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0521847168 - The Politics of Sexual Harassment: A Comparative Study of the United States, the European Union, and Germany

Kathrin S. Zippel

Excerpt

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1 Sexual harassment and gender equality

Sexual harassment serves as a vivid example of heated struggles over sexuality, power, and gender equality on both sides of the Atlantic because it fuses the issues of violence against women, sexuality, and workplace equality. Several notable, high-profile cases in the United States raised public awareness of the problem of unwanted sexual attention in workplaces and brought the term “sexual harassment” into living rooms throughout the world during the 1990s.

Although Europeans were often skeptical about the relevance of the issue to their lives, surveys report that about the same percentage of women in the European Union¹ (EU) member states and in the United States have experienced sexual harassment at work. There have been several notorious scandals involving European men accused of harassment. The British Crown has been in the news twice regarding allegations of sexual harassment among the staff. Most recently, Elaine Day, forty-five years old, a former personal assistant who worked for Prince Charles’s household for four years, resigned and filed a sexual harassment and unfair dismissal suit, testifying that her dismissal was a retaliation for her complaint of “inappropriate touching” by the Prince’s assistant private secretary Paul Kefford. She said that she felt threatened by Kefford and that he had sexually harassed two other staff members (al Yafai 2004).

An American woman who had worked for many years on the staff of the United Nations High Commission for Refugees filed a sexual harassment complaint against the High Commissioner, Ruud Lubbers, in 2004, alleging that he groped her after a meeting in his office. Lubbers, who was Dutch Prime Minister between 1982 and 1994, argued that

¹ The EU is the supranational organization of twenty-five member states in Europe. I use European Community (EC) for policies and institutions prior to the Maastricht Treaty, the Treaty on the European Union, which went into effect in 1993. This study covers the events leading to the adoption of the 2002 European Directive defining sexual harassment; the ten nations that joined in spring 2004 are not considered.

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the woman had misconstrued a “friendly gesture.” UN Secretary General Kofi Annan publicly dismissed the complaint, announcing that it was unsustainable in court, despite the fact that an internal investigation recommended that “appropriate action” be taken (*BBC* 18 May 2004). One year later, in the context of the UN being under fire for corruption and sexual abuse by peacekeepers, this confidential UN report was leaked to the press and Lubbers resigned (*BBC* 20 February 2005).²

Sexual harassment has also been a problem in Germany. In 1983, a group of women staffers accused a male parliamentarian, Klaus Hecker, of the newly founded West German Green party, of groping their breasts. East German politician Heinz Eggert resigned as Saxony’s Minister for Internal Affairs in the aftermath of harassment accusations by male staff members in 1995. Complaints by women students brought male professors of the University of Stuttgart in Hohenheim, Fulda, Berlin, Hannover, and Konstanz to court. Nonetheless, under current German laws, the women did not receive compensation, and the sanctions imposed on the men ranged from excusing them from their teaching obligations, to encouraging early retirement, to reducing their salary by 10 percent for one year. Punitive damages do not exist in German law. In the late 1990s, three young policewomen could no longer endure the sexual harassment and other hostilities they encountered as women in the police force and committed suicide. Their supervisors, the media, and judges, however, called their experiences not discrimination but “mobbing,” which is a gender-neutral term for systematic workplace hostility of a long duration, in Germany described as “psychoterror at work.”

The weak laws against sexual harassment in the European Union mean that women who file complaints risk becoming the accused themselves. In France, for example, several victims of sexual harassment who sought justice in court not only lost their cases but found themselves facing defamation libel suits from the men they accused. In these defamation cases, judges imposed severe penalties, including fines of €15,000 and several months of probationary prison terms (AVFT 2004).

² The UN is not the only organization that has promoted laws against sexual harassment while having to deal with issues of sexual harassment within its own organizations. The UN has specifically addressed sexual harassment, first in the document “Nairobi: Forward Looking Strategies for the Advancement of Women,” which was adopted at the Third World Conference on Women held in Nairobi, Kenya, in July 1985, diffusing the concept of sexual harassment worldwide.

