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Women and social justice, EU choices with respect to social protection

Paper for the twelfth international conference in commemoration of Marco Biagi

1. Introduction

The relationship between ‘women’ and ‘social security’ has always been complex. This complexity has to do with the fact that the concept of social security was defined and elaborated at a time when men were the main breadwinners and women their dependent spouses, and that since that time the world has changed radically. In this paper I will be exploring the lack of social protection that has resulted from this approach, the relationship of this lack to the original prescriptive values and goals of labour law and the attempts that have been made to resolve this. My particular focus will be on the law relating to social security or, in a broader sense, social risk protection. The focus on social protection rather than labour law is worth exploring for a number of reasons. In the first place, the relationship of social security law and labour law does not speak for itself. As early as 1927 the labour sociologist Hugo Sinzheimer stressed that labour law cannot be conceived only as the law governing employment relationships, but has to cover *all the needs and risks which have to be met in an employee’s life*, including the right to employment services (Sinzheimer, 1927, italics added). However, there are very few places where this approach has been taken up. Even though labour law is a major spearhead of EU social policy, social security tends to be seen as an area in which the member states can draw up their own policy (principle of subsidiarity). Weiss once called the separation of the two legal fields ‘a dangerous perversion of the ideas of the founding fathers of labour law’ (Weiss, 2011). This separation is reflected in the *acquis communautaire* in the area of Equal Treatment Law (ETL), an area of law that has held great significance for the theme of ‘women and social security’ (hereinafter ‘women and...’). While most directives on equal treatment in 2006 were incorporated in the Recast Directive¹ in 2006, the Social Security Directive (SSD) of 1979 kept its isolated position. In addition, the consequences of equal treatment – for instance of the topic of indirect discrimination – are more far-reaching in social security than in employment contract law. In social security equal treatment brings about a balancing of interests which is delicate and often highly sensitive politically (Sohrab, 2000). Or, to put it in laymen’s terms: it costs a lot of money. Finally, the topic is complex in the light of social risks, which are sometimes labelled as ‘post-industrial’. Traditionally labour law has taken as its starting point the Fordist employee with no domestic responsibilities. Nowadays, the issue of reconciling work and care responsibilities has become more topical than ever, especially in the light of the Lisbon target of full employment. Busby even goes so far as to call this the most

¹ With the exception of the pregnant workers directive (92/85/EEC) and the directive on parental leave (96/34/EC). This exclusion can be explained by the legal structure of the directives and the ECT. The pregnant workers directive and the directive on parental leave have their legal base on health protection, the Recast Directive (2006/54/EC) is based on Article 141 EC, and can as such only cover employment matters.

pressing problem currently facing labour law (Busby, 2011). And Hemerijck considers the ability to resolve the tension between *women's* new career preference and the continued desire to form families 'the real litmus test for future welfare state success' (Hemerijck, 2012, italics added).

It is not possible to direct the issue of women and social security for each and every member state. Instead, I will be examining the input of other researchers regarding choices made in one or more member states, and connecting this to Esping-Andersen's welfare state typology (Esping-Andersen 1990). This approach is not without its risks, however, as Esping-Andersen's typology has met with strong criticism, especially from a gender perspective (Lewis, 1992). Admittedly, the criticism has been acknowledged by Esping-Andersen himself and has led him to adjust the typology, but feminist scholars have always kept their reservations about the improved model as well. On the other hand, this typology method is useful, because of the impetus it gave to conceiving models that do take gender into consideration and in which unpaid labour does have a legitimate place (Haas, 2003, Daley 2010, Orloff, 2010).

The paper is structured in the following way: I will start by defining my use of two key terms, namely 'social security' and 'gender' (2). The first needs rethinking because of its gendered roots, while the term 'gender' requires an introduction because of the frequency with which it is used – on its own or combined with other words – to discuss issues relating to women and the law. Subsequently I will introduce the theme of welfare state typology (hereinafter WST) (3). I will discuss the classic typology proposed by Esping-Andersen and the criticism it received from a feminist perspective. I will then move onto the discussions – predominantly among feminist scholars – about the meaning of ETL and its interpretation by the European institutions (4.1). I will close this section with a brief description of the contents of the SSD and its significance for the social security schemes in the 1980s. The next part examines the EU's interference in matters relating to social security in the post equal treatment era (4.2). Interpreting the concept of social security in a wide sense – wider than in the SSD, for example – makes it possible to include topics such as gender mainstreaming, work/life balance policies and paid and unpaid leave facilities. At the same time, the focus on social security serves to delimit the theme and make it manageable. Subjects such as preferential treatment, pay discrimination and sexual harassment will not be included. I will end the paper with an analysis of the meaning and possible contents of a modernized concept of social security. In doing so, I will also address one of the central questions of this conference, on the necessity to reformulate the prescriptive values and goals of labour law.

