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#MeToo or #TooMuch?

The Belgian Anti-Sexism Law and the Fight against Sexism

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Abstract

In 2017, American film producer Harvey Weinstein fell from grace after a series of disclosures and accusations by several women who said/confessed that they had been sexually assaulted by the Hollywood tycoon. Their revelations ignited a protest movement against sexism that became known over the world as the #MeToo movement. The targets of these accusations are predominantly men in powerful positions.

In 2014, Belgium adopted a law that defines sexism and qualifies it as a criminal offense. With this new law against sexism, as with the euthanasia legislation earlier, Belgium took a much more radical position than any other country in Europe today.

This thesis addresses three fundamentally intertwined issues:

1) What does #MeToo teach us about the sexist structures of power in a patriarchal order?

2) What does the Belgian anti-sexism law say?

3) Do we need a new (revised, fine-tuned, updated,..) legal framework to heed and protect and defend the claims and concerns of #MeToo, and if so, how can the Belgian anti-sexism law serve as a model or at least a source of inspiration?

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Introduction

Introduction

In the Fall of 2017, the #MeToo movement revealed how widespread and persistent sexual harassment is. Moreover, #MeToo exposed how sexist power structures in our society authorize and perpetuate this climate of sexual harassment and intimidation. Countless women found the courage and support to share their personal experiences with the outside world. Interestingly, many of these women resorted to the use of a hashtag on social media platforms to publicly name and shame their wrongdoers, instead of taking their case to court. Thus, above all, #MeToo demonstrates that women feel ignored and abandoned by the legal system. Too often women cannot count on the legal system to bring their perpetrators to justice. Even though the law has made a lot of progress in the past few decades regarding sexual harassment legislation, much work remains to be done. The ultimate question is whether #MeToo can bring about effective legal and social change.

A few years before #MeToo emerged, the Belgian legislator already made a remarkable attempt to make the legal system more sensitive to the specific obstacles women still face on an everyday basis. More specifically, Belgium adopted an anti-sexism law which criminalizes (individual) sexist behavior, aiming to strengthen the already existing anti-discrimination legislation and to generate a meaningful mentality change in society. This thesis will examine whether the Belgian anti-sexism law serves as an efficient model - or at least a source of inspiration - to heed and protect the underlying concerns of #MeToo.

Essentially, the first Part will focus on the institutionalized sexism in our patriarchal society and how it is perpetuated by the legal system. The second Part contains a theoretical analysis of the Belgian anti-sexism law and whether the law bears any fruit in practice. The third and final Part will then connect the two previous Parts by assessing whether the Belgian anti-sexism law provides an adequate (legal) response to the more fundamental concerns raised by the recent #MeToo movement.

It is important to note that when examining the patriarchal structures of our society, it is not the intention to tar all men with the same brush. Not all men are oppressors, not all women are victims. Men suffer from patriarchy and sexist gender stereotypes in similar, yet very different ways. Therefore, it is important to realize that our society upholds a toxic perception of masculinity

as well. However, this thesis will focus on the current imbalanced power relations between men and women. Undeniably, the power in our society today still lies with (white) men.

Part I. #MeToo and the Law

Chapter 1. Overview

In 2017, American film producer Harvey Weinstein fell from grace after a series of disclosures and accusations by several women who said/confessed that they had been sexually assaulted by the Hollywood tycoon. Their revelations ignited a protest movement against sexism and sexual harassment that became known all over the world as the #MeToo movement. However, #MeToo goes back further than 2017.

In 2006, Tarana Burke founded the 'me too.' movement to help guiding survivors of sexual violence, more specifically young women of color from lower class communities - women who are often not heard. The original 'me too.' movement aims to de-stigmatize survivors and to help them reclaim their power. The 'me too.' website states that sexual violence is a social justice issue, and that it is crucial to disrupt all the systems that allow sexual violence to flourish.[1]

Eleven years after the original 'me too.' movement was established, celebrities adopted the slogan and turned it into a hashtag. #MeToo went viral and countless women spoke up. However, "social media is not a safe space. I thought: this is going to be a fucking disaster", Burke responded to the hashtag. Even though #MeToo helped in de-stigmatizing victims and sparked an essential debate about sexual violence all over the world, some highly problematic issues still arise.

First of all, Burke's 'me too.' originated as a movement mainly for women of color. Today, Hollywood celebrities and primarily white Western women are coming forward in large numbers. This raises the fundamental question of the social backgrounds of the victims who are speaking up and the perpetrators who are being called out. Many women do not have access to (social) media, or fear possible sanctions if they would decide to speak up.[2] The current #MeToo hype overshadows the problems faced by the women and girls who are being undervalued the most in our society today, namely women of color and women with a deprived background. Without wanting to disregard the abhorrent experiences of the numerous women who are coming forward, their individual testimonies ignore the fact that sexual violence is a collective issue that could injure

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[1] https://metoomvmt.org/; Elizabeth Wagmeister, "How Me Too Founder Tarana Burke Wants to Shift the Movement's Narrative", *Variety*, 10 April 2018, http://variety.com/2018/biz/news/tarana-burke-me-too-founder-sexual-violence-1202748012/ (accessed 15 May 2018).

[2] K. Davis and D. Zarkov, "Ambiguities and dilemmas around #MeToo: #ForHowLong and #WhereTo?", *European Journal of Women's Studies*, 25 (1), 2018, pp. 4, 5.

every woman. It is a structural problem that requires grassroots activism and a radical transformation of the current institutions and social structures.[3] Since most women who are coming out on #MeToo are powerful enough to be heard, one could wonder whether #MeToo amounts to more than a hashtag for the privileged.[4]

Another interesting question is what the repercussions of #MeToo are. So far, mostly powerful men in powerful positions of the entertainment industry have been fired. However, firing some high-profile men does not lay bare the cultural and institutional patterns and structures that provoke - if not legitimize - this behavior in the first place. People are not dealing with the underlying structural problems of sexual harassment and abuse. Moreover, #MeToo has generated a trial by (social) media, publicly naming and shaming men - often before they can exercise their right to defend themselves. It is important to nota that women decide to use (social) media platforms instead of the law, because, as to date, the legal system has systematically failed when it comes to cases of sexual harassment. As Charlotte Shane states, "parity and justice and restitution are not priorities of our existing structures because those structures were designed to maintain hierarchies that make justice and parity and restitution impossible."[5] Sexual harassment is built into the structural social hierarchies of our society.[6] According to MacKinnon, #MeToo has finally forced society to believe and value women the way the law never has. "Women have been saying these things forever. It is the response to them that has changed."[7] However, effective legal action is still crucial to tackle the structural problem of sexual harassment. Making a person visible is not the same as making the problem visible.[8] Even though many people claim that the wide scope of #MeToo is what makes it relevant, a hashtag is not enough to achieve justice. By merely calling out powerful men in public, #MeToo risks affirming - rather than challenging - the socio-economic

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[3] Ibid., p. 5.

[4] Ibid., p. 5.

[5] C. Shane, "We Harpies Want More", *Splinter*, 16 January 2018, https://splinternews.com/we-harpies-want-more-1822022182 (accessed 14 May 2018).

[6] C. A. MacKinnon, "#MeToo Has Done What the Law Could Not", *The New York Times*, 4 February 2018, https://www.nytimes.com/2018/02/04/opinion/metoo-law-legal-system.html?smprod=nytcore-iphone&smid=nytcore-iphone-share (accessed 1 March 2018).

[7] Ibid.

[8] K. Davis and D. Zarkov, "Ambiguities and dilemmas around #MeToo: #ForHowLong and #WhereTo?", European Journal of Women's Studies, 25 (1), 2018, p. 6.

status quo.[9] The following section will focus on the underlying fundamental patriarchal and sexist structures of society.

Chapter 2. Relevant Issues

#MeToo exposes the wide practice of sexual harassment, mainly within the workplace. Many women feel that they cannot count on the legal system and resort to social media platforms to share their stories. Victims of sexual harassment want acknowledgment of what happened to them, but somehow the society we live in fails to deliver this. In that sense, #MeToo exposes the problematic reality of how sexist power structures in our society authorize and perpetuate a climate of sexual harassment. This chapter gives a theoretical overview of the most relevant concepts, followed by a critical analysis of these concepts in the light of the current #MeToo movement.

2.1. Patriarchy

Sylvia Walby defines patriarchy as "a system of social structures, and practices in which men dominate, oppress and exploit women."[10] Walby argues that there are different levels of abstraction to patriarchy. At the most abstract level, patriarchy is perceived as a system of social relations (comparable to Connell's gender relations, *cf.* Part I, Chapter 2, *2.1.3.*). At a less abstract level, patriarchy is composed of six structures: patriarchal mode of production, patriarchal relations in paid work, patriarchal relations in the state, male violence, patriarchal relations in sexuality and patriarchal relations in cultural institutions. A very important aspect of patriarchy is how the oppression of women is institutionalized in our society today.[11] As Sarah Jaffe put it, "patriarchy spreads the lie that there are rules we can follow that will keep us safe - that if we wear the right clothes, say no loudly enough, walk away, don't laugh at men, work hard, no harm will come to us. There are not."[12]

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[9] S. Watkins, "Which Feminisms?", *New Left Review*, 2018, p. 70 (accessed 4 April 2018).

[10] S. Walby, "Theorizing Patriarchy", *Sociology*, Vol. 23, No. 2, May 1989, p. 214 (accessed 3 September 2016).

[11] R. Connell, "The State, Gender and Sexual Politics: Theory and Appraisal", *Theory and Society*, Vol. 19, No. 5, Oct. 1990, p. 514 (accessed 9 July 2008).

[12] S. Jaffe, "The Collective Power of #MeToo", *Dissent*, 2018, p. 82 (accessed 14 May 2018).

2.1.1. A Contested Concept

The concept 'patriarchy' is highly contested. A common critique is that patriarchy produces a simplified and distorted view of the world, mainly influenced by a white, Western, and middle-class agenda, and, therefore, not able to deal with historical and cross-cultural variations of women's subordination, especially in relation to ethnicity and class.[13] Valerie Bryson accurately evaluates four prevalent and interconnected critiques on the concept of patriarchy.

First of all, the concept would over-generalize the experiences of women across different centuries and different cultures. This is dangerous, because it trivializes the depth of oppressions by equating it with the inconveniences faced by others. However, Bryson rebuts this critique by stating that the concept of patriarchy identifies the patterns in the oppression of women, but, this does not mean that it qualifies all women's struggles as 'the same'. "It is therefore essential that the analysis of similarities does not slip into the denial of differences amongst women."[14] Secondly, patriarchy would be rooted in the experiences of white, middle-class, Western women. It is certainly true that some white feminists fail to go beyond their privileged position in this world. This way, they ignore not only other persistent forms of oppression (e.g. based on race and class), but, moreover, the fact that they benefit from the oppression of other less privileged women (e.g. hiring women as cleaning ladies, nannies, kitchen maids…). Bryson points out that this self-centeredness of certain women reflects their limited perspectives, simply because they are culturally and materially privileged over others. This critique does not prove that patriarchy is a deficient concept, but should rather encourage feminists to adopt a multifaceted approach, i.e. to think more inclusively about other forms of oppression.[15] Thirdly, opponents argue that patriarchy produces a world view where all men are oppressors and all women are victims. Thus, feminist political activity aims to avoid all contact with men. Even though some feminists opted for this radical and polarized view on gender relationships, many have emphasized the importance of distinguishing between male power and male persons. Male power refers to the structural institutionalized sexism in the world. Male persons, however, can offer support and political solidarity to fight this patriarchal domination, of

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[13] V. Bryson, "Patriarchy': a concept too useful to lose", *Contemporary Politics*, Vol. 5 no. 4, 1999, p. 331; R. Connell, "The State, Gender and Sexual Politics: Theory and Appraisal", *Theory and Society*, Vol. 19, No. 5, Oct. 1990, p. 514 (accessed 9 July 2008); S. Walby, "Theorizing Patriarchy", *Sociology*, Vol. 23, No. 2, May 1989, p. 213 (accessed 3 September 2016).

[14] V. Bryson, "Patriarchy': a concept too useful to lose", *Contemporary Politics*, Vol. 5 no. 4, 1999, p. 316.

[15] Ibid., pp. 317-319.

which they experience negative effects as well.[16] Finally, another common critique is that 'the personal is political' discourse of feminists has focused too much on the personal life and, thus, neglected the serious political and economic inequalities between men and women. Bryson argues against this criticism by stating that a vital element of patriarchy is how intertwined private and political issues are. Women's personal circumstances (e.g. domestic labor) are interconnected with their public and political activities (e.g. economic independence).[17]

These four critiques point out that it is crucial to realize that all men and women in a patriarchal society experience its effects in different ways.[18] Only upon realizing this will the concept of patriarchy succeed in eradicating its negative (Western) connotation. A universal understanding of 'patriarchy' will benefit feminists all over the world.

2.1.2. Sexual-Social Contract Theory

According to Carol Pateman, our modern patriarchal order originates from social contract theory, or, more precisely, from the missing half of this theory. Social contract theorists traditionally explain that the authority of the state and the legitimacy of the civil government derive from an original contract between the inhabitants of a state and that state. These inhabitants give up the insecurities of their natural freedom in return for an equal and civil freedom protected by the state. The social contract is a story of freedom. However, this is only half of the story. The original contract is actually a sexual-social contract, but the sexual contract has been forgotten - or ignored - over time. This part of the contract explains how our modern form of patriarchy was established. The sexual contract is a story of subjection.[19] Pateman defines it as follows:

"The original pact is (…) sexual in the sense of patriarchal - that is; the contract establishes men's political right over women - and also sexual in the sense of establishing orderly access by men to women's bodies. The original contract creates what I shall call, following Adrienne Rich,

[16] Ibid., p. 319.

[17] Ibid., p. 320.

[18] Ibid., p. 319.

[19] C. Pateman, *The Sexual Contract*, Stanford, CA, Stanford University Press, 1988, pp. 1-2.

