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Françoise Milewski, Réjane Sénac

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GENDER EQUALITY

A EUROPEAN CHALLENGE AT THE CROSSROADS OF ECONOMICS, LAW AND POLITICS

Françoise Milewski

OFCE-Sciences Po, PRESAGE

Réjane Sénac

Sciences Po-CEVIPOF, CNRS

Europe is seen as the engine of public policy on gender equality, particularly through Member States' implementation of EU law into national law. Straddling legislative components and soft law instruments (such as a cross-cutting approach and promoting "best practices"), EU gender equality policies represent a vantage point for analyzing the Europeanization process. We shall begin by discussing the specificity of national situations before analyzing the transnational dimension of the EU law on non-discrimination. We shall then look at European equality policies by looking at current debate including: issues surrounding the European employment Strategy, connections between hard law and soft law, gender equality and Europeanization.

In affirming the "principle of equal pay, without discrimination based on sex", Article 119 of the Treaty of Rome embodies the founding dimension of gender equality in the European project. In this way, EU texts – from the Common Market to the internal market, and then to integration – place gender equality at the crossroads of economics, law and politics.

After highlighting how diverse the situation is in different countries, we will present the ways in which European policy on equality addresses this through EU law on non-discrimination. We then take up the debates provoked by policy changes, both in regards to the aims (supporting growth, demographic targets, the

struggle against exclusion, principles of justice, etc.) and their implementation (between the non-binding open method of coordination and the binding legal corpus, as well as between roadmaps and charters on the one hand and directives on the other).

1. Gender inequality in Europe

Inequalities between women and men take multiple forms, whether in the area of employment, political representation, reconciliation, the private sphere (in particular the sharing of household and parental tasks), violence, contraception and abortion laws, etc.

1.1. A wide range of differences among countries

To take just two examples, the employment rate of women ranges from 45.2% in Greece to 76.8% in Sweden (an average of 62.4% in the EU27), and the rate of part-time work ranges from 2.5% in Bulgaria to 76.9% in the Netherlands (an average of 32.1% in the EU27). The employment rate in terms of full-time equivalent is fluctuating between 42% in Malta and 69% in Sweden (an average of 53% in the UE27). The gender gap in employment rates (of all durations) varies from 1.5 points in Lithuania, to 32.2 points in Malta (an average of 12.2 points in the EU27).¹

The rate of women's participation in government is 54% in Sweden but only 7% in Slovakia; in the national parliaments, it varies between 43% in Sweden and 16% in Greece (with an average of 24.7%).²

These are only snapshots, but the figures do demonstrate nonetheless the size of the gap in the situation among different countries.

1.2. National "compromises"

Discrepancies among countries are the result of a number of factors based on different gender arrangements (Dauphin, 2011; Letablier, 2009):

1. 2012 data, 20-64 years, source: Eurostat.

2. 2012 data, source: Eurostat.

- the historical consensuses that has shaped the extent to which women have been integrated into the labour market including both full or part-time forms;
- a welfare state regime;
- “models of articulation” between professional and private spheres, which determine the impact of parenthood on employment;
- work-share and flexible scheduling policies;
- social protection system (family or individual-based);
- social transformations of the family and of parenthood;
- national public policy, whether regarding coordination policies (childcare facilities for young children, school schedules, or parental leave plans and eligibility conditions for family benefits), or the way in which countries provide the means to achieve the targets of the European employment Strategy, particularly the employment rate target;
- methods of adjusting employment during periods of economic crisis (adjustment in work time or in internal or external flexibility).

At the European level, the “reconciliation between professional, private and family life” has four segments (Math, 2013, 2009): parental leave, childcare facilities for very young children, independent women workers and assisting spouses, and maternity leave. As regards childcare facilities, in 2002 the European Council meeting in Barcelona established targets of 33% for children under the age of three and 90% for those over age three. The summations at the end of the first decade of 2000 demonstrate the discrepancies both among the various countries and in the prerogatives of countries, some of which do not feel bound by simple recommendations. In the 2010 Directive of the European Council on parental leave, which is formally more binding, the question of pay is left vague, which is a significant limitation. The directive on maternity extended the length of leave (14 weeks). Thus between the minimum standard for maternity leave and the exclusive jurisdiction of States on childcare arrangements, the impact of European policies has been limited and inconsistent. The 2008 “reconciliation package” has done little to align the countries in this matter.