2. *Theoretical framework: 'gender' meets 'social security'*

Gender is a layered concept that dates back around fifty years. The godfather of 'gender' was a psychoanalyst and gender identity researcher (Robert Stoller) who introduced the word to clarify the phenomenon of being born in a 'wrong body' (Green, 2010). In his analysis, Stoller referred to the

cultural definition of masculinity and femininity and the subsequent ‘agreements’ between the sexes about access to the labour market and caring for children and the elderly. That was in 1968. Several years later his approach was criticized by Oakley, who adopted the term as an instrument to call the dominant theory of the ‘natural differences’ between the sexes into question (Oakley, 1972). Oakley’s approach caught on, gender became politically charged and began a turbulent advance. Gender studies were set up in order to explain systems of sexual theory, whereby ‘men’ and ‘women’ are socially constituted and positioned in relations of hierarchy.² Legal scholars demanded attention for the way the law produces and reproduces gender (Burri, 2000 with reference to Scott, 1989). ‘Sex’ and ‘gender’ are sometimes used more or less interchangeably, but strictly speaking this is incorrect. Gender is a wider concept than sex. While ‘sex’ refers to the biological status, ‘gender’ also refers to social differences between men and women, as well as ideas about their respective roles within the family and in society (Burri and Prechal, 2013). Gender is not only used as a noun, but also as a verb and an adjective. Social phenomena or laws may have a gender aspect, for example the ‘breadwinner’s allowance’ in social security. They can also be stripped of this aspect, a process referred to as degendering or – when referring to a social phenomenon - degenderization. Gender has also become a legal criterion in the *acquis communautaire* on equal treatment. Article 3.2 ECT mentions the obligation of *gender mainstreaming* and the fight against *gender discrimination* is addressed in the preamble of the Recast Directive.

The second concept that is in need of operationalization is the term ‘social security’, a concept that could be traced back through several centuries. For my starting point I am taking the Atlantic Charter of 1941, which defines social security as ‘freedom from fear and want’. So social security *law* is – freely adapted from Eichenhofer - the body of law, which has the aim ‘to realize this freedom’.³ The (legal) realization of social security – at least for most western European countries – dates back to the late 19th century. At that time the German politician Bismarck introduced the first social *insurances* against the classical workers’ risks: sickness, disability, old age and death of the breadwinner. After WW II this risk catalogue was complemented with unemployment and implemented in social insurances for residents, which were suggested in the British Beveridge Plan, based on the aims of the Atlantic Charter. Both types of schemes – that of Bismarck (workers, income-related) as well as that of Beveridge (residents, flat rate) – can be found throughout the EU member states, sometimes in the form of one type or the other and sometimes as a mix of the two.⁴ Besides this, most countries operate replacement or supplementary welfare schemes and other means tested allowances. Social insurances tend to be more beneficial in realizing social security for the

² Orloff (2010) with reference to Haraway (1991). Quotation Marks in the text.

³ Eichenhofer (2007), p. 7, speaks of *Sozialrecht* in this context. Literally: “*Sozialrecht hat soziale Sicherheit zu verwirklichen*”.

⁴ As an example I take my own country (the Netherlands), where the workers schemes (sickness, disability, unemployment) were set up according to Bismarck’s model and the resident schemes (old age, death) use Beveridge’s model.

recipient as they are non-means tested, while welfare schemes and means tested allowances provide less protection.

