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Sexual harassment and criminalisation

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The aim of this paper is to explore sexual harassment and criminalisation, and, more specifically, to what extent the criminal legal system may serve as a measure against sexual harassment. It is not the task of this paper to provide a straightforward answer. Instead, it provides a brief account of ongoing trends in Sweden which prompts further analysis of this issue, such as #metoo, crime statistics on sexual molestation, gender equality policy, and crime policy.

Before proceeding to this account, first, some clarification of the concept of sexual harassment. From the point of view of feminist theory, sexual harassment encompasses a range of intrusive behaviour by men against women, as connected to gender inequality. One significant analysis of this interrelation is Kelly's framing of sexual harassment as part of the continuum of women's experiences of sexual violence, which makes visible the social and gendered harm of everyday, routine, intimate intrusions against women.¹ For the purposes of this paper, a distinction is made between on the one hand rape, sexual abuse and assault, and on the other sexual harassment. As Kelly points out, there is no clear-cut moment when sexual harassment turns into sexual assault, but the following list largely captures the kind of behaviour this paper is concerned with: 'Visual forms of harassment include leering, menacing staring and sexual gestures; verbal forms include whistles, use of innuendo and gossip, sexual joking, propositioning and explicitly threatening remarks; physical forms include unwanted proximity, touching, pinching, patting, deliberately brushing close, grabbing.'² To this list, one might add sexual harassment that takes place in the digital realm.³

Second, a short explanation of the concept of criminalisation. In brief, criminalisation entails something more than, or different from, whether a certain behaviour is or should be in the

¹ Liz Kelly, *Surviving Sexual Violence*. Cambridge, UK: Polity Press, 1988.

² *Ibid.*, 103.

³ Anastasia Powell and Nicola Henry, *Sexual Violence in a Digital Age*. London: Palgrave Macmillan UK, 2017.

criminal code.⁴ Criminalisation includes, among other things, to what extent incidents are reported to the police as well as attrition rates and the daily practises of the courts. In addition, criminalisation encompasses the interests underlying crime policy discourse and the social and economic consequences of punishment. There is much more to say about this, but for now, it is most important to stress that the intention here is neither to promote an abolitionist standpoint, nor to think of the legal domain as ‘the singular arena for justice’.⁵ While we do need to recognize the many flaws of the current criminal legal system, and the socio-economic injustices it partakes in reproducing, at present, this system does provide a response to sexual violence.⁶ Hence, the aim of this paper is not to argue for decriminalisation of sexual offences. Instead, it is concerned with whether criminalisation is a meaningful response to the ubiquitous problem of sexual harassment.⁷ Having defined, in brief, what is meant by sexual harassment and criminalisation, I will now move on to describe tendencies in Sweden which prompt this question.

Quite obviously, the #metoo movement has triggered a call for action against sexual harassment. Through the #metoo movement, women’s narratives of sexual violence became visible and demands were raised for justice, equality and freedom from sexual harassment. In Sweden, #metoo took the shape of 65 mainly occupationally based collective “uprisings,” (*uppror*), but also involved individuals accusing men in powerful positions of engaging in sexual violence. A debate on the impact of #metoo and its contribution to feminist goals in the long run is ongoing.⁸ Leaving that discussion aside, it can be observed that #metoo intensified awareness of sexual harassment, and its problem description has been acknowledged by Swedish governmental institutions. The current anti-discrimination legislation, which includes both pro-active measures and sanctions against sexual harassment in the workplace, has not

⁴ Nicola Lacey, ‘Historicising Criminalisation: Conceptual and Empirical Issues’, *The Modern Law Review* 72, no. 6 (2009): 936–60; R A Duff, *The Realm of Criminal Law*. Oxford: Oxford University Press, 2018, chapter 1.

⁵ Linda Alcoff, *Rape and Resistance: Understanding the Complexities of Sexual Violation*. Cambridge: Polity Press, 2018, 46.

⁶ Compare Lise Gotell, ‘Reassessing the Place of Criminal Law Reform in the Struggle Against Sexual Violence’, in *Rape Justice: Beyond the Criminal Law*, ed. Anastasia Powell, Nicola Henry, and Asher Flynn, London: Palgrave Macmillan UK, 2015, 53–71.

