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**Gender Equality Politics in the Changing European Union:
The European Union Anti-Discrimination
Directive and Sexual Harassment**

by

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Abstract

The European integration process has provided both challenges and opportunities to domestic women's movements. One such ambivalent success is the European Union anti-discrimination directive of 2002 that is the outcome of the lobbying efforts of an emerging European transnational advocacy network on gender. The 2002 Directive prohibits sex discrimination, including sexual and gender harassment. It calls on member states to better protect the rights of victims of sexual harassment and to ensure the integrity, dignity, and equality of women and men at work. This paper examines the 2002 Directive and its potential to effect significant changes in EU member states, in particular, to improve victims' rights in member states laws. It addresses the main question: "Is the EU Directive an opportunity to progress in the direction of protecting victims' rights?" The argument advanced here is that the 2002 Directive is the outcome of a political compromise among the member states, on which feminist discourses did have some bearing. On the one hand, the 2002 Directive can be interpreted as a success of feminist activism around sexual harassment, in particular, in the very definition, linking the problem to sex discrimination. On the other hand, it has limitations and does not go as far as feminists had hoped; for example, the EU has left it up to member states to deal with the most difficult aspects of the problem, , prevention, implementation, and enforcement of the laws.

Introduction

In June 2000, the European Union Commissioner for Employment and Social Affairs, Anna Diamantopoulou of the Greek Socialist Party, announced at a press conference a proposal for an EU directive to prohibit sexual harassment. She told the story of how she herself had experienced sexual harassment as a nineteen-year-old student in her first job while she was studying civil engineering. She said: "I had no redress and I had to give up. The only conclusion at the time was that there was nothing I could do. There was no law in place" (*Financial Times*, January 8, 2000).

When we think about gender inequality at work, the first issue, particularly in Europe, concerns balancing family and work issues for mothers. Most gender policies and the attention of the public and researchers have focused on how women are treated differently from men at work because they are mothers. Less attention has been paid to how constructions of sexuality and abuse of power through sexual means disadvantage women in the workplace. In short, women as individuals are also treated differently from men at work, because they are seen as sexual beings. Yet sexual harassment has been commonplace in workplaces across Europe. The issue cuts across several important fault lines of gender inequality, because the problem is about the abuse of power in the workplace and hence affects economic well-being as well as rights to sexual self-determination.

In 2002, the European Union adopted a binding directive that prohibits sexual and gender harassment. Directive 2002/73/EC of the European Parliament and of the Council of September 23, 2002, amended Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions. This directive calls on member states to better protect the rights of victims of sexual harassment and to ensure the integrity, dignity, and equality of women and men at work. The 2002 Directive requires member states to adopt or modify national laws against sexual harassment by October 2005.

This paper examines the 2002 Directive and its potential to effect significant changes in the member states, in particular, to improve victims' rights in the member states' laws. The argument advanced here is that the Directive is the outcome of a political compromise among the member states, on which feminist discourses did have some bearing. On the one hand, the 2002 Directive can be interpreted as the success of feminist activism around sexual harassment, in particular, in the very definition of what constitutes sexual harassment from a victim-centered perspective, and in linking the problem to sex discrimination. On the other hand, the Directive has limitations and does not go as far as feminists had hoped. For example, the EU has left it up to member states to deal with the most difficult aspects, prevention, implementation, and enforcement of the sexual harassment laws.

This paper discusses the strengths and weaknesses of the EU 2002 Directive from a victim-centered, feminist perspective and explores its implications for the member states, after briefly examining the political developments that led to the Directive and the process of adopting the first binding European law against sexual harassment.

