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**The Division of Competence
and regulation of sex equality
in social protection in European Union social law.**

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1 Introduction

Leibfried and Pierson note that, 'the welfare state remains one of the few key realms of policy competence where national governments still appear to reign supreme'.¹ Apart from the coordinating principles of Regulation 1408/71² and related measures to ensure transfer of social security benefits of mobile workers within the EU, the EU has enacted very few regulatory measures in the field of welfare policy.

The exception to this lack of EU-level regulation of social protection is the EU's regulation of sex equality in the social protection field. The EU has enacted provisions which regulate national social security systems to the extent that measures of those systems which discriminate on grounds of sex are contrary to European Community law.³ These provisions hold a special interest because they occupy a unique position at the 'crossroads' of EU social policy; that is, between labour market regulation and regulation of social welfare. Within social policy, the labour market field is a relatively well-established field for EU regulation, especially in the equal opportunities area.⁴ By contrast, the

¹ Leibfried and Pierson, in Wallace and Wallace, 1996: 189.

² OJ Sp. Ed. 1971 (II) p. 416.

³ Directive 79/7/EEC OJ 1979 L 6/24 (state social security schemes), Directive 86/378/EEC OJ 1986 L 225/40 as amended by Directive 96/97/EC OJ 1997 L 46/20 (occupational social security schemes).

⁴ Article 119 EC; Directive 75/117/EEC; Directive 76/207/EEC; Directive 92/85/EEC.

social welfare field is a highly contentious area in which there is little binding EU regulation, but where at least arguably the dynamics of integration of the single European market may provide the impetus for 'spillover' into the field. In the regulation of sex equality in social security, the EU's regulatory measures already interface with national welfare policies. Attention to that field may provide insights into possible future developments of EU regulation which also affect national social security or welfare systems.⁵

The general aim of this paper is to explore the development of EU regulation of sex equality in social protection. 'Social protection' encompasses both social security and social assistance or welfare. It refers to the whole field of policy which ensures, either through private or public provision, at the very least that the basic needs of people (food, housing) required by human dignity are met. The social protection systems of Western democracies such as the Member States of the EU aim to guarantee rather more protection, especially against the risks entailed in withdrawal from the labour market. The paper's main focus of enquiry is Directive 79/7/EEC (the Directive), which provides for equality in state social security schemes. Related policy measures, in particular Article 119 EC and Directive 86/378/EEC (as amended), which regulate sex equality in occupational social security, will also be relevant in building up a picture of the development of the EU's sex equality measures in the whole field of social protection, whether publicly or privately provided.

The exploration uses the methodology of 'new institutionalism', which provides a research strategy for the study of law and policy development in the EU.⁶ New institutionalism is characterised by the central explanatory role it gives to institutional and organisational structures within a system of governance. Its focus is 'day to day' policy-making, and the 'rules, norms, beliefs, rhetorics, ideologies

⁵ For instance, the application of the freedom to provide services provisions (Articles 59-66 EC) to 'privatised' aspects of national social services regimes.

⁶ See Bulmer, 1994; Wincott, 1995; Armstrong 1996, 1997; Lowndes, 1996.

and procedures which shape the interaction between institutional actors and which orientate institutional actors to their allotted functions.⁷ These ‘norms of appropriate behaviour’⁸ as between institutional actors establish both procedural and substantive modes of operation: ‘ways of doing’ and ‘ways of thinking’. Where actors in distinct organisational contexts (for instance, at different levels in a multi-level system of governance such as the EU⁹) operate according to different norms of appropriateness, ‘organisational linkages’ or dialogue between institutions in various forms may expose tensions in different conceptualisations. Organisational structures may operate to create endogenous forces for change (or may stifle or constrain change) through dialogue, and the establishment of particular norms of appropriateness as predominant. Through a historical process of ‘path dependency’ and ‘feedback loops’, these norms may become established as orthodoxy within the system, and may curtail or constrain potential innovation and creativity by shaping the context for future policy developments. Change may therefore be seen as evolutionary (referable to endogenous forces), rather than revolutionary (referable to exogenous forces).¹⁰

The paper concentrates on the micro-level of policy development, in a specific area of European social policy, sex equality in social protection. It is an area of policy which has been developed both by the EU legislature and by the European Court of Justice through its interpretative jurisdiction. The Court has been a significant player in the development of the policy.¹¹ As a research strategy, new institutionalism is particularly appropriate for enquiry into a policy area where developments are significantly influenced by courts. Attention may be directed to the legal dimension of policy

⁷ Armstrong, in Shaw and More, 1996.

⁸ March and Olsen, 1989.

⁹ Leibfried and Pierson, 1995.

¹⁰ Armstrong, 1997.

¹¹ For example, the Court’s interpretation of Article 119 EEC in Case C-262/88 *Barber* [1990] ECR I-1889, which extended the application of Article 119 to benefits accruing from occupational pension schemes.

development, without taking a narrow legal formalist perspective, and without constructing courts, and especially ‘constitutional level courts’ such as the European Court of Justice, as simply agents of other (political) actors, rather than as significant institutional actors in their own right.¹²

The account revealed by the application of the methodology of new institutionalism to the policy area of sex equality in social protection is one of stultification of potential innovations which might have contributed to policy developments at EU level. The paper focuses on three inter-related research questions: which particular ‘norms of appropriateness’ (procedural and substantive) or understandings of orthodoxy inform the EU-level regulation of sex equality in social protection; how are different conceptualisations of orthodoxy or appropriateness revealed through tensions in organisational linkages; and how has a historical process of path dependency and feedback loops embedded the orthodoxy and constrained potential future development. The underlying theme is the concept of ‘division of competence’ between the Member States and the EU as regulators.

2 Context: sex equality in European welfare regimes

Before exploring the impact of the concept of division of competence in creating norms of appropriate behaviour among the EU legislature and judiciary, it is necessary to set the EU-level regulation of sex equality in social protection in the context of national welfare regimes. This context reveals a variety of differing approaches to sex equality among the welfare regimes of the Member States.

Although the European Commission strives to claim otherwise, with its (sometimes obfuscatory) references to ‘the European social model’,¹³ it seems clear that the similarities between social policy

¹² Armstrong, 1997; Alter and Meunier-Aitsahalia, 1994; Shapiro and Stone, 1994: 408-9.

¹³ ‘Europe is built on a set of values shared by all its societies, and combines the characteristics of democracy - human rights and institutions based on the rule of law - with those of an open economy underpinned by market forces, internal solidarity, and cohesion. These values include the

regimes within the Member States of the European Union are evident only at the highest level of abstraction. At least four, if not more, types of 'welfare regime' or models of the welfare state are represented within the European Union. More recent typologies of welfare regimes¹⁴ divide the welfare regimes of Member States into conservative/corporatist (Germany, France), liberal market (United Kingdom), Scandinavian or social democratic (Sweden, Denmark) and traditional or 'Latin rim' (Italy, Spain). The heterogeneity of European welfare regimes has arisen as a consequence of different political, ideological, historical, cultural and economic forces in different Member States.¹⁵

However, as Jane Lewis¹⁶ (among others¹⁷) has pointed out, these approaches tend to miss the gendered aspects of welfare regimes, in particular the relationship between paid work, unpaid work and welfare.¹⁸ In assessing sex equality provisions within welfare regimes, models which incorporate the unpaid provision of welfare carried out by women, principally within the family, and the social protection of those providers, are needed. Of course, these 'models' or 'ideal types' are not representations of objective reality. Rather, any 'real life' positions are likely to combine a 'mix' of the different elements, albeit with stronger emphasis on some.

Lewis¹⁹ divides European welfare regimes into 'strong' 'moderate' and 'weak' male breadwinner

access for all members of society to universal services or to services of general benefit, thus contributing to solidarity and equal treatment.' (European Commission, 1996).

¹⁴ See for instance, Esping-Andersen, 1990; Leibfried, 1993; Gomà, 1996: 209-230. See Lewis, 1993: 12-13.

¹⁵ For some historical perspectives, see Bock and Thane, 1991.

¹⁶ Lewis, 1993: 1-24; Lewis, 1992: 159-173.

¹⁷ Ostner and Lewis, 1995; Taylor-Gooby, 1991: 93-105.

¹⁸ See, for instance, Leira, *Models of Motherhood* (Oslo: Institute for Social Research, 1989), who shows that once a gender dimension is included, Esping-Andersen's 'Scandinavian model' of welfare regimes is not so coherent. Cited in Lewis, 1992: 162.

¹⁹ Lewis, 1993; Lewis, 1992; Ostner and Lewis, 1995.

states. This division concentrates on the predominant categorisation of women as either mothers (Ireland, the UK, Germany) or as both workers and mothers (France, Belgium), or, in rare cases, as workers (Denmark, Sweden), for the purposes of social protection entitlements. No European state adopts the ‘male breadwinner’ model in its pure form, the implications of which would be the exclusion of married women from the paid workplace, their subordination to their husbands for the purposes of social security and taxation, and an expectation that they carry out caring work on an unpaid basis within the family.²⁰ However, neither has any European state totally abandoned the model of male breadwinner in the organisation of its social policy. Rather, different Member States of the European Union have adopted stronger and weaker versions of the model.

