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Harassment: A Silver Bullet to Tackle Institutional Discrimination, But No Panacea for all Forms of Dignity and Equality Harms

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Abstract[1]

Using Hungarian case law, this essay first explores the singular potential in the anti-discrimination legal concept of 'harassment', as it is perceived under EU law, to tackle institutional discrimination. Following this, the author turns to the risks and limitations of the practical operationalization of institutional discrimination in human rights litigation, as well as the uniqueness and subsequent challenges the subjectified standards of evidence for harassment may pose for due process/fair trial, as demonstrated by harassment cases in American universities.

Keywords: harassment, institutional discrimination, subjectivity, identity, #MeToo, dignity.

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This essay is structured as follows: After proposing a set of definitions concerning 'structural inequalities', 'structural discrimination', 'institutional and institutionalized discrimination' and 'harassment', I turn to exploring the unique potential in the anti-discrimination legal concept of 'harassment,' as it is perceived under EU law, to tackle the phenomenon of institutional discrimination, that is, exclusion rooted in institutional culture, or operational patterns. I will argue that the peculiarity of 'harassment' is that it is focused on the existence of an 'intimidating, hostile, degrading, humiliating or offensive environment', but it does not require a comparator and it allows entire organizations or subunits to be sanctioned along with individuals. Using Hungarian case law (NGO actio popularis litigation), I will show that the flexibility of anti-discrimination law, its unique terminology and conceptualization enables an activist interpretation to broaden its scope to cover novel, subtle and complex inequalities and grievances such as police raids, ethnic profiling, banning pride events and even hate speech. The cases cover a broad range of discrimination in terms of grounds and protected characteristics.

The second part of the article investigates the conceptual complexity, as well as the limitations and risks involved with the concept of harassment. While arguing that it indeed can be a silver bullet to tackle institutional discrimination, I will argue that it is no panacea for all forms of discrimination and social injustice: not every form of institutional discrimination can be conceptualized as harassment, not every form of discriminatory harassment will lead to institutional discrimination, and not every form of harassment amounts to discrimination.

A separate discussion is focused on the conceptual and procedural features of harassment, pointing out that legal standards relying solely on the subjective feeling of the complainant in regards of an intimidating and humiliating environment are not without risk. While it is a powerful and empowering tool for victims and members of marginalized communities, it can lead to lawlessness if there are no constraints to sanctioning based on declarations of feelings. Hence, if a petitioner can assume standing, that is, a protected personality trait or characteristic (for which in several instances of anti-discrimination legislation there is an open-ended list) it is a daunting task for the judiciary and equality bodies to set up standards and due process/fair trial guarantees.

Pointing to the confusing feature of harassment which blends discriminatory, criminal and labor law transgressions, the article discusses the specific case of a gender-based (sexual) discrimination in the *#MeToo*-era in this context, with a special focus on American higher education cases, which are arguably the frontline for (sexual) harassment cases.

The article concludes that no systemic concerns have been raised in regards of harassment charges applied in regards of other protected characteristics. Sexual harassment related occasional backlashes dominate, if not monopolize public discussion and both shift the attention from other forms of harassment, and reduce and misguide the perception of harassment, a truly unique analytic concept and a legal term which binds dignity, equality and identity claims in a complex and unique fashion, able to sanction simultaneously discrimination, employment law and criminal transgressions. The article also adds that the complexity of harassment may prove to be its self-limiting weakness, as if direct or indirect discrimination can be argued in a case, counsels would likely have it easier with any judge going down those roads.

1. Institutional, institutionalized and structural discrimination, and harassment: terms and definitions

Before turning to the analysis of the intricacies of the legal concept of harassment and its potential to offer remedies for various forms of social injustice, an exploration of terminology is in place.

In social science literature, there are dozens of definitions for conceptualizing structural inequalities, marginalization, discrimination, etc. This assessment focuses on law and legal conceptualization and terminology. *Structural discrimination* is the most general phenomenon or process, and it is also the one least feasible to encapsulate in legal terms. Hence, structural discrimination is not a legal term, it is used in social sciences to describe general, systematic forms of exclusion that goes beyond the actual workings of individual organizations and institutions. It calls attention to the fact that exclusion is based on forms of social communication, constant and recurrent habits and patterns that appear in the shape of attitudes, norms, value systems and choices that result in the exclusion and systematic disfavoring of certain groups. It does not require intentional behavior, fault or intent, and might not even be apparent in formal rules of social institutions. Consider segregated housing, the negative and biased media representation of minorities, the low number of women in political bodies or senior positions in the business world or academia.

Moving to *'institutional'* and *'institutionalized' discrimination*, which I use as synonyms, several definitions are available in the literature, but so far there has been no conclusive, generally acceptable theoretical and analytical differentiation between the two terms. Dovidio (2010) emphasizes that institutional discrimination is a rule, a convention or practice that systematically represents and reproduces group-based inequality. McCrudden (1982) argues that the gist of the phenomenon is that exclusion has become so institutionalized that there is no further need for individual decisions and actions to make an institution's operation effectively exclusive. The point is that due to operational mechanisms, the system itself discriminates, and there is no need for specific decisions for exclusion, intention or bias. According to Haney-López (1999: 1717), and what has been termed as new institutionalism, a trend that goes beyond the rational choice theory of institutional sociology, institutional discrimination is a practice that directly or indirectly confirms the social status of disadvantaged groups, and 'institutions' are not necessarily organizations, but can be social practices, as well.

In the social sciences conceptualization institutional discrimination is simply used as a synonym for structural or institutionalized racism. For the purposes of this essay, the most important aspect of institutionalized discrimination is that it is not necessarily a result of deliberate discriminatory procedures or attitudes, but that of an institutional culture, an operational pattern that in effect disfavors certain social groups.

As for *harassment:* it is a truly unique concept in law. It may refer to a wide variety of behavior which can be sanctioned both by civil and criminal law. Criminal harassment usually entails targeting someone else with behavior which causes alarm or distress, or what is meant to alarm, annoy, torment or terrorize, and creating

reasonable fear in the victim for their or their family's safety. Commonly referred to as stalking, criminal harassment may include the repeated following of a person, or communication in a way that could arouse fear. Criminal harassment also includes uttering threats.

But harassment is also part of the anti-discrimination legislation. Anti-discrimination law habitually relies on the distinction between direct and indirect discrimination. Consider for example the EU's Race Directive:

> Direct discrimination shall be taken to occur where one person is treated less favorably than another is, has been or would be treated in a comparable situation on grounds of racial or ethnic origin; indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary. (Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin)

Although strictly speaking no actual disparate treatment is taking place, in order to broaden the concept of discrimination, harassment is usually also included within the legal conceptualization. According to the aforementioned EU Directive, 'harassment shall be deemed to be discrimination [...] when [...] conduct related to racial or ethnic origin takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment.'

