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DOI

[10.4337/9781782547334.00022](https://doi.org/10.4337/9781782547334.00022)

Publication date

2015

Document Version

Final published version

Published in

Research handbook on European social security law

License

Article 25fa Dutch Copyright Act

[Link to publication](#)

Citation for published version (APA):

Westerveld, M. (2015). Women and social security. In F. Pennings, & G. Vonk (Eds.), *Research handbook on European social security law* (pp. 257-280). (Research handbooks in European law). Edward Elgar. <https://doi.org/10.4337/9781782547334.00022>

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11. Women and social security

Mies Westerveld

I. INTRODUCTION

Does 'the' social security take sufficient account of women? Are its protection schemes sufficiently aimed at safeguarding women's interests? These are the questions I was invited to answer for this handbook on social security law. At the same time I was asked to adopt an unorthodox approach, one that is more reflexive than strictly legal. This request is not without complications. To begin with, there is the normativity of the questions at hand. The question whether and, if so, when, protection schemes take sufficient interest in the position of a certain target group is subjective, and people who write about this usually begin or end their discourse with a personal standpoint. One can wonder whether this is appropriate in a book that is supposed to be a handbook.

The second complication has to do with the combination of the target group (women) and the concept of social security. The legal concept of social security was conceived at a time when the context of labour and social risks was very different from what it is today. This was the case at the time the concept was first 'invented', and it was no different shortly after WW II when social security was implemented as a fundamental right in the Universal Declaration of Human Rights. In order to do justice to the request, I must look for a definition of social security that is broader than the one that is generally used.

The third complication is related to the legal scope. The question must be answered in a book on EU law, which means that the social security schemes in all EU member states might be relevant. That element makes this task extremely complicated if not impossible to fulfil. After all, the EU is now made up of 28 member states, each with its own social security scheme. And a description of 28 schemes would be not only tedious, but also far beyond the scope of one chapter. Of course, one could try to tackle this complication by approaching the member states not as separate entities but as members of a welfare state family. This approach is not without its risks, however. For one thing, the original typology method (ie that developed by Esping-Andersen) has met with strong criticism, especially from a gender perspective (I deal with this issue later on). A second possible approach is from the perspective of EU non-discrimination law. A strong position of women in the labour market and, within this context, the equal treatment of men and women have always been goals of EU social policy, practically since the signing of the Treaty of Rome in 1957. As a result, we now have a vast body of EU law, which is generally referred to as equal treatment law. The period of hard law instruments (roughly 1960–1990) was succeeded by a period in which EU social policy was dominated by soft law. In both periods, the topic of women and social security (hereinafter 'women and ...') remained an important focus of EU policymakers. In this chapter, I deal with the two periods successively.

This chapter is organized as follows. I will first present a theoretical framework in the form of a few notions that are central to this theme (Section II). In Section III, I will describe the development of EU equal treatment law and its impact on social security. In Section IV, I will approach the theme from a broader perspective. In this section, the central notions are gender mainstreaming, and work and family reconciliation policies. In the final section (V), I will return to the central question and try to answer it as well as I can. I will deal with social security in individual national schemes only incidentally, as examples or in the context of research studies by other academics.

II. THEORETICAL FRAMEWORK

In this section I will elaborate on two key notions for this topic: 'women and ...' and 'social security' (section II.i). The theme 'women and ...' finds its translation in the word 'gender'. The term 'social security' needs clarification, because of the broader definition that I use in this analysis. Section II.ii deals with the issue of welfare state typology and gender.

II.i Gender and Social Security

A central notion for 'women and the law' (any law) is the word gender. Gender is a layered concept that dates back about 50 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'.¹ 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.² 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.³ Legal scholars demanded attention for the way the law produces and reproduces gender.⁴ Gender and sex are sometimes used interchangeably, but this is, strictly speaking, 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

¹ R Green, 'Robert Stoller's Sex and Gender: 40 Years On', (2010) 39 *Arch Sex Behaviour* 1457–1465.

² A Oakley, *Women's Work: The Housewife Past and Present* (Pantheon Books 1974).

³ AS Orloff, 'Gender', in FG Castles, S Leibfried, J Lewis, H Obinger, C Pierson (eds), *The Oxford Handbook of the Welfare State* (Oxford University Press 2010) 252–265, with reference to DJ Haraway, *Simions, Cyborgs and Women* (Routledge 1991). Quotation marks in the text.

⁴ S Burri, *Tijd delen, Deeltijd, gelijkheid en gender in Europees – en nationaalrechtelijk perspectief* (Utrecht University 2000) with reference to J Scott, 'Gender, a Useful Category of Historical Analysis' in E Weed (ed) *Coming to Terms* (Routledge 1989) 81–100.

roles within the family and in society.⁵ Over the years, gender has also been used as a verb and as 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 of the EC Treaty mentions the obligation of *gender mainstreaming*. And the fight against *gender discrimination* is addressed in the preamble of the Recast Directive.⁶

The second concept that is in need of operationalization is the term social security. In the Anglo-Saxon body of language of the 1980s, social security is defined as 'a system by which the government pays money regularly to people who have no income or only a very small income'.⁷ Social security in this sense runs more or less parallel to welfare. Moreover, in this definition social security is approached by looking at the system, which is resurrected 'to do the job', namely to provide security. Another way to approach social security is by looking at its aim. In the, again Anglo-Saxon, Atlantic Charter of 1941, social security is described as a status of 'freedom from fear and want'. Taking this as a starting point, one could define social security *law* as – freely adapted from Eichenhofer – the body of law that is intended to realize this freedom.⁸ This legal realization dates back – at least for most Western European countries – 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 health costs, and from there it was implemented in social insurances for residents, as suggested in the British Beveridge Plan. 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.⁹ 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 recipient as they are non-means tested, while welfare schemes and means-tested allowances provide less protection. Such schemes and allowances fall under the Anglo-Saxon definition of 'handing out money to people who have no or only a very small income'.