The heterogeneity of welfare regimes of the Member States means that, by definition, no single model can claim to be the appropriate basis for EU-level regulation of sex equality in social protection. This is reflected in the terms of Directive 79/7/EEC, which is a compromise, reflecting each model in part only. For instance, the Directive applies only to ‘the working population’,²¹ and hence offers equal protection only to women who join the paid labour force, suggesting the influence of a strong male bread winner model. However, the Directive also provides that it is to be ‘without prejudice to provisions relating to the protection of women on the grounds of maternity’,²² suggesting the influence of the moderate or weak male breadwinner models.

Because Directive 79/7/EEC does not display a close ‘fit’ with any of models reflected in the welfare regimes of the Member States, we might predict tensions where the Directive is applied in those Member States. Interactions between national and EU actors (both those using litigation and those participating in the political or legislative process) concerning sex equality in social security are likely

²⁰ Lewis, 1992: 162.

²¹ Article 2.

²² Article 4 (2).

to be characterised by conflicts.²³ These conflicts may reveal tensions between different conceptualisations of ‘norms of appropriateness’ in regulation of sex equality in social protection in the contexts of national institutions and EU institutions. Attention is now turned to the ‘norms of appropriateness’ or orthodoxy in institutional behaviour pertaining to EU-level regulation of sex equality in social protection.

3 What is the orthodoxy? - division of competence

In the regulation at EU-level of sex equality in social protection, the institutions appear to have established both procedural and substantive ‘norms of appropriateness’ based on the concept of division of competence.²⁴ These norms appear to be applied not only in the legislative process, but also by the Court in its role as policy-maker. Stated briefly, the procedural norm of appropriateness is to ask the division of competence question (a ‘way of doing’), and only extend regulation by EU-level norms if the EU ‘has competence’, according to the institution’s conceptualisation (a ‘way of thinking’) of the competence issue. The division of competence plays a central role in shaping

²³ For example, Ostner and Lewis argue that the implementation of European sex equality legislation is likely to prove most difficult in strong male breadwinner countries. This is because European sex equality legislation is predicated on sameness of treatment of women with men, predominantly in the context of paid work. Where women are treated as *different* from men in social security provision, because women are not primarily conceptualised as workers, but as mothers, European legislation, as interpreted by the European Court, and implemented in the national regime, will prove most disruptive.

²⁴ The focus of enquiry of this paper is what has happened to policy development once these conceptualisations entered the policy-making process. The paper does not explain how the conceptualisations entered the system in the first place. It may be that they are referable to exogenous forces, arising from preferences of the governments of the Member States, articulated through the legislative process and also in litigation where Member States are litigants, or have intervened, in Article 177 or 169 actions. The Court’s conceptualisation of competence in the field may well be influenced by preferences of the governments of the Member States, for instance based on an essential reluctance of national governments to surrender powers in any field. They may also be referable to endogenous forces. European endeavour in other aspects of social policy is conceptualised as concerned with the market, in particular with labour market regulation. These pre-existing ‘norms of appropriateness’ in other substantive areas may have been applied by analogy to the field of sex equality in social protection.

institutional behaviour in the EU because of the nature of the EU as a multi-level system of governance.²⁵ In such a system, competence to regulate is allocated to different levels in accordance with their respective spheres of influence. The scope of the EU's regulation may only extend as far as its sphere of influence.

The concept of 'division of competence' is complex and has at least three principal facets: the ability of the EU legislature to enact law, the doctrine of subsidiarity, and the scope of application of EU law. Applied to regulation of sex equality in social protection, for each of these three facets the understanding of division of competence which has entered the institutions inter-relationship (ways of doing, but more significantly ways of thinking or conceptualisation of the competence issue) with most persuasive force is the one which draws a sharp line between labour regulation (which is an appropriate concern for the EU) and welfare regulation (which is not). That distinction between labour regulation and welfare regulation has become the orthodoxy on the question of division of competence in this area. The establishment of the orthodoxy has constrained the potential for developments of EU-level regulation of sex equality in social protection based on other, competing constructs of the division of competence issue. The following section seeks to describe the orthodoxy, and to set out some of the other possible constructs, which are perfectly intellectually, conceptually and even politically respectable, but which have not become so firmly embedded in the inter-institutional policy-making process.

3.1 Competence to enact law

The first aspect of division of competence is the political/legal question of competence of the EU institutions to enact measures of European law. This issue locates the question of competence to regulate the specific matter of sex equality in social protection within the broader question of

²⁵ Weiler, 1991.

competence of the EU to regulate in the social policy field generally.

Traditional legal analysis²⁶ tends to focus upon this aspect of division of competence. According to this analysis, areas of regulatory activity are divided into those where the EU enjoys 'exclusive competence',²⁷ those where the Member States retain competence, and those areas falling somewhere in between, which are known as areas of 'concurrent competence'.²⁸ According to the traditional view, in areas of 'concurrent competence', Member States retain competence to act until the EU does so, thereby 'pre-empting' national action.²⁹ According to the Court,³⁰ the EU 'enjoys an internal legislative competence in the area of social policy'. The general consensus³¹ appears to be that this competence is concurrent, not exclusive.

Current legal interpretations of the 'legal basis' provisions of the Treaty of Rome³² (upon which legislation may lawfully be enacted by the EU institutions) seem to concur that there is at present no EU competence for harmonization of general social protection policy.³³ Intervention by the EU

²⁶ See, for instance, Bieber, 1988: 147-158; Dashwood, 1996: 114; but see Weatherill, 1994: 13-33, Weiler, 1991: 2414-2453.

²⁷ For example, common commercial policy, see Opinion 1/75 [1975] ECR 1355.

²⁸ Weiler, 1991: 2436.

²⁹ See Cross, 1992: 447-472.

³⁰ Opinion 2/91 [1994] IRLR 135.

³¹ See Barnard, 1995: 24-25; Watson, 1991: 40-43. See also the text of Article 177 EC, which refers to competence of the Member States and the Community, and Cases 281, 283 & 285/85 *Germany and others v Commission* [1987] ECR 3203.

³² See Nielsen and Szyszczak, 1993: 18-37 for details.

³³ However, it should be remembered that the concept of competence is dynamic not static, and so is open to variations through time, and is dependent upon constellations of particular political actors having success in putting across their perspectives on Community competence. These changes often eventually find legal expression in intergovernmental amendments to legal basis provisions within the Treaties.

legislature of a regulatory harmonizing nature is restricted to that necessary to guarantee freedom of movement for persons³⁴ and to the 'special case' of sex equality in social security. This latter provision is based on the general legal basis provisions of Article 235 EC and the Equal Treatment in Employment Directive 76/207/EEC.³⁵ The competence of the EU institutions to enact regulatory Community sex equality law owes a great deal to the presence in the Treaty of Rome of Article 119 EC on equal pay for men and women. This link with sex equality in paid employment is in turn reflected in the limited nature of European regulation of sex equality in social protection.

However, the legal basis of Article 235 EC, permitting action by the EU institutions 'necessary to attain, in the course of the operation of the common market, one of the objectives of the Community',³⁶ gives this aspect of the concept of competence a distinctly political flavour. If the political will is present (Article 235 EC requires Council to act by unanimity), the legal concept of competence is unlikely to prove a bar to almost any development of European law, given the current stage of integration of the single European market. The 'elasticity' of the provision in Article 235 EC, with its textually ambiguous language,³⁷ could justify action in the social field as necessitated by the integration of the single European market, given the links between economic and social policy, if such action is deemed politically desirable. Hence the concept of competence informs what are essentially political debates concerning where and how the EU ought to act, and in particular, regulate.

Four different types of models³⁸ may be advanced to inform the question of whether 'European social policy' measures are politically desirable, or, to put it another way, to determine the competence of

³⁴ For instance, Regulation 1408/71/EEC and Regulation 1612/68/EEC.

³⁵ OJ 1976 L 39/40.

³⁶ See Articles 2 and 3 EC.

³⁷ Weiler, 1991: 2443-6.

³⁸ See Room, 1991: 8-9; Hagen, 1992; Watson, 1991: 40-41.

European institutions to enact social policy measures. These are models,³⁹ not expressions of objective reality. Each model arises from a consensus formed around a particular description of reality which claims itself to be accurate or true. It is not the case that any of the models can be said to be ‘right’ or ‘wrong’, either in law or in policy.⁴⁰ Support for each of the models can be found in the Treaty provisions on social policy.⁴¹

The four models are the ‘neo-liberal market model’, the ‘convergence model’, the ‘social justice model’ and the ‘conservative social cohesion model’. According to the neo-liberal market tradition, a social dimension is undesirable. Individuals are to be enabled to compete within the marketplace, but no further state intervention is justified. There no need for a European level social dimension; in fact European-level regulation of social policy may introduce inefficiencies into the market.⁴² The

³⁹ Each model presented is a gross over-simplification; a thumbnail sketch. The models are not in any sense established, stable or fixed.