Thus, harassment is a distinct type of discrimination. Its gist is that the harasser creates or tolerates an intimidating, hostile, degrading, humiliating, offending environment that violates the human dignity of the victim. The phenomena of mobbing (harassment at the workplace) and bullying (used in connection to school and educational environments) are also recognized as such. One of the distinctive and most important features of harassment is that it is (also) the employer or a (representative of a) collective entity that can be held responsible for providing a harassment-free environment or procedure, thus it is not (only) individuals, such as police officers or employees, who can engage in this form of discrimination, but the employer, and even an entire organization as well.

There is also a third dimension how harassment surfaces, and due to its massive media representation and presence in public discourse, one of such areas will be in the center of the last section of this essay: when employers conduct disciplinary proceedings against employees or terminate contracts based on allegations of various forms of sexual harassment, following internal guidelines or policy decisions that are only indirectly connected to or based on legislative frameworks. These cases will not involve institutional discrimination directly, but it arguably involves systematic tolerance (and even encouragement) of certain conduct and a pervasive corporate culture which can be seen as form of institutional discrimination.

Harassment can be both a one-time occurrence and a pattern of procedures, or a series of continuous, recurring activities. Its corollary feature is that it does not assume an individual intention, guilt or prejudice and does not (or does not only) sanction the behavior of actual harassers or individuals participating in these

procedures, but the organization, the unit or the whole institution that allows for an intimidating, hostile, degrading, humiliating or offensive environment.

2. Operationalizing institutional discrimination as harassment

The following pages turn to demonstrating the unique potential in the anti-discrimination legal concept of 'harassment,' as it is perceived under EU law, to tackle the phenomenon of institutional discrimination. To accentuate the peculiarity of 'harassment': it is focused on the existence/creation/tolerance of an 'intimidating, hostile, degrading, humiliating or offensive environment', but it does not require a comparator (direct discrimination is defined as unfavourable by comparison to someone in a similar situation), and it allows entire organizations or subunits to be sanctioned along individuals. Using Hungarian case law built on NGO *actio popularis* litigation, I will show how an activist interpretation to broaden the scope of harassment to cover police raids, ethnic profiling, administrative bigotry, such as banning pride events, and even hate speech may open novel avenues for human rights litigation, even tackling cases where no other legal remedies would be available. Arguably, the extraordinary potential and these litigation strategies are exportable throughout the Europe (and maybe even beyond), and can be used as a silver bullet.

In the following I will cite a few cases where Hungarian human rights NGOs convincingly used harassment at some point in litigation to for example combat ethnic profiling and hate speech by local politicians: in all cases where no alternative argument for legal remedy was available. Again, let us be reminded that a defining element of institutional discrimination is that it concerns the aggregate effect of formally legal actions and procedures.

In a 2011 case launched before Hungary's equality body (EBH/865/2011), the Hungarian Helsinki Committee (HHC) successfully argued that in the village of Rimóc (in Northern Hungary), 97 per cent of the 150 bikers stopped and penalized for the lack of bicycle accessories between 1 January and 5 September, 2011 were Roma (Helsinki, 2012). The case ended in a settlement between the Nógrád County Police Headquarters and the HHC. A similar project was launched in 2016 targeting the Budapest Metropolitan Police's stop and search practices concerning 400 homeless people (EBH/17/2016). Here too, settlement negotiations and an agreement was concluded, police undertook to issue a memorandum declaring that it is discriminatory to carry out general identity checks of homeless and socially disadvantaged people.

A series of complex raids on Roma in the northern city of Miskolc triggered considerable attention. Various Hungarian and European NGOs and authorities conducted a complex investigation of the practice of coordinated raids by the police the city health and social departments, child protection services, and the water and gas suppliers in the segregated areas of the city in between 15 April 2013 and 17 April 2014 involving more than 2700 properties and approximately 4500 people, examining residency documentation, livestock conditions, sanitation, etc. (AJB-1474/2014). According to the ombudsman and his deputy in charge of nationalities (minorities), the high security inspections lacked appropriate constitutional reasons and posed an unnecessary and disproportionate restriction on the right to privacy of the inspected people who were mainly socially disadvantaged and Roma. The reoccurring

inspections were focused on the segregated areas of Miskolc and were held to lead to direct discrimination based on social origin and financial status and indirect discrimination based on ethnic origin, as well as the style of communication of the inspectors was found to be offensive, abusive and humiliating. Although a report by the parliamentary commissioner (ombudsperson) for fundamental rights repeatedly stated that the raids were considered to be intimidating, the provision of harassment was not actually used in the findings. Relying heavily on the ombuds-report, the Hungarian Civil Liberties Union successfully argued the case at court. The 57-page-long landmark anti-discrimination decision issued by the Miskolc Regional Court on 2018 December 12 actually held that the authorities' behavior amounted to harassment (and ordered the city of Miskolc to pay app. 33000 Euros to charity working on desegregation and social work.) The court focused special attention on the adjacent communication on behalf of the local government, finding exclusionary, racist statements, which were also found to amount to (discriminatory) harassment.

Harassment has also been applied by the Budapest Court of Appeal in 2014 declaring that the practice of the police repeatedly banning Gay Pride March amounts to institutional harassment. The court declared that the Metropolitan Police committed direct discrimination and harassment based on sexual orientation in 2012 when they banned the march claiming it disrupted traffic in Budapest. In previous years, the police consistently issued similar bans, and all have been overruled by the court, not to mention that various other events were permitted with roughly the same routes with significantly more participants. (One of these was a GONGO-march partially financed by the government with more than a hundredfold number of participants.) The trial court found that the police engaged in harassment, because their decision led to the creation and strengthening of a hostile, degrading and humiliating environment for a group of people with regard to their sexual orientation, and such practices can increase homophobia (Háttér, 2014).

Another set of cases concerned hate speech by local politicians. Before 2012, the coming into force of the new constitution (and subsequent criminal and civil legislation), the significance of these strategic lawsuits was that according to the Constitutional Court neither criminal, nor civil law provided adequate measures to combat racist hate speech.[2] Even though not all cases led to victory, the Equal Treatment Authority (ETA), Hungary's equality body and the courts had no conceptual problems with considering this approach to invoke harassment.

The first notable case concerned racist hate speech by the mayor of a small town, Edelény. At the public meeting of the city council in 2009 that was broadcasted on the city television, Mayor Oszkár Molnár made the following statement:

> It is no secret that in the neighboring villages where mostly the Roma live, for example in Lak and Szendrőlád, pregnant women deliberately take pills to give birth to loony children so that they can claim double the amount of social

[2] 30/1992. (V. 26.) AB határozat, ABH 1992; 36/1994. (VI. 24.) AB határozat, ABH 1994; 18/2004. (V. 25.) AB határozat, ABH 2004; 95/2008. (VII. 3.) AB határozat, ABH 2008; 96/2008. (VII. 3.) AB határozat, ABH 2008. In 2008 the specialized ombudsman for minority rights, a pioneer advocate for the cause, prepared a – never adopted – draft-legislation expanding the scope of harassment explicitly to hate speech: A kisebbségi biztos javaslata a gyűlöletbeszéd elleni fellépésre, *Fundamentum* 12(2): 125–127 (2008).