EU Sexual Harassment Measures

Research persistently has found that, across the European Union member states, sexual harassment constitutes a serious problem. Some 30 to 50 percent of women in Europe experience sexual harassment (European Commission 1999). Though it is a problem predominantly for women, it

can also happen to men. About 10 percent of men in surveys reported sexual harassment (European Commission 1999; Timmerman and Bajema 1999), and, as other research shows, much of the harassment men encounter is by other men. The majority of victims, however, are women who are sexually harassed by male perpetrators because they are women. Researchers have documented its psychologically and physically harmful effects on victims (Timmerman and Bajema 1999). Workplace effects include victims losing jobs because they are fired when they complain about or do not go along with jokes, teasing, or demands for sexual favors. Victims also leave when they cannot endure the harassment any longer. Feminist activists, legal experts and researchers have argued, therefore, that sexual harassment constitutes gender discrimination.

Feminists brought sexual harassment onto the agenda of the European Community in the early 1980s, and a 1984 European Council Resolution mentioned it as a concern of dignity of women in the context of positive measures for women at work.¹ A 1987 community-wide research study triggered further studies of sexual harassment in several member states and created professionalized expertise and knowledge about this issue (Rubenstein 1987). Since then, the EU has been an innovator in the field of sexual harassment; and ahead of most member states in developing policy measures. Several soft-law resolutions and recommendations in the early 1990s encouraged member states to adopt meaningful measures against sexual harassment in the context of equal treatment of women and men; though some member states adopted laws against sexual harassment, their implementation and enforcement have been at best uneven.

This preeminent role of the EU and the 2002 Directive were the result of a long social and political process of slow incremental change in awareness at both the member state and the supranational EU level (Zippel 2004, 2006).

Feminist advocacy was instrumental in pushing the European Community to expand the narrow law on equal pay of the Treaty of Rome. The 1976 Directive on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions considered gender inequality in the workplace more broadly. The revision of this directive in 2000 provided advocates with the opportunity to formulate a binding tool to prohibit sexual harassment at work.

Beginning in the 1980s, feminist actors were instrumental in pushing and promoting the issue at different political levels including local, national (member states), and EU during this twenty-year process leading to the 2002 Directive, (Roggeband and Verloo 1999). I call this process, where policy action cycles back and forth, the ping-pong effect (Zippel 2003). The involved feminist actors included activists, social science and legal researchers, union members, lawyers, and state officials. In particular, three pioneer women's organizations, the French Association contre les Violences Faites aux Femmes au Travail (AVFT), the UK Women Against Sexual Harassment (WASH), and the Dutch Handen Thuis (Hands Off), as well as some unions and other organizations, lobbied successfully in the European Commission, where they found "friendly policy makers" and pushed for EU measures when they found their national governments not responsive. These feminists succeeded in turning an issue considered private behavior, which was not taken seriously and ridiculed and trivialized, into a public, political one. The 2002 Directive hence is the outcome of feminist organizing, an increasing public awareness, and the interaction of national and supranational policy making.

¹For the history of sexual harassment in the European Union, see Collins 1996; Gregory 2000, 1995; DeSacco 1996, Zippel 2006.

The responses of governments and organizations to the problem of sexual harassment in the member states have varied greatly, as comparative research on sexual harassment laws and workplace policies demonstrates (Cahill 2001; Saguy 2003; Zippel 2006). Before the 2002 Directive, a few countries, including Greece and Portugal, ignored the problem entirely and had no laws outlawing sexual harassment. Several countries did adopt some laws during the 1990s as a response to the European Community soft-law measures. Belgium, Ireland, and the Netherlands have adopted perhaps the most far-reaching legal reforms. In some countries, most prominently the UK, case law has significantly improved the legal redress of victims of sexual harassment, by acknowledging that it constitutes sex discrimination and by providing meaningful financial sanctions and compensation against harassers and employers who violate the rights of victims (Samuels 2003; Gregory 1995, 2000).

Most member states have changed their labor laws to hold employers responsible for sexual harassment. Some frame sexual harassment as a women's right; others (e.g., the Netherlands) have considered it a problem of health and safety in the workplace. France has led a push to hold harassers responsible by adopting penal laws bringing harassers into criminal court and threatening prison terms or fines. Problematic, however, in all countries is how laws against sexual harassment are implemented and enforced (Saguy 2003; Cahill 1999; Zippel 1996). Only in a very few countries can victims file complaints with state agencies, for example, the Irish and UK EOC and Austria.