A more recent catalogue of social risks can be deduced from the ILO definition of social security. Here, social security is formulated as ‘the protection which society provides for its members through a series of public measures against the economic and social distress that otherwise would be caused by the stoppage or substantial reduction of earnings resulting from *sickness, maternity, employment injury, unemployment, invalidity, old age and death*, as well as the provision of *medical care* and the provision *for families with children*’ (ILO 1990, italics added). What stands out in this definition is that, with the exception of maternity provisions (which is a health risk), and the clause about ‘provisions for families with children’, the description seems to be written for employees or work seekers without family responsibilities. Fudge labels this as ‘an exclusion of unpaid care work from the scope of labour law’, which is in her view symptomatic for the average labour law scholar. Most of them are unaware of the gendered implications of their analysis. “Not only does the neo-classical model deny the huge productive contribution that women make through their socially necessary, although unpaid labour”, argues Fudge, but “it ignores the link between production and reproduction.” (Fudge, 2011). And about this ‘unpaid labour’ which is usually another word for unpaid care, Orloff states: “Care is central to many feminist understandings of gender, reflecting a long-standing feminist concern with *the gendered division of labour*, unpaid work, domestic labour and social reproduction as central to women’s oppression. *Mainstream researchers* address care principally as a question of women’s differences from men, and as a barrier to employment. In contrast, *gender analysis* considers care as a socially necessary activity, which is not always recognized as such. (...) Doing care is the source of many women’s economic and political disadvantages, but also offers distinctive identifications, resources and ethical commitments’. (Orloff, 2010, italics added).

This short expose shows two things. It sheds light on the complexity of the relationship of women and social security and it shows the inadequacy of the traditional definition. In the selection of insurable risks, social security is gender biased.

3. *Welfare state typology (WST). Esping-Andersen meets gender*

In 1990 Esping-Andersen presented a typology of welfare-state regimes. Based on what he called a ‘decommodification index’, he divided eighteen OECD countries into three categories, which he labelled after the dominant political movements of the twentieth century: liberal, conservative and social democratic.⁵ Two years later, Lewis criticized this approach, identifying two major flaws. In the first place, decommodification is a poor tool for measuring welfare, since the goal of mainstream

⁵ Esping-Andersen (1990). Decommodification refers to activities and efforts, generally by the government, that reduce individuals' reliance on the market and their labour for their well-being.

women's movements has been the ability for women to enter the labour market, not leave it, or in other words: *commodification*. In the second place, the typology leaves out family policy and caring policies, both of which have a great impact on the ability of women to enter and stay on the labour market. Lewis argued for an alternative method, which also overlooks the way in which the breadwinner model is facilitated, if not stimulated.⁶ Lewis' response evoked many reactions. Before this, there was, as Daly put it, a certain 'taken-for-granted' status about the family in early welfare state scholarship, in which 'family' was little more than the context in which state-market relations played out (Daly, 2010). And Saxonberg mentions as a 'possibly unintended consequence' of Esping-Andersen's typology the great impetus it has given to feminist scholars to develop alternative WSTs that do take into account the interaction between social policies and gender relations (Saxonberg 2013, with reference to Lewis 1993 and Sainsbury, 1994). However, the ultimate WST has not materialized as a result of this impetus. On the other hand, the qualification 'familialism' has turned out to be a useful addition, although the term cannot be used as an exclusive criterion. In the words of Saxonberg, the term is 'simply too ambiguous' for this (Saxonberg 2013).

A few years after - and perhaps as a result of - this impetus Esping-Andersen added a fourth category, in which he placed the Southern-European countries. The countries in this category have 'a familialistic orientation of the welfare state', which is to say the family plays a crucial role as an institution of welfare production and distribution of income and services (Esping-Andersen, 2002). 'Familialism' and 'Southern-European' (or Mediterranean) are not interchangeable variables, however. To illustrate this, two WSTs are shown below: the upper version is the original, albeit slightly improved typology of Esping-Andersen; this is followed by a WST based on a (more limited) research study by Daly, in which 'familialism' is a dominant factor.

Decommodification, Esping-Anderson, 1990/2002

Anglo Irish	Continental	Southern	Scandinavian
UK	Austria	Spain	Denmark
Ireland	Germany	Italy	Finland
	France	Portugal	Sweden
	Benelux	Greece	

Familialism, Daly 2010

Anti-poverty	Familialism, selective	Familialism, rigid	Egalitarian
The UK	Germany	France	Denmark
Ireland			Finland
			Sweden

⁶ Lewis, 1992. As an example, she presented the regimes of Sweden, the UK, Ireland and France, which she classified as the strong, modified and weak breadwinner model respectively.