> benefits and that during the pregnancy – this is new information, but I have checked it, it's true – women beat their stomachs with rubber hammers so that they would have handicapped children [...].

The statement was repeated several times in the media, it was made public on the video news website of the national television channel RTL Klub and could be viewed on YouTube. The ETA found it to be a harassment of Roma mothers and pregnant women (EBH/1475/2009). On repeated appeal, the Supreme Court overruled this decision on the grounds that even if the mayor's statements constitute harassment (which it did not rule out), there is a procedural obstacle as the statements were not made with reference to the residents of the local municipality, and the mayor can only be held responsible for discrimination in relation to them.

In 2011 the Supreme Court passed a similar review of a decision of the Equal Treatment Authority (Kfv.III.39.302/2010/8). The case was the following: After the violent death of the 14-year-old Nóra Horák in 2008 there was strong hostility against the Roma among the locals in the town of Kiskunlacháza. The city council organized a meeting with the title 'Demonstration for life against violence' where Mayor József Répás said the following:

> The rapists, the thieves, the murderers should be frightened! There is no place for violence in Kiskunlacháza, there is no place for criminals, we have had enough of the Roma violence! Kiskunlacháza and Hungary belong to the peaceful and law-abiding citizens. We will no longer let them steal our belongings, beat up the elders and deflower the children. We are still in majority.

According to the ETA, the statement caused significant fear in the Roma, because the mayor's words increased the already present hostility. The mayor published an article in the local newspaper of the city council with the title 'We have had enough!' that was published in one of the national daily newspapers. In the article, he stated that

> [s]everal brutal crimes have been revealed that had been committed by perpetrators with verified Roma origin. Still, the leftist, liberal media and the government talks about racism [...] I am sorry to say that today there is an institutionalized racism against Hungarians in Hungary. [...] We must stop the terrorizing of the society, the deliberate creation of fear. We cannot let people hide behind the mask of minority and enjoy more rights than the majority. The basis of a normal society is that people feel safe. It should be a world in which if I leave my home in the evening, later I arrive home safely, and not in a body bag.

Based on the petition of the Hungarian Helsinki Committee the ETA found that the mayor violated the principle of equal treatment with regard to the Roma residents of the town and committed harassment (EBH/187/1/2010). The Supreme Court, again, refused to recognize the scope of the antidiscrimination law. However, in retrial, the Budapest-Capital Administrative and Labour Court stated that the speech and writings of the mayor do not fall under the freedom of expression and constitute unlawful conduct (Helsinki, 2014).

In 2015 the Hungarian Helsinki Committee initiated a lawsuit against Budapest 8th District City Council and Mayor Máté Kocsis because of the harassment of refugees who had come to Hungary. The mayor made a rudely generalizing and inflammatory post public on Facebook. Mr. Kocsis wrote that

> [o]ur recently renewed Pope John Paul II Square has been completely destroyed by the migrants. They have built tents and fires in the park, they throw away their litter, run around madly, they knife people and destroy things. Never has there been so much human excrement in a public space. [...] We will protect the public property and we will guarantee the safety of our citizens with all legally available means.

According to the plaintiff, the majority of the statements were unfounded and inflammatory, capable of inciting hostile emotions, talking about not individual refugees, but generalizing the statements, stigmatizing all migrants regardless of their individual behaviour and attitude, picturing them as threats to Hungarian society, thereby detracting their social assessment. The Facebook post clearly violates the obligation of public authorities to provide equal treatment. When assessing whether the behaviour of the defendant led to the creation of an intimidating, hostile and degrading environment one must take into consideration the already extremely hostile public attitude against migrants that was proved by the atrocities against asylum seekers, the people helping them or the people who were believed to be refugees. In 2016 the Regional Court of Budapest Capital (P.22.427/2016/10), not contesting the applicability of harassment, rejected the petition on procedural grounds, arguing the city council's relationship to the asylum-seekers does not fall within the scope of the anti-discrimination act. As of October 2018, the case is on retrial and pending.

Also in 2016 in another lawsuit initiated by the Hungarian Civil Liberties Union (HCLU) the ETA found that János Majoros, the mayor of Mezőkeresztes committed an act of harassment against the Roma with his public letter published in the July 2015 issue of the local newspaper (EBH/459/5/2016). The article of the title was 'Let's stop the decrease of real estate prices' and the mayor named two reasons for the decrease. One was that people with no income managed to acquire properties in the town and they sub-let these, the other that buyers of the real estates who were paying in instalments did not pay the full amount of the price. Two paragraphs later the mayor suggested a solution to the problem and asked the people of the town that if they could, they should not sell their properties to persons of Roma origin. The public letter was also published on the website of the city council. According to the ETA 'the mayor's warning, that people should not sell their properties to Roma people is in itself degrading and violates their human dignity, but in its context the warning can create a hostile, offending and humiliating environment for the Roma' (HCLU, 2016). There was also an ombudsman report (AJB-703/2017) in the same case coming to similar conclusions.

Möschel (2019) points to two Italian cases. The first involved politicians' statements and posters from the *Lega Nord* and Silvio Berlusconi's party, which warned against voting for a certain candidate in Milan's mayoral elections because he would transform that city into a 'gypsy-town' and into Europe's largest mosque. Following NGO litigation, the court (Tribunale di Milano, Sezione I civile, 26 May 2012, no. 34318/11.) found racial harassment with regard to the comment about

Roma (but not concerning the mosque). In another *actio popularis* case against the local branch of the *Lega Nord* of a small Northern Italian town, Saronno, statements contained on seventy posters hung up in the municipal territory claiming that the town did not want to any illegal immigrants while the government organizes an invasion, the Milan Tribunal rejected discrimination claims (due to the restricted personal scope of the law), but held that the statements were clearly very offensive and humiliating and not only had the effect of violating the dignity of foreigners, asylum applicants and people having a different ethnicity than Italian citizens but also favoured a hostile and intimidating climate against them (Tribunale di Milano, Sezione I civile, 22 February 2017, no. 47117/2016.)

Recognizing hate speech as a form of harassment is not unprecedented in other jurisdictions. Schindlauer (2018: 84–85) points to three Bulgarian cases. In the first, Deputy Prime Minister for Economic and Demographic Policy Valeri Simeonov, who also served as the Chair of the National Council for Cooperation on Ethnic and Integration Issues was found to be guilty of harassment by the Burgas District Court (*K. B. and O. I. vs Valeri Simeonov*, Decision No. 1151, case No. 7094/2016, 31 July 2016), after stating in the National Assembly in 2014 that '[i]t is an undeniable fact that a large part of the gypsy ethnicity lives outside of any laws, rules and general human norms of behaviour.' The Supreme Administrative Court similarly established harassment in 2017 (*N.A. vs Mediapool Ltd.*; Decision No. 2171, case No. 12401/2015, 21 February 2017) when an online news portal failed to delete anti-Turkish hate speech comments for an entire month, and in a 2019 judgment as well, when a national TV company having failed to moderate anti-Roma hate comments on its website (*NN vs NN* Decision No. 13542, case No. 10756/2015, 12 December 2016).