The analysis of the gendered division of social roles is thus an issue in the policy choice, whether economic (structural or

cyclical), family-related (in particular regarding reconciliation), fiscal, social, etc., from which the roles arise and which they reflect. How does the gendered dimension of public policy choices apply nationally and transnationally, especially within the EU (Jacquot, 2009, 2013)?

2. European equality policy

Europe is the engine for public policy on gender equality (Dominguez Alcon, Forest and Sénac, 2013; Kantola, 2010), in particular through Member States' application of EU law in their national law. The application of the primary law of the European treaties³ and of the 2000 Charter of Fundamental Rights is associated with the transposition of EU directives⁴ and with the impact of the jurisprudence of the European Court of Justice on national jurisprudence (Sénac-Slawinski, 2006). Europe also sets out the multiannual strategy, the aims of which range from the economic independence of women to the eradication of violence. However, in the absence of any binding means, these aims remain general and are not achieved.

2.1. Cross-cutting community legal and institutional framework

Pay inequality between male and female workers is the leading factor in the inequality of treatment among salaried workers that EU law addresses specifically, “through Article 119 in particular of the Treaty of Rome (which became the current Article 141), which the European Court of Justice held was directly applicable since 1971 (Defrenne judgement of 25 May 1971), but the sphere of which is limited to pay equality, with protection subsequently extended by the 1976 directive (76/207) to all recruitment, training and working conditions” (Bailly, 2004:83).

Since 1979 gender equality has been one of the values that the Council of Europe has the mission of protecting and promoting, as

3. Cf. in particular Article 1bis and Article 2 paragraph 3 of the European Union Treaty, as well as Article 8 of the consolidated version of the Treaty on the Functioning of the European Union.

4. Cf. in particular, Directive 75/117/CE of 10 February 1975 on equality of pay and Directive 2006/54/CE of the European Parliament and the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast).

it is one of the guiding principles of its activities. This principle is laid out in the two main legal instruments of the Council of Europe: the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) and the European Social Charter (1961).

The EU Charter of Fundamental Rights of 7 December 2000, as adapted on 12 December 2007 in Strasburg, has the same legal value as the treaties.⁵ It stipulates that “everyone is equal before the law” (Article 20), that “any discrimination based on sex shall be prohibited” (Article 21), and that “equality between men and women must be ensured in all areas, including employment, work and pay” (Article 23).

The 2007 Lisbon Treaty establishes gender equality as one of the common values and aims of the Member States of the Union (Article 1bis and 2).

The principle of non-discrimination in pay laid out in the fair competition framework, which was a condition of the Common Market and then of the single market, is thus now a general principle of non-discrimination. It is embodied institutionally by the fact that the equality policy, initially under the DG for Employment, is now the responsibility of the DG for Justice.

2.2. The three phases of the gender equality approach: from legal equality to positive action and to gender mainstreaming

The normative framework for measuring gender equality is clarified by a recommendation “on the promotion of positive action for women” (84/635/EEC) adopted by the Council of European Ministers on 13 December 1984. The reports set out by the European Commission in 1988 and 1995 regret that in the absence of any binding measures, positive action is at best a public policy instrument and not a legal pillar of equal opportunity. Article 19, the former Article 13 TEC, stipulates that “The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt the basic principles of Union incentive measures, excluding any harmonization of the laws and regulations of the Member States, to support action taken

5. Cf. Article 6 of the Treaty of Lisbon.

by the Member States” “in order to combat all forms of discrimination based on sex, race or ethnic origin, religion or beliefs, disabilities, age or sexual orientation.” Article 23 of the Charter of Fundamental Rights on gender equality states that “the principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex”.

