



**EUROPEAN UNION
STUDIES ASSOCIATION**
Vol. 15, No.3 ISSN 1535-7031
Summer 2002 www.eustudies.org

**EUSA
REVIEW**

EUSA Review Forum

Progressive Europe?

Gender and Non-Discrimination in the EU

THE ISSUE OF EQUAL RIGHTS between women and men—at least in the workplace—has long been one of the most prominent examples of “positive integration” in the European Union, and arguably the most far-reaching element of EU social policy. In recent years, the EU’s traditional emphasis on sex equality in the workplace has been supplemented by a commitment to the “mainstreaming” of gender issues, the upgrading of sexual equality as a common objective in the Treaties, and the insertion of a new Treaty provision relating to the principle of non-discrimination more generally. These and other developments have led some authors to present the EU as a “progressive polity” in its commitment to gender equality and non-discrimination.

In this Forum, four authors assess this claim of a “progressive Europe,” focusing on the evolution of EU gender policy (Sonia Mazey, Jo Shaw, R. Amy Elman) and the development of a broader policy regarding non-discrimination on the basis of factors such as race, age, and sexual orientation (Mark Bell). Taken together, the essays reveal the impressive legal and constitutional foundations of EU gender and non-discrimination policies, as well as the significant weaknesses of EU policy practice, the problematic relationship between gender and other grounds for discrimination such as race and age, and the difficulty of measuring what constitutes “progress” in the first place.

—*Forum Editor*

The Development of EU Gender Policies: Toward the Recognition of Difference **Sonia Mazey**

IN THE PAST DECADE, A new phase of EU gender policy, linked to the concept of “gender mainstreaming,” has gained rapid ascendancy within the EU. The 1997 Amsterdam Treaty marked an important turning point in this development. The revised Treaty elevated the status of gender equality to a “fundamental principle” of Community activity, enshrined the principle of gender mainstreaming into the Treaty, and widened the range of positive action measures which may be adopted in order to benefit the disadvantaged sex in the field of employment. In addition, sex was incorporated into a new general non-discrimination clause (Article 13), establishing a legal basis for EU measures to combat

discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. This constitutional embedding of gender equality into the Amsterdam Treaty undoubtedly represented an important victory for European feminists (Helfferrich and Kolb 2001; Mazey 2001). The key question, however, is “whether this exercise will *matter*—whether it will actually influence policy outcomes in the member-states” (Pollack and Hafner-Burton 2000: 445). Five years on from the adoption of the Amsterdam Treaty, EU scholars have begun to examine the evidence.

Gender mainstreaming represents the latest stage in the incremental “broadening” of EU gender policies. In contrast to earlier “equal treatment” and “positive action” EU equality strategies, which, respectively, treated women the same as men and helped women adjust to the (gender blind) male norm, mainstreaming is based upon the recognition of gender differences between men and women. Thus, for EU policy makers, mainstreaming “involves not restricting efforts to promote equality to the implementation of specific measures to help women, but mobilizing all general policies and measures specifically for the purpose of achieving equality by actively and openly taking into account at the planning stage their possible effect on the respective situations of men and women” (Commission of the European Communities, 2000: 5). In a broad sense, mainstreaming is a transversal and long-term political strategy for achieving gender equality by “engendering” the policy-making process. More narrowly conceived, it is a method of policy-making, which requires the adoption of particular policy-making instruments and procedures. In particular, gender mainstreaming has necessitated the introduction at the EU level of “soft” (i.e., legally non-binding) policy instruments, such as the collection of sex disaggregated data, gender impact assessments, benchmarking, national league tables, and gender auditing of EU programmes.

It is important to stress that within the EU, mainstreaming is intended to complement, not replace, positive action measures for women and equal treatment legislation. Thus, the Community Framework Strategy on Gender Equality (2001-2005) brings together all the different EU initiatives and programmes designed to promote gender equality with an across-the-board mainstreaming approach. The positive action program associated with the Framework Strategy (to which •50 million has been allocated) focuses upon five objectives, which provide the frame of reference for policy development, and to which all EU gender equality initiatives are now linked: (*continued on next page*)