Returning to Hungary, another significant decision, targeting different social phenomenon, by the Curia, the supreme court of Hungary (Pfv.IV.21.274/2016/4) concerned litigation initiated by the Hungarian Civil Liberties Union, arguing that the failure of the police to dissolve marches organized by far-right paramilitary organizations in the Roma-inhabited part of the town of Gyöngyöspata amounted to harassment. (This case too was based on a report of the ombudsman.)

Conceptualizing the lack of appropriate law enforcement action as a form of discrimination is in line with the European Court of Human Rights' practice in seeing under-policing of hate crimes as a form of discrimination (although harassment is not used in the decisions, see for example *Balázs v. Hungary* [Application no. 15529/12, 20 October 2015], *R. B. v. Hungary* [Application no. 64602/12, 12 April 2016], *Király and Dömötör v. Hungary* [Application no. 10851/13, 17 January 2017]).[3] In the *Balázs* case the Court pointed out that treating racially induced violence and brutality on an equal footing with cases that have no racist overtones turns a blind eye to the specific nature of acts which are particularly destructive of fundamental rights. A failure to make a distinction in the way in which situations that are essentially different are handled may constitute discrimination, that is, unjustified treatment irreconcilable

[3] The third-party intervener, the European Roma Rights Centre submitted that this was a case of institutional racism against Roma within the State bodies, evidenced by the failure of the authorities to provide an appropriate and professional service to people because of their colour, culture, or ethnic origin.

with Article 14 of the Convention. The vigour and impartiality required for the investigation of attacks with potential racial overtones is needed because States have to continuously reassert society's condemnation of racism in order to maintain the confidence of minorities in the ability of the authorities to protect them from the threat of racist violence. Furthermore, when it comes to offences committed to the detriment of members of particularly vulnerable groups, vigorous investigation is required.[4] In the *Gyöngyöspata* case, while the high court rejected harassment-arguments regarding ethnic profiling of Roma in stop and search practice, it did accept the under-policing claims and ruled that such practices amount to discrimination in the form of harassment.

In another noteworthy case, the administrative court rejected appeals (6.K.31.719/2017/14) against the ruling of the equality body where it held that the city council of the town Tiszavasvári was guilty of harassment when it signed an agreement and cooperated in organizing marches with a far-right paramilitary organisation to 'regulate' its Roma population.

3. Assessing harassment: conceptual peculiarities, practical limitations, procedural risks

So far I have shown that an activist interpretation of harassment may use it as a tool to broaden the scope of anti-discrimination protections to include a number of complex inequalities involving all sorts of discrimination in terms of grounds and protected characteristics (such as race, ethnicity, sexual orientation, social status, class, etc.).

This second part of the article argues that while harassment may indeed be a useful and unique tool to tackle institutional discrimination, it is not a panacea for all forms of discrimination and social injustice, because (i) its scope and application terrain is inherently limited (as not every form of institutional discrimination can be conceptualized as harassment, not every form of discriminatory harassment will lead to institutional discrimination, and not every form of harassment amounts to discrimination); (ii) the very concept of harassment as it encompasses and blends criminal, labour and antidiscrimination law dimensions is not entirely uncontroversial; and (iii) the uniqueness of its operational principle relying on subjectivity also carries risks. Hence, the second part of the article focuses on the limitations and controversies involved with the concept of harassment. While earlier discussions

[4] The Court held that for the investigation to be regarded as 'effective', it should in principle be capable of leading to the establishment of the facts of the case and to the identification and punishment of those responsible. This is not an obligation of result, but one of means; the authorities must have taken all reasonable steps available to them to secure the evidence concerning the incident. When investigating violent incidents, State authorities have the additional duty to take all reasonable steps to unmask any racist motive and to establish whether or not ethnic hatred or prejudice may have played a role in the events. This obligation to investigate possible racist overtones to a violent act is an obligation to use best endeavours and is not absolute. The authorities, however, must do what is reasonable in the circumstances to collect and secure the evidence, explore all practical means of discovering the truth and deliver fully reasoned, impartial and objective decisions, without omitting suspicious facts that may be indicative of racially induced violence.

involved a diverse set of grounds for discrimination, the subsequent analysis focuses on cases involving gender-based (sexual) discrimination. The case of sexual harassment is arguably special and particular for several reasons: (i) the way how the blending of criminal, labour and anti-discriminatory conceptualization of harassment are operationalized in legal practice in this field has not (yet) been applied in other fields involving other grounds of discrimination. Also, (ii) socio-political developments, such as the *#MeToo* movement put sexual harassment in the centre of public discussion, also accentuating the potential dangers and occasional backlashes in legal practice. Furthermore, a prominent and widely publicized field of sexual harassment case law relates to a very particular area, American higher education institutions, which arguably can leave faculty and students without adequate legal protection.

Despite this atypical nature of sexual harassment (which carries the danger of reducing and monopolizing discussions) it is still a useful case to demonstrate the complexities of the legal concept of harassment, as it has been the leading example of how dignity, equality, and identity claims are bridged and blended, which is a general and unique defining feature of harassment. Let us now turn to the discussion of these issues.

3.1 Harassment and institutional discrimination: inherent and implied limitations

The previous pages have argued that harassment can serve as a unique tool to counter various forms of exclusion and social inequalities, cases of institutional discrimination in particular, which would not easily be covered by the classic, 'direct' or 'indirect' forms of discrimination. This nevertheless does not cover all forms of discrimination-related injustice for the following obvious reason: besides (i) cases where institutionalized discrimination is harassment; (ii) there are forms of institutionalized discrimination that cannot be conceptualized and operationalized as harassment; and (iii) there are various forms harassment that amount to discrimination, but not institutional discrimination; and (iv) there are also forms harassment that are not discriminatory.

The previous section brought examples for successfully argued cases for (i), and as a thought experiment we can extend the list of potentially successful similar cases where there is direct personalized emotional harm petitioners can argue to have been induced by identifiable agents in direct interaction with them. Consider judges sitting in courts treating marginalized defendants in a degrading manner; non-inclusive practices in cafeteria offerings (not providing Halal or Kosher food) in schools or prisons (where going out or ordering in is not an option); allowing to display, or in other cases prohibiting religious symbols or clothing in certain public venues; or (in the light of American student-grievances) even not having trigger warnings and 'safe spaces' safeguarding from 'microaggressions' in the classroom.[5] Intimidation in the educational context has also been claimed to be caused by instructors using slang or examples or exam questions that are unknown to students from certain socioeconomic or cultural backgrounds; holding office hours or scheduling significant

[5] These would include the prohibition of discriminatory language as well as hand gestures and other forms of intimidating disagreement.

learning opportunities or exams not only during religious holidays, but also at times commonly used for work-study jobs or athletic practice.