⁷ See also Tatjana Hörnle, ‘#MeToo - Implications for Criminal Law?’, *Bergen Journal of Criminal Law & Criminal Justice* 6, no. 2 2019; Johanna Niemi, ‘Excluding Power from a Narrative: Sexual Harassment in a Criminal Law Reform’, in *Rape Narratives in Motion*, ed. Ulrika Andersson et al., Palgrave Studies in Crime, Media and Culture, Cham: Springer International Publishing, 2019, 17–41.

⁸ For example Dubravka Zarkov and Kathy Davis, ‘Ambiguities and Dilemmas around #MeToo: #ForHow Long and #WhereTo?’, *European Journal of Women’s Studies* 25, no. 1 2018, 3–9; Stavroula Pipyrou, ‘#MeToo Is Little More than Mob Rule / vs / #MeToo Is a Legitimate Form of Social Justice’, *HAU: Journal of Ethnographic Theory* 8, no. 3 2018, 415–19.

fulfilled its promises. Neither have existing criminal law provisions applicable to some instances of intimate intrusions prevented sexual harassment. Due to the political landscape in Sweden, to which I now turn, it is not too far-fetched to expect that proposals will be made for revising the scope of criminal law.

As the #metoo movement increased in intensity, a process of implementing revised criminal law provisions on rape and sexual abuse—the so-called consent-based rape law—was also taking place. This reform, which had been advocated for almost twenty years, was preceded by several amendments of the sexual offences legislation and should be seen in the context of earlier criminal law measures related to matters of feminist concern. In 1998, purchase of sexual services became a criminal offence and a gender-specific domestic violence offence, gross violation of a women's integrity, was introduced. A provision on unlawful persecution (stalking) came into force in 2011, a provision on invasive photography was introduced a couple of years later, and, last year, a provision defining the new crime of unlawful violation of integrity was enacted as a response to image-based sexual abuse. Hence, criminalisation has already played an important role in Swedish gender equality politics, and relates to a broader shift towards addressing violence against women in parliamentary gender equality policy that took place during the 1990s.⁹ This shift parallels an increasingly repressive crime policy in Sweden, where today, most political parties promote a 'tough on crime' agenda.

Against this background, it is perhaps not surprising that Swedish activists have voiced concerns about feminism turning too much to criminalisation.¹⁰ This concern has also been expressed in international research, with Bernstein coining the term 'carceral feminism'.¹¹ I suggest a context-sensitive approach here. I am reluctant to adopt the concept of carceral feminism, which is mainly grounded in U.S. conditions, into the Swedish context. In addition, there is little support for accusing feminist movements of being a driving force towards a punitive agenda. However, feminist calls for justice seem to rather easily become absorbed into a growing criminal legal discourse. Therefore, the increasingly punitive climate in Swedish

⁹ Monica Burman, 'The Ability of Criminal Law to Produce Gender Equality: Judicial Discourses in the Swedish Criminal Legal System', *Violence Against Women* 16, no. 2 2010, 173–88; Katharina Tollin, *Sida Vid Sida: En Studie Av Jämställdhetspolitikens Genealogi 1971-2006*. Stockholm: Atlas Akademi, 2011.

¹⁰ Mirjam Katzin, 'Feminismen i ett förrättsligt landskap', *Bang* no. 3 2018; Silas Aliko, 'Det våras för fängelsefeminismen', *Kontext* (blogpost 8 March 2019, www.kontextpress.se), accessed 3 August 2019.

¹¹ Elizabeth Bernstein, 'Carceral Politics as Gender Justice? The "Traffic in Women" and Neoliberal Circuits of Crime, Sex, and Rights', *Theory and Society*, no. 3 2012: 233–59. For a response to Bernstein, see Gotell fn 6.

politics need to be considered in a discussion of #metoo demands for action against sexual harassment.

In addition to the national political context, the role of international conventions, such as the Council of Europe Convention on Violence against Women and Domestic Violence (Istanbul Convention 2011), must be considered. Article 40 of the Convention requires the states to take the necessary legislative or other measures to ensure that sexual harassment is subject to criminal or other legal sanction. The first evaluation report on Sweden found that Swedish criminal law ‘gives effect to most of the provisions of the Istanbul Convention’ and that the offences named in Article 40 were crimes under Swedish law.¹² As explained above, however, the extent to which sexual harassment is *de facto* criminalised depends (among other things) upon how the courts interpret the law: in this case, mainly the provisions on molestation and sexual molestation (Chapter 4, Section 7 and Chapter 6, Section 10 of the Swedish Penal Code). Two recent cases from the Swedish Supreme Court further warrant a discussion on the criminalisation of everyday, intimate intrusions.