⁴⁰ Each of the models is open to criticism and deconstruction. For instance, the social dumping arguments can be criticised because it has not been clearly established that there is a link between low pay and low levels of social protection for employees, and competitiveness or productivity. It may be on the contrary that low pay and low levels of social protection foster a lack of labour commitment to the enterprise, and therefore contribute to lack of competitiveness. Also, investment decisions are made on a number of bases, not simply direct and indirect labour costs. Other factors, such as infrastructure, or trained workers may be more significant. Perhaps more crucially, (this also applies to the neo-liberal and convergence models) labour markets can never be fully competitive. This is because they are characterised by a number of ‘structural imperfections’ - labour markets as completely free markets in an economic model exist only in myth, not in reality. A particularly significant ‘structural imperfection’ in the European context is that workers are not mobile enough to be able to choose jobs in which they receive optimal rewards. Workers are tied to particular jobs because of personal ties, linguistic capabilities, lack of information about available alternative jobs, and lack of short term funds enabling them to take short term risks in order to optimise the long term benefits from their labour.

⁴¹ Carter, 1996: 241.

⁴² High social standards are seen as ‘rewards’ for efficiency, and should not be rigidities imposed on the market. For instance, if Germany can afford to have high levels of social protection, that is because it has an efficient economy, and the social protection is a reward to those whose work makes it a success. Regulatory measures of European social policy, which protect the northern, richer Member States, are detrimental to the long-term interests of the EU, and especially detrimental to the poorer, southern Member States, whose competitive advantage in the single European market is removed by their application. This advantage arises from their comparatively low labour costs, both ‘direct’ labour costs, ie wages and ‘indirect’ labour costs, such as social security and other

cooperation or convergence model adopts the position that interventionist European-level social policy is superfluous, because political and economic forces within the single European market will of themselves encourage a tendency toward convergence of national social policy standards.⁴³ The social justice model emanates from the social democratic tradition. According to this model, social policy is necessary to 'humanise' the market, for reasons of fairness and distributive justice. Economic efficiency must be balanced by welfare objectives, by the creation of a European social market economy.⁴⁴

The model of conservative social cohesion⁴⁵ holds that social policy measures are necessary to maintain and support the established social order, as an unimpeded market will otherwise produce threatening social dislocation of free market 'losers'. EU-level social policies are necessary to preserve and promote a consensus in favour of European integration among Europeans.⁴⁶ The intensification of competitive pressures brought about by European economic integration, with the restructuring of

contributions, or the costs of training, which might provide an incentive for inward investment in those Member States. This incentive is withdrawn if high social standards require higher wages or higher contributions to social security benefits. Therefore, it is argued that the European Union should not set European-level social standards, but should leave the single European market to function unimpaired.

⁴³ Member States should not be required by law to coordinate national social policies, but will do so for sound economic reasons, because of their ever closer economic integration. Coordination of the cooperative efforts of the Member States, rather than harmonised social policy, is all that is required of the European institutions.

⁴⁴ Support for the social market cohesion model may be found in the aspirational provisions of the founding Treaties, such as the Preamble, Article 2 and Article 117. The (apparent) avowed intention behind the European integration project is to produce social benefits. Those who espouse this model are of the view that pure economic integration is unlikely to deliver these benefits by itself. The single European market perpetuates and increases disparities and inequalities of those who are already socially disadvantaged, by its centralising effect, coupled with the lack of infrastructure in peripheral regions. Social policy measures are necessary to correct this tendency towards inequality.

⁴⁵ Sometimes termed the 'Bismarckian model'.

⁴⁶ Wise and Gibb, 1993: 131.

European industries and services, could lead to more 'losers' - and more exclusion⁴⁷ - in European society. This 'centrifugal force' will have an disintegrating, rather than integrating, effect, which needs to be corrected by social policy intervention.

The conservative social cohesion model also draws on a phenomenon known in the European social policy debate as 'social dumping'. The argument from 'social dumping' seeks to locate social policy firmly in the desire to create a single European market governed by principles of free and fair competition.⁴⁸ Social dumping is short-hand for several related ideas. It is argued that divergent social standards between the Member States will lead to 'trade distortions and price wars' as Member States with lower wages and social protections seek to restrain improvements in working and living conditions in order to increase exports to other Member States, or to protect their home markets.⁴⁹ Without some social harmonization, employers in states with a high level of social protection would find themselves at a competitive disadvantage vis a vis employers in Member States with lower levels of social protection. The (perceived) resultant tendency would be for firms to relocate in areas of low social protection.⁵⁰ Member States with higher levels of social protection would therefore feel constrained to lower their standards in order to maintain their competitive position in terms of trade, and to safeguard employment and investment in the national economy. Thus a 'race to the bottom' - a general lowering of standards throughout the EU - would ensue. Obviously for proponents of a social cohesion model of social policy, such a 'race to the bottom' is regarded as highly undesirable.

No individual or institution adopts a pure version of any model. 'Real life' policy positions are a

⁴⁷ For instance, unemployment and poverty, leading to social ills such as crime and racism.

⁴⁸ See, Barnard, 1995: 81-87; Barnard, 1995a.

⁴⁹ Carter, 1996: 245.

⁵⁰ Implying lower employer overheads, for instance in terms of social contributions, or burdensome health and safety requirements.

mixture of elements of each, but tend to support a particular model more or less strongly. The institutional structure of the EU policy-making process is stacked in favour of 'negative outcomes'; that is to say, it is easier for the institutions to do nothing than to enact positive measures of new policy. This gives an advantage to the neo-liberal and convergence models. In terms of positive policy-making, where the EU seeks to act in the social field, it has done so through situating measures of social policy within the economic endeavour.⁵¹ This is precisely what those adopting the conservative social cohesion model seek to effect, by linking social regulation with notions of competitiveness, social 'efficiency', level playing fields and 'social dumping'. The social democratic model eschews such a linkage, but in contrast places economic and social policy aims in tension against one another. For this reason, the social democratic model has had less success in forming the predominant basis for social policy provisions enacted by the EU institutions.⁵² The conceptualisation of division of competence promoted by the social cohesion model has become more firmly embedded than that of other models as orthodoxy in the policy-making process. This orthodoxy has had consequences for the formation of EU regulatory policy on sex equality in social security, which has tended to be skewed towards the 'labour market' (economic) aspects of social security, rather than its 'welfare' (social) aspects, as we will see below.

3.2 Subsidiarity

The second facet of division of competence centres around the doctrine of subsidiarity:⁵³ the question of what is the 'best level' for action in the field, that of the Member State or the European Union, and

⁵¹ This appears to be necessitated by the aims of the Community. It also enables the legislature to enact measures based on legal bases such as Article 100a and Article 118a which do not require unanimity in Council.

⁵² Although, of course, that model may partially underpin some provisions, as different actors in the integration process may support a development for different reasons.

⁵³ Article B TEU, Article 3b EC. Although the doctrine was added explicitly to the Treaties at Maastricht, it is not a new concept in European law.

the related question of what form European Union action, if justified, should take. The principle of subsidiarity provides guidance on the functional allocation of legislative and administrative powers between different levels of a multi-level system of governance, such as a federation.⁵⁴ Subsidiarity is based on the idea that decisions should be made at as local a level as is possible or consistent with efficiency. More abstracted or removed levels of governance tend to be inefficient in terms of incorporating the desires of individuals, which are given priority in accordance with principles of individual self-determination and human dignity. Local levels of decision-making ensure better representation of individuals' interests, and allow for participatory democracy. Individual interests are thereby protected from the power of the state.⁵⁵

According to Article 3b EC, in areas not within the 'exclusive competence' of the EU, action by the EU institutions is to be taken in accordance with the principle of subsidiarity. The social policy field is one of 'concurrent competence', and therefore the principle of subsidiarity applies to action in that field, including regulation of sex equality in social security.

The first question in the application of the principle of subsidiarity is 'should the European Union act?' (the best level). According to Article 3b EC, the European Community should act if first, the objectives of the proposed action cannot be sufficiently achieved by the Member States, *and* second, if the objectives can, by reason of the scale or effects of the proposed action, be better achieved by the Community.⁵⁶ The application of the principle of subsidiarity therefore requires an assessment

⁵⁴ However, in the European debate, subsidiarity tends to be exclusively concerned with whether the proper level for action is the national Member State level, or the level of the European institutions.

⁵⁵ According to the 1931 Papal Encyclical from which the doctrine is said to originate 'it is an injustice, a grave evil and a disturbance of the right order, for a larger and higher association to arrogate to itself functions which can be performed efficiently by smaller and lower societies.'

⁵⁶ The conclusions of the Edinburgh Council on subsidiarity call for the establishment of these matters by qualitative or quantitative criteria. 'Clear benefits' must be produced by Community action. The reference to the scale of the proposed action alludes to the presence of a 'cross-boundary dimension'. The term 'effects' is less susceptible to a firm definition, and could potentially have a very

of the objectives - the function or aims - of a particular proposed action or policy component. In order to apply the principle of subsidiarity to the policy of sex equality in social protection, or to specific proposals designed to implement that policy aim, it is necessary to define the objective or function of measures to promote sex equality in social protection. This is not straightforward, as such measures are likely to have a number of overlapping (and sometimes even competing) functions.

One possible function of provisions promoting sex equality in social protection is to promote cost effective or efficient welfare measures. According to this position, gender-based assumptions about caring, paid and unpaid work are 'irrational' (as they are based on the economically irrelevant criterion of sex) and therefore inefficient. An extreme variant of this position would hold that no intervention to introduce sex equality is necessary, if welfare is currently provided efficiently, in an economic sense. A related function of sex equality in social protection benefits under this model is to ensure a level playing field of employment costs for all actors in the market, where benefits are linked to contributions of employers. This is closely related to the 'social dumping' arguments discussed above.