For the more generous social insurances, the topic of the recognized risk catalogue is relevant. The original catalogue was developed shortly after WW II and is now outdated. A more recent catalogue can be found on ILO websites. In one of them, social security is formulated as the 'protection that a society provides to individuals and

⁵ S Burri and S Prechal, 'EU Gender Equality Law, Report for the European Commission', in G Goldscheid (ed), *Gender and Equality Law* (Ashgate Publishing Limited 2013) 141–163.

⁶ Recast Directive, 2006/54/EC. On this directive, see footnote 50 *infra*.

⁷ Collins Cobuild English Language Dictionary (1987).

⁸ E Eichenhofer, *Sozialrecht* (Mohr Siebeck 2007) 7, italics added. Literally: '*Sozialrecht hat soziale Sicherheit zu verwirklichen*'.

⁹ For example, 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.

households to ensure access to healthcare and to guarantee income security, particularly in cases of old age, unemployment, sickness, invalidity, work injury, maternity or loss of a breadwinner'.¹⁰ Another ILO document states that social security systems 'provide for basic income in cases of unemployment, illness and injury, old age and retirement, invalidity, family responsibilities such as pregnancy and childcare, and loss of the family breadwinner'. Such benefits are important, in the words of the ILO,

not only for individual workers and their families but also for their communities as a whole. By providing healthcare, income security and social services, social security enhances productivity and contributes to the dignity and full realization of the individual. What is more, social security systems also promote gender equality through the adoption of measures to ensure that women who have children enjoy equal opportunities in the labour market.¹¹

What stands out in most definitions is that, with the exception of maternity provisions (maternity being 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 (in a broad sense, that is apart from childcare). Fudge labels this as 'an exclusion of unpaid care work from the scope of labour law', which is in her view symptomatic of 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'.¹² 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.¹³

This short exposé shows two things. It sheds light on the complexity of the relationship between women and social security, and it shows the inadequacy of traditional definitions. In the selection of social risks, most definitions tend to be gender biased. A more useful approach for our topic is one that is unrelated to social risks, such as the one given by the godfather (or at least, one of the godfathers) of labour law, Hugo

¹⁰ www.ilo.org/wcmsp5/groups/public/-dgreports/-dcomm/documents/publication/wcms_067588.pdf.

¹¹ www.ilo.org/global/standards/subjects-covered-by-international-labour-standards/social-security/lang-en/index.htm.

¹² J Fudge, 'Labour as a "Fictive Commodity": Radically Reconceptualizing Labour Law', in G Davidov and B Langille (eds), *The Idea of Labour Law* (Oxford University Press 2011) 120–137.

¹³ AS Orloff, 'Gender', in FG Castles, S Leibfried, J Lewis, H Obinger, C Pierson (eds), *The Oxford Handbook of the Welfare State* (Oxford University Press 2010) 252–265.

Sinzheimer. 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.¹⁴ If one replaces the word 'employee' with 'citizen' – thus including pensioners, self-employed workers, work-seekers and carers on welfare – this description has the potential to last for yet another century.

A last development that is worth mentioning is the paradigm shift with respect to labour activation and social security that has taken place in many EU member states. This shift, which has found its translation into what the British call the enabling welfare state, the Germans *der Aktivierende Wohlfahrtsstaat* and the Dutch the *Participatiesamenleving*, has altered the goal of social security from income protection through benefits to income protection through labour – any kind of labour, whether it is a 'real' job (employment), a job at a subsidized workplace or a form of workfare. As is the case with most elements of social security, this development has important gendered implications. What is more, it also has consequences for one of the central questions of this chapter, namely whether the 'protection schemes' of social security are sufficiently aimed at safeguarding women's interests. In fact, this development raises yet another question: what is the definition of a protection scheme?

II.ii Welfare State Typology and Gender

In 1990 Esping-Andersen presented a typology of welfare-state regimes. Based on what he called a 'decommodification index', he divided 18 OECD countries into three categories, which he labelled after the dominant political movements of the twentieth century: liberal, conservative and social democratic.¹⁵ This typology led to the archetypes and character traits shown in Table 11.1.

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 women's movements has been the ability for women to enter the labour market, not leave it, or in other words: *commodification*. Moreover, by focusing on the labour market, 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.¹⁶ Lewis argued for an alternative method, which also overlooks the way in which the breadwinner model is facilitated, if not stimulated. As an example, she presented the results of a study of the regimes in Sweden, France and Ireland/the UK, which she classified in terms of the breadwinner model as weak, modified and strong,

¹⁴ H Sinzheimer, 'Das Wesen der Arbeitsrecht', in H Sinzheimer, *Arbeitsrecht und Rechtssoziologie*, Vol 1 (Bund Verlag 1927).

¹⁵ G Esping-Andersen, *The Three Worlds of Welfare Capitalism* (Polity 1990). Decommodification refers to activities and efforts, generally by the government, that reduce individuals' reliance on the market and their labour for their wellbeing.

¹⁶ S Saxonberg, 'From Defamilization to Degenderization: Toward a New Welfare State Typology' (2013) 47(1) *Social Policy and Administration* 26–49 with reference to J Lewis (ed), *Women and Social Policies in Europe* (Edward Elgar 1993) and D Sainsbury (ed), *Gendering Welfare States* (Sage 1994).

Table 11.1 *Welfare states typology according to Esping-Andersen*

	Liberal	Conservative	Social Democratic
Archetype	Anglo-Saxon	Continental Europe	Scandinavia
Decommodification	Low	Medium	High
Entitlements	Strict, means-tested, recipients stigmatized	Earnings-related, status-based	Universal
Benefits	Modest	Medium	High
Public-private mix	Private high Public low	State interferes only when family role exhausted	Public high Private low

Source: G Esping-Andersen, *The Three Worlds of Welfare Capitalism* (Polity 1990).