In 2018 the Supreme Court ruled in two cases concerning charges of sexual molestation and, as alternative charges, molestation. In the first case, the victim was a 15-year-old girl and the defendant was the father of her boyfriend.¹³ The defendant was accused of molesting the girl by caressing her leg and telling her ‘it was cozy to have her there’. The Court argued that caressing someone’s lower leg on top of their clothing is not typically an act of a sexual nature. Furthermore, the Court stated that after taking into account the circumstances in which the deed took place – including that the defendant afterwards told the victim he had feelings for her – it could not conclude that the deed was of the sexual nature required for criminal responsibility. In the second case, a man was charged with sexually molesting a woman by touching the inside of her thigh.¹⁴ The defendant was, at the time, the director of a municipal department and the victim was a trainee in the same department. The alleged offence took place at an after-work event. The Court concluded, after considering the fact that the touching was

¹² ‘GREVIO’s (Baseline) Evaluation Report on Legislative and Other Measures Giving Effect to the Provisions of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention) SWEDEN’ (Secretariat of the monitoring mechanism of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, 2019), 44.

¹³ NJA 2018 s. 443.

¹⁴ NJA 2018 s. 1091.

brief and that the woman was wearing jeans, that the defendant's behaviour was both inappropriate and unwelcome but not so clearly sexual in nature as to fall within the scope of criminalisation. In neither case was the criminal provision on molestation held applicable. From a feminist theory perspective, these acts can easily be described, in Kelly's words, as everyday intimate intrusions. Although one might not agree with the Court's reasons for acquittal, the cases do beg the question of whether these kinds of intimate intrusions should fall within the scope of criminal law. In answering that question, crime statistics should also be taken into consideration, and I turn to these in the final section of this paper.

A recent study looked in detail at the development of sexual offences against persons aged 15 and older in Sweden in the years 2005–2017.¹⁵ Crime statistics show that police-reported sexual molestation rose during that period. The number of reported instances of sexual molestation increased from 40 per 100,000 inhabitants in 2005 to slightly above 50 in the period 2009–2012, and just over 70 in 2017. Between 91 and 93 percent of the victims were women.¹⁶ Furthermore, the study showed an increase in the *share* of physical sexual molestation and in the share of visual sexual molestation, but a decrease in the share of verbal sexual molestation.¹⁷ The *number* of reports of physical sexual molestation increased as well, but the main increase was in cases concerning the touching of body parts other than genitals and/or breasts.¹⁸ Thus, the study reveals not only an increase in police reporting, but also an increase in women reporting incidents that, according to the Supreme Court, might not amount to a crime. These figures further stress the complexity of the issue of sexual harassment and criminalisation, as women exposed to intimate intrusions increasingly turn to the criminal legal system.

Against this backdrop, I suggest that the question of how to define the scope for criminal law interventions regarding sexual harassment needs a more thorough examination from a feminist theory standpoint. A challenge in doing so is that, although the continuum analysis provides a theoretical framework for bringing together everyday, intimate intrusions and gender inequality, it does not provide much guidance on the extent to which such intrusions should be criminalised. According to Kelly and Radford, it would be 'impossible to legislate against

¹⁵ Brottsförebyggande rådet rapport 2019:5 'Indikatorer På Sexualbrottsutvecklingen 2005-2017'.

¹⁶ *Ibid.*, 36–38.

¹⁷ *Ibid.*, 47.

¹⁸ *Ibid.*, 46–47.

all forms of male behavior which women experience as abusive – that would involve criminalising much of the interaction between men and women'.¹⁹ In this paper, I have aimed to show not only why it is important to consider the role of criminalisation as a response to sexual harassment, but also the complexity of this issue.

¹⁹ Liz Kelly and Jill Radford, “‘Nothing Really Happened’: The Invalidation of Women’s Experiences of Sexual Violence”, *Critical Social Policy*, no. 30 1990, 51.