'the law of the male sex-right'. Contract is far from being opposed to patriarchy; contract is the means through which modern patriarchy is constituted."[20]

In social contract theory, the sexual difference between the inhabitants is often neglected. The original social contract between the inhabitants and the state grants individuals the freedom to make contracts, which will be regulated by civil law. Individuals, then, can exercise their freedom by making actual contracts (e.g. marriage contract, employment contract). Needless to say, the state, which traditionally consists of male individuals only, preserves the right to devise and enter contracts to males only. Only men are 'individuals'. In Pateman's words: "Sexual difference is political difference; sexual difference is the difference between freedom and subjection."[21]

However, Pateman's subsequent attempt to ground the rise of a civil patriarchal order in men's natural freedom, is somewhat one-sided, if not ill-conceived, at least from a Rousseauian point of view. Her interpretation of the sexual contract as "the vehicle through which men transform their natural right over women into the security of civil patriarchal right"[22] betrays an inaccurate understanding of Rousseau's concept of the state of nature as developed in *The Second Discourse*.[23] Crucially, Rousseau sees *l'homme sauvage* as a solitary wanderer, devoid of substantial social contacts with either male or female fellow human beings. In Rousseau's state of nature, there is no private property, no language and no social interaction whatsoever. Men and women meet merely for procreational purposes: "Their need once gratified, the sexes took no further notice of each other, and even the child was nothing to his mother, the moment he could do without her."[24] There are no rights, no hierarchies, no rules, no laws. It is hard to see how men could enjoy, much less enforce, natural rights over women under such conditions. In the state of nature, the sole purpose of

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[20] Ibid., p. 2.

[21] Ibid., p. 6.

[22] Ibid., p. 6.

[23] Jean-Jacques Rousseau, "Discourse on the Origins and the Foundations of Inequality Among Mankind", in S. Dunn (ed.), *The Social Contract and The First and Second Discourses*, New Haven and London, Yale University Press, 2002.

[24] Jean-Jacques Rousseau, "Discourse on the Origins and the Foundations of Inequality Among Mankind", in S. Dunn (ed.), *The Social Contract and The First and Second Discourses*, New Haven and London, Yale University Press, 2002, p. 114.

human life is to survive, and thus to satisfy one's most basic and fundamental needs.[25] However, at some (imaginary) point, Rousseau's solitary wanderers (male and female) discover that in order to better satisfy their needs, it may be advisable to collaborate. Indeed, working *together* marks the end of the state of nature and initiates a process of socialization that will engender social practices and institutions that we have come to associate with a patriarchal order. Thus, mutual dependency gives rise to social inequality, division of labor and the differentiation of gender roles. Patriarchy, then, clearly issues forth from this process of socialization. Later, in *The Social Contract*, Rousseau will invest this notion of patriarchy with a political meaning that is relevant to the concerns of this thesis: "The family is (…) the first model of political societies; the leader is the analogue of the father, while the people are like the children."[26]

2.1.3. Gender Regime

Because of the aforementioned controversy around the term patriarchy, Raewyn Connell proposes an alternative concept. She analyzes the patterns in our gender arrangements, essentially how women and men generally occupy different positions and different jobs within a state. She states that these patterns constitute a *gender regime.* A gender regime refers to *"*the historically produced state of play in gender relations within an institution."[27] According to Connell, there are not six (Walby, *cf.* Part I, Chapter 2, 2.1.) but three main structures of a state's gender regime:

1) *The gendered division of labor*. Men predominate in the "elites" of e.g. politics, bureaucracy, and judiciary. Moreover, men constitute more than the majority of the employment in the coercive apparatus of the state (military and police). Women, on the other hand, are mainly present in human-service state employment (elementary school teaching and nursing) or secretarial positions. In sectors where both women and men are present, it is remarkable how women occupy more common, part-time or unskilled jobs,

[25] "Let us conclude that savage men, wandering about in the forests, without industry, without speech, without any fixed residence, an equal stranger to war and every social tie, without any need of his fellows, as well as without any desire of hurting them, and perhaps even without ever distinguishing them individually one from the other, subject to few passions, and finding in himself all he wants, let us, I say, conclude that savage man had no knowledge or feelings but such as were proper to that situation; that he felt only his real necessities, took notice of nothing but what it was his interest to see, and that his understanding made as little progress as his vanity." Ibid., pp. 110-111.

[26] Jean-Jacques Rousseau, "The Social Contract", in S. Dunn (ed.), *The Social Contract and The First and Second Discourses*, New Haven and London, Yale University Press, 2002, p. 156.

[27] R. Connell, "The State, Gender and Sexual Politics: Theory and Appraisal", *Theory and Society*, Vol. 19, No. 5, Oct. 1990, p. 523 (accessed 9 July 2008); R. Connell, *Gender In World Perspective*, Cambridge, Polity Press, 2009, p. 72.

while men monopolize supervisory functions (e.g. woman is employed as the teacher and man as the principal).[28]

2) *The structure of power*, referring to both the external and internal power relations of the state. Internally, bureaucracy evidently reflects this power structure. Nevertheless, Connell points out that the growth of bureaucracy in the late 19th and early 20th centuries actually led to a higher representation of women in this administrative apparatus. Women in bureaucracy successfully tackled several organizational barriers to their access to employment.[29] In addition to the bureaucratic system, Connell also draws the attention to how personal networks are still organized around men, how the language of finance and economic realism deteriorates women's interests and how gendered (i.e. male) the state's system of representation is.
3) *The structure of cathexis or emotional attachments*. Historically, most of the psychological research in this regard was about how men regard political authority or leadership. However, emotion can also be linked to the state's sexual division of labor. As mentioned before, women are predominantly present in the field of "emotional labor", like nursing or domestic work.

Gender regimes are shaped by *gender relations*. Gender relations refer to interactions between women and men, but also to interactions among women or among men. It is important to note that these gender relations - reflected in our everyday conduct - are not a consequence of our gender, but that they constitute gender itself. Even though we make our own gender through these gender relations, "we are not free to make it however we like."[30] This implies that our conduct is in its turn heavily influenced by the wider gender order we live in. The gender arrangements of a society establish a certain social structure. "For instance, if religious, political and conversational practices all place men in authority over women, we speak of a patriarchal structure of gender relations."[31] And so, we inevitably arrive again at the vexed concept of patriarchy.

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[28] R. Connell, "The State, Gender and Sexual Politics: Theory and Appraisal", *Theory and Society*, Vol. 19, No. 5, Oct. 1990, p. 523 (accessed 9 July 2008).

[29] Ibid., p. 525.

[30] R. Connell, *Gender In World Perspective*, Cambridge, Polity Press, 2009, p. 74.

[31] Ibid., p. 74.

One of the biggest merits of #MeToo is that it exposes how pervasive patriarchy is. Many people become (more) aware of the problematic power relations between men and women, and how this imbalance of power is often translated into unacceptable behavior at the work place. Patriarchy creates a toxic culture of intimidation and harassment. Women start to realize that all the - seemingly minor - remarks or actions are expressions of deeply rooted sexism, intended to keep women in their inferior position in society. #MeToo shows that people all over the world – female and male - have finally decided to reject this current patriarchal system.

2.2. Women and the Law

As mentioned before, patriarchy is characterized by the institutionalization of male domination. This institutionalization comes not only from prejudice, but also from the state. More specifically, the state organizes the gendered power relations between its citizens through laws and administrative arrangements.[32] In theory, the state presents itself as a gender-neutral entity and even claims to promote a gender equal policy. In practice, however, the state plays an important, yet indirect role in the oppression of women. This idea of a "male state" can be interpreted in two ways. On the one hand, liberal feminism[33] views the state as an accomplice of patriarchy, thus suggesting that the state is not necessarily intertwined with a patriarchal structure. Therefore, the state can still be reshaped. On the other hand, more radical voices[34] identify the state as the oppressor itself, "the state *is* the patriarchal power structure."[35]

The latter - and, for the purpose of this thesis, more interesting - point of view is part of what Walby calls the patriarchal structure of the state.[36] This entails that the state operates through its mechanisms to effectively organize the (gendered) power relations between its citizens. Women

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[32] R. Connell, "The State, Gender and Sexual Politics: Theory and Appraisal", *Theory and Society*, Vol. 19, No. 5, Oct. 1990, pp. 514, 520.

[33] Liberal feminism is a moderate or mainstream form of feminism. Liberal feminists mainly focus on the barriers to women's participation in the public sphere and on the legal, political and institutional struggles of individuals. These barriers and struggles impede women's equality to men. Liberal feminist thought emphasizes values such as individual autonomy and freedom. In C. Beasly, *What is Feminism? An Introduction to Feminist Theory*, London, Sage Publications Ltd, 1999, p. 51.

[34] Radical feminism rejects this liberal orientation towards the public world of men. Radical feminist though focuses on women's oppression in a social order dominated by men, merely because of their sex. This social system of male domination is called patriarchy. Feminists should have the common goal to overthrow this patriarchy. In C. Beasly, *What is Feminism? An Introduction to Feminist Theory*, London, Sage Publications Ltd, 1999, pp. 54-55.

[35] R. Connell, "The State, Gender and Sexual Politics: Theory and Appraisal", *Theory and Society*, Vol. 19, No. 5, Oct. 1990, pp. 516.

[36] S. Walby, "Theorizing Patriarchy", *Sociology*, Vol. 23, No. 2, May 1989, p. 224 (accessed 3 September 2016).

are underrepresented in important areas such as legislation, policy-making and higher-level administration. In addition, women do not have as much power as men to pressure the decision-making on issues in their favor.[37] One of the most powerful state mechanisms is the legal system. MacKinnon, for example, examines how patriarchy is embedded in our legal system in relation to rape laws. The legal definition of rape as a criminal act was articulated by men, therefore, the legal definition of rape and what is accepted as convincing evidence on the matter is decided upon from a male point of view. In general, state policy thus corresponds with how the male point of view frames an experience. Consequently, when courts objectively apply these laws, they enforce the broader patriarchal system.[38] How objective is legal objectivity then?

The role of the legal system in constructing and maintaining power relations between citizens cannot be underestimated, think of the countless legal rules on e.g. marriage and divorce, abortion, contraception, reproductive technologies (IVF), custody of children, prostitution, sexual violence…[39] This chapter will further explore how the legal system is a key player in maintaining the patriarchal power structures.

2.2.1. Critical Legal Studies

Critical Legal Studies (CLS) is an American phenomenon, which implies that this field of study is mainly rooted in American historical and political conditions. CLS is heavily influenced by factors like the absence of a valuable left tradition in politics, the male monopoly on legal and political power and the issue of institutionalized racism. However, these factors exist outside the USA as well. Essentially, the main goal of CLS is to expose the (political) partiality of the legal system and how this delegitimizes and demystifies the legitimacy of the law.[40] The law appears to be rational and coherent in that the standards of what is rational reflect the interests of those in power. Their authority is then affirmed by the apparent neutral and rational nature of these

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[37] C. Pateman, "The Patriarchal Welfare State: Women and Democracy", in A. Gutmann (ed.), *Democracy and the Welfare State*, Princeton, N.J., Princeton University Press, 1988, p. 5; S. Walby, "Theorizing Patriarchy", *Sociology*, Vol. 23, No. 2, May 1989, p. 224 (accessed 3 September 2016).

[38] R. Connell, "The State, Gender and Sexual Politics: Theory and Appraisal", *Theory and Society*, Vol. 19, No. 5, Oct. 1990, p. 517 (accessed 9 July 2008); A. C. Hutchinson (ed.), *Critical Legal Studies*, Totowa, N.J., Rowman & Littlefield Publishers Inc., 1989, pp. 61-69.

[39] R. Connell, "The State, Gender and Sexual Politics: Theory and Appraisal", *Theory and Society*, Vol. 19, No. 5, Oct. 1990, p. 531 (accessed 9 July 2008); S. Walby, "Theorizing Patriarchy", *Sociology*, Vol. 23, No. 2, May 1989, p. 224 (accessed 3 September 2016).

[40] A. C. Hutchinson (ed.), *Critical Legal Studies*, Totowa, N.J., Rowman & Littlefield Publishers Inc., 1989, pp. 2-6.

standards.[41] Therefore, the legal system preserves the established power relations of society and is a tool for oppression by the powerful to maintain their place in the societal hierarchy. The law simply covers these injustices with "a mask of legitimacy."[42] It may not come as a surprise that CLS is often perceived as part of the program of leftist politics.

CLS has influenced many interesting and successful legal theories, e.g. critical race theory and feminist legal theory. Even though both theories find their roots in CLS, critical race theory has formulated some interesting critiques on CLS' dismissal of the legal system. Evidently, feminist legal theory is the most important theory for the purpose of this thesis. However, a separate section is dedicated to a brief analysis of critical race theory and how it differs from CLS and feminist legal theory regarding the possibility and significance of legal reform.

2.2.2. Feminist Legal Theory

i) General

Feminist legal theory draws directly from CLS.[43] As mentioned before, the legal system institutionalizes the most prevalent and persistent power dynamic in society, i.e. male dominance over women's sexuality. The law sees and treats women the way men see and treat women.[44] This perception of the law playing a vital role in maintaining patriarchy forms the basis of feminist legal theory. Feminist legal theorists, then, examine the (theoretical) issues about the problematic interaction between law and gender. More specifically, they apply a feminist perspective to different areas of the law, such as criminal law, labor law, family law and the law of sexual harassment.[45]

It is worth mentioning that people (subconsciously) internalize the unequal power relations of our society, meaning that people are often guided by implicit biases. Implicit biases exist in that people are not always capable of consciously controlling their processes of social perceptions, impression information and the judgements that motivate certain actions. Thus, implicit biases are

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[41] K. T. Bartlett and R. Kennedy (ed.), *Feminist Legal Theory: Readings in Law and Gender*, Boulder, CO, Westview Press, 1991, p. 3.

[42] "Critical Legal Studies", *West's Encyclopedia of American Law*, edition 2, 2008, https://legal-dictionary.thefreedictionary.com/Critical+Legal+Studies, (accessed 17 March 2018).

[43] K. T. Bartlett and R. Kennedy (ed.), *Feminist Legal Theory: Readings in Law and Gender*, Boulder, CO, Westview Press, 1991, pp. 8-10.

[44] A. C. Hutchinson (ed.), *Critical Legal Studies*, Totowa, N.J., Rowman & Littlefield Publishers Inc., 1989, pp. 57, 61.