A second position on the function of regulation of sex equality in social protection, based on the 'weak male breadwinner' model discussed above, is that equality should be ensured only for working women, to protect them, as men are protected against the risks which would prevent them from continuing to work, such as illness and invalidity. The assumption is that women are to be defined as workers for the purposes of social protection.⁵⁷ Special provision should be made for women workers who become pregnant. Provisions on sex equality in social security essentially have the function of complementing provisions on sex equality in employment.

wide ambit. At the end of the day, 'better' is a subjective test of political choice, no matter how much effort is put into breaking it down into so-called 'objective' components. The choice of components, and the relative weight given to each when a particular policy choice is made, is likely to reflect subjective pre-considerations.

⁵⁷ Ostner and Lewis, 1995: 186.

By contrast, a position focused upon women's role as carers, based on the 'strong male breadwinner model' would maintain that the function of sex equality provisions is to ensure protection for unpaid women, by rewarding their unpaid (caring and domestic) work. An extreme variant would call for 'pay for housework' as some feminist groups have done. Those who do not undertake paid work, but care for dependants, should not be abandoned by the social protection system. As those carers are predominantly women, sex equality provisions will ensure their protection.

Finally, it might be maintained that the function of laws providing for sex equality in social security should protect women as either workers, or carers, or both. This model also holds that men require equal protection regardless of whether they are paid workers, carers, or dependants. This 'combination' position is about promoting individualised 'social justice' - providing a minimum level of social protection for all individuals in society, regardless of their status. From the point of view of women, a combination approach sees the function of sex equality provisions as to increase women's choice and self-determination. This might be for instance by removing past discriminations in the organisation of social welfare systems, such as those based on women's historical role as carers, or those based on women as home-makers with men as bread-winners.

Again not all of these competing or overlapping functions have enjoyed equal status in becoming part of the institutions' mode of operation in the process of making EU-level policy on sex equality in social protection. The history of enactment of Directive 79/7/EEC suggests that the first and second models, concerned with the 'economic' aspects of social protection regimes, were more influential than the third and fourth, which are more concerned with social welfare of women, and of changing deeply gendered aspects of the social structure of work and care.⁵⁸ The EU's competence extends to the labour market aspects of social protection, but not to its social welfare aspects.

⁵⁸ See Hoskyns, 1996: 107-113; Sohrab, 1996: 84-85; Hoskyns and Luckhaus, 1989: 321-326.

The second question in the application of the principle of subsidiarity is ‘what should be the nature or the intensity of Community action?’ This is expressed in Article 3b (3) EC, and is essentially an application of the proportionality principle, that the means should fit the ends. The implication is that Community measures should intervene with national modes of regulation as little as possible or as is consistent with the achievement of their aims.⁵⁹ For example, if that is consistent with their functions, the EU may have competence simply to promote convergence by non-binding measures; or competence to regulate only in the form of framework measures or minimum standards; or to enact regulatory measures of positive or negative harmonisation. It is apparently implicit in Article 3b (3) that EU-level measures should be interpreted by the Court⁶⁰ as leaving maximum discretion to national authorities, again consistent with the functions of the measures concerned.

Regulation of sex equality in social security at EU-level is largely in the form of directives. Directives are binding on the Member States in that they must comply with the result envisaged.⁶¹ However, directives tend to be framed in ‘loose’ language, permitting various interpretations. This characteristic may be used by the European Court of Justice, in interpreting directives, to give more or less discretion to Member States. Where the Court ‘tightens up’ the language, by finding that specific measures of national policy are or are not consistent with the provisions of a directive, the Court reduces the discretion of the national authorities. Where, on the other hand, the Court leaves decisions as to consistency with a directive’s broad principles to national authorities, it increases national discretion. The question essentially becomes one of how much discretion to the national authorities is consistent with the function of the directive? This relates the second part of the application of the

⁵⁹ The implication is a tendency to prefer directives to regulations or decisions, and to prefer non-binding measures to binding ones where appropriate.

⁶⁰ This of course assumes that the Court is subject to the principle of subsidiarity. There is some doubt about the correctness of this assertion, see de Búrca, forthcoming 1997; Irish Presidency Draft Protocol on subsidiarity.

⁶¹ Article 189 EC.

subsidiarity principle (best type of action) firmly to the first part (best level for action).⁶²

Moreover, this aspect of the competence debate (related to subsidiarity) is also linked to the third facet of the concept of division of competences: the expression of the scope of European Union law.

3.3 Scope of European Union law

This third facet of the concept of division of competence between Member States and the EU institutions informs the question of where the limits of application of EU legislation lie. This aspect of division of competence is expressed both in the enactment of legislation (which will define its own scope) and (more importantly) in the judicial process. National courts, in applying provisions of European Community law, incidentally rule on division of competence in this sense. However, the European Court of Justice enjoys a privileged role, as, in accordance with Article 177 EC, the Court is the ultimate arbiter in interpretation of provisions of European Community law, including of course the determination of their scope. Where the Court interprets a provision of European Community law, such as a directive, and in so doing gives a greater or lesser discretion to national authorities, norms and systems, the Court is essentially defining the precise scope of European Community law. However, the Court may also be said to be defining the division of spheres of influence of EU and national regulatory regimes.⁶³

As Stephen Weatherill⁶⁴ points out, the reality of the integration process belies a strict legal conceptualisation of concurrent competence, especially the doctrine of pre-emption. Looking at the

⁶² See de Búrca, forthcoming 1997 for analysis of why the Court should be explicit about the application of the principle of subsidiarity in exercising its interpretative functions.

⁶³ Cf Dashwood, 1996: 114 who distinguishes sharply between the 'Community legislative process' and 'the limits of the Treaty's scope of application'.

⁶⁴ 1994.

example of consumer protection regulation, Weatherill shows that it is not satisfactory to characterise the field as 'occupied' by either the EU alone or the Member States alone. What is necessary is a concept of 'shared competence'. The same may be said of the field of sex equality in social protection, and indeed all fields of European social policy where regulatory measures applying to the field emanate from both EU and national levels, and policy is constituted by interactions between the different levels.

Where both the Member States and the EU regulate a field, so that the system of regulation for that field might be described as 'multi-tiered',⁶⁵ the question of the scope of European law becomes important, as it determines the source of legal norms applicable in specific situations. It is contended that therefore legal norms relating to division of competence may also inform the question of the scope of European Community law. This is a very broad definition of 'division of competence', much wider than the traditional legal concept which is concerned with power to enact legislation, to regulate, to 'occupy the field'. Division of competence in this sense is concerned with division of powers and spheres of influence between the Member States and the EU, or about the 'boundaries' of each level (EU and Member State) of the 'multi-tiered system' of governance of European social policy. Because the system operates on the basis of interaction between levels, resolution of these boundaries is likely to affect both the process of development of the policy as a whole, and also its content. The scope of European law in the field of regulation of sex equality in social protection has been and is constructed by the institutions (especially the Court) on the basis of a distinction between labour market regulation (within the scope of EU law) and welfare regulation (outside its scope). This construction is explored in more detail below.

All of these facets of the debates on division of competence - the power to enact measures of European law, the doctrine of subsidiarity and the scope of European law - have contributed to the

⁶⁵ Leibfried and Pierson, 1995, 1996.

development of a procedural and substantive orthodoxy applying to regulatory action by the EU institutions in the field of sex equality in social protection. The following research orientation focuses on the establishment of this orthodoxy and its revelation through dialogue between different institutions with competing conceptualisations of division of competence in the social protection field.

4 Establishment of the orthodoxy: exploiting competing conceptualisations

A second research theme suggested by a new institutionalist methodology is the phenomenon of the establishment of differing 'norms of appropriateness' in different organisational or institutional contexts. This may lead to differences in conceptualisation of a particular issue in different contexts, for instance the legal and the political. Exploration is to be focused upon revealing these tensions, and on the resolution or indeed exploitation of these tensions by institutional actors such as the Commission or the Court, through the medium of 'organisational linkage' or inter-institutional dialogue. The linkage explored here is that between the Commission and the Court.

The Court may have exploited conflicts between its conceptualisation of the scope of the Directive (as an aspect of the division of competence question) and that of other EU institutions, in particular the Commission. At least to begin with the Commission appeared to hold a different conceptualisation of the scope of Directive 79/7/EEC, as a facet of the division of competence issue, from that held by the Court. The institutional structure within which dialogue between the Commission's original conceptualisation and that of the Court took place - that of the Article 177 reference - may help to explain why the Court's conceptualisation became established as the orthodoxy for the development of EU-level policy on sex equality in social protection.

