



Deliberative Processes and Gender Democracy

Case Studies from Europe

Yvonne Galligan (ed.)

ARENA Report No 1/12
RECON Report No 17

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ISBN (print) 978-82-93137-38-2
ISBN (online) 978-82-93137-88-7
ARENA Report Series (print) | ISSN 0807-3139
ARENA Report Series (online) | ISSN 1504-8152
RECON Report Series (print) | ISSN 1504-7253
RECON Report Series (online) | ISSN 1504-7261

Printed at ARENA
Centre for European Studies
University of Oslo
P.O. Box 1143, Blindern
N-0318 Oslo, Norway
Tel: + 47 22 85 87 00
Fax: + 47 22 85 87 10
E-mail: arena@arena.uio.no
<http://www.arena.uio.no>
<http://www.reconproject.eu>

Oslo, February 2012

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Preface

Reconstituting Democracy in Europe (RECON) is an Integrated Project supported by the European Commission's Sixth Framework Programme for Research, Priority 7 'Citizens and Governance in a Knowledge-based Society'. The five-year project has 21 partners in 13 European countries and New Zealand, and is coordinated by ARENA – Centre for European Studies at the University of Oslo. RECON takes heed of the challenges to democracy in Europe. It seeks to clarify whether democracy is possible under conditions of pluralism, diversity and complex multilevel governance. See more on the project at www.reconproject.eu.

The present report is part of RECON's work package 4 'Justice, Democracy and Gender', which starts from the recognition that gender equality is an essential component of a just and democratic society. The study undertaken in this report assesses decision-making procedures on a gender equality issue – the equal treatment of women and men in the provision of goods and services – in the European Union and six member states. The report offers new empirical and conceptual contributions to the study of democracy. Empirically, the study is the first application of an analytical framework developed in WP 4 – gender democracy – to assess the nature and quality of democratic practices from a feminist point of view. Conceptually, the research advances the study of democracy through refining the notion of deliberative democracy to be more gender sensitive.

Erik O. Eriksen
RECON Scientific Coordinator

Acknowledgements

This report is the product of collaboration among the Justice, Democracy and Gender work package participants and scholars from institutions not formally affiliated to the RECON project. It developed from workshop discussions held in Belfast, Surrey, Budapest, Prague, Helsinki, Oslo and Crete between 2007 and 2011. These workshops provided an environment for supportive collaboration, and we would like to thank the organisers – Sara Clavero, Roberta Guerrina, Maria Heller, Geir Kværk, Sarah Childs, Karen Celis and Yota Papageorgiou – for creating an atmosphere in which our collective efforts could flourish. International contributors to these discussions included Marian Sawer, Linda Trimble, Nicole Doerr and Anne Maria Holli, and we would like to acknowledge their invaluable input into our conceptualisation and operationalisation of gender democracy. RECON project leaders, Erik O. Eriksen and John Erik Fossum, provided important comment and critique along the way, and Christopher Lord shared insights on democratic audits. We thank them for their interest and contribution to our deliberations. Our scientific officer, Angela Liberatore, was always positive, sharing our enthusiasm for exploring the gendered nature of democratic decision-making. Among the many academic and policy commentators who provided us with constructive feedback on earlier versions, Agnès Hubert and Barbara Hefferlich contributed particularly thoughtful comments. The final product is a testament to the care and dedication of Marit Eldholm, Helena Seibicke and Kathinka Louise Rinvik in preparing the script for publication. We thank all who supported us in this endeavour.

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Chapter 1

Justice, democracy and gender

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Introduction

Gender justice, with its concern for gender equality in all spheres of public and private life, has become an important focus of recent studies on democracy. As well as being an issue of normative interest, it is also a matter of empirical investigation. This report addresses this concern in the public sphere. In doing so, it contributes new insights to the normative and institutional study of democracy. Central to the studies in this report is the concept of gender democracy, which frames democratic theory and practice in a manner conducive to revealing the gendered imprint of democracy and democratic decision-making. What this collection of studies reveals is that, normatively and institutionally, democratic processes are deeply gendered. Through the prism of gender democracy, the studies also reveal that democracy in practice is flawed in ways that are not always recognised in the general literature. It questions the adequacy with which the principle of social justice – in the form of gender justice – is treated in democratic decision-making processes in Europe. This Report, then, provides an important contribution to democracy studies more generally.

The research essays contributing to this report are linked in three ways: they work with the concept of gender democracy, they address the same policy study, and empirically they apply an agreed range of indicators to this decision-making process. The resulting studies reveal much about the state of democratic institutions and practices. They also provide the empirical findings for a normative evaluation of democracy from a feminist perspective.

Gender democracy conceptually links the studies. It considers democracy to be grounded in a commitment to deliberation, and that deliberative processes rest on gendered foundations. This insight is not new. Feminist normative studies signal the many gendered facets of democratic theory and practice. The requirement of inclusion emphasised by Young (2002), the redistribution and recognition arguments of Fraser (2000), the 'gyroscopic' and 'surrogate' forms of interest representation identified by Mansbridge (2003), and the insights on gender equality as a group right presented by Moller-Okin (1999) inform the conceptualisation of gender democracy. Other feminist scholars, such as Pateman (1988) and Phillips (1995) also contribute to the concept through the challenge they pose to assumptions of equality embedded in democratic practices, bringing forth the gender-unequal nature of these assumptions. The concept is formulated so as to enable an empirical testing of democratic decision-making processes from a gender-sensitive point of view. It means exactly what it says: that democracy has a gendered assumptions, processes and practices embedded in its working.

Gender democracy, then, envisages a democratic process in which the voices, interests, perspectives and representatives of women are fully integrated and accountable as equals in a deliberative decision-making process. It is also a process in which an understanding of, and respect for, women's claims is evident. It is, in effect, a 'mainstreaming' of gender into democracy. Thus, gender democracy is closely aligned with proceduralist conceptions of democracy. In this collection of research essays, we attempt to theorise, from empirical observations, on the nature and quality of democratic institutions and practices from a gender-sensitive standpoint. In effect, we assess the extent to which democratic procedures are: responsive to gender equality interests; inclusive of women's claims to have their spokespersons recognised and respected within a decision-making process; and accountable to women citizens. In these

research essays, gender democracy operates in a multi-levelled governance environment, and in polycentric institutional locations, making it a complex research task to unravel the decision-making dynamic.

Before turning to the methodology of the study, it is important to discuss the empirical theory guiding the research. A reading of democratic theory aided by feminist conceptions of democracy (Galligan and Clavero 2008: 5-6) revealed that the requisites for gender democracy were: a substantive conception of democracy, an expansive interpretation of the equality principle, and attention to the accountability dimension. The work of deliberative democratic theorists seemed to offer a sympathetic framework for the elaboration of these gender democracy dimensions. At its core, deliberative democracy claims that legitimacy is accorded a decision when it is the outcome of a critical examination by 'qualified and affected members of the community' (Habermas 1998). This requires, as Young (2000: 21-26) points out, that deliberation takes place in public and includes on equal terms all qualified and affected members. In addition, it supposes rational debate, in which decisions are arrived at after a process of reason-giving, free of coercion, and in which the positions of all participants are justified and accepted. Thus, following Young (2000: 21-26) and Fraser (1998), a political decision is 'democratic' if it fulfils the dimensions of inclusion (that embeds political equality within it), accountability and recognition. For gender democracy, with its focus on both substantive and procedural politics, these dimensions are foundational.

This theorisation of the essential elements of gender democracy presents a variant on deliberative democratic theory. To be empirically testable, its elements require operationalisation. The next step in the construction of an analytical framework was to develop a range of sensitising questions, or indicators that would reveal the gendered nature of the democratic decision-making process (see Appendix 1.1). Guided by the dimensions of inclusion, accountability and recognition, and drawing on a wide range of feminist and deliberative scholarship, 17 questions were devised that were designed to elicit the gendered nature of the decision-making process. These sensitising questions were also accompanied by an evaluative scale of 0-2, with 0 indicating an absence of the condition being interrogated (e.g. no right of access to formal institutions, no

information available on websites, no recognition of women's claims), and 2 indicating complete fulfilment of the aspect under scrutiny. This evaluative scale was not intended to be used as a rigorous measurement. Rather, it was designed as an aid to researchers in interpreting the sensitising question responses. In addition, the sensitising questions were designed to cover as many as possible of the substantive aspects of a decision-making process, and not all questions in each dimension would apply in every case. However, the important point was to address the chosen decision-making process with all of the indicator questions, excluding the ones that did not provide relevant insights at the later analysis stage. This was the basic framework informing the individual cases, and facilitating comparative study.

Having set up the theoretical framework based on sensitising questions derived from the aspects of inclusion, accountability and recognition, the next stage was to select cases for study with a view to comparative dimension while contributing to a deeper understanding of the working of democratic institutions, processes and practices in the individual cases. Heed was also paid to the deliberative sites in which democratic decision-making takes place (both institutional and informal). It was also seen as important that the cases chosen address gender equity issues, directly or indirectly. Finally, in giving attention to the comparative dimension, the choice of decision-making cases needed to be held constant across the research. These considerations led to the following criteria being applied for case selection:

- a. The democratic decision-making process was to be conducted – at some stage – in a parliamentary setting, either in committee or plenary debate;
- b. The democratic discussion concerning gender justice issues to be advocated by the women's movement and/or civil society representatives of women's interests;
- c. The issue addressed to be as similar as possible across polities.

Given also that the study on gender justice and democracy was situated in a European context, and that the focus of the research was to explore the extent to which democracy incorporated this normative good in a multi-levelled governing structure, the EU also became a case. Keeping the above case selection criteria in mind, and taking

account of the overall intention to contribute to the intellectual task of reconstituting democracy in Europe, the case chosen for gender democracy assessment was the Goods and Services Directive.¹ The method chosen for its ability to chart a decision path in fine-grained detail was process-tracing. One research focus was the decision-making process leading to the enactment of the Goods and Services Directive at European Union level. This carried into the national contexts as a study of the Directive's transposition process. As the EU does not have a comparator decision-making body, the EU study undertook an assessment of another Directive process, that of the Recast Equal Treatment Directive.²

The gender democracy studies

The empirical content of the report begins with a comparative investigation of the formulation of two Directives at EU level in order to explore the gendered nature of democracy 'beyond the state'. It takes as a base line that a gender democracy environment is one in which 'qualified and affected participants offer reasoned and justified opinions as they attempt to resolve disagreement on a collective problem through coming to a shared understanding that leads to a legitimate decision'. Sara Clavero and Yvonne Galligan in Chapter 2 apply this yardstick to the formulation of the Goods and Services Directive (2004/113/EC) and the Recast Equal Treatment Directive (2006/54/EC). They reveal institutional constraints on access by some affected groups (usually women) over others (industry representatives). They highlight the differential power and influence of the Commission, Parliament and Council, and the positive effect the formation of advocacy coalitions had on the quality of democratic deliberation. Clavero and Galligan conclude that their study highlighted some democratic virtues in the EU law-making process, namely a degree of responsiveness to women's claims, institutionalised routes for making the voices of those 'affected' (women,

¹ Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services *Official Journal L 373*, 21/12/2004 P. 0037 - 0043

² Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) *Official Journal L 204/23*, 26/07/2006 P. 0023-0034

industry, union, employer bodies) heard, and the potential for consensus-seeking. They also point to the undemocratic aspects: Council deliberations that accord priority value to economic over social equity interests and restrictive procedural practices during Commission consultations among them. While the two cases were conducted under different procedural rules, the co-decision procedure was more inclusive of women's representatives (through the EP), and stronger on women's substantive representation (gaining parental leave concessions) than the (now-redundant) consultation procedure. Indeed, in the case of the Goods and Services Directive, despite an extensive mobilisation of women's groups, and the formation of strong advocacy coalitions comprising civil society, MEPs and members of EU advisory bodies, the outcome was a much weaker directive than initially proposed. Ultimately, Clavero and Galligan argue that the institutional context in which a gender equality directive is framed and processed has an important bearing on the eventual outcome, and on the extent to which the process is sensitive to gender democracy concerns.

The country chapters in this report investigate the transposition of the Goods and Services Directive into national law in six European states. The studies highlight the diversity of cultural commitment to gender equality across Europe. They explore the manner in which national gender dispositions interact with the institutional environment to shape legislative outcomes. In addition, the studies present revealing pictures of the health of democracy across Europe.

Austria, with its neo-corporatist form of policy-making, weak federalist structure, and conservative discourse on gender equality, produced a weak transposition of the Goods and Services Directive, as shown in Chapter 3. The close social partnership network – consisting of labour, business, agricultural interests and government – makes the inclusion and articulation of women's interests and perspectives difficult. This case shows how institutional arrangements can inhibit gender equality claims, even when women comprise a significant minority presence in parliament. Directive 2004/113/EC was transposed by amending three pieces of legislation: the Equal Treatment Law, the Federal Law on the Equal Treatment Commission and Equal Treatment Attorneyship, and the Federal Equal Treatment Law. In effect, this transposition requirement was treated as an opportunity to amend equal treatment

provisions in the labour market as well as introducing anti-discrimination measures in the provision of goods and services to the general public. According to Nora Gresch and Birgit Sauer, the effect of this transposition has been to create a hierarchy of intersecting inequalities along two dimensions. One aspect is the exclusion of specific grounds (religion/philosophy of life, age, sexual orientation) from protection against discrimination in the delivery of goods and services. The second aspect is the exemption of specific areas (advertising, education and the media in particular) from having to conform to the anti-discrimination legislation. The culture of secrecy accompanying the informal and institutionalised interactions between the social partners with one another, with political parties and with government, is reinforced through the arbitrary, discretionary inclusion of civil society expertise in policy development. In this instance, the drafting and review stages excluded women's claims, along with the views of other equality-seeking civil society groups. Women's advocates and others sought the inclusion of education, housing, social protection, social privileges and sexual orientation in the proposals amending the Equal Treatment Law. The explicit exemption of the media, advertising and education along with the minimalist transposition of 2004/113/EC was criticized by a wide variety of civil society organisations. None of these issues found its way into the final version of the act despite intensive lobbying by women's and equality groups and experts. However, the strong consensus between civil society, social partners on work and labour, the Ministry for Social Affairs and Consumer Protection and the Equal Treatment Attorneyship introduced two specific improvements in the legislation – on the 'burden of proof' and compensation/continuation of working contracts. Parliamentary debates reveal various party and individual interpretations of gender equality, with majorities in the National and Federal Council favouring the draft provisions. Gresch and Sauer's report indicates that the Austrian decision-making process scored low on the three dimensions of gender democracy – inclusion, accountability and recognition. In their view 'These characteristics of the policy process led to the policy outcome, as well as the policy process as a whole, being only slightly responsive to progressive and visionary legislation that would support the creation of gender equal life opportunities'.

In her study of the transposition of the Goods and Services Directive in Greece, Yota Papageorgiou in Chapter 4 demonstrates how a unitary political system beset by policy-making inertia finally passed a law that improved labour market equality provisions and extended the application of the directive to media and education services while prohibiting the use of sex as factor in calculating insurance premiums. Keeping to its pattern of belated transposition of EU directives, Greek transposition of this directive took place eighteen months beyond the final implementation date and after a written warning from the European Union. Interdepartmental wrangling over responsibility for drafting the required national legislation was the cause of the delay, with the Ministry for Development only 'reluctantly' taking the matter into its remit. Thereafter, as Papageorgiou shows, the process was rushed, limiting the inclusion of civil society women's and equality advocates. The chapter highlights an important deviation from the generally accepted understanding of women's civil society organisations as autonomous representatives of women's voices and interests in the public arena. The Greek case brings attention to the mutually accommodating relationship between women's organisations and political parties, moderating the independence of civil society from party influence. Thus, the content of a gender equality law is entirely dependent on the major political party in office – either the socialist PASOK party or the conservative ND party – and women's voices from the other 'camp' are ignored. In this instance, the ND government was responsible for transposing the directive. Its objective was to enact a law minimally acceptable to the European Union, and this was accomplished in law 3796/2009 in a hasty debate. The only substantive deliberation of the law took place in the Standing Parliamentary Committee of Production and Commerce (a bipartisan committee that reviews draft legislation before parliamentary debate) during one meeting. Trade union representatives took an active part in this discussion, and representatives of women's views called for the draft law to cover media and education. The chapter shows how a combination of government vacillation, prior bureaucratic consensus on the content of the law, limited space for the articulation of women's concerns and a rushed parliamentary schedule contributed to a minimalist transposition process. It also illustrates the specific difficulties of the Greek political system in accommodating the three key dimensions of gender democracy.

The Goods and Services Directive was transposed discreetly, without public debate, into Hungarian national law, according to Roza Vajda in Chapter 5. The absence of involvement of women's civil society groups and gender experts reflects a particular national political view that can be construed as Euroscepticism. The overall outcome of the transposition process was to erode, rather than enhance, gender equality. This perverse result arises from Hungarian political resistance to outside influences on national policy-making, along with an assertion that 'Hungarians know best' the kind of policies that suit their nation. Charting the transposition process tells much about the backlash against gender equality in public opinion following the state socialist era that has become embedded in the political culture, and Vajda elaborates on this process as revealed through the transposition of the Goods and Services Directive. The cultural resistance to gender equality and the persistence of support for a traditional division of labour is seen, for instance, in the unacceptability of having women engage in business and politics. Women who partake in these activities are branded as being 'unnaturally masculine'. EU funding has supported the emergence of women's organisations that challenge the masculinist culture of government and criticise government efforts to deliver gender equality. However, Vajda makes the important point that these women's organisations are themselves lacking in transparency and accountability, work through closed networks, and because of persistent economic insecurity, view similar groups as rivals rather than partners. This dysfunctional culture is exacerbated by the relative newness of democratic politics and the persistent public support for authoritarian rule.

Indeed, the legacy of the state socialist era came to the fore in this study. The absence of institutional memory for the decision-making process, the unavailability of formal records, the reluctance of key players to provide information, all point to a policy culture where the lack of transparency and accountability is institutionalised. Research for the goods and services decision-making process was hampered by bureaucratic resistance to providing documentary evidence, though in part compensated for by informal communication and off-record interviews with officials. Transposition of 2004/113/EC was confined to regulating insurance practices as a technocratic, rather than an equality-expanding, exercise. The legislative process was late, and rushed to comply with the transposition deadline of 31 December

2007. The urgency of passage was also underlined by a concern on the part of insurance companies to benefit from the opt-out clause. Similar to government vacillation in Greece, the decision as to which ministry would be responsible for introducing the necessary law became a matter of inter-departmental contestation, with the Ministry for Financial Affairs finally assigned the task. The Office of the Social Equality of Women and Men, the natural 'home' for this transposition, was a marginal player in the process. Furthermore, civil society was completely excluded from formulation of the Act. The harmonization process was treated as a legal codification, by and large, to existing legislation. This framing of the issue was accepted and the directive was adopted 'quasi-automatically', Vajda reports. Circumvention of the pregnancy/maternity non-discrimination clause is systematically practiced by insurance companies. The idea of positive measures to redress gender inequality is resisted, while the directive only applies to the insurance sector and not to the provision of goods and services more widely. Thus, the issue was decoupled from the equal opportunities agenda, with marginal input from gender bureaucrats, and women's civil society groups and experts reduced to onlooker status. The technocratic framing of the transposition made it virtually impossible for gender equality claims to be recognised, let alone considered. In assessing this transposition process, Vajda reveals serious deficiencies in the operation of democratic practices, as well as inherent non-recognition of gender equality claims in Hungary. This study raises serious concerns regarding the condition of Hungarian democratic procedures and practices.

Some of the institutional weaknesses identified in the Hungarian case appear in the Lithuanian study in Chapter 6, although this did not manifest as Euroscepticism. It was more a failure of political imagination, a missed opportunity to strengthen equality legislation. As Irmina Matonytė and Jurga Bučaitė-Vilkė show, the process was framed as a technocratic matter. Civil society was largely absent from drafting and deliberative forums: the Ministry of Social Security and Labour (drafting), four parliamentary committees (Human Rights, European Affairs, Budget and Finance, and Social Affairs and Labour), and the Lithuanian Parliament (*Seimas*). Only the expert advice of the Ombudsman Office for Equal Opportunities of Women and Men was considered. Although discussion on transposing the Goods and Services Directive took place in June 2005, Lithuania had

not introduced national legislation giving effect to the directive by the end of the 2007. After strong criticism from the European Commission, Lithuania codified 2004/113/EC into national law in July 2009.

Matonytė and Bučaitė-Vilkė explain the limited influence of women's civil society groups on the legislative content – a contrast to the pre-accession period – as the ongoing effect of three factors: a focus by women's groups on social service delivery and localised actions rather than on national lobbying; competition for project-led funds, from which gender equality issues were excluded; and limited awareness of the relevance of gender mainstreaming by officials responsible for implementing the national equal opportunities programme. They draw attention to the marginal influence of women's voices in seeking to have domestic violence incorporated into the law, and point to the importance of informal and personal contact between women's representatives and some government officials and MPs for gleaning information on the proposals. Although, in conformity with good consultative practice, it is possible for all interested parties to participate in parliamentary committee and working group discussions, their study found that this is not facilitated in practice. Citizens require a special invitation from an MP to enable them participate in committee discussions, while the issues for consideration in these forums are not available in advance. Thus, they chart significant structural impediments to the crystallisation of women's interests on this issue, and to the representation of women's concerns. A hostile political climate to gender equality was also evident, with the parliamentary debate focused on the European imperative to introduce anti-discrimination in insurance legislation. Although the transposition served 'as a vehicle for Europeanization of the Lithuanian political arena', the process did not enhance political awareness or responsiveness to gender equality issues.

Poland's transposition of the Goods and Services Directive was long and complex, as the government sought to amend a number of equal treatment laws to comply with EU requirements. Katarzyna Zielińska in Chapter 7 traces the tortuous legislative path of transposing 2004/113/EC. She shows how the process was constrained by a power struggle between the government department responsible for introducing the draft act (Department for Women, Family and Prevention of Discrimination) and the ministry (Plenipotentiary for

Equal Treatment) charged with shaping and monitoring government policy on gender equality. Changes from socialist to conservative administrations also left their mark, destabilising the drafting process and altering the legislative focus. The study also shows that women's organisations mobilised in alternative sites and made alliances with other equality-seeking actors – including the European Commission – to influence the draft legislation. The vibrancy of the women's sector in lobbying for an effective transposition of the Goods and Services Directive (in addition to other directives) is in marked contrast to the absence of women's mobilisation in neighbouring Lithuania. This did not influence the draft content, however. Even during the final stages of shaping the law, in parliamentary committees, suggestions from civil society representatives were ignored.

Similar to the Hungarian experience, the drafting process was dominated by administrative elites, including the Plenipotentiary for Equal Treatment and the Civil Rights Ombudsman. There was a marked reluctance to consult civil society organisations, though these groups, individually and in coalitions, consistently sought to engage with government on drafting the transposing law. When the government consistently refused to listen, they invoked the European Commission to pressure government to listen to their claims. The fact that the draft act was intended to cover a range of discrimination grounds might have diluted women's voices, except for the reality that equality advocates from civil society were in general given little heed. Scant information was available on the process and on the stage of the work until Poland was referred to the European Court of Justice in 2009 for not implementing 2004/113/EC. Even then, explanatory notes and proposed solutions accompanying the draft bill were written in a highly legalistic manner, accessible only to those with legal knowledge. In the end, a broad multi-group anti-discrimination law was enacted incorporating the provisions of the Goods and Services Directive. Poland thus complied with EU requirements and the referral to the ECJ was lifted. Yet, the case shows how national gender regimes can delay implementation of agreed equality norms and practices when these changes are exogenous to the state in question.

The story of the transposition of 2004/113/EC in Spain is very different to that of the previous chapters, yet is in keeping with the gender equality culture predominating there at the time. Sara Clavero

in Chapter 8 shows how the Spanish commitment to gender equality since its transition to democracy from the mid-1970s onwards assisted in swift compliance with EU directives. She questions this speed, and the implications it holds for the democratic process accompanying instances of transposition. In this case, the need to transpose, first, the Directive on Equal Treatment (2002/73/EC) and later the Goods and Services Directive (2004/113/EC) provided an impetus for the Socialist government to develop an all-encompassing Gender Equality Law that also provided for political gender quotas. The process lasted from 2005-2007. The outcome, Clavero argues, was an Act that went significantly beyond EU requirements, and responded to many issues raised by the Spanish, and transnational, women's movement.

This success story had its own process-related democratic deficits, according to Clavero. The absence of a formal channel of consultation with women's civil society organisations – which affected the agenda set during the drafting phase – is shown to be an institutional weakness. Although women's organisations were highly mobilised for the duration of this legal process, they focused their attention on institutional advocacy. The media highlighted the controversial elements of the draft law, especially quotas, ignoring the European dimension. Thus, on two counts an important opportunity for a public discussion on the role of the EU and national government in addressing gender equalities in Spanish life was lost. Furthermore, the procedural aspect brought to the fore the polarisation of the political system, with socialist and conservative party MPs using the issue to score personal and political points. Interesting, as was found for Austria, when deliberation of the issue took place in parliamentary committee, away from the 'theatre' of a plenary session, the discussion was of a higher quality, more inclusive of diverse participants and views, and more measured in tone. In this instance, we see how an outcome supportive of gender equality does not necessarily entail a gender-sensitive democratic process. Yet, as Clavero insightfully observes, the national transposition of European laws often results in 'a domestic capture of the issue in pursuit of domestic political goals'. This is true of all cases in this report.

In a final chapter (Chapter 9) Cathrine Holst discusses what the studies offer in terms of general explanatory insights, and what they offer to democratic theory. Holst takes a systematic look at the

different explanatory factors that are introduced in the different country studies – the pre-transposition situation, the EU-effect, the political color of national government, the role of social partners, elite negotiations and women's civil society organizations and gender experts, cultural and historical parameters, and the broader discourse setting – and discuss to what extent different factors influence the likelihood of progressive gender equality reforms – or the opposite; status quo or even backlash. The empirical studies clearly disprove the notion that legal harmonization equates with legal homogenization. Secondly, she examines what these studies can tell us about the relationship between democratic input and just outcomes. Does high score on democracy indicators correspond with high score on gender equality indicators and vice versa? To what extent does 'more' democracy seem to result in more progressive policies and legislation? Holst points out that a good outcome (understood as an outcome promoting gender equality) is understood differently by the different actors involved. She argues that the conventional democratic arrangements – based on representation and/or social partnership are less conducive to good outcomes than arrangements based on deliberation and the inclusion of gendered perspectives. She shows, though, that this is not a clear-cut conclusion. There are instances when representative/social partner democratic model works to produce important gender equality outcomes. And there are instances where women's civil society organizations lack the capacity to 'represent' gender equality claims.

The quality of EU democracy

We can draw a number of generalisations on the quality of democracy in the EU and member states as seen through the lens of gender democracy. One of the main findings of this study is that democratic processes at national level are not found to serve female citizens, and their claims, well. All indicators of inclusion at the nation-state level convey a deep and systematic exclusion of women and women's interests from decision-making processes that directly affect them. This is a disturbing finding for the quality of democratic processes in European member states. The EU-level processes come out more positively on inclusion indicators, but this is contingent on how the gender equality issue is presented by the Commission in the first place. Accountability indicators also reveal a lower adherence to standards than expected. This applies in all respects: when the indicators taps access to deliberative sites, access to relevant

information, and reason-giving for the positions held. It is not surprising, then, that the principle of recognition comes low on the scale of democratic quality. Recognition of women's claims, whether the context was one of social corporatism (Austria), limited democracy (Hungary) or more conventional democratic politics, was also limited.

The second main finding is that there are exceptions to this generally negative assessment of the quality of democracy from a gender point of view. Spain and the EU-level are cases in point. Certainly, both decision-making spheres offer imperfect gender democracy, but on all dimensions they perform more highly than the other cases. There are two main reasons for this: institutionalised access points where women's equality claims can be expressed alongside the claims of other interests (though utilisation of these access points is contingent, as the EU study shows), and a commitment to gender equality, and gender justice, as a norm. While this commitment is contingent on the ideological disposition of government in the case of Spain, it is a working principle of the EU available to be invoked by gender equity advocates. Although these cases do not come close to ideal-type gender democracy, their institutional channels and cultural contexts, in comparison to other cases in this report, are more facilitative of gender -based equality claims.

Related to this point, it is noticeable that in four cases (Hungary, Poland, Lithuania and Greece), there was notable institutional reluctance to assume responsibility for transposing the directive. This inter-governmental wrangling delayed the transposition process. It also reinforced the ambiguous commitment at elite level to gender equality norms and to equal treatment beyond the workplace. This institutional vacillation did not help women's organisations target their claims. It also wasted time, and the final rush to transpose the directive in these instances prevented women's representatives from advocating their claims with any meaningful impact.

Third, national transposition of a European law is shaped by the cultural disposition towards gender equity issue and claims. In other words, what these studies show is a domestication of European norms and laws. Much of the scholarship on the EU focuses on the Europeanisation of national politics, but what the chapters in this report indicate is that domestic national politics over-rides the

European agenda. Indeed, in some instances, notably Austria and Hungary, domestic considerations displace the European equal treatment baseline. The political interventions prompted by the transposition process induced a reduction in equality provision in both cases, and did not deliver the intended expansion. In other instances, notably Greece and Spain, the national transposition extended the EU law, addressing some of the issues that fell by the wayside during the EU policy-making process. A country's stage of democratisation too seems to play a part in shaping the national response: the relatively recent installation of democratic governance unites the minimalist interpretation of the Directive in Poland, Hungary and Lithuania. Although Greece shares the trait of bureaucratic inertia with these countries, it nonetheless legalised a more extensive definition of goods and services than the former Eastern bloc countries.

Finally, the prospects for gender democracy are contingent on two advances taking place: the gender mainstreaming of representative/social partner democracy, and the expansion of deliberative practices in national and EU decision-making processes.

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Appendix 1.1

Gender democracy indicators

Inclusion

1. To what extent is there a balanced representation of women and men in deliberative arenas such as parliament, parliamentary committees, and other relevant institutional sites?
2. Are there institutionalised deliberative sites for discussing women's interests employed prior to taking decisions on gender-relevant issues?
3. How accessible to women's civil society organisations are the relevant formal political institutions for the purposes of influencing decision-making?
4. Do women's organisations and the 'qualified and affected' public have access to policy proposals pertaining to women's interests?
5. To what extent are women's interests and perspectives included in the deliberative process leading to decision-taking?
6. To what extent do representatives of women's interests participate in the processes under examination?

Accountability

7. Do women's organisations have access to information relevant to the decision-making process?
8. Is this information available to the public more generally?
9. Do the participants in the decision-making process give a reasoned and sufficiently explanatory account of their positions?
10. Are there open sessions, live broadcasts, access to minutes and other accountability channels available on gender equality debates?
11. To what extent do women's organisations seeking to influence political/public deliberations on gender issues communicate their aims, objectives, strategies and activities to the public?
12. Are there mechanisms for rendering decision-makers accountable for upholding gender equality commitments?

Recognition

13. How far are arguments provided by representatives (elected and civil society) of women's interests acknowledged and considered in the course of discussion?
14. To what extent do participants in the deliberative process show that they have an understanding of women's positions?
15. To what extent are women's representatives (civil society and elected) and their positions accorded respect by other actors?
16. To what extent do participants in the deliberative process show respect for the groups of women affected by the decision?
17. How far do women's representatives and other participants justify their positions with reference to the 'public good' or 'common good'?

Chapter 2

Gender equality in the European Union Lessons for democracy?

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Introduction

The European Union (EU) plays an important role in promoting gender equality across the member states and in its external relations in three ways. First, equality between women and men is recognised as a fundamental human right in various EU treaties. Second, it is declared to constitute a 'common value' on which European Union decision-making is based. Third, it informs the framing of policies and actions designed to eliminate gender inequalities.¹ In the course of 50 years, gender equality has moved from being a provision in the Treaty of Rome (Article 119) designed to discourage anti-competitive labour practices to constituting a significant commitment of the EU. This has resulted in a sizeable and disparate corpus of laws, policies, actions and other measures that seek to eliminate gender-based discrimination in employment, employment-related and social fields. In addition, and as a consequence of the Treaty of Amsterdam, the EU promotes gender equality in a positive manner. It does this through a gender-sensitive scrutiny of all policies (gender

¹ For recent commitments in this regard, see the *Women's Charter* – a political declaration setting out five key action areas from 2010 onwards: <<http://ec.europa.eu/social/main.jsp?catId=418>> (last accessed 5 May 2010).

mainstreaming), legislating for positive preference of the 'underrepresented sex', and taking initiatives beyond the employment arena, such as a concern with human trafficking and a commitment to combat gender-based violence.

This impressive commitment to gender equality, which provokes feelings of 'EU envy'² among feminist scholars from other world regions, is the work of many institutions and individuals. Among them are committed feminist bureaucrats within the Commission, individual gender equality experts, equality-promoting Commissioners, Council members, and Members of the European Parliament (MEPs), women's and equality-seeking organisations, and case findings of the European Court of Justice (ECJ). Charting the achievements of these gender equality activists in moving the agenda from a modest equal pay provision in 1975 to the multi-faceted policy field it is today has been a focus of extensive research since Catherine Hoskyns (1996) seminal work on women, law and politics in the European Union. Today, scholars such as Anna Van der Vleuten (2007), Johanna Kantola (2010) and others offer careful analyses of the impact of the EU on member states equality policies, and explore the interaction of academic experts, activists and bureaucrats that has created a 'velvet triangle' (Woodward 2004) of highly effective policy actors at the European level. Much of this literature discusses the interaction of EU equality policies with welfare states (e.g., Lewis 1992; Walby 2004), others address the major theme of Europeanisation from a gender perspective (e.g., Liebert 2003), and a third dominant strand examines implementation across member states (e.g., Falkner et al. 2005). A recent thematic addition to this literature focuses on the connections between EU governance, transnational civil society, and democratic legitimacy (Hoffmann and van der Vleuten 2007; Hoskyns 1999), linking the theoretical insights of international relations and feminist politics and interrogating the democratic deficit arising from governance beyond the nation state.

In this contribution, we explore what the decision-making around gender equality in the EU tells us about the quality of democracy 'beyond the state' (Lord and Harris 2006: 175-198) from a gender equality point of view. One of the challenges of this research has been

² This phrase was coined by Professor Marian Sawer, Australian National University, in discussion with one of the authors.

to conceptualise the theoretical idea of gender justice in empirical terms in order to ask how democratic is the European Union decision-making process in gender equality terms? In contrast to the interest in the EU as a regional democratic player in a global world order, our research focuses on the extent and quality of gender-sensitive democracy *within* the EU polity. Our efforts are primarily geared towards uncovering the gendered nature of democratic decision-making, though the cases themselves reveal much about the particularities of specific equality policy formulation.

The discussion is structured as follows: first, the theoretical basis of the study, gender democracy, is outlined. The next section addresses the policy-making process around the Goods and Services Directive and the Recast Equal Treatment Directive.³ The third section considers the processes in the light of gender democracy, before concluding with reflections on the gendered imprint of EU democratic decision-making.

Concept: Gender democracy

Although the term 'gender democracy' has been around for some time (Cockburn 1996; Sarvasy and Siim 1994), it has not to date been utilised by scholars as a theoretical approach for analysing decision-making processes.⁴ However, the deliberative turn in democratic theory has assisted in the reconceptualisation of gender democracy as a framework for assessing the legitimacy of political decision-making (Galligan and Clavero 2008). Although there are varying emphases among deliberative democracy proponents as to what constitutes deliberation, there is agreement on some of the basic features of a deliberative process. This is one in which qualified and affected participants offer reasoned and justified opinions as they attempt to resolve disagreement on a collective problem through coming to a shared understanding that leads to a legitimate decision. This reason-

³ Council Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services. Directive 2006/54/EC of the European Parliament and of the Council on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast).

⁴ Gender democracy has been adopted by the Heinrich Böll Foundation as a 'socio-political vision and organisational principle' for its activist work in promoting gender equality, see: <www.boell.or.ke/web/52.html> (last accessed 11 November 2010).

giving examination of a public matter requires that, ideally, all who participate in the process are equals. This expectation of political equality is important in considering gender politics and policies (Young 2000). In an ideal gender democracy, women would be endowed with resources (economic, social, personal and political) equal to those of men so as to enable them to join with men as equal peers in exerting popular rule of a polity.

Within this idea of political equality are nested principles of inclusion, accountability and recognition, from which democratic legitimacy is derived. For those who study gender politics, ideas about inclusion are intrinsically connected with representation, encompassing formal (i.e. numerical) and substantive (policy) aspects.⁵ Accountability carries an expectation that those who articulate the views of civil society and its interests, as well as those elected to represent, will be accountable to the public or constituency on whose behalf they speak. It also implies that those qualified and affected by a collective problem are included in the discursive problem-solving process. Under the banner of accountability, feminist scholars also expect there to be some transparency about the decision-making process in which these spokespersons, formal and informal, engage. Without this element of transparency, accountability is diminished. As many studies have shown, closed, opaque decision-making perpetuates women's disadvantage in, and exclusion from, public affairs. The issue of recognition is a touchstone for feminist politics, as it brings the standing of equality between women and men to the fore. It is, as Lynn Sanders notes (1997: 349), more than the formal right of access to, and engagement in, decision-making. In her words, it is about 'equality in "epistemological authority", in the capacity to evoke acknowledgment of one's argument'. There is an expectation that participants will come to the decision-making process with open minds, willing to show respect for the views of women's representatives and other advocates of gender equality. There is also an expectation that there will be accommodation of their views, especially when the subject being debated affects gender relations.

This theoretical model of gender democracy has four basic features:

⁵ An elaboration of gender democracy and its illumination of the RECON models of democracy is discussed in Galligan (2011).

- a) It is informed by a substantive conception of democracy;
- b) It enables an articulation of the principle of political equality which takes into account issues of inclusion, accountability and recognition;
- c) It gives equal weight to the two fundamental principles of democracy – political equality and popular control; and
- d) It can be rendered operational through a series of sensitising questions designed to reveal the gendered imprint of the decision-making processes under scrutiny (Galligan and Clavero 2008: 6-7).

Methodology

The assessment of the decision-making processes on the two equal opportunities directives entailed a process-tracing approach that produced a large amount of data, chiefly from documentary sources, to reconstruct the sequence of events from declaration of intent to adoption stage. Though most of the material was readily available on the websites of the institutions and actors participating in those processes⁶, other material had to be explicitly requested in order to fill information gaps. Additional information was gathered from personal email communication with selected actors, as well as from newspaper articles relating to particular events that arose during the process timeframe.

Once the data were collected, the analytical assessment proceeded by applying a range of sensitising questions operationalising the three main principles of political equality: inclusion, accountability and recognition (adapted from Young 2000).⁷ From the 17 indicators comprising a generic gender democracy evaluation developed in a previous study (Galligan and Clavero 2008: 27-30), seven were chosen for their relevance to the EU policy-making process. Each indicator is sensitive to a particular dimension of gender democracy and is used

⁶ These include: the European Parliament, the European Commission, the Council, the Committee of Regions, the Economic and Social Committee, the Advisory Committee on Equal Opportunities between Women and Men, the European Women's Lobby and the European Women Lawyers' Association.

⁷ A generic list of gender democracy indicators was developed in a previous working paper (Galligan and Clavero 2008), although this list was modified for the study of gender democracy at the supranational level in order to take into account the specific features of EU legislative processes as well as the range of data available.

as an analytical prism with which to determine the receptivity of the process to gender-specified demands.

INC 1: To what extent did representatives of women's interests participate in the processes under examination?

INC 2: To what extent were women's interests and perspectives included in the deliberative agenda?

ACC 1: How accessible were deliberative sites to women organisations seeking to influence decision-making?

ACC 2: Did women's representatives and equality-seeking civil society organisations have access to information relevant to the decision-making process (background and policy documents, minutes and reports of sessions, open sessions).

ACC 3: Were the positions of key actors involved in the process explained through a reason-giving exercise?

REC 1: To what extent did participants in deliberation show understanding of women's positions?

REC 2: To what extent were women representatives and women's positions accorded respect by other actors?

These relatively open questions were formulated so as to provide a qualitative assessment of gender democracy at the EU level. The results of the analysis capture the complexities of democratic practice in the European Union.

The directives: A description of the policy-making process

The Goods and Services Directive

The enactment of the Race Equality Directive in 2000,⁸ which marked the first extension of EU competence into social affairs, prompted

⁸ This was made possible by Article 13 EC in the Treaty of Amsterdam, which empowered the Community to take action to combat discrimination on a range of grounds, including racial and ethnic origin, outside the field of employment (Masselot 2007: 153).

interest in providing something similar for gender equality. Up to that point, the EU had enacted nine gender equality directives in employment and employment-related fields. A Council agreement in 2000 to proceed with what was initially called a Gender Equality Directive began an intensive consultative process between the Commission and relevant economic and social interests, various EU committees and advisory bodies, and the European Parliament (EP). The Commission cited Article 13 of the Treaty of the European Union as the legal basis of this proposed measure, enabling the European Council to take appropriate action to combat discrimination based on sex (among other grounds).⁹

The intention was approved at the end of 2000 by the European Council and the Commission began to draft proposed legislation and consult with interested parties. Shortly thereafter, the European Women's Lobby (EWL) sought to influence the scope of the directive to ten areas including gender parity in decision-making, access to and supply of goods and services, and violence against women.¹⁰ During this time, the EWL worked closely with the formally-constituted Advisory Committee on Equal Opportunities between Women and Men, who were tasked with preparing an opinion for the Commission on this matter.¹¹ This opinion, issued in February 2002, was very much in keeping with EWL demands.¹²

⁹ Article 13 of the Treaty of the European Union which enables the European Council to take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. When the Council acts on the basis of Article 13, it does so unanimously on a proposal from the Commission and after consulting the European Parliament.

¹⁰ The ten areas for inclusion advocated by the EWL were: 1) parity participation of men and women in decision-making; 2) access to and supply of goods and services; 3) taxation; 4) right to reconcile family and working life; 5) social protection, social security, social benefits and non-occupational healthcare and the fight against social exclusion; 6) education, training and research; 7) family and society-based violence against women; 8) health; 9) the images of women and men portrayed in advertising and the media; 10) the surname.

¹¹ The Advisory Committee on Equal Opportunities for Women and Men assists the Commission in formulating and implementing the EU activities aimed at promoting equality between women and men. The Committee fosters ongoing exchanges of experiences, policies and practices between Member States and the various parties involved. To achieve these aims the Committee delivers opinions to the Commission on issues of relevance to the promotion of gender equality in the EU. It comprises representatives of Member States, social partners at EU level and Non-Governmental Organisations (NGOs). The Committee was created in 1981 by Commission

Despite the creation of a consensus between women's civic and bureaucratic representatives around the content of the proposed directive, the Commission circulated an unofficial, internal draft that offered a more narrowly-defined directive addressing access to and supply of goods and services including education, taxation, advertising, and the media – all areas included in the Race Directive. However, this early draft provoked a strong reaction from the insurance and media industries. Media representatives launched a hostile campaign in which they argued that the proposed directive – and more particularly its intention to ban gender stereotypes in media and advertising – represented 'an extraordinary move towards censorship' which would clash with the principle of freedom of expression.¹³ This campaign included sexist attacks in the print media directed against the Commissioner for Employment and Social Affairs, Anna Diamantopoulou.¹⁴ The insurance industry argued that the proposal to eliminate sex differences as a factor in the calculation of insurance premiums and benefits would have serious repercussions for the sector, as well as for consumers, since it would result in increased premiums in order to compensate for the loss of accuracy in prediction and risk.¹⁵ In addition to the objections of these interest groups, some Member States, as well as a number of key Commissioners¹⁶ also expressed their opposition to the Commission draft.

Decision 82/43/EEC, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31982D0043:EN:NOT>.

¹² The full range of areas for inclusion advocated in the Advisory Commission report were: 1) decision-making; 2) access to and supply of goods, services and facilities (including taxation and social protection); 3) health; 4) education and training; 5) violence against women; 6) sexual harassment; 7) commercial advertising and the media; 8) and membership of associations.

¹³ Financial Times, 'EU plan for law against sexism draws fire', 24 June 2003.

¹⁴ Articles had titles such as 'Big sister is watching you: Feminist Eurocrat who wants to ban "sexist" TV shows and adverts'.

¹⁵ The views of the insurance sector on the proposal are described in the Commission's document SEC(2003) 1213: Commission Staff Working Paper: 'Proposal for a Council Directive Implementing the Principle of Equal Treatment between Women and Men in the Access to and Supply of Goods and Services - Extended Impact Assessment'.

¹⁶ A number of Commissioners expressed deep concerns about the proposal, including the Internal Market Commissioner, Frits Bolkestein; the Trade Commissioner, Pascal Lamy; and the Competition Commissioner Mario Monti (Financial Times, 'EU plan for law against sexism draws fire', 24 June 2003).

When it seemed that the process would stall due to a strong polarisation of views among the key actors, women's organisations within the EU institutional framework (European Women's Lobby, EWL; European Women Lawyers' Association, EWLA; Association of Women of Southern Europe, AFEM) continued to lobby in favour of a directive that preserved some of their demands: equality in insurance premiums and benefits, taxation, education, and advertising and the media.¹⁷ In addition, MEPs across political groups involved in the European Parliament's Women's Rights and Gender Equality Committee (FEMM) signed a declaration of solidarity with Commissioner Diamantopoulou, stating that the sexist attacks against her 'put into great danger the adoption of a new proposal for a directive aiming to eliminate sex discrimination'.¹⁸

Yet, despite the lobbying efforts by women's interest representatives for a wide-scope directive, the proposal finally issued by the Commission was further diluted from the earlier draft, since its scope was limited to the access to and supply of goods and services only. This revised proposal was a major disappointment for women's advocates, social and political, who claimed not to have been properly informed, let alone consulted, about these changes.¹⁹ The narrow scope of the proposal was also criticised by the EU's Committee of the Regions (CoR) and the Economic and Social Committee (EESC). In the European Parliament, the matter was first considered by the FEMM Committee, which suggested 34 amendments to the proposal, among them shortening the transitional period for the implementation of gender-neutrality in actuarial factors from six to four years;²⁰ The report was approved by the FEMM Committee on 16th March 2004, with 29 votes in favour and 3 votes against – indicating a consensus across political groups. It was later voted in a plenary session of the European Parliament, on 30th

¹⁷ The Commission received statements from the following women's organisations supporting a broad directive that included education, taxation and the media as well as goods and services: EWL (9 July 2003), EWLA (5 September 2003) and AFEM (7 September 2003).