It is not easy to distinguish these cases in a theoretically sound way from (ii), institutionalized discrimination that cannot be operationalized as harassment in the anti-discrimination legal logic and term. In some cases litigators would just either be in, or out of luck arguing for it. Harassment presupposes a certain litigable action, practice or behaviour which distinguishes it from 'simple' structural discrimination conceptually encoded in the workings of an institution. The more distant, indirect the attributable action and the general the harm will be, the more chances for a successful litigation will decrease. Also, it may be very difficult, sometimes even impossible to establish and measure personal harm caused by intimidation, fear and degradation. Hence, the following phenomena probably fall under the cluster of *non-harassment institutional discrimination:* the systematic under-qualification of hate crimes (when the investigation and the indictment is based on less serious charges); residential or educational segregation (including the case when Roma children are classified as students with special needs, or when standardized tests that are used for classification contain racial or ethno-cultural bias); the legal framework that engages in (racially discriminatory) gerrymandering and enables abuse (in the form of ethno-corruption) in electoral law (see, for example, Pap, 2017); the well-documented instances of the displacement of Roma children from their families to state care; when the organizers of academic events set up 'manels' (panels consisting only of males); the negative media representation of minorities, etc. The ever-long list of bias encoded in legislation, be it direct or embedded in terminology in a subtle way also belong here and to bring examples from a variety of jurisdictions, it can arguably include rules on jury selection; three-strikes- and drug laws; sentencing guidelines; custody decision patterns (including the accumulation of child support debts for incarcerated African American males); the cis-heterosexual conceptualization of marriage; citizenship laws irregularizing certain populations; the legal acceptance of prostitution; culturally biased public holiday-policies, etc. One may even bring here an insensitive approach in memory politics, the way how history in books is represented, or the lack of reflection on certain authors' involvement with slavery, the holocaust, but also not renaming street names, college buildings, fraternities, sports clubs or removing monuments and statutes for similar reasons. The use of historical flags such as the American confederate (*Walker v. Texas Division, Sons of Confederate Veterans*, 576 U.S. [2015]) or the Hungarian 'Árpád stripes' (reminiscent of the Hungarian Arrow Cross Party of 1944–45 and therefore having fascist connotations) can arguably be intimidating, offensive and degrading for certain groups of the population, but it would likely be difficult to litigate such cases.

As for (iii), *non-institutional discrimination harassment*, here the criteria is that discrimination is committed by a particular action and not a general pattern or operational mechanism. Besides 'classic' sexual harassment or bullying, this could include the case one of my colleagues told me about, when a Roma plaintiff made a complaint for a hate crime and the police officer who recorded the complaint was wearing a T-shirt with the inscription of a music band that can be connected to extreme right organizations. I believe that the criterion for creating a humiliating, degrading environment was also fulfilled by the poster campaign of the Hungarian

government in 2015 against migrants – who were, in reality, mostly refugees and asylum seekers.

The *Handbook on European non-discrimination law*, published by the EU's Fundamental Rights Agency (FRA) in 2018 brings a number of further examples (FRA, 2018: ch. 2.4). Such was the case before the Hungarian Equal Treatment Authority, where a complaint was made about teachers who threatened Roma students that their misbehaviour at school will be notified to the 'Hungarian Guard', a paramilitary far-right organization. It was found that the teachers had implicitly endorsed the racist views of the Guard and created a climate of fear and intimidation, amounting to harassment (EBH/654/2009, cf. FRA, 2018: 66–67). In 2012 the Grand Chamber of the European Court of Human Rights issued its judgment in the case of *Catan and Others v. Moldova and Russia* (nos. 43370/04, 8252/05, and 18454/06) in a case concerning Moldovan nationals living in the Moldovan Republic of Transdniestria (MRT), a separatist entity that split from the Republic of Moldova in 1990 but that has not been recognized by the international community, ruling for the applicants who claimed that the MRT's prohibition of using Latin scripts in education, and allowing a systematic campaign of vandalism in the school, along with arresting and profiling protesting parents and threatening them with the loss of their jobs and parental rights amounted to a systematic campaign of harassment and intimidation of those participating in schools using Moldovan as the language of instruction. A separate, repeated discussion is needed to discuss (iv) the scenario where the legal term and concept of harassment is used to sanction behaviour that is not actually discrimination.

3.2 Harassment and discrimination: overlapping but not interchangeable; bridging dignity, identity and equality claims

The conceptual peculiarity of harassment is twofold. As described above it blends transgressions sanctioned by three different fields of law: criminal, anti-discrimination and employment law when employees face disciplinary proceedings based on allegations of (mostly, but not necessarily limited to) sexual harassment, following internal guidelines or policy decisions that are only indirectly connected to or based on legislative frameworks.

The second uniqueness of harassment relates to the complexity of the relationship between identity, equality and dignity claims and policies, and the way in which law conceptualizes and merges the three (and this is also intertwined with the intricate relationship between identity recognition and identity politics: the politics of recognition targeting cultural and symbolic injustice and identity politics). This feature of harassment is an attributable to legislative developments pertaining to gender and sexual harassment in particular but there is no legal indication that it would not be a generally applicable feature of harassment irrespective of the ground (i.e. the protected personality trait or characteristic).

Fraser (2000) shows how, at least in the case of gender, equality includes both recognition and redistribution (thus: equality) claims, and in political (and often legal) discourses (even concerning discrimination) there is a shift from equality to dignity, and, confusingly often also an uncritical, unreflected and unexplored blending of the two. What we actually see here is an interesting back-and-forth bouncing, rondo-like

recognition of these commitments. Since Catherine McKinnon's (1979) seminal work in the 1970s, it has been widely recognized that that dignity harm can be conceptualized as a form of discrimination, and by the 1990s in Europe several legislative documents formally recognized and acknowledged this link, in particular in the context of gender based discrimination and sexual harassment. A 1991 Recommendation by the European Commission on the protection of the dignity of women and men at work (Commission Recommendation 92/131/EEC of 27 November 1991) held that

> sexual harassment means unwanted conduct of a sexual nature, or other conduct based on sex affecting the dignity of women and men at work. This can include unwelcome physical, verbal or non-verbal conduct. [...] It is unacceptable if such conduct is unwanted, unreasonable and offensive to the recipient; [...] and/or [...] creates an intimidating, hostile or humiliating working environment for the recipient. [...] Sexual attention becomes sexual harassment if it is persisted in once it has been made clear that it is regarded by the recipient as offensive, although one incident of harassment may constitute sexual harassment if sufficiently serious. [...] conduct of a sexual nature, or other conduct based on sex affecting the dignity of women and men at work, including conduct of superiors and colleagues, is unacceptable if [...] creates an intimidating, hostile or humiliating work environment for the recipient; and that such conduct may, in certain circumstances, be contrary to the principle of equal treatment.

