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Gender Equality Law and Identity

Building for Europe

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This paper explores the degree to which gender equality law contributes towards the construction and articulation of the European Union's (hereafter, the EU) identity. Van Hoecke claims that "law [offers] a framework for human interaction and communication. Moreover, it is made and developed through communication".² Thus, law can be seen as communicating fundamental ideas about the underlying ideology and values held by a political body (in this case the EU). This paper aims to determine whether and how EU gender equality law communicates a sense of EU identity, and to what degree European citizens identify with this. These are important questions to ask now, at a time when one of the fundamental *raison d'être* of the EU is called into question via a brutal and spreading economic crisis. The literature tells us that in times of such economic hardship, policies aimed at inclusivity and equality (such as gender policy) can be pushed into retreat or at the least their progress can be slowed, as policy-makers and the public focus instead on economic survival.³ As Moghadam notes:

*Economic crisis has a way of undermining social and labor rights. Paid maternity leave is not enjoyed by all working women...but its expansion is undercut by recessions... Gender budgets instituted by governments to ensure that women are integrated into policies and planning and that they benefit from economic growth and social expenditures may be compromised if not eliminated as a result of austerity measures...*⁴

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² M van Hoecke *Law as Communication* (Hart Publishing, Oxford, 2002) at V.

³ I Bakker (ed) *The Strategic Silence: Gender and Economic Policy* (Zed Books, London, 1994); L Beneria and S Feldman (eds) *Unequal Burden: Economic Crises, Persistent Poverty, and Women's Work*. Boulder, CO: Westview Press, Boulder, 1992); D Elson (ed) *Male Bias in the Development Process* (Manchester University Press, Manchester, 1991); P Sparr (ed) *Mortgaging Women's Lives: Feminist Critiques of Structural Adjustment* (Zed Books, London, 1995) All cited in VM Moghadam "Women, Gender, and Economic Crisis Revisited" (2011) *Perspectives on Global Development and Technology* 10 at 33.

⁴ VM Moghadam at 35.

Contemporary criticisms of the current UK government's austerity measures, for example, indicate that women are expected to bear the brunt of the cuts to social policies, thus further entrenching the gender 'gap'.⁵ Given the breadth of the European crisis, it is pertinent at this time to ask whether we can expect to see a similar backtracking away from progressive legislation aimed at improving equality for men and women more widely across the Union. More importantly, we question the consequences that such retreat would have for the EU and ultimately for its identity.

Specifically, our paper considers the ideological motivations underlying gender law within the EU and the articulation, within that legislation, of the political identity of the EU itself. In order to assess the degree to which gender equality law may contribute to the articulation of an EU identity, the paper proceeds as follows: it first explores the concept of political identity in relation to the EU; it then considers the origins and content of gender equality law in the EU, paying particular attention to the institutional ideology inherent in the policy itself and the role that the (European) Court of Justice played in communicating this through its decisions; and finally the paper considers the resonance the EU's efforts in this area have with the European public. By considering closely the political and ideological roots of gender equality law within the EU as well as the connection to this by EU citizens, we aim to evaluate its position within and contribution towards the EU's processes of self-identification and legitimation.

Identity and the European Union

According to Str ath, questions of European identity have been on the political agenda of the EU since the Copenhagen EC summit in 1973.⁶ Over the last three decades, the official discourse of European integration has increasingly been characterised by a focus on identity.⁷ Indeed, so prolific has the discussion about EU identity been that Cerutti argues "there is

⁵ See for instance: K Bennhold "Cuts in UK Raise Risk for Women", *The New York Times* (online ed, New York, 17 April 2012); J Martinson, "Women Paying the Price for Osborne's Austerity Package", *The Guardian* (online ed, London, 30 March 2012); D Sands, *The Impact of Austerity on Women* (Online ed, Fawcett Society, Policy Briefing, March 2012); R Sunderland "This Austerity Budget Acts as a Woman-Seeking Missile", *The Guardian* (online ed, London, 8 August 2010).

⁶ B Str ath, "A European Identity: To the Historical Limits of a Concept" (2002) *European Journal of Social Theory* 5(4) at 387.

⁷ B Str ath, "Introduction: Europe as a discourse" in B Strath (ed) *Europe and the Other and Europe as the Other*, (Brussels, PIE Peter Lang, 2000), cited in G Aiello "The Appearance of Diversity: Visual Design and the Public Communication of EU Identity" in J Bain and M Holland (eds) *European Union Identity* (Nomos, Baden Baden, 2007) at 149.

hardly so confused and polysemic a topic in European affairs as identity”.⁸ It is not within the remit of this paper to review the whole of that highly fragmented field but some delimitation must be made to provide a framework for the remainder of the analysis. On the one hand, there is a vast body of literature which explores the development and existence (or lack thereof) of a shared European identity between European citizens; a ‘groupness’ or ‘community’.⁹ Habermas and Derrida describe the concept as “a feeling of common political belonging... [in which] the image of a peaceful, cooperative Europe, open toward other cultures and capable of dialogue, floats like a mirage before us all”.¹⁰ This usage is often closely linked to the concept of legitimacy, as the existence of such a common ‘identity’ is taken to be a prerequisite for the legitimacy of the EU polity.¹¹

Parallel to this, there is a smaller but still significant cohort which has explored the external identity of the Union itself; the extent to which the EU has constructed a coherent vision and identity for itself which is projected beyond European borders.¹² The claim that the EU is not broadly understood internationally has been a persistent and difficult thorn in the side of EU leaders. Whether one subscribes to Hill’s capabilities-expectations gap,¹³ or concedes that, as Bretherton and Vogler have argued in relation to EU environmental policy, the EU does occupy a presence and role as an international actor,¹⁴ the argument that the EU lacks a coherent international identity has remained an important theme in EU external relations

⁸ F Cerutti, “Why Political Identity and Legitimacy Matter in the European Union”, in F Cerutti and S Lucarelli (eds) *The Search for a European Identity: Values, Policies and Legitimacy of the European Union*, (Routledge/Garnet, London/New York, 2008), at 3.

⁹ V Balli, “An EU Self-Understanding of the European Union Revealed Through Justifications of Political Action”, in J Bain and M Holland (eds) *European Union Identity* (Nomos, Baden Baden, 2007) at 12.

¹⁰ J Habermas and J Derrida “February 15 or What Binds Europeans Together: A Plea for the Common Foreign Policy, Beginning in the Core of Europe” (2003) *Constellations* 10(3) at 293-4.

¹¹ See for example: R Bellamy and A Warleigh “From an Ethics of Integration to an Ethics of Participation: Citizenship and the Future of the European Union” (1998) *Millennium* 27, 447-70; M Bruter, *Citizens of Europe? The Emergence of a Mass European Identity* (Palgrave Macmillan, Houndsmills/Basingstoke/Hampshire/New York, 2005); F Cerutti “A Political Identity of the Europeans?” (2003) *Thesis Eleven* 72(1) 26-45; J Habermas *The Postnational Constellation* (Polity Press, London, 2001); JE Fossum, “Identity-Politics in the European Union” (2001), ARENA Working Papers 1/17; C Lord, “Legitimacy, Democracy and the EU: When Abstract Questions Become Practical Policy Problems” (2000) Economic and Social Research Council Policy Paper 03/00.