¹⁸ 02.COM.FEMM/03/D_30306/ES/ddl, available at: <[www.karamanou/gr](http://www.karamanou.gr)>.

¹⁹ EWL, Annual Report 2003, available at: <www.womenlobby.org>.

²⁰ Amendment 22.

March, with 313 votes for, 141 against and 47 abstentions – a strong majority which, once again, crossed political lines.²¹

However, during this plenary debate the Commission refused to accept any of the amendments tabled by the EP. Furthermore, none of these amendments were considered during deliberations in the Council. Council discussion on this directive mostly focused on the insurance element: application of the principle of equal treatment to the use of sex-based actuarial factors in the calculation of premiums and benefits in the insurance and related industries.²² A small number of Member States²³ voiced dissent on the narrow scope of the proposal, echoing the concerns of women actors. The actuarial provisions provoked much stronger polarisation among Member State representatives, with some arguing that using sex as an actuarial factor was discriminatory, others concerned with the costs to consumers and industry if sex were removed from the calculations of premiums and annuities. The issue was resolved with an agreement that allowed Member States to permit the use of sex as an actuarial factor provided that this practice was *objectively justified*. Although the German representative did not accept this arrangement, he decided to abstain in order to avoid blocking the directive. The directive was finally adopted on 13th December 2004.²⁴ The final version outlawed discrimination based on sex in access to and the supply of goods and services to the public,²⁵ such as housing, transport, banking and other financial and insurance services (IP/08/1014). Its provisions required Member States to transpose the directive into national law by 21 December 2007 (Art. 17.1),²⁶ and also to consult with ‘relevant stakeholders’ with a legitimate interest in

²¹ European Women’s Lobby, ‘New European Directive on Gender Equality in the Area of Goods and Services Adopted in December 2004’, available at: <www.womenlobby.org>.

²² Article 4 of the Commission’s proposal.

²³ These Member States were: Belgium, Finland, Luxembourg, Malta, The Netherlands, Portugal and Sweden.

²⁴ The political agreement is outlined in Council document 13369. France entered a note expressing concern about competition-distorting practices of the insurance industry in other member states.

²⁵ Available at: <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004L0113:EN:HTML>> (Accessed 11 May 2010).

²⁶ Though derogation was possible until 21 Dec 2009 if requested and reasons specified before 21 December 2007.

promoting gender equality when formulating national measures (Article 11). It allowed the insurance sector an extended transitional period of six years for the implementation of the directive, beyond the general transposition period of two years.²⁷

The Recast Equal Treatment Directive

While the Goods and Services Directive was marked by a very long and divisive pre-proposal stage, the proposal-drafting period for the Recast Equal Treatment Directive (generally known as the Recast Directive) was relatively short and straightforward. Its origins can be traced to the European Commission's legislative programme for 2003, which included a 'recasting of gender equality directives'.²⁸ The impetus for this move came from the perceived need to take account of European Court of Justice judgments that had clarified and developed the concept of equality (SEC (2004) 482: 2). A Commission communication issued in February 2003 on 'updating and simplifying the community acquis'²⁹ to provide a single text on equal opportunities directives, and set out three different strategies for achieving the task of simplifying and updating equal treatment legislation – consolidation, codification and recasting.³⁰

The proposal-drafting process began with a web-based consultation of Member States, interested stakeholders and individual citizens, in which the Commission presented the codification and recasting methods as the most viable options for modernising equal treatment legislation. Codification was discussed as a technical exercise with no substantial changes to existing equal treatment legislation. Two recasting options were presented, one which would integrate six

²⁷ COM (2003)657 final.

²⁸ COM(2002)590 final.

²⁹ COM (2003)71 final.

³⁰ Consolidation integrates in a single (non-binding) text the provisions of the original instrument with all subsequent amendments made to it. It does not seek clarification so complexities and ambiguities are not resolved. Codification clarifies the law by bringing together all provisions of an act and subsequent amendments, harmonising terms and definitions. This is a textual exercise which maintains the body of the *acquis* intact, without developing it. Recasting codifies a pre-existing legal act and subsequent amendments while at the same time allows for the possibility of substantial modification and development of pre-existing law. In addition, it also allows the integration on the body of ECJ jurisprudence into the new instrument.

previous equal treatment directives into a single directive³¹ while the alternative recasting option incorporated the employment-related provisions of the pregnant workers' directive, thus involving additional substantial changes in existing legislation. It should be noted, however, that this extended recasting option did not consider the inclusion of the health and safety provisions of the pregnant workers directive, nor did it consider the inclusion of the parental leave directive. In addition to the discussion above, the Commission consultation paper stated a preference for Article 141 EC as the legal basis for this directive, entailing that the adoption procedure to be followed was that of co-decision rather than consultation, in contrast with the process followed in the case of the 'Goods and Services' directive.

In total, there were thirty responses to the Commission's web-based consultation. While employers preferred the relatively straightforward codification option, governments' responses were divided between codification and a limited recasting.³² Trade unions, women's organisations and other civil society organisations favoured either the more extended recasting option or a new, more far-reaching recast to include the parental leave directive. Only a handful of women's organisations submitted an opinion to the consultation paper and the participation of women's organisations in the overall pre-proposal process was relatively low, especially when compared to the case of the Goods and Services Directive.

The Advisory Committee on Equal Opportunities Between Women and Men issued a majority opinion in October 2003 that favoured an extended recast directive. It also called for the inclusion of the health and safety provisions of the pregnant workers directive, as well as some provisions in the directive on equal treatment for the self-employed (a directive not considered in the Commission's consultation paper). This opinion only represented the views of trade unions and national gender equality bodies. It did not reflect the views of employers, who issued a minority position that clearly favoured a codified directive. In arguing for this minority position,

³¹ These directives were: equal pay, equal treatment in employment (as amended in 2002); equal treatment in occupational security schemes (as amended in 1996) and the burden of proof in cases of sex discrimination.

³² One exception is Portugal, as it proposed a more far-reaching option than those presented in the Commission document.

employers stated that no further modification to the existing legislation was necessary, that further amendments to existing legislation would involve costly changes at the national level, and that anything additional to a simple codification would put an unfair burden on employers in acceding countries.³³ The disagreement between employers and trade unions during the consultation process was also evident in an informal meeting organised by the Commission with representatives of social partners at EU level, though divergences of opinion also existed among member states, as became clear in another meeting with the Commission during the pre-proposal stage.³⁴

The Commission finally published its proposal in April 2004.³⁵ It covered the six directives laid out in the integrative recast option, omitting the directives on maternity protection, parental leave, social security and the self-employed. In addition, the proposal incorporated the extensive case-law of the European Court of Justice. The document was welcomed by the Economic and Social Committee (EESC) in its opinion of December 2004,³⁶ which agreed with the Commission that the inclusion of the omitted directives would complicate and lengthen the recast directive. Nonetheless, the EESC called attention to the need to revise and update the directive on the self-employed which, in its view, did not provide sufficient protection for women.

The Commission's proposal gave rise to a lively debate in the FEMM Committee³⁷ that focused on three issues: inclusion of a reference to parental leave in the recast directive; the elimination of distinctions between women and men in occupational pension schemes and the introduction of unisex tariffs; and the need to put more pressure on Member States and social partners to promote gender equality.

³³ Both the Advisory Committee's opinion and the employers minority position can be found at: http://ec.europa.eu/employment_social/gender_equality/gender_mainstreaming/gender/advcom_en.html.

³⁴ Information about the consultation process is included in the Impact Assessment Report annexed to the Commission's proposal, SEC (2004) 482.

³⁵ COM(2004)279 final.

³⁶ 2005/C 157/ 14.

³⁷ These were the words used to describe the deliberations in the FEMM Committee by MEP Joachim Wuermeling, speaking on behalf of rapporteur Angelika Niebler, during the plenary session on 05/07/05.

Deliberations in the FEMM Committee considered the proposal in three separate sessions at the end of which a report prepared by Angelika Niebler (European People's Party, EPP) containing 93 amendments, was adopted.³⁸ The main amendments related to maternity/parental leave and the reconciliation of work and family life.³⁹ However, support for this report did not cross the political spectrum as evidenced by the large number of abstentions during its adoption in the Committee.⁴⁰ The report of the FEMM Committee was adopted by the European Parliament in its plenary session of 5th July 2005, when a total of 93 amendments were approved. During this session, however, the Commission announced that it could not accept a number of these amendments. Of particular note is the Commission's rejection of an amendment proposing a review clause for the parental leave directive as parental leave did not fall within the scope of the recast directive.

The amendment relating to parental leave became the main point of disagreement between the European Parliament, on the one hand, and the Council and Commission, on the other during the inter-institutional deliberations that took place prior to the adoption of the directive. After tripartite negotiations, a political agreement was reached in which both the Council and the Commission made a commitment to put parental leave on top of their gender equality agendas. The recast directive was finally adopted one year later, on 5th July 2006, although the input of the European Parliament in the final text was minimal. Thus, out of the 93 amendments proposed by the European Parliament, the Council only accepted 37, of which 24 related to titles and 10 were already included in the Council general guidelines. The EP secured only three substantial amendments to the directive.

³⁸ A6-0176/2005 Final, adopted in Committee on 26/05/05.

³⁹ These amendments included: to clarify that parental leave is an individual right for every parent; to ensure that any less favourable treatment of a woman who is pregnant or on maternity leave is also deemed discriminatory; to require member states to encourage dialogue among social partners to promote flexible working arrangements with the aim to facilitate reconciliation of work and family life; to ensure that Member States conduct awareness campaigns for employers and the public in general on equal opportunities issues.

⁴⁰ The results of the vote were 9 in favour, 1 against and 22 abstentions.

Analysis of gender democracy

In this section, we return to the three principles of gender democracy to elucidate the nature of the processes described above.

Inclusion

Our analysis of inclusion is concerned with the extent to which women's representatives participate (descriptive representation), and their interests are taken into account (substantive representation) in the EU decision-making processes. Given the institutional heterogeneity of the EU and the complexity of its legislative processes, applying these indicators requires that we look at a variety of deliberations taking place within and across a multiplicity representative institutions, networks and organisations.

INC 1: To what extent did representatives of women's interests participate in the processes under examination?

The Goods and Services Directive

The involvement of representatives of women's interests in the process leading to the adoption of the Goods and Services Directive was quite strong. From the pre-proposal stage onwards, different trans-national organisations, MEPs, femocrats and gender experts formed a solid advocacy network, with consensus around the main issues they wished to see included in the Directive. This network actively lobbied different EU institutions (Commission, European Parliament, and Council) depending on the stage of the legislative process. In this context, it is instructive to note the role played by organisations such as the EWL, EWLA and AFEM – supported by other organisations such as the Federation Européenne des Retraites et Personnes Agees (FERPA) and the European Disability Forum. These organisations sent statements to the Commission during the pre-proposal stage, all of which were very similar in content. The EWL in particular played a prominent role throughout the whole process, as it took the lead in a lobbying campaign for a wide-scoped directive by drafting a shadow directive at the pre-proposal stage and it continued campaigning through to the later stages of the process, when the directive was debated in the Council. Experts at the European Commission's Advisory Committee on Equal Opportunities for Women and Men worked in close cooperation with the EWL in preparing an opinion for the Commission, the content of which was very much in line with that of the EWL shadow directive.

MEPs of the FEMM Committee expressed public solidarity with the Commissioner for Employment and Social Affairs when she became the target of an aggressive campaign against the Commission's draft proposal. The FEMM Committee also played an important role in enhancing dialogue and awareness among actors representing diverging interests and the wider public, by way of organising a public hearing during the pre-proposal stage where the main issues involved in the directive were discussed among a variety of key stakeholders (insurance industry, media industry, women's organisations, national women policy agencies, and others).

In sum, the solidity of women's advocacy networks during this process was illustrated not only by their high level of institutional involvement but also by their ability to adopt a common position and to speak with one voice.

The Recast Directive

In contrast to the Goods and Services Directive, the level of involvement of women's organisations during the process leading to the adoption of the Recast Directive was relatively weak. The web-consultation launched by the Commission during the pre-proposal stage and opened to Member States, stakeholders and individual citizens resulted in thirty responses, only seven of which came from women's organisations and related groups.⁴¹ The European Women's Lobby did not participate in the process leading to this directive and the only trans-national women's organisation providing an input into this process was the European Women Lawyers Association at the stage when the Commission's proposal was being deliberated in the EP's FEMM Committee. The low level of involvement on the part of representatives of women's interests in the Recast process was coupled with a lack of a common position, as evidenced by the different views among FEMM Committee members during the first reading of the Commission's proposal.⁴²

⁴¹ These were: The Clara Wichmann Instituut, the Estonian Women's Associations Roundtable; the European Equality and Diversity Forum; Justice (UK legal and human rights organisations); the German Women's Lawyers Association; the UK Discrimination Law Association; and the European Association of Public Sector Pension Institutions.

⁴² The existence of diverging positions among members of the FEMM committee was reported by the Deputy rapporteur during the plenary session where the first EP reading of the Commission's proposal was debated.

One explanation of the lack of involvement of women's organisations in the recast process could be the widespread perception that this directive mainly concerned technical, rather than political, issues. This was the main reason put forward by the policy director of the EWL when, in a personal email communication with the authors, she explained the reasons why the organisation did not participate in this particular legislative process.

At the time, it was mainly a question of workload and also the fact that this was a very technical/legal issue, more than a political issue, which resulted in the EWL not being very active during the adoption process of the recast directive, even if I agree that it would have been good to be more involved. Our understanding at the time was that it was more a technical exercise of putting together legislation than improving or revising it.

(EWL policy director, November 2008)

Nonetheless, even if the involvement of civil society organisations in the process leading to the Recast Directive required high levels of legal expertise, this does not necessarily entail that this process only consisted of a technical exercise, as was the initial perception of the EWL. In fact, two of the three options presented in Commission consultation paper entailed some level of revision of existing legislation, which opened the possibility for politicisation of the main issues involved. This politicisation role, however, was taken up by MEPs in the FEMM Committee, who took this opportunity to put the issue of parental leave on the agenda and to draw attention to the need for further revisions of the EU gender equality *acquis*.

The lack of involvement of civil society organisations and their perception of the Recast Directive as a technical process may not be a mere oversight on their part, but may rather point to a failure (on the part of the Commission) to communicate in a clear manner the implications of the recast strategy to all interested parties. On this point, Burrows and Robison (2007: 188) argue that the Commission consultation paper is unclear as to the extent to which the recast technique can be used as a tool to modify existing EU legislation on gender equality. If this is true, then the recast process can serve as a good illustration of how a lack of transparency during the proposal drafting process has an impact on the principle of inclusion, as civil

society organisations may be excluded from that process. At the same time, a comparison between the recast and the goods and services processes raises a question about the relationship between the nature of those processes (whether they are perceived as primarily 'technical' or 'political') and their overall democratic quality.

INC 2: To what extent were women's interests and perspectives included in the deliberative agenda?

This indicator aims to assess the substantive representation of women, understood as the feminisation of the political agenda in EU legislative processes on gender equality. A comparison of this indicator between the two case studies under investigation reveals that, while in both cases the level of inclusion of women's interests clearly diminishes as the processes progress, the type of decision-making procedure that was followed in each case had a significant influence on the overall results.

The Goods and Services Directive

An examination of the process leading to the enactment of the Goods and Services Directive from its beginnings to its adoption reveals that the level of inclusion of women's interests and perspectives into the deliberative agenda gradually diminished from 'partial inclusion' to 'no inclusion'. As a result of this, the final directive that was adopted by the Council barely resembled the shadow proposal that was submitted by the European Women's Lobby during the pre-proposal stage. The dilution of this directive began in the very early stages of the process, when the Commission decided during the pre-proposal stage that inclusion in the directive of certain areas advocated by representatives of women's interests (such as parity participation) were to be removed from the deliberative agenda and, therefore, not to be considered in subsequent deliberations. During this stage, the proposal was diluted once again when, following pressure from other stakeholders, important areas for women such as education, taxation and advertising and the media were removed by the Commission from the scope of the proposal. Given the agenda-setting role of Commission, this action had a significant effect on the level of inclusion of women's interests during the remainder of the legislative process. Nor were these issues re-entered, despite a large number of actors (women's organisations, MEPs in different EP Committees, the Committee of Regions and the Economic and Social Committee)

expressing disappointment at the narrow scope of the proposal. Hence, the European Parliament did not adopt any substantial amendment regarding the scope of the directive (albeit some efforts to bring this issue back to the political agenda)⁴³ and, once the proposal reached the Council, deliberations in this institution did not even take the EP opinion into consideration. Instead, Council deliberations centred on the ban of using sex as an actuarial factor in the calculation of premiums and benefits – a provision included in the Commission proposal but on which a number of Member States had expressed reservations.

The Recast Directive

The extent of women's substantive representation during the Recast process was, by comparison, relatively higher than in the case of the Goods and Services Directive, especially during the inter-institutional process. During the pre-proposal process, however, women's interests were only partially included. Thus, neither the option to incorporate the maternity directive in the Recast – an option considered in the Commission's consultation paper – nor the option to incorporate the parental leave directive – an option discarded from the beginning but advocated by some women's organisations – were included in the proposal. Yet, even if the Commission finally opted for a directive that excluded maternity as well as parental leave, once the inter-institutional process began, these issues continued to be on the political agenda until the adoption stage. In sum, the level of women's substantive representation during the inter-institutional process of the Recast directive was appreciably higher than in the Goods and Services Directive.

It was the European Parliament, and most particularly the FEMM Committee, that ensured that issues of parental leave were kept on the political agenda during the Recast process. Not all political groups, however, supported the view that the Recast directive should include parental leave. While MEPs of the Socialist Group and the Greens supported this inclusion, members of European People's Party took a more conservative position. EPP MEPs expressed the view that to bring the parental leave directive into the recast proposal

⁴³ Some political groups of the European Parliament tabled a number of amendments aimed at broadening the scope of the directive, but at the end these were not adopted by the plenary.

would entail a significant modification to EU law, which they did not deem opportune at the time. The compromise reached in the European Parliament was to introduce an amendment that urged Member States, social partners and other stakeholders to review the parental leave directive, with a view to 'improving the situation of women and men who find it difficult to reconcile family and work commitments'. Although this amendment was not incorporated into the final text of the directive (as neither the Council nor the Commission accepted it) a compromise between these three institutions was reached in which the Commission and the Council acknowledged the importance given by the European Parliament to parental leave issues and made a commitment to improve opportunities for reconciling of work and family life.

In summary, the above analysis reveals the important role played by the European Parliament in ensuring representation, in descriptive and substantive terms, for women's groups and views during the processes leading to the Goods and Services Directive and the Recast Directive. What emerges from the comparison between the two cases is that the more decision-making power the European Parliament has, the most likely it is that women's interests will be kept on the political agenda throughout the process. Thus, the fact that the Recast Directive was adopted by the co-decision procedure appears to have been a determining factor in ensuring women's substantive representation. In the Goods and Services Directive, where the procedure followed was that of consultation, the issues raised by the European Parliament and women's organisations completely disappeared from the political agenda once deliberations concentrated in the Council.

Accountability

Our three indicators of accountability are designed to measure the access to, and availability of, information about the positions of different actors in the process, the degree to which different positions were explained as well as availability of information about the processes.

ACC 1: How accessible were deliberative sites to women organisations seeking to influence decision-making?

The level of access of women's organisations to deliberative sites was similar in the two legislative processes under study. In both cases, we observe a differential institutional access, with restricted accessibility to the Commission, full accessibility to the European Parliament and divergent accessibility to the Council, because of the different rules under which each directive was processed.

The Goods and Services Directive

During the pre-proposal stage leading up to the adoption of the Goods and Services Directive, access to deliberative sites seems to have been limited to the main transnational women's organisations – i.e. those who are regularly engaged in dialogue with the Employment and Social Affairs Directorate – as there is no evidence of participation of smaller organisations operating at national, regional or local levels. Those transnational organisations submitted an opinion, and were kept informed of progress in the drafting of the Commission's proposal. In addition to this, the EWL had observer access to the meetings of the Advisory Committee on Equal Opportunities at the time that this body was drafting of an opinion for the Commission. Nonetheless, when the Commission decided to change the content of its draft proposal due to criticisms from other stakeholders, women's organisations claimed not to have been informed about this change and implied that other actors, such as the media and advertising industries, were given preferential access. At any rate, accessibility to the Commission during the consultation process was at best restricted, as women's organisations could only submit documentation in the form of opinions, statements or shadow proposals. Indeed, the main opportunity for them to speak during the pre-proposal stage was not provided by the Commission but by the European Parliament; this was during a public hearing organised by the FEMM Committee where women's organisations and other stakeholders were invited to present their views on the directive. These contributions from civil society organisations to the content of the Goods and Services Directive formed the basis on which the FEMM Committee drafted its opinion. It seems, then, that in this case the European Parliament acted to compensate for some deficiencies in the consultation process with the Commission.

After the Commission issued its proposal and the process entered the inter-institutional stage, the accessibility of deliberative sites to women's organisations became much more limited, if virtually non-

existent. This is because Council meetings were confined to a limited range of participants, and excluded the European Parliament. An additional barrier for women's organisations (and non-governmental organisations in general) in exerting some influence during Council debates is that these groups did not have access to information about the content of those deliberations. This made it very difficult for non-governmental groups to participate at this vital decision-making stage in any meaningful way (Butler 2008).⁴⁴

The Recast Directive

Patterns of access for women's organisations to deliberative sites were not very different during the legislative process leading to the adoption of the Recast Directive, though EP representatives were part of inter-institutional deliberations. During the pre-proposal stage, women's organisations had the opportunity to submit a written opinion. The open consultation engaged in by the Commission meant that access opportunities were broadened to a larger pool of potential contributors than was the case of the Goods and Services Directive. Once again, women's organisations had more access to the deliberations conducted through the European Parliament than other institutional settings. During this stage, the main participating organisation was the European Women's Lawyers' Association which presented an opinion statement at a meeting of the FEMM committee.⁴⁵ As was the case in the Goods and Services Directive, women's organisations did not have access to Council deliberations during the adoption stage of the Recast Directive, though EP participants did advance gender equality arguments.

ACC 2: Did women's organisations and the public have access to information relevant to the decision-making process (background and policy documents, minutes and reports of sessions, open sessions)?

In recent years, the Commission has made important efforts to improve transparency during the pre-proposal stage by publishing

⁴⁴ Nonetheless, there are some potential indirect channels of information and influence through the Commission or through representatives of Member States in the Council deliberations. As of now, we have no information as to whether, and the extent to which, these informal channels were pursued by women's organisations as this information can only be gathered through interviews.

⁴⁵ On 6th March 2005.

extended impact assessment reports. These reports (which are annexed to the Commission's proposal) serve to enhance the transparency of the Community regulatory process by way of providing well-documented proposals. The reports contain information about the objectives of the legislation being proposed; the issues and problems involved; the policy options considered; the potential impact of each of those options; and the consultations conducted with relevant stakeholders in preparing the proposal.⁴⁶ However, while these reports lend much more visibility to pre-proposal processes in the Commission, the information provided is sometimes vague. For example, in the impact assessment report annexed to the proposal for the Goods and Services Directive, the Commission justified the exclusion of taxation, education and advertising and the media from the scope of the directive by claiming that the evidence of gender-based discrimination in these areas was less clear-cut than in the area of insurance, 'or that it was not apparent that the difficulties could be resolved through legislative means'. It concludes that '[T]he Commission has decided therefore that other means would be more appropriate to deal with these issues'.⁴⁷ However, no assessment of the potential impacts of this policy option (both positive and negative) is provided. These gaps of information were also found in the impact assessment accompanying the proposal for the Recast Directive. In this case, the report did not provide a detailed record of the organisations responding to the consultation call, or a detailed description of the responses submitted by each of them. Instead, the information on the consultation process that is provided is quite general in nature.

Despite these developments, women's organisations still had to rely on informal channels of information during the pre-proposal stage, since impact assessment reports were only published towards the end of this stage, together with the Commission proposal. The relative absence of documented official analysis during the relatively fluid discussion period meant that the level of transparency during the consultation process fluctuated, depending on how much information the Commission provided. It has already been mentioned how, during the pre-proposal stage of the Goods and

⁴⁶ 'Better Regulation Plan' – see documents COM(2002)278, COM (2002) 276, COM (2003) 657 final.

⁴⁷ *Op. cit.*, p. 15.

Services Directive, women's organisations were informed about developments in the drafting process, but only up to a point. While these organisations had access to an early, unofficial draft proposal, they claimed not to have been informed when the Commission planned to narrow its scope in significant ways. Yet, because these changes were of direct relevance to the interests represented by these organisations (and significant 'qualified and affected' members), the fact that the Commission did not inform them about these changes meant that they were effectively stripped of the opportunity to consider and issue a reply.

Turning to the information made available to women's organisations and the public during the inter-institutional and adoption stages, this is a matter which is highly regulated. As a result, there were no major differences found between the two case-studies. With respect to the quality of information provided by the European Parliament, the picture is more mixed. While there was public access to verbatim reports of plenary meetings, there was limited information about the content of debates taking place in Committees (as no verbatim reports were available at the time). Yet, it is in committee meetings of the European Parliament where real deliberation took place. In contrast, the EP plenary sessions were highly formal exercises, following the general practice for MEPs to write out their speeches and read them into the record (Footitt 2002: 36-7). Committee meetings were usually public, which meant that women's organisations and European citizens could sit in as observers.

The quality information provided by the Council was the poorest of the three EU institutions. Although the Council has a public register with access to meeting agendas and minutes, written records of deliberative sessions were not always available. In the case of the Goods and Services Directive, reports are available of the deliberations that took place in the working groups, outlining the different positions taken by Member State representatives and the Commission on controversial issues such as the ban in the use of sex in actuarial factors. Yet, for the Recast Directive, no written records were available on the important tripartite negotiations between the Council, the Commission and the European Parliament at the decision-making stage of the process.

In assessing the availability and quality information made available to the public, we also examined the information provided by the European Women's Lobby, with a view to ascertaining how transparent this organisation was with regard to its lobbying activities as well as its role in communicating EU law-making on gender equality to European women. The quality of this information was found to be of a high order.⁴⁸ First, it regularly published updated information on its website (though newsletters and annual reports) which explained the contents of the directive as well as progress made at every step of the process. Second, it made the documents that were submitted to the Commission during the consultation process (such as letters to the Commissioner, opinions and statements) available through its website. Third, it provided information describing how its opinions were drafted (i.e., 'Shadow Directive') detailing the range of internal consultations that were conducted as well as the expertise that was sought out in order to aid that drafting process.

In sum, the availability of information on the decision-making processes under investigation varied depending on the institution in question and the stage of the process. While the Commission provided partial access to information on deliberations to women's organisations and the public, the level of access allowed by the Council was extremely restricted. As a result, important gaps in information were found both at the pre-proposal and the decision-making stages when this indicator accountability was applied to the two case-studies. Of all the EU institutions, the European Parliament was found to be the most transparent, with partial-to-full access to information on deliberations. Finally, the analysis highlighted the important role of women's organisations in enhancing the accountability of EU legislative processes on gender equality.

ACC 3: Were the positions of key actors involved in the process sufficiently explained through a reason-giving exercise?

The principle of accountability not only requires that the public is informed about the objectives, contents and progress of the policies being developed, but also about the reasons that justify the positions

⁴⁸ This refers to information given on the Goods and Services Directive only, as this organisation was not involved in the Recast Directive.

of the actors involved in the decision-making process. This information lends transparency to EU policy-making as well as enhancing the accountability of the actors and institutions involved. One characteristic feature of legislative processes at the EU level is the prominence of reason-giving practices throughout. Thus, the positions of the different institutions involved, as well as every course of action taken by them (e.g. amendments proposed by the European Parliament and their acceptance or rejection by the Commission and the Council) tend to be accompanied by reasoned justification of these positions. In analysing the processes leading to the two directives under study, this feature was found to be especially marked in the Recast directive process, as co-decision procedures required that the Commission, the European Parliament and the Council engage in deliberative discussions aimed at reaching a consensus. In consultation procedures, by contrast, the Council is the only institution with decision-making powers and it is not required to provide justifications of its actions to the other EU institutions. Thus, in the case of the Goods and Services Directive the Council did not explain why it adopted, rejected or ignored each of the amendments made by the EP. In this sense, the analysis lends support to the idea that the more inter-institutional in character EU decision-making processes are, the higher their democratic quality with respect to this indicator of accountability.

While the level of transparency of EU law-making in co-decision processes was found to be quite high at the inter-institutional stages of the process, the same cannot be said when we turn our attention to pre-proposal stages, since the justifications provided by the Commission for its actions in impact assessment reports were found to be only partial.

Finally, it is important to note the vital role that Member States in the Council can play in enhancing or obstructing the transparency of EU legislative processes, especially in the cases when such processes follow the consultation procedure. Thus, the noted lack of transparency of Council deliberations in the Goods and Services Directive is an aspect that limited the accountability of the Member States to their citizens. The widespread perception of the EU as an opaque political entity usually has the Commission as its focus. The problem, however, extends to the Council, as national governments

seem less open to having their positions scrutinised than either the Commission or the EP.

Recognition

REC 1: To what extent did participants in deliberation show understanding of women's positions?

REC 2: To what extent were women's representatives and women's positions accorded respect by other actors?

There is little material available from which to assess levels of recognition of women's claims throughout the process, since the most reliable sources of information are verbatim reports of deliberative sessions. With the exception of the European Parliament, it is impossible to assess responsiveness in other settings such as the Commission or the Council and hence the information gaps for this indicator are significant. Three plenary reports of debates in the European Parliament were analysed: one for the Goods and Services Directive (on 29th March 2004) and two for the Recast Directive (on 5th July 2005 and on 1st June 2006).

These reports show that the majority of participants showed recognition for the different groups affected by the decision (in the case of the Goods and Services Directive, not only women, but the insurance industry as well). No negative remarks about the groups representing the variety of interests involved were made. Recognition and respect cut across the political spectrum, although political groups on the left tended to put more emphasis on the inequality between women and men and the need to reverse this state of affairs. Although the research found no evidence of a violation of respect in deliberations in EU institutions, there is evidence of a violation of this aspect in the wider public sphere – more particularly in the context of a campaign against the Commission proposal launched by the media, which included sexist attacks in the media of Commissioner for Employment and Social Affairs, Anna Diamantopoulou.

The Goods and Services Directive

During the debate on the Goods and Services Directive in the EP all of the political groups made reference to the prevalence of gender-based discrimination in society. The main point of disagreement between these groups was whether the use of sex as an actuarial

factor constituted discrimination, and therefore whether its banning represented a positive step towards a more gender equal society. Even speakers from the European Peoples Party, the group most supportive of the removal of this ban, began their speeches by expressing their wholehearted support to ending gender inequalities, as the extract from MEP Astrid Lulling (EPP) typifies:

Mr President, as long ago as the 1960s, I was fighting for equality between women and men and against discrimination based on sex. I have been fighting since 1963 for equal treatment and opportunities between men and women, in women's organisations, at national and at European level, and most of the time as president. I cannot, therefore, be accused of not promoting the implementation of the principle of equality between women and men by directives covering all fields. I also therefore believe that there is a real legal and moral obligation to support this proposal for a directive establishing equal treatment in the access to and supply of goods and services. In politics, however nobody is forced to do what is impossible or absurd.

At the same time, conservative political groups tended to highlight also the difficulties that the insurance industry would have to face in trying to comply with the new directive, although there were some speakers from other sides of the spectrum who also explicitly acknowledged this point, such as MEP Elspeth Attwool (European Liberal Democrats, ELDR):

I can understand the concerns of the insurance industry. The proposal will bring considerable changes to its practices and at present it is uncertain as to how to go about implementing these changes. Understandably industry never likes uncertainty. However, I do not understand industry's argument that the current use of gender to differentiate premiums and benefits is not discriminatory because it is based on objective factors.

It should be highlighted that recognition of the concerns of the insurance industry was also voiced by other women's and equality advocates such as Commissioner Diamantopoulou and the Equal Opportunities Commission of Great Britain.

The Recast Directive

Turning to the analysis of debates on the Recast Directive, the findings are very similar. Thus, there was also disagreement among political groups on the content of the Commission's proposal – though arguably less than in the debates on the Goods and Services Directive. Thus while MEPs from the left side of the spectrum 'deplored' the absence of the directive on equal treatment of the self-employed and the parental leave directive, conservative MEPs remained silent about this and instead emphasised the need to respect the principle of subsidiarity which leaves Member States the option to decide on measures aimed at reconciling work and family life. Conservative MEPs warmly welcomed the FEMM Commission proposal, while MEPs from the Socialist Group did not make any explicit comment on it. Despite these differences, all participants in the debate clearly showed recognition for the groups affected by the new measure, citing specific problems needing urgent attention such as pay differentials between women and men or the reconciliation of work and family life.

Concluding reflections: Lessons for democracy

This study presented findings of an analysis of the democratic quality of EU legislative processes on gender equality. For comparative purposes, two case-studies were selected: the processes leading to the adoption of Goods and Services Directive and the Recast Equal Treatment Directive.

The findings reveal that the quality of democracy of these processes – measured in terms of inclusion, accountability and recognition – varied across EU institutions, shaped by the type of decision-making procedure being followed, the degree of involvement of representatives of women's interests and the formation of strong women advocacy coalitions, as well as by the level of consensus/disagreement among key actors on the issues involved.

First, different EU institutions allow for different degrees of representativeness, accountability and recognition of deliberative practices associated with legislative processes. Thus, findings from this research show that the gender-democratic quality of deliberative processes in the European Parliament was noticeably higher than in the Council, while the democratic quality of deliberation orchestrated by the Commission sat somewhere in between. These patterns could

be found for the two case studies under examination, despite the fact that the gender-democratic quality of deliberative practices in each of those institutions was also shaped by other factors.

Second, the type of decision-making procedure being followed was found to be a determining factor when assessing the quality of democracy from a gender point of view. The results show that co-decision procedures enhanced the overall level of representativeness since, by giving decision-making powers to the European Parliament, it allows the involvement of a powerful advocate of women's interests (the EP FEMM Committee) from the early stages of the process until the very end. However, the absence of civil society gender representatives from this process must be considered a deficit of this deliberation. By contrast, in consultation procedures such as the one followed in the adoption of the Goods and Services Directive, the participation of representatives of women's interests during deliberations at the adoption stage was nil. Furthermore, the fact that the opinion of the European Parliament is not binding on the Council meant that this latter institution could ignore the EP's amendments, excluding them from the discussion. Finally, in the consultation procedure the level and quality of justifications of the different positions was of a lower order than in co-decision procedure. At the same time the research found that in these consultation procedures, the justifications provided by representatives of different member states in Council deliberations followed a utilitarian logic rather than an equality-seeking one.

Third, the study found that the involvement of representatives of women's interests and the formation of strong advocacy coalitions between MEPs, women's organisations, femocrats and gender experts during the process leading to the Goods and Services Directive (particularly at the pre-proposal stage) acted to enhance the overall democratic quality of the process, in relation to the three types of indicators of democratic quality. This stood in contrast to a very low involvement of advocates of women's interests during the drafting of the Recast directive. It is clear that in the Goods and Services Directive there were other intervening variables at play which offset the impact of a high level of participation of women's advocates on the overall democratic quality of the process. The analysis further suggests that the level of involvement of women advocates in EU legislative processes depends of the political salience of the issues at

hand. This would mean that legislative processes involving issues that are perceived as 'technical' are likely to attract lower participative levels and may therefore be poorer from the point of view of democratic quality, if in fact more successful from the point of view of actual gender equality outcomes.

Fourth, the findings suggest that the degree of polarisation of positions with respect to the issues involved in the processes significantly affects their democratic quality. The analysis presented here reveals that the strong disagreement between actors involved in the Goods and Services process had an impact on the levels of accountability and recognition. In this context, the role of the European Parliament in striving for consensus and reaching a compromise (both among different political groups and with the Council) needs to be highlighted.

In sum, the picture that emerges from our analysis of gender democracy in EU legislative processes is mixed. On the one hand, the research exposed a number of democratic virtues of the EU decision-making process, especially in relation to its deliberative, reason-giving elements that indicated a degree of responsiveness to women's and gender equality, voices and perspectives. Also marked is the potential for consensus-building on an equality agenda between political actors and civil society. On the other hand, deficiencies in access and inclusion of gender equality advocates (including the EP) at critical points of decision-making, along with restrictive procedural processes and the priority in both cases accorded to economic interests by the Council and Commission, combined to limit the possibilities of realising gender democracy. At any rate, given the powers of Member State governments in EU decision-making leading to gender equality directives, a full assessment of their democratic quality requires an investigation into the role of national political actors and institutions in those processes.

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Chapter 3

'Gender-madness' in Austria? The implementation of the EU Directive on Access to Goods and Services

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Introduction: 'politics in the realm of shade'

Up to now, policy analyses from a gender perspective are a rather new phenomenon in Austrian political science. Besides the analytical exploration of the policy process around the development of legal protections against domestic violence 'there is very little feminist political science literature on which actors are involved, in which debates and how debates were influenced by them' (Tertinegg and Sauer 2007: 23).

Austria has been characterised as a conservative welfare regime (Esping-Andersen 1990; Sainsbury 1996) with a dominant male breadwinner model. Although social democratic governments since the early 1970s tried to 'emancipate' women from the 'traditional' choices of envisioning their lives by integrating them into the labour market, the gendered division of labour did not change significantly. To this day, women have higher unemployment rates, the gender-hierarchical work segregation is large, the share of female part-time employment is high and the gender wage gap is still considerable (Grisold et al. 2010). In addition, the extent of public child-care facilities is rather poor. In the 2008 World Economic Forum ranking,

for instance, Austria was placed 29th out of 130 countries (Hausmann et al. 2008: 44). In 2009 Austria slid to 42nd place out of 134 countries, because of a worsening performance in educational attainment and economic participation and opportunities for women (Hausmann et al. 2009: 64).

The slow transformation of the conservative gender regime is primarily located in two characteristics of the political system. *First*, Austrian neo-corporatism with its particularly close cooperation of social partnership, parties and state bureaucracy is a fortified structure of 'male-bonding' (Appelt 1995). The social partners and state administration dominate policy-making on welfare issues, market relations and wages, including the sexual division of labour and the reconciliation of work and family.¹ This setting makes the substantive representation of women in policy processes concerning the labour market and social security especially difficult, even though the quantitative political representation of women in elected bodies has increased over the last 20 years. From 1994 to 2005 the share of female ministers in government grew from 22.7 per cent to 40 per cent and the percentage of women in parliament from 21.9 per cent to 32.8 per cent (Steininger 2006: 254-256). In 2010, female Members of Parliaments (MPs) held 30 per cent of the seats in parliament.

Gender equality policies and machineries developed slowly from the 1970s onwards. Austria established a specific form of 'state feminism': women's policy units created within the bureaucracy were important for the success of women's movements campaigns on abortion, sexuality and political representation (Köpl 2001, 2005; Sauer 2004, 2007a, 2007b). However, the gender equality policy field has suffered from so-called 'package solutions' between the more women-friendly social democrats (SPÖ) and the more family-oriented Christian-conservative party (ÖVP). Governmental change over time, then, has resulted in waves of institutionalisation and de-institutionalisation (Rosenberger 2006, 2009) characterising this policy field.

¹ The 'chambers' or social partners of the Austrian political system are the Austrian Trade Union Association (*Österreichischer Gewerkschaftsbund*, ÖGB), the Chamber of Labour (*Bundesarbeitskammer*, AK), the Chamber of Commerce (*Wirtschaftskammer*, WKÖ) and the Chamber of Agriculture (*Landwirtschaftskammer*).

Second, the weakness of Austrian gender policy is due to a particular characteristic of the Austrian practice in developing and handling policy implementation, which we refer to as 'politics in the realm of shade'. For us, the term denotes the exclusion of publicity, transparency, and informality within the development of a policy process that also relates to the manner in which decisions come about, who is involved and whose interests are supported. Policy-making in the realm of the shade, characterised by consensual pre-parliamentary negotiations in corporatist structures, is strongly androcentric. This pattern of Austrian policy-making, we suggest, can help explain the specific way in which European Union (EU) directives are transposed into the Austrian national context.

This chapter shows how policy making in a corporatist consensus democracy (Austria) has an impact on the implementation of the EU directive 200/113/EC. Hence, we first want to explain the outcome of the transposition of this directive. Our analysis will thus explore the involvement of political organisations and political actors and their respective claims during three phases: the drafting of the law, the draft review and the parliamentary debates. While the EU directive 200/113/EC could have been an opportunity to improve the existing legislation and equal opportunity architecture we will show that the transposition did not change the structure but preserved existing gaps in anti-discrimination policies. This, we argue, is due to the process of transposing the EU directive in the 'Austrian way'.

The second aim of the chapter is to assess the quality of the deliberative process of the transposition with respect to three aspects: the representation of women and women's interests in the transposition process, accountability of policy decisions, and the responsiveness of the policy decision, i.e. the new Austrian law on access to goods and services. We argue that although women were present in the deliberation processes, the decision process was not responsive to demands of gender equality legislation.

We start by showing that path-dependency exists with respect to the content of the law: The EU directive has been embedded in the logic of the national gender discourse and implemented by amending the Austrian Equal Treatment Law. One of the effects of the transposition, however, was the weakening of the existing Equal Treatment Law. Thus, a weak gender equality discourse, mainly focusing on waged

labour was supported and consolidated by the transposition of the EU directive. In the following, we argue that this is due to the way in which the transposition process was negotiated in parliament and in the review process.

First the analysis will show the outcome of the national law, especially which claims were transposed into the current version of the law. *Second*, the focus of attention will be on the characteristics of the policy process in Austria. *Third* we will look at the claims made by different actors in the field, at discourse coalitions and at allusions to the role of the EU in the process of deliberation. *Fourth* we will conclude with an assessment of the consequences of the analysed implementation of 2004/113/EC for the Austrian equal treatment architecture and contemporary equal treatment discourse following the methodological framework for assessing gender democracy in the European Union (Galligan and Clavero 2008) – e.g. representation, accountability and responsiveness.

Transposition of 2004/113/EC into Austrian Law: Transforming the Gender Equality Architecture²

The restructuring of Austrian Equal Treatment Law

In the Austrian context, 2004/113/EC was transposed into national law by amending three pieces of legislation: the Equal Treatment Law (*Gleichbehandlungsgesetz*), the Federal Law on the Equal Treatment

² Please note that an amended version of the Equal Treatment Law came into force on 1 March 2011. The main changes pertain to the introduction of regulations determining the drafting of income reports for companies, people who are close to a person who is protected by the Equal Treatment Law can also claim for compensation (expansion of the scope of protection by the law), increase of the minimum compensation claim regarding harassment from 720 to 1000 Euros, prohibition of discriminating advertisements of housing facilities and the unification of part III and IIIa of the law. Part III pertains now to the equal treatment without differences to gender or ethnic origin in non-workplace areas. Although the structure of the law has been changed, paradoxically the hierarchy of intersecting inequalities like analysed in this paper still remains. Interestingly, the final proposal (Regierungsvorlage) of the law that was approved by the council of ministers included the 'Levelling up' of religion/philosophy of life, age or sexual orientation, but was voted down by the Equal Treatment Committee of the National Council after an amendment request of Dorothea Schittenhelm (ÖVP). See <<http://www.parlinkom.gv.at/PAKT/>> (last accessed 10 August 2011).

Commission and Equal Treatment Attorneyship (*Bundesgesetz über die Gleichbehandlungskommission und die Gleichbehandlungsanwaltschaft*) and the Federal Equal Treatment Law (*Bundes-Gleichbehandlungsgesetz*), which pertains to equal treatment regulations concerning public servants and state institutions. The most influential consequences concern the changes within the Equal Treatment Law as well as the Federal Law on the Equal Treatment Commission and Equal Treatment Attorneyship, the institutions responsible for the enforcement of the equal treatment requirements of the law.³

Before the implementation of 2004/113/EC, the Equal Treatment Law was structured along different grounds of discrimination as well as different public sites and divided into three parts: part I contained the regulations concerning the equal treatment of women and men within the labour market (*Arbeitswelt*), part II covered the requirements regarding equal treatment on the basis of ethnic origin, religion or philosophy of life, age, sexual orientation pertaining to the working environment. Part III focused on the regulations concerning discrimination on the basis of ethnic origin in specific areas outside the labour market.

With the implementation of 2004/113/EC this structure of the Equal Treatment Law has been altered to include the particular requirements concerning the equal treatment between women and men in the access of goods and services as part IIIa into the third section of the Equal Treatment Law. Until then, part III had focused on equal treatment regardless of ethnic origin in all areas except the labour market. Although the two parts of section three pertain to non-workplace areas, they now cover only ethnic origin and gender as grounds of discrimination, while excluding religion/philosophy of life, age or sexual orientation from protection outside the workplace. In addition, the newly constituted part III also distinguishes between the different areas where protection against discrimination is applicable. While equal treatment on grounds of ethnic origin is explicitly protected in the areas of social assistance, including social security as well as health services, social privileges, education and of course access to goods and services, the areas of education as well as

³ The changes within the Federal Equal Treatment Law will not be considered in this chapter, since they primarily comprise an adaptation to the definitions of the Equal Treatment Law and concern the area of public employment.

media and advertising are explicitly exempted from protection on grounds of gender in part IIIa.⁴ As a consequence of transposing the Goods and Services Directive in this way, the Austrian Equal Treatment Law now constitutes a hierarchy of intersecting inequalities along two dimensions. One dimension relates to the exclusion of particular grounds of discrimination – religion/philosophy of life, age or sexual orientation – from protection against discrimination outside the workplace. The other dimension of inequality is the exclusion of specific areas, like education and the media, from having to conform to anti-discrimination provisions.