Earlier Haas had applied the WST method at the level of state intervention with childcare services (Haas 2003, with reference to several researchers). Again, this typology resulted in four families, which she labelled as follows: market-oriented, family-centred, non-interventionist and valued care. Countries with a market-oriented model have strong traditional values concerning the role of women and men and the importance of mothers devoting themselves to the home and children. The qualification family-centred refers to policy making, which is shaped by a traditional religious heritage and/or a strong public commitment to the preservation of the traditional family. Non-interventionist means the harmonization of paid work and care is not recognized or valued. Valued care, finally, means the country has come a long way toward the goal of integrating women into the labour market and in providing comprehensive support systems for working parents. This WST results in the following division:

Childcare services, Haas, 2003

Market-oriented	Family-centred	Non-interventionist	Valued care
The UK	Austria	Spain	Denmark
Ireland	Belgium, Luxembourg	Italy	Finland
The Netherlands	France	Portugal	Sweden
	Germany	Greece	

Two things can be learnt from this exercise: WSTs can be a useful tool for classifying countries, or to classify research into a particular phenomenon. However, they can be misleading when gendered issues are at stake, such as (paid) leave or child care facilities. For this component the qualification ‘familialisme’ can be useful, although this qualification is not suitable as an all-inclusive criterion. A good illustration of the opportunities and limitations of the WST instrument is provided by the recently admitted ‘new’ EU member states, or Central and Eastern European countries (CEECs) as I will call them. These countries are difficult to classify for two reasons: as a group they are very different to the older, relatively prosperous member states, yet as individual countries they are too divergent to lump together in a single family.⁷

4. *Social security and EU social policy*

⁷ Hemerijck et al (2006). The differences are particularly evident with regard to levels of prosperity. Both the percentage of GDP dedicated to social expenditure and the average income level are low compared to the rest of the EU.

There are several ways in which the history of over fifty years of EU interference in social security can be divided up. Some authors use three time periods while yet others use four.⁸ For this paper I will be keeping to a very broad division into two periods. The first period covers a time when the EU was relatively small, the level of interference with legal systems was relatively high, and there was a great emphasis on and confidence in hard law instruments. In the second period the EU grew to become much larger and therefore more difficult to govern, it was faced with crumbling support for the European project and – for reasons including the aforementioned ones – it increasingly sought refuge in soft law instruments. And although every dividing line is arbitrary, for the purposes of this paper I have chosen the year 1985. In this year the economic crisis of the 1980s had reached its climax and this was also the year that the implementation of the SSD central to this topic was due to be completed.

4.1 Equality and equal treatment: 1957-1985

The first phase of EU social policy and gender was centred around equality and was triggered by the equal pay clause in the Treaty of Rome. Although many member states initially assumed this provision would have no direct effect on them, Ms Defrenne – or to be more accurate her lawyer Ms Vogel-Polsky – aided by a comparatively activist ECJ, soon disabused them of this notion (Hoskyns, 1996). For this reason the (first) Defrenne ruling⁹ has been called ‘the founding moment in the history of gender and the EU’ (Kantola 2010). A second important trailblazer of ETL was the French sociologist Evelyne Sullerot. In a study commissioned by the European Commission she convincingly demonstrated the extent to which the labour market was still segregated (Sullerot, 1970). In response, the Commission formulated a Social Action Plan (SAP 1974-1976), which claimed for the first time that it can legitimately interfere in issues concerning the distribution of resources and the maintenance of social stability. As a result of this Plan, three directives were accepted: the Directive on Equal Pay (EPD 1975), the Directive on Equal Treatment (ETD 1976) and the Directive on Social Security (SSD 1979), which is particularly relevant to this paper. By the time this third directive was being prepared the political engagement of women was already somewhat in decline, which – according to Hoskyns – may explain why in this directive no imaginative solutions were presented, for instance about including ‘care’ in the list of insurable insurance risks, or a commitment to the individualization of entitlement to benefits as an ultimate goal. Not that it would have made any practical difference if this had been the case, as both suggestions would most certainly have been turned down on grounds of costs. But their introduction in early stages would – again according to Hoskyns - have helped to

⁸ Beveridge and Velluti (2008), for instance, recognise four periods in ‘EU and gender’: 1) *acquis communautaire*; 2) switch to policy-setting measures; 3) turn towards mainstreaming policies; 4) imposition of obligations on public bodies.

⁹ Defrenne I, case 80/70 [1971] ECR 445.

establish what an alternative policy might look like (Hoskyns, 1996). Unimaginative or not, the impact of the directive would be large, especially on countries with strong breadwinner schemes. As negotiations progressed, therefore, various representatives entered into a state of mild panic about what promises were being made in this document. Moreover, the directive was created at a time when the economic recession began to make itself known, so that some people began to ask themselves why the improvement of the labour market position of women was necessary (Kantola, 2010). Eventually it was decided to exclude occupational pensions from the scope of the directive, as well as death pensions. Also, member states could reserve the right to certain exceptions, such as those concerning the difference in pensionable age between men and women. And finally, a seemingly arbitrary timescale was chosen for the directive's implementation¹⁰ - the longest implementation phase that had yet been given for a directive: six years instead of the usual one or two years. Unsurprisingly therefore, the directive was received with mixed feelings. In a memo to the ETUC, trade union leader and feminist Emilienne Brunfaut wrote that the member states had dictated 'their directives' to the unions. In contrast, the British Commission official who was responsible for the preparation of the SSD called the acceptance of the directive a victory, 'especially as none of the three major countries really wanted it' (Hoskyns, 1996).