The 2002 Directive on Equal Treatment

Under Commissioner Anna Diamantopoulou, an outspoken feminist, the European Commission promoted the 2002 Directive, responding to the very uneven legal and policy situation in the member states and general lack of adequate protection of victims of sexual harassment under national laws (for a more extensive analysis of the political factors leading to the adoption of the Directive, see Zippel 2006). The Commission initiated a Social Dialogue in 1996 to get the social partners, the Europe-wide union ETUC and employers' association UNICE to negotiate a policy against sexual harassment; however, UNICE refused, arguing that the issue was best left at the member state level. In addition, UNICE has maintained that sexual harassment does not constitute sex discrimination. In 2000, drawing on the research commissioned by the DG 05 (European Commission 1999), the Commissioner argued that member states had not sufficiently responded to earlier EC calls for intervention, that vast numbers of women experienced sexual harassment at work, and that their right to dignity and equal treatment was violated.

On April 18, 2002, a joint Council of Ministers/European Parliament (EP) conciliation committee issued an agreed-upon joint text of a draft directive updating the 1976 Directive (76/207/EEC) on equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions. The 2002 Equal Treatment Directive, which modernized and revised the 1976 Equal Treatment Directive, prohibits sexual harassment in the workplace.

The Directive has several important strengths. Foremost, it is binding for member states, which means that all twenty-five member states needed to revise or adopt sexual harassment laws by October 2005. Even the countries that have been most resistant to strengthening the rights of victims, including Greece and Portugal, have to pass sexual harassment laws. In addition, states that join the EU in the future will be required to have a law in place.

The Directive defines sexual harassment broadly as (Article 2, [2])

any form of unwanted verbal, non-verbal or physical conduct of a sexual nature with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment.

The EU used the “European” notion of sexual harassment as the “violation of dignity” in documents of the 1980s. This notion of respect for one’s dignity resonates with individual victims’ feelings of embarrassment, shame, offendedness and humiliation. Victims experience sexual harassment as acts where perpetrators overstep their boundaries and intrude in physical, psychological, and emotional space.

This EU-wide definition has the important strength that it works across cultures. The definition does not outlaw specific behaviors that could be perceived as sexual harassment in one country and not in another, such as joking, touching, kissing to greet each other at work, and so forth. Instead, the definition uses two criteria that are culturally sensitive. First, it allows victims to define what constitutes sexual harassment subjectively based on their own culture. Second is the notion that sexual harassment creates a particular negative environment.

Most important, the EU defines sexual harassment from the victim’s perspective as “unwanted behavior.” This is an important step because it strengthens the perspective of victims. Lawyers can no longer argue that the accused harasser did not mean to harm the women, because the intentions and motivations of the perpetrator(s) are not relevant in assessing whether sexual harassment occurred. Instead, the definition is focused on the perception of the behavior by the victims, and sexual harassment is “unwanted” behavior. This victim-centered definition goes beyond many national laws that have used more limited definitions emphasizing the perpetrators’ intentions. For example, the German law only considered sexually motivated, intentional behaviors that are recognizably rejected.

With the 2002 Directive, sexual harassment is a workplace issue, one that is clearly linked to sex equality because it is defined as sex discrimination. Sexual harassment is finally not viewed as personal, private behavior between individuals for which employers are not responsible. The concept of sex discrimination goes beyond the kind of individualistic analysis by which attorneys can try to excuse behavior as courtship or flirtation gone wrong. It connects sexual harassment to gender inequality and demonstrates its effects on women in the workplace in general (MacKinnon 1979). It clearly links sexual harassment to unequal working conditions for women and men, and gender inequality more broadly speaking, because the underlying notion is that women are treated unfairly as women if they are required to perform sexual favors or engage in eroticized, sexually explicit communication at work (MacKinnon 1979).