¹² See for example: C Bretherton and J Vogler, *The European Union as a Global Actor*, (Routledge, London, 2006 2nd Edition); I Manners and R Whitman “‘The Difference Engine’: Constructing and Representing the International Identity of the European Union”(1998) *Journal of European Public Policy* 10(3); I Manners and R Whitman “Towards Identifying the International Identity of the European Union: A Framework for Analysis of the EU’s Network of Relationships” (1998) *European Integration* 21.

¹³ C Hill “The Capability-Expectations Gap, or Conceptualising Europe’s International Role” (1993) *Journal of Common Market Studies* 31(3).

¹⁴ Bretherton and Vogler, above n 15.

literature,¹⁵ and there appears, as yet, to be no academic consensus on defining “the nature of the beast”.¹⁶ There is, moreover, no consensus on whether such a definition would be useful.

While both the external identity literature and the collective European identity scholarship are of interest in this paper, the principle focus will be on a third dimension of EU identity¹⁷: the political identity of the Union itself. Drawing from Balli’s argument,¹⁸ this paper takes EU identity to mean two things: the kind of entity that the EU *is*, and the particulars of that entity – that is, the “ideational stuff that renders it distinct”.¹⁹ Cerutti adds that political identity must be understood as the issues or actions of the EU which are perceived and talked about by Europeans as communal ones.²⁰ Importantly for this paper, Cerutti further clarifies that ‘Europeans’ should mean not just the citizens of the EU, but also the elites within the institutional processes of integration.²¹

We are speaking then largely of the political identity of the EU itself; this being an essential component of legitimacy.²² But to the extent that identity is a collective concept and that a policy must also be identified with by its citizenry in order to actualise legitimacy, it is also necessary to consider the level of connection with EU gender equality law by European citizens. Balli proposes that the EU identity (or as he calls it, the EU’s normative self-understanding) is linked to observable political actions; in other words, the self-understanding of the EU is revealed in and through its policies, legislation, statements and actions.²³ Identity in this conception is constructivist and understood as a constant process of production and reception. As Mach and Pozarlik claim, identity ought to be conceptualised as “not ‘being’ but as ‘becoming’”, as a process of construction, as activity in the direction of building a

¹⁵ Manners and Whitman, above n 15.

¹⁶ T Risse, “Exploring the Nature of the Beast: International Relations Theory and Comparative Policy Analysis Meet the European Union” (1996) *Journal of Common Market Studies* 34(1) cited in Balli above n 12, at 12.

¹⁷ There is, of course, a fourth line of discussion on the European identity which takes a more historical-cultural perspective on the philosophical roots of a shared European identity and heritage. See for example, E Rudolph “Historical Manifestations of European Identity and its failures” in F Cerutti and E Rudolph (eds) *A Soul for Europe: on the Political and Cultural Identity of the Europeans* (Peeters, Leuven, 2001) cited in Cerutti above n 11.

¹⁸ Balli above n 12 at 12.

¹⁹ *Ibid.*

²⁰ Cerutti above n 11 at 5.

²¹ *Ibid.*

²² *Ibid.* at 6; D Beetham and C Lord, *Legitimacy and the European Union* (Addison Wesley Longman, Essex, 1998).

²³ Balli above n 12 at 13.

collective image in a dialogue and negotiation with others”.²⁴ Schimmelfennig has recently called for a refocusing of scholarship paying attention to *what* the EU does and *why*.²⁵ Within this framework, identity can be considered as a “dynamic process of construction, something one *does*, rather than what one is”.²⁶ Following this line of argument, we contend that EU law is one ‘location’ of EU identity: a location in which the EU’s normative self-understanding is constructed, articulated and communicated to the EU community, citizens and elite more widely. Thus, this paper provides an alternative to policy analysis by considering the actions and ideology of EU law and policy-makers in the field of gender equality, as well as public perceptions of the role of this policy area within the EU itself.

Connecting EU Political Identity and Gender Equality Law

As Sikkink highlights, ideology forms an intrinsic part of social and political structures in the sense that “social institutions can be regarded as cognitive and normative ideas ‘frozen in time’”.²⁷ Further, Jameson argues that the construction of identity does not take place in a neutral vacuum, but is embedded in complex relations of power.²⁸ Within the EU context, those power relations are located within the institution of Union law. Considerable research has examined the various significant legislative steps which have marked the erection of the EU’s gender equality law and policy. Large amounts of literature can be found in relation to the early stages, including the awakening of Article 119 of the Treaty of Rome²⁹ together with the implementation of the Equal Pay Directive,³⁰ and the Equal Treatment Directive³¹;

²⁴ Z Mach and G Pozarlik “Collective Identity Formation in the Process of EU Enlargement: Defeating the Inclusive Paradigm of a European Democracy?” (2008) RECON Online Working Paper 14 at 2 cited in N Schleicher “Gender Identity in a Democratic Europe” (2010) RECON Online Working Paper 6 at 3.

²⁵ K Smith, “The European Union in the World: Future Research Agendas”, in: M Egan and N Nugent, W Paterson (eds) *Research Agendas in EU Studies. Stalking the Elephant* (Palgrave Macmillan, Basingstoke, 2010) at 343 in F Schimmelfennig “Europeanization beyond the Member States” (2010) *Zeitschrift für Staats- und Europawissenschaften* 8; F Schimmelfennig “EU External Governance and Europeanization Beyond the EU” in D Levi-Faur (ed) *Oxford Handbook of Governance* (Oxford University Press, Oxford, 2012) 656 – 672.

²⁶ Mach and Pozarlik in Schleicher above n 26.

²⁷ K Sikkink *Ideas and Institutions: Developmentalism in Brazil and Argentina* (Cornell University Press, Ithaca NY, 1991) at 26 in TA Börzel and T Risse, “The Transformative Power of Europe: The European Union and the Diffusion of Ideas” (2008) *Antrag auf Einrichtung einer Kolleg Forschergruppe*, Online ed.

²⁸ F Jameson “On cultural studies” in J Rajchman (ed.) *The Identity in Question* (Routledge, New York, 1995) in U Olausson “Towards a European identity? The news media and the case of climate change” (2010) *European Journal of Communication* 25(2) at 140.

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

³⁰ Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women, OJ [1975] L45/19.

³¹ Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, OJ [1976] L39/40.

as well as the later gender equality developments³² which have taken multifarious aspects ranging from the many reforms of the original gender equality directives³³; the protection of pregnant workers³⁴; the extension of the policy towards reconciliation between work and family life³⁵; positive actions³⁶ or gender mainstreaming³⁷. However, the vast majority of this scholarship focuses on the relationship between law and politics; there is little attention paid to the role that social policies like the EU's gender equality approach can play in the articulation of a coherent EU identity.³⁸ Yet, as Hoskyns has argued, "[i]ssues of social policy are always extremely sensitive in that they concern the allocation of resources and *the transmission of ideology*".³⁹ Thus it is important to account for the role that EU ideology plays in the development of gender equality policy, and the role that this in turn has in shaping the EU's own institutional or political identity.

In the 1990s, the EU embarked on its ambitious project towards full 'union', with all of the political and social challenges that encompassed. Since then, it has faced several supposed 'legitimacy crises' and it has been vigorously engaged in the process of self-identity building.

³² S Mazey "Policy Entrepreneurship, Group Mobilisation and the Creation of a New Policy Domain: Women's Rights and the European Union" in J. Richardson (ed) *Constructing a Policy-Making State? Policy Dynamics in the EU*, (Oxford University Press, Oxford, 2012).