[45] K. Weisberg (ed.), *Feminist Legal Theory. Foundations*, Philadelphia, Temple University Press, 1993, pp. xvii-xviii.

discriminatory biases, mainly rooted in implicit attitudes or implicit stereotypes. Because of these internalized power relations or implicit biases, the legal system may be perceived as a neutral player, while it actually perpetuates the subordination of oppressed groups.[46]

How does the law facilitate women's subordination, then? The most obvious way is by dividing our society in a separate public and private sphere. First of all, this division refers to the fact that women used to be excluded from the public sphere overall. For a long time, women were denied the right to vote, the right to participate in jury duty, the right to hold their own property, the right to keep their own earnings or the right to determine whether and when they want to have children (the regulation and protection of women's reproductive rights also remains a delicate issues in most countries, e.g. the issues of contraception and abortion) - to only name a few. Today, the exclusion of women from the public sphere tends to be more subtle. For example, because of their role as mothers, women still face numerous obstacles to enter (or stay in) the employment market. Moreover, it is painfully clear that women are still heavily underrepresented in the higher political, judicial or administrative echelons.[47] Secondly, the law has been remarkably absent in the private sphere, i.e. the area where women are traditionally demoted to.[48] One of the most striking examples today is the difference between maternal and paternal leave after the birth of a child. Women still "benefit" a considerable higher maternal leave than men, however, these policies merely reinforce gender differences and increase employment discrimination.[49] Many employers (mistakenly) equate a woman's time of leave with her dedication to her job, which eventually ruins many careers. It is only one example of how the labor market keeps on oppressing and discriminating against women because of their biological characteristics.

Another way to maintain women's subordination is through the persistent perception that there are substantial differences between the sexes. These differences mostly concern women's "destiny" of being a wife and a mother, or women's "physical structure" and "natural functions".

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[46] A. G. Greenwald and L. H. Krieger, "Implicit Bias: Scientific Foundations", *California Law Review*, Vol. 94, July 2006, pp. 946, 951.

[47] In 2010, for example, the average EU board of directors consisted of 11,7% female board members. This means that of a total of 4 875 board seats, women occupy 571 of them. In Belgium, the boards of directors generally consist of 11,1% female board members. Source: EuropeanPWN Board Women Monitor, 2010 Report, http://www.boardagender.org/stats-reports/europe/229-european-pwn-board-monitor-2010.

[48] K. Weisberg (ed.), *Feminist Legal Theory. Foundations*, Philadelphia, Temple University Press, 1993, pp. 9-13.

[49] C. Glass and E. Fodor, "Public Maternalism Goes to Market: Recruitment, Hiring, and Promotion in Postsocialist Hungary", *Gender & Society,* 25(1), 2011, pp. 6-8.

They justify a differential treatment between men and women, which validates inequality.[50] Courts base their judgements on this idea that the equality between the sexes is not violated, simply because men and women are "different". Even though courts may have evolved to a more subtle view on these differences today, judges still seem to confuse (biological) distinctions between the sexes on the one hand, and distinctions created by law or socially imposed distinctions on the other hand. Evidently, there are biological differences between women and men. Women can get pregnant, men cannot. A crucial question is how this unique characteristic can be taken into account in feminist's efforts to achieve equality between the sexes. In other words, how should feminism respond to these biological differences? Do we want a legal system that really reflects the equality of the sexes, or do we want a legal system that makes a distinction between two kind of human beings who are fundamentally different?[51] If we would opt for the latter, what differences should the law then take into account?[52]

ii) Feminist Methodology

An important part of feminist legal theory is the methodology it employs to adequately review the current legal practice and possible legal reforms. This feminist legal methodology consist of three specific elements. In addition to the conventional methods of law, firstly, feminists use the method of asking "the woman question". This means that feminists consider the possible gender implications of laws that otherwise would appear to be gender neutral or objective. More specifically, in what way does the law fail to take into account experiences and values that matter more to women than men, and how can this be corrected? When asking the woman question, it is possible to expose how laws incorporate social structures and thus implicitly render women different and subordinate. This does not mean, however, that asking the woman question results in decision-making in favor of women. It simply raises awareness regarding gender bias in decision-making and challenges the assumption of legal neutrality.[53]

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[50] K. Weisberg (ed.), *Feminist Legal Theory. Foundations*, Philadelphia, Temple University Press, 1993, pp. 13-20.

[51] K. T. Bartlett and R. Kennedy (ed.), *Feminist Legal Theory: Readings in Law and Gender*, Boulder, CO, Westview Press, 1991, pp. 6, 28; K. Weisberg (ed.), *Feminist Legal Theory. Foundations*, Philadelphia, Temple University Press, 1993, pp. 122-123.

[52] K. T. Bartlett and R. Kennedy (ed.), *Feminist Legal Theory: Readings in Law and Gender*, Boulder, CO, Westview Press, 1991, p. 7.

[53] K. T. Bartlett and R. Kennedy (ed.), *Feminist Legal Theory: Readings in Law and Gender*, Boulder, CO, Westview Press, 1991, pp. 10, 371-377; K. Weisberg (ed.), *Feminist Legal Theory. Foundations*, Philadelphia, Temple University Press, 1993, p. 551.

A second aspect of feminist legal methodology is feminist practical reasoning. Allegedly, women reason in a different way than men, meaning that women are more considerate of situation and context, and more resistant towards universal principles and generalizations. "Feminist practical reasoning challenges the legitimacy of the norms of those who claim to speak, through rules, for the community."[54] In order to properly do so, feminists question the notion of community, arguing that it is preposterous that one community possesses the privilege to speak for all the others.[55]

Thirdly, the interactive and collaborative process of consciousness-raising constitutes the third method. By sharing their life-events, women can explore their common experiences and possible patterns. Thus, this process can transform an individual experience into a collective experience of oppression or exclusion. Women can use consciousness-raising in small groups or in more public spaces.[56] The most recent example of public consciousness-raising is without any doubt the #MeToo movement. The question remains whether this (new?) consciousness will truly succeed in piercing the veil of legal neutrality.

iii) Critical Race Theory

Critical race theory builds on both CLS and feminism. More precisely, critical race theory also challenges the current liberal vision of the rule of law, meaning that it agrees with the indeterminacy of the law and that the law tends to legitimate (e.g. racial and patriarchal) hierarchies. Thus, critical race theorists support the idea that inequalities of wealth and power are perpetuated through the aforementioned facade of neutrality of the legal system. Evidently, critical race theory examines the relationship between power, the construction of social roles and the - largely invisible - patterns and habits present in our society based on race, instead of gender.[57]

However, it is important to note that critical race theory has also distanced itself from CLS (thus, also from feminist legal theory, which is more embedded in CLS) to a certain degree. CLS argues that the rights discourse is too dependent on its social setting and, therefore, cannot produce determinate outcomes. This indeterminate character of the legal system prohibits the law to ever

[54] K. T. Bartlett and R. Kennedy (ed.), *Feminist Legal Theory: Readings in Law and Gender*, Boulder, CO, Westview Press, 1991, p. 379.

[55] Ibid., pp. 377-381.

[56] Ibid., pp. 10, 381-383.

[57] R. Delgado and J. Stefancic, *Critical Race Theory. An Introduction*, New York and London, New York University Press, 2012, pp. 3-5; M. Möschel, *Law, Lawyers and Race. Critical Race Theory from the US to Europe*, Oxon and New York, Routledge, 2014, pp. 53-56.

generate real social and cultural change.[58] Critical race theory does not follow this highly critical position of CLS. Instead of dismissing the potential value of the rights discourse in it's entirety, critical race theorists rather support the proposition of efficient and meaningful reforms of the law. "In fact, for the underprivileged and oppressed, rights are a powerful instrument as a means to protect themselves."[59] Thus, the law serves as a tool against white domination and oppression. Essentially, critical race theorists encourage a reconstructive innovation of the existing legal rules and the inclusion of new concepts in the official legal vocabulary (e.g. intersectionality, anti-essentialism, hegemony, hate speech, interest convergence…).[60]

"Once the structure of law and legal categories takes form, it replicates itself as much as, in the world of biology, DNA enables organisms to replicate. In some respects, the predicament is the old one about the chicken and the egg. It is hard to think about something that has no name, and it is difficult to name something unless one's interpretive community has begun talking and thinking about it."[61]

In the light of critical race theory, it is thus preferable to use the law to generate meaningful social and cultural change. The law has the potential to tackle fundamental problems such as racism, but also patriarchy and sexism. However, this can only happen if we rethink and innovate the current legal system and categories.[62] The second and third Part of this thesis will further

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[58] "In effect, the use of rights discourse prevents real social transformation. Such transformation cannot occur because law is the expression of the ruling class' domination. Rights and rights discourse help legitimise hegemony, thereby inducing people to accept domination. Due to the underlying ideology, rights cannot function as a means towards radical social transformation." In M. Möschel, *Law, Lawyers and Race. Critical Race Theory from the US to Europe*, Oxon and New York, Routledge, 2014, p. 54.

[59] M. Möschel, *Law, Lawyers and Race. Critical Race Theory from the US to Europe*, Oxon and New York, Routledge, 2014, p. 54.

[60] R. Delgado and J. Stefancic, *Critical Race Theory. An Introduction*, New York and London, New York University Press, 2012, pp. 31-32; M. Möschel, *Law, Lawyers and Race. Critical Race Theory from the US to Europe*, Oxon and New York, Routledge, 2014, p. 55.

[61] R. Delgado and J. Stefancic, *Critical Race Theory. An Introduction*, New York and London, New York University Press, 2012, p. 32.

[62] "To sum up, instead of 'mere' critical deconstruction of traditional civil rights and hate speech, CRT has come up with original solutions and alternatives to counter some of the problems which arise in the traditional, liberal approach to anti-discrimination and freedom of speech law, and in CLS writings. In many ways, the novelty of CRT resides precisely in the fact that it uses CLS tools to unmask some of the underlying inconsistencies, indeterminacies, and politics of traditional civil rights law and how those have negatively affected racial minorities. However, instead of an outright rejection of rights and law as politics, CRT proposes a broader framework, which includes the view of different groups – including minorities, and the disenfranchised or marginalised – more generally." In M. Möschel, *Law, Lawyers and Race. Critical Race Theory from the US to Europe*, Oxon and New York, Routledge, 2014, p. 56.

examine whether the Belgian anti-sexism law is a step in the right direction towards structural change in the light of the concerns that were raised by #MeToo.

2.3. Sexual Harassment of Working Women

(White) Men constitute the powerful majority in our society today. This implies that even when women are in superior working positions to men, they are still made more vulnerable in their relationship towards men simply because they are women. Male violence (in the broad sense of the word) is the ultimate consequence of this imbalance of power and the sexist structure of our society. Even if men perceive certain sexual initiatives as normal sex role behavior, these initiatives could be truly damaging to women.[63] Sexual harassment of women in the workplace derives from these socially structured power relations, more specifically from the relation between men and women and, in addition, the relation between employer and employee. Men's economic power over women enables the sexual exploitation and coercion of women in a work environment. Sexual harassment is the fruit of the deeply rooted sexism in society. In 1979, MacKinnon wrote that sexual harassment of working women "tacitly, has been both acceptable and taboo; acceptable for men to do, taboo for women to confront, even to themselves."[64] Four decades later, #MeToo may finally break the taboo.

There is no universally accepted (legal) definition of sexual harassment. MacKinnon defines sexual harassment in the broad sense as "the unwanted imposition of sexual requirements in the context of a relationship of unequal power".[65] McDonald, then, specifies it as unwanted or unwelcome behavior with "the purpose or effect of being intimidating, hostile, degrading, humiliating or offensive."[66] Essentially, sexual harassment comprises the creation of an unwanted, uncomfortable sexual environment. Similar to other abusive workplace behaviors (e.g. bullying or racial discrimination), sexual harassment has hierarchical power relations at its core. However, the

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[63] B. Campbell, "After Neoliberalism: The Need For a Gender Revolution", *Soundings*, No. 56, 2014, pp. 3-4; C. A. MacKinnon, *Women's Lives, Men's Laws*, Cambridge, MA, The Belknap Press of Harvard University Press, 2004, p. 111; P. McDonald, "Workplace Sexual Harassment 30 Years on: A Review of the Literature", *International Journal of Management Reviews,* Vol. 14, 2012, p. 6; S. Walby, "Theorizing Patriarchy", *Sociology*, Vol. 23, No. 2, May 1989, p. 224 (accessed 3 September 2016).

[64] C. A. MacKinnon, *Sexual Harassment of Working Women*, New Haven, Yale University Press, 1979, p. 1.

[65] C. A. MacKinnon, *Sexual Harassment of Working Women*, New Haven, Yale University Press, 1979, p. 1.

[66] J. Campbell Quick and M. A. McFayden, "Sexual Harassment: Have We Made Any Progress?", *Journal of Occupational Health Psychology*, Vol. 22, No. 3, 2017, p. 286; P. McDonald, "Workplace Sexual Harassment 30 Years on: A Review of the Literature", *International Journal of Management Reviews,* Vol. 14, 2012, p. 2.

explicit sexual dimension differentiates it from these other abusive workplace behaviors. Sexual harassment can be non-physical (e.g. sexual teasing, verbal remarks about a woman's body, intrusive questions, offensive language or gestures) or physical (e.g. kissing, touching, biting, hitting, groping, attempted assault or rape). Recently, 'cyber sexual harassment' has emerged as well, mainly referring to showing someone offensive and sexually explicit material. Clearly, sexual harassment can constitute of either a single encounter, or a series of incidents.[67]

McDonald points out that (powerful) harassers often use outrage management tactics, essentially to diminish the public resentment of their unjust behavior. These tactics include, first of all, the *cover-up*, where harassers avoid having witnesses of their behavior. Secondly, perpetrators often try to *devaluate* the target of their harassment, for example by claiming that they are dishonest or incompetent. This can lead to disbelief by the public. Thirdly, harassers can reinterpret their own actions by asserting that the victim has misinterpreted or overstated the seriousness of the situation. The fourth tactic includes the perpetrator claiming that he has used official channels (courts or professional organizations) to settle the matter in a fair way. However, as mentioned before, court cases or official procedures are too slow and emphasize more on procedural technicalities than substantial justice. Finally, harassers resort to intimidation or bribery to keep their victims quiet.[68]

The most obvious reason why sexual harassment is so common in the workplace, is the classic segregation between men and women on the labor market. First of all, women are still doing most of the unpaid work, i.e. care and domestic work. Secondly, women who enter the labor market often occupy stereotypical "women's jobs", e.g. secretary, nanny, teacher, nurse… A woman is hired for these jobs because she is a woman, or, more precisely, because of the sexist notion of what the proper role of a woman is. Generally, women in these positions work under the supervision of male superiors. Thus, men are often in the position of hiring, firing and promoting women. This means that they have the possibility to take advantage of their powerful positions. In traditional "women's jobs", male superiors use sexual harassment to keep women down, while in non-traditional jobs,

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[67] C. A. MacKinnon, *Sexual Harassment of Working Women*, New Haven, Yale University Press, 1979, p. 2; P. McDonald, "Workplace Sexual Harassment 30 Years on: A Review of the Literature", *International Journal of Management Reviews,* Vol. 14, 2012, pp. 2, 4-5.