Another significant improvement is that the Directive clearly states that sexual harassment constitutes discrimination. This “stand alone” formulation is also important for national laws, because it clarifies a problem that emerged for example, in UK case law. In a recent case, the judge expected the woman victim not only to show that she was harassed but to show that when her complaint was not treated adequately she was then, too, discriminated against based on her sex (Rubenstein, interview January 15, 2005).

The 2002 Directive not only considers sexual harassment, that is, sexualized behavior, as harassment and a problem for gender equality in the workplace, but also recognizes nonsexual forms of harassment based on gender as sex discrimination. Gender harassment is defined as (Article 2 [2])

harassment: where an 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.

This is crucial because many victims experience sexual harassment not in isolation but often combined with gender harassment. For example, much of the harassment women encounter in male-dominated jobs, such as construction, the police force and the military, is hostility toward women as women. While some of this harassment is sexual, much is not. With the inclusion of gender harassment, derogatory words for women, for example, can be considered harassment whether they have sexual connotations or not. Because courts have, in the past, had difficulty determining what is and is not “sexual,” the Directive covers also any actions and behaviors that are hostile toward women, protecting victims against both gender and sexual harassment.

Sexual and gender harassment victims’ rights have also been improved through some the Directive’s clarifications and modifications of the Equal Treatment Directive. Most importantly, the Directive has lifted limitations on damages for victims of discrimination in general. This means that countries that have laws setting maximum compensation will need to reconsider their laws. For example, under existing legislation France limits fines to EUR 15,000, and Ireland has a maximum compensation for employees of EUR 12,700 or two years salary.

Finally, as in any discrimination case, the 2002 Directive requires a shifting of the burden of proof.

Limitations of the Directive

While the 2002 Directive has brought some improvements in sexual harassment laws to strengthen victims’ rights, it has several important weaknesses. Policymakers need to address these issues at the national level.

Sexual Harassment at Work

The Directive is not specific about which harassment counts, by whom, and in which situations. Though it is crucial to outlaw sexual harassment by both supervisors and colleagues, restaurant and bar waiters, nurses and other service personnel also encounter sexual harassment at work by clients and customers. Furthermore, sexual harassment among colleagues can also occur not only at work but in work-related settings, for example, company parties, business trips or private parties.

Sexual Harassment beyond the Workplace

Beyond the workplace, the Directive does not explicitly prohibit sexual harassment between teachers or professors and students in educational institutions, nor does it cover abuse of power in relationships such as those between doctors or psychologists and patients, attorneys and clients, or landlords and tenants. The EU Council Directive of November 5, 2003, expands EU gender discrimination measures beyond the labor market to any provision of services, including health services and housing. This Directive, implementing the principle of equal treatment between women and men in access to and supply of goods and services, might be applicable to sexual harassment, as well. Spillover effects may eventually strengthen laws prohibiting abuse of power and authority not only in the workplace but also in the provision of services, such as pensions and insurance premiums,

housing, access to bank loans and transport. Laws therefore should prohibit sexual harassment not only at work but also in these situations in the service sector.

Prevention

The Directive statement that employers need to prevent sexual harassment is important, but it is left to the member states to decide how to require employers to take preventive steps. Legal recourse only kicks in after the fact, when the harming behavior has occurred, and victims frequently only use legal means if they have already lost their jobs, because in practice the right to sue the employer does not directly help a victim to protect and keep a job. Given the large numbers of women and some men who experience sexual harassment, however, prevention is crucial. Therefore, the importance of laws in this case is to function as a deterrent for harassers, to strengthen the position of victims when they file a complaint, and most importantly to function as a means to make employers take complaints seriously and work to prevent sexual harassment from occurring in the first place. Prevention can be done by creating awareness and prevention programs and adopting strong policies and internal complaint procedures. It is not about sending men to “charm school” or asking them to modify their behavior. These training programs need to get to the core issue of equal gender cultures at work, in which men treat women as equals. Employers, furthermore, need to have incentives to use a variety of measures to create more gender equality in the workplace, including ensuring that work done by women is regarded as equal to that of men, promoting women into supervisory positions, working against sex segregation, and taking measures to reduce the gender gap in pay.