³³ Directive 2002/73/EC of The European Parliament and of the Council of 23 September 2002 amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, OJ [2002] L269/15 and Directive 2006/54/EC of the European Parliament and of 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), OJ [2006] L204/23. See also: N Burrows and M Robison "An assessment of the Recast of Community Equality Laws" (2007) *European Law Review* 13(2) 186-203; A Masselot "The New Equal Treatment Directive: Plus Ça Change..." (2004) *Feminist Legal Studies* 12(1) 93-104; A Masselot "The State of Gender Equality Law in the European Union" (2007) *European Law Journal* 13, 152-168.

³⁴ Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC), OJ [1992] L348/1. See: E Caracciolo di Torella and A Masselot "Pregnancy, Maternity and the Organisation of Family Life: An Attempt to Classify the Case Law of the Court of Justice" (2001) *European Law Review* 26, 239-260.

³⁵ Association des Femmes de L'Europe Méditerranéenne (AFEM), *Concilier Famille et Travail pour les Hommes et les Femmes : Droit et Pratiques*, (Sakkoulas Bruylant, Brussels, 2005); S Burri "Le point sur la conciliation et la vie professionnelle et la vie privée dans le droit communautaire" ["Reconciliation of work and private life in EU law: state of affairs"] (2010) *ERA Forum* 11(1); E Caracciolo di Torella and A. Masselot *Reconciling Work and Family life in EU Law and Policy* (Palgrave Macmillan, London, 2010).

³⁶ M Stratigaki (2005), "Gender mainstreaming vs Positive Action: an ongoing conflict in EU gender equality policy", *European Journal of Women's Studies*, 12(2), 165-186.

³⁷ M Pollack and E Hafner-Burton "Mainstreaming gender in the European Union" (2000) *Journal of European Public Policy* 7(3), 432-56; J Rubery "Reflections on gender mainstreaming: an example of feminist economics in action?" (2005) *Feminist Economics* 11(3), 1-26.

³⁸ One notable exception is the work by Demertzis. See: V Demertzis "The European Social Model(s) and the Self-Image of Europe" in F Cerutti and S Lucarelli (eds) *The Search for a European Identity: Values, Policies and Legitimacy of the European Union*, (Routledge/Garnet, London/New York, 2008).

³⁹ Hoskyns above n 32 at 46 – emphasis added.

Over that same period, the EU has also seen its progress in the field of specific social policies develop with apparently new enthusiasm. Gender equality law is among the most highly developed EU policy, largely indebted to a remarkable early judicial activism. We contend that, far from being simply a core area of EU law developments, the EU's highly developed body of gender equality law has functioned to foster a supranational political identity for the EU.

Relationship between gender equality and the economy

A feature of the principle of EU gender equality is inherent to its historical development which is anchored in economic considerations.⁴⁰ Although, the original emphasis on equal pay and on avoiding distortions of competition between Member States⁴¹ has gradually been replaced by concerns for equality as a fundamental right,⁴² the economic roots still constitute an integral part of the gender equality principle.⁴³

Paradoxically, it is the very economic background which has made it possible to achieve the political consensus between the Member States to elevate gender equality to a fundamental principle.⁴⁴ It is therefore arguable that the essence of the principle of gender equality lies in the complex balance between human rights and market oriented concerns. These considerations do not apply, at least not to the same extent, to other forms of discrimination. The interplay between economic consideration and fundamental rights which underpins gender equality was not a motivation for introducing Article 13 EC (now Article 19 TFEU), which is instead an expression of social justice.

⁴⁰ C Barnard "The Economic Objectives of Article 119", in T. Hervey and D. O'Keeffe (eds) *Sex Equality Law in the European Union* (Wiley, London, 1996) at 321; I Moebius and E Szyszczak (1998), "Of Raising Pigs and Children" (1998) *Yearbook of European Law* 18 at 126; R Nielsen, *Gender Equality in EU Contract Law*, (DJØF, Copenhagen, 2004).

⁴¹ B Ohlin "Social Aspects of European Economic Co-operation: Report by a Group of Expert" (1956) *International Labour Review* 102 at 99; Barnard above n 43; R. Nielsen, E. Szyszczak, *The Social Dimension of the European Union* (Handelshøjskolens Forlag, Copenhagen, 1997); however Hoskyns (above at n 32) suggests that non-economic factors also contributed to the inclusion of Article 119

⁴² Case 149/77 *Defrenne III*, paragraphs 26 and 27; Joined Cases 75/82 and 117/82 *Razzouk and Beydoun v Commission*, [1984] ECR 1509, paragraph 16, and Case C-13/94 *P. v S. and Cornwall County Council* [1996] ECR I-2143, paragraph 19; A Arnall, *General Principles of EC Law and the Individuals* (Leicester University Press, Leicester, 1990); C Docksey "The Principle of the Equality between Women and Men as a Fundamental Right under Community Law" (1991) *Industrial Law Journal* 20 at 258.

⁴³ See for example, the explanatory memorandum of Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, OJ [2004] L373/37

⁴⁴ Report from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions Report on Equality Between Women and Men, 2004, COM (2004) 115 final.

Origins and Ideology of EU Gender Equality Policy

The concept of equality in EU law is neither static nor monolithic. In the context of individuals, the EU Treaties have traditionally envisaged two grounds of equality: equality between EU nationals,⁴⁵ and equality between men and women.⁴⁶ The Treaty of Amsterdam has extended the scope of application of this principle in the form of a prohibition of discrimination on the basis of seven grounds: race or ethnic origins, religion or belief, age, sexual orientation and disability (Article 19 TFEU).⁴⁷ Despite their undeniable similarities,⁴⁸ each of these grounds of anti-discrimination and equality have evolved in the EU legal order in their own ways. These have been shaped by different actors following different agendas and priorities, each of them thus creating a specific *acquis communautaire*. Accordingly, each ground of discrimination needs to be analysed individually and this article considers gender as the reference grounds for equality.

For the purpose of this article, we can schematically identify the development of EU gender equality into three main phases.

- (1) The first period** starts with the adoption of Article 119 in the Treaty of Rome until the early 1970s **and can be referred to as the “dormant period” of gender equality.**

The principle of equal pay for equal work as inserted in Article 119 of the Treaty of Rome was very much linked to market considerations.⁴⁹ As the French legislator had introduced equal pay in national law, the government feared that industries that relied heavily on female employment, particularly in the textile industry, would face unfair competition from other Member States not bound by equal pay.⁵⁰ The French government therefore negotiated the insertion of Article 119 into the Treaty of Rome. The Treaty provision was originally weak in scope, as it exclusively provided for the prohibition of pay discrimination between men and

⁴⁵ Article 6 EEC provided a general prohibition of “any discrimination on the grounds of nationality” (now Article 18 TFEU).

⁴⁶ Article 119 EEC provided that men and women should receive equal pay for equal work (now Article 157 TFEU).

⁴⁷ L Waddington, “The Development of a New Generation of Sex Equality Directives (editorial)” (2004) *Maastricht Journal of European and Comparative Law* 1 at 3.

⁴⁸ M Bell “The Right to Equality and non Discrimination” in T. Hervey and J. Kenner (eds) *Economic and Social Rights under the EU Charter of Fundamental Rights: a Legal Perspective* (Hart, Oxford, 2003) at 91.