Information and Ideas on the European Union

(*continued*) equality in economic life (labour market policies); equal representation and participation in decision-making (parity democracy); equality in social life (social protection, health); equality in civil life (human rights, gender-related violence, trafficking), and changing gender roles and overcoming stereotypes (in education, culture, media). Each Commission DG is required to produce an annual work programme indicating what actions it intends to undertake towards the above objectives. Meanwhile, both the Commission and the European Women's Lobby have, wherever possible, sought to translate the gender equality principles of the Amsterdam Treaty into a legal framework. Indeed, the Commission intends to introduce a new directive later this summer, based upon Article 13, to achieve equality of women and men outside the field of employment. However, as the veteran feminist advocate and senior Commission official, Agnes Hubert acknowledged, "there is only so far we can go on this [legal] basis." Moreover, given the highly normative nature of gender equality issues, and the numerous veto points in the EU legislative process, it would in any case, be politically difficult for the Commission to "coerce" member states into further Europeanization in this policy sector. Against this backdrop, mainstreaming, characterized by soft policy instruments and "voluntary policy transfer" (Dolowitz and Marsh 2000) between member states, provides an alternative and arguably more subtle means of achieving gender equality "by stealth."

Evidence suggests that gender mainstreaming *has* provided feminist policy entrepreneurs (notably the EWL) with new opportunities to engender EU policy debates within the Commission in areas that were previously "gender blind." New areas analysed under a gender perspective include world trade and globalization, EU enlargement, fisheries, and asylum and refugee policy (Mazey, forthcoming). Gender mainstreaming policy methods have begun to penetrate the European Commission (albeit unevenly), prompting changes in policy discourse, procedures and outputs. Gender awareness training, gender impact assessments, the collection of gender desegregated data and the insertion in all calls for proposals and expressions of interest of a reference to EU gender equality policies have become increasingly routine activities within the Commission. Unsurprisingly, the impact of gender mainstreaming has been greatest in those sectors with prior experience of dealing with equal opportunities issues, notably employment, structural funds, development, education and training. Policy-makers in these sectors were already accustomed to dealing with gender issues and working with women policy stakeholders. Thus, in these services, the minimum conditions required for gender mainstreaming were (more or less) in place: understanding about the gender problematic, appropriate methodological tools; and inclusion of women's interests in the policy-making process. By contrast, in other "gender blind" sectors such as internal market, competition policy, trade, energy and transport, mainstreaming has thus far made less headway (Pollack and Hafner-Burton 2000; Mazey 2001). Significantly, these are also sectors in which women have historically been less well represented in the decision-making process. Just as in the 1970s and 1980s, feminist

advocates within the policy-making process have been influential in achieving this latest expansion of EU gender policies.

Gender mainstreaming has presented European feminists with both new opportunities and new strategic dilemmas. On the one hand, mainstreaming has "legitimized" the EWL within the EU policy-making process. The Lobby has been increasingly active in new policy areas such as globalization and trade, EU enlargement and EU Treaty and institutional reform. Given the continuing under-representation of women and lack of gender expertise in the EU institutions, the EWL has become an influential source of women's representation within the EU decision-making process. The problem is that the EWL (with just eleven full-time staff and meagre funds) currently lacks sufficient resources to deliver this ambitious agenda.

There is also scepticism within the Lobby regarding the likely benefits for women of mainstreaming. Though European feminists acknowledge the transformative potential of such a strategy, many doubt whether there exists either the political commitment or institutional capacity required to implement this strategy within a multi-level polity such as the EU. Given that national governments remain primarily responsible for interpreting and implementing EU policies, there are grounds for such fears. The introduction of so-called "family-friendly" employment, for instance, has in some member states been pursued primarily from the employers' side, resulting in the introduction of increasingly unpredictable, rather than shorter, working hours. More recently, it is extremely revealing that gender issues have not yet featured in the ongoing debates about how European governance structures might be democratised—an omission which suggests that gender mainstreaming has yet to become culturally and institutionally embedded in the EU broadly defined. In view of these uncertainties, the EWL remains committed to grounding gender equality in law.