The period of *acquis communautaire* also saw an academic debate about the strengths and weaknesses of equal treatment. In this debate, the case 'labour and pregnancy' triggered discussions – in the EU as well as the US - about 'sameness' or 'difference', 'formal' or 'substantive' equality. Sameness or equal treatment has always been the dominant EU approach and was also considered by many 'femocrats'¹¹ to be the best strategy for achieving justice (or substantive equality). Opponents to this approach argued that 'equality' is constituted in part in and by denial and ranking of differences and is for this reason less useful as an antidote against injustice (Flax 1992). In a reaction, a later generation of feminists challenged the binary approach in which 'man' is placed opposite 'woman' and where there is too little scope for differences *between* women, for example regarding race or sexual orientation. In the end, three 'approaches of feminism' came out, each with its own strengths and weaknesses: equality (or sameness), which rests on the assumption that social values and standards are gender neutral; difference, which is a critique of equality and of the increased reliance by the economy and the state on women's double presence or dual burden; and post-structural feminism, which deconstructs the social and cultural values of gender, thus allowing feminists to challenge the binary oppositions that support the current gender order.¹²

¹⁰ Hoskyns: "Observers comment that the Council became like an auction with member states bidding for certain dates and with the German president picking six years out of the air as the date most likely to command general agreement". Hoskyns (1996), p. 111.

¹¹ Defined by Saxonberg (2013) as feminists who use democratic means to try and achieve certain political objectives.

¹² Guerrina (2005) with reference to Hoskyns (1985), Flax (1992), Cavarero (1992) and Balbo (1978).

The SSD 1979. Contents and interpretation

The SSD was directed at the member states and aimed at the progressive implementation of equal treatment *in the field of social security and other elements of social protection provided for in Article 3* (Art 1 SSD). Like its two predecessors, the SSD offers protection to members of the working population. The ECJ enlarged this personal scope somewhat to include those who (albeit under certain conditions) had left the labour market in order to care for another person who was receiving an invalidity benefit.¹³ But women who were disadvantaged by a discriminatory rule in the past could only successfully claim discrimination, if they had had at the time a connection with the labour market.¹⁴ The directive was not written for the traditional breadwinner's housewife spouse. Another major stumbling block for women looking for substantive equality was 'hidden' in the material scope of the SSD. Here, the pitfall was caused not by what was mentioned, but by what was left out. Care was, as Hoskyns had earlier noted, included no-where in the directive's risk sphere. Instead, Article 3 only mentioned the classic workers' risks: unemployment, sickness, invalidity and old age, accidents at work and occupational diseases. Moreover, social assistance was excluded, with the exception of social benefits or allowances, which were meant as supplementary for one of the social benefits mentioned in Article 3. Provisions concerning survivors' benefits were excluded as well, as were provisions concerning family benefits, with the exception, again, of family benefits granted by way of increase of a benefit mentioned in Article 3.1 (Art 3.2 SSD).

At the point when the SSD was due to be implemented, the member states already had some experience of interpreting ETL and the amount of leeway the ECJ would allow them in doing this. For feminist ET watchers – academics as well as 'femocrats' – it had been a disappointment that the Court, after the promising Defrenne cases, would not follow the European Commission in its efforts to force the member states to abandon the classic breadwinner model. Care leave facilities, which were only open to women, such as leave during a period following an adoption or pregnancy, and maternity leave, remained intact.¹⁵ For this reason some authors accused the Court of an 'ideology of motherhood': the belief that all women need to be mothers, that all children need their mothers and that all mothers need their children.¹⁶ In retrospect, it is interesting to observe that the European Court of Human Rights would make a similar choice a few years later. In *Petrovic v. Austria*, the Court stated its considerations that, so far as taking care of the child during the said period (several weeks after pregnancy leave), both parents are 'similarly placed'. Nonetheless, the authorities had not

¹³ *Johnson v. Chief Adjudication Office* ECJ 31/90. *Drake v. Chief Adjudication Office* ECJ 1988, 1995.

