regulated discrimination grounds – sex, transgender identity or expression, ethnicity, religion or other belief, disability, sexual orientation and age – and areas – working life, education, labour market policy activities and employment services not under public contract, starting or running a business and professional recognition, membership of certain organisations, goods, services and housing, health and medical care and social services, social insurance system, unemployment insurance and financial aid for studies, national military service and civilian service, and, public employment – in parallel. The Act entered into force 1 January 2009. Before that, sex harassment

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[22] Final Joint Report by the European Social Partners adopted at the Social Dialogue Committee on 27 October 2011.

[23] *Study on the Implementation of the Autonomous Framework Agreement on Harassment and Violence at Work*, Final report, European Commission June 2015, Brussels 2016.

[24] https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12673-Arbetsmiljo-EUs-strategiska-ram-for-2021-2027_sv–accessed 25.5.2021. See also, for instance, https://www.eurocadres.eu/news/eu-health-safety-strategy-must-address-psychosocial-risks/, accessed 25.5.2021.

and sexual harassment were regulated in a special act, the Equal Opportunities Act (1991:433) on sex/gender, whereas harassment on other grounds (when regulated) were found in other, separate, acts.[25]

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. Harassment is defined in Chapter 1, section 4.4 as 'conduct that violates a person's dignity and that is associated with one of the grounds of discrimination'. Sexual harassment is defined in section 4.5 as 'conduct of a sexual nature that violates someone's dignity'. Sexual harassment may relate to any ground covered by the Discrimination Act and is thus not directly linked to sex/gender.[26] It follows directly from the phrasing of section 4 – 'in this Act discrimination has the meaning set out in this Section' – that harassment and sexual harassment are two of the six forms of discrimination covered by the act (direct discrimination, indirect discrimination, harassment, sexual harassment, inadequate accessibility and instructions to discriminate).

Chapter 2 of the Discrimination Act starts out precisely with the prohibition of discrimination in working life. Section 1 contains the ban itself, section 2 the exceptions, and finally, section 3 the obligation of employers to investigate and take measures against any harassment coming to their knowledge. Employers who fail to fulfil this obligation to investigate and take measures against harassment or sexual harassment under the Act are to pay discrimination compensation for the offence resulting from the infringement (Ch 5, sec 1). This is also the case should the employer itself be the perpetrator. Chapter 2, section 18 contains a prohibition of reprisals where the employee has reported or called attention to the fact that the employer has acted contrary to the Act, participated in an investigation under the Act or rejected or given in to harassment or sexual harassment on the part of the employer.

Chapter 3 in the Discrimination Act contains rules on active measures setting forth an obligation on employers to prevent discrimination continuously and serving in other ways to promote equal rights and opportunities in the protected groups. Chapter 3, section 6 expressly state an obligation to have guidelines and routines for activities to prevent harassment, sexual harassment and reprisals – guidelines and routines that must also be followed up and evaluated. These rules on active measures are a bit 'slow' or even ineffective, though, as they require the monitoring of the Equality Ombudsman and, ultimately, financial penalties decided by the special Board against Discrimination – Chapter 4 in the Act.

Harassment and sexual harassment are thus fairly well-anchored as a form of discrimination in Swedish law. It is also clear that the addressee of the

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[25] Two distinct harassment concepts, harassment and sexual harassment, respectively, were introduced in Sweden in 2006 by amendments to the Equal Opportunities Act and the (2003:307) Act Against Discrimination, see further Government Bill 2004/05:147 53.

[26] Susanne Fransson and Eberhard Stüber, *Diskrimineringslagen, en kommentar* (Second ed., Norstedts Juridik, Finland 2015) 86. It can be called into question whether this is a distinction, compared to EU law. It is true that sexual harassment is explicitly regulated only in the Equal Treatment (Recast) Directive and Directive 2004/113/EC, both concerning sex discrimination only. But, it seems logical to me, that harassment of a sexual nature must be seen as an integrated part of the broader concept of harassment in relation to other grounds by means of interpretation.

prohibition of discrimination is the employer (or its representative) – either as the perpetrator or for neglecting the duty to investigate and take measures against harassment and sexual harassment when they occur.