Lastly, many women fear that the privileged status of women's rights within the context of EU social policies may also be jeopardised by the increased emphasis upon mainstreaming. The Amsterdam Treaty established a broad human rights framework which commits the EU to combating various forms of discrimination. This development has highlighted the need for European women to think more systematically about the relationship between *gender* mainstreaming and the more inclusive strategy of *equality* mainstreaming. Thus far, the EWL has been reluctant to embrace a broader definition of "equal opportunities" beyond gender issues and has remained passive towards elderly and disability mainstreaming initiatives. The reluctance of the Lobby to embrace equality mainstreaming is perhaps understandable given the present fragility of EU gender equality policies. Whilst equality mainstreaming may ultimately be a more effective means of incorporating "difference" into EU policies, there is a fear that the greater effort on race, disability, religion, etc. might come at the expense of gender.

Sonia Mazey is Faculty Lecturer in Politics and Tutorial Fellow at Hertford College, Oxford University.

Gender Mainstreaming and the EU Constitution

Jo Shaw

GENDER MAINSTREAMING HAS BECOME the buzz word of EU gender policy since the mid 1990s. Its proponents argue it has greater capacity to deliver socio-economic equity for all members of society, by requiring the thorough scrutiny of every aspect of policy-making, from inception to implementation. Its detractors argue that it is rarely more than formulaic window dressing, and that it could undermine the existing legally binding framework of sex discrimination law. For the purposes of this essay, I shall go with the proponents rather than the detractors. Taking an initially optimistic point of view, I examine the extent to which the gender-receptiveness issues raised by mainstreaming both as a policy style and even—potentially—a new approach to politics are embedded in EU constitutional law and discourse.

The degree of inclusiveness of a polity at the level of constitutionalism matters. It matters whether a non-state polity such as the EU includes within its constitutional framework provisions on gender or race equality. The content, purpose and function of these provisions contribute to what Neil Walker calls the substantive and polity-defining functions of constitutionalism (Walker 2001). It is also important to know how and why these provisions came to be included in a constitutional text, as well as how they have been interpreted by influential actors such as courts, legislatures and executives. Legal feminist scholarship has been quick to recognize the double-edged nature of taking advantage of the privileged sites of struggle provided by constitutional or similar norms. On the one hand, the inclusion of a norm of equality in any constitutional text rarely “just happens” as a top-down phenomenon. On the contrary, even if constitutional norms are not always directly struggled over—especially at the supranational level where there is relatively little direct citizen access to the levers of power—new constitutional norms are still likely at the very least to be the filtered reflection of *other* struggles, ones which are perhaps more localized or less focused on reformism and legal change. To that extent, to harness the normative power of such provisions is to recognize and value the transformative potential of struggle and protest about a repressive *status quo* such as a restrictive gender regime. Yet still, the very fact of engaging with the “state” or “state power,” even in the diffused form of the EU, brings with it the risk of assimilation into that same liberal legal order and of diluting the limited critical resources of a radical feminist politics.

The constitutional dimension of the EU’s gender regime hangs by a slender historical thread: Article 119 EEC. This equal pay provision was included in the Treaty of Rome largely to prevent the risk of distortions of competition in the labour market arising because France had already enacted equal pay guarantees (Barnard 1996). Wobbe (2001) contextualizes this story by reference to the rise of a rights ideology and a rights narrative after the Second World War, not to mention the role taken by the International Labour Organization in the negotiations on the EEC Treaty (Hoskyns, 1996: 53). Until 1999, and the entry into force of the Treaty of Amsterdam, legal change in the gender rights

field was largely driven by judicial activism focused on the Treaty and a limited body of secondary legislation. It also depended upon the agency of a number of key actors. The Commission pressed for a new era of European social policy from the early 1970s and initiated sex equality legislation in the form of equal pay and equal treatment directives. The Court of Justice famously established the direct effect of Article 119 in the Defrenne (No. 2) case, and strategic litigants and their legal advisors and trades unions have helped to ensure a steady flow of cases from national courts to the Court.