¹⁴ *Achterberg te-Riele v Sociale Verzekeringsbank Amsterdam*, ECJ 1989, 1963. *Drake v Chief Adjudication Office*, ECJ 1988, 1995.

¹⁵ *Commission v Italy* (C 163/82), *Hofmann v Barmer Ersatzkasse* (C 184/83) and *Commission v France* (C 312/86).

¹⁶ More (1993) and McGlynn (2000) with reference to Oakley (1974). For a different opinion see Monster (2001).

exceeded the margin of appreciation allowed to them, since at the material time (end of the 1980s) no common standard existed in this field. The majority of the contracting states did not provide for parental leave allowances to be paid for fathers.¹⁷

In cases of social security, the ECJ would follow a similar course, which Sohrab qualifies as ‘characterized by cautiousness’ (Sohrab 2010). Sohrab underlines this observation with a referral to *Roks and others*,¹⁸ an equally telling example is the case *Teuling-Worms*, in which the Court condoned breadwinner’s allowances, provided they were intended as a minimum protection for families.¹⁹ On the other hand, the Court was less lenient towards member states in cases where part-time labour was treated less favourably than full time labour. This type of ‘indirect discrimination’ was condemned both within the scope of labour law and within social security.²⁰

The ET acquis 1985: a first inventory

The period of ET acquis has forced several member states – some more than others – to adjust their social security schemes, making them, at least in the explicit wording, gender neutral. Adjustments are not reforms, however. The underlying question of how social security could or should deal with the fact that the dual earnings model brings about other social risks than the breadwinner’s model had not been dealt with. That question was postponed for the period to come, a period in which the focus would shift from hard to soft law instruments and from legal obligations to policy setting measures.

4.2 1985 and after: policy setting measures; the EU in crisis

In or around 1985 the ET project in the field of social security had come to an end and the focus was turned to increasing labour participation among women and promoting employment opportunities and equal opportunities in general. In addition to socio-economic problems such as the oil crisis of the 1970s and the recession of the 1980s, the EU was faced with political developments that demanded new measures. For example, the entry of a large number of new member states drew attention to the fact that the political administration was in urgent need of modernisation, and the imminent problem of population aging demanded measures to increase labour participation and lower the costs of the welfare state. It is almost impossible to discuss all these developments and the associated intentions and measures briefly and in relation to each other; moreover, one can question whether this relation

¹⁷ Petrovic c. Austria, ECtHR 27.3.1998, Appl number 20458/92. Like Hoffman, this case concerned a rule where, contrary to mothers, fathers are not entitled to parental leave allowance.

¹⁸ *Roks and others v Bestuur van de BVG* ECJ I-571.

¹⁹ *Teuling-Worms v. Bestuur voor de Bedrijfsvereniging voor de Chemische Industrie* (ECJ 30/85). Literally: provided the protection is intended for persons who, by virtue of the fact that they have a dependent spouse or children, bear heavier burdens than single persons.

²⁰ ETD: *Bilka Kaufhaus C 170/84, Rinner-Kühn v FWW Spezial-Gebäudereinigung GmbH & Co KG*. SSD: *Nolte v Landesversicherungsanstalt Hannover*, ECJ 317/93 (1997).

always exists. In this discussion I will be following a chronological order as far as possible, starting with the continuation of the equal treatment programme from the 1970s and early 1980s.

The changes in the socio-economic climate in the early 1980s were reflected in the ET-oriented Social Action Plans (SAPs) from this period. The second Plan (1986-1990) had a high emphasis on cost control and deregulation and far less emphasis on 'hard law' instruments. Developments concerning proposed ET legislation also stagnated. A few ET directives were realized during this period, but they had less impact on national legislation than those realized during the hard law period. Also, the principle that the position of women is always subordinate to that of men and for that reason alone is deserving of attention, gradually fell out of favour. For example, the Third Medium Term Community Action Programme 1991-1995 was entitled "Equal Opportunities for Women and Men", the first time that men were included. "Meaningful", according to Hoskyns (Hoskyns, 2000). In 1992 the Maastricht Treaty introduced a broader equality agenda, extending from equality between women and men to the elimination of inequality based on sex, racial or ethnic origin, religion or belief, disability, age and sexual orientation. Sex equality became a landmark principle of the Council of Europe, but the focus of ETL was no longer exclusively gendered.