As we can see, here the language links dignity harms with the concept of discrimination, although not unconditionally, as it uses terms like 'can' or 'in certain circumstances.' Nevertheless, the link and connection between dignity and equality, incentivized and inspired by sexual harassment legislation, has become a standard form discrimination for all protected characteristics. (Note that the cited EU law definition for racial harassment was only adopted in 2000).

This subsection highlighted the first conceptual peculiarity of harassment: its extreme complexity. Not only does it include and blend sanctions from three different areas of law, but the harms it targets and aims to remedy are also very diverse and different.

3.3 Harassment and subjectivity: inherent risks

The other conceptual peculiarity of harassment concerns how it operationalizes subjectivity in legal conceptualization in a unique fashion. It is quite atypical, and certainly challenging for legal procedures to incorporate subjective feelings. While it is a powerful and empowering tool for victims and members of marginalized communities to seek remedies in regards of an intimidating and humiliating environment, without proper guidelines for legal standards and procedures, the reliance on subjectivity is not without risks. Hence, if a petitioner can assume standing, that is, a protected personality trait or characteristic in relation to which harassment charges can be brought (and for which in several instances of anti-discrimination legislation there is an open-ended list), it is a daunting task for the judiciary and equality bodies to set up standards and due process/fair trial guarantees. It can,

however, lead to lawlessness if there are no constraints to sanctioning based on declarations of feelings.

For comparison, in asylum law, standards have been developed to ascertain and operationalize objective standards for 'well founded-ness' in its central concept of 'well founded fear of persecution' – on the basis of which refugee status should be granted. Here, there is an intricate system of 'objective', pre-established country-specific fear (that is: persecution)-factors, on the basis of which the subjective feeling of fear from persecution can be established. The asylum-seeker will make a claim and recipient authorities will carry out a validation procedure, first establishing whether the group in question is actually in danger of persecution, and second, whether the claimant is a member of the group. The production and reception of the refugee legal narrative is a complex phenomenon involving several narrators with sometimes conflicting stories and objectives (Zagor, 2014).

Although the 'hostile, intimidating environment' conceptually relies on subjective standards, the law is not entirely silent on benchmarking. Referring to the case law of the European Union Civil Service Tribunal, the FRA Handbook sets forth that for a 'conduct to be considered as harassment, it should be perceived as excessive and open to criticism for a reasonable observer of normal sensitivity and in the same situation' (FRA, 2018: 65). This seems to introduce some sort of objective standards. However, the definition continues, and softens the criteria: 'the harasser does not have to intend to discredit the victim or deliberately impair the latter's working conditions. It is sufficient that such reprehensible conduct, provided that it was committed intentionally, led objectively to such consequences', i.e. that the employer felt this way.[6] According to the FRA, for harassment, 'there is no need for a comparator to prove it, as harassment in itself is wrong because of the form it takes (verbal, non-verbal or physical abuse) and the potential effect it may have (violating human dignity)' (FRA, 2018: 66). This 'potentially occurring effect' unfortunately is an utterly vague description, not helping in crystallizing legal standards.

Having shown general peculiarities of the legal conceptualization of harassment, and also having noted the particular role gender-based discrimination played in the development of its current understanding, the prevalence and relevance of the *#MeToo* movement calls for a separate discussion on sexual harassment. The reasons for this are twofold: (i) sexual harassment provides a vivid example of the legal and political dangers, inherent in the concept of harassment, which stems from the blending of criminal, labour and anti-discriminatory frameworks. It is (ii) also special in the sense that in certain fields, in particular in American higher education cases, legal practice has been quite controversial and (iii) academic, legal and political

[6] The European Union Civil Service Tribunal held for example that an appraisal of the performance of an official made by a supervisor, even if critical, cannot as such be classified as harassment. Negative comments addressed to a member of staff do not thereby undermine his personality, dignity or integrity where they are formulated in measured terms and are not based on allegations that are unfair and lacking any connection with objective facts. It has also held that the refusal of annual leave in order to ensure the proper functioning of the service cannot, as such, be regarded as a manifestation of psychological harassment. Case T-11/03, Afari v. ECB, ECLI:EU:T:2004:77 and Joined Cases F 106/13 and F 25/14, DD v. European Union Agency for Fundamental Rights (FRA), ECLI:EU:F:2016:205, cf. FRA (2018: 140).

discussions on this arguable backlash along the *#MeToo* movement put sexual harassment in the frontline of public debates.

3.4 Sexual harassment: From American higher education to the #MeToo movement

Sexual harassment-related cases, be they legal or 'political/ethical', are often complex and multilayered in the sense that they may involve a form of sexual violence (that is unpermitted or unwelcomed physical advances), yet sexual harassment also includes scenarios in which verbal or other non-physical utterances create the intimidating, hostile, degrading, humiliating or offensive environment. Thus, it involves at least two types of conduct: one that has always been illegal, amounting to even criminal sanctioning in the case of rape, sexual assault or coerced sex, but it may also include speech that in a relatively short period of time became socially and politically unacceptable. Verbal harassment creating an intimidating environment mostly came up in American higher educational contexts, and mostly pertaining to gender identity or sexual orientation, but also in the context of race in the public and legal discourse. As we will see, the line between law and politics is often blurred, as charges for sexual harassment – even if unsubstantiated or confirmed by judicial proceedings, or often even by a mere police investigation – are sufficient reasons to terminate employment contracts. This essay concerns primarily the legal aspect of harassment claims and sanctioning. However, ceasing contracts in the media, the art world or publishing (see, for example, Alter, 2018) over allegations (and not findings or judicial rulings), which are triggered to save the reputation of the employers may have legal relevance in adjacent, indirectly related litigation. Hence 'political correctness', and its manifestation in 'cultural appropriation', the shadow of harassment allegations, or the failure to prevent retaliation and to create 'safe places' will carry property interest.

The case of American higher education is not discussed here because the author would believe that academia is the most important or pervasive context (although few professionals are fully exempt from cognitive biases when it comes to their field). The overall impact of the *#MeToo* movement in Hollywood, or even in politics is much higher and much more visible. Most of these cases are, however, extra-legal in the sense, that contracts are being cancelled, nominations are being withdrawn, resignations are handed in without formal legal procedures. The importance of higher education cases lies in the fact that here the endurance of law is tested within social, cultural and political developments.

The legal, constitutional and policy ramification of sexual harassment procedures will therefore be intricate and robust. The following questions require special attention:

First, there is a conceptual and terminological *inconsistency in the legal provision* of harassment as an anti-discrimination clause, which allows for melding verbal transgressions and minor, often culturally ambiguously coded physical advances with criminally sanctionable rape and sexual assault. Kipnis (2015a) points for example to the, in her account troubling, terminology of referring to rape victims as *survivors*, a term previously reserved for holocaust victims. Echoing her assessment of a 'panicky conflation' where 'gropers become rapists', Julia Hartley-Brewer underlines the dangers of generalizations concerning 'rape culture' which is 'characterised by a

"continuum of abuse" – running from locker-room banter to gang rape' (Various Authors, 2017).