As Sonia Mazey has shown above, the 1997 Treaty of Amsterdam has added the imprimatur of member state approval to these developments and embedded gender equality norms more deeply into the fabric of the EU’s constitution, including a revised Article 3(2) EC which enshrines the principle of gender mainstreaming into the Treaty, an amended Article 141 (ex 119), and the new Article 13 EC allowing the adoption of measures to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

Since Amsterdam the EU fundamental rights framework has been transformed. A Convention of national representatives and representatives of the EU institutions elaborated a Fundamental Rights Charter for the EU, adopted at Nice in December 2000. Chapter III of the Charter is simply headed “Equality” and it contains a veritable “potpourri” of rights, some of a traditional justiciable and constitutional type, some of a more aspirational nature. Not all are directly concerned with gender equality, but they do raise the question of how “differences” can be melded together in a fundamental rights regime. Spread across seven articles, we find equality before the law, the prohibition of discrimination, respect for cultural, religious and linguistic diversity, a specific guarantee of equality between men and women in all spheres, and a range of children’s rights, rights of the elderly, and rights of disabled persons. The Charter is not formally binding, but it was quickly employed by Advocates General in the Court of Justice as an inspirational source of rights argument, although the Court itself has been more circumspect. Should the Charter find a place as a formal element of a “European Constitution” after the current Convention and the 2004 IGC, it will have significant effects on the nature of the Euro-polity—effects which are hard to predict with precision given the open-textured character of its provisions.

The evidence points towards an equality principle which is deeply embedded in the EU’s constitutional fabric, at least in formal terms. It also highlights the different ways the principle can operate within the constitutional order. There are straightforward guarantees of non-discrimination, legal bases for implementation of the equality principle by the institutions, and more complex and ambitious techniques to promote substantive socio-economic equality such as gender mainstreaming and positive action. This is fertile territory to argue that gender mainstreaming can be more than just a technique for policy-makers and can be instead the basis for a transformation of politics via the overall polity-generative capacity of constitutionalism.

The constitutional form is unfortunately rather ahead of the constitutional practice. There is so far little evidence that mainstreaming is seeping into the case law of the Court of Justice, despite the Court's generally activist history in the promotion of gender equality. The Court's case law continues to distinguish sharply between labour market issues, where its writ runs, and those of the gendered division of labour in the household, where it does not. "Neutral" legal categories such as rights and remedies are not often open to specifically gendered reasoning. Even so, it is interesting to note the Court's increased willingness in recent judgments to engage more fully with the wider socio-economic circumstances in which gender relations in the family develop. In cases such as *Lommers* (Case C-476/99, March 19 2002), the Court has demonstrated a broader view of the complexities of strategizing for equality than some of the earlier cases, not so much because they represent a radical departure from previous maternalist analyses exemplified by the *Hoffmann* case (Case 184/83 [1984] ECR 3047) and critiqued by McGlynn (2000), but because of the greater depth of legal reasoning applied.

Feminist politics has also so far had little impact upon the mega-constitutional events such as the Convention on the Future of the Union or initiatives such as the Governance White Paper, which involve a critical reflection upon the way the EU does its business. One can point to the paucity of representation amongst the Convention's 105 members and 13 observers. In total, there are ten women from the EU member states, plus six from the accession countries. Two of the thirteen observers are women. Only two of the twelve-member Praesidium, which effectively controls much of the agenda of the Convention, are women, and none of the three-member Presidency. Yet in other respects the principles of parity democracy have seeped into the EU's portfolio of gender equality policies. The Commission adopted a decision on the gender balance of Committees and Expert Groups, with a commitment to forty percent women members, and the Council adopted a recommendation on the balanced participation of women and men in the decision-making process. The latter calls for integrated strategies on the part of the member states to address participation imbalances. The *ad hoc* manner in which members are nominated for a body such as the Convention is precisely the opposite of such an integrated strategy, and appears to be a recipe for ensuring low levels of participation, with everyone relying on everyone else—especially the Scandinavians—to ensure that women are nominated.

The proposition that policy-making operates in a gendered environment and with effects which are not wholly gender-neutral receives no attention whatsoever in the Governance White Paper of July 2001. Yet gender mainstreaming:

“does not mean simply making Community programmes or resources more accessible to women, but rather the simultaneous mobilization of legal instruments, financial resources and the Community's analytical and organizational capacities in order to introduce in all areas the desire to build balanced relationships between women and men.”

This statement from the Commission (1996) clearly resonates with the grand objectives of the White Paper to “open up policy-making,” to “connect the EU more closely to its citizens and

lead to more effective policies.” The White Paper aims to harness five principles of good governance—openness, participation, accountability, effectiveness and coherence—in order to overcome the perceived legitimacy gap infecting the EU and its institutions. Although work on “public spheres” has begun to establish the gendered nature of such legitimacy gaps, gender is ignored in the White Paper. The focus on “better regulation through a greater diversity of policy tools and their combined use,” although fleshed out in places with references to the open method of co-ordination, the role of the social partners and techniques of “co-regulation,” does not extend to identifying the possible contribution to “better regulation” made by gender mainstreaming.