At the same time employment and activation ('jobs, jobs, jobs') became a central goal of EU social policy. The Delors White Paper of 1993 led to the annual European Employment Strategies (EES), in which member states set employment targets for the years to come. Increased participation in the labour market by women was a special focus of this policy, for example, at the 2000 Lisbon Summit the target for 2010 was for 70 per cent of the labour force to be in employment, and women's employment to be 60 per cent. Another important 'social invention' of the 1990s was the policy goal of gender mainstreaming, that was introduced at the Beijing Women's Conference of 1995.

'Mainstreaming a gender perspective' is - in the words of the UN Economic and Social Council - a process as well as a strategy. It is a *process* of assessing the implications for women and men of any planned action, including legislation, policies or programs, in all areas and at all levels; it is a *strategy* for making women's as well as men's concerns and experiences an integral dimension of the design, implementing, monitoring and evaluating policies and programmes in all political, economic and societal spheres so that women and men benefit equally and inequality is not perpetuated.²¹ As such, the concept rests on the idea that policies in pursuit of gender equality should be liberated from the confinement of the equal opportunities 'ghetto', so they can be integrated across all fields of policy-making. From this perspective, according to Lewis, mainstreaming has the potential to address disadvantage (the aim of same-treatment policies) without denying difference (Lewis, 2006).

The commitment to gender mainstreaming was still there when the first EES were formulated, but as one strategy followed another, this commitment gradually vanished (Aybars, 2008). In fact, most soft policy tools would suffer from a lack of stamina. Hemerijck et al observe that the OMC

²¹ UN Report of the Economic and Social Council, 1997 (A/52/3. 18.9.2997). See also Article 29 Recast Directive.

(open method of coordination²²) practices - which were also launched at the Lisbon summit - never became fully integrated into domestic policy processes, while the EES encountered opposition as well as disagreement about its targets and the most appropriate means for achieving them (Hemerijck et al, 2006). An inventory of the gender policy documents of the last decade confirms Aybars' observation about a diminishing commitment to equal treatment or – seen from the perspective of women - 'just outcome'. The Community Framework Strategy on Gender Equality 2001-2005 mentions as one of its targets 'the promotion of equal access and full enjoyment of social rights for women and men' (Com 2000, 335). Since 2005, the equal treatment agenda has been reformulated as 'the furthering of all aspects of equal opportunities, including making it easier to reconcile work and family life'. The document identifies two 'gender-based disadvantages': for women with regard to conditions for access to and participation in the labour market, and for men with regard to participation in family life. It also mentions three methods to reduce the disadvantages. One, by examining the scope for granting working men a right to paternity leave while maintaining their rights relating to employment; two, by reinforcement measures which encourage a balanced sharing of care for children, elderly and other dependent persons between working men and women; and three, where appropriate, by granting specific protection to single parent families (C 218 of 31.7.2000). The Roadmap for Equality between Women and Men (2006-2010) includes the statement (under the heading 'equal economic independence') that some of the Lisbon targets relate to the gender dimension but that the efforts to achieve them must be strengthened, *particularly as regards employment and unemployment rates for women* (COM 2006, 92, Italics added).

Social risk' and 'unemployment' appear to have become synonymous and as if to underline this, the Roadmap also observes that 'the risk of poverty is greater for women than for men as they are more likely to have interrupted careers and, therefore, fewer individual pension rights'. "Social protection schemes should offer them adequate benefits". The document also contains a section on the reconciliation of private and professional life. Under this heading one finds the observation that women have recourse to the arrangements of reconciliation policies more often (than men) and that this could have a negative impact on their professional position and their economic independence. Finally, in the Community Strategy for equality between women and men (2010-2015), social protection, or the lack thereof, has vanished as a matter of concern altogether. The document only mentions – under the heading 'economic independence of women' - initiatives aimed at (among other things) assessing workers' rights with regard to leave for family reasons and of member states' performance with regard to childcare facilities (COM 2010, 491).

Social security as business case: social policy at a member state's level

²² OMC rests on soft law mechanisms such as guidelines and indicators, benchmarking and sharing of best practice. There are no official sanctions for laggards. Its effectiveness must come from peer pressure, as no member state wants to be seen as the worst in a given policy area.

This – again brief - inventory of EU policy-making on the field of ‘women and...’ shows that, as the years go by, the commitment with gender issues changes. Or, as Lewis puts it: the mainstream social and economic policy has become dominated by a ‘sound money, sound finance’ paradigm, which means, in the area of work/family reconciliation, that ‘the business case’ rather than gender equality becomes the dominant frame into which arguments for gender equality must ‘fit’ (Lewis 2006 with reference to Dyson, 2000). And Knijn and Smit observe that the discourse around work and family has been ‘reframed’. “After decades of promoting work-family reconciliation *with the aim of promoting gender equality*, the latter seems to be subordinated to the focus on creating competitive knowledge-based economies in the EU.” (Knijn and Smit, 2009, italics added).