respectively.¹⁷ 'Strong' or 'weak' are poor indicators of 'women's best interests', however. For that topic, two other, related issues are relevant: the valuing of unpaid work and the sharing of that work. Sweden has come a long way in the approach to the first issue: women are compensated for caring work at market rates. But it has not even touched the second. The division of care responsibilities has not taken place, and as a result working mothers are 'double burdened'. France has also provided women with 'substantial rewards for mothering', albeit as a by-product of its prioritizing of family policy. In France, women have greater choice than in Sweden as to whether to work at home or in the labour market. In Britain, the assumption is that women will be secondary wage earners, and this assumption is reflected by the relatively weak position of women in the labour market and a predominantly dependant rights position within social security. In this regime, it is assumed that the family will provide childcare, and minimal provision is made for maternity leave, pay and the right to reinstatement. Part-time work tends to be precarious with short hours and few benefits, and eligibility for unemployment benefit is firmly linked to recent employment and to availability for work. All of this leads to attendant problems for women who interrupt paid work to care or who need childcare facilities.¹⁸

Lewis's response provoked many reactions. It inspired Esping-Andersen to add a fourth regime, in which he situated countries with 'a familialistic orientation of the welfare state'. In this regime, the family plays a crucial role as an institution of welfare

¹⁷ J Lewis, 'Gender and the Development of Welfare Regimes' (1992) *Journal of European Social Policy* 159–173. Sweden is an example of a weak breadwinner regime, the UK and Ireland have strong breadwinner regimes and France sits somewhere in the middle (modified breadwinner regime).

¹⁸ J Lewis, 'Gender and the Development of Welfare Regimes' (1992) 2(3) *Journal of European Social Policy* 159–173.

production and distribution of income and services.¹⁹ The debate also inspired other feminist researchers. Saxonberg mentions as a 'possibly unintended consequence' of Esping-Andersen's typology the great impetus it has given to feminist scholars to develop alternative typologies that do take into account the interaction between social policies and gender relations.²⁰ However, the ultimate alternative model has not materialized as a result of this impetus. It proved – again in the words of Saxonberg – much easier for feminist scholars to criticize the original typology than to agree on an alternative. 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. To this end the term is 'too ambiguous'. Moreover, and this quotation also deserves citation, words like refamilization or defamilization do 'not really clearly describe the main goals of mainstream feminist scholars writing on gender, or the goals of mainstream "femocrats", who have used their influence to push for policies that promote greater gender equality'.²¹

As an illustration of 15 years of welfare state typology and gender, four models are shown in Tables 11.2–11.5: the (improved) typology of Esping-Andersen (Table 11.2), the first presentation of Lewis in reaction of this typology (Table 11.3), a typology by Haas made on the basis of a study to childcare facilities (Table 11.4), and an inventory by Daly of research studies in which 'familialism' is a dominant factor (Table 11.5).

¹⁹ G Esping-Andersen (ed), *Why We Need a New Welfare State* (Oxford University Press 2002); Analysis in, Al Aybars, 'The European Employment Strategy and the Europeanization of Gender, Equality in Employment' in F Beveridge and S Velluti (eds), *Gender and the Open Method of Coordination. Perspectives on Law, Governance and Equality in the EU* (Ashgate 2008) 55–77; M Ferrera, 'The "Southern Model" of Welfare in Social Europe' (1996) 6(1) *Journal of European Social Policy* 17–37; R Trifiletti, 'Southern European Welfare Regimes and the Worsening Position of Women' (1999) 9(1) *Journal of European Social Policy* 49–64; O Salido, *Women's Labour Force Participation in Spain*, working paper 02-15 Unidad de Políticas Comparadas, Madrid: CSIC, 2002.

²⁰ S Saxonberg, 'From Defamilization to Degenderization: Toward a New Welfare State Typology' (2013) 47(1) *Social Policy and Administration* 26–49, with reference to J Lewis (ed), *Women and Social Policies in Europe* (Edward Elgar 1993) and D Sainsbury (ed), *Gendering Welfare States* (Sage 1994).

²¹ S Saxonberg, 'From Defamilization to Degenderization: Toward a New Welfare State Typology' (2013) 47(1) *Social Policy and Administration* 26–49, 27, quotation marks in text. Earlier, Saxonberg and Sirovátka had offered the following explanation of both adjectives. In their words 're-familization differs from familization, in that familization policies are the general policies a regime pursues, while re-familization connotes a direction', S Saxonberg and T Sirovátka, 'Failing Family Policy in Post-Communist Central Europe' (2006) 8(2) *Journal of Comparative Policy Analysis* 185–202, at 200.

Table 11.2 *Decommodification according to Esping-Andersen*

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

Source: G Esping Andersen, *The Three Worlds of Welfare Capitalism* (Polity 1990); G Esping-Andersen (ed), *Why we Need a New Welfare State* (Oxford University Press 2002).

Table 11.3 *Breadwinner regime according to Lewis*

Strong breadwinner	Modified breadwinner	Weak breadwinner
UK	France	Sweden
Ireland		
Mediterranean countries		

Source: J Lewis, 'Gender and the Development of Welfare Regimes' (1992) 2(3) *Journal of European Social Policy* 159–173.

Table 11.4 *Childcare according to Haas*

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

Note: *Market-oriented refers to strong traditional values concerning the role of women and men and the importance of mothers devoting themselves to home and children. The policymaking in family-centred societies is shaped by a traditional religious heritage and/or a strong public commitment to the preservation of the traditional family. A non-interventionist (or privatized) care model means that care of young children is a non-collectivized responsibility, done primarily by mothers or extended family members. Valued care refers to the provision of comprehensive support systems for working parents.

Source: L Haas, 'Parental Leave and Gender Equality: Lessons from the European Union' (2003) 20(1) *Review of Policy Research* 89–114.

Table 11.5 Familialism according to Daly

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

Source: M Daly, 'Families versus State and Market', in FG Castles, S Leibfried, J Lewis, H Obinger, C Pierson (eds), *The Oxford Handbook of the Welfare State* (Oxford University Press 2010) 130–152.

This inventory shows two things. Esping-Andersen's typology may be more useful to understand gender issues than some feminist critics claim. This might explain why for many academics his typology is, to this day, an uncontested starting point to present their research studies.²² On the other hand, for the appreciation of gender issues, familialism is a vital additional element, as it accentuates two issues that mainstream studies tend to overlook: (1) when both parents are family breadwinners, how equally divided is the unpaid work within the family home? (2) what is the position of single-parent households in work and family reconciliation policies?