The White Paper is quick to deal with “powers,” but slow to face head on the question of “power.” Gender is primordially a power question (Shaw, 2000). To follow the gender mainstreaming project to its logical conclusion is to raise some fundamental questions about who decides who gets what, where and how. Gender mainstreaming can be an empowerment project in much the same way that the reconsideration of “governance” could potentially be empowering. Cram (2001) suggests that national conditions, including resistance to reform, will play a huge role in determining the impact of governance reforms at the domestic level. Similarly, Beveridge *et al.* (2000) chart a huge diversity of national conditions affecting gender mainstreaming and gender equality regimes. Issues of “fit” at the national level can dominate in both cases. Moreover, both governance reform and gender mainstreaming are political not technocratic projects. It is regrettable and indeed remarkable that the insights of one innovative governance project in relation to gender mainstreaming have not been brought to bear in the formulation of another broader project of reform.

The marginalization of feminist politics in the Convention and the White Paper, combined with the slow pace of adaptation on the part of the Court of Justice, makes it clear that the embedding of mainstreaming in the constitutional politics of the EU has some way yet to go.

Jo Shaw is Professor of European Law and Jean Monnet Chair at the University of Manchester.

Our European Enigma: Assessing Progress **R. Amy Elman**

ASSESSMENTS OF EUROPE'S “PROGRESS” toward (sexual) equality often reveal more about our conceptions of what equality is than whether and to what extent Europe has been able (or willing) to achieve it. Thus, as some embrace Article 119 and subsequent legislation as significant remedy for gender inequality, others aver that European law legitimates capital accumulation while appearing opposed to the gendered inequities associated with it. Similarly, while reforms for “working mothers” are arguably essential to gender equality, the very term also implies that women's primary status (and responsibility) is motherhood and that working (for wages) is secondary.

Understanding the historical trends, achievements and shortcomings of efforts to ameliorate sexism is complicated. The dynamic and pervasive quality of sexism, the unusual character of Europe's polity and the illusive goals of feminist movements (e.g., to "take back the night," "end male violence" and promote "equality") are only some of the conditions that make "progress" difficult to discern. This essay focuses on these and other factors that haunt our efforts to make sense of sexual equality within the context of European integration.

While women's movements generated the public outrage that likely prompted member-state and Union action against sexual inequality, the general reluctance to *define* women's movements clearly hampers our efforts to measure their effect. Moreover, to what extent have *other social conditions and/or actors* (for whatever the reasons) inspired efforts to counter sexism? In sum, what counts as *evidence* in determining Europe's progress toward ending sex discrimination?

"Feminism" is a term so fraught with dissension over its meaning and application that the relatively more inclusive term "women's movement(s)" has either substituted for or been used interchangeably with it. This linguistic shift diminished some problems and others emerged. First, while feminist movements are women's movements, not all women's movements are feminist and some actually insist on their opposition to or distance from feminism. The erroneous assumption that *women in movements* are feminists suggests that being female is synonymous with being a feminist. Expecting one's experience of oppression to produce an emancipatory politics is essentialist and inevitably disappoints those seeking liberation because oppression produces damaged people at least as often as it produces effectual activists. The tenor of definitional inclusion compromises strategic effectiveness for movement activists while jeopardizing epistemological and methodological precision for scholars of movements.

In the absence of conceptual clarity concerning women's movements and their influence, direct evidence of gender inequality and/or remedies ostensibly adopted to address it may hold greater appeal. In compensating for the dearth of historical detail, scholars use macro-data that unambiguously reveals gender inequality in political representation (i.e., fewer women in positions of power), the wage labor market (i.e., lower wages and benefits), and "the family" (i.e., "the double burden"). These data and related remedies for "working women" in general and "working mothers" in particular are so prominent that their utility is rarely interrogated.

If the emphasis extended to "work" and "family" mirrored empirical reality, this stress might be less objectionable. Yet, however important these issues are to many women, not least to those writing on this subject, they were not (and have not been) as integral to feminist activists as the literature on "women's movements" would suggest. For many, the conundrum of combining (paid) work with family (read "care work" for male partners and children) was (and is) less important than efforts to transcend the confines of this conventional lifestyle (and burdensome expectation). Indeed, more women than ever throughout Europe are opting out of or postponing marriage and motherhood.