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Yet, the increasing visibility of women in the workplace and the public's heightened sensitivity to violence against women have brought nation-states and supranational organizations to struggle over definitions of sexual harassment and the construction of regulations for everyday workplace interactions. This book explores the approaches to sexual harassment that have emerged in the United States and the EU, as well as in one EU member state, the Federal Republic of Germany.³ These countries have varied in timing, policies, implementation, and enforcement. The United States has been a forerunner in this policy area. Since the mid-1980s, US courts and state agencies have addressed the issue within the framework of equal opportunities for women. Case law developments, enforcement and implementation mechanisms have created an environment in which many employers have adopted workplace policies against sexual harassment, following the advice of consultants in order to minimize the risk of expensive lawsuits.

In Europe, sexual harassment is often defined differently. The EU defines sexual harassment as a violation of the dignity of workers; unions and employers have addressed it in the context of conflicts among workers and abuses of power in general. Most EU member states have done little to combat sexual harassment in the workplace. Despite some legal reforms in the early 1990s, implementation and enforcement mechanisms so far have been less effective than in the United States. Employers ignore the problem, prevention efforts are rare, and victims' legal redress is weak.

This study compares the politics of sexual harassment at two levels: first, by examining how legal and governmental institutions respond to women's concerns, and then, how implementation and enforcement challenge politics at the workplace level. The United States has been at the forefront of sexual harassment policy development because of its common law legal system and civil rights legislation. The second-wave women's movement politicized sexual harassment with the goal of creating women-friendly workplaces and promoting gender equality. The courts have been exceptionally hospitable to holding employers responsible in the name of protecting women's equal opportunities at work. Nonetheless, feminist⁴ notions have been able to enter the

³ "Germany" refers to the Federal Republic of Germany after unification in 1990. Prior to 1990, East Germany did not have specific policy measures against sexual harassment.

⁴ "Feminism" is a highly debated, politically charged concept, especially in cross-cultural studies. Feminist comparative researchers have identified several core ideas of feminism across Western post-industrialized democracies (Mazur 2002: 3). By feminist interpretation of sexual harassment, this book refers to views that locate the causes of sexual harassment in gender inequality and an abuse of power.

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development of case law through attorney arguments, expert witnesses, and amicus briefs. As a result, US law defines sexual harassment as sex discrimination, from a victim-centered, subjective perspective.

Through the transatlantic diffusion of policy ideas, the EU translated the US model into a “European version” that defines sexual harassment as the violation of a worker’s dignity. Since the early 1990s, it has slowly increased pressure on member states to take the issue more seriously. The transnational diffusion of ideas by the women’s and labor movements and the increasing influence of the EU itself resulted in similar timing among member states.

While diffusion helps explain why European countries increasingly take sexual harassment seriously, it does not sufficiently explain how ideas actually get translated into policies and employer responses.⁵ The United States, the EU, and its member states have embarked on different institutional routes or paths to change laws and change workplace policies and practices. Sexual harassment law was created in the United States following a path characterized as the “legal–regulatory route,” by which courts expanded preexisting anti-discrimination laws. By contrast, in 1994 German legislators passed a new labor law, the Federal Employee Protection law, defining sexual harassment as violation of dignity.⁶ In this “statutory–corporatist route,” workers’ rights, not issues of minorities, served as the analogy. The EU path was a “bureaucratic, expert-driven” route, in which administrative elites and elected officials decided policies. These distinct paths both facilitated and constrained feminists and other gender-minded actors in their drive to combat sexual harassment.

These paths also had an effect on the implementation of laws and their enforcement. The US legal–regulatory route prefers legal enforcement mechanisms over state regulation: harassed individuals are expected to file complaints to hold employers responsible. The German statutory–corporatist path gives flexibility to workplace organizations to devise policies, assuming that employers and unions can handle their own issues, preferably by collective agreements among employers and unions. Feminist concepts are easy to ignore in this process, since organized women’s interests have no formal place in negotiations. The EU has promoted a combined approach, asking member states to strengthen

⁵ Ulrike Liebert (2003) argues, for example, that member states’ perception of the EU also influenced the ways they translated EU gender equality laws into national laws.

⁶ Before the 1994 German Federal law, several German *Länder* (states) had already passed laws for the public sector through the same statutory route; however, they were largely ignored (see Chapter 4).

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individual legal rights and relying on corporatism to implement sexual harassment laws.