⁴⁹ W Streeck, “From Market Making to State Building? Reflections on the Political Economy of the European Social policy” in S Liebfried and P Pierson (eds), *European Social Policy: Between Fragmentation and Integration* (Brookings, Washington DC, 1995) 389-430 at 399.

⁵⁰ A Van der Vleuten, *The Price of Gender Equality. Member States and governance in the European Union*, (Ashgate, Aldershot, 2007).

women who were doing the same work. It was further regarded as a declaration of intent, and not an active legal obligation of result. Thus, during the late 50s and 60s, Article 119 did not attract much interest and the legal provision lay as dormant as Sleeping Beauty.⁵¹

(2) The period commencing from the awakening of the policy area in 1970 until the adoption of the Treaty of Amsterdam 1997 represents the second period of the development of the EU gender equality and is characterised by the use of formal equality and the prohibition of sex discrimination almost exclusively within the labour market.

It was not until the late 60s that Elaine Vogel-Polsky, a Belgian lawyer, took a series of test cases on equal pay to the ECJ. The so-called three *Defrenne* cases (1970, 1975 and 1979) resulted in ‘awakening’ the anti-discrimination legal provision. She was acting within a social climate where equal pay was high on national agenda, due to a number equal pay strikes in the manufacturing industry. The idea of utilising Article 119 EEC to force the hand of the national legislator had been put forward in various industrial actions. However, despite a high level of activities in the area of manufacturing, Vogel-Polsky could not find a test case through the factory workers. She had to rely instead on the service sector of the airline industry. The air hostesses in the national Belgian airline Sabena were increasingly unhappy about their terms of and conditions of employment. Although direct discrimination in basic payment had been abolished, the Sabena conditions of employment led to pay disparities by requiring female air hostess to retire at the age of 40 as opposed to their male counterpart who could retire at the age of 55. Not only had these terms implied that women were only good enough to serve (male) air travellers while young and beautiful, it also meant that these women lost hard pay. Indeed, they were losing their job and their earning, having to seek work at a vulnerable age. The retirement policy further meant that they could never qualify for the full payment of pension. Gabrielle Defrenne, an air hostess on Sabena, was forced to retire at the age of 40 and agreed that Vogel-Polsky could use her case as a test. The *Defrenne* litigation saga lasted a decade. The earliest chain of key-cases on equal pay (*Defrenne* no.1 and no.2)⁵² provided for the direct horizontal effect of Article 119 EEC as well as its fundamental rights quality. In *Defrenne* (no. 3),⁵³ the ECJ stressed that Article 119 EEC had a double aim: to avoid “*competitive disadvantage in intra Community competition*”

⁵¹ Hoskyns above n 32.

⁵² Case 80/70 *Defrennes* (no. 1) [1971] ECR 445; Case 43/75 *Defrennes* (no. 2) [1976] ECR 455.

⁵³ Case 149/77 *Defrennes* (no. 3) [1978] ECR 1365.

for such undertakings that applied the equal pay principle (economic aim) and the improvement of living and working conditions (social aims). Since its decision in *Deutsche Post /Sievers & Schrage*,⁵⁴ the Court further held that the economic aim is now only secondary to the social aims, making gender equality in the workplace a clear ideological motivation in the application of European Union law.

This period is characterised by the strong impact of **litigation and the activism of the European Court of Justice**. Relying on sparse legal provisions, the Court delivered strong and far reaching judgements in the area of equal treatment between men and women.⁵⁵ The Court has interpreted generously and extended the substantive protection provided by sex equality law to many areas including pregnancy,⁵⁶ positive actions,⁵⁷ and contracted-out occupational pensions.⁵⁸ In addition, it provided procedural safeguards and guaranteed the effectiveness of the law through the development of principles such as the direct effect of directives,⁵⁹ the concept of indirect discrimination,⁶⁰ the shift of the burden of proof from the complainant to the respondent;⁶¹ or the exclusion of prior fixing of any upper limit on compensation.⁶² All these principles have later been codified by legislation to match the case law principles.⁶³

However, this second phase is also characterised by the reliance on the concept of **formal equality and the prohibition of sex discrimination almost exclusively within the labour market**. Although provisions adopted towards the end of this period start to provide for achievement of the broader concept of equal opportunities within and outside the workplace,

⁵⁴ C-270/97 *Deutsche Post /Sievers & Schrage* [2000] ECR I-929.

⁵⁵ P. Davies, "The European Court of Justice, National Courts, and the Member States" in P. Davies, A. Lyon-Caen, S. Sciarra and S. Simitis (eds), *European Community Labour Law: Principles and Perspectives. Liber Amicorum Lord Wedderburn of Charlton* (Oxford University Press, Oxford, 1996), 95-138; G. More "The principle of Equal Treatment: from Market Unifier to Fundamental Right?" in P. Craig and G. De Búrca (eds) *The Evolution of EU Law* (Oxford University Press, Oxford, 1999) at 517.

⁵⁶ Case 177/88, *Elisabeth Johanna Pacifica Dekker v Stichting Vormingscentrum voor Jong Volwassenen (VJV-Centrum) Plus* [1990] ECR I-3941; Case C-32/93, *Carole Louise Webb v EMO Air Cargo (UK) Ltd.* [1994] ECR I-3567.

⁵⁷ Case C-409/95, *Hellmut Marschall v Land Nordrhein-Westfalen* [1997] ECR I-6363.

⁵⁸ Case C-292/88 *Barber v. Guardian Royal Exchange Assurance Group* [1990] ECR I-1889.

⁵⁹ Case 152/84 *Marshall v Southampton and South-West Hampshire Area Health Authority (no. 1)* [1986] ECR 723.

⁶⁰ Case 170/84 *Bilka* [1986] ECR 1607.

⁶¹ Case C-127/92, *Dr. Pamela Mary Enderby v Frenchay Health Authority and Secretary of State for Health* [1993] ECR I-5535.

⁶² Case C-271/91 *Marshall v Southampton and South-West Hampshire Area Health Authority (no. 2)* [1993] ECR I-4367.

⁶³ Masselot above n 36.

generally EU sex anti-discrimination law did not address structural inequalities and was merely concerned with female issues.

In spite of its activism during this period, the Court had not gone as far as to provide a definition for the broader concept of gender equality but it had identified its main features, namely *formal* or *substantial* equality. As these features have characterised the gender equality debate since its introduction in 1957 it is important to briefly analyse them. The concept of formal equality stems from the Aristotelian principle “... things that are alike must be treated alike, while things that are unlike should be treated unlike in proportion to their unalikehood”.⁶⁴ Formal equality aims to develop a system of legal neutrality which is blind to sex differences. This has led to the creation of gender neutral norms. Thus, individuals doing the same jobs must receive equal remuneration regardless of their sex.⁶⁵ Although, this approach has been most useful to redress blatant sex discrimination, social and legal evolutions have highlighted the shortcoming of the formal equality principle.⁶⁶ Formal equality neither specifies the circumstances which make individuals different nor gives an indication as to how one might find an adequate comparator. Indeed, the difficulties in establishing a comparator have been heightened by the ECJ’s judgment in *Allonby*.⁶⁷ It thus leaves open some crucial questions: what constitutes likeness? What constitutes difference? Who are deemed to be alike? Without answering these questions, equality is mere rhetoric and can have some detrimental consequences.⁶⁸ Firstly, formal equality does not consider the overall context in which individuals are placed and the fact that that inequalities between men and women often arise from structural inequalities which are inherent in society. Secondly, it assumes that individuals make free choices when often this is not the case. Thirdly, too often it uses the male norm as a standpoint.⁶⁹

The shortcomings inherent in the concept of formal equality have been addressed by relying on the concept of substantive equality.⁷⁰ This is based on the assumptions that gender

⁶⁴ Aristotle, *Ethica Nicomachea*, V. 3 1131a - 1131b, W. Ross trans, 1925.