In addition to the changes above, the adoption of the directive resulted in an expansion of the scope of the Equal Treatment Law as well as of the offences of discrimination (*Diskriminierungstatbestände*).⁵ In detail, the amendments to the Equal Treatment Law were⁶:

- Introduction of harassment and sexual harassment as an offence of discrimination (*Diskriminierungstatbestand*);
- Introduction of measures for law enforcement, including the prohibition of disadvantage (*Benachteiligungsverbot*) for people who report or sue people who discriminate, also regarding witnesses in all parts of the Equal Treatment Law;
- Creation of the possibility to choose if a person concerned sues for compensation of damage or for the continuation of the contract in cases of discriminating terminations of working contracts;
- The expansion of authorization for creating 'positive measures' regarding equal treatment for the entire labour market;
- Increase of the minimum compensation claim to the equivalent of two monthly salaries instead of one if the person concerned was discriminated against when applying or interviewing for a job;
- Regarding harassment, the minimum compensation claim was increased from 400 to 720 Euros;

⁴ BGBl 66/2004 in the version with amendments of BGBl 82/2005 and 98/2008, §30, §40a(3).

⁵ See <http://www.parlinkom.gv.at/PG/PR/JAHR_2008/PK0449/PK0449.shtml> (accessed 3 July 2009).

⁶ This summary is given at: <http://www.parlament.gv.at/PG/DE/XXIII/ME/ME_00142/imfname_089586.pdf>.

- The scope of protection includes also explicitly possible charges of discrimination if a limited working contract is not renewed or a probation contract not continued;
- Clarification that the amount of compensation has to reflect multiple offences of discrimination in an appropriate way;
- Increase of the limitation period for asserting harassment on grounds of ethnic origin, religion or belief, age or sexual orientation from six months to one year;
- Expansion of the scope of responsibility of Senate III of the Equal Treatment Commission and a re-structuring due to the new responsibilities and added tasks;
- The Equal Treatment Commission is obliged to appoint a deputy for the president of the respective Senate;
- The issuing and posting of the decisions of the Equal Treatment Commission within three months after the Commission has made its resolution;
- The publication of all decisions of the Equal Treatment Commission on the website of the Chancellory in its complete, but anonymous form.

The restructuring of the architecture of equal treatment machinery

The architecture of equal treatment legislation and the corresponding institutionalization of the Equal Treatment Commission as well as the Equal Treatment Attorneyship has been in existence since the end of the 1970s; it has been changed as a result of the implementation of the EC anti-discrimination directives into national law at the beginning of the new century which were processed slowly and only with pressure from the EC (Rosenberger 2009).⁷ Until the introduction of the completely revised Equal Treatment Law in July 2004⁸, the Equal Treatment Commission (GBK) as well as the Equal Treatment Attorneyship dealt only with cases regarding discrimination on grounds of gender within the labour market (Tertinegg and Sauer 2007: 21).

⁷ Austria was convicted by the European Court in May 2005 for delay in implementing the directives (Frey 2006: 52).

⁸ BGBl. I 66/2004.

The Equal Treatment Commission

Originally, the establishment of the Equal Treatment Commission was part of the requirements of the Equal Treatment Law when it was introduced in 1979, located at the Ministry for Women and situated within the Austrian negotiation structure of 'social partnership' (Tertinegg and Sauer 2007: 5). This positioning determined the composition of the GBK, with members sent by the 'social partners' and Federal Ministries. It also continued the 'corporatist' culture of secrecy (Bei 2008: 143). In regard to its legal power, the decisions of GBK's three senates are not legally binding power, and are instead recommendations or legal opinion (Allhutter 2003: 85–87; Tertinegg and Sauer 2007: 21). The GBK can thus be described as an 'arbitration body' with the task to 'mediate between parties and to promote a settlement reached out of court.' (Tertinegg and Sauer 2007: 22). Nonetheless, a justification of its recommendation in a particular case is mandatory if a court decision differs from a decision of the GBK (Tertinegg and Sauer 2007: 22).

Although the terms of its establishment led to the expectation that the GKB could play an active role in the realisation of equal treatment on the labour market (Tertinegg and Sauer 2007: 5), the responsible ministry – that of social affairs (*Sozialministerium*) – sought to prevent the publication of information on companies infringing equal treatment rights. It continued this strategy even ten years after the law came into force (Bei 2008: 144). Moreover, despite various amendments of the Equal Treatment Law (including the revisions generated by 2004/113/EC), no civil society organization has had a regular seat within a senate of the GBK. Furthermore, the obligation to publish all decisions of the Equal Treatment Commission on the website of the Chancellery in its complete form is restricted in so far that they have to be formulated in an anonymous way.⁹ Hence, the implementation of 2004/113/EC could have been an opportunity to improve the existing laws and equal opportunity architecture. Both issues were criticized by women's and civil society organizations in their review of the policy proposal, while the Equal Treatment Attorneyship pointed out that the anonymity requirement could be used to avoid the obligation to make decisions and cases public.¹⁰

⁹ BGBl 66/2004 in the version with amendments of BGBl 82/2005 and 98/2008.

¹⁰ Comment to the law proposal by the Equal Treatment Attorneyship;

With the introduction of new grounds of discrimination in 2004, the GBK was extended from one commission to three senates. Senate I became responsible for the equal treatment of men and women in the workforce, Senate II for equal treatment on grounds of ethnic origin, religion or philosophy of life, age or sexual orientation in the workforce and Senate III is in charge of equal treatment on grounds of ethnic origin in all other spheres. In the cases of multiple discriminations, Senate I is in charge.¹¹

With the implementation of 2004/113/EC responsibility for cases of discrimination on grounds of gender in areas outside the workplace has now been assigned to Senate III. This is a new addition to the remit of Senate III. The title of Senate III reads now: 'Senate III for equal treatment without difference pertaining to ethnic origin in other areas and for equal treatment of women and men concerning the access to goods and services.'¹² Moreover, the composition of Senate III has also been changed as a result of this amendment extending its remit. Instead of having just one member sent by the ministry of education, science and culture, one member is now sent by the ministry for science and research and one member by the ministry for education, art and culture. The ministry for health, family and youth is also a new inclusion, sending one member. Thus, the total membership of Senate III (except for the president) has been raised from 10 to 12 and no seats for civil society organisations have been created.¹³

The Equal Treatment Attorneyships

While it is the task of the GBK to mediate between parties in advance of potential court proceedings, the Equal Treatment Attorneyship is responsible for providing comprehensive advice, support and

http://www.parlament.gv.at/PG/DE/XXIII/ME/ME_00142_19/imfname_091734.pdf (accessed 3 July 2009).

¹¹ Please see <<http://www.frauen.bka.gv.at>> (accessed 5 June 2009).

¹² The original wording reads: 'Senat III für die Gleichbehandlung ohne Unterschied der ethnischen Zugehörigkeit in sonstigen Bereichen und für die Gleichbehandlung von Frauen und Männern beim Zugang zu und bei der Versorgung mit Gütern und Dienstleistungen'.

¹³ BGBl 66/2004 in the version with amendments of BGBl 82/2005 and 98/2008.

information to people regarding their rights and claims for equal treatment.¹⁴

The establishment of a legal advisor for equal treatment rights was part of the Equal Treatment Law amendment of 1990 (Allhutter 2003: 54–86). With the major restructuring of the Equal Treatment Law in 2004, this ‘ombud-institution’ was also extended to mirror the structure of the law with its three areas of equal treatment. Thus, three different attorneyships addressed questions of discrimination:

1. The attorneyship for cases pertaining to the equal treatment of women and men in the workforce (*Anwältin für die Gleichbehandlung von Frauen und Männern in der Arbeitswelt*);
2. The attorneyship for cases pertaining to the equal treatment without difference concerning ethnic origin, religion or philosophy of life, age or sexual orientation in the workforce (*Anwalt/Anwältin für die Gleichbehandlung ohne Unterschied der ethnischen Zugehörigkeit, der Religion oder der Weltanschauung, des Alters oder der sexuellen Orientierung in der Arbeitswelt*);
3. The attorneyship for cases pertaining to the equal treatment without difference concerning ethnic origin in other areas (*Anwalt/Anwältin für die Gleichbehandlung ohne Unterschied der ethnischen Zugehörigkeit in sonstigen Bereichen*).

Beside of Vienna, there are also four regional attorneys for the equal treatment of women and men in the workforce in the provinces. They are located in the provinces Tyrol (Innsbruck, also responsible for cases occurring in Salzburg and Vorarlberg), Carinthia (Klagenfurt), Styria (Graz) and Upper Austria (Linz).

The implementation of the Goods and Services Directive has also brought about changes in the attorneyship responsible for equal treatment regarding ethnic origin in areas other than the workplace. Given the extension of the remit to gender, three attorneys are now working within this area and have the title of an ‘attorney for equal treatment without difference pertaining to ethnic origin in other areas and for equal treatment of women and men concerning the access to goods and services’. One of the newly created positions of an

¹⁴ Please see <<http://www.gleichbehandlungsanwaltschaft.at>> (accessed 5 June 2009).

additional attorney is currently held by the only male attorney within the three attorneyships.¹⁵

As the foregoing discussion indicates, the transposition and implementation of the Goods and Services Directive has resulted in detailed, if limited, changes to the role, remit and scope of the equality machinery, which simultaneously puts forward the need to evaluate the capability of this new structure if it adheres to the complex demands of multiple discrimination cases.

Austrian neo-corporatism as a structure for 'male-bonding' and informal policy making

The particular institutionalisation of a 'neo-corporatist' and federal political system is crucial for analysing policy processes in Austria (Tálos 2006: 425). Being structured as a federal republic, Austria has two chambers of parliament – the so called National Council as the directly-elected first chamber of parliament and the so-called Federal Council as the second chamber of parliament, representing the governments of the nine Austrian federal states. The National Council is the primary legislative body, as the Federal Council is rather weak and has usually only the right to make objections to decisions of the National Council, which it can ignore (Fallend 2006: 1032-1033). In contrast to other federal systems, comparative research continuously stresses the centralized architecture of the relationship between federal and provincial levels, and leads to Austrian federalism being characterized as a weak form of that political arrangement (Fallend 2006; Watts 1999). Thus, the federal states do not have their own courts.

In contrast to other neo-corporatist formations, the Austrian version is characterised by the organization of private sector professional interests as public corporations. The respective public and private professional associations are highly centralised within the 'chamber-system' (see footnote 1) and the chamber organisations are legally entitled to be involved in processes of policy drafting as well as policy implementation (Fink 2006: 443-444).

¹⁵ Please see <<http://www.gleichbehandlungsanwaltschaft.at>> (accessed 5 June 2009).

Furthermore, the 'realm of influence' of Austrian neo-corporatism is embedded within two different functional networks, one vertical and the other horizontal (Tálos 2006: 430–431). The vertical network describes institutionalized interactions as well as often close cooperation and advocacy for common interests between parties and the chambers. These networks reinforce the main ideological cleavages in Austrian politics: on the one hand the links between the Austrian Trade Union Association, the Chamber of Labour and the Austrian Social Democratic Party (*Sozial Demokratische Partei Österreichs, SPÖ*) are well established and on the other hand one finds connections between the Christian-conservative Austrian People Party (*Österreichische Volkspartei, ÖVP*), the Chamber of Commerce and the Conference of Presidents of the Chamber of Agriculture (Tálos 2006: 430). The horizontal network is constituted by informal and institutionalised interactions between the chambers, and, on occasions, between the chambers and the government (Tálos 2006: 431).

The social partnership, Austria's 'corporate corporatism' (Neyer 1996: 88ff.; Czada 1992: 223) is literally 'manned' (Appelt 1995: 612). This androcentric structure has contributed to the exclusion of dealing with women's issues, with the exception of abortion, – from political deliberation.¹⁶ At the end of the 1970s, dissent among the interest organisations and conflicts within the social partnership diminished their influence in political processes (Tálos 1997: 436). This formed an opportunity structure in which women-specific issues could be raised. The SPÖ institutionalised women's policies by the end of the 1970s through a top-down modernisation process after some pressure from the women's movement. Subsequently, Austria developed a specific form of state feminism in which the national women's policy agency, the state secretary, and since 1991 the Ministry for women, promoted women's movements demands (Sauer 2007a).

Although the described institutionalisation and different networks of the neo-corporatist system have been a key feature of policy making for decades, its leverage within policy drafting processes has declined within the last ten years due to national, European and international pressures on national policy making. The conservative-populist coalition of ÖVP and FPÖ (2000–2006), for instance, refrained from

¹⁶ Abortion is a long-standing policy position of the Social Democratic Party, and so has been included on the political agenda (Köpl 2001).

including the social partners during policy drafting on a broad range of issues, preferring instead the opinions of experts from outside the chamber networks (Tálos 2006: 440). During the early years of government (2000-2001), the ÖVP-FPÖ coalition stopped sending out policy drafts for review to the chambers, but altered this practice after protest of the social partners and public critique (Tálos 2006: 440). In contrast to governmental engagement with the chambers and expert advisors, the Austrian political system has not to date institutionalized the inclusion of NGOs and their expertise in the policy development process.

In general, drafts of laws are prepared by civil servants in the respective ministry who often consult different experts during this phase. Information about which experts are invited to participate in the drafting process is not publicly accessible. Drafts are then usually sent to the parliament and given to parliamentary working groups for their comments (Müller 2006: 112; Tertinegg and Sauer 2007: 23). The reviewed draft is subsequently submitted to various interest groups by the responsible ministry with an invitation to comment. The interest-groups consulted vary from ministry to ministry. While some institutions have the right to receive policy drafts, such as the social partners, the invitation to other organisations to comment on the proposal lies within the discretion of the relevant ministry (Tertinegg and Sauer 2007: 23). Even so, every citizen and organisation has the right to submit suggested amendments to the policy proposal within a specific time period to the ministry.¹⁷ These statements and suggestions must be published in the parliamentary archive and are subsequently reviewed by the particular ministry (*ibid.*). Some of the suggestions may be included in the second draft of the proposal, which will then be discussed in the council of ministers, the cabinet, and if passed, debated in parliament.

This institutional context is relevant for analysing the implementation of 2004/113/EC in so far as it will point to the central role and political leverage of certain networks as well as their relevance for influencing the parliamentary debates. It also illuminates the political influence of civil society organizations.

¹⁷ Interview with Anna Sporrer, 24 June 2009.

Explaining the transposition of 2004/113/EC in a social partnership context¹⁸

In January 2007, the ministry for economy and labour, responsible for implementation of 2004/113/EC, began the policy drafting process with expert consultations.¹⁹ Important for this first phase was the involvement of the ministry of justice, the ministry for social affairs, the ministry for women, media and public service, the social partners as well as the Equal Treatment Attorneyship (*Gleichbehandlungs-anwaltschaft*).²⁰ But much to the surprise of the attorneyship, none of the suggestions it put forward were transposed into the draft that was published on the ministry's website on 29 October 2007, even though the advice it offered was positively received positively during the consultations.²¹ In a written statement on the proposal, the Equal Treatment Attorneyship was critical of the fact that the draft was not sent to its office for comment before publication. Instead, the attorneyship and another 28 interested groups and organizations commented on the published draft within 18 days (13 working days) – a short time.²² All reviews of the draft were then analysed and discussed by the ministry for economy and labour and the ministry for women, media and public service with a view as to which suggestions to include in the final proposal (*Regierungsvorlage*).²³ This second draft was debated within the council of ministers and

¹⁸ Please note that due to the implementation of 2004/113/EC regulations of insurance legislation were changed as well because insurance companies calculated with a higher average quotient for contracts if women were concerned. This part of the directive was already implemented in December 2007 and worked out together with the ministry of justice. The implementation of the remaining stipulations of 2004/113/EC was treated separately and represents the focus of the following description (E-Mail by Anna Ritzberger-Moser; May 2010).

¹⁹ Comment to the law proposal by the Equal Treatment Attorneyship;

<http://www.parlament.gv.at/PG/DG/XXIII/ME/ME_00142_19/imfname_091734.pdf> (accessed 3 July 2009).

²⁰ Interview with Anna Ritzberger-Moser, 2 July 2009. Mrs Ritzberger-Moser was the responsible person for developing the law proposal within the ministry for economy and labour and explained in a very helpful manner the development process to us.

²¹ Comment to the law proposal by the Equal Treatment Attorneyship;

<http://www.parlament.gv.at/PG/DG/XXIII/ME/ME_00142_19/imfname_091734.pdf> (accessed 3 July 2009).

²² Comment to the law proposal by the Litigation Association against Discrimination;

<http://www.parlament.gv.at/PG/DG/XXIII/ME/ME_00142_20/imfname_091733.pdf> (accessed 3 July 2009).

²³ Interview with Anna Ritzberger-Moser, 2 July 2009.

approved of on 19 December 2007 (CCC 2007) and subsequently submitted to parliament on 21 December 2007.²⁴

The legislative proposal was announced during the 44th session of parliament on 16 January 2008 and referred to the Equal Treatment Committee of parliament for consideration, where it was scrutinised on 20 May 2008. This is an unusually long lapse of time between receiving and considering proposals that have already passed the council of ministers.²⁵

Interestingly, on 19 March 2008 Robert Marschall, the editor of *Wien konkret*,²⁶ an on-line magazine focusing on events in Vienna, announced that he had submitted a complaint to the EC about Austria's tardiness in implementing the EU directive on equal access to goods and services during the required time frame. He justified the complaint by arguing that the sexual discrimination of men and women in Austria could not be accepted any longer. In making his case, he referred to the 'ticket scandal' in advance of a soccer match in February 2008, when men had to pay 87 percent more for a ticket than women (CCC 2008a).

The policy process continued in May 2008 and the submitted draft was approved by the Equal Treatment Committee with the support of a majority of SPÖ, ÖVP, Greens and Bündnis Zukunft Österreich (BZÖ) deputies.²⁷ The parliamentary debate followed on June 6, 2008. The bill was sharply contested by the deputies of the right-wing FPÖ alone. A majority comprising of SPÖ, ÖVP, Greens and the BZÖ deputies ensured its adoption.²⁸ It was then considered by the Committee of Women's Affairs of the Federal Council and unanimously approved by its SPÖ, ÖVP and the Green Party members on 17 June 2008.²⁹ The Committee requested the Federal

²⁴ Documentation of the parliamentary proceeding of the amendment to the Equal Treatment Law at http://www.parlinkom.gv.at/PG/DE/XXIII/I/I_00415/pmh.shtml (accessed 13 May 2009).

²⁵ Interview with Anna Ritzberger-Moser, 2 July 2009.

²⁶ <http://www.wien-konkret.at>.

²⁷ Please see part 4 of this chapter for a detailed account on the arguments and contents of the parliamentary debates.

²⁸ Decision 250/BNR (XXIII. GP).

²⁹ Report of the Committee of Women's Affairs of the Federal Council concerning the decision of the National Council in regard to the amendment of the Equal Treatment

Council not to object to the draft, which was passed by a majority of the Federal Council deputies on 19 June 2008. The amendments to the Equal Treatment Law were published 2 July 2008³⁰ and came into force 1 August 2008 (CCC 2008b).

The gender equality discourse in the wake of the implementation of 2004/113/EC: Assessing the democratic quality of the transposition process

In this section, we *first* describe the negotiation process in order to assess the gender democratic quality of the policy process. This will also provide us with an opportunity to, *second*, assess the transposition of EU-law into national law in terms of shaping the national gender equality agenda to explain the outcome in terms of Austrian path dependency.

The debate in the National Council³¹

The debate in the National Council opened with a statement from Karlheinz Klement, a deputy from the right-wing FPÖ party that set the stage for the subsequent discussion. Referring generally to gender equality policies, he ridiculed the need for such measures. As a consequence, subsequent speakers devoted much of their time to refuting these points and the derogatory tone of his statement, as well as arguing for the proposal before them. Only marginally attention, then, was given to the fundamental changes introduced in the proposal, and to the commentary of social partners and civil society.

The reference points within which Klement frames his arguments against gender equality measures reflected the dominant frames of Austrian gender equality discourse: 'protection', 'sex differences', and 'focus on the measures regarding the labour market', although 2004/113/EC explicitly focused on gender equality requirements outside the labour market (Di Torella 2005). But Klement and his

Law and the Federal Law on the Equal Treatment Commission and Equal Treatment Attorneyship. Available at: <http://www.parlinkom.gv.at/PG/DE/BR/I-BR/I-BR_07968/pmh.shtml>.

³⁰ BGBl. I Nr. 98/2008.

³¹ The reference for the following account is the stenographical protocol of the 63. session of the National Council of the republic of Austria held 6 and 7 June 2008 at: <http://www.parlament.gv.at/PG/DE/XXIII/NRSITZ/NRSITZ_00063/fname_131299.pdf>.

colleagues did not use these frames for the advancement of equality for women and girls. Instead, they reinforced the gender equality discourse in Austria by charging that the proposal before the legislature dissolved sex differences and discriminated against men: Klement opened his parliamentary speech by presenting a picture of a family, consisting of a man, woman and a child, with the caption 'Who protects Austria from Bures?'.³² He began by stating that he would not comment on a 'dry and dreary' law, but would focus on the 'thoughts behind' this law.³³ He suggested that the objective of the proposal was to re-educate³⁴ or socially reengineer³⁵ relations between the sexes. This intent, he argued, was evident in the 'guideline for non-discriminating language' as well as 'gender mainstreaming' in work, with youth outside school, or in schools and kindergartens. He attacked the campaign of the Minister for Women, Doris Bures, against domestic violence as a discrimination against men, stating: 'Here, we experience gender-madness and a discussion that is exclusively led as a feminist one'.³⁶ Moreover, he discerned a 'feminisation' of schools and kindergartens that would lead to better grades for girls and a negation of the desires of girls who 'want to become sales assistants, secretaries and hair dressers'.³⁷ He furthermore criticized alleged plans to build districts within cities exclusively for women. Klement concluded by emphasising that there were other important areas to 'help' women from being discriminated against and that there should not be a 'politics of division', but measures to promote the 'connectedness' between the sexes.³⁸ During this speech he was called to order (*'Ordnungsruf'*) three times by the president of the National Council, Eva Glawischnig (Green Party), because of his repeated use of the phrase 'gender-madness'.

Many comments of subsequent speakers targeted the contents of Klement's speech by rejecting his interpretation of the intention of equal treatment measures. They stressed that affirmative action and

³² Karlheinz Klement, FPÖ, 261. Bures was the then Minister for Women.

³³ Karlheinz Klement, FPÖ, 261.

³⁴ Karlheinz Klement, FPÖ, 261.

³⁵ Karlheinz Klement, FPÖ, 285.

³⁶ Karlheinz Klement, FPÖ, 261. The German terms he uses are 'Gender-Wahn', 'Gender-Wahnsinnigkeit' and 'Gender-Wahnsinn' and are here translated as 'gender-madness'.

³⁷ Karlheinz Klement, FPÖ, 263.

³⁸ Karlheinz Klement, FPÖ, 264.

the proposed improvements were necessary to combat discrimination and to achieve equal treatment and equal opportunities in a democratic society.³⁹ They harshly criticised the manner and tone in which Klement had spoken. Deputies called for a discussion on parliamentary procedure in the parliament and how to formally respond if politicians do not comply with the Speaker's calls to order. Moreover, deputies pointed to Klement's outrageous rhetorical 'hysteria and emotionality'⁴⁰ as well as his disrespectful, hostile and ridiculing 'macho'⁴¹-behaviour towards women and equal treatment policies.

All other statements *against* the amendment of the Equal Treatment Law were given by Klement's male colleagues from the FPÖ, who argued that 'to gender' would lead to an 'abolition of the sexes'⁴², a 'move towards an illiberal society'⁴³ with gender mainstreaming as 'the enemy of the rule of law'.⁴⁴ The important issues, in their view, were the equal pay gap, the 'real problems of women, like problems of single mothers'⁴⁵ and to 'help them'.⁴⁶ Interestingly, the statement that this amendment provided 'more protection and help'⁴⁷ for the 'weak sex of society'⁴⁸ was made by the only male MP not from the FPÖ, Johannes Zweytick from the ÖVP, who contributed to the debate. Although he also constructed his argument within the frames of 'protection' and 'sexual difference', he advocated for the law.

The only points of critique on the substance of the proposal made by the FPÖ deputies related to a potential abuse of the law by suing for a continuation of a limited or probational working contract due to an 'alleged' discrimination, and the anti-discrimination requirements in respect of housing: 'You want to dictate to whom I, as a private man, rent out my apartment or to whom I, as a private man, sell my used

³⁹ Gisela Wurm, SPÖ, 267; Brigid Weinzing, Grüne, 272; Doris Bures, SPÖ, 275-276; Christine Marek, ÖVP, 277-278; Edeltraud Lentsch, ÖVP, 281; Gertraud Knoll, SPÖ, 281-282.

⁴⁰ Brigid Weinzing, Green Party, 271.

⁴¹ Bettina Stadlbauer, SPÖ, 279.

⁴² Manfred Haimbuchner, FPÖ, 267.

⁴³ Manfred Haimbuchner, FPÖ, 268.

⁴⁴ Manfred Haimbuchner, FPÖ, 268.

⁴⁵ Manfred Haimbuchner, FPÖ, 267.

⁴⁶ Karlheinz Klement, FPÖ, 264.

⁴⁷ Johannes Zweytick, ÖVP, 283.

⁴⁸ Johannes Zweytick, ÖVP, 283.

car? You want to tell me that? Ladies and gentlemen, this is the abolition of democracy'.⁴⁹

The main point of critique from speakers supportive of the proposal was raised by Gertraud Knoll from the SPÖ who judged the amendment a 'great progress'⁵⁰ while remarking that it could have been even better if the minister of economy would have been more committed to it by, for example, linking positive actions concerning women with state funds (*Wirtschaftsförderung*) for private businesses.

Apart from this point of critique, speakers generally emphasised the necessity and importance of the law to combat discrimination and of having rules to ensure that 'nobody is discriminated against in Austria'⁵¹ as well as the proposal being a further move towards more democracy, justice and a 'respectful living together'.⁵² While arguing in favour of the law, the areas especially emphasized as important for equal treatment measures were the unequal salaries paid to women and men for equal work, violence against women and the family-work balance.

Furthermore, crucial improvements introduced by the proposal were welcomed during the debate, such as the novel measure of choosing between financial compensation or the continuation of the working contract by those found to have been subject to discrimination, the increase of minimum compensation from 420 to 700 Euros, the consideration of multiple discrimination when fixing the amount of compensation, and the inclusion of limited and probational working contracts within the remit of this law.

Reference to the role of the EU in instigating changes in the Equal Treatment Law was articulated on three occasions. One came from Klement (FPÖ), who remarked that the EU supported the 're-education projects'⁵³, the second by the minister for women, media and public services, Doris Bures, who stressed the measures that went beyond the requirements of the EC directive and the third by Edeltraud Lentsch from the ÖVP. She pointed out the relevance of the

⁴⁹ Manfred Haimbuchner, FPÖ, 268.

⁵⁰ Gertraud Knoll, SPÖ, 281.

⁵¹ Edeltraud Lentsch, ÖVP, 281.

⁵² Christine Marek, ÖVP, 278.

⁵³ Karlheinz Klement, FPÖ, 261.

EU for the development of Austrian equal treatment legislation, that the changes 'are a shining example of what the European Union forces us to do [...] This is exactly why we amend the Equal Treatment Law today.'⁵⁴

Thus, the main focus of the debate revolved around the changes to equal treatment measures concerning the labour market and paid little attention to equal treatment outside the labour market, which was the main focus of 2004/113/EC. Moreover, the exclusion of advertising, the media and education from the proposal was almost completely ignored, as was the creation of differently protected grounds of discrimination in regard to specific areas.⁵⁵

The debate in the Federal Council⁵⁶

Interestingly, the parliamentary discussion in the Federal Council was much more precise and critical of the outcome of the transposition of 2004/113/EC, although no change of law was recommended in the wake of that debate. Although the main frames of reference used by supporters of reform centred on 'sexual difference' and 'measures concerning the labour market', the deputies extensively discussed the actual changes introduced by the amendment. The changes most frequently referred to were the possibility of choosing between continuation of the working contract or compensation arising from discrimination, the increase of minimum compensations and the inclusion of limited and probational working contracts into the law.⁵⁷ These themes echoed the debate in the National parliament. In the Federal Council, though, deputies were more explicitly aware of the application of the law to those providing goods and services to the general public. Also, the debate stressed that it is an improvement for the enforcement of the Equal Treatment Law in Austria that all

⁵⁴ Edeltraud Lentsch, ÖVP, 281.

⁵⁵ Please note that the exclusion of the areas media, advertisement and education was a major topic within the session of the Equal Treatment Committee that was held prior to the session of the National Council. Available at:

<http://www.parlament.gv.at/PG/PR/JAHR_2008/PK0460/PK0460.shtml>

(accessed 26 May 2009).

⁵⁶ The reference for the following account is the stenographical protocol of the 757. session of the Federal Council of the republic of Austria, held on 19 June 2008 at: <http://www.parlament.gv.at/PG/DE/BR/BR_SITZ/BR_SITZ_00757/fname_141565.pdf>.

⁵⁷ Christine Marek, ÖVP, 125-126; Maria Mosbacher, SPÖ, 127; Barbara Eibinger, ÖVP, 128; Doris Bures, SPÖ, 133-134.

decisions of the Equal Treatment Commission will be published on the website of the Chancellery and that the issuing and posting of the decisions of the Equal Treatment Commission has to occur within three months after the Commission has made its resolution. Another feature discussed was the appointment of a deputy for the president of the respective senate of the GBK.⁵⁸

While these legislative reforms were generally judged to be important improvements for equal treatment legislation in Austria, the exemption of the media, education and private family life from measures of protection. Eva Konrad from the Green Party was the only one who explicitly pointed towards the consequences of the implementation of these changes as well as to the missed opportunity for creating an effective and ambitious reform of the Equal Treatment Law. She argued that Austria could have done much more in regard to the protection against discrimination by including the areas of advertising, education and media in the law. She also highlighted that with the amendment Austrian legislation would enact a hierarchy of grounds of discrimination with different degrees of protection. Referring explicitly to the law reviews of HOSI (the Initiative for Lesbians and Gays Vienna), and the Equal Treatment Attorneyship, Konrad pointed out that 'sexual orientation' is not protected in the areas outside the labour market along with the exclusion of age and religion/philosophical conviction. In addition to ignoring the UN-convention for Human Rights, requiring all grounds of discrimination to be treated equally, she criticised the Austrian law for being structured in a very complicated, user-unfriendly way. Thus, she pleaded for the implementation of a new and more comprehensive law, which had been suggested in the review of the Equal Treatment Attorneyship. Furthermore, Konrad suggested the implementation of two suggestions made by the Austrian Trade Union: The first one would demand the publication of average salaries of men and women in businesses to gain some idea of the actual gender pay gap which cannot be explained by reference to part-time working contracts. The second suggestion would introduce an obligatory agreement on 'positive actions' for women as well as measures against discriminations within a company. At the end of her statement she stressed that equality has to be actively realised and men and women had to combat the patriarchal structures of society together. These

⁵⁸ Christine Marek, ÖVP, 125-126; Maria Mosbacher, SPÖ, 127.

amendments, she argued, would represent small improvements and much more could have been achieved with the implementation of the EC-directive: 'I wish I lived in a country where we would not need the EU to insistently remind us that we have to do something in this regard.'⁵⁹

Further points of critique were also articulated by Monika Mühlwerth, officially an independent but FPÖ representative on the Federal Council and a member of the executive committee of the FPÖ at the federal level (*'Bundesparteivorstand'*). Being the only deputy arguing against the amendment, she stressed that the extension of the protection against discrimination for limited and probational working contracts would open the door to improper use and that the 'whole equal treatment discussion'⁶⁰ missed the aspect of living and working together. Although she was in favour of the initiatives encouraging girls' interests in technical or scientific professions, she pleaded for respecting the differences between the sexes: 'guys should be guys and girls should be girls'.⁶¹ Mühlwerth stressed the 'good intentions' of the law, but objected to it on the grounds that it would create new discriminations because working conditions would get more complicated, and new discriminations introduced.⁶²

The differences between men and women were subsequently a major point of reference in the statements. In particular, the different needs of women and men, and their different life-role experiences were stressed: the issue of violence against women,⁶³ discrimination of pregnant women, and the importance of men and women living and working together.⁶⁴

The only man debating the amendment in the Federal Council, Efgani Dönmez, a Turkish Austrian from the Green Party, reported about his own experiences of discrimination when trying to get access to bars and referred to discrimination in the housing market and in

⁵⁹ Eva Konrad, Green Party, 129-132.

⁶⁰ Monika Mühlwerth, without party denomination, 123.

⁶¹ Monika Mühlwerth, without party denomination, 123.

⁶² Monika Mühlwerth, without party denomination, 124.

⁶³ Christine Marek, ÖVP, 125; Barbara Eibinger, ÖVP, 128.

⁶⁴ Barbara Eibinger, ÖVP, 128; Ana Blatnik, SPÖ, 135; Eva Konrad, Green Party, 132.

newspaper advertisements due to ethnicity or nationality. He strongly supported the amendments to the law.⁶⁵

The views of civil society and equality organisations

In contrast to the debates in the two chambers of parliament, assessments of the Equal Treatment Law amendment expressed by civil society and equality bodies were more wide-ranging. In all, 29 submissions commenting on the policy proposal were received by the ministry of economy and labour.⁶⁶ The Equal Treatment Attorneyship and women's organizations such as the Österreichischer Frauenring (*Coordination organization for Austrian Women's association*), Grazer Frauenrat (*Women's council of the city of Graz*), Verein österreichischer Juristinnen (*Association of Austrian Women Lawyers*), as well as the civil society organizations Ludwig Boltzmann Institut für Menschenrechte (*Ludwig Boltzmann Institute for Human Rights*) and the Klagsverband (*Litigation Association against discrimination*) articulated the most sophisticated critique and suggested the most detailed changes. Predictably, the positions of the social partners were mirrored, to some extent, in civil society representations. The social partners of the Chamber of Labour and the Austrian Association of Trade Unions (ÖGB) joined the women's and civil society organizations in some of their arguments while the other 'network' of the social partners criticised the increase of minimum compensations (*Chamber of Commerce, Association of Industrials*) as well as the inclusion of limited and probational working contracts (*Chamber of Agriculture, Association of Industrials*) into the regulations of the Equal Treatment Law.

The major critique of the proposal from outside the social partner referred to the assignment of gender discrimination cases outside of the workplace to Senate III which had no competence in areas of gender equality. Its expertise rested with cases concerning discrimination on grounds of ethnic origin outside the workplace. Suggestions for reform to address this problem ranged from creating a new Senate IV, an own attorney solely devoted to cases pertaining to discrimination on grounds of gender outside the workplace, to the assignment of the new cases to Senate I as well as a complete

⁶⁵ Efgani Dönmez, Green Party, 136-137.

⁶⁶ Please see the complete list of the institutions and organizations that submitted a review of the policy proposal as well as the respective reference at the end of the chapter.

restructuring of the Equal Treatment Law and the equality machineries.

Linked to this critique was a concern that the proposal was setting up vertical and horizontal hierarchies of protection. The coordinating body of Austrian Women's Associations, for example, pointed out that discrimination on grounds of gender regarding access to goods and services was due to be protected to a lesser extent than discrimination on grounds of ethnic origin. Protection against discrimination in education was explicitly mentioned within part III, but exempted within part IIIa. This represented infringements of international commitments, especially Article 10 of CEDAW, in which discrimination against women in matters of education are forbidden. It was important to civil society equality advocates that education, housing, social protection and social privileges be included in amendments to the Equal Treatment Law. In addition, HOSI (*Initiative for Lesbians and Gays Vienna*) pointed out that discrimination outside the workplace on the basis of sexual orientation, which would infringe Article 26 of the UN-Human Rights Convention, was not provided for in the draft amendment.

Moreover, it was further argued that this amendment to the Equal Treatment Law, with its focus on protection of discrimination outside the workplace, was an opportunity to improve discriminatory protections more generally than was planned. Thus, the Association of Austrian Women Lawyers and the coordination body of Austrian Women's Organisations referred to the report of the UN-committee on the elimination of discrimination against women which criticized the Austrian equal treatment legislation because it focuses on discrimination against women in the labour market while anti-discrimination measures concerning other areas are not transposed into measures.⁶⁷

This criticism of the proposal was related to two additional points of concern for equality-seeking groups: the explicit exemption of the media, advertising and education along with the narrow and minimal

⁶⁷ Comment to the law proposal by the Coordination Organization for the Austrian Women's Associations and the Association of Austrian Women Lawyers.

transposition of 2004/113/EC.⁶⁸ The 'Association of Austrian Cities' (*Österreichischer Städtebund*), for example, regretted that the Austrian government had missed an opportunity to become a leader in equal treatment provision, and that the sexual harassment of female pupils could not be prosecuted as long as education remained exempt from the law. Women's organisations stressed that with the exclusion of the media and advertising from the remit of the proposal, stereotypical images of men and women created and reinforced through these media were exempt from legal challenge.⁶⁹

The potential for particular terms of description, such as 'motherhood' and 'pregnancy' to be employed in a discriminatory manner was an additional concern of women's organisations, the 'Ligitation Association' against discrimination, the Equal Treatment Attorneyship and the 'Ludwig Boltzmann Institute for Human Rights'. When used without reference to 'fatherhood' or parenting, it was argued that the possibility of being or becoming a mother without being pregnant (such as through adoption of a child) was ignored and that the proposal discriminated against men who fulfilled their responsibilities as a parent.

The civil society submissions also criticized the low minimum compensation amounts, which did not reflect the requirements of European law for effective and reasonable deterrents to infringement. Other points on which the proposal was critiqued included the lack of an institutionalised regular dialogue with NGOs and civil society organisations; imprecision on definitions of discrimination; the restricted location of the obligatory publication of GBK decisions – on the website of the Chancellery and not in the federal legal information system (*Rechtsinformationssystem*); the missed chance to require obligatory positive actions for women in companies, such as publishing annually the average salaries of men and women.

Finally, a significant issue of concern for equality-seeking groups referred to the 'burden of proof' requirement in discrimination cases.

⁶⁸ Although the guideline for implementing EC directives given out by the government stipulates that only the minimum requirements should be met ('no golden plating'), but current developments regarding the amendment of the Equal Treatment Law consider a 'levelling up' of the EC requirements (Interviews with Anna Sporrer, 24 June 2009; Anna Ritzberger-Moser, 2 July 2009).

⁶⁹ This point was also made by the Association of Austrian Women Lawyers.

The women's and other civil society organisations as well as the ministry for social affairs and consumer protection and the AK insisted that it was the responsibility of the accused to show the 'burden of proof'. The person who claims discrimination had to make the charges credible, as is the standard in European law. This point was accepted by the drafting group, and changed in the version that was sent to parliament.

A second significant change in the proposal was introduced after the review process, following representations from the Association of Austrian Women Lawyers, the Coordinating organisation for Austrian Women's Organisations, the Klagsverband, the ministry for social affairs and consumer protection, the Equal Treatment Attorneyship, the Chamber of Work and the Association of Trade Unions. This was the possibility for a female employee to choose between the continuation of a terminated working contract or to claim compensation. Interestingly, the EC had earlier warned the Austrian government to ensure that the amended law conformed to EU standards regarding compensation claims. The combined representations on this point, along with the EC warning led to the draft being altered to take account of this proposal.⁷⁰ As we have seen, it became one of the most debated points in the subsequent parliamentary debates.

Conclusion

The implementation of the EU directive on equal treatment between women and men in the access to and supply of goods and services was transposed and debated within the logic of the national discourse on waged labour and conservative gender roles, although 2004/113/EC explicitly addresses gender equality beyond the labour market. This logic behind the transposition of 2004/113/EC created a further hierarchy of protection against discriminations by assigning different and specific grounds of discrimination to different scales of protection. With the amendment of the Equal Treatment Law, discrimination on the basis of religion/philosophy of life, sexual orientation and age are now not protected beyond the workplace and discrimination on grounds of gender, such as sexual harassment, cannot be prosecuted in the fields of education, the media and advertising.

⁷⁰ Interview with Anna Ritzberger-Moser, 2 July 2009.

This nationally path-dependent transposition of the EU directive is due to the Austrian way of policy making. Although it was possible to find a form of deliberation on the transposition process, it is clear that the institutionalisation of neo-corporatism along with the rearticulated conservative gender equality discourse in the parliamentary debates led to a weak transposition of the EU directive and an even more non-transparent Equal Treatment Law.

Women or women's movements as well as women's policy machineries were not represented in the debates about the policy transposition. Characteristically for this Austrian way of 'doing politics' is the inclusion and valuation of representatives of women's interests in every relevant deliberative site outside of the decision making bodies, but the non-acknowledgement of their arguments in the actual law proposals (see for similar results Köpl 2005, Sauer 2004 and 2007a).

In the grand coalition of 2006 between SPÖ and ÖVP the term 'package solution' might explain the reluctance of the SPÖ to be more assertive in seeking better implementation of the EU directive and for strengthening the existing policy machinery. Even though we found discourse coalitions between feminist NGOs, other civil society organisations, the equal treatment machinery and the trade unions, their content was lost in the consensual policy-making process and in the sacrifice of gender equality to other policy goals, such as the inclusion of women into the labour market.

In conclusion, we can explain the transposition of 2000/113/EC into Austrian law as being path-dependent, dominated by the typical process of Austrian neo-corporatist policymaking. The quality of the deliberation during the transposition process was varied, and restricted by the framing of the directive in terms of the labour market and conservative differentialist images of gender roles. In this regard, we would like to point out three areas of analysis that are crucial for developing a theoretical frame for the assessment of the quality of gender democracy:

1. To differentiate and look precisely at the different deliberative sites that are of importance for the special implementation process;
2. To look at the different actors involved and their arguments;

3. To analyse the political leverage of the arguments of the respective actors and their relevance for the implemented version of the law.

In this case, we could conclude that women were reasonably present in decision-making bodies of the Austrian political system, but due to the Austrian social partnership negotiations, accountability is difficult to assess – elected representatives are often not accountable for decisions – as was the case with 2004/113/EC. These characteristics of the policy process led to the policy outcome, as well as the policy process as a whole, being only slightly responsive to progressive and visionary legislation that would support the creation of gender equal life opportunities.

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Abbreviations and glossary

SPÖ	<i>Sozialdemokratische Partei Österreichs</i> (Social Democratic Party)
ÖVP	<i>Österreichische Volkspartei</i> (Austrian People's Party, Conservative Party)
Grüne	<i>Grüne</i> (Green Party)
FPÖ	<i>Freiheitliche Partei Österreichs</i> (Freedom Party)
BZÖ	<i>Bündnis Zukunft Österreich</i> (Association Future Austria)
ÖGB	<i>Österreichischer Gewerkschaftsbund</i> (Austrian Trade Union Association)
WKÖ	<i>Wirtschaftskammer Österreich</i> (Austrian Chamber of Commerce)
AK	<i>Bundesarbeitskammer</i> (Chamber of Labour)
BGBI	<i>Bundesgesetzblatt</i> (Federal Law Leaf, actual wording of the law)
GBK	<i>Gleichbehandlungskommission</i> (Equal Treatment Commission)
GAW	<i>Gleichbehandlungsanwaltschaft</i> (Equal Treatment Attorneyship)
HOSI	<i>Homosexuelle Initiative Wien</i> (Initiative for Lesbians and Gays Vienna)

<i>Klagsverband zur Durchsetzung der Rechte von Diskriminierungsopfern</i>	Litigation association against discrimination
<i>Landwirtschaftskammer</i>	Chamber of Agriculture
<i>Nationalrat</i>	National Council, first chamber of Parliament
<i>Bundesrat</i>	Federal Council, second chamber of Parliament, representatives of the federal states
<i>Gleichbehandlungsausschuss</i>	Equal Treatment Committee, Committee of the National Council
<i>Ausschuss für Frauenangelegenheiten des Bundesrates</i>	Committee for Women's Affairs, Committee of the Federal Council
<i>Bundesländer</i>	Federal states (9)

Chapter 4

Gender expectations and state inertia The case of Greece

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Introduction

The purpose of this study is to present and evaluate, from a gender perspective, the democratic quality of the processes tied to the transposition of the European Union (EU) Directive on gender equality into Greek national legislation. This is a penumbra of a law with many ramifications concerning gender equality in both the public and private sectors. The analysis focuses on how the EU Directive 2004/113/EC was transposed into the corpus of Greek domestic Law 3769/2009, under the name 'Equal opportunities and equal treatment of men and women in Goods and Services'.

The chapter is divided into three parts. The first part gives an overview of the Greek political system and legal institutions and how they handle the issue of gender equality; the second part outlines the transposition of the EU Directives into Greek law, and then focuses on the Goods and Services Directive by examining the indicators of gendered democratic equality (inclusion, accountability, and recognition); the third part presents the results of the study and examines to what extent the Directive was successful and where it failed.

Greek society, legal and political systems

Before discussing the transposition of EU Directives into Greek law, a few words on the nature of Greek society and its political system are helpful in setting the context. Unlike most EU states, which have federal systems of government, the Greek political system is unitary and highly centralised. It has a unicameral parliament and a powerful prime minister. The political parties are disciplined and strongly ideological headed by powerful leaders. In the past 35 years the state has been run by two strong parties, the Panhellenic Socialist Movement (PASOK) and the conservative New Democracy (ND). The majority of ruling governments have served their full term in office (four years). In this respect Greece has a democratic system characterised by both government and party stability. Greece is ethnically, racially, religiously and culturally homogenous with Orthodox Christians making up 90 per cent of the population. Because of its small size and its location on the periphery of Europe, historically Greece has found itself under foreign domination for extended periods of time and has often appealed to outside help to extricate itself. Consequently, Greece has developed a culture of national dependency that ultimately spilled over into a dependency on the state, which in turn extended to reliance on political and economic patronage. This patron-client system was hierarchical, with women relegated to the bottom of the pyramid and, to a certain extent, this system still persists today (Legg and Roberts 1997; Papageorgiou 2006; Tsoucalas 1983; Voulgaris 2001).