[68] P. McDonald, "Workplace Sexual Harassment 30 Years on: A Review of the Literature", *International Journal of Management Reviews,* Vol. 14, 2012, p. 5.

they use it to keep women out.[69] Another feature that paves the way for sexual harassment, is the workplace culture. This refers to how tolerant a certain workplace is towards sexual harassment, which can be measured by the presence, accessibility and effectiveness of harassment remedies for victims.[70] MacKinnon summarizes that sexual harassment perpetuates women's structural inferior status in society: "sexual harassment of women can occur largely because women occupy inferior job positions and job roles; at the same time, sexual harassment works to keep women in such positions."[71]

Part II. Belgium's Anti-Sexism Law

The previous Part focused on the #MeToo movement and how it exposes the pervasive presence of sexism in our patriarchal society. Sexual harassment - inside or outside the workplace - is the result of this deeply rooted sexism. #MeToo did not (yet) lead to any systemic change. The legal system has to acknowledge and adapt to the most important claims and concerns raised by #MeToo. The question is how we can revise, fine-tune or update the current legal framework. In order to adequately answer this question, this second Part will thoroughly examine the Belgian anti-sexism law. The third Part will then assess whether the anti-sexism law can function as an example for legal reform with regard to the concerns raised by #MeToo.

In 2014, Belgium adopted a controversial law which criminalizes sexism in public spaces. The law aims to strengthen the existing anti-discrimination legislation, in that it had failed to truly address all the sexist realities women still face on a daily basis. Moreover, this anti-sexism law wants to lead to profound social change, namely by raising more awareness about the persistent and damaging – yet often invisible - gender stereotypes. A state that is founded on the principles of democracy and the rule of law cannot allow that a person would be attacked because of his/her

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[69] C. A. MacKinnon, *Sexual Harassment of Working Women*, New Haven, Yale University Press, 1979, pp. 10-23; P. McDonald, "Workplace Sexual Harassment 30 Years on: A Review of the Literature", *International Journal of Management Reviews,* Vol. 14, 2012, p. 6; S. Watkins, "Which Feminisms?", *New Left Review*, 2018, p. 8 (accessed 4 April 2018).

[70] P. McDonald, "Workplace Sexual Harassment 30 Years on: A Review of the Literature", *International Journal of Management Reviews,* Vol. 14, 2012, p. 6.

[71] C. A. MacKinnon, *Sexual Harassment of Working Women*, New Haven, Yale University Press, 1979, pp. 9-10.

sex.[72] With this new law against sexism, Belgium took a much more radical position than any other country. In the preparatory documents, the legislator states that by adopting this law, Belgium hopes to serve as an example and a source of inspiration for further positive developments in the fight against sexism – and, thus, sexual harassment - on a European level.[73]

The first chapter of this second Part briefly assesses the current workplace sexual harassment legislation in Belgium. The second chapter focuses on the background of the law and provides the legal definition of sexism. The third chapter describes and analyzes the six different elements of this definition, consisting of three general and three constitutive elements. Finally, the fourth chapter critically assesses the importance of the anti-sexism law by, firstly, focusing on the first - and last - judgement made based on the anti-sexism law, and, secondly, by appraising the symbolic value of the law.

Chapter 1. Sexual Harassment Legislation

1.1. General

Sexual harassment law turned women from sexual objects into citizens. By giving victims of sexual harassment the legitimate power to stand up and protect themselves, the law has substantially reduced the stigmatization of victims. By now, it is widely recognized that sexual harassment is a practice of inequality of the sexes, thus, constituting sex discrimination. Consequently, sexual harassment at work constitutes sex discrimination in employment.[74]

However, what drives #MeToo more than anything else is women's sense that the legal system has failed them. Even though sexual harassment law put victims of sexual harassment in a stronger position to address what happened to them, these victims sill face some major hurdles. First of all, not everyone has the resources to find an attorney and bring their case to court. Many

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[72] Constitutional Court (GwH) 25 May 2016, no. 72/2016, p. 4; Wetsontwerp ter bestrijding van seksisme in de openbare ruimte en tot aanpassing van de wet van 10 mei 2007 ter bestrijding van discriminatie tussen vrouwen en mannen teneinde de daad van discriminatie te bestraffen, *Parl.St.*, Kamer 2014, nr. 3297/001, p. 3; Wetsontwerp ter bestrijding van seksisme in de openbare ruimte en tot aanpassing van de wet van 10 mei 2007 ter bestrijding van discriminatie tussen vrouwen en mannen teneinde de daad van discriminatie te bestraffen & wetsvoorstel tot bestraffing van bepaalde door seksisme ingegeven daden, *Parl.St.*, Kamer 2014, nr. 3297/003, p. 5.

[73] *Parl.St.*, Kamer 2014, nr. 3297/001, p. 3.

[74] C. A. MacKinnon, *Women's Lives, Men's Laws*, Cambridge, MA, The Belknap Press of Harvard University Press, 2004, pp. 184-205.

victims of sexual harassment are low-income or even undocumented workers who have been harassed by their male superiors. They do not have the (economic) power to come forward. Secondly, when women do succeed in bringing their claim to court, they are too often not believed, mainly because it is very difficult to provide documented proof or witnesses to support their claim. This results in a he-said-she-said case, not leading to any satisfying outcome. Moreover, a common perception seems to be that, if you were not raped, how bad can it be? Thirdly, some women are ashamed or scared of what happened to them. It might take some time and courage to finally decide to speak up. However, the legal system painfully fails in this regard because of the short statutes of limitation of sexual harassment laws. A final hurdle is that court proceedings generally take a long time. This puts a big economic and emotional burden on the victims.

The difficult enforcement of the current sexual harassment legislation reflects the tense relation between the equality principle of the law on the one hand, and the unequal social reality on the other hand. Should the law merely reflect the current society, characterized by its patriarchal and sexist structure, or should the law actively pursue an improvement of women's rights within the workplace?[75] Undoubtedly, the law has to be included in the current discussion on sexual harassment at the workplace. More than anything, the legal system has the capability to initiate meaningful change."[76] Therefore, #MeToo will only be of real value if it also generates effective legal change.

1.2. Belgium

As mentioned before, sexual harassment qualifies as sex discrimination. In Belgium, sex discrimination is prohibited based on the anti-discrimination law of 2007.[77] However, this law specifically states that it does not apply to workplace sexual harassment. Instead, there is an earlier law on employees' well-being at work, which includes the explicit prohibition of sexual harassment in the workplace.[78] Moreover, this law obliges employers to establish an *internal service for*

[75] C. A. MacKinnon, *Women's Lives, Men's Laws*, Cambridge, MA, The Belknap Press of Harvard University Press, 2004, p. 114.

[76] R. Zakaria, "The Legal System Needs to Catch Up With the #MeToo Movement", *The Nation*, 18 April 2018, https://www.thenation.com/article/the-legal-system-needs-to-catch-up-with-the-metoo-movement/.

[77] Wet ter bestrijding van discriminatie tussen vrouwen en mannen, 10 mei 2007.

[78] Art. 32*bis et seq.* Wet van 4 augustus 1996 betreffende het welzijn van de werknemers bij de uitvoering van hun werk, 18 September 1996.

prevention and protection at work.[79] This internal service involves the presence of a prevention-advisor, specialized in the psychosocial aspects of the job, referring to the malpractices of violence, bullying and sexual harassment at work. In theory, the role of prevention-advisor is taken up by an employer of the business enterprise. In enterprises with less than 20 employees, this role can be taken up by the employer him-/herself as well. In any event, the prevention-advisor ought to act independently from both the employer and the employees and should not experience any repercussions in his/her daily job from their independent work as a prevention-advisor. The general task of the internal service consists of following up whether the business enterprise respects the law on wellbeing at work. More specifically, the internal service carries out a thorough risk analysis of the work environment (e.g. identifying certain risks, examining previous incidents, analyzing the most common work-related illnesses…) and the medical supervision of the employees.[80] When the internal service fails to handle a certain case, or if it suffers from a huge workload, the employer can decide to include an *external service for prevention and protection at work*.[81] The external service involves a prevention-advisor as well, carrying out similar tasks as mentioned before, but based on a contractual relationship with the employer.[82] The external prevention-advisor has to share his/her findings and suggestions to improve the work situation with the internal service of prevention and protection.[83]

Even though this procedure seems to work fine in theory, #MeToo has proven that relying mainly on the in-house solutions of the human resources department has some substantial shortcomings as well. An inevitable problem of these procedures and services is that the independence of the members of internal committees or services cannot be guaranteed in practice. Moreover, many of the powerful men who were fired because of sexual harassment allegations in the light of #MeToo worked at big corporations that have all these HR trainings and policies at the disposal of their employees. Employers can easily avoid further legal repercussions by merely demonstrating that these policies and services are present in their businesses.[84] The judicial system

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[79] Art. 32 Welzijnswet.

[80] Artt. II. 1-4 - II. 1-5 Codex over het welzijn op het werk, 28 April 2017.

[81] Art. 40 Welzijnswet.

[82] Art. 42 Welzijnswet.

[83] Art. 32*quinquiesdecies*, 2°, e) Welzijnswet.

[84] R. Zakaria, "The Legal System Needs to Catch Up With the #MeToo Movement", *The Nation*, 18 April 2018, https://www.thenation.com/article/the-legal-system-needs-to-catch-up-with-the-metoo-movement/.

has the potential to remove these obstacles, for example, by making employers strictly liable for sexual harassment committed by their employees. This strict liability implies that employers would be held legally responsible, even if they are not at fault themselves. This way, employers will be more inclined to offer effective prevention or protection policies to adequately fight sexual harassment at work. The introduction of strict liability is an example of how #MeToo could lead to concrete legal change that finally focuses on ""problem men" who harass rather than "problem women" who complain."[85]

Chapter 2. The Anti-Sexism Law

2.1. Background

In 2012, Sofie Peeters, a student at the Royal Institute of Theatre, Cinema and Sound (RITCS) in Brussels, made an eye-opening documentary called *Femme De La Rue.* She used a hidden camera to document the harassment and intimidation she experienced on a daily basis when walking on the streets of the Belgian capital city, whether she was wearing pants and a coat or a skirt and a t-shirt. The documentary caused a lot of commotion in Belgium. How does our society cope with this unacceptable behavior? Joëlle Milquet, the Belgian minister of equal opportunities at the time, proposed the (in)famous anti-sexism law. The law was adopted in 2014 and criminalizes sexism on the streets or other public places, at work or on the internet. It is meant to amplify the already existing legal framework of sexual harassment and anti-discrimination laws, while recognizing sexism as a separate phenomenon that has to be tackled. In 2016, an action for annulment of the law was filed before the Constitutional Court. The claimants argued that vague wording of the law violated the principles of legal certainty and foreseeability of the law. The vagueness of the law would prevent the enforcement of the law. Thus, the anti-sexism law would fail to achieve its goals and, more specifically, to effectively address the climate of impunity with regard to sexism. Moreover, the claimants stated that the law violates the freedom of expression, as guaranteed by art. 19 of the Belgian Constitution and articles 9 and 10 of the European Convention of Human Rights.[86] The Constitutional Court rejected the action for annulment on all grounds.

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[85] Ibid.

[86] Constitutional Court (GwH) 25 May 2016, no. 72/2016; De gecoördineerde Grondwet van 7 februari 1994; European Convention for the Protection of Human Rights and Fundamental Freedoms, *Council of Europe*, 4 November 1950.

2.2. Sexism: Definition

The anti-sexism law is based on article 11*bis* of the Belgian Constitution, which guarantees the equality between men and women.[87] Article 2 of the anti-sexism law of 2014 defines the crime of sexism as follows:

"every gesture or deed that, in the circumstances stated in article 444 Criminal Code, is clearly meant to express contempt towards a person because of his or her sex, or to consider, for these same reasons, this person inferior, or to reduce this person to his or her sexual dimension, which gravely affects the dignity of that person as a result."[88]

The reference to article 444 of the Criminal Code signifies that the sexist gestures or actions have to be made in public spaces or in the presence of other people. This expands the scope of application of the anti-sexism law to the sphere of internet and social media. Moreover, the presence of other people or the evidence of certain images on the internet should facilitate the burden of proof.[89]

The anti-sexism law stipulates that a person who violates article 2 can be punished with a prison sentence from one month to one year, and/or with a monetary fine from fifty euro to one thousand euro.[90]

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[87] De gecoördineerde Grondwet van 17 februari 1994.

[88] Art. 2 Wet ter bestrijding van seksisme in de openbare ruimte en tot aanpassing van de wet van 10 mei 2007 ter bestrijding van discriminatie teneinde de daad van discriminatie te bestraffen, 22 mei 2014: "Voor de toepassing van deze wet wordt begrepen onder seksisme elk gebaar of handeling die, in de in artikel 444 van het Strafwetboek bedoelde omstandigheden, klaarblijkelijk bedoeld is om minachting uit te drukken jegens een persoon wegens zijn geslacht, of deze, om dezelfde reden, als minderwaardig te beschouwen of te reduceren tot diens geslachtelijke dimensie en die een ernstige aantasting van de waardigheid van deze persoon ten gevolge heeft."

[89] *Parl.St.*, Kamer 2014, nr. 3297/003, p. 4.

[90] Art. 3 anti-sexism law. Original wording: "Met gevangenisstraf van een maand tot een jaar en met geldboete van vijftig euro tot duizend euro of met een van die straffen alleen wordt gestraft hij die een in artikel 2 bedoeld gedrag aanneemt."