⁶⁵ Case 80/70 *Defrennes* (no. 1) [1971] ECR 445.

⁶⁶ S Fredman *Combating Racism with Human Rights: the Right to Equality* (Oxford University Press, Oxford, 2001) at 20.

⁶⁷ Case C-256/01 *Allonby v Accrington & Rossendale College and Others* [2004] ECR I-873.

⁶⁸ P Western “The Empty Idea of Equality” (1982) *Harvard Law Review* 95 at 543; C Barnard (1999), ‘Gender Equality in the EU: A Balance Sheet’ in P Alston (ed) *The EU and Human Rights* (Oxford University Press, Oxford, 2000) at 223.

⁶⁹ K O’Donovan *Family Law Matters* (Pluto, London, 1993) at 63.

⁷⁰ B Hepple and C Barnard ‘Substantive Equality’ (2000) *Cambridge Law Journal* 59, at 562.

inequalities are structural and attempts to focus on the *symptoms* of inequality by taking account of the starting differences and different contexts in which individuals are placed. The scope of substantive equality is to facilitate the achievement of equality of opportunity, as for instance, the specific provisions applying for the protection of pregnant workers and working mothers.⁷¹ However, it can be stretched as to lead to equality of result.

(3) The third period is characterised by the constitutionalisation of the principle of gender equality in the Treaty of Amsterdam and reinforced by the Treaty of Lisbon.

In the month leading up to the negotiation of the Amsterdam Treaty, a new Labour government was elected in the United Kingdom, which facilitated the unlocking of a number of social policy impasses and generally lifted the mood surrounding social negotiations. As a result, the Treaty of Amsterdam fundamentally changed the EU approach to gender equality law and established a very different frame of mind by entrenching the concept of substantive equality within the constitutional order of the EU. This approach was further reinforced by the Lisbon Treaty. The introduction of Article 13 EC (now Article 19 TFEU), which has permitted the EU to adopt for the first time legislation on gender equality outside of the strict confine of the workplace,⁷² symbolises this new approach to equality.

(a) Gender equality has become a constitutional principle of EU law

The Treaty of Amsterdam and later the Lisbon Treaty have entrenched “gender equality as one of the central missions and activities of the Union.”⁷³ The Treaty on European Union formalised the EU’s positive obligation to not only achieve but also to promote gender equality. Article 2 TEU includes equality as one of the *values* on which the Union is founded. Article 3 TEU provided that gender equality and the combat of discrimination constitute aims of the EU.

The Treaty of Amsterdam also saw the introduction of the concept of ‘gender mainstreaming’,⁷⁴ now enshrined in Article 8 TFEU,⁷⁵ which places the EU legislator under

⁷¹ Caracciolo and Masselot, above n 37.

⁷² Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, OJ [2004] L373/37.

⁷³ M Bell, “The Principle of Equal treatment: Widening and Deepening”, in P Craig and G. De Búrca (eds) *The Evolution of EU Law* (second edition), (Oxford University Press, Oxford, 2011) 611-639 at 629.

⁷⁴ M Pollack and E Hafner-Burton “Mainstreaming gender in the European Union”, (2000) *Journal of European Public Policy* 7(3) 432-56.

an obligation to take into account the principle of gender equality when planning and enacting legislation.⁷⁶ Gender mainstreaming has also arguably been reinforced by the general mainstreaming provision included in Article 10 TFEU.⁷⁷ In addition, Article 141(4) EC (now Article 157(4) TFEU) allows using of positive action measures which provide specific advantages to make it easier for the under-represented sex to take part in paid employment. As such this provision aims to prevent or compensate for (past) disadvantages.⁷⁸ Together, gender mainstreaming and positive actions require that the elimination of gender inequalities and the promotion of gender equality be achieved in all fields of EU law.⁷⁹ In other words, the Amsterdam and Lisbon Treaties have clearly changed the game in that gender equality is no longer considered a question of reaction, but more importantly of pro-action. Accordingly, one of the main features of EU gender equality is that it is formed by both an obligation to achieve equality and an obligation not to discriminate against. Thus, gender equality has become a horizontal requirement to not only combat discrimination but also positively achieve equality in all areas of competence of the EU. Gender equality is no longer an exclusively female issue since the focus has been shifted to address inequalities on a more general socio-economic and structural level.

In addition, gender equality is confirmed as a constitutional fundamental right legally guaranteed by the Charter of Fundamental Rights following the adoption of the Lisbon Treaty. The Charter includes two types of provision on equality. First it provides for general provisions on equality in Article 20 which states that ‘everyone is equal before the law’ and in Article 21(1) which contains a prohibition of discrimination.⁸⁰ Second the Charter addresses a number of specific forms of inequalities; including gender equality at Article

⁷⁵ Article 8 TFEU provides that “[i]n all its activities, the Union shall aim to eliminate inequalities, and to promote equality, between men and women.”

⁷⁶ COM (1996) 67 final.

⁷⁷ Article 10 TFEU provides: “In defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.”

⁷⁸ RC Tobler, “Positive Action under the Revised Second Equal Treatment Directive”, in Association des Femmes Françaises Juristes & European Women Lawyers Association (Eds.), *L’Egalité entre Femmes et Hommes et la Vie Professionnelle, le Point sur les Développements Actuels en Europe*, (Paris: Editions Dalloz, 2003) 59-92.

⁷⁹ Masselot above n 36 at 154.

⁸⁰ Article 21(1) of the Charter provides: “Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.”

23.⁸¹ Moreover, under the solidarity title, Article 33 (2) includes provisions regarding the reconciliation of work and family life which guarantee the prohibition of dismissal on the grounds of pregnancy, maternity and parental leaves.⁸²

The impact of the Charter is still under discussion.⁸³ However, the concept of equality is central to the Charter, which together with the Treaty makes it a core value and an aim of the Union.⁸⁴ As Article 6(1) TEU gives the Charter the same legal value as the Treaties, gender equality has therefore been elevated not only as one of the fundamental values on which the EU is founded, but also as an objective, an aim, a principle, a fundamental right, a duty and a legal competence.

(b) Gender equality has become an external value of EU law

The constitutionalisation of gender equality law has moreover triggered its externalisation. The expansion of the scope of EU gender equality under the Amsterdam and the Lisbon Treaties has had international impacts. The Lisbon Treaty in particular includes competence relating to freedom, security and justice to which equality between women and men apply. Article 21(1) of the TEU outlines clearly that the EU's Common Foreign Policy and Security Policy "shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the *principles of equality* and solidarity, and respect for the principles of the United Nations Charter and international law."⁸⁵ Moreover, in this context it is also relevant to mention the Declaration made by the Member States on TFEU Article 3, which states that "The Conference agrees that, in its general efforts to eliminate inequalities between women and men, the Union will aim in its different policies to combat all kinds of domestic violence. The Member States should take all necessary measures to prevent and punish these criminal acts and to support and protect the victims." This means that issues such as use of evidence in

⁸¹ Article 23 of the Charter provides: "Equality between women and men must be ensured in all areas, including employment, work and pay. The principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex."