However, we also come across the Double Approach to harassment and sexual harassment in the Swedish regulations. To begin with, as in EU law, dignity is part of the very definition of harassment and sexual harassment. Moreover, harassment and sexual harassment as phenomena are also covered by the Work Environment Act (1977:1160) (WEA). The Act makes no explicit mention of either harassment or sexual harassment, but according to the Act it is the duty of employers to offer a 'good' work environment (Ch 2, sec 2a WEA). At the same time, employers are obliged to undertake all measures necessary to prevent putting individual workers at risk (Ch 3, sec 2 WEA), a duty covering both physical and psycho-social work environments, which must consequently be free from both harassment and violence. Harassment and sexual harassment were long addressed in additional provisions produced by the Swedish Work Environment Authority in terms of victimization in AFS 1993:17. These provisions covered harassment and sexual harassment in the meaning of the Discrimination Act, but also mobbing and bullying of individuals not covered by a discrimination ban. These provisions are now replaced by AFS 2015:4 concerning organisational and social work environment. These new provisions cover the psycho-social work environment in a very broad sense, including demands concerning the work, victimization, unhealthy workloads, organizational work environment and resources for the work at stake.

The psycho-social work environment is covered by the WEA through systematic work environment management, and the new provisions contain special requirements on the training of managers and supervisors concerning how to prevent and handle victimization (Sec 6), on objectives for the organizational and social work environment in terms of workload, working hours, and victimization, as well as the written documentation of such objectives where there are ten or more employees. (Secs 8-14). Concerning victimization, employers are to clarify that this is not accepted in the operations and to develop procedures for how to handle victimization. There is no explicit mentioning of either harassment or sexual harassment in the provisions. Victimization is defined as 'actions directed against one or more employees in an abusive manner, which could lead to ill health or their being placed outside the community of the workplace' (Sec 4). In the guidelines to the provisions, victimization is said to mean 'being treated differently than others in an incomprehensible or unfair manner and to risk being placed outside the community of the workplace'.[27] It is briefly mentioned that sexual harassment and other forms of discrimination are covered by the concept, and a reference is also made to the Discrimination Act.[28] The more exact relation between the Discrimination Act and the provisions is not explained, though. There is therefore an obvious risk that discriminatory harassment is 'buried' in more general work environment activities. This risk is augmented by the fact that

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[27] Den organisatoriska och sociala arbetsmiljön – viktiga pusselbitar i en god arbetsmiljö, *Vägledning till Arbetsmiljöverkets föreskrifter om organisatorisk och social arbetsmiljö* (2015) 56.

[28] Ibid., 58 f.

according to AFS 2015:4 – and in contrast to the Discrimination Act – there is no requirement to investigate whether it is a question of discriminatory harassment or not. Instead, it is stressed that 'a deficient investigation process as regards victimization may be harmful from a work environment and a health viewpoint' and the importance of the trust of those involved is especially mentioned.[29]

The problem with work environment regulations is that they are mainly of a public law character, concerning employer duties in relation to labour inspectorates and other authorities and their monitoring of work places. It is true that there are possibilities to address individual workplaces in terms of monitoring and even fines, and thus make real change at the workplace. At the individual level, though, the WEA is quite a numb or sluggish instrument. No compensation for the individual is possible under the WEA, and offences at the individual level must often be addressed by means of other regulations such as the Employment Protection Act – maybe in terms of 'constructive employment termination' – or precisely the Discrimination Act – if you belong to a protected group.

To come forward with a lawsuit is always stressful on the individual, but when it comes to alleged discrimination, there is the possibility to turn to the Equality Ombudsman for support, as well as a right to compensation should an employer be proven to having infringed the law. Discrimination claims are also supported by the rule on a reversed burden of proof. Already the very existence of the Discrimination Act can be supposed to have a preventive effect on discriminatory behaviour – including harassment and sexual harassment – at the same time as the duty to investigate and take measures against harassment when it has occurred, and to continuously take active measures to prevent such behaviour, can be supposed to promote workplace change under its real name - discrimination.[30] It should also be recognized as concerns Sweden that discriminatory harassment cases – or at least sexual harassment cases – seem to mainly have been brought before the Equality Ombudsman or the Labour Court under anti-discrimination legislation.

1.3 An International Outlook

Whereas the 1966 UN International Covenant on Economic, Social and Cultural Rights (ICESCR) generally states that women are to be guaranteed conditions of work not inferior to those enjoyed by men, it does not explicitly mention sexual harassment. Nor does the 1979 UN Convention on Elimination of Discrimination against Women (CEDAW). In its General Recommendation No 19 on violence against women from 1992, however, sexual harassment is expressly addressed as a form of discrimination within Article 1 of the Convention. It can be of interest to compare this definition of sexual harassment

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[29] Ibid., 64.