Given the current climate, why are working mothers the "hegemonic subject" of scholars? According to Lisa D. Brush (forthcoming), politics play a decisive role in the persistent preoccupation of scholars in the selection of their case studies and the relatively circumscribed approach to research that they take. She notes that the reliance on standard measures produces scholarship that addresses women in *comparison* to men but does not assess women in their social *relation* to them. In consequence, "the cultural, sexual, physical, and emotional enforcement of male dominance goes unmeasured, unremarked, and unchallenged" (Brush, forthcoming). If analogous claims can be made concerning the consequences of privileging working mothers as the key beneficiaries of Europe's equality policies, are there alternative policies and critical analyses that may better facilitate sexual equality?

Years ago I placed my faith in the utility of case studies and policies adopted to mitigate male violence because, I argued, male dominance is clearly expressed in the violence and sexual abuse that men and boys perpetrate against women and girls. I thus asserted that efforts to end male violence and penalize the perpetrators reveal a greater responsiveness to women on the part of capitalist states than the more conventional policies that are of interest to most researchers on women, the ("welfare") state and European integration. After the Commission's adoption of a community-wide information campaign on violence against women (i.e., the Daphne Program) and the explosion of interest in and rhetorical statements on this subject, I wonder.

Previously determined to promote social change by ending male violence, feminist activists began resembling poster children for the same states and EU institutions they once challenged, if not loathed. If not for an appreciation of the unintended consequences of strategic actions, one would be at a loss to explain this transformation. After states acknowledged their apathy and attributed it to the expense of policies that could prove beneficial to women, feminists began reversing these arguments to show the cost of oppression both to states and their reputations. After insisting that the effects of battering spilled over into the workplace at considerable loss to the economy (through lowered productivity and increased absenteeism due to injuries), activist claims resonated not just with member-states but with the EU.

The increased interest among Europe's policy-makers in mitigating male violence, moreover, corresponded to escalating public concern throughout the member states. In 1997, the European Commission released a report acknowledging that male violence is the most endemic form of violence within all member states. The following year, the European Parliament designated 1999 as the "European Year Against Violence Against Women." The Commission concomitantly proposed funding for investigations into the problem as well as the community-wide information campaign, Daphne.

Though too soon to tell, it is likely that the above-noted Community efforts will provide remedy to some and prove illusory to many. That is because when the framing, chain of political command, and market structures relating to women's oppression remain intact, illusion masks the absence of redress. National reputation is an essential part of any state's strategic

equity, particularly now that “globalization and the media revolution have made each state more aware of itself, its image, its reputation, and its attitude—in short, its brand” (Van Ham 2001: 3). Market-oriented Europe is no less brand-oriented and, as Peter Van Ham wisely warns, branding holds a “preference for style over substance” (ibid.). State and EU action is taken to increase legitimacy much as corporate sponsorship is an investment in future profit. Such acts are not movement actions determined to liberate women—they are marketing tools. The extent to which the public perceives that sexual equality has progressed and credits Europe with this success, the acts are wise investments—whether or not the product is compassion without the effort taken so that it is not needed.

Problems of measurement render an authoritative assessment of Europe’s progress impossible to provide. However, questioning what progress means encourages us to better understand our capacity to initiate change in ways that might convince us that progress is possible.

R. Amy Elman is Professor of Political Science at Kalamazoo College.

Managing Diversity: Non-Discrimination and the European Union

Mark Bell

EU LAW ON DISCRIMINATION has been subject to a dynamic series of changes in recent years. These stem from the decision of the member states in 1997 to add a new legal competence for combating discrimination to the EC Treaty, Article 13. This provision extended the material scope for anti-discrimination law beyond the labour market, as well as providing the Community with powers to combat discrimination on grounds of sex, racial or ethnic origin, religion or belief, age, disability and sexual orientation. In this essay, three trends are examined: first, the adoption of new instruments for combating discrimination; second, the application of non-discrimination norms to a wider range of grounds; and third, the extension of the material scope of discrimination law. Whilst progress has been made in all these areas, it is argued that there is little clarity as to the underlying vision or ultimate legal framework.