Traditionally, the family has been the bastion and centre of Greek society with the state as its patron. People relied (and to a large extent, still do) on the family for practical, psychological and economic support.¹ The family network serves as the primary institution where personal identity and individual stature are fundamentally based on the individual's family status (Kyriazis 1998; Legg and Roberts 1997; Limberes 1986; Papageorgiou 2006, 2007; Petmezidou 2003; Stratigaki 2007). The second most important institution is the state. Hence, the family and the state have historically been the two main pillars of Greek society; while the role of Greek women in the state is evolving, their role and importance in

¹ Recent studies conducted on the Greek family confirmed the critical role of the family as a central social institution within Greek society, which is supported by Christian ideology and the social idealization of the nuclear family (Stratigaki 2005: 121).

the family remains both pivotal and primordial (Faubion 1993; Legg and Roberts 1997; Papageorgiou 2006, 2007).

The evolution and improvement of gender equality has been gradual, beginning in the early post-World War II period when the state started instituting programmes aimed at incorporating women into the public sphere and improving their condition in general. First, women were granted the right of suffrage in 1952; second, various forms of aid were gradually provided for women employed by the state, such as maternity leave, early retirement and other benefits not offered to their male counterparts; third, during the early 1960s the education system was reformed by a centre-left government, which instituted free education at all levels for both sexes, thus offering a precious opportunity to women of the lower economic strata. These and other progressive programmes were welcomed by women, but alarmed the reactionary element in Greece for whom such reforms were viewed as revolutionary. Then, in 1967, a military coup was engineered that put an end to all such reform (Papageorgiou 2006).

Following the fall of the military junta in 1974, a new republic came into being. To make up for lost time, the first conservative government (ND) drew up a new Constitution (1975) requiring that specific laws must explicitly spell out equal rights for both men and women. In 1981 the Socialists (PASOK) came to power on the platform of total gender equality in both the domestic and public sphere. That same year, Greece became a full member of the EU (1981). During the 1980s several laws were passed under the PASOK administration that aimed at eliminating the male-female disparity. PASOK's sensitivity to the feminist cause was behind the passing of many such laws, in addition to its pre-election promise to fully comply with the EU Directives concerning gender equality. However, to date there has been no study made to determine which of the two, the PASOK government or the EU Directives, should be given more credit for introducing policies dealing with women's issues (Karamesini 2008; Papageorgiou 2007; Petmezidou 2003; Stratigaki 2008). In this respect, the EU was both symbolic and instrumental, and played a crucial role in aiding and consolidating gender equality in Greece, as the focus of policy-making *per se*. Therefore, Greece could not circumvent the EU Directives that demanded it coordinate its legal system with the laws and requirements of the EU, including those laws that dealt with individual freedoms and gender equality.

In recent years women have become more visible in the public sphere. For instance, the number of women who work outside the home is increasing, especially among the younger generation. Thus, while in 1995 working women constituted 38.1 per cent of the workforce, in 2006 this had increased to 47.4 per cent, most of whom were State-employed. By mid-2009 over 50 per cent of the Greek working population was employed by the State either directly or through some of its utility agencies and the majority were women (National Report of Greece 2009). Eventually, a number of laws were passed and many structures and mechanisms were created to deal exclusively with gender issues. Therefore, the 1980s were marked by legal gender changes, while attention was given to affirmative action (positive action) in the early 1990s. In the later 1990s emphasis was put on improving structures and mechanisms in order to respond to the increased need for the planning and monitoring of EU large-scale programs. At the beginning of the new millennium, promotion of gender equality and equal opportunity had finally become the focal point. By the end of the year 2000 a large number of laws were passed. Suffice to say in this brief introduction, conditional upon joining the EU, the State was required to pass a series of gender equality laws, while in some cases gender reforms actually went beyond the scope of EU Directives, e.g. certain laws passed by the PASOK government in the early 1980s.

Transposition of EU Directives in Greece

Some PASOK laws that aimed to deliver gender equality were passed under the Family Act. Therefore, prior to the transposition of EU Directives concerning gender equality in Greece, there was no specific policy on women as a separate policy category, neither in the legal nor in the social realm. The Family Act laws existed within the framework of a policy that referred to individual rights generally speaking and not to women exclusively. Nonetheless, the transposition of the Directives into Greek law did not meet with much public, political or governmental resistance, because the consensus viewed Greek membership of the EU as an opportunity for institutional and economic improvement and because the various PASOK reforms had already paved the way for change. Therefore, it was assumed that any Directives issued from the EU were for the benefit and improvement of the Greek society as a whole.

Consequently, the EU Directives positively influenced Greek policies in several areas concerning gender equality, especially in those areas where it could directly intervene through financing (e.g. education and employment; Mavromoustakou 2007; Stratigaki 2008: 357). In fact, the transposition of Directives into Greek law was regarded by women as leverage for pressuring the government into creating more gender equality policies and measures. For instance, in the domain of work, Greek policy on gender equality has been influenced by the EU in two specific ways; first through the EU Directives concerning equality in the workplace and second, through the European Community Fund which reflects the Community's commitment to promoting gender equality at the workplace and in employment practices. The amount of funding and the rules established by the European Community Fund provided the springboard for designing an actual employment policy in Greece, as well as for measures taken to advance the policy on gender equality (Karamesini 2008: 280-281). Another benefit of the EU Directives was that they required the Greek legal system to align its laws with those of the EU. Thus, the EU Court decisions stand as a measurement for the Greek legal system with regard to gender discrimination (Mavromoustakou 2007; Ombudsman's Special Report 2009: 11).

The disposition of the EU Directives and the subsequent need for Greek law to coordinate with them has also contributed to the development of *institutions and mechanisms* whose purpose it is to promote and ensure gender equality. One such institution is the General Secretary of Gender Equality (GSGE), which is an autonomous permanent state agency. Some of its important duties include the design, promotion, adaptation and implementation of measures that promote gender equality. Another such institution is the Research Centre for Gender Equality Issues (KETHI), which studies, promotes and monitors gender issues. In addition, the National Committee for Gender Equality (NCGE) was established in 2006 as a permanent forum for social dialogue on gender issues. Its responsibilities include the designing of a national strategy for advancing gender equality, the monitoring and implementation of necessary policies and measures, and evaluating the results of these efforts at both the national and the local level. This committee consists of a broad spectrum of decision-makers, such as the Minister of Administration and the Interior, who serves as the president, and the General Secretary on Equality, who serves as the vice-president.

Also included are the General Secretaries of other Ministries, representatives of local administrations, representatives of the Social and Economic Committee (OKE), representatives of social partners, and representatives of nongovernmental organisations who handle gender equality issues, as well as individuals (Karamesini 2008: 286). Finally, in 2006, the Ombudsman was chosen to monitor the application of the EC Directives related to gender and to enforce the principle of equal treatment of the sexes in issues of work and employment. In 2008 a specialised department was established, the *Cycle of Gender Equality* (CGE), which was vested with the responsibility of examining gender discrimination reports as stipulated in Law 3488/2006 (which transposed Directive 2002/73/EU), in order to determine if such acts transgressed the principle of equal treatment of both genders (law 3488/2006). It examines reports from various sources such as the Work Inspector Corpus, (WIC), public administration, social partners, unions and non-governmental organisations (NGOs) (Mavromoustakou 2007). These agencies are exclusively concerned with the promotion of gender issues and are involved in the process of transposition of gender equality Directives. For instance, in 2009 during an 11-month period (May 2008-April 2009) 280 discrimination reports were filed, most of them relating to maternity leave and the mistreatment of pregnant women (Ombudsman's Report 2009).

Thus far, public reaction to the transposition of the Directives has not been negative; yet, there remain some difficulties in transposing them into national law. Data concerning the status of the transposition of EU Directives into Greek national law show that the transposition moves rather slowly. The annual national report published by the Greek Ombudsman states that, in terms of the transposition of European Directives, Greece ranks 27th on the list of European members,² and particularly those directives that are related to gender treatment, e.g. Directive 113/2006/EC (Ombudsman's Report 2009: 11). The slow transposition of the EU Directives into Greek law results from four problematic factors: 1) lack of governmental will; 2) reluctance of the government to finance permanent structures and to staff them with paid specialists; 3) lack of citizen participation; and 4) lack of scientific gender knowledge (e.g. gender studies programs;

² For instance for the Directive 2000/43/EC there was a delay of 18 months and for the 2000/78/EC Directive a delay of 13 months.

Stratigaki 2008: 360-66). In addition, the idiosyncratic nature of the Greek political culture and the bureaucratic nature of the Greek political system make it less compatible with the principles of the EU Directives, which further complicate the transposition process.

In addition, some EU Directives, even if transposed into Greek law, still present difficulties when put into practice. This is especially true of those Directives related to gender in employment and the problem is due to the peculiar nature of the Greek labour market. Research has brought to light three specificities that characterise the Greek labour market: first, the private sector of the market (which employs a considerable number of women); second, the frequency of family-owned businesses; and third, the large percentage of unemployed women. These factors contribute to the fact that a significant number of women have no legal coverage and, thus, cannot initiate legal proceedings (Koukoulis-Spiliotopoulos 1998; Stratigaki 2007). This condition is especially common in the private sector where women are more reluctant to report discriminatory practices for fear of losing their jobs. In addition, Greek laws are ambiguous and do not explicitly spell out the details. Moreover, there is a lack of specialised personnel in the public sector sufficiently versed in gender issues to assist women (Ombudsman's Report 2009: 11). However, aside from certain problems, the EU Directives successively brought forth new and innovative ideas at all levels of society and secured benefits for women especially in the labour market.

In the following section we will answer the question, 'How democratic has the compliance process of transposition of the EU gender Directive been in Greece and to what degree has it been successful?' using the transposition of EU Directive 2004/113/EC into Greek law. In order to evaluate the democratic quality of the process related to transposition of the above EU Directives into national legislation, we will trace the indicators of gender democratic equality (inclusion, accountability and recognition) as defined by Galligan and Clavero (2008).

Transposition of the Goods and Services Directive (Greek Law 3769/2009)

Directive 113/2004/EC was transposed into Greek Law 3769/2009 and expanded to incorporate the principle of equality beyond the

workplace. Therefore, this transposition is of particular interest because 'it is the first European Community instrument to implement the principle of gender equality outside the workplace, and has the potential to close an important gap in European Union law' (Caracciolo de Torella 2005: 337).

The process of transposing this Directive was delayed. While the country was obliged to transpose the Directive by 31 December 2007, the Act was voted in on 23 June 2009, after a one and a half year delay and a written reprimand to Greece from the European Union. Thus, following the European Directive, the Ministry of Development took the initiative and designed a draft that was brought before the Standing Committee of Production and Commerce³ on 3 April 2009. (The Standing Committee of Production and Commerce is a bipartisan committee in the Parliament that deliberates drafts before they go before the Full House to be voted). After a three month period of discussion and deliberation by the committee, the Act was taken to a plenary session of Parliament, where it was voted upon and passed. Finally, on 21 December 2009, the Act was published in the Official State Journal⁴ as Greek Law 3769/2009. Its most salient characteristic is that it prohibits 'the use of sex as a factor in the calculation of premiums and benefits in insurance allocated after 21/12/2007' (Koukoulis-Spiliotopoulos 2009: 56). The EU Directive gave Member States licence to take into account proportionate differences where gender could be a determining factor in the assessment of insurance premiums based on relevant and statistical data until 21 December 2007. Greece, however, exceeded the time limit because it transposed the EU Directive some eighteen months after the deadline had passed.

We will evaluate the democratic quality of the process based on Galligan and Clavero's 2008 thesis on the transposition of the above EU Directive into the national legislation. Thus, we will trace the indicators of gender democratic equality (namely, inclusion, accountability, and recognition) to determine the degree of democratic disposition of this Directive in Greece. Our data was

³ The Standing Committee of Production and Commerce is one of the six permanent committees of the Greek Parliament responsible for deliberating issues within the committee's jurisdiction before they go to the Full House for voting. Members of the committee meet to deliberate the draft propositions.

⁴ FEK A105/1/7/2009.

gathered from various resources, such as Parliament proceedings, interviews, newspapers, journals, and the Internet.

Inclusion

Before officially drafting a Bill, the GSGE normally invites representatives of women's groups to partake in informal talks on the broad intent and outlines of the proposed legislation. However, in the case of this particular Act, no such invitation was extended. Based on this fact and drawing from the interviews we conducted and the written material we collected, we can conclude that the degree of women's participation was rather limited.

During the conception and discussion stages of the drafting process transposing the Directive, a committee was formed by the Ministry of Development, which included representatives of the General Secretariat of Gender Equality (GSGE), and the Ministry of Development. Thus, the committee was composed of bureaucratic experts and lawyers from the Ministry of Development, and representatives of the GSGE, who represents women *ex officio* – mainly lawyers – in all processes of deliberation. In our interviews with GSGE lawyers, we were told that during the deliberations, the GSGE staff 'fully and actively participated in the Law Drafting Committee of the Ministry of Development and took the initiative to push toward the completion of the Directive'.

Representatives of both women's organisations and unions contended that the main reason for their low participation was that notification of the parliamentary committee sessions was delivered only one day before the deliberation process began. Two women representatives from two different organisations attended the deliberation process at the Permanent Committee of Production and Commerce on the draft for women's issues – a representative of the Federation of Greek Women (OGE), and the president of the Greek Women's Political League (GWPL). OGE is ideologically aligned with the Communist Party of Greece, against European integration, and the demands it puts forth are often more ideological than pragmatic, while the demands made by GWPL tend to be more pragmatic. The parliamentary committee claimed that the reason the invitation came late was because the EU Directive deadline was fast approaching so they hastily sent out invitations to avoid getting dragged before the European Court (Parliamentary Committee Proceedings 2009). It

would be pertinent to mention here that in our interviews we learned that the reason why the government passed this law so quickly was because there had been such extensive debate over which department would be assigned the responsibility of drafting the Act. After protracted intra-governmental deliberations, and a serious spell of inertia that would last two and a half years, it was finally decided that the Bill would be assigned to the Ministry of Development, which in turn reluctantly accepted the task.

Although the committee's invitation to participate in the talks was limited in scope, union representatives, who were not necessarily concerned with commercial and trade issues, did show up⁵, partook vociferously and played a dominant role in the discussions⁶. The trade union representatives' interest was sparked by the issue of private insurance premiums, a much contested one in Greece, as well as that of equal treatment in occupational pension plans. This issue was very controversial both socially and politically. There are gender differences in the age of retirement (another hot issue), which women were eligible for at a much earlier age than men. The EU gender Directives on pension provisions, which demanded equal treatment and equal retirement age for both men and women, generated a great deal of debate but was nonetheless voted upon.

During the committee deliberations, OGE, whose habitual tactics are more disruptive than accommodating, attended the sessions only to voice their complaints about the invitation's belated arrival. Arguing that they had no time to prepare, they insisted that they needed more time to develop their strategy. And although they generally disagreed with all the European Directives, they still claimed that they needed more time to discuss the particulars, where they might find points of convergence. The representative of the PLGW, (representing the bi-party League of Women's Sections of political parties), also complained about the limited notice and insisted that they too needed time to prepare and also argued that the Greek law

⁵ E.g. the President of the National Federation of Greek Commerce, a representative of the Panhellenic Federation of Popular Markets, the President of the Union of Independent Salespeople, and the vice-president of the energy groups.

⁶ This type of behavior on the part of the unions is very common in Greece where unions often get involved in issues that don't affect them directly simply in order to demonstrate their clout, which in reality does hold weight (see Sakelaropoulos 1993, 2001; Stratigaki 2008).

ought to be extended to include monitoring of the mass media. On the other hand, the representative of the PLGW approved of the role assigned to the GSGE. Ultimately, representatives of both OGE and PLGW agreed that the proposed Greek law should be expanded to include the mass media and education.

Concerning the *accessibility of the deliberative sites seeking to influence decision-making*, we may note that, while the GSGE had full accessibility to the deliberative site, women's organisations had only limited access. As mentioned above, information concerning the Act to representatives and women's organisations' came one day before the Act went before the Committee for deliberation, and thus the interested parties did not have sufficient time to go over all the details of the Act. This in fact was a criticism voiced by the socialist party's deputy during voting on the Act in Parliament (Tzakri 2009). She contended that the issues were too numerous and time too limited to go into an in-depth discussion and that they were thus forced to vote. The official role of GSGE is to represent and promote women's interests and to this end it is always present at the deliberations of every Directive that concerns women transposed into Greek law. However, the General Secretary of Gender Equality at that time⁷ was a very close friend of the Minister of Development (until 4 October 2009 when the government changed), who was responsible for the passing of the above law, and it is possible that she participated and contributed to the drafting process, leaning more towards the government's interests than women's.

GSGE lawyers told us that they would normally start with strategy and tactics discussions before they decide to engage in parliamentary committee deliberations. However, in this particular case they did not call for a strategy meeting before the law was passed, due to the early expiration date of the Directive. They claimed that for them the important thing was for the law to be voted and passed. Also the General Secretariat staff was aware of the issue. Should any changes in detail later be necessary, they would be made in the course of the law's application. To the best of our knowledge, aside from the meeting of 9 April 2009, at which time the draft was discussed at the

⁷ The GSGE is appointed by the Minister of Interior. The Secretary Eugene Tsoumani, held the position until 4 October 2009. She was a member of the conservative (ND) party and with the 4 October elections, she was appointed to Parliament with the ND party at which point she resigned from office at the GSGE.

parliamentary committee, no other meeting relating to this law took place.

As far as the inclusion of women's interests and perspectives in the deliberative agenda is concerned, we need to define women's interests based almost solely on the cultural values observed in Greek society. Thus, in Greece women's interests vary according to social class, geographic location, hierarchy, education and sexuality. In addition, there are any number of groups, organisations and small autonomous collectives that all claim they represent women's interests; often when their differences are minor they form alliances – as the best way of guaranteeing women's fundamental rights. For instance, not all women's organisations agree on a common definition of what women's interests are (Papageorgiou 2006; Stratigaki 2007). Women's rights are protected by the Constitution by specific provisions stating that deviations from the principle of equality are not permitted and that the State is obliged to take appropriate action against instances of prejudice towards women (article 116, paragraph 2). However, the Constitution cannot be explicit in all areas. But the Law 3769/2009 on Goods and Services covers certain points explicitly and also introduces some changes in favour of women.

Apart from these difficulties, women's interests aren't perceived as separate and autonomous in as much as they are promoted by groups, associations and organisations that deal with work and social conditions. Instead, they are usually shaped, defined, articulated and mobilised by their respective political parties, since most groups, associations and organisations are affiliated, patronised and dominated by political parties. Therefore, since most of these groups are attached to political parties, we cannot speak of women's interests as articulated by independent civil society organisations *per se*. (Papageorgiou 1992a, 1992b, 2006). Nonetheless, a caveat is in order. Political parties do not arbitrarily or overtly impose their will on interest groups. In the case of women's groups, the parties merely make promises to them and since these groups are all ideologically partisans (to the Left or to the Right) they easily adhere to their respective party platforms. Women, on the other hand, feel that they get more done when they belong to a political party. In essence, therefore, tacit mutual accommodation/exploitation prevails and everyone seems to be satisfied with this arrangement (Papageorgiou 1992a, 1992b, 2006).

Thus, when a party comes to power it makes a number of general pronouncements concerning women's interests, often incorporates them into non-women's issues, diffuses them, and thus ultimately succeeds in pacifying its female members; whereas the interests of those women whose agencies are not affiliated with the party in power are left on hold until their respective party comes to the fore. They have learned to be patient. The principle of compromise and accommodation has no bearing on political party life in Greece. Therefore, in cases where women are called to participate in deliberations concerning the making of a law that involves women's interests, they actually have little say about the government's preconceived notion of a specific law's content and scope, regardless of the intellectual deliberations and protracted discussions conducted by women's groups, especially those opposing the government. Ultimately, what the party in power says goes. However, the socialist parties are traditionally more sensitive to women's interests than conservative parties are inclined to be. Nevertheless, the bottom line is that, for women who wish to have something done to advance their interests they are better off joining a majority political party. It is also worth mentioning that all women do not perceive their interests in the same way. For instance, in the case of the security pension issue a segment of women from the unions were more concerned with trade and labour protection laws than women's issues that did not specifically deal with work. The governmental decision satisfied the union women because they were greater in number and hence a more powerful lobby, and consequently could exert more influence on public decisions compared to women belonging to women's movements. And the numerical strength of the unions is probably the reason why women's organisations did not participate as much in the deliberation process. In this sense, women's interests were not adequately represented.

In Greece, apart from the Constitution there is also law 3488/2006 that transposed the Directive 2002/73EC, which deals with the principle of equality. However, Act 3769/2009 brings in some new positive points that reinforce women's interests. Law 3488/2006 provided that trade unions and other organisations could have recourse to and present a case to the administrative authorities in support of a victim of gender discrimination. However, the Law stipulated that intervention on behalf of a victim in court could occur only after the victim officially filed a complaint. However, it did not

allow recourse to a court of justice by a union or organisation independently. Conversely, Act 3769/2009 amends this omission by permitting unions and other organisations to intervene in favour of victims before administrative authorities and courts as well as to take the initiative to bring cases of discrimination to the attention of administrative authorities and appeal to courts of law (Kakoulis-Spiliotopoulos 2009).

However, there are some weak points to Act 3769/2009. One fault is the lack of a clear-cut definition of the term *indirect discrimination*. As the Ombudsman report states (2009), this ambiguity poses a problem and makes it difficult for its practical application in judicial matters. Judges use their own subjective interpretations and sometimes decisions are taken against women. Although the term *harassment* was defined as distinct from sexual harassment, thus contributing to the interest of women, it is nevertheless difficult to practically apply and utilise such terminology in Greek society (Ombudsman's Report 2009).

Another more important point is the rule on the shifting of the burden of proof in favour of the complainant. For example the Burden of Proof Directive demands that the victim of discrimination give proof of the circumstances that led to the alleged injustice. Conversely, the employer needs to show proof to the contrary. If he cannot do so, the victim wins the case. The rationale is that the victim often does not have enough evidence to provide proof for her accusation (e.g. the size of salary and/or the attributes of others who have allegedly received preferential treatment) even though she may hold some evidence against the person she is accusing. The bottom line is that if the employer cannot fully convince the court, he loses his case. In essence, the court looks more favourably on the victim, for, unlike the employer, the plaintiff is not required to fully convince the court. All Directives specifically state that this rule must be taken into consideration by the courts as well as all public authorities, except in criminal cases. The law draft allowed for an exemption from this rule in extrajudicial cases such as in issues involving the Ombudsman, administrative agencies and various labour boards (Kakoulis-Spiliotopoulos 2009: 57; National Commission for Human Rights 2009; Greek League for Women's Rights 2008: 27).

The Directive requires the victim's approval while Act 3769/2009 requires the victim's consent. According to Greek law, 'approval' is given after recourse to a court or administrative authority, whereas 'consent' must be granted beforehand. Therefore, recourse to a court of law or intervention on behalf of a victim before a court or administrative authority can prove to be a time-consuming procedure even before the union or organization obtains the victim's consent. This claim is reinforced by the Ombudsman Report on gender treatment, which clearly states that the practical application of the burden of proof is very difficult due to a lack of experience on the part of lawyers in dealing with such cases. It appears that lawyers are not familiar with this Directive and cannot effectively apply such laws and, thus far, they have not invoked the Directive in Court proceedings (Ombudsman's Report 2009: 76).

Concerning the mechanisms that were aimed at rendering decision-makers accountable for upholding gender equality commitments, there were two main institutions responsible for gender discrimination issues. The Ombudsman was called to monitor the application of equality issues concerning the public sector while the Union of Consumers, a private agency, is called to monitor the private sector. The Ombudsman is an independent body, and, in 2008, established a women's chapter that deals exclusively with gender discrimination issues, called 'Cycle of Gender Equality' (Chatzi 2006). This office is very active and trusted by women. In cases regarding employment practices, according to its 2009 Report, 280 women filed claims against gender discrimination at the workplace. In three cases, organisations accepted their pronouncement and eventually this decision aided in amending the clause. Two cases were concerned with the protection of maternity leave and were included in law 3488/2006 (Directive 2002/73/EC), while the other case concerned the private sector. In both cases the Ombudsman's proposals led to the modification of rules concerning administrative procedures, thus benefiting a large number of women.

Accountability

Another indicator for the evaluation of the democratic quality of the transposition process is the accountability factor. That is, even if women's organisations and the public did have access to information relevant to the decision-making process, e.g. access to background and policy documents, along with minutes and reports of open

sessions, our research showed that there is no evidence that there was sufficient information in circulation during the process of drafting the Bill on Goods and Services. Probably the GSGE received some information via collaboration with the State and the unions, but, because of the urgency of passing the Bill there was not enough time to adequately diffuse information about the disagreement or cooperation of the parties involved.

The GSGE normally provides information to women's groups on the new Directives and informs them through lectures and workshops. In the above case however, apart from the limited time that the government had before the transposition of the Directive, an additional consideration was the forthcoming election, of October 10, 2009, when the GSGE published a brochure explaining the nature of the Law and the subjects under consideration. The election was won by PASOK and, once the new government was in office, information concerning the Act 3769/2009 became more accessible, and was included in the brochures, GSGE sites, reports and feminist journals. Concerning the positions of the key actors involved in the process, the GSGE was the principle figure in representing women, and played two different roles. On one hand, it functioned as a non-governmental organisation and on the other, as a governmental institution. As a non-governmental organisation it put pressure on the ministries and bureaucracy in order to produce expeditious decisions to aid women. To this end the legal staff of the GSGE concentrated on raising more legal and bureaucratic support. In addition, they called on women's organisations and related agencies to express their opinions concerning the issue under examination. However, in this particular case, given the urgency of the above law, there was not much involvement in the deliberations from GSGE and other women's groups.

Recognition

The above Act was hastily passed by the Parliament during the first summer session. The ND government that transposed the above Act lost the European Parliamentary elections of 15 June about the same time that the law was passed in Parliament (1 July 2009). In addition, the government had been under severe criticism from both political parties and the public for a number of allegedly unjust and unlawful practices committed by several government ministers. The government therefore, gave little attention to the fully detailed

discussions and deliberations of this Act, particularly because women's issues had not been a priority for it in the first place. In our interviews with GSGE lawyers we were told that what was important for them (the government) was the transposition of the Directive, and if there were some changes to be made 'we had plenty of time to do them later on'. Consequently, the government was merely concerned with passing the Act before the expiration date to avoid facing further embarrassment before the European Court. In addition, on 15 September 2009, the parliament was dissolved and the government called for new elections to be held on 4 October of the same year, in which the ND government was badly defeated by the socialist opposition. At present the socialist government is dealing with the severe economic crisis, and has put every other issue on hold, including gender.

Thus, as far as participants' respect for women's interests goes, since there were no other groups involved, no changes were made. The changes that were made concerned mainly market issues. Furthermore, in Greece labour issues take precedence over gender issues. Therefore, hardly any attention was paid to the gender question.

Discussion and conclusion

In conclusion, we will recapitulate some of the key points. Thus, in reviewing the transposition process of the Directive into the Greek political milieu we can assert the following. The EU Goods and Services Directive 113/2004 has been fully transposed into Greek law 3769/2009. The EU Directive was incorporated in the domestic Greek market of goods and services; it covers the concepts of discrimination (direct and indirect), harassment as well as sexual harassment and affirmative (positive) action. Although the Greek Constitution contains clauses that include affirmative (positive) action measures for women, the State must also comply with EU Directives. The EU definition of harassment was sorely needed in Greece, because the existing legal definition was narrow and the legislator was therefore reluctant to pronounce judgments on sexual harassment. Also, although Greek legislation prohibits direct discrimination in cases of pregnancy, maternity leave, and other instances pertaining to the public sector, it is still difficult to define indirect discrimination in practical terms.

Given the brief time allotted, women's organisations did not have access to the early versions of the draft. In deliberations on the transposition of the law by the Standing Parliamentary Committee, those who participated were the members of this Committee, union representatives who were concerned with the law and also two representatives from women's organisations⁸. Also present were union members of the National Federation of Commerce, the president of Commerce and several representatives from the professional community, such as small entrepreneurs and salespeople who worked in open flea markets. As we were told in interviews and read in the committee proceedings, the invitations were issued just one day before the meeting took place. All those who were invited complained that the notice was too short to attentively read the draft and adequately prepare themselves for the meeting. Nevertheless, even though the invitation was late, there were some constructively critical comments voiced on the weakness of the proposal Act from the representatives of women's organisations. The OGE representative analysed everything from an ideological viewpoint and rejected the draft both in theory and practice. Although the contents of the proposition were broad, the committee had nevertheless asked for comments concerning the practical application of the draft. In addition, the representatives of women's organisations were requested to submit their verbal contribution – comments and recommendations – in written form. To the best of our knowledge, none of them complied. Also, no other committee meeting took place due to lack of time. Finally, the draft was drawn up with only small changes that were mostly related to market issues. As far as the implementation and overseeing of the EU Directive was concerned, the GSGE and the Ombudsman were responsible for the public sector and the advisor of the commerce association was assigned to monitor the private sector.

Finally, governmental vacillation, and inertia in the face of this Directive, almost derailed the entire process. In addition, the last minute call by the committee responsible for the deliberation of this Bill contributed to the lack of involvement of the groups who were most concerned – the women's groups. Thus, the GWPL, in order to

⁸ Efi Bekou, is the president of the 'Political League of Women', and Kalliopi Bountouroglou is a member of the women's organisation (OGE), which is ideologically affiliated with the Communist Party of Greece.

justify why they weren't prepared, blamed the government for being too slow. This is something of an excuse, as these groups knew that the Directive was in government hands and that sooner or later it would come up for deliberation. On the other hand, the OGE, which was the most prepared participant, was not particularly constructive either. Consequently, the overall participation of women's groups in the democratic process of transposition of the Directive into a Greek Law was very low.

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Abbreviations

EUC	European Union Court
EWL	Evropaiko Lobby Gynaikon, European Women's Lobby
GSGE	Geniki Grammateia Isotitas Fylon, General Secretary of Gender Equality
KETHI	Kentro Erevnon gia Themata Isotitas, Research Center for Gender Equality Issues
NCGE	National Committee for Gender Equality
ND	Nea Dimokratia, New Democracy (Conservative Party)
NGO	Nongovernmental Organisation
OGE	Omospondia Gynaikon Elladas, Federation of Greek Women
PASOK	Panelinio Socialistiko Kinima, Panhellenic Socialist Movement (Socialist Party)
PLGW	Political League of Greek Women

Chapter 5

'Making a sow's ear from a silk purse' * Gender democracy in Hungary

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Introduction

This chapter analyses the quality of gender democracy in Hungary by tracing the transposition of the Goods and Services Directive (2004/113/EC, henceforward: 'the Directive'). This process-tracing exercise applies indicators derived from the normative concept of 'gender democracy', discussed in Chapter 1 of this report. This country case study follows the prescribed methodology with one important distinction: due to the scarcity of available documentation and difficulties in securing access to relevant civil servants, it mainly relies on interviews and second-hand information for data.

The Directive has been incorporated into Hungarian legislation quietly and basically unnoticed, without public or professional debates or attracting much attention. Its meagre political significance is understandable, given that it is a hollow Directive that, to the disappointment of women's international advocacy networks, was already severely diluted at the European Union (EU) level prior to its

* The title's aphorism inverted from the original succinctly describes an effort to create a more diminished and limited product from something valuable.

final passage (cf. Caracciolo di Torella 2005; Galligan and Clavero 2009). Beyond this, the absence of a social and political discourse on the Directive, and the lack of involvement of women's Non-governmental Organisations (NGOs) and gender experts during the transposition process in Hungary is not surprising for reasons concerning the characteristics of national politics. Gender equality Directives, as a rule, are adopted in Hungary without consulting the representatives of interested parties. Thus, even though the Directive itself may not have much relevance in terms of the gender equality policy framework in Hungary, the story of its transposition throws light on the workings of Hungarian (gender) democracy.

In order to contextualise this particular transposition process and the harmonisation of national law with EU legislation in general, it is helpful to begin by discussing the state of gender equality in Hungary, especially as it relates to the democratic transition process. The chapter will then consider the available empirical data and the constraints on data collection. This is followed by an analysis of the political process itself. The concluding section reflects on the contribution represented by the adoption of this Directive to gender equality in Hungary, and highlights generic features and lessons that can be derived from this case in terms of democratic processes and EU-membership.

The Hungarian context: Gender equality and democratisation

Even though women as a social group lost their previous social standing with the regime change and, in general, consider themselves its victims to a greater extent than men,¹ gender equality was a marginal issue during Hungary's transition to democracy.² Using Fraser's social justice model as an analytical prism, one finds that

¹ According to a public opinion poll taken 20 years after regime change, more women than men think their own life and the life of their family had worsened over the two decades (Szonda Ipsos Public Poll Institute 2009).

² Like other East and Central European countries, Hungary was a socialist country for 40 years after the Second World War. In 1989 and 1990 a 'soft transition' or 'velvet revolution' took place, whereby the single party system was overturned and replaced by a multiparty system. In the early 1990s democratic institutions started to develop, while, along with massive privatisation following the collapse of socialist economy, the market economy has gradually taken over.

women's relative disadvantage in the new democratic context have both redistributive and the recognition aspects (Fraser 1995). With regard to material inequalities, increasing female poverty (caused by unemployment, the gender wage gap and the lack of adequate state support systems) and the plight of specific risk groups (single mothers, female-headed households and elderly women) are worthy of note. As far as the cultural bases of women's inequality, (i.e. the social construction of gender roles and the recognition of women) are concerned, there has been a backlash against gender equality. This is rooted in the spread of conservative norms on gender relations and family life, along with the transition to a profit-oriented market-economy and the erosion of welfare provision (in particular, the dismantling of the childcare infrastructure). Obviously, the two dimensions of social injustice – growing material inequalities and the misrecognition of women's needs, interests and qualities – are interrelated. Thus the reason for the failure to address women's general lack of social and political power, or the problems of specific risk groups increasingly subjected to poverty, lies, to a great extent, in the harmful cultural norms that have led to their marginalisation, while obfuscating the very structural bases of this social problem.

With the consolidation of the multi-party system, women almost disappeared from the public sphere and, despite a slight improvement in recent years, their participation in decision-making is still minimal (see Appendix 5.1). As women's representation is largely determined by the intricacies of party politics, the presence of women politicians does not offer much potential for increasing women's power. This can be explained, to some extent, by the absence of a critical mass of women in elected office. Furthermore, women's interests are not adequately articulated and promoted by female politicians because of the lack of support for this issue from civil society. The proliferation of women's NGOs in the early 1990s did not automatically lead to the adoption of a progressive agenda informed by the principle of gender equality and to the creation of broad alliances to enforce women's rights. Women's organisations with a political orientation were few in number and disregarded by successive governments. Thus it was mainly due to Hungary's accession to the European Union that the basic norms and rules of gender equality finally gained ground. More recently, due to the better coordination of civil society efforts and the institutionalisation of women's issues at a national level, the representation of women's

interests has improved. Nevertheless, the access of women's NGOs and gender experts to decision making is still uncertain, hectic and insufficient. In the next sections, the obstacles and opportunities for gender equality politics are considered, providing a context in which to situate the analysis of the transposition of the Goods and Services Directive.

Ideological obstacles

The failure to acknowledge gender equality as an intrinsic element of democracy has primarily to do with ideological reasons that can be conceptualised as a series of misapprehensions characterising Hungarian society at large.

The first of these takes the form of a false question: *Why bother about gender equality when it's already in place?* The suggestion is that women's emancipation was accomplished during state socialism, and was even carried to extremes during that time.³ Therefore, if anything, a re-feminisation of women is needed in order to restore the natural order of gender relations. This trend of thought is largely responsible for denying or trivialising discrimination and discrediting any means to eliminate it. As a result, legal prohibitions are disrespected and affirmative action policies (such as quotas) meet with strong public aversion.

The second misapprehension consists of a misinterpretation of history whereby, in denouncing the previous regime, the real achievements of state socialism in the field of gender equality fall into oblivion. This easily feeds into a false image of the present challenges. For instance, even though the two-earner family model prevails in reality due to economic exigencies, the goal of having women stay at home has a strong political appeal. The dominant understanding of gender roles is framed by an unrealistic conservative agenda, the influence of which cuts across party lines. Basic liberal values like the freedom of choice are deceptively applied in a context defined by a strong gender bias: *women should not be forced to work but be free to decide between career and care duties*. The concern about women as

³ The extremes were supposed to be demonstrated by the 'perverted' images of women in masculine roles such as that of a truck driver or the so-called 'must-women', wearing traditional folk dress, who were seated in the Parliament by way of a socialist-type of affirmative action policy.

autonomous individuals is superficial and misleading here; the underlying (and most probably false) assumption is that women's employment acts against their fertility and so contradicts the national interest of demographic growth. Consequently, the issue of reconciling family and working life is pushed into the background, while women bear the 'double burden'. On the rare occasions when this problem is discussed, arguments focus on women exclusively as the subjects of such a choice (and of potential policies supporting it). Reaching work-life balance remains *their* problem, thus effectively denying the validity of the norms of gender equality and democracy in both the private and the public spheres.

As feminism has had only a limited impact in Hungary, never developing into a movement, there are no ideological resources to effectively undermine conservative gender stereotypes. Given the strong hostility against feminism, politicians and civil society activists, as a rule, refrain from identifying themselves as feminists. This is not only a matter of labelling: the aversion against the denomination either entails the refusal of a women's rights agenda altogether, or leads to the adoption of a soft position on key issues. Eventually, instead of a structural transformation of society governed by the principle of gender equality, the ultimate goal becomes defined, at best, by an acquiescent ambition to compensate for women's relative disadvantages and help them cope with their difficulties.

The indifference towards, and de-politicisation of, problems hindering the improvement of women's social status and their recognition as peers or equal partners, coupled with the distortion of progressive discourses, have led to a virtually uncritical acceptance of the patriarchal order and the suppression of gender equality as a constituent and indicator of democratic processes. Nevertheless, significant progress has been made in terms of institutionalising women's equal rights, which has contributed to the slow transformation of attitudes regarding gender roles.

Institutional improvements and changing attitudes

The reinvigorated conservatism characterising gender relations in the 1990s was countered by the influence of the imminent EU accession. In meeting the requirements of legal harmonisation, the legal prohibition of discrimination was reinforced and became more

specific with the introduction of the Equal Treatment Act in 2003.⁴ Furthermore, thanks to new institutional arrangements, the representation of women's interests has been realised to some degree, and with alternating effectiveness, at the national level.

The main mechanisms protecting and promoting women's rights include:

- The Act on Equal Treatment and the Promotion of Equal Opportunities of 2003, a compound legislation based on European principles protecting all kinds of disadvantaged minorities;
- The Office of the Social Equality of Women and Men at the Department of Equal Opportunities, now operating in the Ministry of Labour and Social Affairs;
- The independent Equal Treatment Authority that enforces the equal treatment legislation by investigating cases of discrimination and imposing sanctions.

As for civil endeavours in the area of gender relations, the traditional emphasis on women's role as care-givers has been somewhat displaced by a human rights agenda and a concern for women's economic independence. These issues are represented by a few but effective NGOs that have become natural partners in forming alliances, like the umbrella organization Hungarian Alliance to Promote Women's Interests (MANÉSZ) that joined the European Women's Lobby (EWL). Issues including the elimination of gender-based violence or the share of domestic responsibilities and the design of family-friendly workplace policies have gradually gained prominence as the goals of several EU-sponsored projects are now realised in state-civil partnership, or occasionally relying on employers' organisations.

Increasing women's participation in decision-making – in politics as well as business – has become an important concern for some activists but, given the lack of consensus regarding the significance of this objective and the general aversion towards the means (like quotas) conducive to it, no major changes have so far occurred.

⁴ Act CXXV of 2003 on Equal Treatment and the Promotion of Equal Opportunities.

Cooperation between women's organisations and the government's equality machinery is a relatively recent phenomenon. Although the government relied, to some extent, on the expertise of civil society advisors – mainly via informal channels – before as well, the means of the formal inclusion of civil concerns in policy making have been developed only lately. Thus:

- Six working groups consisting of representatives of women's NGOs and gender experts as well as of civil servants, coordinated by the Office of the Social Equality of Women and Men, are responsible for realizing the goals of the Gender Equality Roadmap 2006-2011;
- The Council of Women's Representation, also with a mixed membership of civil society activists, experts, and representatives of various government bodies, has been re-established as an advisory body to the government;
- Civil organisations and experts are increasingly invited to support government programs on a project basis.

It is due to the dual pressure exercised by the EU and some women's organisations (including the women's sections of some trade unions) that the issue of gender equality appeared on the political agenda, and related concepts (like gender-based discrimination and violence, work-life balance, gender mainstreaming, etc.) were introduced in policy-making and public consciousness. Notwithstanding this progress, it must be noted that government decisions affecting women's social status are primarily driven by economic exigencies and national interests – yet they undoubtedly have a potential to transform mainstream discourses on gender roles.⁵

⁵ For example, for over 40 years after its introduction, no governments have had the will or the courage to touch the three years long parental leave, a major support of the traditional gendered division of labor. As it is claimed in 95 per cent of cases by women, this provision effectively maintains gender inequality. As a response to the present economic crisis, the Socialist-liberal government recently decided to reduce the time of the leave, cutting down the related benefits and restricting the conditions of eligibility. This move stirred significant debate for being untimely, as the necessary conditions of employing women returning to the workplace (childcare facilities, available jobs) are seriously lacking. Nevertheless, in justifying the decision, the issue of assisting the reintegration of young mothers in the labor market has suddenly been taken up in government rhetoric. This, given the low overall female activity rate, is a significant (and, hopefully, consequential) development in itself,

Finally, the popular media is an important agent in introducing and maintaining gender equality as a topic of public discourse. Although manifestations of prejudiced and sexist views remain overwhelming both in the print and electronic press, several tabloids and women's magazines regularly publish articles uncovering serious problems related to gender-based violence and discrimination, and report on recent research findings and projects in this field. Some of these publications have a permanent column dedicated to a discussion of these issues.

Unresolved problems

In examining the relationship between democratisation and the adoption of a European order of gender equality, it is useful to distinguish between structural and cultural factors. The focus here lies on those aspects of the institutional setting and prevailing social norms that restrain the advance of gender democracy. In singling out key problem areas, a range of underlying barriers can be detected:

Discrimination: Despite its explicit legal prohibition, discrimination is widely practiced by employers and other social actors. Very few cases reach the courts or the Equal Treatment Authority, which suffer from a general lack of capacity and fail to tackle hidden and indirect forms of discrimination. In addition, victims are often unaware of their legal rights and available remedies, or are not aware that they have suffered wrong. This is because gender discrimination is accepted as part of the 'natural order' of things, with many of its forms being represented as positive cultural values.

Violence: The situation is even worse in the case of domestic violence, prostitution and other forms of gender violence. As this area represents a serious gap in legislation (indicating the lack of political will to resolve these problems), victims of violence are completely helpless and cannot count on protection from the authorities or the solidarity of society. In such a context, otherwise promising initiatives to help victims are engaged in a Sisyphean fight limited to instant

even though the new parental leave policies were soon revoked by the next, conservative, government.

crisis management, thus prevented from devising stable solutions to this pervasive problem.⁶

Employment: As an effect of reinvigorated conservatism, also present in family policies, traditional gender relations have been reinforced and legitimised. This is reflected both in structural defects such as the horizontal and vertical segregation of the labour market, and widespread pernicious attitudes among women such as victimisation and 'learned helplessness', characteristic of dominated social groups. The policy of safeguarding of relatively generous childcare benefits instead of preserving the previously strong childcare infrastructure is a major contributor to women's deteriorating employment opportunities and career prospects.

Decision-making: As a result of the gendered division of labour in the public and private spheres, politics and enterprise are considered unfeminine professions. Thus, the few women that choose these careers are frequently accused of being unnaturally masculine. It is partly because of their numeric disadvantage that they are, in fact, constrained to adopt and accommodate to the male norms prevailing in everyday practices (like schedules and meetings disregarding family obligation) and serve patriarchal interests in general.⁷ Hence, the idea of women's participation in politics and decision-making in general is not linked to the defence of women's interests. At the same

⁶ This is the case with the Regional Network of Crisis Management, a model program started by the Office of the Social Equality of Women and Men in the Ministry of Labour and Social Affairs in collaboration with civil foundations in 2005 to prevent domestic violence and assist its victims. Not only that responsible bodies (like judges) are notoriously biased in a negative way, but the intertwined interests of local (male-dominated) cliques (the police, the mayor's office, economic potentates, etc.) characteristically make them take sides with the perpetrator, so that concerns to 'resolve' cases by denying them or blaming them on the victims supersede considerations regarding the victims' safety and the eradication of violence.

⁷ The abusive consequences of cultural norms and stereotypes related to women's participation in decision-making also include their encouragement (i.e. confinement) to work in fields representing feminine values (such as social affairs, healthcare, or education), and appreciation for demonstrating (i.e. pressing to demonstrate) 'feminine assets' (like empathy and the inclination to compromise). Based on such notions, women politicians and decision makers are exploited, for instance, when they are used as 'puffers' to manage critical situations so that men can take over as soon as the conflict is resolved. Thus, it is no wonder that women's ambitions are already curtailed by their (perceived) opportunities.

time, notwithstanding the prejudices surrounding the political profession and leadership as a 'man's job' and the often abusive treatment of women politicians and managers, the mere fact that an increasing number of women are appointed as well as elected to important positions, and are able to demonstrate power in changing the state of affairs, challenges these very stereotypes.