In general, there is an inherent difficulty in striking a balance between due process requirements for the accused (harassers) and narrowly tailored commitments to combat secondary victimization and the subsequent chilling effect of silencing and non-reporting (see, for example, Cortina and Berdahl, 2008).

Second, as Dobbin and Kalev (2018) show, the *adversarial*, law-based formal *grievance systems are* most often intrinsically *inadequate* for sexual harassment, as victims do not trust the process, they fear social and job-related retaliation,[7] and formal complaints actually rarely lead to the removal of the harasser and the victims will continue to coexist in the same space. Also, in many cases victims are not interested in severe sanctioning, they mostly want the practice to stop. However, the non-legal sanction-based ombuds-type mediation, which employers are incentivized to follow to avoid high profile, public procedures and costly lawsuits, run the risk of depriving victims of legal remedies by forced private arbitration procedures (see the *IBM* and *Uber* cases and Fowler, 2018).

Third, in a certain specific environment, such as *higher education*, the location of the most visible and widely discussed harassment cases, there is an inherent conflict between aspirations for an intimidation-free safe place, and academic freedom: which, besides *free speech* being a fundamental constitutional value and an individual right, is also a specific professional, educational value. It is the core of the free speech doctrine in all jurisdictions that up to a certain degree, and here the margin of appreciation is usually quite broad, even offensive, shocking speech should not be censored and outlawed. The required degree of tolerance for artistic and political speech varies depending on the manner, time and place of the speech, and for the workplace the standards may very well be more stringent. There are also certain exceptional content-based limitations on free speech: it is a habitual practice to introduce (even criminal) sanctions on holocaust-denial, blasphemy, or the violation of other, specific, historically rooted sensitivities concerning the dignity of certain communities. One may argue that such exceptional protections need to include verbal sexual (or other protected characteristic-based) harassment. At this point, however, no straightforward judicial or political declarations for this type of exceptionalism have been set forth.

Since, as mentioned above, the field of American higher education is arguably a visible frontline for harassment (legal, or para-legal) cases it is important to provide an overview of the legal and socio-political landscape. American universities have become the social and political laboratory where the delicate interplay between legal and political/cultural responses to changing attitudes and social practices (i.e. political correctness and the emergence of calls for trigger warnings and safe places from 'microaggressions' and other forms of cultural insensitivity) surfaces. University related harassment cases have received the greatest attention (not only from the media, but also in terms of legal practice), and arguably, produced controversial cases and trends, and this was intrinsically connected with debates on the 'snowflake' generation's peculiar role in the commercialized educational sector. True, in the past years higher education culture developed hypersensitivity against any form of an unwelcoming or

[7] A US federal survey indicated that 66 per cent experienced it, see Dobbin and Kalev (2018), quoting Cortina and Magley (2003).

intimidating environment, going well beyond prohibiting discriminatory language and actions.[8]

The legal background for higher educational sexual harassment cases in the US is Title IX of the Civil Rights Act, which states that 'no person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance'. Title IX defines sexual harassment as 'unwelcome conduct of a sexual nature' as long as the behaviour is serious enough to impact the victim's access to educational opportunities by creating a hostile environment. Facing federal and civil penalties, schools are required to conduct a 'prompt, thorough, and impartial' investigation into any allegation of sexual assault reported on campus. Thus, an originally antidiscrimination provision, following the interpretation that such conduct may create a hostile environment was expanded to investigate sexual assaults, issues that may include criminal behaviour falling under the competence of the police. It is important to note that these cases will typically involve alleged actual physical contact of some sort (and go beyond non-verbal intimidation).

The Office of Civil Rights (OCR) is the federal agency charged with enforcing federal antidiscrimination statutes, and in 2011, it issued an official correspondence (called Dear Colleague Letter (DCL)) regarding campus *rape*, which laid out the minimum grievance procedures by which schools must comply for cases involving sexual violence (Kirkpatrick, 2016).

The DCL mandated that schools provide notice to students of the procedures and outcomes, perform adequate and impartial investigation into complaints, develop an equitable process in which parties have an equal opportunity to speak and present evidence, and ensure that the proceedings are facilitated by individuals who receive annual training on sexual violence issues. Other than these broad guidelines, the OCR fails to specify how schools should carry out these mandates. As a result, some schools are conducting such disciplinary hearings differently than others. (Kirkpatrick, 2016: 165)

As Kirkpatrick (2016: 165) points out, out of the nineteen-page document, a mere two sentences address due process rights for the accused. 'The document even urges that steps to afford due process rights to the accused should not restrict or delay protections for the Complainant' and 'strongly discourages institutions from allowing the accused to cross-examine the complainant.' Failing to comply, universities risk losing federal funding. Generally discouraging to pay too much attention to the due process rights of the accused, the DCL set forth the so called 'preponderance of the evidence standard,' used in civil cases, requiring (50.01 per cent certainty) to resolve sexual assault accusations. Using a higher burden of proof, such as a clear and convincing evidence standard, applied in criminal cases, the schools arguably would

[8] See for example accounts of Laura Kipnis arguing that feminism became hijacked by melodrama and students are committed to vulnerability and conditioned to infantilization, and that they have no agency in what happens to them, and anyone with a grudge, a political agenda, or a desire for attention can easily leverage the system. She argues that now emotional discomfort is regarded as equivalent to material injury (to be remediated) and the climate on campuses is so accusatory and sanctimonious and chilling that open conversations are practically impossible (Kipnis, 2015a; 2015b; 2017).

be in violation of Title IX. A typical hearing process may end in expelling students and firing professors, and as interim measures banning from campus (if they were living there, forcing them to move) and suspension (with or without pay). The disciplinary process is otherwise the same 'that governs alleged violations of university codes of conduct, such as the plagiarism of a term paper or the theft of a roommate's belongings' (Kirkpatrick, 2016: 166). Most operate like courts, using a panel of decision makers who hear and weigh evidence, determine the facts, and decide sanctions. There is extensive but contradictory judicial practice on these procedures (following litigation contesting school decisions): universities are under no clear obligation to allow the accused to have legal counsel present, although they usually allow a fellow faculty member (called faculty counsel) to be present, and there is also no legal requirement to inform the accused students or faculty of the specific charges or the discovery of any evidence, and the right to cross-examine witnesses or the complainant is also not provided (Kirkpatrick, 2016: 167).

Kirkpatrick (2016: 167) shows how, 'courts even differ as to whether or not hearing committee members need to recuse themselves if they are familiar with the accused or complainant and have a conflict of interest'.[9] In a typical sexual assault hearing, the university will first send notice of the charge to the accused and ask him or her to respond. The accused (and maybe but not always complainant) will then appear before a panel akin to a jury, which is typically comprised of disinterested tenured professors, sometimes along with students, faculty, and staff.