Adopting New Strategies and Instruments

Three Directives on combating discrimination have been adopted since the introduction of Article 13. First, in June 2000, the Council adopted the “Racial Equality Directive” (2000/43/EC, OJ L180/22) forbidding discrimination on grounds of racial or ethnic origin in a range of areas, such as employment, education and health care. Second, in November 2000, the Council adopted the “Framework Directive” (2000/78/EC, OJ L303/16) prohibiting discrimination on grounds of religion or belief, disability, age and sexual orientation, but only in the (broadly defined) area of employment. Finally, on 17 May 2002, the Parliament and Council agreed a series of amendments to the 1976 Equal Treatment Directive, which forbids gender discrimination in employment. Significantly, each of these Directives pursues a number of new strategies.

First, there is a wider definition of unlawful discrimination. Indirect discrimination is redefined in order to move away from the existing dependence on statistical evidence (e.g. Case C-167/97 Seymour-Smith [1999] ECR I-623). Instead, the new standard focuses on situations where “an apparently neutral provision, criterion or practice would put persons [with particular characteristics, e.g. a disability] at a *particular disadvantage*.” Harassment is also explicitly prohibited as well as any instructions to discriminate by third parties. Second, there is a new stress on enforcement and remedies. Victimization of complainants is forbidden and the sanctions adopted by national law are required to be “effective, proportionate and dissuasive.” More importantly, the need to support individual litigants is recognised: organizations with a “legitimate interest” in enforcing equal treatment can bring cases on behalf of individuals, and member states must establish “equal treatment bodies” with a duty to provide independent assistance to victims of discrimination. Strangely though, such bodies need only cover discrimination based on sex and racial or ethnic origin.

Extending the Umbrella of Protection

As noted above, Article 13 gave the Community a clear mandate to apply non-discrimination principles beyond the existing “suspect” grounds of sex and nationality. Yet, the European Union has since added a further and broader layer of protection in the Charter of Fundamental Rights (2000, OJ C364/01). The Charter provides a statement of the fundamental rights recognised by the Union. However, disagreement amongst the member states at the time of its conclusion meant that it has an ambivalent legal status. It is not part of the founding Treaties and hence not legally binding. Nonetheless, reference to its norms by the Court of First Instance and Advocates-General at the Court of Justice suggest that the Charter will certainly have legal effects. Article 21 provides a non-exhaustive list of grounds on which discrimination is prohibited. In addition to the grounds already recognized in the EC Treaty, reference is made to colour, social origin, genetic features, language, political or any other opinion, membership of a national minority, property and birth.

An unusual hierarchy emerges as a result. First, there is discrimination on grounds of EU nationality, which, by virtue of the directly effective rights conferred in Article 12 EC, is prohibited throughout Community law and seemingly in most areas of national law (e.g. Case C-184/99 Grzelczyk [2001] ECR I-6193). Second, the grounds found in Article 13 can, through the passage of EC legislation, become forbidden areas of discrimination in national law. Finally, the remaining grounds only appearing in the Charter are, at least, likely to be regarded by the Court of Justice as suspect classifications as regards differential treatment within EU law, but in respect of which the Union enjoys no powers to adopt implementing legislation.

Moving Beyond the Labour Market

The other new trend is the application of non-discrimination norms to areas outside employment. Whilst this was already true for the prohibition of nationality discrimination, Community law on sex discrimination applied primarily in situations connected to participation in employment. In contrast, the Racial Equality Directive additionally covers the areas of “social protection,

including social security and healthcare; social advantages; education; and access to and supply of goods and services which are available to the public, including housing” (Article 3(1)). However, these are subject to the important, if vague, caveat that it is only in so far as these issues fall “within the limits of the powers conferred upon the Community.” Given the blurred boundaries of EC legal competence in areas such as healthcare or education, the scope of the non-discrimination requirement remains ambiguous.

Nonetheless, the Council has already committed itself to the adoption of further legislation on gender equality in areas outside employment (European Social Agenda, [2001] OJ C157/4) and there are active campaigns for similar legislation on grounds of disability and sexual orientation. The experience of applying the 1976 Equal Treatment Directive means that the Court of Justice already possesses a rich body of case-law from which to draw principles when confronted with questions surrounding the employment provisions of the new anti-discrimination Directives. However, the promotion of equality in education, for example, will present the Court with new challenges, such as the legal scope for positive action in this area.