Teresa Rees (2002) analyzes the EU legal non-discrimination framework by identifying three phases that are both chronological and theoretical: equality of treatment in the 1970s, giving way to positive actions in the 1980s and to gender mainstreaming in the 1990s. She associates equality before the law with a form of “tinkering” with what exists, while the adaptation of the rule of law to differences in the situation of each person through adopting specific measures is considered to be “tailoring”. Gender mainstreaming (Dauphin and Sénac-Slawinski, 2008) for its part is associated with transformation in so far as it is positioned above both isonomy and corrective equality. Indeed, it “should ideally make it possible to identify systems and structures at the origin of indirect discrimination and rethink them in order to find remedies” (Rees, 2002: 46–48).

Challenging any unequivocal or ideal definition, Judith Squires analyzes the scope and practical limits of this concept-method by offering three possible approaches: a new strategy to change public policy (transformation), a bureaucratic instrument to integrate gender (inclusion), and a process of adding it to the agenda (displacement). Her thinking emphasizes the need to reflect on gender inequality and discrimination in relation to other forms of discrimination.

2.3. Contributions of EU law: indirect discrimination and sharing the burden of proof

Pierre Bailly, senior judge at the Social Division of France’s Cour de Cassation, outlines four points regarding the main contributions of EU jurisprudence to French jurisprudence in the matter of equality between men and women workers: the method of verifying inequalities by introducing the concept of indirect discrimination; evidentiary rules to be applied; possible justifications of differential treatment; and the issue of “positive”

discrimination or action. The first two principles, which he defines as characterizing the approach to equality by EU law, express a common goal: to give full effect to the prohibition of discrimination between men and women workers by changing the rules of evidence. “After 1980 the EU judge ... has recourse to the notion of indirect discrimination: the application of an apparently neutral criterion, foreign to the sexual identity of the salaried employee and establishing differential treatment between workers, can in reality conceal discrimination towards persons of a particular sex. For instance, if a collective agreement denies part-time workers the benefit of an end-of-the-year bonus and if in reality it turns out that this category is primarily made up of women, it will be an example of indirect discrimination. (ECJ, 9 September 1999, *Krüger*, n° C 281/97)” (Bailly, 2004: 83). ECJ jurisprudence considers in fact that as soon as differential treatment statistically affects a majority of workers of the same sex, unjustified by objective facts, this represents indirect discrimination. It has ruled in particular that a difference in taking into consideration the seniority of the full- and part-time workers is discriminatory.⁶

In addition, EU Directive 97/80 of 15 December 1997 and EU jurisprudence⁷ impel the States to transpose the principle of sharing the burden of proof. “The main judgments of the Court have been about equality in pay. These include the *Danfoss*, *Enderby* and *Royal Copenhagen* cases, as well as the *Bilka* judgement” (Lanquetin, 1998: 688).

2.4. Multiannual strategy

The priority areas for action are defined in the roadmaps and the multiannual strategy. These reflect the changes in targets and priorities. The first one, dated 1 March 2006, sets out six areas for action for the 2006-2010 period:

- equal economic independence for women and men;
- reconciliation of professional, family and private life;
- equal representation in decision-making;
- eradication of all forms of gender-based violence and slavery;
- eliminating gender-based stereotypes in society;
- promoting gender equality outside the European Union.

6. EJC 7 February 1991, case C. 184/89 (*Nimz*), Rec. I, p. 91.

7. EJC 13 May 1986, *Bilka*, case 170/84; EJC, 27 October 1993, *Enderby*, case C-127/92.

A new strategy was elaborated in 2010 for the 2010-2015 period. It is now part of the Europe 2020 strategy. The priorities are similar, except that reconciliation disappeared from the six priority areas for action (although it is still covered by the instruments) and is replaced by equal pay.

Another sign of the times, the equality policy which throughout the 1970s and 80s was part of the free competition framework, was in 2006 included in the growth and employment programmes as well as those dealing with demographic changes. The Roadmap clarifies that not only is gender equality a fundamental right and a common value of the European Union, but also a necessary condition for attaining the EU's goals for growth, employment and social cohesion (EC, 2007): "The Pact demonstrates the Member States' determination to implement policies aimed at promoting the employment of women and guaranteeing a better balance between professional and private life in order to meet the challenges of demographic change. ...The ageing of the population, combined with declining birth rates, raises considerable challenges for our societies... It is clear that policies on gender equality will contribute significantly to meeting those challenges: on the one hand, by stimulating the employment of women, thus compensating for the forecast decline in the working population; and, on the other, by supporting the individual choices of women and men, including decisions on the number of children they wish to have."