III. SOCIAL SECURITY AND GENDER: FIRST PHASE (1957–1985)

I now return to the history of EU social policy and gender. The first phase of this development is characterized by hard law measures and the formation of the traditional *acquis communautaire*.²³ In this period, EU equal treatment law had a strong impact on the individual social security schemes. This period also witnessed the birth of gender studies, with academic debates about several key notions for the topic 'women and ...'.

I will start this section with the coming of age of the EU *acquis* in equal treatment law. After that I deal with the contents of the Social Security Directive – the relevant

²² See, e.g., A Hemerijck, M Keune and M Rhodes, 'European Welfare States: Diversity', in PM Heywood et al, *Challenges and Reforms* (Palgrave Macmillan 2006) 259–279 in a study on, among other things, the level of social expenditure and taxation in several welfare states. In this study the Scandinavian countries rank high and they are also large employers, especially for women in the social-service sector. Moreover, they spend almost twice as much on family services as the average amount of the Continental and Anglo-Irish groups, and three times as much as some southern European countries. In terms of employment, the Scandinavian countries far out-perform the other three 'families', and low levels of employment, especially among young people, women and the elderly are evident in southern Europe, with Portugal something of an exception.

²³ See also F Beveridge and S Velluti (eds), *Gender and the Open Method of Coordination. Perspectives on Law, Governance and Equality in the EU* (Ashgate Publishing Company 2008) 11, 12. Next to this period of *acquis communautaire* they identify: a switch to policy-setting measures; a turn towards mainstreaming policies; and the imposition of obligations on public bodies.

case law for our topic – and the comments it elicited. Section III.iii. deals with the academic discourse about the central notions of equal treatment law.

III.i The Concepts of the First Three Equal Treatment Law Directives

The EU *acquis* on equal treatment law 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 Court of Justice, soon disabused them of this notion. In an analysis of the history of equal treatment law, Hoskyns puts it this way: ‘The potential for a stronger implementation of equal pay was embedded in the history of the article ... It took activist women to realize these possibilities and switch the debate from one of economic rationality to a demand for rights.’²⁴ For this reason the first *Defrenne* ruling²⁵ has been called ‘the founding moment in the history of gender and the EU’. The case exposed the challenges facing the EU legislation on gender equality and it played a role in the intensification of gender policy in the 1970s, when three new directives were drafted.²⁶ A second important trail-blazer of equal treatment law was the French sociologist Evelyne Sullerot, who presented two reports, the first in 1968 and the second two years later. The first strongly criticized the lack of attention given to both the paid and the unpaid work that women do.²⁷ In the second report she convincingly demonstrated the extent to which the labour market was still segregated.²⁸ In response, the European Commission formulated a Social Action Plan (SAP 1974–1976), which claimed (for the first time) that the Commission 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 (1979).

By the time the third directive was being prepared the political engagement of women was already somewhat in decline, which – according to Hoskyns – may explain why 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. 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 establish what an alternative policy might look like.²⁹

Unimaginative or not, the impact of the directive would be large, especially on countries with strong breadwinner schemes. Countries like Germany and France did not

²⁴ C Hoskyns, *Integrating Gender: Women, Law and Politics in the European Union* (Verso 1996) 57.

²⁵ Case 80/70 *Defrenne I* [1971] ECR 445.

²⁶ J Kantola, *Gender and the European Union* (Palgrave Macmillan 2010) 29–30.

²⁷ E Sullerot, *Histoire et sociologie du travail féminin* (Editions Gonthier 1968).

²⁸ E Sullerot, *L'emploi des femmes et ses problèmes dans les états membres de la Communauté Européenne* (European Commission 1970).

²⁹ C Hoskyns, *Integrating Gender: Women, Law and Politics in the European Union* (Verso 1996) 109.

expect that they would have to modify their legislation drastically.³⁰ As negotiations progressed, therefore, various representatives entered into a state of mild panic about what promises were being made in this document. Their objections were strengthened by the fact that the directive was created at a time when the economic recession began to make itself known, so that the necessity, or even the wisdom, of measures aimed at the improvement of the labour market position of women became questionable.³¹ In the end, 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 implementation – the longest implementation phase that had yet been given for a directive: six years instead of the usual one or two years.³² Unsurprisingly therefore, the directive was received with mixed feelings. In a memo to the European Trade Union Confederation, 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 Social Security Directive called the acceptance of the directive a victory, 'especially as none of the three major countries really wanted it'.³³

III.ii Equal Treatment Law and the Social Security Directive: Contents and Case Law

At the point when the Social Security Directive was due to be implemented, the member states already had some experience of interpreting equal treatment law by the Court of Justice and the amount of leeway the Court would allow them in doing this. For feminist equal treatment watchers – academics as well as 'femocrats' – it had been a disappointment that the Court, after the promising *Defrenne* cases, did not follow the European Commission in its efforts to force the member states to abandon the classic breadwinner model. 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.³⁴ This observation was illustrated by a number of court cases in which 'mummy provisions' – such as maternity leave and

³⁰ Observation, J Kantola, *Gender and the European Union* (Palgrave Macmillan 2010) 37.

³¹ Ibid, 36.

³² C Hoskyns, *Integrating Gender: Women, Law and Politics in the European Union* (Verso 1996) 111: '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.'

³³ Ibid.