Interest representation: Notwithstanding its merits, the gender equality machinery of the government is relatively isolated and has limited capacity and influence. Although all major parties have established women's sections (with varying but generally meagre success in influencing politics), women's interests as such are barely represented in Parliament. The women's section of the National Alliance of Hungarian Trade Unions is more effective in introducing issues of gender equality into the political agenda as well as in enforcing women's interests. The few politically active women's NGOs also have increasing political influence, both as agents of control and as partners in policy-making. However, these organisations still tend to be regarded by government officials (including representatives of the Office of the Social Equality of Women and Men) as a nuisance because of their aggressive criticism of government at home and their discrediting of government efforts in international forums. Nor are these groups popular with the wider public. Thanks to EU project funding, the economic independence of civil society organisations from the state, and thereby their autonomy, has somewhat increased. Cooperation among these groups has also improved: common platforms on key issues have been formed, and they have developed democratic rules of negotiation along with the necessary pragmatism to exercise political influence. At the same time, there are serious problems with the representativeness, transparency, accountability and independence of these groups. Organisations are generally operated by a handful of professionals and managers who distribute limited EU funds to their clientele, i.e. the gender experts living from the market of gender equality tenders. Thus they lack legitimacy in terms of a group of supporters whose interest they are supposed to represent. Their operations are scarcely traceable and, given the lack of a solid social basis, their accountability is virtually out of question. Public events generally consist of conferences organised at the close of projects, providing little access to the general public. Moreover, the lobbying potential of women's organisations is limited due to persisting

economic insecurity and its accompanying side-effect: relationships in the sector are characterised by rivalry rather than cooperation.

Gaps and challenges

Over the past decade, Hungary has successfully adopted the European normative and institutional framework to enforce gender equality. However, norms are not really acknowledged and institutions often prove to be inadequate and dysfunctional. The concept of gender equality, just like the means of enforcing it, is perceived as an alien construction imposed on Hungarian society by way of imperial techniques.⁸ The goal of gender equality has recently been simply removed from the list of government priorities. Thus, in order to obtain financial support for gender equality projects, applicants need to squeeze their proposals into other kinds of tenders. In addition, the present economic crisis makes the implementation of the principle of gender equality virtually impossible in most fields.⁹

As a result, there is still a large gap between the *de jure* and the *de facto* equality of women and men. It is not just because of the general conservatism of gender roles and attitudes that the spirit of gender equality has not been understood and accepted. The immaturity of democratic institutions and the ingrained public sympathy towards authoritarianism are also responsible for this state of affairs. In fact, the deficient interpretation of democracy that lacks, among other things, a definitive stance on the equality of women and men, is constantly reinforced by procedural shortcomings inhibiting

⁸ The non-recognition of the significance of gender equality is overwhelming with respect to national agencies that are supposed to promote it. This is the case, for instance, with the National Development Agency responsible for managing EU-funded projects – and heavily criticized for ill functioning and corruption – just like the Ministry of Finances that effectively blocks any gender equality strategies. As a rule, the persons – in both cases women – in charge of implementing the principle of equal opportunities are explicitly against the idea of improving women's social standing. The widespread ignorance concerning this field is also reflected by the fact that important European strategic approaches and guidelines, like gender mainstreaming or the Lisbon Targets, are basically unknown to the representatives of responsible government institutions.

⁹ For example, training programs to increase the competences of women with children – this has remained virtually the only kind of project that can be financed from EU funds – fail to bring about any real change given the general lack of employment opportunities.

democratic control and interest representation. Beyond ideological barriers and conceptual uncertainties, a serious deficiency of Hungarian democracy – the lack of accountability – affects gender politics especially severely because of the novelty of equality institutions. As the mechanisms to implement the principle of gender equality and the concept of what this idea should actually embrace are being worked out simultaneously, there is a great deal of hesitancy in formulating equality objectives. Thus, in addition to the general problems of democratic control, this policy area suffers relative disadvantage compared with other fields, with respect to both collective deliberation and keeping a check on responsible persons and institutions.

Filling the voids: The empirical research methods

As has been mentioned already, collecting material was a challenging task during the research. At the same time, initial methodological concerns turned out to be directly relevant to the inquiry: difficulties in accessing documentation and relevant bureaucrats shed light on the workings of Hungarian democracy and, within it, the approach to gender justice.¹⁰

Illuminating hiatuses

Difficulties in researching the transposition of the Goods and Services Directive were partly due to the publicity policies of responsible institutions and partly to the apparent lack of substantial documents from the decision-making process.¹¹ The time-issue also contributed to the problem, as many of the interviewees complained that the implementation of the Directive had happened ‘so long ago’ (in 2007) that they were unable to recall the details or access the requested documents (in 2009-2010, when the research was conducted).

¹⁰ Issues implied in methodological difficulties – like autonomy, participation, inclusion, publicity, accountability, transparency, reasonableness and respect – happen to be central to our research.

¹¹ The presumed lack of documents was mentioned, first of all, by the present head of the legal department dealing with EU issues at the Ministry of Justice (replacing the person in charge at the time of the implementation of the Directive), who refused to give out any records of the process anyway saying that implementation was the state’s duty and did not concern the public. By the same token, a representative of the Department of Regulation at the State Supervision of Financial Organisations argued that the introduction of the Directive was an obligation of Hungary as an EU member state, a professional procedure, having nothing to do with the civil sphere.

Moreover, many of the key persons involved in the process no longer occupied the same position, and thus claimed to be unauthorised to provide us with information about it, while their successors in office were obviously unfamiliar with the details. Their belief that no important records were produced during the transposition process may be a false assumption stemming from this ignorance, yet it is supported by the fact that the Directive was adopted in a rather hasty manner, without any real negotiations.

Overall, our interviewees were supportive in terms of informing us about the conditions of implementation procedures in general, advising us about competent persons and institutions, sharing their personal experiences and views, and generously providing us with auxiliary materials (like government resolutions and guidelines, summaries, memos and the texts of presentations). However, in referring to internal rules or the unavailability of records, occasionally mentioning personal difficulties like heavy workload – and sometimes without any explanation whatsoever – they did not secure access to records specifically dealing with the implementation of the Directive.

The initial pre-proposal phase is a particularly sensitive category as regards the publicity policies of government bodies, giving insight into a serious democratic deficit resulting from the lack of transparency and accountability. Data used at government meetings to prepare decisions are actually classified state secret in Hungary.¹² However, the legal grounds for denying access to such information is quite shaky as the same data can be also considered ‘public interest data’.¹³ This contradiction – and the notorious refusal of responsible

¹² According to Section 13 of Appendix 1 (on the scope of state secret) of Act LXV of 1995 on State Secret and Service Secret, ‘data that relate to the operations of the Government and of bodies created according to its rules of procedure and are generated for confidential use in the preparation of decisions, as well as summaries, memos and minutes of the meetings of such bodies, qualify as state secret’.

¹³ According to the definition of 2. § (4) of Act LXIII of 1992 on the Protection of Personal Data and the Publicity of Public Interest Data, ‘any information or piece of knowledge, recorded in whatever way or form, handled by a body or person providing public service ... or related to their activities, independently from the ways of handling it, is considered public interest data unless it qualifies as personal data’. The same act provides for the accessibility of public interest data, reinforcing Paragraph (1) of Section 61.§ of the Constitution which stipulates that ‘everyone in

bodies to acknowledge any legal obligations to disclose information – is part of the larger problem concerning the lack of accountability of decision-makers, which has kept civil society organizations that specialise in such issues quite busy over the past decades.¹⁴ Due to inconsistencies in relevant legislation, the status of certain documents is subject to the discretion of individual government bodies. Public interest litigations against ministries (particularly the Ministry of Justice that otherwise bears the main responsibility for legal harmonisation) are remarkably frequent.¹⁵ Although in the course of this research we were advised to sue the Ministry of Justice, and offered legal assistance in the procedure by an NGO specialised in defending basic liberties,¹⁶ we decided instead to accept the ministerial ‘no’ as a final answer and stopped harassing the department responsible for legal harmonisation for the requested documentation. To be sure, we were provided, instead, with a short summary prepared specially for us about the implementation of the Directive.¹⁷ Beyond this generous favour, all that the head of the Department of European Union Legal Affairs at the Ministry of Justice had to say about the implementation of the Directive was that it is ‘the state’s duty and the way it was done does not concern the public’.

Generally speaking, the reluctance to share information with the public is a pervasive attitude in the state bureaucracy, breeding on often vague and anti-democratic internal rules and regulations, while

the Hungarian Republic has the right to the freedom of expression as well as access to, and dissemination of, public interest data’.

¹⁴ As a result of civil enterprise, a dossier ‘aiming at enhancing the transparency of public life’ was submitted to the government in 2005. However, contradictions and abuses persist and the problem is far from being solved.

¹⁵ Such litigations are undertaken by TASZ (Hungarian Civil Liberties Union, HCLU). Also, currently (in September 2009) an important case occupies the media in which a historian and an activist concerned about the freedom of information is challenging the Hungarian state for unlawfully withholding documents about the operations of the secret services during state socialism. Although he has won several court trials and the European Court of Justice has also decided against the Hungarian state, the historian still cannot get hold of the requested material for the purposes of research and publication.

¹⁶ That is, the aforementioned HCLU.

¹⁷ We were reminded that the proposed summary may not include the names of persons being present at meetings, and participants of negotiations are not authorised to provide us with information anyway.

at the same time determining their interpretation and application. This attitude is based on the paternalistic notion that the public need not and should not interfere with the workings of the state, and much less is the public supposed to criticize the state. Alongside the uncertainties relating to the status of information, such assumptions seem to generate a fear, rational or otherwise, of the negative consequences suffered by individual civil servants of revealing insider affairs to outsiders. The result is a form of collective paranoia, exerting disciplinary control on administrators, and working as a partially self-inflicted constraint to close ranks and exclude outsiders. Thus mistrust appears to be part of the *comme il faut* conduct of state officials, a proof of loyalty and servility, expressing their commitment to protect the image of their own institution and of the state in general. This pledge, nevertheless, allows for a considerable degree of confidentiality that may be perceived as a legacy of the 'soft' regime of late state socialism. As a result, informal information – though not evidence – is easily leaked even to complete strangers – like a researcher on the other end of the phone line.

Sources and types of information¹⁸

Some data were accessible in written form. Among the publicly-available *written information* belong the outcomes of the transposition process, governed by a new piecemeal act.¹⁹ A government resolution and a guideline setting the rules of legal harmonisation processes were easily accessible too, just like other pieces of legislation regulating legislative procedures. Minutes of parliamentary committee meetings on the implementation of the Directive and recommendations submitted for plenary voting were also public and available on the Internet. The same applied to the yearly reports on the activities of the Equal Treatment Authority containing cases of infringement of, and recommendations to improve, the legislation on equal treatment and equal opportunities and its enforcement. In addition, a summary of the transposition process was prepared specifically for our use by an employee of the Legal Harmonisation Office belonging to the Department of European Union Legal Affairs.

¹⁸ See Appendix 5.2 for an overview.

¹⁹ Act CXXVII of 2007. What comes here is a classification and gross description of sources. On details about legal changes entailed in the transposition of the Directive, the characteristics of the process itself, and the legislative framework of implementation procedures, see later in this study.

An official of the Insurance Regulation Office at the Department of Financial Services in the Ministry of Finances provided us with technical details of the transposition process and a partial transposition table indicating the correspondence between the articles of the Directive and respective sections of Hungarian legislation. A memo about a European Committee meeting in March 2009 dealing with the implementation of the Directive and a presentation given there by the delegate of the Equal Treatment Authority were also at our disposal. Finally, an official publication of the Alliance of Hungarian Insurance Companies explaining the significance of the Directive and an analysis of the challenges posed by its implementation were used in this study. Additionally, we accessed a legal journal which briefly reported on the critique of the Directive launched by a Hungarian socialist MEP at the European Parliament.²⁰ Apart from these articles – apparently the only professional publications on this subject matter – the Directive and related national obligations are only casually mentioned on government portals (belonging to the Ministry of Social Affairs and Labour) in the context of equal treatment and equal opportunities policies.

Via *oral communication*, information was gathered about the details of the decision-making process together with comments on the significance of the Directive and its dominant national interpretation determining the course and outcome of implementation. This research consisted of semi-structured interviews with officials from the responsible institutions and organisations involved in the implementation of the Directive and others made with experts (see Appendix 5.2).

Interviewees ranged from the heads of ministerial departments and other civil servants, with some degree of insight into implementation processes in general or the implementation of the Directive in particular, at the three ministries (Ministry of Justice, Ministry of

²⁰ Katalin Lévai, an alternate member of the Committee on Civil Liberties, Justice and Home Affairs, spoke at the plenary meeting of the European Parliament on 1 April 2009. She criticised the Human Rights Committee for including a reduced list of the forms of discrimination to be prohibited in its recommendation, thereby implicitly legitimating the ones that were on the list. The debate was related to a report on the Directives concerning equal opportunities (2000/43/EC, 2000/78/EC, and 2004/113/EC) that had been prepared with the aim of reconciling them.

Financial Affairs, Ministry of Social Affairs and Labour) involved in negotiations, only a minority of whom had been personally present during negotiations related to the political process analysed here; through responsible persons at the State Supervision of Financial Organisations, the Alliance of Hungarian Insurance Companies²¹ and the Equal Treatment Authority, some of whom had participated in the implementation of the Directive; to representatives of women's sections of trade unions and women's NGOs as well as experts in gender issues, none of whom had been invited to meetings in the process.

Actually, oral communication, particularly due to its semi-official character, proved to be a much richer source of information than written records that were either missing or unavailable. Thanks to the generosity and expertise, verbosity as well as characteristic omissions of our interviewees, the story of the implementation of the Directive has taken shape, ready to be rendered into an account focusing on its nuances and background factors that are revealing with regard to gender democracy.

'It is not about discrimination': Overview of the implementation process

In examining the implementation of the Goods and Services Directive in Hungary, it should be borne in mind that the main motivation behind adopting this European legislation in a timely fashion was to explicitly undermine the principle of gender equality. While as a result of insurance sector lobbying at the EU level the Directive already conveyed a truncated sense of gender equality, its transposition in Hungary further confined and, indeed, inverted its original intention.

Resolving a technical problem: Formation of a national standpoint and identification of corresponding legislative means

Since comprehensive equal treatment legislation, establishing gender equality norms in the public sphere, has been in place in Hungary

²¹ As a member of the umbrella organization of European insurance companies (Comité Européen des Assurances, CEA), the Alliance of Hungarian Insurance Companies participated also in the drafting of the Directive.

since 2003, the relevance of 2004/113/EC became restricted to only a few kinds of private relationships, most importantly those related to insurance practices. In this respect, however, the basic claim reflecting the interests of the insurance sector became widely supported by state bureaucrats – discounting the views of some representatives of the government’s equal treatment machinery.

According to this claim, certain gender-based distinctions in insurance practices, supposedly forming exceptions to the main rule, are disconnected from the notion of discrimination as long as they are in conformity with the conditions set in Article 5 and corresponding Hungarian legislation, i.e. are rooted in some ‘objective’ difference between women and men. This fundamental idea was adopted as the basis of the national standpoint on the Directive that governed ensuing legal changes.

As the implementation of the Directive was assumed to represent a technical exercise, consisting in adjustments of the rules and practices related to the provision of financial services to comply with new standards, its potential to proactively contribute to gender equality was ignored. To the contrary, the legislator sought to find a way to curtail the validity of the equal treatment principle (see Text box 5.1).

Text box 5.1: National position on the Goods and Services Directive

In reviewing the legal harmonisation duties involved in adopting the Directive, it was affirmed that, beyond Paragraph (2) of Article 5^A, it did not require any legislative procedures since Hungarian law, in particular Act CXXV of 2003 on Equal Treatment and the Promotion of Equal Opportunities, sufficiently ensures conformity with the Directive.

According to the national standpoint assumed with regard of Paragraph (2) of Article 5, gender-based distinctions, manifested in the rates of insurance products, have no bearing on the issue of equal opportunities, since the models forming the basis of rates are founded on statistical facts (experiential values) of the past. Difference in the evaluation of genders is unavoidable as long as factual statistical data referring to past conditions do not show any changes towards equilibrium. While gender-based discrimination must be eliminated in the insurance sector as well, this goal does not preclude gender-based distinctions in cases where the differential treatment based on gender is supported by objective factors. Therefore, the principle prohibiting gender-based discrimination is not impaired by the publishing of demographic data, and no distortions of the market or – in severe cases – deterioration of competitiveness are faced in the insurance sector, either. The disregard of differences manifested in the incidence and morbidity rates of the two genders would not promote social equality or equal opportunities. For all these reasons, Hungary has opted for making use of the opportunity provided in Paragraph (2) of Article (5)^B.

In case they wish to divert from the main rule included in Paragraph (1) of Article 5 prohibiting any distinctions, member states are explicitly required to take legislative steps in order to specify the reasons for using practices that employ distinctions, as established in the Directive. To this end, such practices should generally be made possible by modifying the Equal Treatment Act of 2003, while also must be regulated more specifically by sectoral law. The solution found was to complement the Equal Treatment Act with a paragraph about the possibility of applying gender-based distinctions in the case of the provision of insurance services and services based on the insurance principle, referenced in the individual sectoral acts.

Notes

This section is the abbreviated yet almost a verbatim translation of a summary of the implementation process, provided by the Ministry of Justice.

^A According to Paragraph (2) of Article 5, member states may allow some proportional differences in the fees and benefits of individual insurances, provided that insurance mathematics and statistical data suggest that the consideration of gender is a determining factor in risk analysis. Member states also undertake the responsibility of collecting, publishing and regularly updating relevant data, and informing the Commission of such procedures. In the 5 years following the deadline of implementation (December 21, 2007), member states must evaluate their decision and inform the Commission about the results of this review.

^B This argument is perfectly in line with the position of the insurance sector, as conveyed by the head of the Hungarian Alliance of Insurance Companies. According to this view, there is a legitimate need for gender-based distinctions for professional reasons in certain areas like life insurance (including health and accident insurance), travel insurance (including health risks, in particular related to pregnancy) and, to a lesser extent, car insurance. Furthermore, such distinctions do not qualify as discrimination but as professional differentiation, since it is not about contrasting male vs. female interests but the registration of objective differences in incurring risks between men and women. Our respondent also claimed that failure to employ

this principle would cause serious damage to the insurance sector or even destroy it completely. Moreover, in distinguishing social security from private insurance, he insisted that 'you cannot pass the risk onto somebody else' because that would be unfair. It is worth noting that, to begin with, this kind of considerations supporting the opt-out clause clearly miss the point of the arbitrariness in defining risk groups (such as 'women' and 'men') as the basis of statistical analysis.

As part of the legislative program of fall 2007, the Directive was adopted in conjunction with three other Directives related to insurance activities and the provision of financial services.²² Officially, the aim of the new regulation was to fulfil the obligations concerning legal harmonisation by setting and developing the rules governing mutual insurance companies and practices.²³ As a result, Act CXXVII of 2007 on the modification of selected acts concerning financial services with the intent of legal harmonisation (henceforward: compound legislation on financial services), presented to the Parliament by the Ministry of Financial Affairs, was passed. The most important aspect of these legal changes was the introduction of references to a modified section (30/A. §) of Act CXXV of 2003 on Equal Treatment and the Promotion of Equal Opportunities into several acts regulating insurance practices and the provision of financial services. In addition, the new legislation established the rules of accountability and transparency, prescribed the mechanisms of supervision and named the responsible bodies (Text box 5.2).

²² 2005/68/EC, 2005/60/EC and 2006/70/EC.

²³ As a starting point, a draft of the modification of Act LX of 2003 on Insurance Companies and Insurance Practices was prepared.

Text box 5.2: National implementation measures regarding the transposition of 2004/113/EC

Act CXXVII of 2007 on the modification of selected acts concerning financial services with the intent of legal harmonisation (in force since 1 December 2007) contains the following important modifications:

- (Chapter 1) Introduction of 18.§ on the prohibition of gender-based discrimination and regulation of data provision into Act XCVI of 1993 on Voluntary Mutual Insurance Companies;
- (Chapter 3) Introduction of 96/A.§(1) and (2) on the conditions of applying gender-based distinctions and obligations regarding publicity and yearly reporting into Act LX of 2003 on Insurance Companies and Insurance Practices;
- (Chapter 4) Introduction of 30/A. § (1) and (2)^A specifying the conditions of applying gender-based distinctions in insurance practices into Act CXXV of 2003 on Equal Treatment and the Promotion of Equal Opportunities^B;
- (Chapter 6) Complementing Act CXVII of 2007 on Employment Pension and Its Institutions with a clause on legal harmonisation;
- Introduction of a section on enforcement and temporary measures.
- Act CXXXV on State Supervision of Financial Organisations contains a provision on the obligation of the institution to report to the European Commission^C.
- Government order 362/2004 (26 Dec) provides for the establishment of the Equal Treatment Authority and prescribes detailed rules of its procedures^D.

Notes

This list corresponds to the official notification on legislative acts, prescribed by Paragraph (2) of Article 17 of the Directive.

^A (1) is to be applied for contracts made after 21 December 2007, while (2) is to be applied for contracts made after 21 December 2008.

^B Since Hungary decided to make use of the opt-out clause of the Directive, special notification was necessary that involved this new section of the Equal Treatment Act. Thus 30/A. § (1) stipulates that, in the case of insurance services and services based on the insurance principle, gender-based distinctions do not infringe the obligation of equal treatment as long as a) the value of rates and services, defined in proportion to risks, is based on determining risk groups; and b) as suggested by relevant and accurate data of insurance mathematics and statistics, gender proves to be a determining factor in risk analysis with respect to calculating rates and providing services. At the same time, (2) stipulates that making distinctions with respect to costs related to pregnancy and maternity constitutes an infringement of the demand of equal treatment even under conditions specified in (1).

^C The State Supervision of Financial Organizations is a government office controlled by the Ministry of Finances, which coordinates the tasks related to supervision and liaises with other institutions, including legislative bodies.

^D The Equal Treatment Authority is an independent public institution, the establishment of which was provided in the Equal Treatment Act. It investigates cases of infringement of the same act and proposes recommendations to the government with regard of enforcement strategies as well as the improvement of legislative means to combat discrimination.

No time for debates: The trajectory of the Directive in the government structure

In spite of the relatively generous transposition deadline of 3 years, the actual legislative process took place late in the day and the necessary arrangements were made literally at the last minute. The new compound legislation on financial services entered into force on 1 December 2007. Ironically, it was actually the insurance sector that urged the passing of the new legislation out of anxiety that Hungary would otherwise lose the opt-out opportunity provided by Article 5 of the Directive that sets the conditions for applying gender-based distinctions in insurance practices. As assumed by the representative of the Hungarian Alliance of Insurance Companies, there was neither any opposition to this ambition, nor any doubt that the insurance lobby would succeed in enforcing its interests.²⁴ Apparently, the real issue at stake during transposition was whether the entire process would be accomplished in time so that insurance companies would be able to benefit in the future from legalizing a form of gender distinction that arguably is not considered discrimination.²⁵

After years of hesitation and red-tape, during which time it remained undecided as to which ministry would take care of the transposition of the Directive, the Ministry of Financial Affairs was appointed as the responsible body to coordinate the process, as necessary legislative changes were assumed to concern the regulation of the financial sector. According to the head of the Insurance Regulation Office at the Department of Financial Services in the Ministry of Financial Affairs, this decision was unusual since, in the normal course, the Ministry of Justice and Police or the Ministry of Social Affairs and Labour should have assumed this duty.²⁶ The competence

²⁴ Since opting-out was enforced in other member states as well, its introduction in Hungarian law did not seem to be difficult, according to the head of the National Alliance of Insurance Companies. Our contact person also affirmed that there were no debates about the matter, or at least he did not hear about them.

²⁵ This interpretation of the stakes of transposition was suggested by the head of the Hungarian Alliance of Insurance Companies, who said they had been 'bombarding' state institutions during 2005 and 2006 for fear of losing the opportunity secured by the opt-out clause. (In case of any delay in enforcing new legislation, the prohibition of gender-based distinctions would have been enforced automatically.)

²⁶ The representative of this office at the Ministry of Financial Affairs also complained about the attitude of the other two ministries, claiming that their reluctance to provide us with accurate information regarding negotiations during the

of the former flows from its responsibility for all procedures related to legal harmonisation and its role in preparing the Directive at EU-level, while that of the latter has to do with its obligations concerning any matters that involve equal treatment and equal opportunities (Text box 5.3).

Text box 5.3: Assignment of responsibility regarding the implementation of the directive

According to the government resolution regulating the definition, programming and supervising of legal harmonisation duties arising from Hungary's EU membership (1036/2004, 27 April), the task of drafting proposals with the aim of complying with legal harmonization requirements should be assumed by the ministry or other government body that has participated, with first-rate responsibility, in the procedure aiming at the development of a national position to enter negotiations as well as in deliberations at the EU-level. The same order, in addition, establishes the responsibility of the competent ministry according to its field of expertise.^A At the same time, as also reflected by the institutional structure, the primary responsibility for coordinating legal harmonization processes is born by the Ministry of Justice, since the Legal Harmonization Office belonging to the Department of EU Legal Affairs operates in this ministry.

When the Ministry of Justice first recommended that the Ministry of Financial Affairs should coordinate the preparation of legislative modifications necessary for adopting the Directive, the latter refused to assume this duty. In its argument, the Ministry of Financial Affairs referred to the rules of procedure set in Section 2 of Government Resolution 1036/2004 (27 April), claiming that these suggested the responsibility rested with the Ministry of Justice. The explanation put forth stated that the representatives of this ministry had participated in the working group undertaking the task of drafting the Directive at the EU level, and thus the transposition of the Directive in the national legal order was to be managed by the same ministry. In addition, the Equal Treatment Act of 2003, about to be modified to implement the Directive, was presented to the Parliament also by the Ministry of Justice, which is therefore responsible for any EU Directives concerning the Equal Treatment Act. (For the same reason, the Department of Equal Opportunities, being part of the Ministry of Labour and Social Affairs, seems to be devoid of any significant authority in such matters.)

However, the Directive also generated tasks related to the regulation of insurance practices (based on Article 5), which the Ministry of Financial Affairs was ready to undertake as long as these were considered to form only a part of implementation duties. The final decision, relegating the entire implementation process under the Ministry of Financial Affairs, may have been made on the grounds that legal modifications required for transposing Article 5 have exceeded, in their extent as well as complexity, the legislative tasks tied to the Ministry of Justice.

implementation process, as well as their attempt to forward our inquiry to other ministries, are yet additional signs of their tendency to passing on problems instead of resolving them.

Notes

This account is based on interpretations concerning the application of the rules of implementation procedures, provided by representatives of the Insurance Regulation Office at the Department of Financial Services and the Office of EU Affairs at the Department of International Relations, both belonging to the Ministry of Financial Affairs. The remark in parentheses, concerning the lack of authority of the Department of Equal Opportunities, is my contribution.

^A Government resolution 1123/2006 (15 December) on the participation in deliberation activities in the EU and related governmental coordination (also regulating mechanisms of developing a national position on Directives, the system of representation and preparatory arrangements) defines responsibility in the same vein: Appendix no. 2 of the resolution about the leadership and membership of expert groups of the Inter-ministerial Committee of European Coordination designates the Ministry of Financial Affairs as the state body in charge of leading the expert group with respect to issues concerning the provision of financial services. At the same time, the promotion of equal opportunities, or any similar category, is missing from the list of fields of expertise.

Apparently, uncertainties and controversies related to competence in the implementation of the Goods and Services Directive may have partly come from the division of coordinating and legislative tasks in legal harmonisation processes. Yet the very nature of the Directive – that concerns issues of equal treatment and equal opportunities as well as professional matters related to financial services – has certainly contributed to this confusion that, had deliberations taken another course (and especially if the government's equality machinery had been involved) may have been resolved differently.

Thus although the staff in the Ministry of Financial Affairs were of the view that they should have only provided professional advice and review in contribution to implementing the Directive, eventually they found themselves tangled up in a complicated procedure that was partly beyond their field of expertise, yet which they were able to resolve, in their own estimation, in an excellent way. Conducting negotiations 'according to the normal rules of procedure', as its representative put it, with other competent bodies (responsible departments belonging to the two other ministries as well as other institutions concerned by the four Directives that were going to be implemented together), the legal department drafted the legal modifications to be discussed by the Parliament.

The same course of events is interpreted differently by a representative of the Office of the Social Equality of Women and Men at the Department of Equal Opportunities in the Ministry of Labour and Social Affairs, who has complained about being only formally involved in negotiations, without any chance to influence their outcomes. As, due to the waste of time, decisions on the merits of the

case were made very late, this final stage of the pre-decision-making phase was when deliberations actually took place. By this point, however, the government body in charge of the protection of equal opportunities, at first present during negotiations but 'forgotten' after the 3rd or 4th meeting, had given up trying to influence the course of affairs or the outcome of the deliberative and legislative process. In this way, its standpoint and aspirations – consisting of pushing a more comprehensive understanding of the Directive, not reduced solely to insurance practices – were lost and the department remained unable to express its disagreement and disappointment with the other stakeholders (in particular, the insurance sector) and the points of view they represented. This situation did not catch them by surprise as they had been used to 'swimming against the tide' in the government structure, including their own ministry. From this perspective – which is actually in line with the observations of women's NGOs and gender experts – the fact that the Ministry of Financial Affairs had gained an upper hand during negotiations ensured that interests related to gender justice would not be respected.²⁷

A remarkable feature of the implementation process is the complete lack of civil society involvement.²⁸ Despite constitutional guarantees forming its theoretical grounds, cooperation between the government and social organisations is far from being satisfactory.²⁹ As a matter of fact, the government is not obliged to consult interested social organizations in the course of legislative processes. The relevant clause of the Constitution has been repeatedly interpreted as merely containing a methodological recommendation that does not identify the kinds of decisions implied, or specify the form of cooperation.³⁰

²⁷ According to civil activists promoting the interests of women, the Ministry of Financial Affairs is notorious in blocking gender equality strategies.

²⁸ The analysis provided in this section is heavily based on a study about the potential consequences of a bill on legislative procedures (Földes 2005).

²⁹ Section 36 of the Constitution stipulates that the government cooperates with interested social organisations in performing its duties, while the meaning of 'cooperation' and 'interested social organisations' is elaborated elsewhere in Hungarian law.

³⁰ The Constitutional Court examined Section 36. § of the Constitution several times (cf. its decisions 30/1991/5 June/, 7/1993 /15 February/ and 39/1999 /21 December/), and came to the conclusion that it did not mean that the government was obliged to consult concerned organisations by whatever means during

Instead, Act XI of 1987 on Legislative Procedures has been pointed out as the piece of legislation regulating the consultative obligations of legislative bodies. This act basically reduces cooperation to reporting, i.e. interested social organisations only have the right to express their opinion on planned legislative changes. However, the meaning of 'interested' as the criterion of practicing this right remains unclear, which leaves social organizations at a loss as to their legal entitlements with respect to participating in decision making at a governmental level. In this context, the fact that women's organisations are systematically excluded from deliberations is not an exception to the rule. Nonetheless, it constitutes an especially conspicuous injury with respect to women's rights and interests as well as considering democratic principles.

Snubber circuits: Deliberation by parliamentary committees

It has been pointed out already that the implementation of the Directive did not stir any public debates, due partly to its reduced relevance and partly to the exclusion of agents of gender equality. In fact, the harmonisation process itself was conceived of by our respondents holding public offices as a procedure of codification, concerning only lawyers engaged in identifying and redrafting corresponding sections in Hungarian law. The assumption that the Directive was smoothly adopted in Hungary – by simply complementing the existing legislation regulating the provision of financial services with reference to one new paragraph of the Equal Treatment Act – is actually supported by the records of the recommendations made by the three parliamentary committees – Committee of the Budget, Financial Affairs and the Audit Office, Committee of Human Rights, Minorities and Civil and Religious Affairs, and Committee of Economics and Informatics – dealing with the bill on the modification of selected acts concerning financial services with the intent of legal harmonisation (T/3807). These records show that all the recommendations submitted were simply 'accepted'.

legislative procedures, for by failing to do so it would become guilty of serious negligence and so the resulting piece of legislation would be considered unconstitutional.

Nevertheless, there seems to be one issue over which there was some disagreement in the committee meeting where the bill was last discussed and decision was passed about its readiness to be submitted for voting: the question of deadlines. The only debate of which records are available – and possibly the only one during the implementation process that concerns substantial, as opposed to procedural, issues – developed around Section (2) of Paragraph 30/A.§ to be introduced in Act CXXV of 2003. This particular section specifies the exceptions to exceptions, i.e. identifies the conditions that do not allow by any means for suspending the rule of non-differentiation between genders. Thus – in accordance with the Directive – Section (2) contains an absolute prohibition of the use of gender-based distinctions in calculating insurance fees and benefits in case of pregnancy or maternity. Member States had the opportunity to enforce this provision two years after the deadline of adopting the rest of the Directive. In Hungary, as a result of a compromise, it was decided that Section (2) would be applied for contracts made after 21 December 2008, i.e. insurance companies had one year to make necessary arrangements in adjusting the system to conform to the standards prescribed by the Directive.

However, the novelty of these standards is questionable, since the legal protection of certain categories of people – including the conditions of pregnancy and maternity – as especially vulnerable to discrimination has already been guaranteed by the Equal Treatment Act of 2003. This issue was raised by the representative of the Equal Treatment Authority at the general debate of the bill at a committee meeting. This debate took place in December 2007 with the participation of members of the three aforementioned parliamentary committees, representatives of the Ministry of Labour and Social Affairs and the Ministry of Financial Affairs as well as invited speakers from other institutions (like the representative of the Equal Treatment Authority).³¹ In her argument, she pointed out that,

³¹ Since several issues were discussed on the same day, it is impossible to figure out from the minutes who was actually present at the debate of this bill; the records only show who actually spoke up during the meeting. However, what is clear from the document is that the Ministry of Justice was not represented at all, and that two invited guest speakers contributed to the debate of the bill on financial services: the representative of the Equal Treatment Authority and a head of department at the Ministry of Financial Affairs. The rest of the participants were silent except for a member of the conservative party Fidesz, who just made some very general remarks.

according to the legislation already in force (i.e. the Equal Treatment Act), insurance companies may not differentiate between genders without any justified reasons, while pregnancy and maternity form the basis of absolute prohibition of gender-based distinctions. Therefore, the one-year delay in introducing Section (2) would create legal uncertainty and provide a basis for insurance companies to suspend the prohibition of discrimination with reference to pregnancy and maternity.

This concern was quickly dismissed by the representative of the Ministry of Financial Affairs – the ministry that presented the bill in Parliament – as missing the point and being based on misapprehensions. She explained that ‘this [i.e. Section 2] was not about making social distinctions but taking related costs into account’. However, she failed to explain why and how taking cost differentials into account were in any way different from making distinctions according to social categories. Her clarification regarding the background reasons of the decision is even more vague and unconvincing:

The government recommends one-year immunity because, obviously, legitimate claims have been raised by insurance companies as well, suggesting that this kind of distinction should not entail any changes with respect to previous insurance practices which would, as a matter of fact, cause disadvantages to women, who otherwise can count on preferential treatment [being positively affected] in this matter.

Thus, the planned modification is supposed to actually protect women, whose interests are supposed to be supported by the insurance sector, while the representative of the Equal Treatment Authority, expressing her concern regarding the temporary deterioration of the existing equal treatment legislation (and thereby of the rule of law), is supposed to be at a loss in comprehending this situation.

Eventually, as reported by the chair of the discussion in the document attached to the recommendations concerning bill T/3807, ‘the majority of committee members acknowledged the response given by the representative of the body [i.e. the Ministry of Financial Affairs] presenting the bill, according to which the planned modification does

not support social distinctions but only the display of costs'. In fact, the result of voting at the committee meeting was ten for and nine against, thus the bill barely made it to the plenary stage. However, this probably had very little to do with its content: the customary strategy of the parliamentary opposition for the previous seven years consisted in obstructing basically any propositions set forth by the governing parties.

Count but little: A note on the enforcement of the modified legislation

The Goods and Services Directive, as our interviewees agreed, had been adopted quasi-automatically in Hungary, according to the minimum conditions (though instead of two, only one year delay was allowed with respect to enforcing the absolute prohibition of making gender-based distinctions in calculating costs and benefits related to pregnancy and maternity). In contrast to the provisions in some other member states, the new Hungarian legislation concerns all types of insurance products. The way in which the importance of related legal changes is reported in a brochure published by insurance companies reveals the significance of the Directive in the Hungarian context:

The opt-out opportunity, allowed by the Directive concerning gender discrimination, has been introduced in the Hungarian legal system. According to this – just like in most EU member states – insurance companies may continue to use gender as an actuarial factor, as long as they can justify this by statistics which they are ready to publish. After 13 December 2007 (sic!), however, pregnancy and maternity may not influence the determination of insurance fees.³²

The introduction of new regulations has not caused any hitch in insurance practices. As explained by a representative of the Hungarian Alliance of Insurance Companies, the legal environment of insurance practices is ever-changing, thus companies are accustomed to having to adapt to new circumstances. Nevertheless, the issue of pregnancy and maternity has caused some problems. For instance, travelling abroad for the purpose of giving birth is a

³² Yearbook of Hungarian Insurance Companies 2008, MABISZ, p. 9. The information regarding deadlines is incorrect, as the prohibition really applies since December 2008.

sensitive situation concerning travel insurance. In such cases, as affirmed by both the representative of the Hungarian Alliance of Insurance Companies and our contact in the Ministry of Financial Affairs, insurance companies employ a 'technical solution': the institution of exclusion, meaning that they refuse to sign travel insurance contracts with women at late periods of pregnancy. While our interviewees expressed their uncertainty as to whether such a measure was in accordance with the Directive, they nevertheless considered this solution perfectly justified and legitimate. What is more, the same strategy is advertised as a means to solve such situations in official publications of insurance companies as well.

Beside this loop-hole, our respondent at the Alliance of Hungarian Insurance Companies also mentioned a general concern regarding the obligation of publishing data to justify gender-based distinctions. In her argument, this rule is unreasonable since it picks out one element of the actuarial statistics. Additionally, the rule is unfair because it impairs business interests: 'As an economist, I think this is incorrect, since competition is recognised in all other kinds of enterprise. The means of determining fees qualifies as a trade secret; therefore its publication is harmful for market interests'. In spite of such concerns, it is probably not surprising that, during negotiations related to the revision of the implementation of the Directive and its reintroduction in the agenda of the European Commission, Hungarian insurance companies support the maintenance of the present state of affairs.

Apparently, the new regulations have not caused any disturbance in society at large, either: no related cases have reached the courts or the Equal Treatment Authority in charge of supervising compliance with anti-discrimination provisions.³³ The absence of legal cases involving

³³ In fact, as recorded in the yearbook of the Equal Treatment Authority of 2008 and reported by a representative of the institution, a few cases involving gender-based distinctions have been reported to – but not investigated individually by – the Authority. However, all these cases involved the possible infringement of the equal treatment legislation in fields other than insurance contracts. As a matter of fact, some nightclubs still employ gender-based distinctions when letting girls in free, but demanding an entrance fee from boys. This unfortunate situation provoked a complaint from the head of the Insurance Regulation Office at the Department of Financial Services belonging to the Ministry of Financial Affairs who sighed: 'My heart aches whenever nightclubs advertise themselves saying that entrance is free for women. Where is equality of opportunities to be found here?'.

the new regulations of the insurance sector was commented upon by our respondent at the Hungarian Alliance of Insurance Companies thus: '...our clients, so it seems, are more mature in thinking than legislators: they know that necessary distinction does not mean discrimination.' Considering this statement in particular, and the ways in which the significance of the Directive has been dismissed or inverted in general, it is not unreasonable to suspect that – at least in the perception of responsible persons actively involved in the implementation of the Directive – gender equality as a mainstreaming principle seems to be an alien dogma in Hungary, imposed by aggressive and doctrinaire Eurocrats, and assumed in a perfunctory way by clever Hungarians who know that 'forcing equal opportunities may have contrary effects: equal rights should not be defended so militantly for that may eventually cause disadvantages', as claimed by the head of the Insurance Regulation Office in the Ministry of Financial Affairs. How this sham is expected to serve national interests is another matter.

Analysis of the decision-making process by applying WP4 research indicators

The implementation of the Goods and Services Directive has been successfully accomplished by Hungary inasmuch as the country has met the requirements of legal harmonisation set by the European Commission. At the same time, as we have seen, the outcome of transposition – i.e. the new body of law and the mechanisms enforcing it – is not altogether satisfactory with respect to gender equality. The reasons are manifold. Firstly, the dominant interpretation of the concept of gender relations fails to take women's relative disadvantages, and the need to eliminate them, into account. Gender mainstreaming³⁴ as a political program is seen as arising from the disregard of all sorts of asymmetries between women and men (which are taken as natural givens), and aiming at the mechanical eradication of any differences (which is violently refused). Secondly, as the relevance of the Directive has been restricted to the insurance sector, most fields of social life potentially concerned by related

³⁴ This term is hardly used by, let alone familiar to, Hungarian policy makers. I nevertheless employ it here in order to distinguish the current framework of gender policies from previous approaches based on anti-discrimination and affirmative action.

legislation have remained unaffected. Thirdly, even insurance practices do not seem to be influenced in a way that might 'do away' with gender-based discrimination. The Directive, in fact, motivated legal changes with the aim of legitimising gender differentiation, while actual practices go even further in employing clearly discriminatory means in service provision.

These deficiencies regarding the impact of the Directive are obviously linked to the shortcomings of the transposition process itself. Thus it is worth taking a closer look at the characteristics of decision-making leading to the adoption of national legislation that corresponds to the contents of the Directive. According to the methodology of WP4 research, the implementation process is analysed here by applying indicators derived from substantial criteria of gender democracy, a variant of the theoretic model of deliberative democracy. The analysis concerns three main dimensions: (1) political equality and inclusion; (2) accountability and transparency; (3) reasonableness and respect. Each dimension is approached by means of research questions that regard their key aspects and allow for a general evaluation of the democratic quality of these particular attributes in the course of the harmonisation process.

Inclusion

In determining the extent to which women were considered equal partners during deliberations, it is important to assess the degree of participation of women and organisations promoting women's interests in the decision-making process, the accessibility of deliberative sites, and the extent to which women's interests were incorporated in the deliberative agenda.

Our data suggest that the involvement of representatives of women's interests in the process was very limited in scope or non-existent. Although the institutional framework for the promotion of gender equality exists in Hungary, its (relatively meagre) capacities were not effectively utilised during the implementation of the Directive. The Directive was supposed to have no connection whatsoever with the issue of equal opportunities or discrimination, as claimed unanimously by representatives of responsible departments of the Ministry of Justice and the Ministry of Financial Affairs, as well as of the Alliance of Hungarian Insurance Companies, the points of view of which appeared to enjoy priority, if not exclusivity, during the

process. Thus the government's gender equality machinery³⁵ was just formally present at negotiations, and only at the beginning of the process. While its competence and responsibility emerged at the start, this made little impact and the representatives of this key institution soon found themselves excluded from decision-making altogether. As claimed by the head of the office, after the third or fourth meeting they were, in fact, not invited to participate in any further negotiations.

As for NGOs, they were absolutely not involved in deliberations, let alone consulted by the legislator. Most gender experts and women's organizations, potentially competent in this field, admitted they were totally ignorant as regards the contents of the Directive and/or the specifics of its implementation in Hungary. Those few who were more or less familiar with the basics of the Directive and its story, affirm that they were neither officially contacted, nor eager to influence its transposition into Hungarian law. The die was cast already, they claim: as the essentials of the Directive had been lobbied out at the EU level, there was not much stake involved in national decision-making.

Yet the question of deadlines turned out to be a disputable issue. Thus a representative of the Equal Treatment Authority, speaking at the last parliamentary committee meeting preceding the submission of the bills related to the Directive to the plenary, managed to voice her concern regarding the legal protection of equal treatment that she found to be challenged by the planned (and then accepted) modifications. According to available records and oral communication, she was actually the only gender equality agent invited to participate in the negotiations, discounting the initial phase during which representatives of the Department of Equal Opportunities were present at meetings in which, however, only the question of responsibility was disputed, i.e. which government body should be in charge of coordinating the implementation. At the same time, following from her position, this delegate of the Equal Treatment Authority had a chance to influence decision-making only

³⁵ That is, the Office of the Social Equality of Women and Men at the Department of Equal Opportunities of the Ministry of Social Affairs and Labour.

as an outsider. Therefore, the involvement of representatives of women's interests in the process was fairly limited.

The picture is somewhat heterogeneous and unclear with respect to the question of accessibility. There is good reason to suspect that – with the exception of the Equal Treatment Authority – women's organisations and institutions promoting equal opportunities were, at best, onlookers without any chance to express their opinion and, at worst, totally excluded from deliberations. Available data show that they were virtually shut out from the process. However, due to the lack of available documentation, it is hard to verify this assumption with absolute certainty.

Slight variations in accessibility to deliberative sites occur, first of all, according to the kind of organisation in question. Thus public bodies seem to have had a better opportunity to follow the process and even participate in it to some extent. However, as regards the import of their participation, the time factor also matters. Thus while involved at the beginning, the government body responsible for promoting equal opportunities was already out of the game when it came to the point of making substantial decisions. The Equal Treatment Authority, in turn, had the opportunity to deliver a speech at the very last parliamentary committee meeting before the bill was submitted for voting, i.e. when it was already too late to make substantial changes. In between, that is after agreeing on the procedural aspects of the implementation and before the codification of proposed legal changes, negotiations took place with the participation of several ministerial departments and public bodies that were professionally concerned in the implementation of all four Directives dealing with the provision of financial services. Apparently, precisely because of the multiplicity of parties present and issues discussed at these meetings and, in addition, owing to the predominance of technical aspects in interpreting challenges, agents of gender equality were pushed to the background. There is no trace of their participation in this phase of the deliberative process, which is especially true in the case of civil organisations that had absolutely no access to deliberative sites.