> Panels often use the same Title IX coordinator as investigator, prosecutor, defender, jury, and judge. [...] In addition, the panels are made up of university employees who most likely have an innate interest in the claims [...], as acquitting the accused student carries with it the threat of OCR costing colleges over half a billion dollars in federal funding. (Kirkpatrick, 2016: 172)

Appeal is not always available, but most often there is a fairness hearing review committee, the decision of which then can be appealed to the President, and then Board of Trustees (but only) for procedural errors.

It is a twist that in several cases faculty members can actually be sanctioned for retaliation, even if it merely involves an academic commentary on a case, be it even a mere tweet (see, for example, Smith 2003). Laura Kipnis of Northwestern University provides a broadly cited documentary of what she labels as a witch hunt against her by 'allowing intellectual disagreement to be redefined as retaliation' (in particular attending disgraced philosophy professor Peter Ludlow's dismissal hearing) (Kipnis, 2015a; 2015b; 2017).

In sum, students and professors can be expelled (with very slim chances or re-employed in or able to transfer to another institution) without even a police report ever filed, by a committee the members of which are not impartial (due to their position) and actually lack any formal training in dealing with sexual misconduct,

[9] Citing, for example, Osteen v. Henley, 13 F. 3d 221 (7th Cir. 1993), Winnick v. Manning, 460 R. 2d 545, 549 (2nd Cir. 1972), Dillon v. Pulaski County Special School District, 468 F. Supp. 54 (8th Cir. 2009).

effects of alcohol or even law (Kirkpatrick, 2016).[10] And these judgments are passed not (only) for engaging in alleged physical interaction, but also for a mere commentary. Here and by this, the more general concept and conceptualization of harassment is revisited.

In 2018 the Trump-administration projected that the 6000 colleges and universities conduct an average of 1.18, and the 17000 elementary and secondary schools 3.23 sexual harassment investigations annually (Green, 2018b). The Department of Education foreclosed a proposal to redefine federally regulated sexual harassment narrowing it down to 'unwelcome conduct on the basis of sex that is so severe, pervasive and objectively offensive that it denies a person access to the school's education program or activity.' The proposed rules would hold schools accountable only for formal complaints filed and for conduct said to have occurred on campus, and a higher legal standard to determine whether schools improperly addressed complaints would also be allowed, leaving it in the schools' discretion to choose between 'preponderance of evidence' or 'clear and convincing' evidentiary standards. Secretary DeVos actually rescinded the 2011 DCL, assailing the guidelines as federal overreach that coerced schools into setting up quasi-judicial systems fraught with inconsistencies. The proposed rules would expand the accused perpetrators' right to use mediation, request evidence and cross-examine.[11]

It should be noted that the peculiarity of the higher education cases is not independent from how the business interests in this highly lucrative enterprise, where students are customers and consumer satisfaction is paramount, and avoiding classroom friction with unpopular is an existential necessity for adjuncts, instructors, and part-time faculty with renewable contracts, who make up a majority of teaching staff (Kipnis, 2015a).

The alarming feature of the American cases is how the application of the (essentially legal) concept of harassment is applied in an extra-legal arena in terminating contracts, ending careers, etc. without due process findings and investigations by competent authorities. And this is where we revisit the terrain of politics in the (social) mediatized world, where social progress is often blurred by reductionism, and moral panic.

Lídia Balogh (2017), for example, demonstrates how the European Parliament resolution of 26 October 2017 on combating sexual harassment and abuse in the EU (2017/2897(RSP)) provides a continental case for the moral panic-induced conceptual and terminological chaos: first, the European Parliament throughout the text repeatedly uncritically bundles non-criminal conduct such as harassment and other forms of discrimination, with rape, physical violence, forced marriage, female genital mutilation and honour crimes. Sexual harassment and sexual abuse are identified as forms of gender-based violence. Furthermore, as if a grievance competition would be at place, sexual harassment is identified as 'the most extreme [...] form of gender-

[10] It also needs to be added that '[e]ven though most of these cases involve the voluntary consumption of alcohol, the accused male may not use it as a defense whereas the female complainant can escape scrutiny from it' (Kirkpatrick, 2016: 164).

[11] Cf. Green (2018a): 'The Obama administration [...] strongly discouraged parties from personally questioning each other during hearings, believing it would be "traumatic or intimidating, thereby possibly escalating or perpetuating a hostile environment".'

based discrimination.' Also, the resolution indiscriminately 'Welcomes initiatives such as the #MeToo movement that aim to report cases of sexual harassment and violence against women; strongly supports all the women and girls who have participated in the campaign, including those who denounced their perpetrators.' Besides endorsing an informal movement (lacking identifiable agents) this unselective support for all women making accusations, in principle includes even fraudulent, malevolent ones, and hence, arguably is problematic.

On a final note on sexual harassment and *#MeToo*, the occasional controversial use, or even as some argue, abuse in relation of sexual harassment can and should be seen as a necessary side effect or externality of the massive shift in how gender equality, gender roles, and the contours of social interaction changes in Western societies, which includes the recognition and rejection of certain deep running particular behavioural patterns.

The detailed discussion of American sexual harassment cases in this article is prompted by several reasons. First, since sexual harassment (and this is the main message of the *#MeToo* movement) is so pervasive and systematic in many facets of the workplace that it may actually amount to institutional discrimination. Second, the *#MeToo* movement, as well as the arguable backlashes seem to dominate, if not monopolize public discussion and actually shifted attention from other areas of workplace related harassment. A third reason lies in the fact that although there are no reports of, or systemic fair trial concerns have been raised regarding harassment-related legal practice applied with regard to other protected characteristics, there is no conceptual or textual gag rule that would limit potential backlashes to sexual harassment.

Summing up this section, harassment is an exceptionally complex and multifaceted legal concept. It may be added, its uniqueness may prove to be its weakness as well, as it may potentially be self-limiting. If there are other feasible alternatives such as direct or indirect discrimination to build the cases on, it will be easier for counsels to argue their case in front of a judge – especially in continental jurisdictions, with less room for judicial activism and savour for abstract, theoretical argumentations. Although the above described institutional discrimination-targeting harassment cases are remarkable, and I believe in a global export-potential, we need to be aware of its limitations. Apparently, institutional discrimination is an important analytical category, but due to its theoretical and doctrinal complexity, its application in public policy planning is likely to be more successful than in human rights litigation.

4. Concluding remarks

To conclude: harassment is a truly unique legal concept which binds dignity, equality and identity claims in a complex and unique fashion, encompassing sanctions for criminal, discriminatory and employment law transgressions, and conceptualizing and operationalizing subjectivity in a singular fashion. The article showed that the concept is no panacea for all forms of social injustice, and has several technical and conceptual limitations. However, the occasional controversial legal practice of sexual harassment (where fair trial procedures potentially lack guarantees) should not blind and monopolize discussion on this multifaceted analytic concept and a legal term, which can work as a unique tool to combat institutional discrimination in regards of a broad

range of protected characteristics in the legal, as well as the broader, political and cultural sense. While the *#MeToo* movement provides a vivid example for the latter, this article overall targeted the former.

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