⁸² Article 33(2) of the Charter provides: "To reconcile family and professional life, everyone shall have the right to protection from dismissal for a reason connected with maternity and the right to paid maternity leave and to parental leave following the birth or adoption of a child."

⁸³ E. Ellis "The Impact of the Lisbon Treaty on Gender Equality" (2010) *European Gender Equality Law Review* 1, 7-13.

⁸⁴ Bell above n 76 at 630.

⁸⁵ Emphasis added.

criminal matters, protection of individuals in criminal proceedings, protection of victims of crime and the provisions on combating the traffic in human beings and the sexual exploitation of women and children has become subject to the respect of the principle of gender equality.⁸⁶ These issues are international issues to which the EU is parties. Thus, any action undertaken by the EU on these fronts is guided by the principle of EU gender equality and imposed to third countries.

Arguably the entrenching of gender mainstreaming in EU law and policy has constituted a transformative component of gender equality efforts⁸⁷ – that is involves a transformation of society “by naming and challenging the existing gender- and power relations through policy interventions wherein formerly disempowered women... participate in questioning, analysing and acting upon the gendered world”.⁸⁸ In some instances – such as EU aid policies with the developing world – this transformative principle amounts to conditionality,⁸⁹ however in the case of relations with neighbouring and other countries, the externalisation of EU gender equality principles is achieved to a large extent via the EU’s normative appeal. As Borzel and Risse have noted, EU partners may decide to emulate its approach by adopting certain ideas and values to improve their own performance or obtain greater legitimacy.⁹⁰

(c) Gender equality is directly linked to the identity of EU law

There is further evidence since the adoption of the Lisbon Treaty that gender equality is directly linked to the identity building of the EU. The process of constitutionalisation (at least with regards to the principle of gender equality) arguably began with the incorporation into the various treaties of the European Court of Justice’s General Principle of law.⁹¹ Bell argues that this process has evolved to include the entrenchment of norms, which are given higher legal status.⁹² While the constitutionalisation of the various symbols of EU identity (the flag and anthem in particular) was not included in the final Lisbon Treaty, there have been normative developments in areas like gender equality law which have contributed to EU

⁸⁶ H Askola, “Violence against Women, Trafficking and Migration in the European Union”, (2007) *European Law Journal*, 13(2) 204-217.

⁸⁷ P Debusscher “Mainstreaming gender in European Commission development policy: Conservative Europeanness?” (2011) *Women’s Studies International Forum* 34, 39–49.

⁸⁸ *Ibid.*

⁸⁹ *Ibid.*

⁹⁰ Borzel and Risse above n 30.

⁹¹ G More “The Principle of Equal Treatment: from Market Unifier to Fundamental Right” in P Craig and de Búrca (eds) *The Evolution of EU Law* (Oxford University Press, Oxford, 1999) at 548.

⁹² Bell above n 76 at 625.

identity construction. The extent to which gender equality has been embedded in to the Treaty as a higher value and a fundamental principle is of significance because it justifies the purposive interpretation of cases where there are legal conflicts of norms. It also serves as a reminder that gender equality is a frame of reference for reviewing all of the Union's actions, not just the narrow contexts in which there is specific EU legislation.⁹³ As Weiss and Wodak note: "the political construction of Europe is legitimised from above by reference to... participation, democracy and efficiency (procedure) as well as humanitarianism and social and economic standards (standardization)".⁹⁴ Further, as is demonstrated below, public awareness and support for the EU's actions in field of gender equality appear strong, particularly in areas of hard law. Since identity needs recognition for its construction, we contend that this is evidence of an increasingly clear EU identity.

Gender Equality Policy and European Public Discourses

European efforts in gender equality promotion are not a one-sided phenomenon. The goals and aspirations and efforts of law and policy-makers, while important, are not enough to fully understand the role that this area of EU action plays within the process of identity building in Europe. Since, as Hoskyns notes, "...it is through social policy that a large part of the population most directly experiences the actions of the state",⁹⁵ this paper therefore asks, how do the European public experience the developments of EU gender equality law? This section considers the findings from recent special Eurobarometer surveys including EBS 326 which focused specifically on perceptions of gender equality within the EU;⁹⁶ EBS 344 which explored EU citizens' perceptions of gender violence,⁹⁷ and EBS 376 which focused

⁹³ Ellis above n 86 at 8; J Shaw "The European Union and Gender Mainstreaming: Constitutionality Embedded or Comprehensively Marginalized?" (2002) *Feminist Legal Studies* 10 at 215.

⁹⁴ G Weiss and R Wodak "Analyzing EU discourses: Theories and applications" in R Wodak and P Chilton (eds) *A New Agenda in (Critical) Discourse Analysis* (John Benjamins Publishing Company, Amsterdam, 2005), 121-136 in LR Augustin, "It is all about the women': Intertwining discourses on gender equality, ethno national diversity and identity constructions among Danish politicians", (2009) EUROSPHERE WORKING PAPER SERIES Online Working Paper 22, at 5.

⁹⁵ Hoskyns above n 32 at 47.

⁹⁶ European Commission, "Special Eurobarometer 326: Gender equality in the EU in 2009" (2010) EBS 326. EBS 326 was carried out by TNS Opinion & Social network between 11 September and 5 October 2009. All 27 Member States were covered and a total of 26,470 respondents (all European citizens) were interviewed face-to-face. The methodology is that of Eurobarometer surveys as carried out by the Directorate General for Communication ("Research and Political Analysis" Unit).

⁹⁷ European Commission, "Special Eurobarometer 344: Domestic Violence Against Women" (2010) EBS 344. EBS 344 was carried out by TNS Opinion & Social network in February and March 2010. All 27 Member States were covered and a total of 26,800 (all European citizens) were interviewed face to face about domestic violence against women. The methodology used is that of surveys as carried out by the Directorate-General for Communication ("Research and Speechwriting" Unit).

on women in decision-making positions across Europe.⁹⁸ A number of dominant themes with which EU citizens are concerned when asked about issues of gender equality emerge from the data. The findings of the Eurobarometer surveys indicate that, in particular, violence against women and the gender pay gap are considered the key areas for future action. Indeed, so important are these two issues considered by the EU public that 92% of those surveyed felt that violence against women needed to be tackled urgently,⁹⁹ while 82% felt the gender pay gap required urgent attention.¹⁰⁰ These two issues (equal pay and violence against women) represent two opposite points on the spectrum of the EU's activities in the area of gender equality. On the one hand, the obligation to achieve equal pay between men and women is the oldest and a very well legally articulated right, supported by legally binding primary and secondary Union law as well as an array of case law. It is a core competence of the European Union. On the other hand, domestic violence is an issue that has been recently added on the list of "concerns" EU. It is an area where the EU has had little or no competence until very recently and where the EU has mostly intervened through non-legally binding soft law. The issue of domestic violence has also been fleshed out through the development of indirectly relevant secondary legislation. One such example can be found in the area of free movement of persons where following a divorce, the spouse who is not a national of a Member State is entitled to keep his/her right of residence in the EU if s/he has been a victim of domestic violence during the marriage.¹⁰¹ There does appear, from the findings, to be an East-West split across Europe, with those in some Eastern European countries giving much less priority to these issues than those in the older Member States (for example, in Latvia, Cyprus, Estonia, Bulgaria, the Czech Republic, Lithuania, and Poland more than a fifth of respondents felt this issue is "not urgent").