Implementation and Enforcement

A major flaw of the 2002 Directive is that the member states did not agree on how these laws will be implemented and enforced. A major problem in individual countries remains the lack of awareness of the issue in general and of the existing laws in particular. For example, victims often do not have information about their legal rights, and the national laws remain unknown. Few countries require employers to have policies in place or to conduct awareness and educational programs, and most member states have left it to employers and unions to take preventive measures.

The 2002 Directive emphasizes the important role of social partners, both employers and trade unions, in establishing collective bargaining agreements and complaint procedures. But the problem in member states so far is that these existing channels for implementing laws are insufficient. Many governments have left it up to the collective bargaining partners, unions and employers, to adopt sexual harassment policy statements and measures on a voluntary basis. In fact, if governments expect that employers and unions will voluntarily implement and enforce the laws, the result most likely will be that the laws will be ignored, as experiences in member states show. Many employers, as well as union officials (Pflüger and Baer 2005; Zippel 2003), have been unaware of the 1994 German Federal Law for the Protection of Employees. An EU-wide study commissioned by the Irish Government found that few collective bargaining agreements covered sexual harassment: only 24 percent of the surveyed unions/employee organizations and 15 percent of the employer organizations were party to collective agreements that addressed sexual harassment specifically (Government of Ireland 2004: xiii). Even gender equality advocates within state offices in Germany, who are legally responsible for gender equality laws, were unaware of the 1994 law (Zippel 2006). Individuals responsible for implementing sexual harassment laws frequently still lack awareness and sensitivity for victims. Across the member states, several prominent cases of sexual harassment among union stewards, in courts, and in state administrations have also demonstrated that sexual harass-

ment is a pervasive problem in most organizations, including those ostensibly created to represent or ensure the rights of employees.

One important issue that needs to be addressed by national laws is therefore to ensure that potential victims, harassers, and employers are informed about their legal rights and responsibilities. One option is to hold employers responsible to inform all employees, supervisors, clients, and other interested parties about the law.

In addition, there is a problem inherent in the structure of unions as representatives of all their members. If both the harasser and the victim are union members, union rules might state that conflict of interest prevents the union from representing the victim. Laws therefore should require unions to have internal policies against sexual harassment and to ensure gender equality within their organizations. Unions should be held accountable to treat all their members equally and to represent victims of sexual harassment in a fair and just manner.

Crucial for any law against sexual harassment is what sanctions are attached to it. Harassers will inevitably ask themselves if they can get away with their behavior. The answer to this question is linked to the question employers and unions will ask: “What if we continue to close our eyes to the problem of sexual harassment? What if we do not take sexual harassment complaints seriously?” If national laws do not carry significant financial and other sanctions for those responsible for violating sexual harassment laws, the laws will not be effective.

Offices for Implementation and Services for Victims

The 2002 Directive leaves it up to member states to create enforcement agencies. The Directive requires member states to establish agencies to promote equality and enforce anti-discrimination laws. National laws, however, will need to ensure that these agencies are empowered to act on behalf of victims. These offices could also provide consultation services for employers, unions, and victims. Legal and psychological consultation and emotional, legal, and financial support are especially important for victims.

Some best-practice models from the member states are centralized national complaint offices as part of gender equality agencies that maintain centralized information about complaints and lawsuits. These offices can monitor enforcement and in the long run provide the necessary feedback to lawmakers if, for instance, laws need to be modified. These offices can also provide crucial guidance for employers and unions about how to comply with the laws and how to deal with sexual harassment at work. In Austria, the vast majority of sex discrimination complaints brought to this equality body have been sexual harassment cases. Hence, these offices need sufficient staff and monetary resources to be effective. The lack of services for victims should be addressed by national laws, and resources need to be channeled to ensure the best possible outcomes for victims. In some countries, feminist organizations like AVFT have taken on the role of supporting victims and providing information to employers and unions. Yet they often do so with little funding and resources.