While the political will and institutional mechanisms of involving equal opportunities bodies and women's organisations in decision-making were clearly insufficient, it must be highlighted that these

institutions were not particularly keen on becoming involved. Thus women's NGOs, including the umbrella organisation MANÉSZ, were neither contacted by responsible ministries, nor ready to interfere in the implementation process. As for the Department of Equal Opportunities in the Ministry of Social Affairs and Labour, their exclusion is partly due to their passivity, which, in turn, can be explained by their lack of capacity and power. The isolation of the government's gender equality body is also indicative of the lack of understanding of the concept of gender mainstreaming and the underdevelopment of suitable mechanisms to implement this principle. Due to structural and organisational reasons, there is an awkward division of tasks requiring technical expertise pertaining to different professional fields and those aiming at the promotion of equal opportunities as a goal of public policy.³⁶

Taken together, the accessibility of deliberative sites to women's organisations was deficient as they, at best, were present only as observers. At the same time, it can be asserted that agents of gender equality did not really seek to influence decision-making.

Given the meagre opportunities of gender equality agents to participate in the implementation process and their deficient access to deliberative sites, they obviously could not have a significant impact on decisions. In fact, the gender equality issue was hardly raised in the process since the matter at hand was deemed not to be an issue of gender discrimination, as agreed by the main actors: the Ministry of Financial Affairs and the Alliance of Hungarian Insurance Companies.

The only contribution that concerns substantial issues (the question of deadlines) regarding implementation and framed in terms of the principle of gender equality was made by a representative of the Equal Treatment Authority at the last parliamentary committee meeting discussing the implementation of the Directive. However,

³⁶ This point is well illustrated by a remark made by the representative of the Insurance Regulation Office at the Department of Financial Services in the Ministry of Financial Affairs: 'The Department of Equal Opportunities at the Ministry of Social Affairs and Labor remains in the background without doing anything. They only declare principles while concrete tasks are relegated to those responsible for distinct professional fields.'

her – rather timid – contribution was quickly dismissed as mistaken and irrelevant. Other than this concern related to the protection of legalism, women's interests and perspectives were, far from being incorporated into the deliberative agenda, not even voiced during the implementation process.

It is worth noting that the majority of persons actually involved in decision-making were women. As a (male) representative of the Ministry of Financial Affairs has put it, 'the issue was settled by ladies who discussed it among themselves'.³⁷ He also added that all of these women were very much against enforcing implications concerning gender equality. This state of affairs clearly shows that descriptive representation, as an indicator of the political equality of women, is totally misleading. The ambiguous relationship of descriptive and substantial representation can be traced back to background institutional interests defined by structural factors (predominantly, the patriarchal social order) that appear more determining than individual group membership (i.e. being a woman). Thus the lack of coincidence between the two highlights the general insensitivity surrounding gender-based discrimination, failure in understanding its implications, as well as ignorance regarding social responsibilities it implies and the means to correct it.

Accountability

The first reaction of the head of the Legal Harmonisation Office in the Ministry of Justice to our query summarises the attitude of responsible institutions towards accountability: 'Legal harmonisation is the responsibility of the state and the public should be excluded from it'. This attitude, reflecting the immaturity of democratic institutions, is also supported by the ambiguities of relevant legislation. It is a general belief, widespread in state bureaucracy, that only the outcome of legislative processes concerns the public. However, this axiom does not hold for all segments of society in the same way. Prevailing social norms and the uneven distribution of social and political power generate differences in the opportunities of

³⁷ This remark has some paternalistic resonances, as the term 'ladies' conveys protective or even derogative connotations. At the same time the tone used by the interviewee was rather friendly. Thus the implication might be something like: luckily, our women have taken charge of this nonsensical issue that otherwise does not concern us at all.

social groups regarding political participation. Thus, women's organisations, notoriously excluded from decision making concerning gender equality issues, were not even consulted during the implementation of the Directive. At the same time, the Alliance of Hungarian Insurance Companies was intensely involved in deliberations, both in designing the Directive at the EU-level and in implementing it at the national level. Consequently, the insurance lobby had a strong influence already at the stage of drafting the Directive, and later with regard to its official interpretation and way of transposition in Hungary. This striking asymmetry in the positions and opportunities to participate of interested parties reflects the power imbalance among (potential) actors, while also indicating the lack of acceptance of gender equality as a mainstreaming principle. As a result of yielding to the pressure exercised by the insurance lobby, while excluding the representatives of specifically sensitive groups of clients (i.e. women and various sub-groups of women) from negotiations, the implementation of the Directive was forcefully interpreted as a technical challenge, to be managed by professionals in insurance mathematics and law, while its implications regarding gender equality were refuted and marginalised.

Given the institutional rules and attitudes that are hostile towards the principles of accountability and transparency, neither women's organizations nor the broader public had much access to information relevant to the decision-making process. Documents created during the preparatory stages of decision-making are legally classified as state secret, while their actual accessibility is practically determined by individual government bodies. As a rule, negotiations, at this stage, are conducted behind closed doors, and the public may not become familiar even with the list of participants, not to mention issues and arguments raised during discussions. Moreover, as claimed (though without any justifications or explanations) by a key person in charge (the head of the Legal Harmonisation Office in the Ministry of Justice), it is probable that no documents were produced during the implementation of the Directive anyway. Thus, excepting the minutes and recommendations of the three parliamentary committees discussing proposed legal changes, no information (directly related to decision-making or even concerning the implications of implementation) reached women's organisations and the public before the passing of new legislation.

Besides general accountability policies, the nature of the issue at hand was supposed to justify the austere treatment of the public during the implementation of the Directive. Its adoption being regarded as a professional matter relevant for insurance mathematics, the general public was considered unable to comprehend, or not interested in, such technicalities.³⁸ What is more, since related legal modifications merely reinforced and legitimised existing practices employed in the insurance business, the public was supposed to be not even concerned by the changes.

According to the national position developed with respect to the Directive,

[T]he distinction of genders manifested in the fees of insurance products is disconnected from the issue of equal opportunities, since the models serving as the basis for calculating fees are founded in statistical data (experiential values) of the past ... i.e. objective factors determining gender-based differences.³⁹

This argument was presumably developed by responsible officials of the Ministry of Financial Affairs, in cooperation with representatives of the insurance sector. We have no positive information regarding the availability of this thesis to participants of the transposition process, nevertheless, it probably forms part of the closed documents

³⁸ The supposition regarding the incomprehension and disinterest of the public reveals a kind of contradiction. As a matter of fact, the Directive itself is occasionally considered unreasonable by those in charge of enforcing related legislation. Ironically, provisions of the Directive concerning obligations of insurance companies related to publicity were dismissed as nonsensical by our respondent representing the Alliance of Hungarian Insurance Companies for singling out one dimension – gender – from among the many factors employed in statistical analysis. However, besides the work implied, this provision probably elicited the aversion of insurance companies, in fact, for betraying their market interests in disclosing one of the factors influencing insurance fees. (This understanding was suggested by the representative of the Hungarian Alliance of Insurance Companies.) At the same time, according to the official national position, ‘the publishing of necessary demographic data neither infringes the principle of the prohibition of gender-based differentiation, nor interferes with the market interests or undermines the competitiveness in the insurance sector’ (as stated in the summary of the implementation of the Directive, provided by the Ministry of Justice).

³⁹ Quotation from the summary of the implementation of the Directive, provided by the Ministry of Justice.

produced during inter-ministerial negotiations. What is important here is that the issue of gender equality as a potential concern was ruled out at the beginning, and therefore it was hardly discussed at subsequent negotiations.

Nevertheless, when modified bills were ready for submission, concerns related to equal treatment emerged once more at the last parliamentary committee meeting. The concern was voiced by the representative of the Equal Treatment Authority and responded by the representative of the Ministry of Financial Affairs. This exchange represents the only available example of a reason-giving exercise that can be analysed here.

In her speech, the representative of the Equal Treatment Authority warned against the legal inconsistency, following from the deterioration of the existing equal treatment legislation, implied in the proposed legal changes. However, in introducing this theme, she started by praising planned modifications for providing a 'reasonable, clear and transparent solution to a problem that those in charge of enforcing legislation have been long struggling with'. According to her argument, the new legislation provides insurance companies with an excellent tool to justify gender-based distinctions without incurring the risk of becoming the target of discrimination complaints. After this timid exposé, the speaker continued by explaining why the absolute prohibition of employing gender-based distinctions in cases of pregnancy and maternity should be enforced without delay. As this provision merely reiterates what already has been established in the equal treatment legislation of 2003, the proposed one-year period, during which it would not come into effect, would create confusion. Thus the contribution of the representative of the Equal Treatment Authority concerned the need to avoid legal uncertainties, rather than aiming to protect women's interests *per se*.

The representative of the Ministry of Financial Affairs, in turn, positioned herself as the defender of women, by claiming that women would actually benefit from differential treatment. Starting with an outright dismissal of the contribution made by the representative of the Equal Treatment Authority for being flawed as well as partial in describing the objectives of the Directive, she went on to assure those present that the one-year exemption (i.e. delay in introducing the

provision on pregnancy and maternity) ‘concerns only the representation of fees’ and, therefore, ‘this is not about social differentiation but only takes related costs into account’.⁴⁰ The same speaker also rebuffed worries with respect to disadvantaging women by saying that, given their higher life expectancy, their insurance fees are much lower than those of men.

Thus the government decision, which was clearly in line with the ambitions of the insurance lobby, was presented by responsible persons as actually serving the cause of promoting women’s interests. This confusion of meanings, however, should not divert attention from the fact that the market interests of the insurance sector were presumed to be a priority over the needs and interests of clients or the issue of gender equality during implementation. In this light, the justifications given in support of adopting the Directive at minimal standards (though reducing the period of exemption from two years to one year only) were not only partial but also misleading.

Recognition

Philanthropic concerns easily become discarded by obscure technical reasoning. In the case of discussions about the implications of the Directive and related Hungarian legislation analysed here, what could be considered as a human rights discourse barely appeared on the scene. Since technicalities and market interests determined the common understanding of the necessary steps to be made in order to comply with EU law, it seems to have been hard to challenge decisions on human rights grounds. As exemplified by the aforementioned exchange between the representatives of the Equal Treatment Authority and the Ministry of Financial Affairs, the issue at hand was, instead, a conflict between legalism and the rationales of insurance practices. The languages used in this discussion were, on

⁴⁰ It is worth quoting the – fairly confused and confusing – argument of the representative of the Ministry of Financial Affairs, as it reveals the inversion, or neutralisation, of the meaning of discrimination: ‘One-year exemption was proposed by the government since legitimate presumptions have obviously been voiced by insurance companies, too, regarding changes in previous insurance practices, potentially caused by this kind of differentiation, that would actually concern women in a negative way, while they should otherwise count on positive treatment in such matters. In sum, one-year exemption, instead of two years, was the product of a compromise that aimed at increasing security for one side, while ensuring the calculability of the situation for the other side.’

the one hand, a register of legal speech directed at popularizing a proposition that was clearly unpopular in the present context and, on the other hand, the not very sophisticated yet rather obscure professional jargon of the insurance trade (exploited with the purpose of warding off any inconveniences that might frustrate the smooth enforcement of the interests of the insurance lobby).

As the implications of the Directive for gender equality were denied from the outset, concerns for potential disadvantages affecting either women or men were ruled out, or neutralised by reference to objective differences between genders. During the discussion at the parliamentary committee meeting, women's interests were only peripherally touched. A (female) representative of the conservative party Fidesz gave voice to this type of concern in general but was turned down (i.e. assured that it was completely misplaced) immediately. (Remark by Fidesz Member of Parliament, MP): 'Only for the sake of making sure: so does this opportunity to make any kind of differentiations imply, again, that women will be disadvantaged?' (Response by the representative of the Ministry of Financial Affairs): 'No, it does not.' (Fidesz MP): 'Good.'

Apart from this brief exchange, respect for the groups affected appeared only in the deceitful form discussed above in connection with the inversion of the meaning of discrimination and the pretentious assumption of a women's rights agenda in promoting gender-based differentiation by the representative of the Ministry of Financial Affairs presenting the bill. Overall, the denial of the validity of a gender-equality perspective determined a kind of fundamental neutrality towards the problem that women and men as groups are differently affected by the legitimisation of gender-based differentiation.

The only concrete evidence available as to how gender justice arguments were treated again consists in the contribution of the Equal Treatment Authority made at the last phase of the decision-making process, i.e. at the joint meeting of the three parliamentary committees. Although claims were responded to and no harsh remarks were launched against any discussants, none of the points made by those questioning the proposition of the government were answered according to the merits of the issues raised. Thus the argument of the representative of the Equal Treatment Authority as

well as the remark made by the Fidesz MP were dismissed by the representative of the Ministry of Financial Affairs as out of place, without actually providing a logical and rational explanation as to why this was so. The technocratic attitude dominating implementation is closely connected to the underlying paternalism of state activities. In this way, counter-arguments challenging the official position taken by the government were actually ignored and degraded.

Conclusion

The implementation of the Goods and Services Directive in Hungary was accomplished without much ado, and lacked substantive negotiations and public discussions. To be sure, as the dice had already been cast at the European level, there were hardly any stakes involved in the political process at the national level. What is curious about the Hungarian story is that the Directive gained an inverted significance in the process of equalising genders. The transposition was effectively realised by revoking a legal provision ensuring non-discrimination based on gender by complementing the concerned section of the gender equality legislation with lenient rules allowing for gender-based unequal treatment in certain situations. As legality breeds legitimacy, the practice of making gender-based distinctions has been made even more acceptable, notoriously reinforced by self-fulfilling arguments stripping gender equality of any political significance.

With regard to its actual outcomes, the twisted story of the transposition goes back to the starting point. At the outset, the objective of the political process was the adoption of a Directive that concerned gender equality only peripherally, while purposefully containing loopholes that could be used in order to circumvent this principle. Thus, not surprisingly, the overall outcome of the implementation process, as opposed to the stated aim of the Directive, actually represented a step back in terms of eliminating discrimination and instituting gender equality policies.

The main reasons why gender equality was not even at issue during implementation, as already the stakes were defined quite to the contrary, are manifold, and are related to both social structures and political processes. Firstly, this hollow Directive did not represent a challenge to the general non-understanding of, and aversion to

dealing with, this issue. As equal treatment legislation was already in place, the Directive could not add much to it; rather, it happened to take away some of its force and impair its consistency. According to the biased national interpretation of the Directive, only its opt-out clause was deemed worth of considering and enforcing. Secondly, due to the unequal distribution of social power, the insurance sector that represents a greater lobbying potential, and thus its concerns have more political weight, gained an upper hand during the transposition, to the detriment of the already weak women's advocacy network. As a result, the new body of legislation implementing the Directive has not, in fact, instituted any real changes in the operations of insurance companies that, admittedly, even found ways to get around the provision absolutely prohibiting gender-based differentiation in cases of pregnancy and maternity.

Yet, even though the adoption of the Directive has not much significance in terms of improving the framework of gender equality policies, the story of its transposition and implementation – as well as that of tracing this process in the context of the present research – reveals a lot about Hungarian (gender) democracy as well as the social regard of gender discrimination and attitudes towards the EU. Thus the recurrent statement raised by various actors of the implementation process, 'it's not about discrimination', actually refers to various issues discussed in this study. It concerns insurance practices in which the application of gender-based differentiation is considered perfectly legitimate for only restating 'objective' differences. ('...the distinction has objective bases and it is not discriminatory. Nevertheless, they tried to impose this [anti-discrimination] rule on this field as well,' complained the head of the Insurance Regulation Office in the Ministry of Financial Affairs.) It also bears on the implementation process that was 'negotiated by ladies who were much more against it [i.e. the promotion of equal treatment] than men', as claimed by the same person. Finally, given the absence of any related legal cases, the insurance-buying public are also supposed to transcend this perspective, demonstrating that Hungarians form a kind of 'national front' to ward off outside influences. ('...our clients, so it seems, are more mature in thinking than legislators: they know that necessary distinction does not mean discrimination,' affirmed the director of the Hungarian Alliance of Insurance Companies.)

What all this adds up to is a form of Euro-scepticism, infused with a kind of typical national self-pity mixed with pride: the assumption that Hungarians – decision-makers, agents of enforcement and social groups (including women) as the subjects of policies alike – are more reasonable than outsiders (this time represented by the EU) boldly trying to impose their imperial interests on this nation, yet duly expecting to succeed because of the dependent political position of this long-suffering country. The point is something like this: again, a norm was imposed on us; however, we have found the best means to formally comply with rules while preserving our national identity. Such underlying sensibilities represent a closed circuit with respect to attitudes towards European standards, including those related to gender equality and other democratic values. By evoking an imagined (national) community the members of which – save a few ‘agents of the enemy’ – are supposed to form a consensus regarding the need to shield alien influences, key contemporary issues become rendered invisible while, at the same time, conferring a kind of inherent legitimacy to their suppression (stemming somewhere in the national spirit). The reference to national virtues in defending the stubbornness in not acknowledging the relevance of actual concerns, particularly those related to the protection of human rights may become politicised, while obfuscating related social and political responsibilities.

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Appendix 5.1

Women in Hungary are severely underrepresented in decision-making in politics just as in the economy. For instance, while women represent 52.3 per cent of the population and 54.2 per cent of those holding a higher education degree, their rate among MPs has never been more than 9-10 per cent since the regime change.

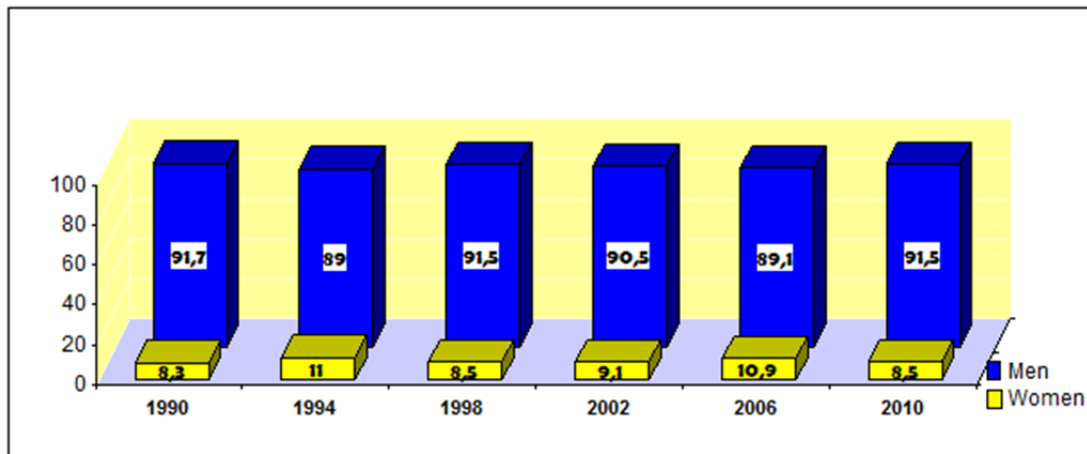


Figure 5.2: Women as a Proportion of MPs from 1990 to 2010

Appendix 5.2

Types of documents analysed in this study:

- Official (national) standpoint on the Directive
- Minutes of sessions of Parliamentary Committees
- Text of legislations and modifications
- Transposition table listing the main points of the Directive and indicating corresponding sections in Hungarian legislation
- Summary of the implementation prepared by a representative of the Ministry of Justice (informal)
- Professional publications by the Hungarian Alliance of Insurance Companies
- Memos (few)
- Newspaper articles (scarce)

List of interviewed institutions and organisations:

- Department of Equal Opportunities in the Ministry of Social Affairs and Labour
- Office of EU Affairs at the Department of Equal Opportunities
- Legal Harmonization Office at the Department of EU Law in the Ministry of Justice and the Police
- Office of EU Affairs at the Department of International Relations in the Ministry of Financial Affairs
- Insurance Regulation Office at the Department of Financial Services in the Ministry of Financial Affairs
- Office of Regulations at the State Supervision of Financial Organizations
- Office of Economics, Risk Evaluation and Regulations at the State Supervision of Financial Organizations
- Alliance of Hungarian Insurance Companies
- Equal Treatment Authority
- Alliance of Interest Promotion of Hungarian Women (umbrella organization of Hungarian women's NGOs that has joined the EWL)
- Civil organizations promoting women's interests (SEED, NANE, etc.)
- Gender experts

Chapter 6

Lithuania's unnoticed transposition Invisible gender democracy

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Introduction

This chapter is organised into two main sections. The first section describes the situation of gender politics and policies in Lithuania prior to transposition of the European Council (EC) Directive on gender equality, which covers equal treatment of women and men in access to and the supply of goods and services (2004/113/EC) into Lithuanian law.

The second section of the chapter is devoted to the analysis of the democratic quality of the process of the transposition of the EC Directive (2004/113/EC) and is primarily concerned with the extent to which women's representatives participated in the deliberations related to the decision-making (descriptive representation) and how far their interests were incorporated into the deliberative agenda and the final text of the law (substantive representation).

For these purposes we examine various documents, such as national reports, legal documents, documentation of the *Seimas* (the Lithuanian one chamber parliament) and national ministries, transcripts of parliamentary debates, mass media articles and websites of the relevant non-governmental organisations (NGOs) (mostly, women's

organisations). Another mass of data comes from qualitative interviews with representatives of ministries (mostly, Ministry of Social Security and Labour), women's NGOs and parliamentarians as well as academic experts of gender equality in Lithuania. These interviews were carried out by the authors in 2010-2011. We also used some qualitative interview material, focused on Ombudsman Office of Equal Opportunities for Women and Men, gathered in 1999.

Reflective of the Lithuanian political culture and context,¹ we focus in this study on the actions and speeches of the Lithuanian parliamentary elite. The decisive roles of high public officials (from the Ombudsman's Offices and Ministries) are also highlighted. Where applicable, we refer to NGOs (mostly internationally funded and/or academic expert community driven). Trade unions are virtually absent from our research, as their impact on women (gender) policies is practically nil.

The guiding question of our research was: To what extent did Europeanization of the Lithuanian legislation relative to gender equality conform to the principles of deliberative democracy, which rests on three corner-stone values: inclusion, accountability and recognition of the stake-holders (Galligan and Clavero 2008).

Equal gender opportunities: Lithuania as a leader in equality legislation

In 1997-98 Lithuania became one the first countries in Central and Eastern Europe to establish an inter-parliamentary Women Member of Parliaments (MPs) group, approved the Equal Opportunities Act of Women and Men (EOAWM²) and create an Ombudsman Office of Equal Opportunities of Women and Men (OOEOWM³). We hold that

¹ Features of the Lithuanian political context include: obstructive political party polarization, an acquiescent administrative elite, weakly developed civil society, the continually marginal role of trade unions, a highly commercialized mass-media

² The EOAWM, enacted in 1998, came from within the national legislative elite: it was initiated by the parliamentary women's group. The Board of the *Seimas* in summer 1997 appointed the working group to prepare the law. The group comprised parliamentarians from various political parties (the chairwoman was a conservative MP), representatives of the Ministry of Justice, the *Seimas* Ombudsman Office and the Free Market Institute (a private think tank, advocating employer's interests), (see Krupavičius and Matonytė 2003: 101).

³ An Ombudsman Office of Equal Opportunities functioned since 1999 as an independent state institution. Since 2005 The Ombudsman in Lithuania changed its

this highly visible initial success to promote gender equality in Lithuania was related to three main factors. First of all, there still were some positive path-dependencies from the Soviet times, where political women's representation, women's engagement in civic activities and female employment outside the household had been established as social norms. Even though Lithuanian independence has been accompanied by strong traditionalist, familiarist, conservative discourse and policies, the return to the 'normal' happened soon afterwards and Lithuanian women did not succumb to the re-traditionalisation effects for long. Social democratic, liberal and feminist currents re-emerged in the public sphere and were represented in the *Seimas* (the 1996 *Seimas* contained 18 per cent women MPs, compared to the *Seimas* which proclaimed the Lithuanian Independence act on 11 March 1990 which comprised only 10 per cent women MPs). Secondly, the 1996-2000 *Seimas* had a helpful distribution of parliamentary mandates and political ambitions: former Prime Minister Kazimiera Prunskienė, who in 1990-1991 as an impressive Lithuanian Amber Lady fought against Moscow domination along with two other Fathers of Lithuanian Independence Vytautas Landsbergis and Algirdas Brazauskas, was excluded from significant political office after the 1996 election. In response to being sidelined, the active politician Prunskienė became interested in promoting a women-centred political agenda and successfully mobilized her parliamentary female peers (Krupavičius and Matonytė 2003: 82).⁴ Thirdly, there were important impulses coming from the European (mostly, Scandinavian) and American partners of various political parties and non-governmental organizations, encouraging them to become more inclusive and attentive to women as special interest group (Krupavičius and Matonytė 2003: 100-102). This concurrence of circumstances bore fruits in legislative and administrative terms.

name from the Ombudsman for 'Equal Opportunities for Women and Men' to the 'Equal Opportunities'.

⁴ Even though the inter-parliamentary women's group survived after the 2000 election (which witnessed a significant drop in women's parliamentary representation from 18 to 11 per cent), and became even more inclusive, it has however, lost its impetus with the passing of time and many women MPs have decided not to follow its activities (the last meetings of Women's Caucus were held in the *Seimas* in 2004).

The 'Equal Opportunities for Women and Men' (EOAWM) was passed by the *Seimas* in 1998 with little opposition (it was supported by 48 MPs, opposed by 2, with 7 members abstaining). Mindful that the Lithuanian *Seimas* comprises 141 MPs, the low vote totals show that perhaps the modal reaction was one of indifference (Krupavičius and Matonytė 2003: 100-102). The first (and to date the only) OOEGO Ombudswoman, Burneikienė, praised the long-term educative influence of the new law, which 'will teach us to respect our Constitution and not to publish labour announcements where recruitment criterion is not personal competence, but a candidate's gender. Labour relations have to be based on professional grounds and they do not have to depend on an individual's sex' (personal interview in October 1999).

Since 1999, the OOEGO supervises implementation of the Law on Equal Opportunities (discrimination based on the grounds of age, sexual orientation, disability, racial or ethnic origin, religion or belief), investigates complaints relative to the EOAWM by public institutions and employers, hears cases of administrative offences and imposes administrative sanctions, consults the victims of discrimination, assists public organisations and NGOs, collects, analyses and summarizes data on equal opportunities in Lithuania, submits recommendations and reports to national and international authorities, etc. The Ombudsman examines complaints relating to discrimination and sexual harassment, supervises mass media so that it does not place discriminatory advertisements, inspects administrative cases and can impose administrative sanctions. The OOEGO had to undergo uneasy institutional adjustments, its place and role in the institutional design of political institutions of the country for some time remained unclear and its potential is still not fully grasped. For instance, legal experts find that the OOEGO could be more intensively involved in the anti-discrimination monitoring and legal assistance to victims (Gumbrevičiūtė-Kuzminskienė 2011). Since its first iteration in 1998, the EOAWM has undergone a series of major revisions. Enforced in 1999, the EOAWM regulations covered only gender. The law was amended in 2005 to cover additional grounds of discrimination. The revised law (Equal Opportunities Law, EOL) is in force since 2005. It defines direct and indirect discrimination on grounds of age, religious beliefs, ethnicity/race and disability. The same grounds are applicable for sexual harassment and harassment. The law covers only the public sphere:

the labour market, education, public administration, goods and services. The private sphere is beyond the scope of the law. The Law stipulates that the government and all administrative institutions have a responsibility to support activities of women's NGOs. However, in practice this support is highly fragmented, decided through competitive tendering, and is intermittent. Most of the public tenders on specific gender equality projects are organised through two government departments, the Ministry of Social Security and Labour and of the Ministry of Culture. Although seldom active on gender equality issues in the early 2000s, since 2006 the Ministry of Defence and Ministry of Foreign Affairs also began to engage in gender equality activities.

The development of national legislation regulating gender issues coincided with Lithuania's process of adopting the *acquis communautaire*. Around 2000, prior to the country's membership of the EU, Lithuania transposed several important EC Directives related to equal gender opportunities. Interestingly, compared to the social-democratic, liberal and feminist political debates in the *Seimas* during 1997-2000, there were no major controversies on the harmonisation of the national law with the *acquis communautaire* during the 2000-2004 accession period. The most important issue for the Lithuanian political and administrative elites was to be in a position to join the EU as soon as possible. The European Commission evaluated the accession progress of Lithuania in its reports highly⁵. After accession, this reform of national equality law stalled. From 2007 onwards, transposition of the EC Directives relative to gender equality became a mere formality (Pilinkaitė-Sotirovič 2008). In this vein, the transposition of Directive 2004/113/EC (the Goods and Services Directive) was considered as an inescapable obligation by national political and administrative elites. The ensuing political debates lasting until late 2008 had a narrow partisan obstructive character (opposition hampering to approve some laws). When the opposition parties (2004-2008) came to power in a new coalition government (November 2008), they in turn, became very pro-European and promoted the improvements called for by the EC with regard to the satisfactory transposition of the EC Directive 2004/113/EC.

⁵ Commission's 2002 Regular Report on progress made by Lithuania towards accession, available at: ec.europa.eu/enlargement/archives/pdf/key_documents/2002/Lt_en.pdf.

The paradoxical decrease in political and civic attention to gender issues, which happened in Lithuania just before and soon after the country joined the EU is reflected in the World Economic Forum's Global Gender Gap Reports⁶ which measure gender differentials in terms of political empowerment, economic participation and opportunity, educational attainment and health provision.

Table 6.1: Lithuania in global gender rankings

Year	2005	2006	2007	2008	2009	2010
Rank order of Lithuania	12	21	14	23	30	35
Total number of countries included in the Report	58	115	128	130	134	134

Source:

World Economic Forum, Global Gender Gap Report. Available at: <www3.weforum.org/docs>.

In 2008 Lithuania's fall of nine places was due to a decrease in the percentage of women among legislators, senior officials and managers from 42 per cent to 40 per cent (Hausmann et al. 2008: 18). In 2009, despite the nation-wide election of female president Dalia Grybauskaitė⁷, Lithuania fell by another 12 positions mostly due to the lack of progress in reducing the gender gap in economic and educational achievement. The gender pay gap in Lithuania remained substantial, variously estimated as 15-18 per cent. A further fall (by an additional five places) in 2010 can be largely explained by women's shrinking economic participation and reduced opportunities for women, who under conditions of economic crisis, find themselves less protected in the labour market and social security system.

However, it would be an exaggeration to claim that Lithuanian membership of the EU can be directly related to the deterioration of women's conditions in politics, economy and social life, or that EU membership was (is) detrimental to gender equality lobbying in national and supranational politics. As a symbolic recognition of the

⁶ The World Economic Forum's Global Gender Gap rating is established and the reports are published since 2005.

⁷ In 2009 Dalia Grybauskaitė was elected with 68.21 per cent of votes in a first round among the other seven candidates (five men and two women).

country's early progress in the field of gender equality, and as a result of women's NGOs activism in international networks and Lithuanian governmental bodies, in 2008 the European Council decided to establish the European Gender Equality Institute (EIGE) in Vilnius (operational since 2009).

The advent of EU membership, followed by the 2005 European Parliament elections, provided the conditions for a renewed discussion of gender quotas as a means of increasing women's political representation, and bringing greater gender equality into politics. The Lithuanian social-democratic party (with a record of applying the gender quota principle in its own electoral lists since 1996) and the New Democracy/ Lithuanian Peasant Union (a fringe party, created from the former Women's party and Peasant Union, also applies the gender quota principle), led by Kazimiera Prunskienė, grasped the opportunity to re-launch political debates about the gender quota in elections. However, their attempts did not succeed, as only these two parties respected the formal quota principle in the European Parliament (EP) election (Matonytė and Mejerė 2011). Before the 2008 elections to the *Seimas*, draft amendments to the electoral law proposed to apply quotas to ensure the balanced participation of women and men in party electoral lists. The suggestion was actively supported by Lithuanian women's NGOs, but was defeated in the *Seimas* (Mecajeva and Kisilienė 2008). After the 2008 national parliamentary elections, which returned a conservative majority, the absence of a critical evaluation of gender issues and the lack of public debates on the subject further distanced women's political groups from gender equality issues and activists. The EP elections in 2009 in Lithuania were conducted with an absence of debate on gender and political representation, in contrast to the 2005 experience.

Institutional arrangements relative to gender equality promotion in Lithuania

The culminating point in terms of the institutional visibility of gender awareness was reached in Lithuania in the period 2002-2004 when the Counsellor to the Prime Minister on Gender Issues and NGOs was appointed. Yet, this position was abolished (first merged into the Counsellor to the Prime Minister on Social and Cultural Affairs, and

then completely abolished in 2008) while the EC Directive 2004/113/EC was being transposed into Lithuanian law.

On an institutional level, the main actors engaged in public policies on gender equality in 2005-2009, apart from the *Seimas*, were the independent Office of Equal Opportunities Ombudsman (OEEO, former OEOWM, the Ombudsman for Equal Opportunities for Women and Men), the Inter-ministerial Commission on Equal Opportunities and the Department of Equal Opportunities.⁸

The Inter-ministerial Commission on Equal opportunities for women and men (hereafter I-MC) was formed in 2000. Its main functions involve coordination of public policies geared at implementing gender equality; it advances proposals to the Government and other public authorities to this end. The I-MC has representatives from all government ministries. It also includes representatives of the OEEO, NGOs and trade unions.⁹ The Commission is responsible for preparing and monitoring the National Program for Equal Opportunities for Women and Men (there were separate programs for the periods 2003-2004; 2005-2009 and 2010-2014¹⁰).

Created as early as 1999, the OEEO is an evolving institution. Interestingly, the EC reported in 2009 that a deficiency in Lithuanian transposition of the EC Directive 2004/113/EC¹¹ was related to insufficient state support (unclear principles of financing and lack of financial stability) of the OEEO.

⁸ The Department of Equal Opportunities and Social Integration within the Division of Gender Equality was established in 2001 in the Ministry of Social Security and Labour; the Division of Gender Equality was functional until late 2009, when it was incorporated into the Department of Social Integration and Communities

⁹ See: <www.lygus.lt>.

¹⁰ The national program on equal opportunities for women and men was firstly adopted in 2003 within the aim of the Government of the Republic of Lithuania to define measures and allocate finances for solving gender equality issues in all spheres of public life. The period of the program covered two years, 2003-2004 (No. 712, 3 June 2003). The next National programs on EOAWM continued to allocate finances for advancement of gender equality and covered periods of four years (2005-2009, 2010-2014).

¹¹ EC Directive 2004/113/EC paragraph 25 requires each Member State to establish a national body which could take the responsibility for the implementation of the principle of equal treatment and provide concrete assistance in the case of discrimination.

As to the social partners relevant to gender equality policies, trade unions and non-governmental organizations are worth mentioning. Only since the financial and economic crisis in 2008 has the role of trade unions become relevant in Lithuanian policy-making. Despite this new lease of life, trade unions – compared to parliamentary, industrial, banking, and mass-media elites – remain a rather weak political actor (Matonytė 2010). The Labour Code in Lithuania was revised in 2003. It is gender-neutral, at best, and could more accurately be described as gender-blind in its treatment of labour relationships.

The National Agreement on Tripartite Cooperation (the three contracting partners were the Ministry of Economics, the Confederation of Industrialists and the National Confederation of Trade Unions) was signed on 13 June 2005 and aspired to consolidate *inter alia* the promotion of equal opportunities in the labour market. However, the Agreement did not specify any particular measures to be taken or any particular targets to be achieved in this context. Employer and business interests clearly had an absolute priority in the social partnership agenda.

The Coalition of non-governmental organisations for the promotion of women's rights was established in 2001. It closely cooperated with the inter-parliamentary Women-parliamentarians' group (until its dissolution in 2004), and has a continued relationship with the OEEO, and the I-MC. Women's NGOs lobbied for the establishment of the position of Prime Minister's Counsellor on Gender Issues, yet their success was short-lived (the position existed for three years, to 2005, see above). In 2003 the Centre for Equality Advancement (CEA, Lygiu galimybių pletros centras, GAP) was jointly established by the NGO Kaunas Women's Employment Information Center, the Ministry of Social Security and Labour and the OEEO. Soon the CEA became one of the leading women's NGO in the country and the region. The main target activities of the CEA involve academic research and educational programs aimed at promoting gender equality. The CEA regularly conducts research on women's issues, financed by the Ministry of Social Security and Labour and EU funding programmes.

The Women's Information Centre (WIC, Moterų informacijos centras), established in 1998 as a pilot with support from the UNDP,

is an umbrella organisation bringing together individual women activists, state agencies, non-governmental organisations, social partners, scientists and gender equality experts. The WIC has 125 institutional members and facilitates horizontal cooperation among the various stake-holders in equal gender opportunities policies.

In 2004 the Women's Coalition for Support of Women's Rights (in conjunction with the Prime Minister's Counsellor on Gender Issues) formulated the public appeal against ineffective gender equality policies. This action was the outcome of three seminars on women rights and gender equality and a joint conference on Gender Equality and Social Partnership (held under auspices of the Lithuanian Government on 28 June 2004). The appeal was widely supported and provoked intensive internet forum discussions among women's organizations. The document addressed the questions of insufficient public funding of NGOs and suggested that there should be a special budget line for this purpose. The petition also emphasised that the state had a responsibility to assure the stability and effectiveness of women's organisations. It proposed devising institutional mechanism to finance women's organisations from the state and municipal budgets. The authors of the petition argued that only stable and consistent financing of women's NGOs would ensure the implementation of gender equality across society. The petition also addressed insufficient financing of the National Program for Equal Opportunities for Women and Men (2002-2004), and sought a better social dialogue between civil society and governmental institutions. The petition, signed by 60 women's organisations, was submitted to the government and *Seimas* but it did not produce any significant effect. The following National Program for Equal Opportunities for Women and Men (2005-2009) did not receive greater financial assistance or more solid institutional guarantees, even though the responsibility of the state to provide assistance for NGOs was clearly prescribed by the existing EOAWM law.¹²

The National Consultative Women's Forum was re-established formally in 2008 with the aim of promoting gender equality principles and fostering cooperation between women's NGOs, political parties, governmental bodies and social partners. The

¹² Women's Coalition for Support of Women's Rights. Available at: http://www.moterukoalicia.webinfo.lt/veikla_kreipimasis3.htm.

National Agreement for Equal Rights for Women and Men was formulated on 29 September 2008 by the Forum after the Women's Congress, just before parliamentary elections in late October 2008. The document was signed by nine parliamentary parties, numerous social partners (including the labour union 'Solidarity', the confederation of labour unions and the employers' confederation) and the Forum representative, Ramunė Trakymienė.¹³ The main provisions of the Agreement stipulated the need for effective cooperation between governmental bodies, NGO's and business towards promoting gender equality principles in all economic, political and social fields, as well as transparent and efficient distribution of the EU Structural Financial Funds for NGO initiatives. However, the National Agreement was soon forgotten by the victorious conservatives who formed the coalition government in December 2008. The new political majority of the *Seimas* preferred to concentrate more on family policies, not on gender equality promotion. From late 2008, the National Consultative Women's Forum lost its public visibility and political influence.

Despite this rather lively picture of institutional change and women's interest groups in Lithuanian, women remain under-represented in the national political-administrative elites (see Appendix 6.1 and 6.2). The backlash against women's weak 'politics of presence' among Lithuanian elites, regardless of the existence of a vibrant feminist civil society, captured attention in the public sphere and in academia (Matonytė 2010).

Overview of the legislative transposition of the Goods and Services Directive

The EC Directive 2004/113/EC was transposed in Lithuania in the period 2005-2009. The transposition was coordinated by the executive branch, and was largely an exercise conducted by the administrative elite. The relevant legislative drafts were prepared by the Ministry of Social Security and Labour. The OOEO presented its expert commentaries. Three legislating *Seimas* committees were involved:

¹³ Trakymienė is the former Prime Minister's Counselor on Social and Foreign Affairs, Gender and NGOs; the Agreement is available at: <http://www.manoteises.lt/index.php?lang=1&sid=535&tid=620&PHPSESSID=>>.

Human Rights, European Affairs, Social Affairs and Labour¹⁴. The participation of other governmental bodies and NGOs was limited in terms of descriptive representation, but importantly too, in terms of substantial representation.

Its transposition coincided with a parliamentary shift from a social-democrat dominated coalition government to Christian Democrats – Conservatives coalition in late 2008. In early 2009 EC auditors reported that Lithuania had failed to fully transpose this Directive. The initial EC Report evaluating the transposition signalled that the national labour legislation (adopted in 2007) has been so heavily loaded with guarantees for women and persons raising children that some provisions could potentially be challenged by male employees.¹⁵ There were also some problems with the practical implementation of non-discrimination rules in the workplace. It judged that state agencies and social partners had insufficient capacity to promote a real enforcement of gender equality principles. The Report drew attention to the fragmented nature of Lithuanian NGO activities in the domain of gender equality in late 2000s, and noted that these were mostly limited to surveys and public campaigns.¹⁶ The newly elected national *Seimas*, despite being dominated by the traditional-oriented Christian democrats, moved quickly to fix the failures and fully transpose the EC Directive so as to meet all 'European expectations'.

During the period of 2004-2008/9 several amendments were introduced to the EOAWM law and EOL (see Appendix 6.2). The Lithuanian Labour Code also underwent several modifications in this

¹⁴ The Seimas' Commission for Family and Child Affairs (1996-2008), albeit having only consultative functions and without the right to table the Drafts of the Laws itself played an important role in promotion of women issues. The Commission has been dissolved after the elections 2008, its responsibilities towards gender issues were turned to the Committee of Social Affairs and Labour.

¹⁵ Law on social Insurance of Sickness and Maternity introduces conditions for maternity leave (first legislation approved in 2000). It was revised in 2006 concerning maternity legislation (compensation for 126 days, 1 year 100 per cent, 2nd year- 80 per cent of salary) and introducing paternity leave of one month after child's birth (2006 June 8 No. X-659). In 2007 the final amendments of the law established two years paid parental leave.

¹⁶ Gender Equality Law in 30 European Countries, 2009 update. European Commission, Directorate General for Employment, Social Affairs and Equal Opportunities. Available at: <http://ec.europa.eu/social/main.jsp?catId=418&langId=en>.

process, including provisions covering guarantees and special arrangements for pregnant workers, women who have recently given birth and breastfeeding mothers. However, the Labour Code was left without any further provisions expressly prohibiting direct or indirect discrimination as regards access to employment, vocational training and promotion, and working conditions. These provisions were consolidated in the EOAWM.¹⁷

All the drafts of the laws relating to the EC Directive 2004/113/EC in the Lithuanian *Seimas* were given a special status (coded as ES, meaning *Europos Sąjunga*, the EU, in Lithuanian) and were deliberated on and voted in an urgent (or extremely urgent) manner. The very first legislative deliberations concerning the EC Directive 2004/113/EC in the Lithuanian *Seimas* took place on 23 June 2005. V. Blinkevičiūtė, social-democrat MP and minister of Social Security and Labour, presented the draft of the amendments (Nr.XP-608ES) to the EOAWM law which aimed at defining the marital and the family situation (*santuokinės ir šeimyninės padėties*), direct and indirect discrimination on gender grounds, harassment, sexual harassment and order to harass as well as introducing the exception into the EOAWM providing for eventual non-applicability of the gender equality principle in the sphere of goods and services. The *Seimas* standing committees of Human Rights and European Affairs were the legislating committees considering the proposal. The draft was further discussed on 30 June 2005 and approved by *Seimas* on 5 July 2005 by an almost unanimous vote (90 for, 2 against).

On 25 April 2006 C. Juršėnas, a social-democrat MP of the *Seimas* on behalf of the Law and Legislation Committee, introduced the draft of the amendments Nr.XP-631 to the EOAWM. One of the issues to be decided was if the oath of the EO Ombudsman should contain any reference to God. On 4 May 2006 the draft was approved (vote of 71 in favour out of 75) providing for the right of a candidate for the EO Ombudsman position to choose the text of the oath (with or without any reference to God).

¹⁷ Lithuania (by Tomas Davulis). Gender Equality Law in 30 European Countries, 2009 update. European Network of Legal Experts in the Field of Gender Equality. European Commission, Directorate General for Employment, Social Affairs and Equal Opportunities. Available at: <http://ec.europa.eu/social/main.jsp?catId=418&langId=en>.

On 13 July 2006, J. Lionginas, a social democrat MP and chair of the Committee of Budget and Finance, presented a draft of the amendment to the EOAWM (Nr.XP-1274) with new principles in the evaluation of insurance risk, based on the equal treatment of women and men. The draft was rejected.

V. Blinkevičiūtė, Minister of Social Security and Labour on 18 September 2007 presented a draft of the amendments to the EOL (Nr.XP-2384). The Minister emphasised that the EC recently sent official statements to the Lithuanian government urging a full transposition of the EU Directives. The Draft *inter-alia* introduced the concept of sexual orientation into the list of grounds on which discrimination was prohibited. The subsequent plenary sitting devoted to the issue of non-discrimination on various grounds took place on 18 December 2007. The legislating committee was that of human rights. It was backed by the OOEO, parliamentary committees of social affairs and labour, of education, science and culture and of law and legislation. The main speaker minister V. Blinkevičiūtė reminded parliamentarians that the deadline for transposition of the Directives in this case was 21 December 2007. Further parliamentary deliberations of the Draft took place on 17 April 2008¹⁸ and a further Parliamentary vote took place on 22 April 2008, when the draft was passed by votes 66 out of 76. The revised draft Nr.XP-2384(5*) ES was re-introduced to a plenary sitting of parliament on 20 May 2008. It focused on the notion of social situation and the prohibition to discriminate on these grounds. In the voting of the afternoon plenary session of 20 May 2008 the draft was rejected. A newly revised law Nr.XP-2384(6*) ES was presented by the human rights committee on 05 June 2008. Its plenary deliberation took place on 10 June 2008. Due to the absence of a quorum, plenary voting could not take place on that very same day. Further plenary deliberations took place on 12 June 2008 and breakthrough voting happened on 17 June 2008 (votes 64 in favour out of 71).