It is perhaps unsurprising to see the concern given to the issue of the gender pay gap, as across the EU, there is an average gap in wages between men and women of 17.9%. As the

⁹⁸ European Commission, "Special Eurobarometer 376: Women in Decision Making Positions" (2012) EBS 376. EBS 376 was carried out by TNS Opinion & Social network between 3 to 18 September 2011. All 27 Member States were covered and a total of 26,856 respondents (all European citizens) were interviewed face to face. The methodology used is that of the Standard Eurobarometer surveys of the Directorate-General for Communication ("Research and Speechwriting" Unit).

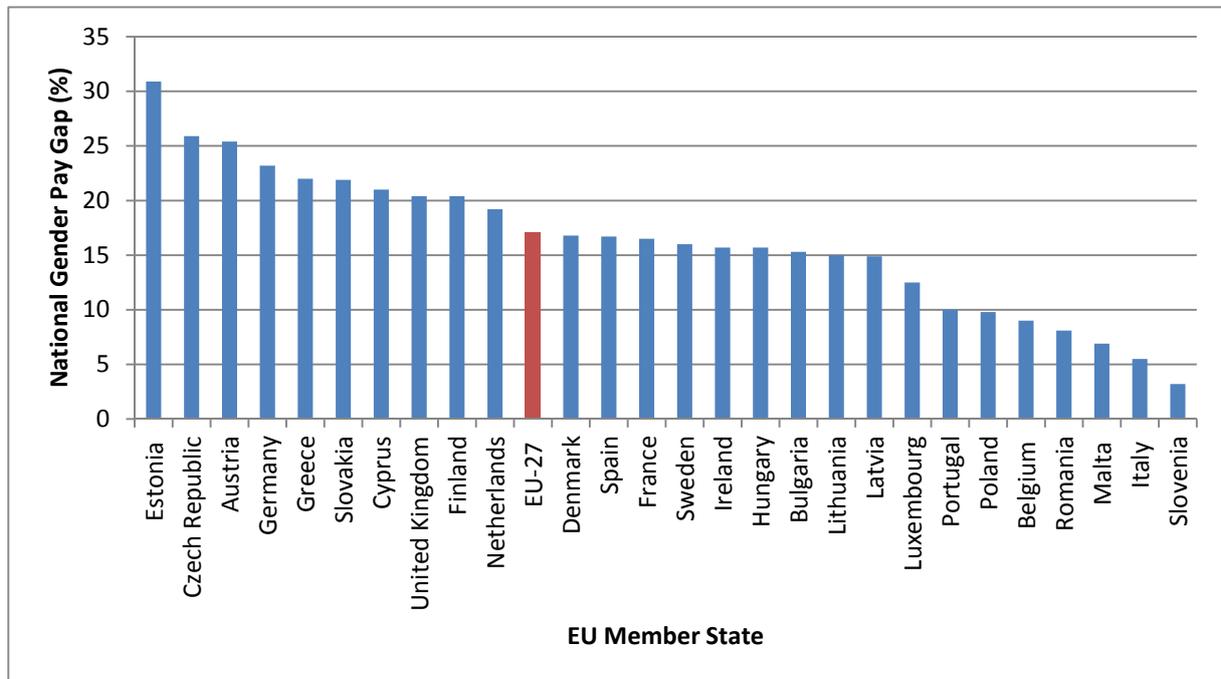
⁹⁹ EBS 326 above n 99 at 101.

¹⁰⁰ *Ibid.* at 64.

¹⁰¹ Article 13(3) of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (Text with EEA relevance), OJ [2004] L158/77.

table below indicates, though, several of those who felt generally that urgent attention to the gap was unnecessary are relatively over-represented in terms of their national gender pay gap, as Figure 1 (below), indicates.

Figure 1: European Union National Gender Pay Gap



Source: Eurostat 2008¹⁰²

Opinion across the Member States is also split on the degree of effort currently being made in this field: 44% of EU citizens participating in the survey felt that enough is being done to combat inequality, while 42% disagreed. There are some stark contrasts within this average. Participants from Cyprus and Greece, for example, were more likely to think that enough is being done (79% and 78% respectively), while Swedish respondents were the least likely to agree with that comment (20%). Given the importance afforded issues of equality within the Swedish state, the latter finding is perhaps unsurprising. The case of (arguable) complacency in Greece might be linked to the economic crisis, but may also relate to the much later emergence of gender equality ideals in Greek society, compared to other European nations.¹⁰³ Further, as Figure 1, above, indicates, Greece has one of the higher gender pay gaps in the

¹⁰² European Commission/Eurostat, *Gender Pay Gap Statistics* (online).

¹⁰³ A Marcos and S Bahr, “Hellenic (Greek) Attitudes towards Gender” (2001) *Gender Issues Summer*, at 24.

EU, and recent austerity measures are claimed to be impacting on women most significantly.¹⁰⁴

Participants in the Eurobarometer survey were also asked to reflect more generally on the areas which they felt needed greater prioritisation in the field of gender equality, and the results correlate closely to those discussed above: 62% of respondents chose “acts of violence against women”, while 50% selected “the pay gap between men and women”. These two choices were ranked more highly than any of the other choices. Further, a more recent Special Eurobarometer survey noted that “There is strong support for EU involvement in eradicating domestic violence against women (87% of respondents feel that the EU should probably or definitely be involved)”.¹⁰⁵ However, it should also be noted that only 14% of respondents in the Domestic Violence survey were aware of EU legislation relating to domestic or gender-based violence.¹⁰⁶ This may reflect the fact that the EU primarily has only soft law measures available for dealing with an issue like domestic violence. Following closely behind, though, with 42%, was addressing the violation of women’s rights in developing countries. This indicates a relative synchronicity between EU policy priorities and the preferences of its citizens, as the EU places gender equality norms at the heart of its policy towards the developing world, and it certainly relates to the strong theme of the externalisation of EU gender equality goals discussed above. This can also be seen as evidence that the Union’s normative role abroad can impact on perceptions domestically, as well as making it an important global agenda setter in this area of legislation.

Equality in the workplace has long been a well regulated area of EU law through the Treaty and hard legally binding directives such as the Recast Gender Equality Directive.¹⁰⁷ It is also an issue which has been much discussed within the EU institutions. Commission Vice President Vivian Reading has most recently announced a discussion paper on the notion of quotas to ensure gender balance in corporate boardrooms. The idea has met with mixed responses, and a similar ambiguity appears to exist within the EU citizenry, despite the fact that the reliance on positive actions under Article 157(4) TFEU is considered an essential tool

¹⁰⁴ L Davis, “Greek crisis hits women especially hard”, *The Guardian* (online ed: Blog, London, 15 June 2012).

¹⁰⁵ EBS 344 above n 100 at 11.