The definition of sexism consists of six different elements. The following chapter firstly analyzes the three fairly general components, and, secondly, the three constitutive and more problematic elements of the crime of sexism.[91]

Chapter 3. Elements of the law

3.1. General Elements

3.*1.1. Every gesture or deed*

This refers to every verbal or physical action, but publications on the internet as well. Gestures include, for example, spitting on someone, or following someone.[92]

A vital question is whether expressions of an opinion fall under this first element of the law. Some argue that the legislator meant to include these expressions, because a (verbal) gesture can qualify as an expression.[93] Others, however, tend to disagree with this because a gesture is always non-verbal.[94] Nevertheless, the expression of an opinion - whether oral or in writing - could be understood as a deed and thus falls under the scope of application of the law. Of course, this raises questions regarding possible constraints to the right of freedom of expression.

3.1.2. In the public sphere

The sexist gesture or deed has to be made in a public space or in the presence of other people, including internet fora or social media. An example of sexism on social media is when someone creates a social media page that publishes (private) pictures of women without their consent, generating contemptuous and openly sexist comments.[95]

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[91] *Parl.St.*, Kamer 2014, nr. 3297/003, p. 4-5; "Seksisme tegengaan: een uitdaging voor de gelijkheid van vrouwen en mannen.", *Institute for the Equality of Women and Men*, 2016, http://igvm-iefh.belgium.be/sites/default/files/92_-_seksisme_tegengaan_nl_0.pdf.

[92] *Parl.St.*, Kamer 2014, nr. 3297/001, p. 7.

[93] T. Vandromme, "Seksisme", *OSS*, Afl. 85, 5 mei 2015, p. 5.

[94] J. Vrielink and S. Van Dyck, "Seksismeverbod in de Strafwet. Baat niet, schaadt wel (deel 1)", *Nieuw Juridisch Weekblad*, nr. 331, 25 november 2015, p. 774.

[95] *Parl.St.*, Kamer 2014, nr. 3297/001, p. 8.

3.1.3. Because of his or her sex

During the preparatory sessions, the question arose whether trans- or intersexual people fall under the understanding of 'sex', as stipulated in this law. An amendment was made to add the criteria of 'gender expression' and 'gender identity' to the law, in order to extend the protection against sexism to include also people whose gender experience or expression is not necessarily compatible with traditional and stereotyped gender patterns.[96] However, this amendment was rejected based on the argument that the grounds of gender expression and gender identity should be included *stricto sensu* in other discrimination legislation.[97] Vrielink and Van Dyck mention that this response suggests that 'sex' under the anti-sexism law has to be interpreted in a very strict way.[98]

Even though the wording of the law criminalizes sexist behavior towards both women and men, the preparatory documents refer almost exclusively to sexist gestures and deeds directed against women. This is not surprising. The recent #MeToo phenomenon illustrates how sexism still gravely affects women in their daily lives. Even though #MeToo focused mainly on sexual harassment as a specific expression of the deeply rooted sexism in our society, sexism can occur in many different ways. It ranges from micro-aggressions to sexual intimidation and, in the worst cases, to sexual violence.

Nevertheless, the Belgian anti-sexism law allows in theory that certain demeaning behavior towards men could also amount to sexism. Radical feminists, however, strongly disagree with this point of view. It is important to acknowledge that men can be discriminated against based on their gender as well, and that they can experience negative consequences because of a sexist environment that is rooted in harming gender stereotypes. It is certainly true that our society upholds a toxic perception of masculinity, too. However, the act of sexism requires the presence of the power element. This implies that "(…) *all people* can experience stereotyping, prejudice, and discrimination. However, only *oppressed people* experience all of that *and* institutionalized violence and systematic erasure."[99] Sexism is a form of oppression. Therefore, only the powerful majority can perform sexist behavior. As established in the previous section on patriarchy - and based on

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[96] *Parl.St.*, Kamer 2014, nr. 3297/002, p. 2.

[97] Today, this has indeed been included in the anti-discrimination law of 2007: art. 4, §3 Wet ter bestrijding van discriminatie tussen vrouwen en mannen, 10 mei 2007.

[98] J. Vrielink and S. Van Dyck, "Seksismeverbod in de Strafwet. Baat niet, schaadt wel (deel 1)", *Nieuw Juridisch Weekblad*, nr. 331, 25 november 2015, p. 777.

[99] M. A. Fabello, "Why Reverse Oppression Simply Cannot Exist (No Matter What Merriam-Webster Says)", *Everyday Feminism*, 26 January 2015, https://everydayfeminism.com/2015/01/reverse-oppression-cant-exist/ (accessed 8 June 2018).

common sense -, it is crystal clear that there is still a persistent and structural power imbalance between men and women in our society today. Women do not possess this power, which means that it is simply not possible for women to perform sexist behavior – even if they intend to.

"When people in power are stereotyped or discriminated against – awful as that is – it isn't the result of subjugation, regardless of what the dictionary tells you. Those negative attitudes toward privileged people aren't pervasive, restrictive, or hierarchal."[100]

Thus, sexism stands for the discrimination by the powerful group (men) towards the oppressed group (women). Radical feminists thus reject the idea that reverse sexism (i.e. sexism perpetrated by women against men) exists. Sexism is a one way street.

3.2. Constitutive Elements

3.2.1. *Clearly meant to humiliate*

The person making the gesture or the action has to do this willfully. This refers to a person's intent to harm another person. A crime consists of material elements and a moral element. This intent constitutes the moral element of the crime.

The moral element is the condition for the perpetrator's criminal responsibility. The moral element of intent implies that the perpetrator acted knowingly (*sciens*) and willingly (*volens*). Thus, in general, people with limited mental capacity cannot be held responsible for a crime that requires this intent because they are unable to act knowingly and willingly. In Belgian criminal law, there are two possible types of intent, i.e. a general intent and special intent. General intent simply refers to the perpetrator acting knowingly and willingly. However, certain crimes require a special intent, meaning that the perpetrator, again, acted knowingly and willingly, but, moreover, while having a specific motive to commit the crime. Usually, this specific motive is expressed through the wording of the legislation, e.g. that the perpetrator had the purpose of insulting or harming the victim, or that the perpetrator acted in a malevolent or deceitful way.[101] *In casu*, the wording of the anti-sexism law does not seem to indicate that a special motive is required on the perpetrator's behalf. The law

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[100] Ibid.

[101] F. Verbruggen and R. Verstraeten, *Strafrecht en Strafprocesrecht voor bachelors*, Deel I, Antwerpen, Maklu, Uitgave 2014-2015, pp. 52-54; J. Vrielink and S. Van Dyck, "Seksismeverbod in de Strafwet. Baat niet, schaadt wel (deel 1)", *Nieuw Juridisch Weekblad*, nr. 331, 25 november 2015, pp. 771-772.

states that the sexist gesture or deed should be "clearly meant to humiliate", which seems to imply that the perpetrator does not need a specific purpose and, thus, the general intent would suffice. However, the preparatory documents say differently. Here, the legislator clarified that the wrongdoer should have the intent to cause damage (special intent) and should generate a humiliating effect because of the sexist behavior. The intent should be clear and incontestable, implying that the behavior should reach a certain level of severity in order to prove this intent. The level of severity has to be measured by a judge (*cf.* Part II, Chapter 2, *2.2.3.*).[102] The Constitutional Court confirmed that this special intent to harm has to be present, and that the gesture or deed should really generate a seriously humiliating effect. These are substantial requirements for certain behavior in order to fall under the scope of the anti-sexism law.[103] Clearly, this special intent limits the scope of application of the law. For example, distasteful flirtation or whistling on the street do not qualify as sexism under this law, nor do sexist jokes.[104]

The requirement of special intent raises some important difficulties regarding the enforcement of the law. Since special intent is so difficult to prove and limits the material scope of application substantially, the anti-sexism law might amount to nothing more than a deterrent mechanism. For example, if the wrongdoer successfully claims that he made a (distasteful) joke, without the specific intent to hurt the target *in casu*, he will escape any criminal responsibility under this law.[105] Can the law then still accomplish its own goals, i.e. to guarantee the right to equality and human dignity of individuals, but also, more structurally, to fight the persistent gender stereotypes, gender inequality and violence against women?

3.2.2. One or more specific persons

The gesture or action has to be directed to one or more specific persons, not to a general group. The target(s) should be identifiable, thus, avoiding situations where the female or male sex in general is targeted. The law does not aim to address general opinions regarding the place and role of the different sexes within society. However, sexist expressions against a specific person often automatically concern that person's sex in general. For example, during the preparation process of the law, minister Milquet mentioned some cases that should certainly qualify as sexism under this

[102] *Parl.St.*, Kamer 2014, nr. 3297/003, pp. 3, 7.

[103] Constitutional Court (GwH) 25 May 2016, no. 72/2016, p. 26.

[104] *Parl.St.*, Kamer 2014, nr. 3297/003, p. 11; T. Vandromme, "Seksisme", *OSS*, Afl. 85, 5 mei 2015, pp. 9-10.

[105] T. Vandromme, "Seksisme", *OSS*, Afl. 85, 5 mei 2015, p. 9.

law, i.e. expressing doubts that a woman could perform a certain job, merely because she is a woman, or claiming that a woman should not pursue a promotion, because she should rather take care of her family.[106] These expressions clearly relate to a certain point of view of a woman's general place and role in society. Therefore, this precondition of the law is not as straightforward as it may seem. Moreover, the requirement of an identifiable target excludes sexist advertisement, sexist jokes and sexist music lyrics (predominantly present in rap and hip-hop music) from the law's scope of application. By excluding machismo in the advertisement and music industry, the legislator clearly tried not to interfere with artistic freedom and freedom of expression. Even though it is crucial to guarantee these freedoms in a democratic and pluralistic society, one could wonder whether this limited scope of application prevents the anti-sexism law from effectively achieving its (too?) ambitious goals, i.e. changing the climate of impunity regarding sexism and generating a meaningful mentality shift in society.[107]

It is noteworthy to mention that certain other crimes in the Belgian criminal code are also applicable to specific persons only. These crimes constitute complaint offenses. A complaint offense means that the person who has been harmed by the criminalized behavior has to formally file a complaint in order to prosecute the crime. For example, the crime of slander and defamation[108] explicitly relates to expressions and/or acts towards a specific person. The law specifies that the prosecution of slander and defamation can only be initiated by the (alleged) victim.[109] During the preparation period of the law, it was argued that it would make sense to qualify sexism as a complaint offense as well, because every target experiences the humiliating effect of sexist behavior in a different way.[110] Nevertheless, the legislator decided that sexism does not qualify as a complaint offense.[111] Since the law stipulates that the gesture or deed has to be made in public, others (including the public prosecutor and the Institute for the Equality between Women and Men) have the possibility to pursue a claim as well, even without the permission of the specific person

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[106] *Parl.St.*, Kamer 2014, nr. 3297/001, p. 16.

[107] T. Vandromme, "Seksisme", *OSS*, Afl. 85, 5 mei 2015, p. 10.

[108] Art. 443 Strafwetboek: "Hij die in de hierna aangeduide gevallen *aan een persoon* kwaadwillig een bepaald feit ten laste legt, dat *zijn eer* kan krenken of hem aan de openbare verachting kan blootstellen, en waarvan het wettelijk bewijs niet wordt geleverd, is schuldig aan laster, wanneer de wet het bewijs van het ten laste gelegde feit toelaat, en aan eerroof, wanneer de wet dit bewijs niet toelaat." (emphasis added).

[109] Art. 450 Strafwetboek: "De in dit hoofdstuk omschreven misdrijven tegen bijzondere personen gepleegd, de lasterlijke aangifte uitgezonderd, kunnen *niet worden vervolgd dan op klacht van de persoon die beweert beledigd te zijn.*" (emphasis added).

[110] *Parl.St.*, Kamer 2014, nr. 3297/003, p. 14.

[111] Ibid., p. 16.

who was harmed. Interestingly, it is not necessary for the target to be notified about the prosecution. For example, a sexist gesture or deed that targets a public figure can be prosecuted without the affected person knowing about it.[112] By precluding the target's consent as a condition to prosecute the sexist behavior, the law has a very wide potential reach.[113]

3.2.3. Which gravely affects the dignity of that person as a result

The target is humiliated because of his/her sex. This reduction to one's sex has to result in serious harm to the victim's human dignity in order to qualify as a crime of sexism. The criminal judge has to decide whether the implications constitute such serious harm

According to the preparatory documents, sexist behavior has to reach a certain level of severity before it gravely affect a person's dignity. Thus, a certain level of severity is required in order to fall under the scope of the anti-sexism law. The judge will have to apply an objective standard to assess the severity of the sexist behavior on a case by case basis. This implies that it is up to the judge's discretion whether a certain sexist gesture or deed amounts to sexism, even if the target *in casu* does not feel affected by this behavior. Likewise, the judge can decide that certain behavior does not amount to sexism, even if the target would personally feel gravely affected by this behavior. Moreover, when a target consents with certain sexist behavior, this does not impede the criminal responsibility of the person who performed the sexist gesture or deed.[114] However, Vrielink and Van Dyck argue that this external interpretation by a judge does not issue from the legal text itself. The harm inflicted upon one's dignity should rather be understood as a subjective consequence for the target, independent from the objective severity of the sexist gesture or deed that caused the harm. It should be for the target to assess the gravity of the harm inflicted, not the judge.[115] Vandromme criticizes this point of view, because it renders the criminalized behavior dependent on the subjective judgement and perception of the target. This would make it very hard for others to anticipate which gesture or deed would fall under the scope of application of this law. The Constitutional Court seconds this line of reasoning, and emphasizes again that the target's lack

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[112] T. Vandromme, "Seksisme", *OSS*, Afl. 85, 5 mei 2015, p. 11.

[113] J. Vrielink and S. Van Dyck, "Seksismeverbod in de Strafwet. Baat niet, schaadt wel (deel 1)", *Nieuw Juridisch Weekblad*, nr. 331, 25 november 2015, p. 776.

[114] Constitutional Court (GwH) 25 May 2016, no. 72/2016, p. 17; T. Vandromme, "Seksisme", *OSS*, Afl. 85, 5 mei 2015, pp. 8-9.