In a broader and less pessimistic analysis Hemerijck observes ‘a re-orientation in social citizenship away from freedom from want and towards a freedom to act’. Key policy directive in this approach is a high level of employment for both men and women, a combination of elements of flexicurity and security, under the proviso of accommodating work and family life, and a guaranteed rich social minimum. In this concept, the state is key provider for families and labour markets, playing an important role in ensuring adequate services, for example childcare, family services, education and training and active labour market support (Hemerijck 2012).

At the state level this ‘business case’ or ‘re-orientation’ has found its translation into what the British call ‘the enabling welfare state’, the Germans ‘*der Aktivierende Wohlfahrtsstaat*’ (Eichenhofer, 2013) and the Dutch ‘*Participatiesamenleving*’. The combination of enabling, participation and welfare means that (with the exception of the ‘security’ for fully disabled persons and pensioners) the function of social security has shifted from income protection through benefits to income protection through labour, whether it is a real job, a (state) subsidized workplace or involuntary ‘volunteer’ work. This development has taken place in almost all member states, regardless of their ‘family membership’. Each has, in some way or the other, adopted more or less similar policy initiatives with a high level of employment as the key objective and a greater focus on risk prevention and activation of benefit claimants (Hemerijck et al, 2006). This is true for nearly all, that is. An exception to this rule can be found in several CEECs. Under communist regime, state policy was directed to full labour participation of men and women, which was facilitated by generous subsidized childcare services. After the regime change, many governments opted for the male-breadwinner model, closing childcare centres and withdrawing the financial support for these. The focus shifted to cash benefits and expanded parental leave, encouraging women to stay at home and take care of their children (Saxonberg & Szelewa, 2007). In terms of familialism this development can be classified as ‘refamilization’, emphasizing that maternity and child rearing are a woman’s role. (Robila, 2010).

5 Social security and the prescriptive values of labour law: is the issue of care and labour at all solvable?

For the theme ‘women and...’ Hemerijck’s analysis is interesting for a number of reasons. It is interesting because of the new light it sheds on the classical approach of labour law by Hugo Sinzheimer. In the 21st century, not only must the classical workers’ risks be met but also social risks, which are family or care related. As Sinzheimer, unlike the EU or the ILO, refrained from an explicit risk catalogue, his analysis is more timeless and as such still useful. In the second place, Hemerijck’s referral to a paradigm shift - from ‘freedom of want’ to ‘freedom to act’ - is interesting, because of its implicit opportunity to label care-related activities or responsibilities as social risk. This does not necessarily mean, as the author seems to imply, that the state should be the key provider for facilities, which resolve this issue. After all, social security can be publicly or privately organised or even a mix of the two. But the recognition of this paradigm shift raises the question whether or not it is justified to present the bill for this ‘inability to act’ only to care takers.

As regards to this question, this inventory of over fifty years of EU social policy shows two things. First, all the efforts to do justice to the position of women in the labour market have not succeeded in resolving the issue of gender and social risk coverage. Not one welfare state family member has been able to come up with an adequate response to the fact that a society needs care-givers, that giving care and working for one’s living are activities that cannot be done simultaneously, and that giving care is usually an unrewarded activity (in terms of pay, that is). The second, more or less interrelated, conclusion has to do with the concept of social security. Social security was originally built around the concept of paid labour, with the result that its ‘rewards’ tend to go to people who are or have been in paid labour. This foundation has never been successfully contested. Equal treatment Law may have stripped social security law of its blatant discriminatory elements, it has not touched the gendered layer underneath. The best illustration of the consequences of this ‘gap’ is the social security protection in the post-active period, when everything that one earned and/or accumulated during one’s ‘working life’ adds up. In 2007, an EU research study confirmed the assumption that in every EU pension regime women are more poorly covered than men. This phenomenon is universal, although almost every country report contains the clause that this specific social security scheme is especially complex, typical and/or difficult to grasp or explain. Social security and gender equality: it’s complicated,²³ and it will probably remain so, in terms of both contents and strategy.

²³ This qualification refers to the title of a recent report by Bisom-Rapp and Sargeant about gender and old age pension schemes in the US and the UK.

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