³⁴ GC More, "'Equal Treatment' of the Sexes in European Community Law: What Does 'Equal' Mean?" (1993) 1 *Feminist Legal Studies*, and C McGlynn, 'Ideologies of Motherhood in European Community Sex Equality Law' (2000) 6 *European Law Journal* 29–44 with reference to A Oakley, *Women's Work: The Housewife Past and Present* (Pantheon Books 1974).

leave during a period following an adoption or pregnancy, which were only open to women – remained untouched.³⁵

The implicit message – or what they assumed was the implicit message – of the Court's considerations especially irritated feminist equal treatment watchers.³⁶ For instance, More observed that in effect, the decision in *Hofmann* entrenched the separation of male and female roles, suggesting that only women can have close relationships with their children and implying that only women should look after their children during the first few months of life. And McGlynn wrote that the Court is encouraging women to stay at home with their children at least during the early months, while men continue their uninterrupted careers. 'This in turn leads to a greater emphasis being placed on the father's career while the mother's inevitably slows down.'³⁷ In *Hofmann*, the Court also delivered a message about the role of equal treatment law and the role of the Court of Justice in interpreting this branch of law. In response to Hofmann's argument that granting parental leave to men would reduce the multiplicity of burdens borne by women, the Court replied that 'the directive is not designed to settle questions concerned with the organization of the family, or to alter the division of responsibility between parents'.³⁸

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*, this Court started its considerations with the observation 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 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.³⁹

Returning to social security, at the time the Social Security Directive became part of the body of EU law there were three stumbling blocks for women in their quest for equality. The first had to do with the theme 'access'. Like its predecessors, the Social Security Directive offers protection to members of the working population. The Court of Justice 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.⁴⁰ But women who were disadvantaged by a

³⁵ Case C-163/82 *Commission v Italy* [1983] ECR 03273; Case C 184/83 *Hofmann v Barmer Ersatzkasse* [1984] ECR 03047; Case 312/86 *Commission v France* [1988] ECR 06315.

³⁶ GC More, "Equal Treatment" of the Sexes in European Community Law: What Does "Equal" Mean? (1993) 1 *Feminist Legal Studies*, C McGlynn, 'European Union Family Values: Ideologies of "Family" and "Motherhood" in European Union Law' [2001] (Fall) *Social Politics*. For a different view, WC Monster, 'Moederschapsideologie en het HvJEG: een reactie' [The ideology of Motherhood and the ECJ: A Reaction] (2001) 2 *Nemesis*.

³⁷ C McGlynn, 'European Union Family Values: Ideologies of "Family" and "Motherhood" in European Union Law' [2001] (Fall) *Social Politics*, with reference to S Fredman, 'European Community Discrimination Law: A Critique' (1992) 21 *Industrial Law Journal* 119–134.

³⁸ Case C 184/83 *Hofmann v Barmer Ersatzkasse* [1984] ECR 03047 at 3075.

³⁹ *Petrovic v Austria* App no 20458/92 (ECHR, 27 March 1998). Like *Hofmann*, this case concerned a rule whereby, unlike mothers, fathers were not entitled to parental leave allowance.

⁴⁰ Case 150/85 *Drake v Chief Adjudication Office* [1986] ECR 01995.

discriminatory rule in the past could only successfully claim discrimination if they had had a connection with the labour market at the time.⁴¹ The directive was not written for the traditional breadwinner's housewife spouse. The second stumbling block from the perspective of gender is the exclusion of social assistance benefits. Social assistance is only included in so far as it is intended to supplement or replace the schemes that are explicitly included. For women, assistance schemes are very often disadvantageous because of the household means test enshrined in the benefit.⁴² Last, but certainly not least, is the disadvantage that Hoskyns had already mentioned: a disadvantage not by what was mentioned, but by what was omitted. Care was included nowhere in the directive's risk sphere. The directive only mentioned the classic workers' risks: unemployment, sickness, invalidity and old age, accidents at work and occupational diseases.⁴³

The Court of Justice could not, of course, touch such 'omissions'. But apart from this, its course in this area of the law could be – and has been – characterized as 'cautious',⁴⁴ which in many instances would favour the member state involved. This was not the case in *Roks and others* though, where the Court stated that 'budgetary considerations cannot in themselves justify discrimination against one of the sexes'. Any other approach would imply that the application and scope of equal treatment might vary in time and place according to the state of the public finances of the member state.⁴⁵ But for member states that claimed other than budgetary considerations, the Court would show considerable leniency. Earlier, within the scope of the Equal Treatment Directive, it had declared a less favourable treatment of part-time workers by employers to be indirectly discriminatory.⁴⁶ In *Nolte*, the Court seemed to continue on this path by arguing that also persons with employment that is considered 'minor' – in this case, regularly less than 15 hours a week – fall under the personal scope of the directive. Having said that, however, the Court accepted the justification for the exclusion of this employment from a compulsory insurance scheme, as the

⁴¹ Cases 48/88, 106/88 and 107/88 *Achterberg te-Riele v Sociale Verzekeringsbank Amsterdam* [1989] ECR 01963; Case 150/85 *Drake v Chief Adjudication Office* [1986] ECR 01995.

⁴² Observation by JA Sohrab, 'European Equality Legislation on Social Security', in M Rossili (ed), *Gender Policies in the European Union* (Peter Lang Publishing Inc 2000) 107–123.

⁴³ Article 3 Social Security Directive. 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 Social Security Directive).

⁴⁴ Observation by JA Sohrab, 'European Equality Legislation on Social Security', in M Rossili (ed), *Gender Policies in the European Union* (Peter Lang Publishing Inc. 2000) 107–123, who ascribes this to 'the delicate and often politically highly sensitive balancing of interest, which this domain of social policy requests'.

⁴⁵ Case C-343/92 *Roks and others v Bestuur van de BVG* [1994] ECR I-00571, [1994] 2 CMLR 325.

⁴⁶ Case C-170/84 *Bilka Kaufhaus* [1986] ECR 01607; Case C-171/88 *Rinner-Kühn v FWW Spezial-Gebäudereinigung GmbH & Co KG* [1989] ECR 02743.

arguments that were brought forward served a legitimate goal of social policy.⁴⁷ And in *Teuling-Worms*, the Court of Justice declared allowances on a social insurance benefit admissible, provided they are intended as a minimum protection for *families*.⁴⁸