These routes have advantages and disadvantages for changing employer practices and gender culture in the workplace. In the United States there is a *politics of fear* centered on sexual harassment; employers and male employees are told to be afraid of women's lawsuits. In Germany there exists a *politics as usual* that allows employers to ignore both sexual harassment and the law that requires them to protect women from it. However, neither approach accomplishes feminists' ultimate objective of gender equality in the workplace.

The Politics of Sexual Harassment is the story of the diffusion across two continents of a feminist concept, named by a grassroots movement, developed by legal scholars in the United States in the mid-1970s, and implemented in workplace organizations on two continents. The book looks at gender politics in the context of a globalization that has facilitated the transnational exchange of ideas and politicized concepts, expert knowledge, and policy and legal models among social movement actors and policy-makers. Drawing on theories of comparative feminist policy, gender and welfare regimes, and social movements, it examines how feminist actors have shaped these processes at the national and supranational levels, and in the workplace. Through transnational networks among unions, academics, the media, and policy-makers, the concept of sexual harassment traveled from the United States to the EU and its member states. The resulting nationally specific politics – legal reforms and workplace changes – have been profoundly shaped by the different routes.

To explain the history of sexual harassment policies it is important to look at the complex relationship between social movements and institutions. This relationship has been of critical interest in current comparative studies of public policies and social movements. To study the emergence and implementation of sexual harassment laws is to draw on (feminist) theories of political institutions and social movements.

We know surprisingly little about the origins of policy measures against sexual harassment. Despite the public attention it has garnered and the struggles of workplaces to handle it, there has been little sociological and political science research on sexual harassment. A vast literature on sexual harassment exists in social psychology, education, human resources management, and legal research in the United States, but there is astonishingly little comparative work on its cross-national politicization. Scholars of feminist political science and political sociology rarely consider sexual harassment when examining gender relations and the state. Only a handful of studies have investigated government

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responses and legal developments in the United States and EU member states. Most comparative studies have focused on legal reforms, implicitly using the United States as a model from which the EU member states deviate.⁷

The politics of sexual harassment in the United States, EU, and Germany offers intriguing insights into feminist politics and the role of states and international institutions in shaping gender relations. Sexual harassment policies are a prime example of how state policies reach into the everyday worlds of millions of workers. The issue is fascinating because it connects problems of violence against women and sexuality with gender inequality at work. These issues have been handled by very different sets of actors and institutional arrangements depending on whether sexual harassment is considered a health and safety issue or women's right to sexual self-determination. This distinction allows us to look at how gender ideologies – specifically notions of gender equality and sexuality – intersect with political and legal traditions to shape understandings of sexual harassment and emerging policies.

By systematically considering transnational as well as national contexts, this study also improves current conceptualizations of gender politics in feminist scholarship and policy studies.⁸ In particular, because the EU has been a major force in putting sexual harassment on the agenda of its member states, sexual harassment policies are an excellent case through which to examine emerging gender politics in the EU. This comparison provides useful insights into how state, legal, and employer policy approaches and practices might indeed promote or hinder gender equality. These insights are important for European policy-makers, lawyers, and human resource professionals in their efforts to implement the 2002 EU policy directive in the member states, and for US policy-makers and employers in their assessments of alternative paths to gender equality. The study of the politics of sexual harassment thus contributes to scholarship on public policy, comparative public policy, institutions, and social movements.

Sexual harassment also provides a compelling area for investigating broader questions about the origins, adoption, and implementation of

⁷ Most studies compare the United States to EU member states (Bernstein 1994), including Sweden (Elman 1996, 2000), Austria (Cahill 2001), and France (Saguy 2003). Only two studies compare two EU member states – Spain and the Netherlands (Roggeband and Verloo 1999) and Spain and France (Mazur 2002). In the few studies that examine specific countries, Spain (Valiente 1998) and France (Mazur 1994, 1996, 2002) have attracted most attention. Two German studies compare the United States to Germany (Baer 1995; Kuhlmann 1996).

⁸ See Jackie Smith (2004) and Sidney Tarrow (2005) for a useful discussion of transnational movements.