[30] For a critical discussion on legal developments in the US, where 'symbolic structures' by means of mandatory preventive measures related to sexual harassment and its handling, are said to have led to employers extensively being freed from *vicarious liability*, see Lauren B. Edelman, *Working Law. Courts, Corporations, and Symbolic Civil Rights* (Chicago, University of Chicago Press 2016).

with the ones in EU law and Swedish law already touched upon. Here, the concept is said to imply:

> [S]uch 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*[31] 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.

In my opinion, this definition shows less emphasis on dignity than the ones in EU law and domestic Swedish law. Recommendation No 19 was later (in 2017) complemented with further guidance on its application by General Recommendation No 35 on gender-based violence against women, updating General Recommendation No 19. Sexual harassment was not especially highlighted there, but the discriminative character of gender-based violence was and so was the need to repeal 'defence of honour' related rules and practices.[32]

The 2011 Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, the 'Istanbul Convention', can also be mentioned here. The Istanbul Convention is based on the understanding that certain types of violence are a manifestation of the historically unequal power relations between women and men, and it condemns all forms of discrimination against women including sexual harassment. Article 40 contains a definition identical with that of the Recast Directive. The Convention's scope of non-discrimination (including required measures against sexual harassment) goes nevertheless well beyond what is traditionally understood as EU sex equality and non-discrimination law, with a special bearing on the areas of criminal and procedural law aspects of violence against women. However, covering all forms of domestic violence including that of men and children, the Convention is not specifically formulated as an instrument against discrimination of women.[33]

Worth mentioning in this international outlook, in my opinion, is also the 2019 report from UN Women, *What Will It Take? Promoting Cultural Change to End Sexual Harassment*.[34] Taking its starting point in (among others) the #metoo movement, and, with reference to the UN 2030 Agenda for Sustainable

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31 Emphasis added.

32 P 31.b.

33 See further, for instance, Kevät Nousianinen and Christine Chinkin, *Legal Implication of EU Accession to the Istanbul Convention* (European Commission, Brussels, 2015), http://www.equalitylaw.eu/downloads/3794-legal-implications-of-eu-accession-to-the-istanbul-convention, accessed 15.5.2021.

34 Available at https://www.unwomen.org/en/digital-library/publications/2019/09/discussion-paper-what-will-it-take-promoting-cultural-change-to-end-sexual-harassment, accessed 26.5.2021. See also the 2018 UN Women publication *Towards an End to Sexual Harassment. The Urgency and Nature of Change in the Era of #MeToo* at http://www.unwoman.org/en/digital-library/publications/2018/11/towards-an-end-to-sexual-harassment, accessed 26.5.2021.

Development Goal 5 (to achieve gender equality and empower all women and girls), the Report more straight-forwardly addresses the phenomenon of sexual harassment (at work and elsewhere) in terms of inequality and discrimination. Through practices of zero tolerance and victim-centred approaches, it seeks to achieve a shift 'from the normalisation of sexual harassment as an inevitable fact of life to its consignment to history and the real accountability of perpetrators'.[35]

Both the CEDAW and the Istanbul Convention are thus very broad in scope, addressing gender-based violence throughout society. I have therefore found it of special interest in this context to more thoroughly address the recent 2019 ILO Convention 190 concerning the Elimination of Violence and Harassment at Work (hereafter the Convention) and its accompanying Recommendation 206, now open for ratification by ILO Member States. The Convention implies the introduction of *a new labour standard* 'to shape the future of work based on dignity and respect, free from violence and harassment'. It is true, that sexual harassment – without being explicitly mentioned – was already covered by the 1958 ILO Convention 111 on Discrimination in Respect of Employment and Occupation, and there treated as discrimination. Convention 190 has a much broader (and less focused) approach though, introducing a general definition of violence and harassment at work including gender-based violence and sexual harassment that applies to all workers, including those in informal work, and occurring in the course of, linked with or arising out of work. The Convention also addresses domestic work in terms of mitigation. The Convention requires states to implement legislation, training, monitoring, and avenues to redress and support in order to prevent and remedy practices implying violence and harassment. It also calls on states to address the particular needs of vulnerable groups and those impacted by domestic violence. Already the preamble acknowledges that issues related to violence and harassment at work disproportionally impact women and girls. The Recommendation also puts special emphasis on the duty to protect those particularly vulnerable.