III.iii Sameness versus Difference: A Debate about Preferential Strategies

The development of the EU *acquis* on equal treatment also triggered a debate about preferential strategies, as well as about the question what equal treatment law prescribes, or should prescribe. Should it, in the words of Hoskyns, be directed at formal, law-in-the-books equality, or should its aim be real-life or 'substantive' equality? Others continued on this path, using qualifications such as 'justice' or 'just outcome'. In the USA, where the debate was centred on pregnancy and maternity leave, the notions of 'sameness' and 'difference' were used. Advocates for a sameness approach argued that laws that classify pregnancy as a temporary disability could best protect women. Rhode, for instance, in a defence of the sameness strategy, warned against overrating the importance of pregnancy leave. 'Pregnancy-related policies affect most women workers for relatively brief intervals, while the absence of broader disability, health, child-rearing and caretaking assistance remains a chronic problem for the vast majority of employees, male and female, throughout their working lives.' She also saw potential dangers in a difference-oriented approach. In labour relations this approach may lead to the establishment of special 'mummy tracks', which may in the end turn into 'mummy traps'.⁴⁹ Flax, on the other hand, argued that 'equality' is partly constituted in and by denial and ranking of differences, and is for this reason less useful as an antidote to injustice than difference.⁵⁰ At a later stage, feminists who called themselves 'post-modern' or 'post-structural' rejected the sameness versus difference dichotomy. In their view, the dichotomy is ineffective in that it suppresses differences *between men and between women*, thus ignoring similarities that would be highlighted by categorizing them differently, for example by class or ethnicity. Moreover, both

⁴⁷ Case C317/93 *Nolte v Landesversicherungsanstalt Hannover* [1995] ECR I-04625. The German government had argued that the exclusion is the only means of satisfying a social demand for such employment and is designed to avoid an increase in unlawful employment and devices circumventing social legislation.

⁴⁸ Case 30/85 *Teuling-Worms v Bestuur voor de Bedrijfsvereniging voor de Chemische Industrie* [1987] ECR 02497. Literally: 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.

⁴⁹ DL Rhode, 'The Politics of Paradigms: Gender Difference and Gender Disadvantage', in G Bock and S James (eds), *Beyond Equality and Difference, Citizenship, Feminist Politics and Female Subjectivity* (Routledge 1992) 149–163, at 154, with reference to R Spathler-Roth, *Unnecessary Losses: Costs to Americans for the Lack of Family and Medical Leave* (Institute for Women's Policy Research 1990).

⁵⁰ J Flax, 'Beyond Equality: Gender, Justice and Difference', in G Bock, and S James (eds), *Beyond Equality and Difference, Citizenship, Feminist Politics and Female Subjectivity* (Routledge 1992) 93–210.

criteria embody the notion of a male standard against which 'sameness' and 'difference' are judged.⁵¹

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.⁵²

IV. EU SOCIAL POLICY AND GENDER: SECOND PHASE

By the end of the 1980s, the EU had successfully implemented a body of law that has had great influence on, among other things, social security. Especially member states that had set up their schemes around the breadwinner model were forced to make adjustments. 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 model had not been dealt with. That question was postponed for the period to come, when the focus would shift from hard to soft law instruments and from legal obligations to policy-setting measures. Perhaps it is safe to say that, at the dawn of the second phase, the Equal Treatment project in social security had come to an end, and the focus turned to increasing labour participation among women and promoting employment opportunities and equal opportunities in general.

At the same time – and this may be an explanatory factor – the EU was faced with political developments that demanded new measures and unorthodox solutions. 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 modernization, 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 developments and the associated intentions and measures briefly and in relation to each other; moreover, one can question whether this relation always exists. In this section 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 'invention' of gender mainstreaming and work–family policies (Section IV.i.), and continuing with the final

⁵¹ S Liff and J Wajcman, "'Sameness' and 'Difference' Revisited: Which Way Forward For Equal Opportunity Initiatives?" (1996) 33 *Journal of Management Studies* 1996.

⁵² Analysis by R Guerrina, *Mothering the Union. Gender politics in the EU* (Manchester University Press 2005), J Flax, 'Beyond Equality: Gender, Justice and Difference', in G Bock, and S James (eds), *Beyond Equality and Difference, Citizenship, Feminist Politics and Female Subjectivity* (Routledge 1992) 93–210, A Cavarero, 'Equality and Sexual Difference: Amnesia in Political Thought', in G Bock, and S James (eds), *Beyond Equality and Difference, Citizenship, Feminist Politics and Female Subjectivity* (Routledge 1992) 32–48 and L Balbo, 'La doppia presenza' [1978] *Inchiesta* 32.

period (Section IV.ii.), when gender issues were forced out of the spotlight and into the background of social policy.

IV.i From Equal Treatment to Gender Mainstreaming: 1985–1995

The changes in the socioeconomic climate in the early 1980s were reflected in the equal treatment-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 equal treatment legislation also stagnated. A proposed directive on positive action was ‘demoted’, an intended directive on parental leave had to be withdrawn, and the proposed directives on occupational pensions and self-employed women were considerably weakened.⁵³ After the Social Security Directive 1979, the EU would not initiate any other directives aimed at improving the position of women in social security. In 2006 most equal treatment directives were embodied in the Recast Directive.⁵⁴ The Social Security Directive remained as a sole directive and a warning toward all member states that social security (or protection) should be free from discrimination according to sex.

The idea that the position of women is as a rule subordinate to that of men and for that reason alone is deserving of attention, gradually fell out of favour, however. The wording of the successive equal opportunity programmes of this period bears witness to this: the Third Medium-Term Community Action Programme 1991–1995 was entitled ‘Equal Opportunities for Women and Men’ – the first time that the programme’s title had included the words ‘and men’.⁵⁵ At the same time, 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 equal treatment law was no longer exclusively gendered. The Treaty also constitutionalized the principle of subsidiarity, thus expressing the importance of member states’ autonomy. The EU, and consequently the direct impact of EU equal treatment law, seemed to be on the retreat.

The intention to reduce the pay gap and other inequalities between men and women had not disappeared, however. On the contrary, at the 1995 Beijing Women’s Conference the concept of gender mainstreaming was introduced, and it was shortly thereafter embraced by the EU as a useful instrument to achieve more gender equality. ‘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

⁵³ Observation by C Hoskyns, ‘A Study of Four Action Programmes on Equal Opportunities’, in M Rossili (ed), *Gender Policies in the European Union* (Peter Lang Publishing 2000) 43–61.

⁵⁴ Recast Directive, 2006/54/EC. The pregnant workers and the parental leave directives were excluded from this operation, because of their different legal bases relating to the protection of health: J Kantola, *Gender and the European Union* (Palgrave Macmillan 2010) 114.