The Role of Feminist Organizations

The 2002 Directive encourages member states to allow interested third parties, for example, associations and organizations, to become involved in legal action either “on behalf of or in support of any victim” (preamble 20). But it is left to the national level to decide how laws can strengthen not only the role of unions and employers, but also that of feminist and other civil organizations in

implementing and enforcing the laws. It is important for civil organizations to support lawsuits actively, in order to use laws as a tool for effecting broader change with collective means. If organizations cannot be involved in supporting lawsuits, the problem of sexual harassment remains one for individual women to fight in the courts themselves. The burden of combating sexual harassment is then placed on the individuals already hurt most by sexual harassment, the victims.

Bullying, Mobbing, and Moral Harassment

Finally, because the 2002 Directive is being implemented in several member states at the same time as other EU directives on discrimination, there is a danger that sexual harassment will be lost in broader concerns about bullying, mobbing, and moral harassment. The 2000 Directive (2000/43/EC) against discrimination based on race (EU0006256F) and the 2000 Directive (2000/78/EC) establishing a general framework for equal treatment (EU0010274F) were supposed to be transposed by the member states by 2003; this means that member states have to revise or adopt national legislation to comply with their mandate to comply with the EU directives. Several member states, including Germany, however, have worked on a comprehensive anti-discrimination law including gender discrimination and sexual and gender harassment. In several countries unions and employers have “mainstreamed” sexual harassment to include violations of dignity of all workers.

Whereas it is certainly important to address these broader issues, for victims of sexual harassment and for future prevention, it is crucial to insist on creating awareness specifically about sexual harassment. Because the issue remains controversial and complex, and involves strong emotions on all sides, it is important to have laws that specifically define sexual harassment. Sexual harassment is not like other forms of bullying, mobbing, or moral harassment because it is a gendered problem and involves complicated issues of sexuality, power, dominance, and abuse. Hence, it is crucial to recognize the sexual nature of the problem and to educate those involved in implementing laws about the complexities of victims’ experiences, including the embarrassment, shame, and other emotional issues that intrusions and violations of dignity can lead to. Furthermore, unlike definitions of mobbing, for example, sexual harassment does not have to be a long-time pattern of or repeated behavior in order to be harmful. Single incidents can be discriminatory.

Conclusion

The EU Council Directive of 2002 was a response to feminist activism and the uneven legal situation regarding the rights of victims of sexual harassment in the member states. The Directive prohibits sexual harassment and states clearly that such harassment constitutes sex discrimination throughout the EU. This is an important victory for feminist activists who have advocated for legal reforms against sexual harassment. The Directive strengthens the rights of victims of sexual harassment in the workplace. The EU’s recognition of workplace sexual harassment challenges the assumption that gender cultures in workplaces are equal today and brings the issue onto the agenda of member states again. Most importantly, feminist demands to address violence against women and the sexual and cultural dimensions of gender inequality, as well as economic inequality of women and men, have entered into and expanded the narrow focus of previous EU workplace regulations and gender equality politics.

Despite its weaknesses, the 2002 Directive has the potential to significantly improve most member states’ laws against sexual harassment. It has already triggered new reform efforts in the member states to create and refine laws. It is now up to the members to ensure legal reforms with

real promise to ensure prevention of sexual harassment and strengthen the rights of victims. These legal reforms need to focus on meaningful mechanisms for implementation and enforcement. Laws against sexual harassment can be meaningful tools for individuals and groups to create a more equal gender culture in the workplace and ensure equal and fair working conditions for women and men. But efforts of activists, unions, state administrators, attorneys, judges, and employers are necessary to bring these laws to life and create more equal gender culture in the workplace.

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