According to its Article 1(1)(a), 'violence and harassment' refers to 'a range of 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'. Despite covering violation and harassment at work more generally, the Convention thus makes it very clear that there is an important gender component. Article 1(1)(b) includes a special definition of 'gender-based violence and harassment' stating that this means 'violence and harassment directed at persons because of their sex or gender, or affecting persons of a particular sex or gender disproportionally, and includes sexual harassment'. The Recommendation thus stresses the need for Member States to take into account equality and non-discrimination instruments as well as to pay special attention to the protection of women and other especially vulnerable groups – Guidelines 5, 12 and 13.

No doubt, the adoption of Convention 190 is important. An estimated 500 million working-age women during the adoption process were reported not to be covered by legal protections against (sexual) harassment at work – notably in the Middle East, North Africa, East Asia and the Pacific. The broad areas of

[35] The Report, 11.

application in terms of contractual arrangements, etc, is of course also welcome as is the definition of violence and harassment covering a significantly broad range of behaviours and practices. The Convention also stresses the importance of tackling the underlying causes and risk factors of violence and harassment at work in terms of discrimination, gender stereotypes, multiple and intersecting forms of discrimination and unequal gender-based power relations.

Of special importance is also that the new convention offers the regular supervisory system and complaints procedure of the ILO, including the option for any ILO Member State to file a complaint against another state who is not 'securing effective observance of any Convention which both have ratified'. This has been said to shift the due diligence of ILO Member States from what is often 'a passive, litigation driven, case by case reactionary approach taken by States to gender-based violence and harassment, to one of active precaution in designing work conditions and regulations to avoid and sanction gender-based violence and harassment in the world of work'.[36]

The Convention and Recommendation thus offer a broad spectrum for legal – and other – actions against violence and (also sexual) harassment at work. What remains to be seen is to what extent such actions will be taken in terms of precisely non-discrimination. According to Article 1(2), it is up to national law whether to work with separate concepts for 'violence and harassment' and 'gender-based violence and harassment', or not. And, what is really meant by 'an inclusive, integrated and gender-responsive approach' in Article 4(2)?[37] Notwithstanding, Article 6 reaffirms the duty of states to ensure the right to equality and non-discrimination of especially women workers and other vulnerable groups. The elimination of discrimination in respect of employment and occupation is also among the fundamental principles and rights at work that shall be respected and promoted according to Article 5.

2 Discriminatory or Dignity Harm Approach?

It would be too easy to say that whether to apply the Discriminatory or Dignity Harm Approach is just a matter of choice. The approach applied is interrelated with both the historical and substantive contexts.[38] In the American context, there are both the race issues more generally speaking and the introduction of the Civil Rights Act in the 1960s to explain the presence of specific prohibitions of discrimination. To this we can add, the special importance of anti-discrimination regulation in a country with practically no employment protection in place but instead based on the employment-at-will doctrine. In Europe on the other hand, characterized by relatively well-developed rights to protection against arbitrary dismissal, it is only natural to concentrate more on fair conditions in on-going employment also when it comes to harassment and sexual harassment. This also goes hand-in-hand with well-developed structures

[36] Diane Desierto, 'The ESCR Revolution Continues: ILO Convention No. 190 on the Elimination of Violence and Harassment in the World of Work', Blog of the European International Journal of International Law, June 28, 2019.

[37] Compare also the Recommendation Guidelines 2 and 3.

[38] Compare Sagay (n 6).

concerning employer health and safety obligations supervised by public authorities. This does not mean, however, that hiring, termination, and promotion are not central issues also from a European perspective. And, this is not less true in the current era of labour-market flexibilisation, making precarious employment and fragmentized working careers ever more common. Still, in many EU Member States discriminatory harassment in working life 'competes' with labour law or even broader civil or public law provisions on mobbing/bullying in general.

Anti-discrimination regulation is typically designed as complaints-led allegations at the individual level.[39] At the heart of discrimination prohibitions are fundamental perceptions of the equal worth of every individual. The intrinsic value of every human life is precisely that which is reflected in the very definition of harassment and sexual harassment as an attempt towards the dignity of a person. It has also been argued that discriminatory harassment – and in particular age discrimination – are special in that they do not, as compared to other forms and grounds of discrimination, in the same way require a comparison/comparator. The dignity offence would then come to the fore.[40] Notwithstanding, treating harassment and sexual harassment as a 'discriminatory wrong' draws our attention to the protection of precisely human rights compared to a former health and safety approach.