⁵⁵ Observation by C Hoskyns, ‘A Study of Four Action Programmes on Equal Opportunities’, in M Rossili (ed), *Gender Policies in the European Union* (Peter Lang Publishing 2000) 43–61, who calls this ‘meaningful’.

for women and men of any planned action, including legislation, policies or programmes, 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.⁵⁶ The EU translated the concept as 'the integration of gender equality considerations in all activities and policies at all levels'.⁵⁷ According to Lewis, mainstreaming 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 policymaking. From this perspective, mainstreaming has the potential to address disadvantage (the aim of same-treatment policies) without denying difference.⁵⁸

IV.ii Employment Policies and Gender: 1990–2015

Meanwhile, within the domain of employment policies, the Delors White Paper (1993) initiated the instrument of European Employment Strategies (EES), a policy tool that 'invites' member states to set employment targets for the years to come. Many strategies contained special references to the labour market participation of women, but as the years went by this special attention gradually took off. 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. In the first five-year period of EES (1997–2002), the labour market participation of women was still a predominant focus. A few years later (the Barcelona Mid-term Review, 2002–2005), the central notions were childcare facilities and reconciliation policies. But after this period, specific gender guidelines were absent; all that remained were a few references to the labour market situation of women.⁵⁹ The Lisbon Summit also saw the birth of yet another tool of soft law policy, namely the Open Method of Coordination (OMC).

This method rests on soft law mechanisms, such as guidelines and indicators, benchmarking and sharing of best practice. Again, as with most soft policy instruments, there are no official sanctions for laggards. Its effectiveness must come from peer pressure.

⁵⁶ UN, *Report of the Economic and Social Council*, 1997 (A/52/3, 18 September 1997).

⁵⁷ CEC (Commission of the European Communities), *Gender and the National Action Plans on Employment (NAPs)*, Doc. EQOP 56–98, DG V/D/5 (European Commission 1998). Nowadays gender mainstreaming has a legal base in Art 3.3 TEU.

⁵⁸ J Lewis, 'Work/family Reconciliation, Equal Opportunities and Social Policies: The Interpretation of Policy Trajectories at the EU Level and the Meaning of Gender Equality' (2006) 13(3) *Journal of European Public Policy* 420–437, at 426, with reference to T Rees, *Mainstreaming Equality in the European Union: Education, Training and Labour Market Policies* (Routledge 1998).

⁵⁹ Observation by AI Aybars, 'The European Employment Strategy and the Europeanization of Gender, Equality in Employment', in F Beveridge and S Velluti (eds), *Gender and the Open Method of Coordination. Perspectives on Law, Governance and Equality in the EU* (Ashgate Publishing Company 2008) 55–77.

But it was not just the employment policy documents that witnessed a waning interest in the position of women: a comparable development can be seen in the successive EU policy documents on gender. After Lisbon, 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'.⁶⁰ In response to this, the resolution on the 'Balanced participation of women and men in family and working life' 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. The document mentions three methods to reduce the disadvantages: (1) by examining the scope for granting working men a right to paternity leave while maintaining their rights relating to employment; (2) by reinforcement measures which encourage a balanced sharing of care for children, the elderly and other dependent persons between working men and women; and (3) where appropriate, by granting specific protection to single-parent families.⁶¹ The succeeding (2006–2010) Roadmap for Equality between Women and Men 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*'.⁶²

'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 member states' performance with regard to childcare facilities.⁶³

On the other hand, the 'fate' of dwindling EU commitment was not restricted to gender issues: most soft policy tools would suffer from a lack of stamina. Hemerijck et al observe that the OMC practices 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.⁶⁴ Be that as it may, it was clear to some feminist policy watchers that the EU had lost interest in gender issues

⁶⁰ 'Balanced participation of women and men in family and working life' [2000] OJ C 218.

⁶¹ [2000] COM 218.

⁶² [2006] COM, 92, italics added.

⁶³ [2010] COM 491.

⁶⁴ A Hemerijck, M Keune and M Rhodes, 'European Welfare States: Diversity, Challenges and Reforms', in PM Heywood, E Jones, M Rhodes and U Sedelmeijer (eds), *Developments in European Politics* (Palgrave Macmillan 2006) 259–279.

and/or substantive equality. Lewis, for instance, observed that the mainstream social and economic policy had 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 quality must fit.⁶⁵ And Knijn and Smit believe 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.'⁶⁶

In a less gendered – and consequently (?) less pessimistic – analysis, Hemerijck classifies the development as 'a re-orientation in social citizenship away from freedom from want and towards a freedom to act'. A key policy directive in this approach is, in his view, 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.⁶⁷

This perspective sounds promising, especially because of addenda such as 'the proviso of accommodating work and family life' and 'adequate services, for example childcare and family services'. But, as in many cases, the proof of the pudding is in the eating. And when one looks at a more concrete level, one finds that the 'reorientation' – or 'business case' – has been translated into a combination of 'enabling' and 'welfare', which means that, with the exception of pensioners and fully disabled persons, social security has lost its former rationale. Its function has shifted from income protection through benefits to income protection through labour, even if it is 'artificial labour' or working for the dole. In these member states, social security has become more about 'quid pro quo'⁶⁸ than about social protection. Again, in this perspective, the question 'What about women?' – or better yet, 'What about care?' – remains un-dealt with, or at least neglected.

A remarkable, contrary development has taken place in some Central and Eastern European countries (CEECs). In most of them, state policy under the Communist regime was directed to full labour participation of men and women, which was facilitated by heavily subsidized childcare services. This did not result in an equal

⁶⁵ J Lewis, 'Work/family Reconciliation, Equal Opportunities and Social Policies: The Interpretation of Policy Trajectories at the EU Level and the Meaning of Gender Equality' (2006) 13(3) *Journal of European Public Policy* 420–437, with reference to K Dyson, 'EMU as Europeanization: Convergence, Diversity and Contingency' (2000) 38(4) *Journal of Common Market Studies* 645–666.