On 13 November 2007 V. Blinkevičiūtė, minister of Social Security and Labour, presented a draft of amendments to the EOAWM Nr.XP-

¹⁸ It was noted that there was some misinterpretation of the meaning of the EC Directive in the Lithuanian translation (Directive requires to prohibit any discrimination to be admitted to the trade unions and employers organisations, yet the Lithuanian translation talked of requirement not to discriminate any person because of his/her membership in the trade unions and employers' organisations).

2626ES. The proposal concerned the right for NGOs, trade unions and OOEO to represent the victim in court and administrative procedures. Further parliamentary deliberation of the draft took place on 5 December 2007, and on 18 December 2007 the draft was accepted (by 62 votes out of 78).

On 13 May 2008 the vice-minister of Social security and Labour P. V. Žiūkas, introduced the draft of amendments to EOAWM Nr.XP-3051. The proposed changes aimed to better guarantee anti-discrimination of women and men and equal opportunities in labour market and professional activities, as well as in the system of social protection, including those instruments of social security which would replace or complement the existing system of social provisions. Plenary deliberations ensued on 12 June 2008 and the plenary voting took place on 19 June 2008, with the amendments being passed by 71 votes out of 74.

Following the critiques contained in the EC Report on transposition of EC/2004/113, the newly elected *Seimas* in early 2009 had to address some of the provisions inserted into the legislation by the conservative/traditionalist opposition in the previous term while in opposition. Interestingly, the main protagonist of the equal gender opportunities legislation in earlier debates, social-democrat V. Blinkevičiūtė, became the fiercest critic of the legislative initiatives proposed by the new Minister of Social Security and Labour which sought to accommodate EU requirements. On 21 April 2009 in the plenary meeting of the *Seimas* minister J. Dagys introduced the drafts of amendments to the EOAWM and to the Labour Code Nr. XIP-510ES and Nr. XIP-511ES. The minister emphasised the need to more clearly define workplace and professional advancement guarantees for women and men returning to employment after (lengthy) parental leave. The Draft specified that employees returning from parental leave should have the opportunity to participate in training programmes and qualification workshops, and benefit from other improvements in working conditions available to their peer-employees during their paternity/pregnancy leave. Further parliamentary deliberation took place on 22 June 2009 and the Draft was approved almost unanimously on 14 July 2009 (99 votes out of 100).

The following section will analyse this transposition process through a gender democracy lens, utilising the principles of inclusion, accountability and recognition and their accompanying sensitising questions.

Inclusion

Our analysis of the democratic quality of the transposition of the EC Directive 1113/2004 starts with the examination of institutionalized procedures which allowed for formal and informal discussions of women's interests prior to and during the decision-making. In theory, all deliberative sites and formal decision-making procedures (aimed at transposing gender equality norms) in Lithuania are open to all kinds of NGOs, labour unions, experts, and civil society representatives. However, as our case study shows, in practice these civil society organizations and actions remain rather disconnected from deliberative sites, and mostly limit their engagement to informal discussions, open table meetings, advisory consultations, and other gatherings that are peripheral to the decision-making process.

INC 1: To what extent did representatives of women's interests participate in the process under examination?

In previous section an overview of the legislative process transposing EC Directive 2004/113/EC was briefly introduced, emphasizing the main legislative deliberations since 2005. Although the process of the EOAWM law amendments took a few years and was the subject of many debates in the *Seimas*, the role of women's civil organisations in this process was insignificant. The foregoing discussion indicates a lack of evidence of women's participation in the drafting processes, due to their limited access to elite deliberations at this stage.

The first draft for the amendments (Nr.XP-608ES) to the EOAWM law was introduced in *Seimas* in 2005 and was approved without any disagreements or intense negotiations after few months. The other amendments for the EOAWM law in 2006-2007-2008¹⁹ also were submitted and discussed without any active involvement or consultations with civil society organisations.

¹⁹ Practically, all the Drafts under consideration have been prepared by the Working group at the Ministry of Social Security and Labour, Department of Gender Equality, (personal interview with a representative of the Ministry of Social Security and Labor 25 May 2011).

Analysing the content of the sittings of *Seimas*, the committees (particularly the Committee of Social Affairs and Labour and the Committee of Human Rights) did not receive any written proposals suggesting the position of women's organisations towards the EOAWM law amendments. Therefore, the populist macho MP P. Gražulis, talking on behalf of the Human Rights Committee, found it opportune to point out that: 'the Committee did not receive any proposal towards the amendment (Nr.XP-2626(2*)ES) from Parliament members, political parties, and from any other organisation'.²⁰

Further parliamentary debates concerning transposition of the EC Directive 2004/113/EC and related amendments indicate the vacuum of civic initiatives and weak political engagement in representing and promoting equal gender opportunities principles in the Lithuanian *Seimas*. In her comments, the social democratic MP, M.A.Pavilionienė, one of the most prominent Lithuanian activists on gender issues and a former university professor, hearkened back to the past vigour of civil society organisations in implementing gender equality principles and rights, and rhetorically appealed to disinterested MPs, trying to mobilise their support for the law:

...I remember that Lithuanian NGOs and some politicians have undergone a very difficult road; they were spreading the ideas of gender equality and changing the gender stereotypes... I wish they would vote today for gender equality in society.²¹

The low participation of women's organisations in the parliamentary deliberation process may be explained in a few ways. Firstly, women's organisations active in public policy or lobbying for women's interests are highly dispersed and fragmented. In 2005-2010 there were 125 NGOs in Lithuania oriented towards women's interest promotion, equal gender opportunities, and related subjects²². Most of these organisations prioritise actions against social inequality,

²⁰ 5 December 2007 the plenary sitting on issue of non-discrimination on various grounds (*deliberations for Nr.XP-2626(2*)ES*).

²¹ 19 June 2008 the plenary voting for amendment Nr.XP-3051(2*)ES on anti-discrimination of women and men and equal opportunities in the labour market, professional activities and social protection.

²² The Women's Information Center Database. Available at: <http://www.lygus.lt/ITC/nvo.php>.

reducing female poverty, promoting and organising cultural and educational activities for women and other aspects which do not directly lead to active participation in parliamentary deliberations and/or the preparation of some law initiatives (personal interview with J. Šeduikienė, WIC, 17 May 2011). The actual database of Lithuanian women's NGOs covers such activities as education, consultations, assistance, spread of information, publishing, culture, but none of these organisations give priority to promoting the gender agenda at national level. This indicates a shift in the focus of women's organisations, for in and around 2000 there were 20 women's NGOs committed to lobbying and advocating for the political representation of women interests as their top priority (Taljūnaitė 2005).

The second explanation for the low participation of women's organisations in the legislative process is related to internal organisational challenges in NGOs, including financial and human resources, after Lithuanian accession to the EU in 2004. Before 2004 women's NGO activities were mainly financed by foreign donors, especially by donors interested in promoting the issues of gender equality in economic, cultural and political fields. Membership of the EU opened access to the Structural Funds which became the most important financial granting platform for NGO activities in the country. In other words civic organisations became dependent on government-mediated EU funds, requiring women's organisations to participate in project competition, defined along strategic lines, and specific to policy fields (such as the family, labour market, development of social care infrastructure, etc.). According to representatives of various women's NGOs (formerly active in gender equality lobbying) the Lithuanian government almost completely excluded gender equality issues or women's career issues from the EU-Lithuanian granting agenda (Interview 21 May 2011 with J. Šeduikienė, WIC and interview with V. Pilinakaitė-Sotirovič, CEA 11 May 2011).

Until 2004 there were financial donors and you could concentrate more on public advocacy of gender issues, i.e. more public speaking, more advocacy, suggesting more public

questions, more participation in public policy...but after 2004 NGOs were obliged to seek national financial resources.²³

In principle now women's organisations are very passive. Most of them are facing financial difficulties and thinking about survival. A lot of things would change if they were more active in the country.²⁴

However, it would be an exaggeration to suggest that the entire third sector in Lithuania since 2004-2005 is dependent on EU financing. As mentioned above, the National Program for Equal Opportunities for Women and Men is one of the most important governmental tools for the implementation of different measures towards gender equality in the fields of employment, education, political decision-making, human rights and violence against women and is financed directly from the Lithuanian state budget. However, within this program, support for women's organisations remains scarce and fragmented. For instance, in the National Program for Equal Opportunities for Women and Men approved for the 2005-09 period (and coinciding with the period of EU Directive transposition under investigation), the state support for women's organisations activities was not included in the program, except for joint conferences, round tables and educational seminars on gender equality and promotion of women's participation in the work of governmental bodies, social partners and other third-parties. 'If the programs are not financed enough, you cannot implement something tangible, effective ... And if NGOs become inactive, the whole gender equality thing would stop at all'.²⁵

In general the involvement of women's organisations into the previous and following National Programs has not been organised on an occasional, rather than strategic, basis (Mecajeva and Kiselinė, 2008). As V. Pilinkaitė-Sotirovič (2008) observed, 'gender mainstreaming by the Lithuanian state was and remains fragmented, without any clear strategy, limited to inter-institutional cooperation

²³ Interview with a representative of the Center of Equality Advancement, 12 May 2011.

²⁴ Interview with a representative of the Women's Information Centre, 18 May 2011.

²⁵ Interview with a representative of the Women's Information Centre, 18 May 2011.

and crucially lacking professional competences of the staff that supervise the programs'.²⁶

INC 2: How accessible were the deliberative sites to women organizations seeking to influence decision-making?

The question aims to analyse the formal and informal access of women's civil society organisations to participating in the transposition process of gender equality principles to national legislation. We are interested in this case to see if there were any formal channels for cooperation and negotiation between women's organisations and state institutions responsible for the transposition of the Goods and Services Directive.

Formally, all stages of parliamentary deliberations are publicly accessible. The agendas of *Seimas* plenary sessions and committee meetings are available on the official Seimas website.²⁷ The interested parties can present their written proposal to the particular Committee of the *Seimas* and/ or participate in the committee meeting on the basis of an invitation from any MP. However, legislative procedures are complicated and require special knowledge or competences, and it is far from evident that any participation (observation) by the 'interested party' could yield some tangible results or exercise any influence on the result.

As it was mentioned previously, practically, all the drafts of the laws relating to EC Directive 2004/113/EC in the Lithuanian *Seimas* were accorded priority status and were deliberated and voted on in an urgent manner (sometimes the whole legislative procedure took three weeks or less). This type of legislative procedure (presumably, very favourable to the law initiatives under consideration) dramatically limited the opportunity for civil society views to be expressed appropriately. Even worse: our document analysis and interviews reveal that – because of the speed and intensity of the legislative procedures – there was a lack of constructive dialogue between the formally responsible parties, i.e. MPs from legislating committees and

²⁶ Pilinkaitė-Sotirovič, Vilana (2008): *Context Study Lithuania*, QUING Project, Vienna: Institute for Human Sciences (IWM), available at: http://www.quing.eu/files/results/cs_lithuania.pdf.

²⁷ www.lrs.lt.

representatives of the Ministry of Social Security and Labour who prepared the relevant drafts of the law. Furthermore, commentaries and suggestions of the OOEO, the state-agency with gender equality expertise, were often ignored during this period²⁸. In order to have their views taken into account in this rushed legislative context, women's organisations sought informal contacts with representatives from the Ministry of Social Security and Labour and MPs favourable to the issues of gender equality, and agreeing that they would 'leak' the information as soon as it became available (i.e. send the first drafts of the amendments to the EOAWM Law to the personal e-mail accounts of NGOs activists).

You need to observe the agenda, you need to write emails, you need to ask for the permission to participate in sittings...Usually it is said that there is not enough space in a meeting room, the room is too small, it is impossible to change the location.²⁹

Under such conditions, good personal relations with MPs and government officials were crucial.

Informal contacts are very helpful. If parliament members receive the draft projects of law, they are sending them and informing us about it...but if you want to influence the process and influence is most effective when draft project is still in a ministry and is being in the drafting stage. So you have to get an invitation from them.³⁰

Our interviewees longed for the 'golden times' when the Inter-parliamentary women's group in the *Seimas* provided a good contact point for any women's issues advocate: 'In the Seimas, since 2005, apart from maybe two MPs who were really preoccupied with gender issues, there was nobody to contact and to get a helping hand on those matters' (personal interview with ex-parliamentarian, 20 May 2011). Also, the reform of the OOEOWM into the OOEO, which

²⁸ These concerned Lithuanian language equivalents for some specific terms, used in the Drafts of the laws and proposals to fix more clearly the scope of financial state support for the public activities in the field of equal opportunities.

²⁹ Interview with a representative of the Center of Equality Advancement, 12 May 2011.

³⁰ Interview with a representative of the Women's Information Centre, 18 May 2011.

happened in 2005, was seen as a loss for promoters of gender equality policies. The functions of the OOEO have been extended to cover all anti-discrimination policies. This institutional expansion and new niches of action of the OOEO turned women NGOs into 'one among many' interest groups seeking OOEO assistance and intermediation.

INC 3: To what extent are women's interests and perspectives included in the deliberative agenda?

Among the most publicised (articulated in petitions, public appeals and discussed in conferences) women's interests in Lithuania were: financial support for NGOs, lack of cooperation with state agencies, harmonisation of work and family obligations, and violence against women. As shown above, these issues were scarcely included in laws adopted when transposing the EU Directive; accordingly, these interests were vaguely included in the parliamentary deliberative agenda. It is not by accident that women's organisations interests were indirectly and insufficiently included in the deliberative agenda. This lacuna was underlined in the European Commission Report which criticised as inadequate the capacities of Lithuanian state agencies to promote the principles of gender equality³¹.

For instance, in 2006 the Centre for Equality Advancement (GAP) initiated a petition to Prime Minister Gediminas Kirkilas addressing the insufficient promotion of gender equality principles, structural barriers for implementing gender equality, and the lack of concern of the Lithuanian government for its international commitments³². The Women's Information centre (WIP) organised a discussion of the petition in its network of women's organisations. 24 women's NGOs and the OOEO signed the petition. However, it fell on deaf ears in government (personal interview with Sotirovič 12 May 2011).

Another demand of women's organisations included the issue of violence against women, especially in the private realm. The provisions on violence against women were not directly incorporated in amendments to the EOAWM law. But the discussion on this issue was widely shared among very different political and civic actors,

³¹ Gender Equality Law in 30 European Countries, 2009 update. European Commission, Directorate General for Employment, Social Affairs and Equal Opportunities. Available at:

<<http://ec.europa.eu/social/main.jsp?catId=418&langId=en>>.

³² <<http://www.gap.lt/index.php?cid=292>>.

including parliamentary committees, women's organisation activists, the OEOO and women's crisis centres. In 2006 the parliamentary Human Rights Committee, under pressure from NGOs, initiated several open discussions on protecting women against domestic violence. On 11 April 2007 a round table was organised by the Committee of Social Affairs and Labour of the *Seimas* together with representatives of the NGOs coalition 'Women's Rights - Human Rights' and the Ministry of Social Security and Labour to discuss public policies aimed at counteracting violence against women³³. There were some attempts to include the issue of violence against women into the deliberations of the Goods and Services Directive. In particular, the social democrat MP M. A. Pavilionienė on 19 June 2008, before the plenary vote on amendment Nr.XP-3051(2*) on anti-discrimination of women and men and equal opportunities in the labour market, professional activities and social protection tried to enlarge the scope of the draft law by arguing that: '...There won't be any gender equality in any society as long as the society tolerates gender inequality in the form of violence in Lithuanian families'.³⁴

Accountability

The analysis of the democratic quality of the transposition of the Goods and Services Directive into Lithuanian national law examines the degree of visibility of this process. It focuses on the extent to which the relevant information was available and accessible to the relevant actors as well as to the general public. We are interested in understanding who were the main actors informed on the issue and forming the appropriate answer (whether civil society, the media, the politicians and the administrative elites, as well as gender experts) and how these actors were performing the task of responsibly publicising the issue, the interests involved and the proposed responses (i.e. the overall quality of information and seriousness of the arguments provided).

The indicator of accountability focuses on whether women's NGOs and the public had access to information relevant to the deliberative

³³ Report of Committee on Social Affairs and Labour, 2007. Available at: http://www3.lrs.lt/docs3/kad5/w5_istorija.show5-p_r=315&p_k=1.html.

³⁴ However, it took until 25 May 2011 to get the new additional anti-violence in private domain draft of the law approved by the *Seimas* in plenary sitting (lengthy discussions have been caused by politically sensible terms 'private domain' and 'family/ family surroundings').

process surrounding amendments to the EOAWM law. It also explores if the organisations shared with others the opportunity to discuss and submit proposals towards various legislative drafts.

As discussed above, the opportunities for women's organisations to participate in the drafting process of legislation on the EOAWM law were limited because of the tight time-schedule, complex procedures of legislative deliberations and a lack of constructive relations with the relevant politicians and state officials. According to the legislative procedure relating to EU Directives, the drafts proposing amendments to the EOAWM were prepared by the Division of Gender Equality in the Ministry of Social Security and Labour. Once approved by the government, they were presented for parliamentary deliberation and approval in the *Seimas*.

ACC 1: Did women's organizations and the public have access to information relevant to the decision-making?

Our respondents from women's NGOs argued that they did not have any privileged special access to the draft amendments of the EOAWM law which was prepared under the supervision of the Gender Equality Division in the Ministry of Social Security and Labour. In principle, the governmental bodies and the *Seimas* are open to all kinds of written proposals and views of civil society. But the interviews reveal the problem of making known the initiatives undertaken by the executive and/or legislative institutions. The Statute of the *Seimas* grants the opportunity to participate in the sittings of *Seimas* committees or working groups in the parliament for 'all interested parties, including governmental bodies, representatives of civil organisations or political parties, experts and academics.'³⁵ However, as we have earlier noted, non-parliamentarians (i.e. representatives of women's organisations) need a special invitation from any MP to enable them participate in committee deliberations or to observe plenary discussions.

Typically, except for the agenda of plenary sittings clearly displayed on the *Seimas* website, it is difficult to know the forthcoming agendas

³⁵ See www.lrs.lt. The Statute of the *Seimas* also provides the opportunities for committees to organise the *closed door* meetings which are not available, neither for the public nor to the press. Yet, none of the relevant Drafts have been discussed formally 'under closed doors.'

of particular Seimas committees. As one of our interviewers from the NGO sector observed:

It's possible to find the agenda of committees somewhere, but I don't know where exactly, ...it's practically impossible to find them... you have to be a professional in this system, or receive information in other ways, using acquaintances or friends...this is the attitude of officers, that everything is available publicly, but it is available in such a complicated way. Seimas committees are not sending their agenda to NGOs, you have to look for them by yourself... for public policy discourse formation and advocacy NGOs do not have many opportunities, they do not have huge human resources...you cannot get involved in everything, especially when you are not welcome by those who have the ultimate responsibility on the issues of your concern... it consumes a lot of time and energy to remain in all of that.³⁶

In addition, the representatives of women's organisations reveal the tactical challenges in lobbying for women's interests:

Sometimes the committees are sending the invitation, but in principle if you want to lobby, you have to talk with an MP and receive his or her support. If you only attend the sittings of committee and provide your own opinion, it would not go very far without this additional human support. So you have to do some invisible work, that your opinion should be expressed by somebody who has power.³⁷

Evidently, the representatives of the NGOs acknowledged that there is no problem to find information *post-factum*: every resolution or position adopted by parliamentary committees is published by the *Seimas* press office and available publicly on the parliamentary website. But – as our interlocutors from civil society underlined: 'after the combat, there is no point to raise your voice or your hands...'

³⁶ Interview with a representative of the Center of Equality Advancement, 12 May 2011.

³⁷ Interview with a representative of the Women's Information Centre, 18 May 2011.

ACC 2: Were the positions of key actors involved in the process sufficiently explained through a reason giving exercise?

The other aspect of accountability in the analysis of democratic quality of EU Directive transposition, and what it reveals about gender democracy, is related to the justification of arguments by key actors. In this case, since there was only a small circle of actors involved in the process of transposing the EOAWM law, we limit ourselves to the content analysis of the minutes of the relevant plenary *Seimas* sittings. Our general observation is that there was little (if any) in-depth analysis of the problems under deliberation. The main 'arguments' in favour of the proposed drafts were related to external leverage: the need to comply with the EU Directive, failure to do so would lead the European Commission to start a financial penalty procedure, MPs and government would be blamed and shamed by the EU, and Lithuania would lose its place in various rankings. For instance, Minister V. Blinkevičiūtė, in her speech on 13 November 2007, explaining one of the drafts, referred to the external leverage argument:

I would like to remind you that Lithuania has always given priority attention to the issue of gender equality. We received positive international evaluations. Recently, in November, the World Economic Forum rated Lithuania 14th in the Gender Gap Report, compared to 2006 Lithuania improved its position by 7 places.³⁸

The main arguments against the smooth transposition of the Directive referred to national pride and Lithuanian traditions of patriarchy: that the country should not follow European initiatives blindly; Lithuanian MPs should protect our concepts of family, genders, traditions, etc.

As surprising as it might sound, in the plenary debates there was a need to 'functionally' justify the proposed Draft of the Law (Nr. XP 3051) aiming to guarantee gender equality in labour market and social sphere in general. The conservative lawyer MP Žiemelis requested some hard facts which would show that 'there is some

³⁸ 13 November 2007 plenary sittings on the Draft of the amendments Nr.XP-2626ES to the EOAWM (deliberation).

discrimination in the social sphere. I have not heard of any case of discrimination based on an individual's gender in the social sphere. I think that mentioning social sphere is unnecessary in the law. We do not have this problem. Or maybe I am wrong?' (13 May 2008).

Interestingly, the presenter of the draft Law, Vice-minister of Social Security and Labour V. P. Žiūkas, first of all apologised that as a man he was speaking in favour of women before providing the 'hard fact' that the pay gap in Lithuania, at around 15-18 percent, put women at a disadvantage: 'Perhaps it would be better if instead of me there would be a woman speaker. Because when a man asks and a man replies, it is more difficult to communicate [on this particular issue]'. The vice minister also mentioned the 'hard fact' that it is more difficult for a woman to reconcile her career and family life, but – again – he admitted that 'a woman in my place would be a better advocate than I am, she would explain the problem much better, but I must admit that indeed there might be cases of [indirect] discrimination'.

So, in a somewhat unexpected way, the issue of politics of presence and gender mainstreaming was brought into the centre of parliamentary deliberations concerning transposition of gender equality legislation from European to Lithuanian law.

Otherwise, there were two major frames grouping the 'reason giving' references used by Lithuanian parliamentarians in the relevant plenary debates. The first was related to Christian/secular ideologies and the second pertained to the essentialist vs. social constructivism driving political ideologies and law-making.

The first frame of ideological Christian-secular references might be well illustrated by discussions concerning the oath of the EO Ombudsman and the appropriateness of any reference to God in it. C. Juršėnas, social-democrat MP and at the time Speaker of the *Seimas*, while introducing the Draft of the law, presented the main argument against having any reference to God in this particular document. He insisted on the ultimate constitutional value of the freedom of confession, which should be guaranteed to everybody, state officials including:

But this principle – and I underline it once again, is well-rooted in European jurisprudence and holds that all citizens are equal, and the person who is not-religious or agnostic cannot be treated as being in a somewhat lower position, necessary some exceptional tolerance or he/she has not been put in an inconvenient position as a member of a human society on this earth ... This is the question of principle, the civic question.³⁹

The second frame of the parliamentary debates was related to the concept of gender and understanding of gender equality in general. For instance, when the Draft law proposing some changes aimed at better guaranteeing anti-discrimination of women and men and equal opportunities in labour market and professional activities in the system of social protection were introduced, the social democrat MP M. A. Pavilionienė concentrated on the very concept of gender equality which usually does not extend to domestic violence (against women). The Member of Parliament expressed her wish that other members would rely on pragmatic reasoning and vote for gender equality broadly construed⁴⁰.

The conservative MP K. Čilinskas, referring to persistent gender stereotypes in public opinion in Lithuania and the parliamentarians' duty to harmonise Lithuanian legislation with the European norms and standards, returned to the nuances of law-making through the 'discursive or terminological innovation':

I propose to vote for this law. It is totally justifiable, corresponds to the practices of the European Court of Justice. It is adapted to the Lithuanian situation. The interpretation of 'equal gender opportunities' is a bit modified [narrowed down] reflective of the Lithuanian intolerance to some issues...⁴¹

Lithuanian parliamentarians did not have any difficulty in espousing the *traditional* notion of gender equality (and support relevant anti-discrimination measures). However, the notions of gender and sexual

³⁹ 25 April 2006 plenary sitting on the Draft of the amendments Nr.XP-631 to the EOAWM.

⁴⁰ 19 June 2008 plenary sittings on the Draft of the amendments Nr.XP-3051(2*)ES to the EOAWM (voting).

⁴¹ 19 June 2008 plenary sittings on the Draft of the amendments Nr.XP-3051(2*)ES to the EOAWM (voting).

orientation/discrimination provoked considerable debate. Parliamentarians entered into paradigmatic discussions about biological vs. cultural-social backgrounds of sexual orientation and gender identity. Most MPs argued for the need to preserve in law the essential perception of difference between women and men. Social democratic MP V. Čepas invited the *Seimas* to provoke more vibrant public discussions and nation-wide 'negotiations on what gender' is:

We have a lot of discussion in the mass media about gender equality, but we need to discuss more. Because we are from another epoch, our perception of gender equality is outdated... Maybe we understand only that there are biological differences between the two sexes that we are not identical in a biological sense, but we should be equal in all social and cultural relations without any exception.⁴²

Deliberations in the *Seimas* in terms of accountability were really poor. Most committee discussions and plenary debates were conducted in an extremely pragmatic manner, i.e. brief and dry, without any in-depth analysis and careful listening to the outsiders from the civil society. In a series of prolonged plenary debates (concerning the draft of the law proposing a Europeanized interpretation of sexual orientation and gender identity, which was finally approved after its 7th reading) parliamentarians got stuck on incompatible ideological essentialist vs. social constructivist philosophies, arguments which were employed in the stubborn game of political opposition, where women's and gender equality interests as such were relegated to a secondary place and the most important stake was only 'who controls the political agenda'.

When the parliamentary majority changed in late 2008 and Lithuania received a negative evaluation of its transposition of Directive 2004/113/EC, the new parliamentary majority was quick to remedy the failures. This improvement process was operated in a similar, low publicity and weak argumentative reasoning regime as in the previous *Seimas*. Former supporters and promoters of the law (in particular, former minister of Social Security and Labour, social democrat MP V. Blinkevičiūtė) were critical of the new improved

⁴² 17 April 2008 plenary sittings on the EOL Draft of the amendments Nr.XP-2384(4*)ES (*deliberations*).

drafts, presented and supported by the former conservative sceptics of gender equality (in particular, MP R. J. Dagys, who became a Minister of Social Security and Labour in the new right-wing coalition government).

The Lithuanian media coverage of the EU Directive 2004/133/EC was scarce and highly populist, and concentrated on entertaining elements of plenary discussions. Sexual orientation, gender identity, gender mainstreaming and similar topics are sensitive and to some, provocative, so the Lithuanian mass media was very eager to publish any 'hot news' on these issues. However, the media (especially TV) did not present arguments and analyse the content and innovative elements introduced into Lithuanian law by the Directive. The media concentrated on populist (conservative) commentaries of the Lithuanian politicians (men and women), who very often ridiculed the questions related to gender equality. A. M. Pavilionienė, the most consequential and sophisticated defender of gender equality legislation, received fiercely negative media coverage. It is not by coincidence that an MP V. Zinkevičiūtė once (2007 06 05 40 (302)) in the plenary discussions of the Annual Report of the OOEO asked if the Office could initiate some court action against the press and TV, which 'escalate negative information about gender equality issues and exercise negative influence on public opinion'.

Recognition

The content analysis of the parliamentary debates mainly reveals a crude power game, based on an unscrupulous disagreement between government and opposition parties and individual MPs. In their speeches, parliamentarians showed little respect to the intended beneficiaries of the law (women and society at large), and there is not a single mention of public interest throughout all plenary debates related to the transposition of the Goods and Services Directive in the Lithuanian parliament in 2005-2009. Unsubstantiated frontal assaults against proponents of the drafts and criticisms *ad hominem* (which generated some media attention) pepper the parliamentary discourse on gender equality and related issues.

REC1: To what extent do participants in deliberation show respect for the groups affected by the decision?

One of the most significant examples of the lack of recognition and respect for the groups affected by the decision is observed in the debates concerning the draft of the amendments to the EOL (Nr.XP-2384) on the concept of sexual orientation as an anti-discrimination ground. The draft was presented by a social democrat MP V. Blinkevičiūtė, then Minister of Social Security and Labour on September, (an unmarried woman who lived alone). A conservative MP V. Aleknaitė-Abramikienė (married with small children), opposing the very concept of 'sexual orientation', with great cynicism asked the Minister: 'Don't be surprised, dear Minister, if after approval of this law, you will be asked in many places, what is your, dear Minister, sexual orientation' (V. Aleknaitė-Abramikienė).⁴³ The Minister also replied with a personal attack: 'you, as a member of the Committee on European Affairs, should take a wider look at European Directives' (V. Blinkevičiūtė).⁴⁴

Therefore we witness once again that the reference to Europe (the EU) was the strongest argument in support of the necessary laws. Parliamentarians (and administrative elites) concentrated much more on the imperative to transpose the European Directives than to deliberate in any depth about gender equality and to devise the best public policy tools to achieve it. For instance, a social democrat MP A. Sysas, underlined the importance of demonstrating to the European institutions that the Lithuanian state is consistent in its openness to gender equality:

We have to vote and get the amendment finally approved. I think we would send a very bad signal to the European institution if we fail to do so. We got the opportunity to host the first European agency in Lithuania. This is European Gender Equality Institute.⁴⁵

Ironically then, it can be considered fortunate that most of the drafts were prepared and adopted by the Lithuanian political and administrative elites with some urgency, so that there was no space

⁴³ 18 September 2007 plenary sitting on EOL draft Project Nr.XP-2384 (deliberations).

⁴⁴ 18 September 2007 plenary sitting on EOL draft Project Nr.XP-2384 (deliberations).

⁴⁵ 10 June 2008 plenary sitting on EOL Draft Nr.XP-2384(7*)ES.

(or need) for prolonged discussions. This speed possibly avoided even more destructive commentaries and suggestions, emitted by the most media-friendly politicians, epitomising a limited understanding of the principles and ideas of gender equality as well as displaying poor standards of qualitative respectful democratic deliberation and value-based political communication.

Discussion and conclusion

Despite the effective mechanism and diversity of institutional or political actors engaged in gender equality policies, there was an evident lack of public debate on the issue and civil society was poorly included in transposition of the EC Directive 2004/113/EC into Lithuanian national law. After 2004, when Lithuania became a fully-fledged member of the EU, the process of gender policy implementation according to the European Directives, especially transposing gender norms in access to and the supply of goods and services, was highly fragmented and was never at the top of the political or media agenda.

When transposing EC Directive 2004/113/EC into domestic legislation, the Lithuanian government opted for the punctuated action, aimed at filling the gaps and remedying failures of the existing Equal Opportunities Act for Women and Men, Equal Opportunities Law and the Labour Code. In the spirit of democratic elitism, emerging and strengthening itself in the new EU member states after 2004 (Matonytė and Varnagy, 2007) the scattered legislative initiatives and acts were prepared without any significant mobilisation and participation of civil society. The Lithuanian women's organisations, feminist intellectuals and social-democratic politicians had done their gender justice promotion job well before the advent of the transposition of the Goods and Services Directive. Around 2005, the progressive Lithuanian political elites and civil society ran out of steam to pursue the broad gender agenda. The transposition period of the relevant Directive coincided with this low season of political concerns about gender equality in the government and the *Seimas*. National political elites and civil society started paying more attention to other (new) high-stake socio-political and economic issues such as use of the European Structural Funds, the deteriorating demographic situation of the Lithuanian population, and the Schengen border controls. It is not by accident that the charismatic politician and long-standing MP Kazimiera Prunskienė,

who was behind the early gender equality legislation and gender justice promotion in Lithuania in 1997-2000, did not take part in a single parliamentary debate on the transposition of Directive 2004/113/EC in Lithuania. In 2004-2008 Kazimiera Prunskienė held the post of Minister of Agriculture and was preoccupied with the new (European) portfolios concerning rural affairs in Lithuania. For the most of the Lithuanian politico-administrative elites, transposition of Directive 2004/113/EC was but another task to be completed with the lowest possible costs. The first negative evaluations of the EC Reports on the Lithuanian success in transposing the Directive did not produce any major reaction among politicians, nor among women activists. Quite simply, the lacunae in the national law were hurriedly addressed, according to the EC Reports in early 2009.

It is not by accident that the foregoing analysis of the quality of democracy of transposition processes revealed important deficiencies in relation to three broad principles of deliberative democracy from which the assessment indicators of our study were derived.

In relation to the principle of inclusion, the analysis found that the dialogue between political and administrative elites with the civil society actors at the drafting and deliberation stages was inadequate, and the level of engagement and mobilisation of relevant social actors throughout the process was insignificant and rather ceremonial. Women's organisations were not well informed about the legislative process itself and were never formally consulted. The government gave no space to civil society in setting the legislative agenda or enlarged the scope of deliberations as suggested by women activists (for instance, already in 2007, there was a strong push from feminist activists to expand the legislation to cover domestic violence). However, the Lithuanian government curtailed and limited the gender policy agenda, largely excluded the civil society actors and reduced expert discussion. Thus, the substantive representation of women- in terms of outcomes- was significantly absent, i.e. it was difficult for women's groups to introduce innovations to the content of a law once it had been (recently) approved. As one of our respondents remarked – after the combat, there is little sense to raise your hands or voice. The negative impact of this non-participatory agenda setting process on the substantive representation of women's

views and interests' was partially remedied by the blueprints prepared and imposed by the EC.

Secondly, shortcomings in relation to the principle of accountability were also found. The public was not well informed about the issues. In the media, one-sided, patriarchal, populist views were particularly salient. Some vocal Lithuanian parliamentarians irreverently showed their lack of understanding of various aspects of the drafts of the law and sometimes even did not have sufficient knowledge of the socio-economic and cultural background of the assumptions guiding the law initiatives. One incident highlights the glaring lack of basic competences was recorded in the Ministry of Social Security and Labour, whose representatives prepared the bulk of the drafts of the law: it was revealed by experts and parliamentarians that the high Lithuanian officials misinterpreted some European provisions while translating them into the Lithuanian language.

Also, relative to the principle of accountability, interestingly, and contrary to the Spanish case, the EU dimension of the relevant laws in Lithuanian legislative deliberations was strongly underlined, and Europe (the EU) was frequently used as a short-cut and an ultimate argument for (rapid) adoption of the presented drafts. Europe (the EU, international community) was perhaps the only aspect of political debates which stood as a common-denominator for the governing coalition vs. oppositional parties which tried to obstruct each other's action and initiatives on any other possible ground. However, analysis of the democratic quality of the deliberative process in terms of the principle of accountability shows that a golden opportunity problem was largely missed for in-depth, engaged public information and discussion of gender inequalities and gender stereotypes in Lithuanian society and the role of the EU and national government to redress these. Following the theories of institutional adaptation, we might argue that the *misfit* between the existing Lithuanian laws and practices of gender equality and the norms and instruments promoted by the EC Directive was small and therefore the adaptation was relatively mechanical and unproblematic. Sometimes, especially in the cases related to deep-seated ideological convictions, politicians turned to *logics of appropriateness* and argued against certain aspects (of a normative, discursive character) of the EC Directive 2004/113/EC and successfully blocked adoption of the relevant pieces of legislation,

until the last minute (negative reports and pending sanctions from the EU in 2009).

Finally, in relation to the principle of recognition, the overall quality of deliberations during the legislative process was tarnished by offensive *ad hominem* remarks, diminishing the value of the arguments presented by political opponents, experts and engaged women activists. Interestingly, there were more signs of deference in the parliamentary debates when some 'outsiders' (high-level public official such as a vice-minister or Ombudsperson) participated in the plenary sittings. However, we are unable to fully substantiate this insight about the civilizing role of the 'outsiders' towards the quality of parliamentary debates, since there were very few plenary sittings where persons other than political elites participated. Women NGOs, for instance, did not take part in any plenary sitting.

The results of this study prompt some reflections about the prevalence of domestic politics and national governance styles vis-à-vis adoption and implementation of the EU policy on gender equality (and of other EU policies). Our case study serves as an illustration of the impact of new forms of multi-level governance. The limited political deliberation in Lithuania was divided between domestic and European aspects of the law. Thus, we might claim that transposition of the EC Directive served as a vehicle for Europeanization of the Lithuanian political arena and public sphere.

The analysis also points to the potential and limitations of putting the principles of deliberative democracy in practice. This particular process of Europeanization of the gender equality policies operated with a striking 'democratic deficit' – both, in terms of popular support and representation of the interested parties and in terms of the quality of deliberative process. All three major principles (inclusion, accountability and recognition) were brought to the lowest possible common denominator and the shortcoming of one did not produce any advantages for the other. Organisational behaviour and negotiations research shows that the quality of arguments can increase when actors deliberate *in camera* or, on the contrary, demonstrate a positive spill-over effect: the higher the level of inclusion, the higher propensity to deliberate in terms of a reason-giving practice. The Lithuanian observations in this instance, and the

specificity of a higher respect for interlocutors in public deliberations when the level of inclusion is higher, require further exploration.

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Appendix 6.1

Overview of 2004–2010 Lithuanian political-administrative elite with respect to its gender composition and gender equality oriented public activities

Institution	No of women	No of men	Remarks about involvement into general gender equality policies on national level	Remarks about involvement into transposition of the Directives
President (2004-2009)	0	1 Valdas Adamkus	None	None
President (since 2009)	1 Dalia Grybauskaitė	0	None	None
Prime minister (2004-2006)	0	1 Algirdas Brazauskas	Summer 2005, 4 th Lithuanian Women's Congress in 2005 held under auspices of the Lithuanian Government. The Prime Minister of Lithuania social democrat M. A. Brazauskas opened the ceremony with the welcoming speech pointing out that the main problems such as violence against women, poverty and discrimination in workplace remains one of the most important political challenges for gender equality politics ¹	None
Prime Minister (2006-2008)	0	Gediminas Kirilas	None	None
Prime Minister (since November 2008)	0	Andrius Kubilius	None	None
Speaker of the Seimas (2004-2008)	0	1 Česlovas Juršėnas	Congratulating women on the occasion of 8 March	Occasional involvement into legislative dates, concerning trans-position of the EC Directive 113

¹ <<http://www.lrv.lt/naujienos/?nid=2881>>.

Institution	No of women	No of men	Remarks about involvement into general gender equality policies on national level	Remarks about involvement into transposition of the Directives
Speaker of the Seimas (2008-2012)	1 (I. Degutienė since 2009.04)	1 (A. Valinskas 2008.11-2009.04)	None	None
Members of the Parliament 2004-2008 (at the beginning of term)	29 out of 141 (20% of MP women)	112 out of 141 (80% of MP men)	Blinkevičiūtė, Pavilionienė	Pavilionienė
Members of the Parliament 2008-2012 (at the beginning of term)	25 out of 141 (18% of MP women)	116 out of 141 (82% of MP men)	After 2009 EP elections, replaced Blinkevičiūtė Pavilionienė	Pavilionienė
Chairs of the Parliamentary Committees (2004-2008)	5	11	Committee on Social Affairs and Labour Committee on Human Rights Committee of European Affairs	Committee on Social Affairs and Labour Committee on Human Rights Committee of European Affairs
Chairs of the Parliamentary Committees (2008-2012)	1	15	Committee on Social Affairs and Labour Committee on Human Rights	Committee on Social Affairs and Labour Committee on Human Rights
Chairs of the Parliamentary Commissions 2004-2008	6	17	Commission for Child and family	Commission for Child and family
Chairs of the Parliamentary Commissions 2008-2012	2	8	None	None

Institution	No of women	No of men	Remarks about involvement into general gender equality policies on national level	Remarks about involvement into transposition of the Directives
Cabinet of Ministers 2004-2008	3 (Ministry of Social Security and Labour, of Science and Education and of Rural Affairs)	12	Ministry of Social Security and Labour	Ministry of Social Security and Labour
Cabinet of Ministers since 2008	2 (Ministry of Finance and Ministry of Defence)	12	Ministry of Social Security and Labour (mostly through activities of the Unit of Gender Equality in Department of Equal Opportunities and Social Integration until 2009), Ministry of Defence Ministry of Culture	Ministry of Social Security and Labour A man vice-minister acknowledges that he, being a man, is 'ill-suited' to provide evidence about women's problems in the labour market and persisting pay gap
Inter-Ministerial Commission on Equal Opportunities for Women and Men	20	4	Composed of representatives of all Ministries (14), Department of Statistics and rep2005-2009 and 2010-2014) prepared under the coordination of the Ministry of Social Security and Labour representatives of the NGOs and trade unions the Commission is responsible for National program for Equal Opportunities for Women and Men (several Programs were implemented in 2003-2004; in 2005-2009 and 2010-2014) prepared under the coordination of the Ministry of Social Security and Labour	None
OEOO	Since 1999 1 A. Burneikienė	0	Very much engaged	Moderately involved

Source: Matonytė 2010, <www.lrs.lt>, <www.president.lt> and <www.lrv.lt>.

Appendix 6.2

Transposition of the EC Directive 113/2004 in Lithuania: Features of the legislative process

The law	Length of parliamentary deliberations (from the first introduction in the plenary sitting to the plenary vote)	Results of voting in the Seimas (for/against/abstained/quorum)	Organisation s/ experts involved in preparation of the Draft	The Parliamentary Committees involved in the drafting	The law issue under consideration	Any reference in parliamentary deliberations to civil society organizations
Nr.XP-608ES	2 weeks	By vote 90 out of 92		Human rights and European Affairs	Definition the marital and the family situation and direct and indirect discrimination	None
Nr.XP-1631	10 days	By vote 71 out of 75		Human rights	Prohibition on discrimination based on gender in social security systems	None
Nr.XP-2384ES	11 months	On April 22, 2008 (by vote 66 out of 76) Voting on revised draft on June 17, 2008 (by votes 64 out of 71)		Main committee: Human rights Supplement committees: Social Affairs and Labour, Education, science and culture, Law and Legislation	Definition on discrimination on sexual orientation grounds	None

The law	Length of parliament-ary deliberations (from the first introduction in the plenary sitting to the plenary vote)	Results of voting in the <i>Seimas</i> (for/against/abstained/quorum)	Organisations/ experts involved in preparation of the Draft	The Parliamentary Committees involved in the drafting	The law issue under consideration	Any reference in parliamentary deliberations to civil society organizations
Nr.XP-2626ES	1 month	By votes 62 out of 78	OOEO	Human rights	The right for NGOs, trade-union and OOEO to represent the victim in court and administrative procedures	Yes, to the absence of NGOs comments or critiques of the Draft (Grazulis) Yes, the remarks from expert community (OOEWM) about inadequacies of the Lithuanian translation
Nr.XP-3051ES	1 month	By votes 71 out of 74	OOEO	Human rights Supplement committees: Social Affairs and Labour, Law and Legislation	Definition on anti-discrimination of women and men and equal opportunities in labour market and professional activities	None
Nr. XIP-510ES and Nr. XIP-511ES	3 months	By votes 99 out of 100	OOEO, confederation of Lithuanian labour unions, Lithuanian labour federation, Lithuanian labour union 'Solidarumas' and Lithuanian confederation of employers	Human rights Supplement committee: Social Affairs and Labour	Definition of workplace and professional advancement guarantees for women and men in their parental leave	None

Source: <www.lrs.lt>.

Appendix 6.3

Internet resources

World Economic Forum, Global Gender Gap Report:

www3.weforum.org

Lithuanian parliament official web-site: www.lrs.lt

Lithuanian president official web-site: www.president.lt

Lithuanian government official web-site: www.lrv.lt

Official web-site of the Ministry of Social Security and Labour:

www.sadm.lt

EC evaluation reports: www.ec.europa.eu/enlargement/archives

EC DG for Employment, Social Affairs and Equal Opportunities:

<http://ec.europa.eu/social>

Web-site of the Centre for Equality Advancement:

<http://www.gap.lt/index.php?cid=292>

Web-site of the Women Information centre: www.mic.lt

Women's Coalition web-site: <http://www.moterukoalicija.webinfo.lt>

Women's Forum web-site: <http://www.manoteises.lt>

Website: www.lygus.lt

Interviews

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Interview with a representative of the Centre of Equality Advancement, V. Pilinkaitė-Sotirovič, 12 May 2011.

Interview with a representative of the Women's Information Centre, Jūratė Šeduikienė, 18 May 2011.

Interview with a representative of the Ministry of Social Security and Labour, 18 April 2011.

Interview with the ex-parliamentarian, social-democrat Giedre Purvaneckienė 19 March 2011.

Chapter 7

Assessing gender democracy in Poland

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The significance of the European Union (EU) gender equality provisions at the domestic level and the inclusion of women in the national democratic system are shaped to a considerable degree by a country's existing institutionalised gender regimes, culture, religious tradition, and presence of a women's movement (Inglehart and Norris 2003; Gerhards et al. 2009; Walby 2004). In the context of Poland, the significance of these variables is complemented by the democratic transformation process and accession to the EU. The first part of this study provides this background. This is followed by an overview of the political and institutional context in which the creation and implementation of the new law took place in Poland. The third part of the chapter discusses the transposition of the Good and Services Directive.¹ This is then followed by an analytical discussion, which applies a series of gender democracy indicators to the process under investigation. The last section discusses and interprets the results.²

¹ Council Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services.

² I would like to wholeheartedly thank Agata Młodawska for her research assistance in collecting materials and data for this report.