A Coherent Vision of Equality and Diversity?

The transformation of EU anti-discrimination law has provided a welcome revitalization, rather than continued reliance on the stale legal framework provided in the 1976 Equal Treatment Directive. Moreover, the Directives are producing a trickle-down effect by stimulating debate across the member states, as well as the EU applicant states, on how best to (re)construct anti-discrimination law. For the most part, the new Directives should enhance protection against discrimination at the national level; however, there is also the potential for EU norms to disrupt established legal traditions and frameworks. In particular, the Article 13 initiatives have not reduced the pre-existing equality hierarchy within EU law. On the contrary, new hierarchies have emerged and there is an evident lack of consistency between the various legislative initiatives. This is problematic for national legal systems based around common standards for all forms of discrimination; indeed, the Directives may provide the opportunity for the emergence or exaggeration of national equality hierarchies. The challenge for the Union is to ensure that the end product is not a discrimination law of “bits and pieces,” but a coherent and consistent framework for promoting equality.

Mark Bell is Lecturer in the Centre for European Law and Integration, University of Leicester.

Forum References

- Barnard, C., 1996. “The Economic Objectives of Article 119,” in *Sex Equality in the European Union*, T. Hervey and D. O’Keeffe (eds.), Chichester: Wiley, 321-334.
- Beveridge, F., Nott, S. and Stephen K., (eds.), 2000. *Making Women Count: Integrating Gender into Law and Policy-Making*. Aldershot: Ashgate.

- Brush, Lisa D., forthcoming. “Changing the Subject: Gender and Welfare Regime Studies,” *Social Politics*, 9: 2.
- Commission of the European Communities, 2000. *Report from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions: Equal Opportunities for Woman and Men in the European Union 1999*. Brussels, COM(2000), 123 final.
- _____, 1996. *Communication to the European Parliament and the Council: Incorporating Equal Opportunities for Women and Men into all Community Policies and Activities*. Brussels: COM(96) 67 final.
- Cram, L., 2001. “Governance ‘to Go’: Domestic Actors, Institutions and the Boundaries of the Possible,” *Journal of Common Market Studies* 39: 595-618.
- Dolowitz, D. and Marsh, D., 2000. “Learning from Abroad: the Role of Policy Transfer in Contemporary Policy Making,” *Governance* 13, 5-24.
- Helfferrich, B. and Kolb, F., 2001. “Multilevel Action Coordination in European Contentious Politics: The Case of the European Women’s Lobby,” in Imig, D and Tarrow, S. (eds.), *Contentious Europeans: Protest and Politics in an Emerging Polity*. Boulder, CO: Rowman & Littlefield.
- Hoskyns, C., 1996. *Integrating Gender: Women, Law and Politics in the European Union*. London: Verso.
- Mazey, S., forthcoming. “Gender Mainstreaming Strategies in the EU: Delivering on an Agenda?” *Feminist Legal Studies*, 10: 3.
- _____, 2001. *Gender Mainstreaming in the EU: Principles and Practice*. London: Kogan Page.
- McGlynn, C., 2000. “Ideologies of Motherhood in European Community Sex Equality Law,” *European Law Journal* 6, 29-44.
- Pollack, M. and Hafner-Burton, E., 2000. “Mainstreaming Gender in the European Union,” *Journal of European Public Policy* 7: 3, 432-456.
- Shaw, J., 2000. “Importing Gender: The Challenge of Feminism and the Analysis of the EU Legal Order,” *Journal of European Public Policy* 7: 406-431.
- Van Ham, P., 2001. “The Rise of the Brand State: The Postmodern Politics of Image and Reputation,” *Foreign Affairs* 80: 5, 2-6.
- Walker, Neil, 2001. “The White Paper in Constitutional Context,” Jean Monnet Working Papers 6/01 www.jeanmonnetprogram.org/papers/01/011001.html
- Wobbe, T., 2001. “Institutionalisierung von Gleichberechtigungsnormen im Supranationalen Kontext: Die EU-Geschlechterpolitik,” *Kölner Zeitschrift für Soziologie und Sozialpsychologie, Sonderheft* 41: 332-355.