⁶⁶ T Knijn, and A Smit, 'Investing, Facilitating, or Individualizing the Reconciliation of Work and Family Life: Three Paradigms and Ambivalent Policies' [2009] *Oxford Journals* 484–518 (italics added).

⁶⁷ A Hemerijck, 'The Political Economy of Social Investment', in L Burroni, M Keune and G Meardi (eds), *Economy and Society in Europe. A Relationship in Crisis* (Elgaronline 2012) 40–60.

⁶⁸ G Vonk, 'Repressive Welfare States: The Spiral of Obligations and Sanctions in Social Security' (2014) 3 *EJSS* 188–203.

sharing of care, however: as in the Scandinavian countries most women in the CEECs were double burdened.⁶⁹ Nor did this situation result in real equality in the division of labour. Czech sociologist Čermáková once called the situation in these countries ‘a gender contract, in which both spouses work, but only men have careers’.⁷⁰ After joining the EU, several CEECs replaced the dual-earnings model with a traditional male-breadwinner model. Childcare centres had their financial support withdrawn, which led to their closure. The focus shifted to cash benefits and expanded parental leave, encouraging women to stay at home and take care of their children.⁷¹

IV.iii The Court of Justice and the Social Security Directive; Recent Case Law

Before turning to my conclusions, I return once more to hard law instruments, and more specifically to the Social Security Directive and its influence on national legislation. This directive has produced some case law also in recent years, albeit scarce. First, this case law shows two things. Social security rules, which offer better rights to men than to women, have not vanished altogether, and secondly, in this day and age the Court tends to be less lenient towards such rules than it had been in the 1980s, when some ‘femocrats’ accused it of being an adherent of an ‘ideology of motherhood’ (see Section III.ii.). In 2009 the Court rejected an allowance on old-age pensions for pensioners whose income – *that of the spouse included* – remained under a certain minimum amount.⁷² Two years later, it did the same with respect to a rule about contribution conditions for old-age pensions, which are stricter for part-time than for full-time workers.⁷³ Very recently, the Court of Justice was even consulted about a case of direct discrimination. This concerned a method of calculating damages in case of a work-related accident, in which one of the relevant factors is that women live on average longer than men. Not surprisingly, the Court found this inconsistent with the directive as well.⁷⁴

⁶⁹ M Robila, ‘Family Policies in Eastern Europe: A Focus on Parental Leave’ (2012) 21 *Journal of Child Family Studies* 32–41, at 35 with reference to S Saxonberg and D Szelewa, ‘The Continuing Legacy of the Communist Legacy? The Development of Family Policies in Poland and the Czech Republic’ (2007) 14 *Social Politics* 351–379.

⁷⁰ S Saxonberg and T Sirovátka, ‘Failing Family Policy in Post-Communist Central Europe’ (2006) 8(2) *Journal of Comparative Policy Analysis* 185–202, with reference to M Čermáková, ‘Postavení žen na trhu práce’ [1997] 33(4) *Sociologický časopis* 389–404.

⁷¹ S Saxonberg and D Szelewa, ‘The Continuing Legacy of the Communist Legacy? The Development of Family Policies in Poland and the Czech Republic’ (2007) 14 *Social Politics* 351–379. M Robila, ‘Family Policies in Eastern Europe: A Focus on Parental Leave’ (2012) 21 *Journal of Child Family Studies* 32–41 classifies this as ‘refamilization’, emphasizing that maternity and child rearing are a woman’s role.

⁷² Case C-123/10 *Brachner v Pensionsversicherungsanstalt* [2011] ECR I-10003.

⁷³ Case C-385/11 *Isabel Elbal Moreno v Instituto de la Seguridad Social (INSS) and Tesoraría General de la Seguridad Social (TGSS)* ECLI:EU:C:2012:746.

⁷⁴ Case C-318/13 *X* ECLI:EU:C:2014:213.

V. WOMEN AND SOCIAL SECURITY: CONCLUSION

I now return to the central questions of this chapter: does the social security take sufficient account of women? And are its protection schemes sufficiently aimed at safeguarding women's interests? I have tried to show why this question is difficult, if not impossible to answer. For one thing, the answer depends on the notion of 'protection schemes', which is embedded in the term 'social security'. For another, the answer is dependent on one's ideological view of social security and its function. Should it give maximum – and equal – income protection to people who are not, were never or are no longer capable of earning a living by performing paid labour (for whatever reason)? Or should the focus be on activation, even if this means a strict reduction of protection? If so, what about the 'free choice' to provide care to dependent family members or other loved ones? And what, if anything, does the answer say about 'women's interests'? Instead of giving a yes or no answer to these questions, I will end with a few observations that may shed some light on a possible conclusion.

My first observation is that the issue of gender and social risk coverage remains unresolved. Not one Welfare State Families member has formulated 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).

My second observation is connected to this. Social security has been 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. The best illustration of the consequences of this structure is the social security protection in the post-active period when everything that is earned during one's working life adds up. In 2007, an EU research study confirmed the assumption (which had initiated the study) that in every EU pension regime women are more poorly covered than men. If anything, the report indicates that the social security does *not* take sufficient account of women, and that its protection schemes are not really, or primarily aimed at safeguarding women's interests.

My third observation is derived from the post-structural feminists: there is no such thing as 'the' woman. In other words, the answer to the central question is dependent on the type of woman one is referring to: the career woman, the dual-earning woman, the housewife by choice or the head of a single-parent household.

My final observation concerns the comments on EU social policy that I came across during this study. It seems to me that some equal treatment watchers (or femocrats) suffer from a certain short-sightedness that is induced by wishful thinking. In the 'golden' period of equal treatment law they were disappointed about the course of the EU institutions, which they accused of adhering to an ideology of motherhood and a refusal to do justice to the interests of women. In the post-equal treatment period, the argument is that the discussion around women and work has been reframed: from the desire to give women real equality, to the objective of work and care reconciliation with the sole intention of making ends meet economically. For me it is more likely that social justice and substantive equality have never been at the root of EU social policy and that the only way to achieve such goals is by aiming at smart combinations of 'just outcome' and positive economic results or the promise thereof.

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