Moreover, the *raison d'être* of discrimination regulation is not only to come to terms with individual injustices, but – and maybe foremost – to eliminate structural and systemic unequal treatment of particular groups. Such considerations at the macro-level are what instigates discrimination regulation (on behalf of women, disabled, minority groups, etc.) in the first place. This is what, in my opinion, makes it so important to honour the legislator's intention to prohibit harassment and sexual harassment precisely in terms of discrimination. We know that mainly women are harassed sexually – such behaviour is not only intolerable, it reflects and reinforces societal gender hierarchies, not least in workplaces.

A particularly unpleasant trait of the Dignity Harm Approach is that it draws our attention to a woman's dignity/honour in ways that – and especially when it concerns sexual harassment – make one associate with 'honour's culture', patriarchal structures and women's downplaying when it comes to sexuality in general terms. The difficulties for the Discriminatory Approach, when it comes to sexual harassment making its way into legal application, may well be interpreted as a reflection of still prevailing sexist and discriminatory perceptions of 'women and sexuality' as not really belonging to the central dimensions of economic and social life. Violence and sexual violence certainly require interference at societal level. This comes about as criminalization and in the form of specific sexual crimes. Here we refer to the individual level – both as regards the perpetrator and the victim – and the requirements on intentional proof are high.

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[39] Sandra Fredman, *Making Equality Effective: The Rule of Proactive Measures* (European Commission, 2009).

[40] See further Alexander A Boni-Saenz, 'Age, Time and Discrimination', (2019) 53(3) Georgia Law Review 845.

When we talk about working life – whether in terms of access and promotion or as conditions of work – it is not only about the individual. Here, the structural and systemic limitations and obstacles for women in a sexualised workplace are the target. Then individual women's dignity is not what comes to the fore, but workplace institutionalisation, presenting women with equal opportunities and conditions as men in terms of power and influence. An individual offence is an offence against all women.

Whether a continued 'Double Approach' is still the right way to go forward is an issue of continuous debate.[41] My argument in this chapter is that there really is an added-value in making sure to use the 'Discriminatory Approach'. Non-discrimination regulation is far from perfect given the current situation. Traditional design – based on a complaints-led model at the individual level – has its clear drawbacks.[42] Regarding sexual harassment, there is also the 'stigma' still accompanying sexualised conduct, deterring victims from coming forward. To do this within a general bullying context makes it less of a 'women's issue'. This is where the #metoo movement arguably has made a 'de-stigmatizing' difference. Non-discrimination regulation is generally implying greater access to justice for individuals than work environment regulation – with rights to individual compensation, the frequent existence of specialized bodies, the reversed burden of proof and no upper limits concerning compensation. Moreover, the addressees of prohibitions of discrimination are employers, with the power to institutionalise change they typically possess. Sure, work environment measures may also result in real change at the workplace level. However, this is rarely done in terms of the groups especially targeted by sexual harassment – i.e., women – and an offense requires normally both full proof and intent and does not necessarily offer compensation for individual workers.

If we want to draw attention to the injustices against women, we must instead develop the Discriminatory Approach. A next step is to go beyond the individual complaints-model by introducing what is labelled second generation discriminatory measures, aiming precisely at coming to terms with systemic discrimination in different forms altering the internal workings of the regulated organisation.[43] From a Swedish perspective, this can be done as part of active measures according to Chapter 3 in the Discrimination Act, and one example is the activity following the movements #tystnadtagning and #metoo in the world of theatre. Another way is by opening up for class action suits. – A common understanding of 'victimization' regardless of the victim, instead results in a covering-up of group inequalities – and in this case the oppression of women. To discriminate is something else – and more serious – than to victimize any individual. A ban in terms of discrimination is a much more effective and

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41 Friedman and Whitman (n 6), Clarke (n 6), and Rikki Holtmaat, 'Sexual Harassment as Sex Discrimination: A Logical Step in the Evolution of EU Sex Discrimination Law or a Step too Far?', in Mielle Bulterman, et al. (eds.) *Views of European Law from the Mountain, Liber Amicorum Piet Jan Slot* (Kluwer Law International, 2009) 27.

42 Fredman (n 39).

43 See, for instance, Simonetta Manfredi, Lucy Vickers and Kate Clayton-Hathway, 'The Public Sector Equality Duty: Enforcing Equality Rights Through Second-Generation Regulation', (2018) 47(3) Industrial Law Journal 365; and Marie Mercat-Bruns, 'Systemic Discrimination: Rethinking the Tools of Gender Equality', (2018) 2 European Equality Law Review 1.

accurate weapon for women's rights, than considerations in terms of dignity and honour together with individual reprisals and general work environment activities!