¹⁰⁶ *Ibid.*

¹⁰⁷ Directive 2006/54/EC of the European Parliament and of 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), OJ [2006] L204/23.

to promote and achieve equal treatment and equal opportunities, both within and outside the workplace. Perhaps for that reason, Europeans are agreeing with Vice President Reading in noting that male dominance of the boardroom should not continue. According to Special Eurobarometer 376 on Women in Decision Making Positions, the majority of Europeans felt that women should be equally represented in company leadership positions (88%). However, the role of the EU in ensuring this takes place is not unilaterally accepted as there was little agreement by survey participants when asked to indicate how this gender balance should be achieved and only 26% felt that the EU should implement binding legal measures. This is interesting given our discussion above which indicates that in areas where the EU has hard law in place there is both considerable success in practice and consensus amongst the public about the value of those measures. Presumably if boardroom targets are to be achieved through soft law measures, we could expect to continue to see uncertainty amongst the European public about the issue.

Beyond basic equalities, the issue of work-family-life balance also appear to be in the minds of many Europeans, with 41% of those surveyed believing that there should be more care facilities provided for young children and dependents, as a means of boosting the number of women in employment. This might also reflect the recent surge in EU legal activities in this area as indicated by the adoption of the European Commission's Work-Life Balance Package in 2008, which includes four documents: a Communication from the European Commission¹⁰⁸ setting the context; two legislative proposals to revise existing directives, the Pregnant Workers Directive¹⁰⁹ and the Self Employed Directive,¹¹⁰ both with accompanying impact assessment; finally a report monitoring the national progress towards the childcare targets set by the 2002 Barcelona Council.¹¹¹

¹⁰⁸ Communication from the Commission, 'A Better Work-Life Balance: Stronger Support for Reconciling Professional, Private and Family Life', COM(2008) 635.

¹⁰⁹ Proposal for a Directive amending Council Directive 92/85/EEC on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding, COM(2008) 637.

¹¹⁰ Proposal for a Directive on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Directive 86/613/EEC, COM(2008) 636. This Directive has now been adopted: Council Directive 2010/41/EU of the European Parliament and of the Council of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC.

¹¹¹ European Commission report, 'Implementation of the Barcelona Objectives Concerning Facilities for Pre-School-Age Children', COM (2008) 638.

The issue of work-life balance and care weigh heavily on the European's mind because it is a growing concern as reflected by the very sharp demographic changes. These are issues which are only going to increase as women are not only being participating in the labour market but continue to bear the bulk of the domestic care. The growing demand for care of the elderly is going to weigh even more on women's shoulders.

Connecting this analysis to the EU's political identity more explicitly, it is notable that more than 60% of respondents felt that decisions about gender equality should be made jointly by the EU and the Member States. Perhaps owing once again to its strong national history of leading the charge against gender inequalities, opinion amongst the Swedish respondents was split between feeling the between national government (48%) should be responsible for these decisions, and joint decisions within the EU (48%). Public opinion in the UK was also divided: 47% think that decisions should be made by the Government, while 48% would prefer these decisions to be taken jointly within the EU, but perhaps in contrast to the case of Sweden, this most likely represents the reluctance of many Britons to see responsibilities delegated to the EU, than a particular feeling that the UK government is the best placed to achieve gender equality goals. In terms of gender equality in the 'boardroom', Europeans are divided on the level of decision with regards to measures taken to improve gender balance on boards of publicly listed companies. A slight relative majority is in favour of the European level rather than the national level (35% vs. 34%). Nearly a quarter of the respondents answer wanted measures to be taken at both levels (23%).¹¹²

Despite their clear desire for further progress in certain areas, a majority of respondents (64%) felt that there has been progress in the past decade, and over half were aware of the EU's efforts to combat gender inequality. And, as the authors of the surveys themselves noted, there does appear to be a correlation between satisfaction and awareness¹¹³ – perhaps unsurprisingly, those EU citizens with the longest history of experiencing the benefits of EU gender equality law (namely the older Member States), have much higher levels of satisfaction in the case of progress, and desire for further change in areas where less has been achieved. It is assumed, based on the 'transformative' power of the EU's gender equality law (discussed earlier), that eventually a higher impact will be identified in the newer Member States as well.

¹¹² EBS 376 above n 101.

¹¹³ EBS 326 above n 99 at 130.

This is particularly interesting for our discussion of EU identity, and it would appear to align to the literature on European identity (that is, the degree to which EU citizens feel connected – or identify with – the EU).¹¹⁴ The more knowledgeable people consider themselves to be about Europe, the more they engage with EU politics and the more they actively seek information and news about EU developments, the more likely they are to identify with Europe. While this paper has not concerned itself with the identity of EU citizens, but rather has focused on the articulation of a political identity for the EU as communicated through gender equality law, still, the finding that awareness of EU efforts correlates to satisfaction and engagement with its policies is significant. It supports our claim, based on Cerutti's conceptualisation of EU political identity; that EU identity is inherently connected to those Union activities which are valued collectively by the European citizenry.¹¹⁵

Conclusions

Why look at gender equality law and identity now? To begin with, as has been shown above, this is a fruitful area for exploration of the construction of a political identity for Europe, and one which has been largely ignored in the existing literature. Further, there is notable time-frame impact here. The EU is in the midst of the toughest economic challenge of its existence. In 2011-12 there has been little news from Europe outside the framework of this economic and currency crisis. This crisis is likely to pose further challenges to the EU's embryonic political identity, so it is prudent now to examine the various locations of that identity. Studies have shown that during periods of economic crisis, social inequalities like gender discrimination can increase, as political and public attention turns to the task of economic survival. Further, there is clear statistical evidence which shows the disparate gender impact (long and short term) of economic crises. In the Eurobarometer survey discussed above, nearly two fifths of Europeans polled believed that the current economic crisis would lead to increased inequalities along gender lines within the EU.¹¹⁶ Yet, we argue that gender equality law is likely to remain an important part of the EU's activities. Although the balance between social and economic policy in the EU has always been an uneasy one, counter-intuitively, economic crises have not necessarily always led to the restriction or to the

¹¹⁴ See for example: M Bruter "On What Citizens Mean by Feeling 'European': Perceptions of News, Symbols and Borderless-ness" (2004) *Journal of Ethnic and Migration Studies*, 30(1), 21-39.

¹¹⁵ Cerutti above n 11.

¹¹⁶ EBS 326 above n 99 at 7.

regression of social and human rights including women's rights.¹¹⁷ On the contrary, developing social rights has often been seen by EU leaders as a way to ease economic crisis. Indeed, the Ohlin report¹¹⁸ argued from very early on that the economic and social dimensions of the European construction are intrinsically linked. This is a classical liberal view: in times of crisis, more money needs to be invested in order to secure future returns. For instance, the tightening of the purse resulting from the oil crisis in the early 1970s did not lead to a restriction of the women's rights but instead was the time for a drastic expansion of gender equality law. Further, there is a clear ideological foundation – especially since Amsterdam and Lisbon – for the EU's efforts in this field of law. Through its actions, and the motivations behind those, we can see an expression of an EU identity: an identity underwritten with the value of equality, and articulated through a range of legislative mechanisms. Moreover, this is an identity which has recognition amongst the European public. In light of the recognition of its 'actorness' in this field by its citizens, we argue that it would be damaging to the EU's political identity to move away from gender equality as a core component of EU legislation. In fact, the results of the public opinion surveys indicate that more hard law would be likely to strengthen the EU's political identity and thus its legitimacy, as well as benefiting the European population by achieving greater gender equality.

¹¹⁷ D Schiek *Economic and Social Integration: The Challenge for EU Constitutional Law*, (Edward Elgard, Cheltenham, 2012).