The 2010 strategy highlights the contribution of gender equality "to economic growth and sustainable development" while "taking inspiration from the Charter's priorities and the experiences of the 2006 gender equality roadmap." Between the two, sustainable development has replaced the demographic challenges. Simply a change of language?

3. Some debates

3.1. The European employment Strategy: employment rate and/or job quality?

According to the Lisbon employment targets set in 2000, by 2010 for the 15-64 age group the rate of women's employment was to reach 60% and the overall rate 70%. Neither of these two targets

was achieved as a European average, as there was a step backward between 2008 and 2010 due to the crisis. In 2010, the rate was 5.9 points short of the goal for the overall employment rate and 1.8 point short of that for women.

The European employment Strategy set a goal for 2020 of 75%, for women, as for men, but this time for the 20 to 64 age group. Therefore it will be easier to achieve (if the Lisbon target for 2010 had been set for that age group, it would have been achieved for women).

The major remaining question, however, is that of the means to get there. If the rise in the employment rate is based on an increase in part-time and temporary jobs, it is not a guarantee of economic independence, which is after all the number one objective of the roadmaps. Worse, the appearance of new forms of inequality is another result. The Commission is vacillating from this point of view between an analysis of inequalities brought on by the fact that the part-time jobs are in the main held by women and the vagueness of recommendations on how to reach the employment rate objectives. Beyond that, there are still ambiguities regarding flexibility: flexibility is sometimes extolled as an instrument of employment policy (eliminate the rules that create rigidity), and at others times as an element of reconciliation policy (flexibility and scheduling arrangements for parents).

By neglecting the multiple forms of employment inequality, the targets established are not likely to reduce these inequalities. The question of job quality is thus vital.

3.2. “Best practices” and soft law against anti-discriminatory law?

As far as the legal framing is concerned, in the context of developing the EU’s anti-discriminatory law, promoting equality as soft law (charter, label) “without rights or obligations” (Junter and Sénac-Slawinski, 2010) reveals tensions between managerial norms and legal-political norms (Beveridge and Velluti, 2008). Thus it is essential to question the normative stakes of promoting gender equality through soft law, stripped of any binding dimension, which “is also inevitably a *fuzzy law* (Delmas-Marty, 1986, 2004). Formulated in terms of targets or recommendations, the law loses precision; not only do vague terms tend to multiply, such as “charter” or “partnership”, but formulations such as “principles”

or “standards” create an area of uncertainty and indeterminacy” (Delmas-Marty, 2004: 143–44).

3.3. Gender equality interrogates the Europeanization process

EU policies on gender equality provide a vantage point for analyzing the Europeanization process (Lombardo and Forest, 2012; Radaelli, 2003) at the intersection of three perspectives (Liebert, 2003): *institutional* (directives and ECJ decisions), *cognitive* (analysis of frames of reference, through which the “public problem” of gender equality is reformulated (Muller, 2005)); and *interactionist* (in relation to the creation of transnational voices representing “gender interests”).

Taking into account the multiple types of discrimination with an intersectional approach of discriminatory criteria is in particular a challenge for 21st century Europe (Squires, Skeje and Krizsan, 2012). Currently “the method of processing appeals cases seeks the motive behind the discrimination or the motive that appears the easiest to demonstrate, not the interactions” (Lanquetin, 2009: 103–4).

From a cognitive point of view, equality policies were first conceived to eliminate distortions in competition, but then have changed, without at the same time questioning the soundness of free competition. Between supporting growth (Wilkinson and Pickett, 2013) and anti-discriminatory principles, the justification of these policies in the name of social investment (Morel, Palier and Palme, 2012) interrogates the principle of justice at work (Sénac, 2012).

The decision level is also problematic: simple guidelines and principles of subsidiarity now allow some countries to implement regressive policies on gender equality, while all are facing budget cuts for social policies in this period of crisis. This environment makes a convergence of the different countries unlikely.

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