Directive 79/7/EEC is based on a fundamental distinction between 'social security' and 'social assistance'. 'Social security' is traditionally understood to provide insurance for employed and self-

employed people who are no longer available to work because of the materialization of one of the classic risks of sickness, invalidity, unemployment, and old age. 'Social assistance' provides a minimum level of protection (for instance, a minimum income) to ensure that individuals' basic human living requirements are met,⁶⁶ basically protecting against the risk of poverty. Social security is therefore directly linked to the labour market, and thence to the 'economic' rationales for EU social regulation implicit in the social cohesion model on the competence debate, and in the 'weak male breadwinner' position that the function of regulation of sex equality in social security is to extend equality from the provisions on equal pay and equal treatment in conditions of employment, to complete women's equality in the (public) world of work. The conservative social cohesion model implies that provisions ensuring sex equality in social security at the European level are desirable, partly for 'social' reasons (to prevent 'exclusion' of women), but also for competitive reasons. The social dumping argument is commonly used to describe the reason for the inclusion of Article 119 EC in the Treaty of Rome.⁶⁷ Fears by the French that their employers, already subject to an equal pay law, would be disadvantaged in the new common market prompted the application of equal pay for men and women to all Member States. But direct pay is only one cost for an employer; employers may also be liable for contributions to provide social protection. By extension, therefore, it might be claimed that other provisions of sex equality, beyond the simple equal pay requirement, are necessary or justified. This would only be the case, however, for provisions which are closely enough connected to the labour market for them to be necessitated to avoid social dumping. More general provisions of social protection - 'social assistance' measures - being only indirectly linked to the labour market, in the sense of providing only indirect protection against the classic risks - are less likely to fit this requirement than provisions of social security in its narrow sense. Regulation of sex equality in social assistance strays into the private field of the family and households, where the Court's construction

⁶⁶ Holloway, 1981: 6.

⁶⁷ But see Hoskyns, 1996: 43-57, Hoskyns, 1996a: 15-17 and Barnard, 1996: 322-327 for more detailed explanations.

of norms on division of competence between EU and Member States holds that competence remains in the hands of the Member States.

At the stage of formulating proposals for Directive 79/7/EEC, the Commission's understanding of the social security/social assistance distinction appears to have been that it is a weak distinction, the boundaries of which are not clear. The view appeared to be that the scope of EU law was not clearly confined to social security, but had the potential to extend into social assistance or welfare provision. The Commission's proposals for Directive 79/7/EEC suggest that the Commission adopted a construction of division of competence based on the social security/social assistance divide, but not in its 'strong' form as eventually established by the Court. The Commission's explanatory memorandum⁶⁸ shows that the Commission considered the Directive to be directly related to its 'parent' Directive 76/207/EEC on equal treatment in employment. The Directive was to apply to the same persons as Directive 76/207/EEC, that is, the potential, present and former working population, including the self-employed. The memorandum explains that family benefits were not included as they 'lie more within the domain of family policy than working conditions'.

However, the Commission's construction of the scope of the Directive, at least in the original proposal, suggested that the Directive be given the widest material scope possible: covering statutory social security schemes, occupational schemes, and 'social assistance arrangements to the extent that they supplement or stand in lieu of social insurance payments for one of the listed contingencies'. At this stage, the Commission even gave the example of supplementary means-tested benefits to meet basic living standards, and payments to the long-term unemployed whose insurance benefits are exhausted. The link between social assistance and the listed contingencies appears to have been conceived as not necessarily a direct link. This 'weak' definition of the scope of the Directive was necessary, according to the Commission, because the same contingencies are covered in very different ways in different Member States, either by contributory, non-contributory or means-tested benefits, or, more commonly, by a combination of some or all of these types of benefit. Thus the Commission appeared to be leaving open the potential for future development of EU-level regulation of sex equality in social

⁶⁸ COM(76) 650 final. Hoskyns and Luckhaus, 1989: 323-4.

protection, by extending EU-level measures into the social assistance or welfare field.

However, the social security/social protection distinction which was eventually enacted in Article 3 of the Directive, as interpreted by the Court, in effect undermined the potential of this weak conceptualisation of the scope of the Directive. The Court's construction of the personal and material scope of Directive 79/7/EEC reveals a strong conceptualisation of the scope of the Directive, which draws a sharp distinction between social security and social assistance, and excludes social assistance from the sphere of influence of the EU.

Article 2 of Directive 79/7/EEC defines the personal scope of the Directive as 'the working population - including self-employed persons, workers and self-employed persons whose activity is interrupted by illness, accident or involuntary unemployment - and to retired or invalided workers and self-employed persons'. In *Drake*⁶⁹ the Court held that the Directive applied to a person whose work has been interrupted by a risk in Article 3, even where the risk befell an ascendant of that person. Drake gave up her employment to care for her invalided mother, and was held to fall within the personal scope of the Directive. The Court's definition of personal scope thus reflects the employment-related material scope of the Directive. This is a narrower interpretation of Article 2 than is necessary,⁷⁰ and is explicable by the understanding of division of competence between Member States and EU which allows the EU to regulate social security, but not the social protection field, which falls beyond the employment sphere.⁷¹

This work-related definition of the Directive's personal scope was confirmed by the Court in the

⁶⁹ Case 150/85 *Drake v Chief Adjudication Officer* [1986] ECR 1995.

⁷⁰ Sjerps, 1988.

⁷¹ See Sohrab, 1996: 86; More, 1993: 56.

subsequent cases of *Achterberg*⁷² and *Johnson No 1*,⁷³ and most recently in *Züchner*.⁷⁴ The basis of the cases brought by the litigants reflects the Commission's conceptualisation of the 'weak' distinction between social security and social assistance. The Court adopted its own strong conceptualisation. For instance in *Züchner*, the Court ruled that the personal scope of the Directive does not extend to a woman who is not 'economically active' (neither in paid employment, nor seeking work, nor whose employment was interrupted by one of the risks listed in Article 3 of the Directive) who gives special care to her invalid husband. The ruling in *Züchner* takes no account of the social circumstances in which women's relationship with the paid employment market and social security systems is constituted. Attention to these social circumstances is implicit in the Commission's conceptualisation of the scope of the Directive. If *Züchner's* husband had had no relation to care for him, the caring work carried out by his carer would have been remunerated, either privately, or by the state through its social security provision. However, caring work carried out by women on a private basis is not characterised by the Court as 'work' and therefore falls outside the scope of European sex equality provisions. The Court is clearly concerned with delimiting the scope of application of Directive 79/7/EEC. To extend its scope to women such as *Züchner* would, as the Court put it, 'have the effect of infinitely extending the scope of the directive'.⁷⁵ The Court's 'norm of appropriateness', on the division of competence issue reflected in the question of the scope of the Directive, is at odds with the norm at least apparently favoured by the Commission in its initial proposals.

Article 3 of Directive 79/7/EEC governs its material scope, providing that the Directive is to apply to schemes which provide protection against the risks of sickness; invalidity; old age; accidents at work and occupational diseases; unemployment, and to 'social assistance, in so far as it is intended to

⁷² Cases 48/88 and 106-7/88 [1989] ECR 1963.

⁷³ Case C-31/90 [1991] ECR I-3723.

⁷⁴ Case C-77/95 Judgment of 7 November 1996.

⁷⁵ Para 15.

supplement or replace the schemes referred to' above. The Court has held⁷⁶ that the method of payment of a benefit does not determine its essential nature, or whether it falls within the Directive 79/7/EEC. So, for instance, the Directive may cover a benefit payable to a carer of an invalid. The Court's articulation of the 'legal test' to determine whether a benefit falls within the Directive is whether the benefit is 'directly and effectively linked' with one of the risks specified in Article 3 (1). Therefore, for instance, differential rules on public health service prescription charges fall within the scope of the Directive,⁷⁷ being linked to the risks of sickness and invalidity. However, the Court has found no 'direct link' with the listed risks in cases such as *Smithson*⁷⁸ (housing benefit), *Jackson and Cresswell*⁷⁹ (a general benefit aimed at people with insufficient needs to provide for themselves) and *Atkins*⁸⁰ (concessionary fares on public transport services), holding that these benefits do not fall within the scope of the Directive.

The Court's approach has been characterised by Julia Sohrab as ignoring the realities of benefit provision. The social security systems of the Member States do not distinguish between 'social security' and 'social protection' in the same way as Directive 79/7/EEC does. Benefit packages are made up of social insurance (contributory and non-contributory) benefits and social assistance (means-tested) benefits, as the Commission's memorandum to the proposal for the Directive pointed out. To deny the application of the EU's sex equality regulation to social assistance benefits has the effect of differentiating in standards of equality in different Member States, depending upon the internal organisation of their benefit systems.

⁷⁶ Case 150/85 *Drake v Chief Adjudication Officer*.

⁷⁷ Case C-137/94 *Richardson* [1995] ECR I-3407.

⁷⁸ Case 243/90 *Smithson* [1992] ECR I-467.

⁷⁹ Cases 63 & 64/91 *Jackson and Cresswell* [1992] ECR I-4737.

⁸⁰ Case C-228/94 *Atkins* [1996] ECR I-3633.

The Commission appears to have been alive to this in its 1988 Report on the Application of the Directive,⁸¹ in which the Commission signalled that the possibility of extending the scope of the Directive remained,⁸² as the Court had not yet developed a clearly defined concept of social security in that context. However, that report predates the Court's more recent rulings, for instance in *Smithson*, *Jackson and Cresswell* and *Atkins*, which appear to have cut off any such possibility, by emphasising the necessity of a 'direct' link with a classic risk. In the conflict between the Commission's (original) conceptualisation of the potential scope of the Directive, and the Court's construction of that issue, the Court's position has become the orthodoxy. The establishment of the Court's position as orthodoxy is predicated upon the context in which the conflict between the positions of the Court and the Commission arises, that of the Article 177 reference, in which the Court is the established authority, in accordance with the rule of law and the supremacy of European Community law.