[115] J. Vrielink and S. Van Dyck, "Seksismeverbod in de Strafwet. Baat niet, schaadt wel (deel 1)", *Nieuw Juridisch Weekblad*, nr. 331, 25 november 2015, pp. 777-778.

of consent regarding the sexist behavior is no constitutive element of the crime. The judge has to decide whether the three constitutive elements are present, taking the particular circumstances into account.[116] Even though Vandromme raises a fair point here, it does not uphold how the external interpretation by a judge would bring more legal certainty. As mentioned before, the legislator decided that judges have to apply an objective standard to assess the severity of certain sexist behavior. This objective standard should reflect what - at the time of the facts - is generally accepted as human dignity.[117] However, the assumption that such an objective standard exists, is highly problematic. It puts a heavy burden on judges to measure what the public opinion considers to fall under the heading of human dignity. By leaving this decision up to the criminal judges, the legislator easily handed off its own responsibility regarding the understanding of human dignity. Moreover, human dignity is in itself a very difficult concept to define and to apply in a clear and precise way. For example, Vrielink and Van Dyck mention how human dignity is often adopted by the opposed discourses in ethical debates, e.g. abortion or euthanasia. For some, human dignity stands for self-determination and autonomy (pro-choice), while others interpret human dignity in a way that justifies certain paternalistic regulations, setting aside personal choices (pro-life).[118] Nevertheless, the Constitutional Court decided that this condition of gravely harming a person's human dignity is essential to comply with the principle of legality in criminal cases.[119]

3.3 Concluding remarks

In its jurisprudence, the Belgian Constitutional Court emphasizes that the legislator has to respect the principle of legality when adopting new criminal legislation. The principle of legality in criminal cases is based on the idea that criminal laws should be defined in a way that every person, when behaving in a certain way, can assert whether this behavior is criminal or not. Thus, the legislator has to formulate the law in a precise and clear manner, in order to provide and maintain legal security. This way, an individual can sufficiently estimate the possible criminal consequences of certain behavior. Moreover, little discretionary power will be left in the hands of criminal judges. Evidently, the principle of legality in criminal cases is violated when the legislator uses vague

[116] Constitutional Court (GwH) 25 May 2016, no. 72/2016, pp. 16-17.

[117] T. Vandromme, "Seksisme", *OSS*, Afl. 85, 5 mei 2015, pp. 8-9.

[118] J. Vrielink and S. Van Dyck, "Seksismeverbod in de Strafwet. Baat niet, schaadt wel (deel 1)", *Nieuw Juridisch Weekblad*, nr. 331, 25 november 2015, p. 778.

[119] Constitutional Court (GwH) 25 May 2016, no. 72/2016, p. 20.

wordings, perpetuating legal uncertainty.[120] After analyzing the different elements of the crime of sexism, it is clear that a lot of ambiguity and uncertainty still stands. It is noteworthy to mention that since the adoption of the anti-sexism law in 2014, the law has been enforced only once, i.e. in November 2017 (*cf.* Part II, Chapter 3, 3.1.). Even though the legislator made a strong statement by classifying sexism as a criminal offense, the law is so vague that one can question its usefulness.

Another important issue regarding the anti-sexism law is the limited scope of application. As mentioned before, the constitutive elements of the crime of sexism are, firstly, a special intent, secondly, that the sexist behavior results in grave harm to a person's human dignity, and, thirdly, that the behavior is directed against a specific person. According to the preparatory documents and the interpretation of the Constitutional Court, the law does, therefore, not apply to sexist jokes, pamphlets, mocking remarks, advertisement and general opinions regarding the place and role of the different sexes within society. Clearly, these limitations are – rightly so – to the advantage of the freedom of expression. However, it puts the ambitious goals of the law in jeopardy. How can this law still effectively address sexism in our current patriarchal culture if it only applies to very specific individual behavior, and only if performed in a public space? It is highly doubtful whether the (current) criminalization of sexism will lead to any meaningful mentality change.

Chapter 4. The Law in Practice

4.1. Judgement 8 November 2017

4.1.1. Facts

The anti-sexism law has been enforced for the first - and so far the last - time in November 2017 by the criminal court of first instance in Brussels.[121] *In casu*, two police officers (one male and one female) saw a male pedestrian committing several traffic offenses, e.g. ignoring a red traffic light and consequently putting other people's lives in danger. Instead of obeying the police's request to stop, the man walked away into the crowd on the streets. When the police caught up with the man and asked him for his identification documents, he reacted in an agitated way. After the identification process, the situation deteriorated and the man became angry and used aggressive language ("ne me touche pas, espèce de merde" and "sale flic de merde. Si tu me touches, je te

[120] Constitutional Court (GwH) 12 Febr 2009, no. 17/2009, p. 83; Constitutional Court (GwH) 25 May 2016, no. 72/2016, p. 13.

[121] Corr. Brussel 8 November 2017, no. 0052991/2017.

casse la gueule"[122]). Finally, he addressed the female officer in a patronizing way and said to her that she should not be a police officer, but that she should rather find a job fit for women, like a bank clerk. When the officers admonished him to talk in a more respectful manner, the man continued that he does not want to speak to women, and that the female officer should be quiet and get lost, calling her a filthy whore.[123]

During a following police hearing, the defendant was asked whether he has a problem with women in general. The man answered: maybe, it depends on the situation.[124]

4.1.2. Elements Article 2 Anti-Sexism Law

Even though the judgement of November 2017 does not specifically elaborate on the six different elements of the crime of sexism, this section will analyze whether these elements of the law are fulfilled *in casu*.

1) Every gesture or deed

The defendant clearly showed that he viewed the female officer as inferior to her male colleague, based on her sex. He claimed that she should find a "woman job", because she is, as a woman, not qualified to do an authoritative job, i.e. being a police officer. Moreover, the man expressed his contempt towards her by calling her a filthy whore. Clearly, these insults towards the female officer constitute a verbal attack. This can qualify as a (verbal) deed under article 2 of the anti-sexism law.

2) Made in the public sphere

The defendant and the police officers were standing in the streets of the city center when the defendant bursted into his sexist tirade. At the time of the events, there was a carnival fair and an annual market happening in the city center. Therefore, there were many bystanders and eyewitnesses present. Moreover, the male police officer could account for what happened. In the judgement, the court stated that the officers' statements are apparent enough. In addition, the

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[122] English translation: "Don't touch me, you piece of shit" and "Filthy shitty cop. If you touch me, I will beat you up."

[123] Corr. Brussel 8 November 2017, no. 0052991/2017, pp. 4-5.

[124] Ibid., p. 5.

defendant admitted in his police hearing that he sometimes has difficulties with dealing with people from the female sex in general. This statement strengthens the proof of the sexist remarks he made.

3) Because of his/her sex

The defendant's verbal attack towards the female police officer was clearly based on gender stereotypes and a certain - sexist - point of view regarding the position of women in society. As mentioned before, the man acknowledged in his police hearing that he sometimes has difficulties interacting with women in general, because of these particular beliefs. It is clear that the defendant used disrespectful sexist language because of the female officer's sex.

4) Clearly meant to humiliate

According to the preparatory documents of the anti-sexism law and the interpretation by the Constitutional Court, this element refers to a special intent on behalf of the perpetrator in order for certain behavior to qualify as sexism under article 2. As stipulated before, this special intent requires, firstly, that the perpetrator acts knowingly and willingly, and, secondly, that he has a specific purpose for committing the crime. The legislator clarified the latter by explaining that the perpetrator should have the specific intent to cause damage and that he should generate a humiliating effect because of his sexist gesture or deed. This is only the case if the sexist gesture or deed is severe enough to cause this damage and humiliation.

In casu, it is clear that the defendant knowingly and willingly insulted the female police officer. However, it is rather difficult to prove his specific motive to do so. Usually, the wording of the law specifies this special intent by requiring that the perpetrator has to behave in a malevolent or deceitful way. These clear wordings are not present in the anti-sexism law. Therefore, it is necessary to resort to the aforementioned explanation provided in the preparatory documents. First of all, the defendant should have had the intent to cause damage. Generally, this is very difficult to prove. However, in this case the police hearing made clear that the defendant often adopts a troublesome attitude towards women, related to his sexist perception of women's place and role in society. Thus, it is plausible that the defendant wanted to cause damage to the female officer with his sexist remarks. Secondly, the defendant's sexist behavior should have generated a humiliating effect. It is important to mention here that this element is only present if the sexist behavior is severe enough. This severity is assessed by the judge, as a part of an objectivity test to determine whether the dignity of the target is gravely affected. Thus, this humiliating effect is strongly interlocked with the sixth element of this section. However, it is feasible to already determine here that the insults

(calling her a filthy whore) and demeaning attitude (reducing her to her sex by stating that she should occupy an inferior and submissive "woman's job") of the defendant has generated a humiliating effect to the female officer.

5) One or more specific persons

The defendant targeted the female police officer personally. However, this case is a clear example that his sexist behavior per definition attacks the female sex in general as well. The defendant has an explicit view on where women "belong" in society, and that they will get called names if they do not fit this picture. By claiming that there are certain professions specifically fit for women, the defendant does not only target this specific police officer, but women in general.

6) Which gravely affects the dignity of that person as a result

The reduction to one's sex has to inflict serious harm on the victim's human dignity. This element of article 2 is only present if the sexist behavior was severe enough to cause such serious harm. The legislator decided that the severity of the sexist behavior and the potentially damaging effects on the target's dignity have to be measured by the judge on a case to case basis. The judgement does not elaborate further on the so-called objectivity test that has to be applied in this regard.

Nevertheless, since this element is so heavily connected with the defendant's purpose to humiliate, this requirement is met as well.

It is important to note that the defendant was convicted on two other criminal charges as well. First of all, the defendant was found guilty of the defamation of public officials during their active duty[125], namely by insulting them with foul language ("espèce de merde", "sale flic de merde", "sale pute" and "sales racistes"). Secondly, he was found guilty of orally threatening the police officers[126], namely by saying that if they would touch him, he would beat them up. Based on the three charges together, the defendant was fined € 3.000, augmented by the additional judicial costs.

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[125] Art. 275 Strafwetboek: "Met gevangenisstraf van vijftien dagen tot zes maanden en met geldboete van vijftig [euro] tot driehonderd [euro] wordt gestraft hij die (…) een officier van de openbare macht in actieve dienst, in de uitoefening of ter gelegenheid van de uitoefening van hun bediening, smaadt door daden, woorden, gebaren of bedreigingen."

[126] Art. 330 Strafwetboek: "Hij die, hetzij mondeling, hetzij bij een naamloos of ondertekend geschrift iemand onder een bevel of onder een voorwaarde bedreigt met een aanslag op personen of eigendommen, waarop gevangenisstraf van ten minste drie maanden gesteld is, wordt gestraft met gevangenisstraf van acht dagen tot drie maanden en met geldboete van zesentwintig [euro] tot honderd [euro]."

4.1.3. Alternatives?

In their critical analysis of the anti-sexism law, Vrielink and Van Dyck suggest that the crime of sexism is a redundant addition to the already existing provisions in the Belgian criminal law.[127] Indeed, the preparatory documents of the anti-sexism law show that the legislator was aware of certain overlaps with current criminal provisions. However, the legislator claimed that the benefits of a separate criminalization of sexism would capture other possible situations that do not fall under the current criminal provisions, in particular the crimes of insult or intimidation. Supposedly, it would be possible for a person to perform contemptuous behavior, but without inherently insulting or intimidating the target as well.[128] The legislator does not provide an example of such purely contemptuous behavior. To be sure, contemptuous behavior is not always tantamount to intimidating behavior. However, it is very hard to come up with an exemplary situation in which a person expresses contempt towards another person without also insulting that person. Contemptuous behavior is inherently degrading and insulting. Moreover, the legislator decided that sexist behavior only amounts to a crime if it gravely affects the dignity of the target. It is rather difficult to imagine how this does not coincide with the crime of insult.

Vrielink and Van Dyck argue that there are many more possible alternatives to the crime of sexism as defined in article 2. This section will briefly point out some of the most important alternative provisions and, where feasible, will apply these provisions to the judgement of November 2017.

i) Stalking/intimidation

Stalking or intimidation refers to the unwanted harassment of a person, in a way that disturbs this person.[129] The crime of intimidation differs from sexism in that it only requires a general intent. Moreover, it is a complaint offense, meaning that it can only be prosecuted if the

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[127] J. Vrielink and S. Van Dyck, "Seksismeverbod in de Strafwet. Baat niet, schaadt wel (deel 1)", *Nieuw Juridisch Weekblad*, nr. 331, 25 november 2015, p. 780.

[128] *Parl.St.*, Kamer 2014, nr. 3297/001, p. 8.

[129] Art. 442*bis* Strafwetboek: "Hij die een persoon heeft belaagd terwijl hij wist of had moeten weten dat hij door zijn gedrag de rust van die bewuste persoon ernstig zou verstoren, wordt gestraft met gevangenisstraf van vijftien dagen tot twee jaar en met geldboete van vijftig [euro] tot driehonderd [euro] of met een van die straffen alleen."

target files a complaint.[130] The preparatory documents of the anti-sexism law stipulate that intimidation implies a disturbance of a person's peace and, therefore, intimidation does not arise from the idea of sexism. Vrielink and Van Dyck counter this argument by pointing out that - amongst others - a gender-related motive is considered an aggravating circumstance in Belgian criminal law.[131] The crime of intimidation thus encompasses more than the unwanted following of a certain person. Other forms of intimidation are e.g. continuously accosting someone on the streets after being told to stop, touching someone's loins or grabbing someone's behind.

ii) Violence, bullying and unwanted sexual behavior at work

The previous Part of this thesis elaborated already on the importance of the law on well-being at work with regard to the concerns raised by #MeToo, i.e. in cases of workplace sexual harassment. However, this law is also worth mentioning with regard to the broader concerns that the Belgian legislator wanted to address by adopting the anti-sexism law. Needless to say that the law on well-being at work only applies to situations of intimidation in a professional environment. Nevertheless, the law pertains to a wide scope of situations and relations, since it relates to employers, employees and all persons who somehow are in contact with those employees (e.g. pupils, patients, suppliers…).[132]

The law on well-being targets bullying in the workplace, referring to the derogation of a person's personality, dignity or integrity or the creation of a threatening, hostile, insulting, humiliating or hurtful environment at work. The law specifically states that bullying can relate to the sex of the target.[133] In addition, the law prohibits unwanted sexual behavior in the workplace. Vrielink and Van Dyck specify that this does not only refer to the violation of sexual integrity, but also encompasses discriminatory behavior based on sex (e.g. not inviting the only woman to the

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[130] J. Vrielink and S. Van Dyck, "Seksismeverbod in de Strafwet. Baat niet, schaadt wel (deel 1)", *Nieuw Juridisch Weekblad*, nr. 331, 25 november 2015, p. 780.