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policies ostensibly designed to create more gender equality in the workplace. Exploring cross-national variation in the new field of gender-specific policy, this book addresses two main questions: What explains differences in approaches to sexual harassment in terms of the timing and nature of the laws? What are the consequences for actual implementation of these policies in the workplace? One aim is to compare policy formation in different national and supranational contexts in order to identify the critical factors that explain its origins. The second aim is to identify criteria for how policy approaches vary in the workplace. These criteria help us to evaluate how states, legislators, courts, and employers deal with this controversial issue.

This introductory chapter first discusses the significance of the politics of sexual harassment as a contemporary site of struggle over gender and organizational norms, sexuality, power, and gender equality, as well as the historical emergence of sexual harassment as a social problem. It further outlines the empirical puzzle of cross-national differences in approaches to sexual harassment. Drawing on the gender and welfare state literature and theories of feminist policy and social movements, it develops a comparative framework, focused on feminist involvement in policy formation, to examine the evolution of sexual harassment policies. The main actors and stakeholders in the politics of sexual harassment are identified, along with the institutional, political, legal, and cultural factors that shape the creation of national laws and regulations. Finally, comparative criteria to map out the cross-national variations in policy approaches to sexual harassment are proposed.

Why compare sexual harassment politics?

The politics of sexual harassment is the outcome of social and political processes in which ideologies of gender equality and sexuality are negotiated. Comparing the evolution of sexual harassment policy in the United States, the EU, and Germany identifies qualitative differences between policies and policy-making processes in historical, social, institutional, and cultural contexts (Ragin 1994; Steinmetz 2004). These cases are not “independent”; the United States has influenced developments in Europe and the EU has been a catalyst for policy in member states. Therefore, it is instructive to understand how the United States has affected the politicization of sexual harassment in the EU.

Germany and the United States are both advanced industrialized countries with democratic political systems and federal structures, but their political, institutional, and legal structures differ significantly. Specifically, their systems of workplace regulation, their women’s

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movements and gender politics have markedly different histories (Buechler 1990; Ferree 1987, 1995b; Ferree and Roth 1998; Mushaben 2001, 1989; Moeller 1993; von Wahl 1999). Comparing the paths the two countries and the EU took to deal with sexual harassment allows us to examine the role women's movements played in the emergence of policies and to identify the complexity and conjunctural character of factors that produce policy trajectories and outcomes. Theda Skocpol (1984) calls this comparative strategy "highlighting difference," similar to Charles Tilly's (1984) notion of "individualizing" comparisons.

Sexual harassment is a particularly interesting policy field for several reasons. We can trace its evolution from a "radical"⁹ feminist concern in a grassroots movement, to its formal acknowledgment as a "social problem," to its diffusion across the Atlantic and its translation into laws and practices in different cultural, legal, and political contexts. How this issue has been handled provides clues about the status of women in the workforce and their ability to effect legal and political change. The contentious debates over laws and policies are the locus of broader challenges and changes in gender and sexual norms – women's equality and socio-sexual workplace relations. Not surprisingly, the debates triggered by high-profile cases have taken place in politics, courts, the military, church, unions, workplaces, and educational institutions.

Some critics view sexual harassment laws as the quintessence of what is wrong with feminism. Mainstream media have contributed to this by blaming feminists for what they call *sexual correctness* (Zippel 1996). The plight of victims is seen as less newsworthy and exciting than that of men who become the victim of "false" accusations by vengeful women. Based on American media, Europeans have portrayed the issue as a "war of the sexes," and depicted feminists as moralist, anti-sex crusaders (*SittenwächterInnen* and *TugendblockwärtInnen*) seeking to sanitize the workplace from cherished flirtation and eroticism by reintroducing Victorian standards (Möller 1999; Saguy 2003; Baer 1996; Hauserman 1999). The German media, in particular, found more problems with American sexual correctness than with sexual harassment per se.

European media have been highly critical of what they perceive as the American preoccupation with sexuality, or "American excesses" in the 1990s. Reports of million-dollar punitive damage settlements fuel this perception. Skeptical European feminists, employers, and lawmakers have been reluctant to prohibit flirtation or consensual relations in the

⁹ Radical feminists focused on violence and sexual exploitation as a primary source of women's oppression in patriarchal societies (Lorber 2001: 78).