5 Embedding the orthodoxy - 'path dependency'

A third and final theme raised by the research questions posited by a new institutionalist approach is to explore how, once established, an orthodoxy in terms of procedure and substance becomes embedded in the policy-making process. Through a process of path dependency, institutional action becomes constrained by past actions and conceptualisations. 'Feedback loops' between institutions, for instance the process whereby the Court forms a view of appropriate division of competence, which then informs Commission proposals and also litigation, which in turn feeds later Court judgments, operate to constrain potential policy innovation and creativity.

⁸¹ COM(88) 769 final.

⁸² 'Taken to extremes, the concept could be stretched to encompass *any* action taken by a Member State to provide its nationals with *material assistance*. However, even when reduced to a more traditional and *probably* more appropriate definition of compulsory social insurance, social security is usually made up in a great many countries of several [schemes]. (Italics added).

Directive 79/7/EEC was enacted on the basis of Directive 76/207/EEC as its parent directive. Instead of explicitly extending EU regulation into the welfare sphere, by using the sole legal basis of Article 235 EEC to extend legislative competence,⁸³ Directive 79/7 was enacted by the EU's legislature on the basis that it is basically⁸⁴ a piece of labour market regulation, for which the EU had already established competence, not least by the presence of Article 119 EC in the Treaty. The Court's construction of the significance of the situation of the Directive within labour market regulation was eventually established by a history of decision-making by the Court in interpreting (Article 177) and applying (Article 169) the Directive. This 'norm of appropriateness' also became embedded in the Commission's approach. The conceptualisation of division of competence in the field may therefore be seen as an endogenous force channelling developments in the EU's policy on sex equality in social protection, which has constrained its subsequent development, stifling potential innovations present at the time of the Directive's original enactment.

The potential trajectory of Article 119 EC and the equal treatment provisions could have been to extend EU-level regulation of sex equality incrementally (through a process of spillover) to all areas of social life linked (less and less directly over time) to the equal pay of men and women. Because social protection regulation is conceptually linked to regulation of employment (in terms of the national social policies of the Member States taken generally and as a whole), the eventual extension of EU-level regulation to social security, then social assistance, and eventually welfare policies generally would have been possible. However, the substantive and procedural 'norm of appropriateness' concerning division of competence prevented this. Instead intervention of that norm fed into a loop of retrenchment of application of EU-level regulation, which fettered the application of European Community law in some areas (those extending into social assistance/welfare), but

⁸³ Weiler, 1991.

⁸⁴ Although not entirely - as revealed by the fact that Article 235 EEC is the joint basis of the Directive.

coincidentally opened up the potential for legislative reform within the (occupational) social security field.

5.1 Constraining EU regulation of social assistance

A process of path dependency and feedback loops between the Court and Commission has had the effect of constraining potential development of EU policy on sex equality into the social assistance or welfare fields. The context for this development was the application of the orthodoxy concerning division of competence to the question of indirect sex discrimination, and in particular its justification.

Directive 79/7/EEC covers both direct and indirect discrimination.⁸⁵ The concept of indirect discrimination was originally established by the Court in the context of lower pay of part-time workers.⁸⁶ The prohibition of indirect discrimination aims to outlaw policies which are sexually discriminatory in impact, in the sense of disadvantaging more members of one sex than another in practice, not simply those which discriminate directly on the basis of sex.

Applied in the context of sex equality in state social protection measures, the concept of indirect discrimination has the potential to severely disrupt national social protection schemes. Indirect discrimination has the potential to extend significantly the scope of application of EU-level regulation of sex equality in social security. This is because measures which are indirectly discriminatory are likely to be those based upon traditional 'male breadwinner' social protection systems in which women's caring role leads to their disadvantage, for instance systems based on the aggregation of

⁸⁵ Article 4 (1); Case 30/85 *Teuling* [1987] ECR 2497; Case C-102/88 *Ruzius Wilbrink* [1989] ECR 4311.

⁸⁶ Case 96/80 *Jenkins v Kingsgate* [1981] ECR 911; Case 170/84 *Bilka-Kaufhaus v Weber von Hartz* [1986] ECR 1607.

household income for the purposes of granting benefits.⁸⁷ In an even more sweeping reading of the indirect discrimination principle, Sohrab⁸⁸ suggests that national social protection systems are more likely to provide (more generous) social security for ‘masculine risks’ and only means-tested social assistance for ‘feminine risks’. Fewer women than men are able to benefit from social insurance provisions. Application of the principle of indirect discrimination might therefore require dismantling this structural inequality, which is fundamental to the social protection systems of most, if not all, Member States, and especially those based on ‘strong male breadwinner’ models. Therefore, the concept of indirect discrimination could have been used to undermine aspects of national social protection systems in effect taking the application of the Directive from social security into the realm of social assistance, in the sense that removing indirect discrimination requires an examination of women’s situation in relationship to social benefits, given their work patterns which are influenced by women’s caring role, and not modelled on patterns in the formal (male) labour market.⁸⁹

An imaginative application of the concept of indirect discrimination could therefore have affected the division of competence between EU and Member State regulation of sex equality in social security, by extending the scope of EU sex equality regulation. However, on the contrary, what has actually happened in the process of interpreting and applying Directive 79/7/EEC is that the concept of division of competence has limited the potentially broad application of the principle of indirect discrimination in that Directive.

The Commission signalled the possibilities of the application of the principle of indirect discrimination in its interim report on the application of Directive 79/7/EEC.⁹⁰ Referring to the Court’s earliest case

⁸⁷ Sohrab, 1996; Ostner and Lewis, 1995; Cullen, 1994: 412.

⁸⁸ 1996: 23-46.

⁸⁹ See further, Hervey and Shaw, forthcoming 1997.

⁹⁰ COM(83) 793 final.

law on indirect discrimination (*Jenkins*), the Commission indicated possible infringements in national systems in several Member States.⁹¹ In its subsequent report on the application of the Directive,⁹² the Commission suggested that it was likely to pursue the indirectly discriminatory aspects of national schemes.⁹³ However, the Commission did seem to be relying on the Court to help develop the law in an appropriate direction,⁹⁴ a development which, as it turned out, was not eventually forthcoming. The Court's early cases on indirect discrimination in Directive 79/7/EEC⁹⁵ appeared to be helpful to the Commission's strategy. The European Commission seized the opportunities apparently provided by the Court's application of indirect discrimination in the *Teuling* case.⁹⁶ There the Court held that supplements to social security benefits with the function of providing a minimum subsistence income, based upon marital or family status, were indirectly discriminatory on grounds of sex.

However, the concept of indirect discrimination, as developed by the Court, contains within it a mechanism for its limitation. This is the concept of justification for indirect discrimination.⁹⁷ In *Bilka*, the Court clarified the concept of justification for indirect discrimination, holding that 'if the national court finds [the reasons for the discriminatory policy] meet a genuine need of the enterprise, are suitable for attaining the objective pursued by the enterprise, and are necessary for that purpose' the

⁹¹ Belgium, the Netherlands and the UK (all have strong or moderate male breadwinner systems according to Lewis' typology).

⁹² COM(88) 769 final.

⁹³ By including information on whether each Member State had a definition of indirect discrimination in its national legal system, and whether the Commission considered there to be indirect discrimination present in the national schemes.

⁹⁴ 'The uncertainties and problems of interpretation will disappear only gradually as the case law of the Court of Justice in this area develops.'

⁹⁵ Case 30/85 *Teuling* [1987] ECR 2497; Case C-102/88 *Ruzius-Wilbrink* [1989] ECR I-4311.

⁹⁶ Case 30/85 [1987] ECR 2497.

⁹⁷ The justifications argument was first applied by the Court (although the purported justification was not accepted in this case) to indirect discrimination under Directive 79/7/EEC in Case 30/85 *Teuling v Bedrijfsvereniging voor de Chemische* [1987] ECR 2497.

indirect discrimination may be justified. This is essentially a proportionality test. In *Teuling*, the Court held that, in the case of minimum subsistence benefits, provisions of national law which provided higher supplements to persons with dependants, although indirectly discriminatory, could be justified on the grounds of the social policy aim of protecting against poverty, and would not fall foul of Directive 79/7/EEC. The Commission⁹⁸ interpreted this ruling as establishing the principle that indirectly discriminatory measures of state social security systems could be justified only if they were designed to meet the *needs* of the persons protected. By definition, this would involve a means-tested benefit, and not one based upon previous income. Relying upon the procedure in Article 169 EC, the Commission therefore challenged aspects of the Belgian social security system, on the grounds that they were indirectly discriminatory, and not justifiable in terms of providing minimum income to meet the needs of the recipients of the benefits.⁹⁹ The Article 169 procedure provided a forum for an inter-institutional dialogue in which the Commission's conceptualisation of the division of competence issue implicit in its construction of the justification test came in direct conflict with the conceptualisation of the Court.

Although the Court applied its ruling in *Teuling* in form, the substance of its decision had the effect of communicating to the Commission that its (the Commission's) understanding of the principle enunciated in *Teuling* was incorrect and overoptimistic. The Court held that indirect discrimination could be justified by a necessary aim of national social policy, over which Member States could legitimately decide. Karen Banks, a Member of the Legal Service of the European Commission at the time, described the judgment as 'ominous'.¹⁰⁰ The Commission's inability to enforce the indirect discrimination principle in the face of Member State discretion in national social policy in *Commission v Belgium* may help to explain the dearth of actions against Member States based on Article 169 EC,

⁹⁸ See Case C-229/89 *Commission v Belgium* [1991] ECR I-2205; Banks, 1991: 220-223.