[131] Art. 442*ter* Strafwetboek: "In de gevallen bepaald in artikel 442bis kan het minimum van de bij dit artikel bepaalde correctionele straffen worden verdubbeld, wanneer een van de drijfveren van het wanbedrijf bestaat in de haat tegen, het misprijzen van of de vijandigheid tegen een persoon wegens […] zijn geslacht […]."

[132] Art. 32*bis juncto* art. 2 § 1 Welzijnswet; J. Vrielink and S. Van Dyck, "Seksismeverbod in de Strafwet. Baat niet, schaadt wel (deel 1)", *Nieuw Juridisch Weekblad*, nr. 331, 25 november 2015, p. 782.

[133] Art. 32*ter*, 2° Welzijnswet: "een onrechtmatig geheel van meerdere gelijkaardige of uiteenlopende gedragingen]1, buiten of binnen de onderneming of instelling, die plaats hebben gedurende een bepaalde tijd, die tot doel of gevolg hebben dat de persoonlijkheid, de waardigheid of de fysieke of psychische integriteit van een werknemer of een andere persoon waarop [1 deze afdeling]1 van toepassing is bij de uitvoering van zijn werk wordt aangetast, dat zijn betrekking in gevaar wordt gebracht of dat een bedreigende, vijandige, beledigende, vernederende of kwetsende omgeving wordt gecreëerd en die zich inzonderheid uiten in woorden, bedreigingen, handelingen, gebaren of eenzijdige geschriften. Deze gedragingen kunnen inzonderheid verband houden met [...] geslacht […]."

board meetings).[134] Finally, the law also tackles physical and psychological violence in the workplace. Psychological violence occurs through verbal aggressions, e.g. scoffs, insults and humiliations.[135]

The law on well-being at work does not require an intentional element. A person will violate one of the aforementioned stipulations if he simply does not behave like a normal and cautious person. Therefore, this law covers a much wider range of acts and utterances than the anti-sexism law, which requires a special intent. Clearly, sexist behavior in the workplace (either in the form of bullying, sexual harassment or violence based on a person's sex) is already covered by the law on well-being at work.

iii) Defamation

Defamation implies that a person is malevolently and publicly charged with a certain fact, which harms this person's honor and good name.[136] Defamation can be either written (libel) or spoken (slander). Obviously, sexist statements can amount to such harmful defamation, for example, when a person publicly says to a woman that she works too hard and, therefore, is a bad mother.

Similar to the crime of sexism, defamation has to be perpetrated in public, meaning that others have to be able to take note of the malevolent allegation. This obviously includes the internet and social media platforms. Crucial, however, is that the fact of which a person is charged should be sufficiently specific and precise, meaning that general statements cannot qualify as defamation. This substantially reduces defamation's scope of application. Moreover, the use of the word 'malevolently' clearly indicates that defamation requires a specific intent. The perpetrator has to aim to harm the target.

Similar to the anti-sexism law, the crime of defamation does not apply to general statements. However, even though the preparatory documents of the anti-sexism law state that sexism has to be directed towards one (or more) specific person(s), this behavior often - if not always - refers to

[134] Art. 32*ter*, 3° Welzijnswet: "elke vorm van ongewenst verbaal, non-verbaal of lichamelijk gedrag met een seksuele connotatie dat als doel of gevolg heeft dat de waardigheid van een persoon wordt aangetast of een bedreigende, vijandige, beledigende, vernederende of kwetsende omgeving wordt gecreëerd."

[135] Art. 32*ter*, 1° Welzijnswet: "elke feitelijkheid waarbij een werknemer of een andere persoon waarop deze afdeling van toepassing is psychisch of fysiek wordt bedreigd of aangevallen bij de uitvoering van het werk."

[136] Art. 443 Strafwetboek: "Hij die in de hierna aangeduide gevallen aan een persoon kwaadwillig een bepaald feit ten laste legt, dat zijn eer kan krenken of hem aan de openbare verachting kan blootstellen, en waarvan het wettelijk bewijs niet wordt geleverd, is schuldig aan laster, wanneer de wet het bewijs van het ten laste gelegde feit toelaat, en aan eerroof, wanneer de wet dit bewijs niet toelaat. [...] Wordt een genoegzaam bewijs geleverd, dan geeft de tenlastelegging geen aanleiding tot enige strafvervolging."

certain comments or beliefs regarding a sex in general. Therefore, the anti-sexism law *de facto* covers general remarks or statements as well.

The sexist behavior of the defendant in the November 2017 judgement amounts to defamation. By stating that the female police officer should rather be a bank clerk than a police officer, the defendant clearly charged the officer with the fact that she was not fit for her job because she is a woman. Moreover, the man called the female officer a filthy whore, which is an even more obvious example of defamation. Indeed, as mentioned before, the judge convicted the defendant of defamation as well. Even though a specific type of defamation was applied, namely the defamation of public officials during their active duty, one could still wonder what the anti-sexism law then really contributed to the conviction of the man. After the press release of the judgement, Vrielink commented that, even though the man was rightly convicted, it does not prove the added value of the anti-sexism law: "The judgement proves that provisions regarding defamation, insult and menace already sufficed. The motivation to convict the man of sexism seems insufficient. The law leaves too much room for interpretation."[137]

iv) Insult

When a certain statement or charge is too vague to fall under the scope of the crime of defamation, it may, however, qualify as an insult.[138] The law does not provide a definition of insult, but the dictionary defines it as "to defame, affront, hurt someone's honor and good name."[139] Since the crime of insult applies to vague charges as well, it has a very broad scope of application. The motive to insult a person based on the hatred or contempt towards this person's sex amounts to an aggravating circumstance.[140] Similar to sexism and defamation, an insult has to be made in public

[137] Original quote: "Het vonnis toont dat bepalingen inzake smaad, belediging en bedreiging al volstonden. De motivering om de man voor seksisme te veroordelen lijkt verder onvoldoende. De wet laat te veel ruimte voor interpretatie." In F. Van Garderen, "Eerste veroordeling voor seksisme is een feit: "Bewijs dat de wet niet overbodig is", *De Morgen*, 6 March 2018, https://www.demorgen.be/binnenland/eerste-veroordeling-voor-seksisme-is-een-feit-bewijs-dat-wet-niet-overbodig-is-b4d79b56/ (accessed 21 June 2018).

[138] Art. 448 Strafwetboek: "Hij die hetzij door daden, hetzij door geschriften, prenten of zinnebeelden iemand beledigt in een van de omstandigheden in artikel 444 bepaald, wordt gestraft met gevangenisstraf van acht dagen tot twee maanden en met geldboete van zesentwintig [euro] tot vijfhonderd [euro] of met een van die straffen alleen."

[139] Van Dale: "iemands eer en goede naam aantasten; krenken, kwetsen."; J. Vrielink and S. Van Dyck, "Seksismeverbod in de Strafwet. Baat niet, schaadt wel (deel 1)", *Nieuw Juridisch Weekblad*, nr. 331, 25 november 2015, p. 785.

[140] Art. 453*bis* Strafwetboek: "In de gevallen bepaald in dit hoofdstuk kan het minimum van de correctionele straffen worden verdubbeld, wanneer een van de drijfveren van het wanbedrijf bestaat in de haat tegen, het misprijzen van of de vijandigheid tegen een persoon wegens [...] zijn geslacht […]."

and with a special intent to harm someone.[141] It is very important to note that an insult is only criminalized when it is perpetrated through e.g. deeds, writings, pictures or symbols, but never in an oral way. Therefore, the defendant's behavior of the judgement of November 2017 cannot qualify as - sexist - insult.

The preparatory documents of the anti-sexism law stipulate that the crime of sexism is different from the crime of insult because contemptuous sexist behavior does not automatically equal insulting behavior. As mentioned before, this line of reasoning is very hard to support.

vi) Harming a person's sexual or physical integrity

This section refers to more explicit forms of sexism, such as indecent assault and battery.[142] Indecent assault and battery consists of behavior of a certain severity which derogates a person's sexual integrity. Similar to the crimes of intimidation and insult, the motive to commit indecent assault and battery because of hatred towards a person's sex constitutes an aggravating circumstance.[143] Examples of indecent assault and battery are the deliberate and unwanted touching of a person's erogenous zones, forcing a person to undress, lifting a person's clothes to expose their intimate body parts… These events can also occur in the context of sexist street intimidation.[144]

Indecent assault and battery has a graver impact than the provision of unwanted sexual behavior at work. However, both provisions are often used for very similar behavior. For example, the court of first instance in Brussels convicted an employer who inappropriately touched his female employee, while saying dubious and hurtful words, for indecent assault and battery instead of unwanted sexual behavior at work.

Vrielink and Van Dyck stipulate that indecent assault and battery will always coincide with the criminal provision of sexism, in cases where it constitutes contemptuous behavior related to a

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[141] J. Vrielink and S. Van Dyck, "Seksismeverbod in de Strafwet. Baat niet, schaadt wel (deel 1)", *Nieuw Juridisch Weekblad*, nr. 331, 25 november 2015, p. 785.

[142] Art. 373 Strafwetboek: "Met gevangenisstraf van zes maanden tot vijf jaar wordt gestraft de aanranding van de eerbaarheid gepleegd op personen of met behulp van personen van het mannelijke of vrouwelijke geslacht, met geweld, dwang, bedreiging, verrassing of list, of die mogelijk werd gemaakt door een onvolwaardigheid of een lichamelijk of geestelijk gebrek van het slachtoffer."

[143] Art. 377bis Strafwetboek: "In de gevallen bepaald in dit hoofdstuk kan het minimum van de bij die artikelen bepaalde straffen worden verdubbeld in geval van gevangenisstraf en met twee jaar verhoogd in geval van opsluiting, wanneer een van de drijfveren van de misdaad of het wanbedrijf bestaat in de haat tegen, het misprijzen van of de vijandigheid tegen een persoon wegens […] zijn geslacht […]."

[144] J. Vrielink and S. Van Dyck, "Seksismeverbod in de Strafwet. Baat niet, schaadt wel (deel 1)", *Nieuw Juridisch Weekblad*, nr. 331, 25 november 2015, p. 790.

person's sex or the reduction of a person to his or her sexual dimension, which gravely affects the dignity of that person as a result.[145]

After analyzing some of the alternative (criminal) provisions that could apply in order to punish sexist behavior, it becomes questionable whether it is really useful to have an autonomous criminal provision for sexism. The legislator certainly believed that it would be recommendable to punish sexism separately from the already existing criminal clauses, such as intimidation or defamation.[146] More precisely, the preparatory documents of the anti-sexism law stipulate that the autonomy of the crime of sexism is of important symbolic value, because this autonomous clause makes it possible to punish all forms of sexist behavior from now on. However, the preceding analysis of the different elements of crime of sexism (*cf.* Part II, Chapter 2) rebuts this claim. By explicitly excluding sexist jokes, pamphlets, mocking remarks, advertisement and general opinions regarding the place and role of the different sexes within society from the law's scope of application, it is highly doubtful whether the autonomous criminal provision of sexism is more desirable than what was already criminalized under the pre-existing provisions. Moreover, the legislator argues that an autonomous anti-sexism law provides legal certainty and a clear foreseeability of the applicable punishment. Again, the preceding analysis of the different elements of the crime of sexism shows that there is still a lot of ambiguity regarding the interpretation of the law.

In addition, the legislator claims that an autonomous provision on sexism has a practical advantage, in that it helps the judges to qualify sexist behavior under this one straightforward provision. Thus, judges no longer have to make 'difficult intellectual exercises' by trying to qualify sexist behavior under any of the pre-existing classic criminal provisions. The anti-sexism law provides a 'go-to solution'. However, the analysis of some of the possible (criminal) alternatives has exactly proven that it does not require disproportionate extensive thinking to qualify sexism under one of the other clauses. For example, the recent judgement of November 2017 illustrated how the sexist behavior *in casu* did also fall under the provision of defamation.[147] Moreover, these alternative clauses often explicitly state that motives related to a person's sex constitute aggravating

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[145] Ibid., p. 791.

[146] *Parl.St.*, Kamer 2014, nr. 3297/001, p. 7.

[147] Even though the judgement of November 2017 convicted the defendant of a specific variant of defamation (i.e. defamation of public officials), it is obviously feasible to apply the general provisions of defamation when the target of the sexist behavior is not a public official.

circumstances.[148] Therefore, Vrielink and Van Dyck conclude that tackling sexism was already attainable by simply applying the pre-existing (criminal) provisions. Nevertheless, it would have been desirable to focus on the effective enforcement of these provisions, specifically when they are violated because of sexist motives. As observed and examined in the previous Part (*cf.* Part I, Chapter 2, 2.2.), women still feel ignored by the legal system. The anti-sexism law has not changed this.[149]

4.2. Symbolic Value

The previous section concluded that the autonomous criminalization of sexism does not necessarily amount to an important added value to the already existing Belgian legal framework when it comes to punishing sexist behavior. Judges could already resort to alternative (criminal) provisions to condemn sexism. However, the legislator emphasized that the anti-sexism law primarily has an important symbolic value.[150] The law in general has to fulfill a symbolic function as well, i.e. signifying what a certain society considers to be acceptable behavior and what not. In accordance with the views of critical race theorists (*cf.* Part I, Chapter 2, *2.2.2.*, *iii)*), the preparatory documents of the anti-sexism law stipulate that the law can provide a useful tool in generating a meaningful mentality change in society. The preparatory documents mention that Belgian criminal law already includes some mainly symbolic provisions, such as the prohibition of genital mutilation[151] and the prohibition of forced marriages[152]. These provisions do not necessarily lead to judicial convictions. Nevertheless, they have a valuable impact in society.[153]

Once again, Vrielink and Van Dyck beg to differ. They emphasize that criminal law is the *ultimum remedium* in a society governed by the rule of law. Even though sexism is still a highly problematic issue that needs to be tackled, it is not useful to dedicate a separate criminal law to the punishment of sexist behavior. The pre-existing legal (criminal) provisions suffice. It is simply a

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[148] J. Vrielink and S. Van Dyck, "Seksismeverbod in de Strafwet. Baat niet, schaadt wel (deel 1)", *Nieuw Juridisch Weekblad*, nr. 331, 25 november 2015, p. 793.

[149] Ibid., p. 793.