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workplace. Employers in the United States have justified these policies as prohibitions against the so-called “sexual favoritism,” outlined in Equal Employment Opportunity Commission (EEOC) guidelines. Neither German nor EU sexual harassment laws include this notion. Instead, German advocates have insisted that neither the state nor employers should limit women’s freedom to engage in voluntary intimate relationships at work. Spanish and French policy-makers have explicitly rejected broad US notions, and asserted that Mediterranean cultural values include flirtation and seduction as normal interactions between women and men in the workplace (Valiente 1998; Saguy 2003, Jenson and Sineau 1995).

Drawing on Europe’s tradition of workers’ rights and international human rights documents, EU member states are creating an alternative “European way” to address sexual and nonsexual forms of harassment in the broader context of “violations against workers’ dignity.”¹⁰ Campaigns for fairness in the workplace and against violations of dignity of all workers tend to emphasize the *exclusionary* aspects of harassing practices, such as bullying, mobbing, and moral harassment. For example, when male coworkers in the police and other male-dominated occupations use sexual or nonsexual harassment to create an exclusionary, hostile environment for women, the problem is regarded as one not of *inappropriate sexual conduct* but of *exclusionary* practices against an individual.

Mobbing, a concept introduced by a Swedish doctor, Heinz Leymann, is known in Germany as “psychoterror at work,” describing a conflict-laden communication among colleagues or between superiors and employees. It is a process by which one or more persons systematically, over a long period, attack someone directly or indirectly with the goal of marginalizing and getting rid of him or her (Holzbecher and Meschkutat 1999; Meschkutat, Stackelbeck and Langenhoff 2002). Similarly, Marie-France Hirigoyen, a French psychiatrist, coined the term “moral harassment” to capture emotional abuse including insults against individuals at work.

Neither notion locates the root in (gender) inequality, instead the focus is on the harm done. Hence, these European concepts apply to any worker. By contrast, US employees’ rights to “privacy” in the workplace

¹⁰ Several countries have already introduced laws. Sweden was the first EU country to have an Ordinance on Victimization at Work in 1993. Belgium and France passed laws against “moral harassment” in 2002. German, Spanish, and United Kingdom labor courts have increasingly recognized bullying, mobbing, and harassment (Bernstein 1994; Friedman and Whitman 2003).

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are very weak, and anti-harassment law applies only to groups protected by civil rights legislation, such as women and racial and ethnic minorities. Does preventing exclusionary practices as “violations of the dignity of workers” jeopardize the feminist vision of a gender-specific concept of sexual harassment as some feminists have worried (Baer 1995, 1996, 2004; Carter 1992; DeSacco 1996; Ehrenreich 1999; Samuels 2003)? Or can the United States learn from EU member states to create inclusionary workplaces safeguarding the human dignity of all workers?

To follow the diffusion of the phenomenon of “sexual harassment” across different countries provides the opportunity to trace the influence of transnational social movements and international organizations. For instance, once feminists in the United States had named the concept, women in Europe did not have to reinvent it. Surprisingly, European women had their first success in passing measures against sexual harassment not in their home countries but in the EU (Collins 1996; Gregory 1995). With the EU measures in hand to legitimate their demands, feminist activists, women in trade unions, and state administrators brought the issue to national agendas. In this process, member states translated the concept of harassment into their own languages using nationally specific concepts.

Sexual harassment offers a unique opportunity to compare the relationship among social movements, states, and supranational organizations. Most studies of political issues focus exclusively on policy-making, or on mobilization of protest outside institutions; this study brings these together by examining the role feminists, both within and outside institutions, played in changing and adopting laws (Katzenstein 1998). The issue of sexual harassment in the EU arose simultaneously with the creation of (gender) equality offices and networks among various gender-minded actors, who became a driving force to create this new policy issue. Furthermore, the equality offices were part of a transnational network through which they could draw on important resources. Thus, the comparative study of sexual harassment provides an interesting means to study the relationship between insiders and outsiders in policy and legal change, and how gender equality bodies use transnational resources.

Because sexual harassment challenges gender workplace culture, it raises important questions about the role of the state and the law in cultural change. Should laws follow and reflect changes in public awareness of social problems, or are laws suitable tools to create and change awareness? The statutory path required a slower process of consensus building among political elites than the US legal-regulatory path where