⁹⁹ Case C-229/89 *Commission v Belgium* [1991] ECR I-2205.

¹⁰⁰ Banks, 1991: 223.

in spite of the Commission's earlier indications (in the interim report and report on the application of the Directive) that it was intending to bring several such actions. The Member States simply enjoy too much discretion over national social policies to make further litigation worthwhile, as the ability of Directive 79/7/EEC to fetter this discretion is severely limited by the ability of Member States to advance social policy justifications. The Court's conceptualisation of the division of competence issue left the Commission unable to assert its own construction of that issue in the context of indirect discrimination, as readily available justifications would have the effect of reducing the scope of application of EU law.

If *Commission v Belgium* did not send a clear message, subsequent jurisprudence certainly has done so. The Court has operated on the basis of its previously established 'norm of appropriateness' in its subsequent jurisprudence on social policy justifications. The Court first ruled that a 'social policy' justification could in some circumstances be permitted in *Rinner-Kühn*,¹⁰¹ concerning the exclusion of part-time workers from sick pay provision. The Court's recent case law on Directive 79/7/EEC - *Megner and Scheffel*¹⁰², *Nolte*,¹⁰³ *Posthuma-van Damme*,¹⁰⁴ and *Laperre*¹⁰⁵ - extends this principle almost to the extent that the Court has forfeited control over the issue of justification in every case. The Court has explicitly reasserted that the Member States enjoy a 'broad discretion' in the organisation of their social welfare policies.¹⁰⁶ Moreover, the Court has been reluctant to consider whether the justifications put forward by the Member States were proportionate and non-

¹⁰¹ Case 171/88 *Rinner-Kühn* [1989] ECR 2743.

¹⁰² Case C-444/93 [1995] ECR I-4741.

¹⁰³ Case C-317/93 [1995] ECR I-4625.

¹⁰⁴ Case C-280/94 [1996] ECR I-179.

¹⁰⁵ Case C-8/94 [1996] ECR I-273.

¹⁰⁶ *Megner and Scheffel* para 29; *Nolte* para 33; Case C-280/94 *Posthuma-van Damme*, para 26

discriminatory,¹⁰⁷ leaving such assessment to the national courts. The effect of a finding by the national court that the indirectly discriminatory policy at issue is justified is that the Member States' discretion is not removed by the application of Directive 79/7/EEC. The social policy choices of a Member State may provide a full defence to a claim that a social security scheme is indirectly discriminatory on grounds of sex. This approach ensures that national competence in respect of social welfare policies is relatively unfettered by provisions of European Community sex equality law.¹⁰⁸ In this jurisprudence, the Court appears to have been concerned with the financial implications of a finding that the national systems breached Directive 79/7/EEC. Although the Court had held in *Commission v Belgium* and *De Weerd* that justification may not be established simply on budgetary grounds,¹⁰⁹ the Court has not repeated or applied this holding in more recent cases.¹¹⁰ This may be an example of exogenous pressure emanating from the Member States entering the policy development process. However, it is also explicable as a logical development of the Court's own mode of operation in approaching the justification issue.

Justification for indirect discrimination is significant in that it provides a mechanism whereby the balancing of means and ends implicit in the test is relocated to the national level. According to the Court, the issue of justification is a 'question of fact' *for the national court*. Although in some of its earlier cases, and in particular in cases concerning sex equality in employment, the Court has been prepared to give an indicative ruling in respect of the justifiability or non-justifiability of a particular indirectly discriminatory policy,¹¹¹ more recently, and especially in cases concerning Directive

¹⁰⁷ Case C-280/94 *Posthuma-van Damme*, para 25, 27.

¹⁰⁸ Sohrab, 1996: 132.

¹⁰⁹ Case C-229/89 *Commission v Belgium* [1991] ECR I-2205; Case C-343/92 *De Weerd* [1994] ECR I-571.

¹¹⁰ See, for instance *Megner and Scheffel*.

¹¹¹ See, for instance Case 109/88 *Danfoss* [1989] ECR 3199; Case C-184/89 *Nimz v Freie und Hansestadt Hamburg* [1991] ECR I-297.

79/7/EEC,¹¹² the Court has shown a marked reluctance to engage with the question of whether the purported aims of a particular aspect of a national social security scheme match the evidence, or indeed are proportionate.¹¹³ The effect of this jurisprudence is to situate the competence to decide on the balancing issue of whether indirect discrimination is to be removed at the cost of, for instance, removing protection against poverty, firmly at the Member State level.

Thus the Court, in applying its construction of the division of competence question, has curtailed potential development of Directive 79/7/EEC, through imaginative interpretations, for instance sponsored by the Commission through Article 169 actions. The ‘strong’ conception of the sphere of influence of the Directive, reflected in the Court’s jurisprudence on its scope, is also reflected in its jurisprudence on indirect discrimination and justifications. Indirect discrimination cannot now be utilised by institutional actors (or private litigants) to extend the regulation of EU sex equality provisions into the field of social assistance or social welfare.

5.2 Opening potential for legislative reform in occupational social security

In addition to the social security/social assistance distinction, the EU’s regulation of sex equality is also based on a second distinction, between equality in employment (and especially equal pay) and equality in social security. This distinction has particular significance from the point of view of enforceability of legal norms emanating from the EU by individuals within the Member States.¹¹⁴ The distinction has however also proved relevant for the policy-making process of the EU in the field

¹¹² Case 30/85 *Teuling*; Case C-229/87 *Commission v Belgium*; Case C-227/91 *Molenbroek* [1991] ECR I-5943.

¹¹³ Sohrab, 1996: 132.

¹¹⁴ Article 119 EC - equal pay - Treaty article so ‘horizontally’ directly effective (*Defrenne No 2*); whereas other provisions enacted in directives, including Directive 79/7/EEC, so only enforceable by individuals against an ‘emanation of the state’ (*Marshall No 1*; *Foster v British Gas*).

of sex equality, in particular the exclusion of various matters from the scope of EU regulation of sex equality in social security.

Equal pay between women and men is guaranteed by Article 119 EC. The Commission and Council therefore have no competence to enact measures of secondary legislation derogating from that principle. On the other hand, measures regulating sex equality in social security, such as Directive 79/7/EEC (state social security) and 86/378/EEC (occupational social security) are based upon Articles 100 and 235 EC. Article 235 EC gives Council competence to 'take the appropriate measures' necessary 'to attain ... one of the objectives of the Community'; and implicitly to exclude from any such measures regulation which is not necessary. The principle of subsidiarity also implies such an exclusion.

The original proposal for Directive 79/7/EEC was to include occupational social security schemes within its scope.¹¹⁵ However, during the negotiations it became apparent that the Member States would not agree to the inclusion of occupational social security, and so the Directive was enacted on the basis that occupational schemes would be excluded from its scope, but would be covered in a separate directive.¹¹⁶ This was eventually enacted as Directive 86/378/EEC. Both Directives include more or less identical exclusion provisions. These exclusion provisions are of two main types:¹¹⁷ permanent derogations for family benefits and survivors' benefits,¹¹⁸ on the grounds that these fall outside the scope of the labour sphere, and temporary, 'permissive' exclusions for various matters such

¹¹⁵ COM(76) 650 final.

¹¹⁶ Article 3 (3); Hoskyns and Luckhaus, 1989: 325-6.

¹¹⁷ Not including the general derogation for maternity provisions in Directive 79/7/EEC, Article 4 (3) and Directive 86/378/EEC, Article 5 (2).

¹¹⁸ Directive 79/7/EEC, Article 3 (2); the exclusion of family benefits is implicit in Directive 86/378/EEC, Article 3, although Article 4 (b) provides that survivors' benefits and family benefits fall within the scope of the Directive if they are accorded to employed persons.

as pensionable age,¹¹⁹ and derived benefits.¹²⁰

The competence to exclude these various matters from Directive 79/7/EEC could not readily be contested within the norms relating to division of competence between the Member States and the EU. This is reflected in the Court's jurisprudence on the exclusion provisions. For example, the Court has construed the provision in Article 7 (1) (a) which provides that the Directive 'shall be without prejudice to the right of Member States to exclude from its scope the determination of pensionable age for the purposes of granting old-age and retirement pensions and the possible consequences thereof for other benefits ...', to the effect that the phrase 'the possible consequences thereof for other benefits' in Article 7 (1) must be construed as only permitting derogations for discriminatory measures in benefit schemes which are 'necessarily and objectively linked' to different state pensionable ages.¹²¹ However, although the Court has occasionally held that the 'necessary and objective link' requirement has not been met,¹²² generally speaking the Court gives a broad interpretation to the exclusion clause.¹²³ In giving this broad interpretation to the exemption provision in Directive 79/7/EEC, Article 7, the Court is again applying its division of competence norms and ensuring that national competences are protected. The national entitlement to preserve differential ages for state pensions is extended into other benefits, thus increasing national competence in making social provision for retirement and old age pensions, and other related benefits.

On the other hand, competence to exclude essentially the same matters from Directive 86/378/EEC

¹¹⁹ Directive 79/7/EEC, Article 7 (1) (a); Directive 86/378/EEC, Article 9 (a).