[150] "Het belang van deze autonomie is in de eerste plaats symbolisch, aangezien elk seksistisch gedrag voortaan strafbaar zal zijn en rechtszekerheid versterkt wordt door de voorzienbaarheid van de straf. Het signaal is duidelijk." In *Parl.St.*, Kamer 2014, nr. 3297/001, p. 7.

[151] Art. 409 Strafwetboek.

[152] Art. 391*sexies* Strafwetboek.

[153] *Parl.St.*, Kamer 2014, nr. 3297/003, pp. 9, 12.

matter of strengthening these pre-existing provisions and enforcing them in a more efficient and clear way. The vagueness of the anti-sexism law only causes more confusion for judges in the battle against sexism. The legislator and proponents of the law classically argue that the law still sends a powerful signal about the despicable nature of sexism. However, Vrielink and Van Dyck unmistakably state that in case of the anti-sexism law, the legislator (mis)uses criminal law merely to send a message.[154]

Clearly, it is not desirable to criminalize sexist behavior with the sole purpose of sending a symbolic message. However, this symbolic function of the anti-sexism law should not be underestimated. In addition to serving as a deterrent, the law can also be regarded as an important cultural expression, emphasizing a changed or changing attitude towards sexism. The conviction of the man in the judgement of November 2017 sent a strong signal that sexist behavior is to be condemned. Thus, indeed, there is room for symbolism in the legal system. However, it is debatable whether the (criminal) law is the appropriate tool to adequately fight such structural societal problems.

Part III. The Anti-Sexism Law as a Cure for #MeToo?

The most important assessment of the first Part of this thesis is that the legal system does not offer an effective answer to the institutionalized sexism in our patriarchal society. If anything, the inadequacy of the legal system even helps to maintain and perpetuate this structural sexism. However, the public shaming of mainly powerful men does not address the roots of the problem of sexism. No substantial change can be achieved without a meaningful legal reform. Subsequently, the second Part of this thesis offered a legal assessment of the unique and controversial Belgian anti-sexism law. The Belgian legislator claimed that this law helps to tackle sexism by criminalizing certain forms of sexist behavior. Moreover, the legislator claimed that the anti-sexism law would generate a meaningful mentality change in society.

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[154] "Maar het strafrecht is het ultimum remedium in onze rechtsstaat en een strafrechtelijke vervolging is geen smsje of vorm van 'direct marketing' om politieke doelen te bereiken. Als je ergens over wilt debatteren of iets wilt aankaarten, debatteer dan, kaart dan iets aan. Schrijf een boek. Organiseer een campagne. Of maak een beklijvende documentaire (zoals Sofie Peeters deed). Strafrecht dient daar niet voor. Als de nieuwe wet al een 'boodschap' stuurt, dan is het hoe lichtzinnig de wetgever omspringt met de grondrechten van zijn burgers." In J. Vrielink and S. Van Dyck, "Seksismeverbod in de Strafwet. Baat niet, schaadt wel (deel 2)", *Nieuw Juridisch Weekblad*, nr. 332, 9 december 2015, p. 843.

This third Part will connect the two previous Parts. It aims to assess whether the Belgian anti-sexism law can indeed serve as an example - or at least a source of inspiration - for legal reform, aiming to tackle the persistent sexist and patriarchal structures as exposed by #MeToo. The first chapter of this Part will examine whether the (criminal) law really constitutes an appropriate tool to address structural problems such as sexism and patriarchy. The second chapter will analyze whether the criminalization of sexism as provided by the Belgian anti-sexism law is an effective legal tool in the fight against sexism.

Chapter 1. Legal Reform?

1.1. Legal Reform and/or Public Policy?

In order to fight sexism and patriarchal structures in a constructive way, it is crucial to decide whether we need the law to do so. According to critical race theory (*cf.* Part I, Chapter 2, *2.2.2.*, *iii)*), an oppressed group can indeed engage the law to protect and defend their fundamental claims and concerns. While critical race theorists use the law as a tool against white domination, it is obvious that women should use the law against male domination. In the recent past, women have already successfully challenged legal rules and structures deemed sexist and/or unfair. For example, the legal reforms regarding voting rights, rape laws, equal pay for equal work, abortion, contraception… have definitely improved the situation of women, mainly by gradually removing the rigid separation between the private and the public sphere. Even though these reforms have been crucial for the empowerment and emancipation of women, #MeToo brings attention to the most fundamental underlying issue. Patriarchy, also understood as institutionalized sexism, is the driving factor behind all these obstacles women faced and still face today. In order to meet the concerns of #MeToo, the law has to prove that it can challenge the underlying, deeply rooted sexist structure of society. It is clearly not expedient for women to dismiss the law in their fight for any meaningful social and cultural change.[155]

[155] "While changing cultural and social mores will inevitably have some positive effect on the way complaints are made and adjudicated, the judicial system has the potential to usher far more meaningful change. Such a translation of the power and vigor of #MeToo as a social movement into concrete legal change will ensure that it transforms not only the lives of celebrities and highly visible perpetrators but also the ordinary harasser and the ordinary harassed." In R. Zakaria, "The Legal System Needs to Catch Up With the #MeToo Movement", *The Nation*, 18 April 2018, https://www.thenation.com/article/the-legal-system-needs-to-catch-up-with-the-metoo-movement/.

Even though the law is a strong and unparalleled tool to incite meaningful change, the law is not enough. Public policies are important and urgent in order to adequately tackle sexism. Think, for example, of the widespread campaigns that accompanied the criminal provisions on the prohibition of smoking. These anti-smoking campaigns consisted of e.g. repulsive pictures on tobacco products, powerful advertisement on television and in public areas, fundraising by cancer organizations, publishing scientific studies regarding health risks… Thorough and widespread campaigning helped to raise awareness among the population regarding the severe dangers of smoking. Analogously, the legal fight against sexism can only truly generate a mentality change if it is part of a more encompassing public policy. This broader policy can consist of e.g. publishing research on the negative effects of sexism, providing statistics of the everyday sexism women still face both on a personal and a professional level, educating children in school about the issues of sexism and patriarchy, offering police trainings to adequately respond to cases of sexism… In order to tackle such a structural and pervasive problem, it is clearly very important to engage people to help challenging sexism, instead of simply applying repressive legal tools. This bigger anti-sexism framework is still missing.

1.2. Criminal Legal Reform?

The law is a crucial instrument in the fight against sexism. Nevertheless, it is debatable whether criminal law is the best tool to address a deeply rooted social issue such as sexism. Criminal law defines and punishes the wrongdoings of individuals which are considered to be public matters. Because of this public nature of criminal law, these crimes can generally be prosecuted and punished on behalf of the state, regardless of the individual victim's willingness to pursue the case.[156] By regulating and punishing individual conduct, criminal law takes place at the micro-level. However, in order to address the underlying structure that produces sexism, we should also aim for a more structural line of action, exceeding this individual level. Thus, to achieve effective collective change, it is necessary to involve the so-called meso- and macro-level organizations and institutional structures.[157] To illustrate this in the light of the fight against sexism, the meso structures could, for example, concern the conduct and policymaking of states, while

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[156] A. Duff, "Theories of Criminal Law", *The Stanford Encyclopedia of Philosophy,* October 2002, https://plato.stanford.edu/entries/criminal-law/#CriPubWro (accessed 25 June 2018).

[157] D. P. Johnson, *Contemporary Sociological Theory. An Integrated Multi-Level Approach*, New York, Springer, 2008, p. 228.

macro structures could involve global anti-sexist action planning. Individual criminal provisions do not (sufficiently) tackle the structural issue of sexism.

The next chapter will briefly examine whether the criminal micro-level character of the anti-sexism law undermines its importance in constituting a meaningful legal reform .

Chapter 2. The Belgian Anti-Sexism Law as a Source of Inspiration?

The previous chapter determined that legal reform is a useful instrument to adequately overthrow institutionalized sexism in our society, albeit as a part of a more encompassing public policy. The question is whether the criminalization of sexism is a good example of such a legal reform, or whether it amounts to nothing more than window-dressing, i.e. a superficial effort of a state to merely profile itself as an equal and fair society. This chapter examines whether the Belgian anti-sexism law meets it's ambitious goals and, thus, provides a successful response to the pressing concerns raised by #MeToo.

2.1. A Criminal Legal Reform

The Belgian anti-sexism law is a criminal law that targets the sexist behavior of individuals. As mentioned in the previous chapter (*cf.* Part III, Chapter 1, 1.2.), individual criminal provisions do not suffice to efficiently attack the patriarchal structures that produce sexism. Nevertheless, by criminalizing sexism, the Belgian legislator gave a strong signal that it considers sexism a public matter that has to be fought through criminal prosecution and punishment.

"However, meso and macro level groups and organizations have no independent existence and cannot act except through their members. Thus the actions of individual members should be seen as contributing to, or helping to constitute, part of the collective line of action of these larger structures."[158]

Even though a structural issue encompasses more than individual behavior, the consistent and prominent (individual) application of the law could have positive effects on the more fundamental

[158] D. P. Johnson, *Contemporary Sociological Theory. An Integrated Multi-Level Approach*, New York, Springer, 2008, pp. 228-229.

fight against sexism. In other words, a sum of small individual convictions could generate a big structural change. The anti-sexism law has not (yet) produced authoritative results in reality.

2.2. A Vague and Underenforced Legal Reform

The second Part of this thesis laid bare that the anti-sexism law is mainly criticized because of the vagueness of the wording of the law, leaving too much open for interpretation. According to the main opponents of the law, this ambiguity necessarily means that the law can never be enforced in a legitimate and consistent way. Therefore, the anti-sexism law is a superfluous law and a useless tool in the fight against sexism. However, it is crucial to ask whether the opponents consider the anti-sexism law to be a "bad law" because of its vagueness, or because of its underenforcement. For example, it is possible that the anti-sexism law is currently underenforced because of the lack of a broader public policy that generates more awareness around the issue of sexism. More specifically, would more enforcement lead to less vagueness, and thus to a better law?

A more frequent interpretation of the anti-sexism law could indeed constitute a public dismissal of sexist behavior. However, it obviously depends on the way in which the law is enforced. There is a difference between convicting construction workers of catcalling on the streets, or convicting CEO's of harassing their employees. Only the latter act of sexism clearly occurs in a hierarchical environment where uneven power relations between men and women still prevail. When the anti-sexism law is enforced in a way which openly condemns and attacks these structural sexist power relations, the law would truly succeed in repelling the structural problem and achieve a meaningful mentality change. A high enforcement of the anti-sexism law could then indeed help to undermine the sexist patriarchal structures of society, as unveiled by #MeToo.

Part IV. Conclusion

The first Part of this thesis essentially stipulated what #MeToo teaches us about the sexist power structures in our patriarchal society. First and foremost, the biggest asset of #MeToo is that it showed how widespread sexual harassment is. The massive responses from women all over the world generated awareness and had a personal impact on many women who (finally) decided to speak up. Sexual harassment encompasses more than rape. #MeToo made women realize that their

experiences mattered, too, and that people believed them. Moreover, #MeToo made many men reflect on their own everyday behavior and even inspired them to call out other men because of their inappropriate actions. Secondly, and most importantly for the purpose of this thesis, #MeToo also highlights that even though there are sexual harassment laws in theory, these laws still seem to fail the victims of sexual harassment in many different ways. Because of the numerous hurdles still in place, women prefer to resort to social media platforms rather than to pursue legal action.

Unlike Burke's original 'me too.' movement, however, the current #MeToo trend is still a very narrow movement. #MeToo does not effectively tackle the underlying issues of sexual harassment, namely our inherently sexist and patriarchal society and how the legal system perpetuates these power relations. Notwithstanding the fact that #MeToo exposed many women's dissatisfaction with sexual harassment legislation, it does not pierce the general legal facade of neutrality. Clearly, #MeToo is not #TooMuch. On the contrary, it still does not go far enough. As Catherine Rottenberg put it:

"#MeToo has carried out important cultural work. At its best, it has exposed how male entitlement saturates our culture. Ultimately, though, this will not suffice. Exposure is not enough for ensuring systemic change."

In 2014, Belgium already aimed to address women's concerns regarding sexual harassment and intimidation, i.e. by adopting an anti-sexism law which criminalizes (individual) sexist behavior. The second Part of this thesis critically examined the different aspects and the practical importance of the anti-sexism law. First and foremost, a legal analysis of the different elements of the law revealed that the wording of the law is too vague, causing legal uncertainty. Moreover, the preparatory documents of the law indicate a rather limited scope of application, for example by excluding sexist jokes, pamphlets, mocking remarks, advertisement and general opinions regarding the place and role of the different sexes within society. It is debatable whether the anti-sexism law can still meet its ambitious goals, namely to eradicate deeply rooted gender stereotypes, gender inequality and violence against women.[159] Opponents of the law also emphasized that the criminalization and punishment of sexism was already possible through other pre-existing criminal provisions in the Belgian legal system, e.g. crimes of defamation, insult, intimidation…

Indeed, all these critiques raised pertinent questions about the practical relevance of the anti-sexism law. However, the law upholds an important symbolic value as well. Condemning an

[159] Constitutional Court (GwH) 25 May 2016, no. 72/2016, p. 4.

individual of sexism sends out a strong signal of how the public opinion openly rejects this type of contemptuous and demeaning behavior. Therefore, it is not desirable to completely dismiss the anti-sexism law as a superfluous and useless tool.

Finally, the third Part examined whether the Belgian anti-sexism law forms an adequate response to the fundamental problems of sexism and patriarchy, as raised by #MeToo. According to critical race theory, (criminal) legal reforms are useful instruments to fundamentally improve the situation of the less powerful in society. However, to efficiently achieve social and cultural change, legal reforms have to be part of a more encompassing public policy. This overarching policy should involve the meso- and macro-level as well, implying that a state's anti-sexism policy should be consistent with it's regional or international policies. For example, it is rather painful that Belgium aims to profile itself as a fair and gender equal society, while it still has important trade relations with e.g. Saudi-Arabia, a country that is famous for it's sexist and misogynistic policies.

Moreover, the anti-sexism law still faces some important practical obstacles. Its underenforcement and the lack of supplementary policy measures make that the anti-sexism law currently has the superficial working of a herbicide. It will at best temporarily destroy unwanted vegetation, only to see similar vegetation come back the next spring. Even though the criminalization of sexism is a strong signal and a step in the right direction towards a tolerant and gender equal society, the anti-sexism law has not (yet) fully proven to be an efficient tool in undermining the sexist power structures in society.

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