¹²⁰ Directive 79/7/EEC, Article 7 (1) (c), (d); Directive 86/378/EEC, Article 9 (b).

¹²¹ Case C-328/91 *Thomas* [1993] ECR I-1247.

¹²² Case C-137/94 *Richardson* [1995] ECR I-3407.

¹²³ Case C-328/91 *Thomas* [1993] ECR I-1247; Case C-92/94 *Graham* [1995] ECR I-2521; Case C-139/95 *Balestra* Judgment of 30 January 1997.

on sex equality in occupational social security *could* be contested within the norms on division of competence between Member States and the EU. The reason for this was the relationship between Article 119 EC and occupational pensions.

The Court's early case law on equal pay¹²⁴ was sufficiently inconclusive on the relationship between pay and social security to allow the enactment of Directive 86/378/EEC, including the exclusion provisions.¹²⁵ However, the Court subsequently held in the *Barber* case¹²⁶ that benefits from occupational pensions fall within the concept of pay in Article 119 EC. This ruling was followed by confirmation that Article 119 EC applies to survivors' pensions (including the right of survivors to claim benefits)¹²⁷ and access to occupational pension schemes (in addition to benefits payable under the schemes).¹²⁸ The implications of the *Barber* ruling were that all forms of occupational pensions, and implicitly all forms of benefit deriving from occupational social security schemes, constitute an element of pay within the meaning of Article 119 EC. These (and other¹²⁹) developments of the Court's jurisprudence on Article 119 EC had the effect of rendering much of Directive 86/378/EEC obsolete.

Relying on this judicial development the Commission proposed an amendment to Directive

¹²⁴ Case 80/70 *Defrenne No 1* [1971] ECR 445; Case 69/80 *Worringham and Humphreys* [198] ECR 767; Case 19/81 *Burton* [1982] ECR 554; Case 151/84 *Roberts* [1986] ECR 703.

¹²⁵ Recital 2 of the directive reflects the confusion.

¹²⁶ Case C-262/88 [1990] ECR I-1889.

¹²⁷ Case C-109/91 *Ten Oever* [1993] ECR I-4879; Case C-200/91 *Coloroll* [1994] ECR I-4389.

¹²⁸ Case 170/84 *Bilka-Kaufhaus*; Case C-57/93 *Vroege* [1994] ECR I-4541; Case C-128/93 *Fischer* [1994] ECR I-4583; Case C-435/93 *Dietz* Judgment of 24 October 1996. The temporal limitation in *Barber* does not apply to access to occupational schemes.

¹²⁹ See Case C-110/91 *Moroni* [1993] ECR I-6591; Case C-152/91 *Neath* [1993] ECR I-6953; Case C-408/92 *Smith v Avdel Systems* [1994] ECR I-4435; Case C-28/93 *Van den Akker* [1994] ECR I-4527; Case C-7/93 *ABP v Beune* [1994] ECR I-4471.

86/378/EEC,¹³⁰ the main thrust of which was to remove many of the exclusions found in the Directive, and thus to move EU regulation of occupational social security to a position of much more complete coverage of the principle of equal treatment. In the face of the Court's jurisprudence, on the basis of Article 119 EC (a primary provision of European law, about which there can be no debate on the competence to enact such a provision), Council had little option but to agree the amendment. The path established by the Court's jurisprudence on Article 119 EC was well-trodden. The Commission's explanatory memorandum¹³¹ explicitly states that the proposal is consistent with the principles of subsidiarity as Article 119 EC is primary law, prevailing over secondary law, and that the legal basis of the proposed Directive is Article 100 EC, that is that the provision directly affects the establishment or functioning of the common market. Directive 96/97/EC¹³² was enacted in December 1996, and has the effect of removing from Directive 86/378/EEC the provisions rendered inapplicable by the Court's jurisprudence,¹³³ in particular those measures excluding retirement age and survivors' benefits from the scope of the Directive.

The Court's judicial development of Article 119 EC thus created a substantive 'norm of appropriateness' which allowed the EU legislature to continue the process of implementing the principle of equal treatment in respect of occupational social security. The derogations in both Directive 86/378/EEC and Directive 79/7/EEC were expressed from the beginning to be temporary, as the Directives were only the beginning of a 'progressive implementation' of the principle of equal treatment. However, although a proposal for removing the exclusions in both Directives was put

¹³⁰ COM(95) 186 final.

¹³¹ COM(95) 186 final.

¹³² OJ 1997 L 46/20.

¹³³ The relevant provisions are invalid only in respect of employed persons - the self-employed are still subject to the exclusions.

forward by the Commission in 1987,¹³⁴ in terms are more or less identical to the terms agreed by Council in Directive 96/97/EC for occupational social security schemes, the prospects of enactment of that proposal, without the support of jurisprudence of the European Court of Justice, seem remote. The distinction between equality in employment (and especially equal pay) and equality in social security, itself of course related to the distinction between social security and social protection, is preserved by the institutions' application of norms relating to division of competence between the EU and the Member States. While permitting policy development in the form of Directive 96/97/EC, the 'norms of appropriateness' established through the actions of the Commission and especially the Court have effectively constrained the potential for removal of the exclusion clauses from Directive 79/7/EEC.

6 Conclusion

The development of EU-level regulation on sex equality in social security implied by the 'progressive implementation'¹³⁵ of the principle of equality appears to have halted. The main Directive 79/7/EEC was only supposed to be a beginning of this 'progressive implementation' but nearly 20 years after its enactment, no (live) proposal to complete sex equality in social security is on the books.¹³⁶ The Commission seems to have turned its attention elsewhere in the drive for equal opportunities.¹³⁷

The 'norms of appropriateness' ensuring the application of a particular conceptualisation of the division of competence may help to explain this lack of development. Directive 79/7/EEC is based on

¹³⁴ COM(87) 494 final.

¹³⁵ Preamble, recital 1; Article 1.

¹³⁶ Although the Commission did mention the proposal in COM(87) 494 final in its Medium Term Social Action Programme of 1995-1999 (Social Europe 1/95), stating that it would seek to relaunch the proposal during 1995, no progress seems to have been made in this respect.

¹³⁷ Mazey, 1995: 602-608.

the concept of social security, as directly related to the labour market, where the competence of the EU to regulate is less politically contested, and the scope of EU law is more supported by the jurisprudence of the European Court of Justice, than in the welfare field of social protection. The position of women in the European Union is likely to be significantly improved only by action in social protection area, as this is where the more deeply imbedded inequalities lie. But, given opposition from the governments of the Member States, there appear to be limits to how far the Commission can successfully pursue the integration project begun in Directive 76/207/EEC and continued in Directive 79/7/EEC, without the support of a dynamic interpretative vision supplied by the Court's conceptualisations of appropriate regulatory behaviour. The Court's vision of Directive 79/7/EEC appears to be equally constrained by the concept of division of competence between the Member States and EU, with the Court insisting that Member States retain competence over national measures of social protection policy. While the Court is confining the scope of the Directive, and correspondingly increasing the discretion given to the Member States within its terms, the Commission is unlikely to be successful in securing enactment of any further legislative proposals. This might help to explain why the Commission is pursuing other strategies, in particular enacting measures of soft law, supporting policy networks for equal opportunities, and supporting action programmes for women.¹³⁸ The Commission's policy of 'mainstreaming' equal opportunities, so that they are included in all measures of EU action, applied in the context of European soft law measures on social protection more generally,¹³⁹ is the likelier road for future development of sex equality in social security at EU level.

¹³⁸ Decision 95/593/EC on the Fourth Equal Opportunities Programme OJ 1995 L 335/37; Mazey, 1995: 600-606.

¹³⁹ See, for instance, Council Recommendation 92/441/EEC on common criteria concerning sufficient resources and social assistance in social protection systems OJ 1992 L 245/46; Council Recommendation 92/442/EEC on the convergence of social protection objectives and policies OJ 1992 L 245/49, Article I A (2); Resolution of the Council and Representatives of the Governments of the Member States, meeting within the Council on the role of social protection systems in the fight against unemployment OJ 1996 C 386/3; Commission Communication on 'Social Protection in the EU: Modernisation and Improvement' of 12 March 1997.

Application of a new institutionalist methodology reveals that different potential conceptualisations of the basis for policy developments at EU level do not continue to compete on the same terms. Those conceptualisations (such as the Court's 'strong' social security/social assistance distinction) that become established are likely to become self-perpetuating through a process of path dependency. The behaviour of the EU institutions in terms of day to day policy implementation and application may operate to curtail the possibilities for future policy provision. Without the intervention of exogenous forces (for instance if the national governments decided to extend EU regulation into social welfare, perhaps by Treaty reform) other conceptualisations of division of competence question will find it difficult to enter the policy-making process.

If the division of competence question is a 'norm of appropriateness' which applies not only to the regulation by the EU of sex equality in social protection, but also across the social policy sphere, then we might predict that 'spillover' from the labour market sphere into the welfare sphere is likely to be impeded not only by the reluctance of the governments of Member States to permit EU-level regulation of social welfare, but also by the impact of the institutions' established modes of operation in the policy-making process. Even though the connection between regulation of the labour market and regulation of social protection is clearly established on a national level, at the EU level the potential for policy development implicit in that connection remains (at least at present) significantly constrained.

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