'Democracy without women is only half democracy'³: The gender order in Poland

The processes of transformation and democratisation that took place after 1989 radically reshaped the political, social and economic reality in Poland. These changes also had a significant influence on the redefinition of the gender order in society. During the Communist regime, official state ideology stressed gender equality and women's liberation. In practice, however, these assumptions were mostly declaratory. The representation of women in Communist party politics remained low, the relatively high participation of women in the labour market was not accompanied by equal pay, nor was there a redefinition of traditional gender roles in the domestic sphere. As a result, many women's lives were marked by exploitation in the workplace and at home: the classic double burden (Fidelis 2004: 314; Fuszara 2005: 89; Sawa-Czajka 1996: 104). In addition, traditional gender roles had been tightly incorporated into the Polish national project, so when the Communist regime sought to redefine or reshape traditional gender identities its efforts were perceived as a threat to Polishness.⁴ Embracing traditional gender identities was perceived as a cultural resource for both resistance against the imposed regime and survival of the nation. It appeared that the socialist state, by challenging the traditional gender regime, was paradoxically reinforcing it (Watson 1993: 472).

After the fall of communism, a qualitative change became visible in the nature of patriarchy and power in Central and Eastern Europe. Before 1989, both women and men were excluded from power, or, put another way, fully shared in the 'power of the powerless'. In the new emerging democracies the distribution of power, new rights and new social power took place in a strictly gendered way, with women

³ A slogan of The National Women's Information Center Ośka.

⁴ The expression of the role of women in the dominant nationalistic discourse is the model of the 'Matka Polka' (Mother Pole). It was constructed in the 19th century and then further developed by the romantic visions, imposing on women the duty to sacrifice for the homeland and family. Initially, this kind of vision dominated among the upper class (landowners and intelligentsia), but it was further promoted by the state and the Catholic Church during the inter-war period as the ideal for women of all social strata (Fidelis 2004: 309). Women's presence in the public sphere was accepted only under extraordinary conditions – when men were absent fighting for the homeland. Upon their return women were expected to return to their traditional gender roles.

excluded from political power and the public sphere (Watson 1993: 473). The democratic transformations were accompanied by the reinforcement of traditional gender roles, sentimentalisation of home and family, and a strong backlash against feminism and women's emancipation, perceived as remnants of the previous, then discredited, system. This profound redefinition of gender roles occurring after 1989 is described by Moghadam as the women-in-the-family model of revolution⁵ that:

excludes or marginalises women from definitions and constructions of independence, liberation and liberty. It frequently constructs ideological linkage between patriarchal values, nationalism, and the religious order. It assigns women the role of wife and mother, and associates women not only with family but with tradition, culture and religion.

(Moghadam 1995: 336)

This point is put more forcibly by Watson (1993: 485), who argues that changes in gender relations and the degradation of feminine identity that took place in Poland (and in other countries of Central and Eastern Europe) at the beginning of the 1990s constituted 'a visible measure of the masculinism at the heart of Western democracy'.

The exclusion of women from political and public life in Poland after 1989 was responded to by the political mobilisation of women. Various women's organisations emerged at that time, some with the aim of enhancing descriptive and substantive representation and advocating the introduction of women-friendly policies. Numerous initiatives undertaken by women's organisations in coalition with female politicians sought to include women into the new democratic system and into the processes of decision-making. Women's organisations protested when the anti-abortion law was introduced without taking into account the views of those most affected by the new regulations, women. Women's non-governmental organisations (NGOs), working alongside female politicians, prepared and proposed drafts of acts on equality submitted to parliament in 1996,

⁵ She contrasts this with the 'women's emancipation model of revolution' (e.g. Bolshevik revolution, Kemalism in Turkey) in which women's equality is an essential part of the revolution.

1997, 1998 and 2004, without success. Furthermore, in response to the small number of women in the Sejm (Lower Chamber of the Polish Parliament) and Senate, the Pre-Election Polish Women's Coalition was founded by women's organisations with the aim of supporting women candidates for parliament and local authorities. The activities of the Coalition aimed to strengthen the representation of women at all levels. The increased number of women in the Sejm and Senate – up to 20 per cent and 23 per cent respectively for the 2001 round – was to a large extent a result of the Coalition's activities (Nowosielska 2004).

Poland's accession to the EU in 2004 was another significant factor contributing considerably to transformations in the institutional and political character of Polish democracy. The perception of the accession process differed among various strata of society, from strong Euro-enthusiasts to devoted Eurosceptics. However, the negotiations were overshadowed by a considerable level of uncertainty about the outcome of the Polish referendum (Kemmerling 2008: 285). Among Eurosceptics, the fear, fuelled by the Catholic Church, of assumed European threats, i.e., secularism, support for euthanasia, same-sex marriages and the destruction of family, constructed the dominant narrative. As a result, politicians from across the spectrum, under pressure from the Catholic Church, negotiated a guarantee from the EU that Poland's accession would not limit the right of the state to regulate questions of moral significance and those related to the protection of human life.⁶ In the opinion of some critics, this constituted and legitimised the state's negligence of women's rights and its resistance to the national implementation of the EU gender provisions (Dunin 2004).⁷

Women's activists perceived the EU accession as crucial for transforming Poland's institutionalised gender regimes and as an opportunity to introduce some measure of gender equality into

⁶ See: 'Declaration by the Government of the Republic of Poland concerning public morality', available at: <http://eur-lex.europa.eu/en/treaties/dat/12003T/htm/L2003236EN.095700.htm>. (Accessed 10 March 2010).

⁷ Agnieszka Graff, a well-known feminist intellectual, commented bitterly at the time that gender discrimination could be accepted by the EU as a matter of local colour: 'the French have their cheeses, the Brits their Queen and the Poles have their discrimination against women' (Graff 2001: 17).

Polish political and public life. They believed that the act of joining the EU would impose on the Polish state a need to adjust national laws to the EU's gender-mainstreaming norms and standards (Matynia 2003: 503). However, women's organisations had already become disillusioned during the negotiation process as in their views gender issues were not taken seriously (Mizielińska 2008: 133). This disenchantment did not prevent them from using the EU as a tool for putting pressure on the government, politicians or local authorities to support women's interests (Mizielińska 2008: 135). They also viewed the EU as an alternative route to implementing gender equality at home (Mizielińska 2008: 138).⁸

The EU's structures became new political actors in the region, a provider of legal order and a new space for transnational cooperation between women's organisations (Regulska 2009). A clear example was the inclusion of the Polish Women's Lobby, the umbrella organisation for Polish NGOs, in the European Women's Lobby,⁹ and its cooperation with women's organisations from other EU countries (Grabowska and Regulska 2008: 209). Participation in these wider feminist networks, however, did not diminish women's distrust of government. As one respondent stressed, 'the EU is the only wider organisation to which we belong which we can rely on in our activities critical of the government' (Interview 1). At the same time she acknowledged the economic imperative of the EU and that its support for gender equality is driven by economic rather than equality principles.

⁸ Examples are letters of protest sent by women's organisations on various occasions when they felt that the government was remaining indifferent to issues related to gender equality. These were letters and appeals sent to the European Parliament and Anna Diamantopoulou, the EU commissioner for labour and social policy (2002); to the Council of Europe and Women's Rights and Gender Equality Committee of the European Parliament (2008); to the Parliamentary Assembly of the Council of Europe (2008); to the European Commission DG Employment, Social Affairs and Equal Opportunities (2009).

⁹ The European Women's Lobby (EWL) works mainly with the institutions of the EU (the European Parliament, the European Commission and the EU Council of Ministers) and is the only lobbying organisation representing European women's interests at the level of the EU. See: <<http://www.womenlobby.org/site/hp.asp?langue=EN>> (Accessed 1 January 2010).

Gender equality in Poland: Institutions and actors

In the context of Poland's accession to the EU, it is interesting to examine the extent to which the integration process has influenced the institutional architecture of the state on gender equality. Given the well documented significance of femocrats and female politicians in lobbying for and implementing gender equality policies (Squires 2007) it is instructive to explore their role in the Polish context.

At the governmental level the pressure from the EU (and from the women's organisations) during accession, resulted in the introduction by a left-wing government under Leszek Miller of the Plenipotentiary for Equal Status of Women and Men (*Pełnomocnik ds. Równego Statusu Kobiet i Mężczyzn*) bureau in 2001. The office – accorded ministerial rank – was affiliated to the Prime Minister Office¹⁰. It was tasked with monitoring and shaping Polish government policies on the equal status of women and men. Additionally, it was to be responsible for the creation of a new, independent government office with a wider remit, which would deal with the prevention of discrimination due to race, ethnicity, religion and beliefs, age and sexual orientation¹¹.

This Plenipotentiary office was disbanded in 2005 by the conservative government of Kazimierz Marcinkiewicz. Its responsibilities were handed over to the Ministry of Labour and Social Policy where the Department for Women, Family and Prevention of Discrimination (*Departament do Spraw Kobiet, Rodziny i Przeciwdziałania Dyskryminacji*, hereafter the DWFCD) was established in January 2006. This new department became responsible for the government's gender equality policy. Some powers of the former Plenipotentiary were transferred to Joanna Kluzik-Rostkowska, junior minister in the Ministry of Labour and Social Policy. Other aspects of the remit were assigned to the Ministry of Foreign Affairs, the Ministry of Education and the Ministry of Health (Rutkowska 2008: 92). In March 2008, Donald Tusk, prime minister of the new centre-right government, reinstated the Office of Plenipotentiary appointing Ewa Radziszewska to the position. The name was modified to Government Plenipotentiary for Equal Treatment (*Pełnomocnik Rządu do Spraw Równego Traktowania*)

¹⁰ The first minister was Izabela Jaruga-Nowacka and the second Magdalena Środa.

¹¹ Rozporządzenie Rady Ministrów z dn. 25 czerwca 2002 r. w sprawie Pełnomocnika Rządu do Spraw Równego Statusu Kobiet i Mężczyzn. (Dz. U. z dnia 1 lipca 2002 r.), <<http://www.abc.com.pl/serwis/du/2002/0849.htm>> (Accessed 14 April 2010).

so as to reflect the wider scope of the new office. In winter 2009 the Department for Women, Family and Prevention of Discrimination was dissolved.¹² On the website of the Ministry of Labour and Social Policy, where the Department was located, the information and contact details of the Department disappeared, but there was no information about its closure, no explanation as to why the Department disappeared nor which body had overtaken its former responsibilities. According to the media, some of the responsibilities of this Department were given to the Department of Economic Analyses and Forecasts (*Departament Analiz Ekonomicznych i Prognoz*) in the Ministry of Labour and Social Policy.¹³ Most of them were transposed to the office of Ewa Radziszewska, current Government Plenipotentiary for Equal Treatment (Monokos 2010).

Yet another form of implementation of the gender equality principle was the Sejm (Parliamentary) Commission for the Equal Status of Women and Men (*Komisja Równego Statusu Kobiet i Mężczyzn*). This body existed from April to October 2005, when it was transformed, under the new right-wing government led by the Law and Justice party (*Prawo i Sprawiedliwość*), into the Sejm Commission for Family and Women's Rights (*Sejmowa Komisja Rodziny i Praw Kobiet*), dissolved in 2007. The responsibilities of the former commission involved: 'dealing with issues resulting from the constitutional principle of equal rights of women and men, including providing equal opportunities for both sexes in the political, economic and social life of the country' (Rutkowska 2008: 93). The role of the latter commission was primarily focused on the family. It was to concentrate on 'issues resulting directly from the functioning of the

¹² I learned about this during a telephone conversation with an employee of the Ministry in January 2010, while I was trying to contact the Department in order to gather further information on the work on the act aiming to implement the Goods and Services Directive. Nobody was able to inform me where I could find information on the work of the Department related to the Directive in question and how to access this information. I was redirected to the office of the Plenipotentiary, from which, after a month and a half, I received the information that they did not have the requested documents (telephone communication with the workers of the Ministry of Labour and Social Policy, a former worker of the Department and email communication with the Head of the Office of the Government Plenipotentiary for Equal Treatment).

¹³ This seems to be confirmed by their recent project on gender mainstreaming as a tool for change in the labour market, see: <<http://analizy.mpips.gov.pl/>>. (Accessed 1 July 2011).

family, fulfilment of its roles and aims'.¹⁴ Additionally, the commission was supposed to suggest legal regulations to protect women's rights, their equal opportunities in professional and social life and also deal with issues related to the constitutional provision of equality between men and women. During the 2007-2011 term of the Sejm the issues related to gender equality were included in the responsibilities of the Social Policy and Family Committee (*Komisja Polityki Społecznej i Rodziny*) whose main focus is social policy.¹⁵

This fluidity of institutions responsible for gender equality policies and subordination of women's issues to family or to more general social policy issues may be perceived as proof of the reluctance or negligence of the recent governments to attend to gender equality. This observation seems to find reflection in various reports prepared by women's NGOs pointing to the failure of government to implement gender mainstreaming policies in the Polish context. Although the activities of the first two Plenipotentiaries were evaluated positively (they closely cooperated with women's NGOs and their activities were aimed at strengthening women's position in social, economic and private life), the initiatives of the DWFC during its existence and current Plenipotentiary Radziszewska (appointed in March 2008) have been seen in a much more negative light. Critics stress the lack of cohesion and effectiveness of their activities. This may partly be due to a lack of clear division of responsibilities (at the time when the DWFC was still functioning), but may also be a result of placing a heavier emphasis on the family rather than on women and gender equality issues (especially in the activities of the Department).¹⁶ For this reason, the activities of the Plenipotentiary Radziszewska came in for particular criticism from

¹⁴ The detailed record of activities of the Commission can be found at: <<http://orka.sejm.gov.pl/SQL.nsf/pracekom5?OpenAgent&ROD>>. (Accessed 10 February 2010).

¹⁵ Details about its work can be found at: <<http://orka.sejm.gov.pl/SQL.nsf/pracekom6?OpenAgent&PSR>>. (Accessed 10 March 2010).

¹⁶ For example, the main activities of the Department under the head of Kluzik-Rostkowska (2005-2007) focused on reconciliation of family and professional life. In the opinion of one of my respondents this shows a much more limiting approach – rather than focusing on the equal status of all women as citizens, the policies aimed at strengthening status of a particular group of women, i.e. mothers (Interview 1).

women's organisations (Kicińska and Leszczyńska 2008: 71-78; Kicińska 2008a: 80-84).¹⁷

A further noteworthy issue is the role of female politicians in the promotion of gender equality policies. As early as 1991, the Parliamentary Group of Women (*Parlamentarna Grupa Kobiet*), consisting of female parliamentarians of various political persuasions, was established in the Polish Parliament, and continues to meet. Formed at the beginning of each parliamentary term, the group works on the assumption that it expresses and coordinates women's interests (Kicińska 2008b: 21). It played an important role in promoting women's interests and lobbying for gender equality policies, and was particularly active in the 1990s.¹⁸ Some of its activities included organising various conferences dealing with issues of concern to women, e.g. on equality, violence against women and strengthening the political representation of women. Additionally, members of the group closely cooperated with women's organisations. The group's role as a representative of women's interests was weakened during the 2005-2007 term due to the political climate, which, under a right-wing government, was hostile towards the issue of women's rights. The group that functions under the current Donald Tusk's administration is also strongly criticised by women's organisations for a lack of interest in women's issues, avoidance of controversial topics (e.g. reproductive rights), a lack of a clear position on acts and changes concerning women proposed to the Parliament, and, above all, for ceasing to be an arena for exchanging ideas and discussions on women's issues (Kicińska 2008b: 35).

In the light of the above description of the actors and institutions responsible for the creation and implementation of gender equality policies, the question about the representation of women's interests in Polish politics arises. Since the 1990s the more or less neglectful

¹⁷ Radziszewska has frequently stressed in her public statements that she does not represent the interests of women only and that she will not be focusing exclusively on issues related to equality between men and women. This issue was also mentioned by my interviewee (Interview 3).

¹⁸ The inclusion of the provision on equality of men and women in the Polish Constitution was the outcome of lobbying by this group, they also, along with women's activists, prepared two drafts of a bill on the equal status of women and men, the latter was rejected in 1996, 1997, 1998 and 2005.

attitude of the governments to gender equality principles has been visible. Women's interests have been therefore mostly represented and lobbied on by women's organisations, often in cooperation with the Parliamentary Group of Women (especially in the 1990s) and with the first two Plenipotentiaries. Under the last two right-wing governments (2005-2007 and 2007-2011 terms), women's organisations have complained of the lack of support given by female politicians and femocrats to women's interests in general, and the subordination of women's issues to issues related to the family or the labour market (Interviews 1, 2, 3, 4).

(Non-)implementation of the Goods and Services Directive: A brief overview

Work on preparing the measures to fully transpose the EU Directives¹⁹ on equality, including the Goods and Services Directive, started in the second half of 2006. Initially, the work took place in the DWFCD in the Ministry of Labour and Social Policy. The first draft, entitled *Act on Equal Treatment (Ustawa o równym traktowaniu)*,²⁰ proposing necessary regulations and administrative procedures, was presented on 2 April 2007. According to its authors, this act intended to introduce one complex set of regulations covering all aspects of equality policy and administrative provisions related to it. It distinguished direct and indirect discrimination based on 'gender, race, ethnicity, nationality, beliefs or convictions, political views, disability, age or sexual orientation, marital and family status or on any other basis' in all aspects of public life. However, the spheres of private and family life were excluded from the provisions of this act. It also proposed the introduction of a new administrative body²¹ responsible for implementation, monitoring and execution of records of the proposed act.

Since 2007, this draft act has gone through various consultations with governmental institutions and organisations representing parties

¹⁹ The bill, passed in December 2010, implemented the following Directives: 86/613/EEC (11.12.1986), 2000/43/EC (29. 06. 2000), 2000/78/EC (27 November 2000), 2004/113/EC (13. 12. 2004), 2006/54/EC (5. 07. 2006).

²⁰ See <<http://www.mpips.gov.pl/bip/download/USTAWA3.pdf>>. (Accessed 15 March 2010).

²¹ In various versions of the proposed act this new institution was called either a governmental Plenipotentiary on Equal Treatment or Body Responsible for Equal Treatment.

affected by its provisions (including, among others, women's and Lesbians, Gays, Bisexuals and Transsexuals, LGBT organisations). In the course of the process the name of the act has also been modified, and from September 2008 was called the Act on Implementation of Some of the EU Regulations on Equal Treatment (*Ustawa w sprawie wdrożenia niektórych przepisów Unii Europejskiej w zakresie równego traktowania*).

Various governmental institutions were involved in the consultation process on the new act. Particularly vocal in proposing amendments to the various versions of acts, especially in 2009, were the Government Plenipotentiary for Equal Legal Status (Ewa Radziszewska) and the Ombudsman (then Janusz Kochanowski). In the course of consultations, they frequently questioned the need for establishing a completely new equal treatment institution as proposed in the new act. Both pointed out that the lack of a clear division of responsibilities and relations between the designated new institution and their offices was a major problem. As a solution, the Ombudsman proposed an extension and redefinition of his duties so as to accommodate the responsibilities designated for the new plenipotentiary. In fact this solution was partially adopted in the August 2009 version of the act. Some of the competences in the field of monitoring and execution of the equality policy were added to the responsibilities of Ombudsman and others designated to the new Plenipotentiary for Equal Treatment (*Pełnomocnik do Spraw Równego Traktowania*). Even then, the division of competences remained unclear. Furthermore, it was not obvious if the new Plenipotentiary would replace the existing Government Plenipotentiary for Equal Legal Status or whether it would be an additional institution.

The proposed regulations were also criticised by the Legislative Council of the Ministry (*Rada Legislacyjna przy Radzie Ministrów*)²². The Council pointed to the vagueness and complexity of the proposed regulations aiming to transpose a number of Directives in one law. More generally, the Council questioned the need to introduce the new law. In the Council's opinion most issues addressed by the Directives, which the new act aimed to transpose, had already been partly integrated into the Polish legal system.

²² Responsible for giving opinions and advising on new legal acts and evaluating its social impact and its compatibility with the Polish constitution.

Consequently, it was suggested that work on the existing laws be continued instead of introducing new ones.

Women's organisations, despite their active involvement in the process of introducing gender equality provisions in Poland, did not play a strong part in the drafting of the new act. Nor were they consulted by government on its initial provisions. Representatives of women's organisations frequently pointed out that DWFCD officials were not interested in consulting with them and complained that they were not being informed about the progress of the work. Only when the first draft was prepared did the DWFCD send it for consultations to various organisations including a handful of women's organisations.²³ These were very critical of the proposed act. Their main objection was to the proposal that the new body responsible for implementation and execution of equality law and for monitoring its accomplishment would be a governmental body. Representatives of these organisations stressed that such an idea was in contradiction to European equality legislation. They argued that this body needed to be impartial and independent of the government and that this was essential to ensuring full implementation of European equality law and fulfilment of the body's principles. Secondly, women's organisations pointed out that there were no provisions for financial resources to be allocated to the new body. Thus, fulfilment of its responsibilities would be impossible. Thirdly, the draft law did not provide an enforcement function – a further shortcoming, in their view. The new plenipotentiary or new body would not be able to offer legal help and legal representation to people suffering from discrimination. Fourthly, these organisations pointed out that this new body should be appointed in consultation with equality organisations and those representing groups particularly exposed to discrimination. Finally, representatives of women's NGOs also pointed out that by combining in one act the issue of gender equality with minority issues and other types of

²³ The organisations were picked by the DWFCD and were from different fields of activities e.g. human rights, gays and lesbians, representatives of unions as well as employers, governmental bodies and religious organisations. There were also a few women's organisations: the Centre for Women's Rights (*Centrum Praw Kobiet*), "eFKa" Women's Foundation (*Fundacja Kobieta "eFKa"*), Polish Federation for Women and Family Planning (*Federacja na Rzecz Kobiet i Planowania Rodziny*) and Foundation for Women's Issues "I am woman" (Forum 50+) (*Fundacja na Rzecz Kobiet "Ja Kobieta" (Forum 50+)*).

discrimination, its significance as a piece of gender equality legislation was diminished.

As a result of the series of criticisms above, especially those from governmental bodies, the act was repeatedly sent back to the DWFCD for further amendments. As a consequence, several versions of the draft were created. The last version was prepared in October 2009. The important change concerned the body responsible for the implementation of equality policies – in this draft these provisions were given to the Ombudsman, not to the Plenipotentiary for Equal Treatment. The draft was sent to the Council of Ministers, where it was due to be discussed in greater detail, with approval to be sent to the Sejm afterwards. This approval was not given and in January 2010 the Council of Ministers decided that further work on the act would be carried out by the Governmental Plenipotentiary for Equal Treatment – Ewa Radziszewska.

Meanwhile, on 29 April 2010, yet another draft of was launched by the Ministry of Labour and Social Policy, with a slightly amended name – *The Act on Implementation of Some of the EU Regulations on Equal Treatment in Employment and Labour* (*Ustawa o wdrożeniu niektórych przepisów Unii Europejskiej w zakresie równego traktowania w zatrudnieniu i pracy*). It was intended to transpose a more limited number of Directives, namely Directives 2000/43/EC (29 June 2000), 2000/78/EC (27 November 2000), 2006/54/EC (05 July 2006) and was a reaction to the reasoned opinion sent to Poland by the European Commission on 28 January 2010 for incorrectly implementing the provisions of Directive 2000/78/EC²⁴. The accompanying explanatory memorandum sets out the rationale for this draft:

The drafted act complements the transposition of so called ‘Equality Directives’ only in so far as it affects the responsibilities of the Minister of Labour and Social Policy. The decision to prepare the draft was made because of the prolonged work on the draft act providing for the implementation of some regulations on equal treatment (the so-

²⁴ At the beginning of May 2010 the Commission referred Poland to the EU Court of Justice for incorrectly implementing EU rules prohibiting discrimination based on race or ethnic origin (Race Directive), see: <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/531&format=HTML&aged=0&language=EN&guiLanguage=en>. (Accessed 27 May 2010).

called horizontal act), the coordination of which is currently beyond the remit of the Minister of Labour and Social Policy.

(Uzasadnienie 2010: 2)

The draft bill proposed by the Ministry of Labour and Social Policy was not further discussed, and, on 21 May 2010, yet another draft version of the *Act on Implementation of some of the EU Regulations on Equal Treatment* was issued, but this time it was prepared by the Plenipotentiary. The draft was sent for consultation to governmental bodies and a broad range of social partners (including women's organisations).²⁵ This version aimed to implement five Directives, including the Directive on Goods and Services. It proposed that responsibility for monitoring equality and preventing discrimination should be shared between the existing Governmental Plenipotentiary and the Ombudsman. It envisaged that the former would monitor governmental activities as well as prepare a policy assessment to make sure that the existing and proposed acts are in accordance with national and international laws on equality. It was proposed that the Ombudsman would deal with particular issues and complaints.²⁶

The draft was accepted by the Council of Ministers on August 31, 2010 and sent to the Sejm. The first public discussion on its contents took place in October 2010 in the joint Committees of Social Policy and Family and Justice and Human Rights (*Komisja Sprawiedliwości i Praw Człowieka*). The members of a few NGOs took part in the meetings of the committees, i.e. the Helsinki Foundation for Human Rights (*Helsińska Fundacja Praw Człowieka*), Campaign Against

²⁵ Among the organisations which received draft for the consultation were six women's organisations (Centre for Women's Rights, Women's Foundation 'eFKA', Crisis Intervention Society (*Towarzystwo Interwencji Kryzysowej*), 'La Strada' Foundation Against Trafficking in Persons and Slavery (*'La Strada' Fundacja Przeciwko Handlowi Ludźmi i Niewolnictwu*), Foundation for Women's Issues 'I am woman' (Forum 50+) and Feminioteka). The draft was also sent to the Polish Society of Anti-Discrimination Law (*Towarzystwo Prawa Antydyskryminacyjnego*) representing an informal coalition of 42 nongovernmental organisations - Coalition for Equal Opportunities (*Koalicja na Rzecz Równych Szans*) established in autumn 2009. In this group there were also 12 women's organisations, (including the Foundation for Women's Issues 'I am woman' (Forum 50+) and Feminioteka. See: <http://www.ptpa.org.pl/index.php?option=com_content&view=article&id=116&Itemid=65>. (Accessed 2 July 2011).

²⁶ See: <http://bip.kprm.gov.pl/g2/2010_05/2702_fileot.pdf>. (Accessed 26 May 2010).

Homophobia (*Kampania przeciw Homofobii*) and Open Republic – Association against Anti-Semitism and Xenophobia (*"Otwarta Rzeczpospolita", Stowarzyszenie przeciw Antysemityzmowi i Ksenofobii*), and also a representative of the Polish Society of Anti-Discrimination Law on behalf of the Coalition for Equal Opportunities. In the discussion the draft bill was strongly criticized by left-wing parliamentarians and representatives of NGOs. They pointed to two major weaknesses of the draft bill – the failure to create a body responsible for dealing with issues of discrimination independent from government and with sufficient financial resources to carry out its duties. They also pointed to the closed list of groups in relation to which the anti-discriminatory law was supposed to apply. Additionally, they demanded a public hearing on the draft bill to allow various social actors to express their opinions. A special sub-committee further refined the draft and, after presenting the result of its work (with small, mostly editorial changes and voting out the propositions suggested during the first session of the committee), the draft was accepted by the Committee at its 26 October meeting. It was then sent to the Sejm, where it was passed on 29 October, without any further discussions. After that the draft bill was sent to the Senat where a few small, again mostly editorial, amendments were suggested. After that the draft was again discussed and accepted in the Joint Committee. The bill was finally passed by the Sejm on 3 December, and signed by the President on 22 December. On 14 March 2011 the European Commission dropped the case against Poland for lack of transposition of the Goods and Services Directive, thereby accepting the new anti-discriminatory law as being in line with the Directive.²⁷

Taking into account the long and troublesome history of the drafts of acts aiming to implement the equality Directives into the Polish legal system, the question arises as to the reasons for such reluctance. There are a few possible explanations. Firstly, both current and previous governments do not put issues related to equality high on

²⁷ The European Commission closed also the case concerning lack of conformity of the Polish law with EU rules prohibiting race and ethnic origin discrimination (Race Directive) as well as ended infringement process against Poland for non-communication of all measures transposing the Recast Directive into Polish law. The new law successfully transposed the EU rules included in both Directives, see: <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/311&format=HTML&aged=0&language=EN&guiLanguage=en>.

their agenda. In the context of gender equality it was particularly visible in the elimination or transformation of the bodies responsible for promoting and monitoring gender equality issues. Support for such principles would be characteristic for left-wing, oppositional parties, and frequently found expression in their parliamentary questions and the pressure put on the government.²⁸ This criticism is also frequently raised by the representatives of various NGOs who monitor or campaign on equality issues in Poland as well as by my all interviewees. Secondly, the change of government in 2007, after the electoral victory of the Civic Platform, had a disturbing effect on the functioning of the DWFCD which was responsible for preparing the drafts. This was mostly due to the replacement of the various officials engaged in framing the draft legislation. Thirdly, the absence of a clear division of responsibilities between the two bodies dealing with gender discrimination i.e. DWFCD and Plenipotentiary influenced the dynamics and elaboration of their work on the act, but also disturbed the consultation processes on this matter. My interviewees reported an open conflict between the two bodies and a constant struggle over domination (Interviews 1, 2, 3). Eleonora Zielińska points out, that difficulties arose from the complexity of the proposed act – it aimed to transpose the provisions various anti-discriminatory Directives and therefore would have an impact on some of the already existing laws. Ultimately she explains that failure to legislate came from traditional assumptions about gender roles and an absence of a sensitivity to gender issues and (Zielińska 2009: 80).

Analysis and discussion

In order to reconstruct the chain of events making up the process under investigation a vast amount of information was collected. The data was gathered mostly from documentary sources. These were materials available from the websites of governmental institutions,²⁹ organisations consulted in the drafting process³⁰, and from

²⁸ An illustration can be provided by parliamentary questions by Janusz Krason, see <<http://orka2.sejm.gov.pl/IZ6.nsf/main/665141FF>> and by Izabela Jaruga-Nowacka, see <<http://orka2.sejm.gov.pl/IZ6.nsf>>, or <<http://orka2.sejm.gov.pl/IZ6.nsf>> among others (accessed 20 May 2010).

²⁹ Particularly useful were the websites of the Ministry of Labour and Social Policy, the Ombudsman and the Chancellery of the Prime Minister.

³⁰ The website of the following NGOs was particularly useful: Feminoteka <http://www.feminoteka.pl/viewpage.php?page_id=10>, Campaign Against Homophobia <<http://world.kph.org.pl/?lang=en>>, Polish Society of Anti-

newspapers.³¹ Additionally, data were collected from direct communication (either face to face, by phone or via emails) with selected actors – representatives of women's and gay organisations involved in the consultation process and employees of the DWFC in the Ministry of Labour and Social Policy – the body responsible for constructing the act.³² The analytical part was carried out by applying the set of indicators of gender democracy developed by Galligan and Clavero (2008, 2009) to the collected materials.

A gender-sensitive reading of deliberative democracy requires that a political decision fulfils the principles of inclusion, accountability and recognition (Galligan 2011; Galligan and Clavero 2008, 2009). By operationalising these principles, Galligan and Clavero (2009) constructed a set of indicators, in the form of questions, which can be used as a yardstick against which assessment of gender democracy may be carried out. Not all of the indicators will be used in this analysis, as the nature of the collected data does not allow all the questions relating to these four principles to be answered.³³ However, there will be at least some indicators covered in the case of each of the principles of gender democracy.

Inclusion

In my analysis I was mostly interested in the question of to what extent women's representatives participated in the deliberative process surrounding the Goods and Services Directive transposition. I was also interested to see if women's interests and perspectives were taken into consideration and treated on equal terms with the interests of other actors involved.

Discrimination

Law

<http://ptpa.org.pl/index.php?option=com_content&view=article&id=57&Itemid=63> (accessed 10 January 2010).

³¹ The articles published in three dailies representing different political views were analysed, namely *Gazeta Wyborcza*, *Rzeczpospolita* and *Dziennik*.

³² Detailed information is provided in the appendix.

³³ In the latest version of their paper Galligan and Clavero (2009: 141) distinguish 21 indicators for assessing gender democracy. Furthermore, they differentiate two types of indicators for each principle. The first type, minimum indicators, refers to institutional arrangements, and the second type, additional indicators, refers to real deliberative practices.

To what extent did representatives of women's interests participate in the processes under examination?

The level of involvement of women's organisations in the process of consulting the draft of the new act was not particularly high at the beginning of the process. The DWFCD, responsible for preparing subsequent drafts of the equality act, in the opinions of various women's NGOs representatives, was not interested in using the expert knowledge and experience of civil society organisations which dealt with equality issues and which had previous experience in drafting proposals for an equality law. The first draft bill was prepared only by DWFCD officials without consulting women's NGOs. One of my interviewees made it clear that this was a serious obstacle in the process of constructing an effective equality law as required by EU regulations. She pointed out that it is easier to include certain interests and solutions when you are included from the beginning, an opportunity women's NGOs did not enjoy (Interview 1). Similar points were made by other interviewees.

Only after the first draft bill was ready, were social actors invited for consultations. The proposed act was supposed to deal with various forms of discrimination e.g. against religious beliefs and convictions, ethnicity, nationality, age, sexual orientation, gender and marital status, and therefore organisations dealing with a wide scope of issues were invited into consultations on the proposed act, including a small number of women's organisations. Initially the total number of organisations was small. With the subsequent draft bills their numbers grew to approximately thirty-five, but the number of women's organisations remained low. However, when the Coalition for Equal Opportunities was established, many more women's groups were consulted.

Some other organisations were invited by DWFCD officials to express their opinions either on the entire draft or on specific parts of it. However, their participation in the initial consultations on the draft of the bill was not mentioned in the official documents of the DWFCD. This was the case with PSF Women's Centre as well as with the Polish Society of Anti-Discrimination Law.

Overall, my interviewees stressed the reluctance on the side of governmental bodies to conduct consultations or to cooperate with civil society partners (Interviews 1, 2, 3, 4). Also, representatives of

NGOs taking part in consultations (i.e. representatives of Campaign Against Homophobia and the Polish Society of Anti-Discrimination Law) often expressed their disenchantment with the cooperation with governmental bodies on the creation of the new anti-discriminatory law.

How accessible were deliberative sites to women's representatives seeking to influence decision-making?

The collected data show that access to deliberative sites by women's representatives was quite limited. As already mentioned, women's organisations did not take part in the process of constructing the first draft of the act transposing the regulations of the Goods and Services Directive. Limited consultations took place when the first draft was ready and some of the women's organisations were invited to express their opinion (e.g. Centre of Women's Rights, Women's Foundation eFKa, Polish Federation for Women and Family Planning). Women's organisations did not have access to the meetings of the DWFCD and were not informed about the progress of the draft. The department did not arrange consultations or discussions in order to debate the form and scope of the proposed act. Organisations usually communicated with the department by means of letters containing comments and suggestions on the draft bill. This strategy was also employed by organisations that were not directly invited to express their opinions – and often used by the Polish Society of Anti-Discrimination Law in the early stages of their engagement with this law.

Interestingly, women's NGOs organised alternative places for deliberation. Some meetings were arranged to discuss general issues related to the subject of equality and in particular to discuss the issues related to the proposed horizontal act aiming to introduce the equality law. Representatives of the DWFCD were invited to the meetings, and often took part in them. However, it did not result in better communication or cooperation thereafter between DWFCD and civil society actors.

Moreover, NGOs actively looked for access to the deliberative spaces. One illustration of this is provided by the example of activities undertaken by the DWFCD Advisory Committee. This was a body established in order to advise the DWFCD during the European Year of Equal Opportunities in 2007. Members of the Committee were not

invited to have an input into the first draft, issued in April 2007. In response, the organisations constituting this Committee sent a letter to Minister Jolanta Fedak offering their expert knowledge in the field of equality issues and suggesting an extension of their mandate so as to participate in the process of drafting a new act with the Department.³⁴ The Minister ignored their offer of support and the Committee was dissolved when the European Year of Equal Opportunities came to an end (Interview 1).³⁵ Another example would be the creation of the Coalition for Equal Opportunities, consisting of about 42 organisations dealing with equality issues, coordinated by the Polish Society of Anti-Discrimination Law. The coalition was established in autumn 2009 as an answer to the insufficient and incomplete work of the government on preparation of the equality act. It aimed to put more pressure on the government, hoping that the voice of the coalition would be more difficult to ignore (Interview 5). From the time of its establishment representatives of the Coalition took an active part in monitoring the preparation of the act and in the consultation process.

In order to put pressure on the Polish government to accelerate the work being done on the new act and shift more attention to equality issues, women's and other organisations turned to the EU. In April 2008, the Federation of Polish Women's Lobbies organised a meeting with Vladimír Špidla, then Commissioner for Employment, Social Affairs and Equal Opportunities. Representatives of women's organisations pointed to the lack of reaction from the Polish government to their concerns regarding the equality policy. They also requested that the Commissioner monitor and enforce transposition of Directives and EU law on equal treatment and prevention of violence against women.³⁶ Almost a year later, in January 2009 the Federation of Polish Women's Lobbies sent a letter to the

³⁴ The Committee comprised of 14 organisations representing human rights, workers unions, employers, gay and lesbian rights and women's rights. Altogether there were seven women's organisations – Feminioteka, PSF Women's Centre/Polish Feminist Association, Women's Foundation 'eFKA', Network of East-West Women/NEWW-Polska (*Stowarzyszenie Współpracy Kobiet NEWW – Polska*), Democratic Union of Women (*Demokratyczna Unia Kobiet*) and Federation of Polish Women's Lobby (*Federacja Polskie Lobby Kobiet*).

³⁵ See also 'Letter of the Advisory Committee' sent to the Minister of Labour and Social Policy, available at: <<http://wiadomosci.ngo.pl/wiadomosci/331629.html>>. (Accessed 10 October 2009).

³⁶ See: <<http://www.dukrk.pl/news.php?readmore=81>>.

Commissioner expressing its concern at the government's negligence in the field of gender equality policy. It pointed out that its constituent organisations were particularly critical of the lack of transposition of the equality Directives as well as the lack of an independent body responsible for monitoring and enforcement of the equality policies. In their opinion neither the Governmental Plenipotentiary (re-established in March 2008) nor the DWFCD met that criterion.³⁷

A similar topic was the subject of the letter signed by 35 women's organisations sent in February 2009 to the DE Employment, Social Affairs and Equal Opportunities of the European Commission. The signatories expressed their concern over the lack of government progress in the introduction of the equality law and implementation of the EU Directives (including the Goods and Services Directive).³⁸ In response to this letter, Belinda Pyke, Director of DE Employment, Social Affairs and Equal Opportunities, underlined the Commission's concern on equality issues. She also expressed her interpretation of the provisions stemming from the Directives in question and stressed that it was an explicit requirement of the European legislation that an independent body be established to implement and monitor the equality law.³⁹

In sum, the lack of access to deliberative sites at a national level and the experience of indifference on the side of the governmental institutions encouraged women's organisations to create new sites and alliances with other social actors. It also led them to bringing in a new, supranational actor supporting their interests to put pressure on government. However, based on the collected material for this study it is difficult to assess the impact of the Commission's reaction to the deliberative discussions.

To what extent were women's Interests and perspectives included in deliberative discussions?

The examination of the drafting process, which aimed to implement, among others, the regulations of the Goods and Services Directive, shows that the level of inclusion of women's interest representatives

³⁷ See <http://dukrc.cal.pl/dokumenty/lIST_DO_SPIDLA_01_2009%20ang.pdf>.

³⁸ See: <<http://www.lambdawarszawa.org/content/view/264/1/>>.

³⁹ See: <<http://www.feminoteka.pl/news.php?readmore=4786>>.

in the process of deliberation was not high. Women's organisations were not present at the stage of preparing the first draft of the act. Neither were their comments and propositions regarding the subsequent versions of the draft taken into consideration. It may be that the problem regarding inclusion of women's interests and perspectives in the deliberative discussions stemmed from the fact that the proposed act was aiming to deal with all sorts of discriminations. Therefore, the specific issues related to gender equality were diluted and not strongly reflected in the draft. However, this is a hypothesis which cannot be fully supported by the collected data.

Based on the collected data it is difficult to tell if the interests of other groups were better represented or taken more seriously, especially as the proposed act has such a wide scope of application. From my email correspondence with a representative of a gay rights organisation, I can only say that their experience was very much in line with the experience of women's organisations. Furthermore, comparison of the subsequent versions of the act shows that, in the process of consultation, more attention was given to governmental opinions and comments than to the input from women's or LGBT organisations. For example, criticism made by women's organisations regarding the lack of an independent body responsible for implementation and execution of the equality law was not addressed and did not find expression in the amended versions of the act. Similarly, during the meeting of the Joint Committees of Social Policy and Family and Justice and Human Rights where the final draft was negotiated, the comments and suggestions from representatives of social actors were also ignored.

Did women's organisations and the public have access to information relevant to the decision-making process?

Each draft of the proposed act was made available on the website of the DWFC in the Bulletin of Public Information section (*Biuletyn Informacji Publicznej*). Each version was accompanied with a brief justification for the introduction of the proposed act. Besides availability of the subsequent drafts and their justifications there is little information readily available on the numerous drafting and

consulting processes preceding the act.⁴⁰ On the Department's website there is no information on the comments and remarks received from the organisations taking part in the process of consultations, nor is there information on whether the comments were taken into consideration. Additionally, there is no complete list in the public domain of organisations involved in the consultation process.⁴¹

Representatives of women's organisations frequently complained about the lack of information regarding the process of preparing the new act on equality and about the stage of its advancement. This is best expressed by a representative of one of the women's associations that I contacted while researching this study. She stressed that she learnt about the preparation of the new act on equality when she was browsing the internet. It was bizarre for her as she, along with representatives of other organisations and associations dealing with issues of equality, closely cooperated with the DWFCD in the Ministry of Labour and Social Policy in 2007, during the European Year of Equal Opportunities for All. This was in the same year when the first draft of the act on equality was released by the same department. However, the department did not make the information about the work taking place explicitly available to the members of the Committee (Interview 1). Another interviewee stressed that constant changes introduced to the draft were a serious constraint on the involvement of her organisation: At some point we stopped monitoring this act, because we were not able to keep up with the changes, especially as the Ministry did not made these changes available systematically (Interview 2)

⁴⁰ In order to receive more detailed information one needs to apply to the Ministry with a request for them to make particular information available to the applicant. My attempts to access such information from the Ministry were unsuccessful – my request was redirected to the office of Plenipotentiary, from which I received the information that the relevant materials are in the Ministry. During my phone conversations with the employees of the Ministry (after the department dealing with the draft bill was dissolved), nobody was able to inform me who to contact and how to access the materials.

⁴¹ For example, the Polish Society of Anti-Discrimination Law took part in the consultations from 2007. However, there is no information about this organisation included in the list of organisations involved in consultations realised by the DWFCD. There was a similar case with the PSF Women's Centre Foundation.

The data collected from the three main daily newspapers show that, generally speaking, they seldom carried information on the process, stage and content of the drafting of the new act. Naturally, more information was available at times when specific events directly related to the issue took place (e.g. conferences run by women's or LGBT organisations, or the publication of the new version of the draft). It was particularly visible when Poland was referred to the European Court of Justice (14 May 2009) for not fully implementing the Goods and Services Directive 2004/113/EC.⁴² At that time there was a noticeable intensification of discussions and a growing interest in the development of the new equality act. Greater attention was expressed by various actors; politicians were asking more questions in parliament, the ombudsman wrote to Jolanta Fedak, then Minister of Labour and Social Policy, and the minister responsible for drafting the law, to inquire about the stage of development of the act, and the printed media published more articles in the national dailies. Noticeable at that time also was the mobilisation of NGOs to organise more frequent meetings to discuss these issues and to inform the public about the stage of the drafting process.

Did women's organisations seeking influence in political decision-making make their aims, objectives, strategies and activities widely available to the public?

In the course of my research I was also interested in the extent to which women's organisations make information available to the wider public. The issue of equality is frequently covered on the websites of equality organisations (e.g. reports on equality in Poland, references to EU activities in the field of equality, information on conferences, seminars, workshops and projects in this field). Occasionally, information referring to the introduction of the equality law in Poland emerges. However, I could not find specific sections devoted to the activities of the government on the introduction of a new law. Furthermore, on the websites of the main women's organisations (Feminoteka, Centre for Women's Rights, Network of East West Women, National Women's Information Centre Ośka, Women's Foundation eFka, Federation of Polish Women's Lobby) there are no sections providing comprehensive information about the

⁴²See:

<<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/09/785&format=HTML&aged=0&language=EN&%20guiLanguage=en>>. (Accessed 10 May 2010).

equality Directives. There is usually only scarce information available on the activities of women's organisations regarding lobbying for the introduction of the new law or for including particular issues in the proposed acts. The documents and letters sent to the department during the process of consultations were not made available to the wider public on the websites of most of the women's organisations involved in the process. It seems, from the collected information, that there were various conferences and meetings for both NGOs as well as wider public addressing gender equality issues, but no information meetings for women from the wider public about the impact of the introduction of propositions made by the government organised by women's NGOs. A partial exception is the Polish Society of Anti-Discrimination Law, representing the Coalition for Equal Opportunities on whose website various documents on European equality law were available. In addition, the letters sent by the Society to various institutions regarding the implementation of the European equality law are also available. Organisations involved in the Coalition also held regular meetings to discuss the progress of works on the anti-discrimination law as well as monitor other activities of the government related to equality issues. There were also some meetings and conferences held by this organisation opened to the wider public (especially in 2009, even before the Coalition was formally established).

Were the positions of key actors involved in the process sufficiently explained by reason-giving?

The position of the DWFCD working on the drafts was explained in the preambles accompanying subsequent versions of the act. These explained the need to introduce the new regulations on equality, providing a brief overview of the existing regulations and pointing to the missing elements. Additionally, they also stress that the proposed act aims to implement the records of the European Directives on equality into the Polish legal system. In terms of justifications there is also an impact assessment section commenting on the potential influence of the proposed act on the labour market, competitiveness of the market, enterprise and the development of the regions. However, these sections are only brief commentaries and are not accompanied by any research or analysis supporting these opinions.

In the opinion of the representatives of women's organisations the justifications provided were not sufficient. They complained about

the incomprehensible language of the drafts and the lack of sufficient explanation provided by the DWFCD. Due to the highly specialist language used in drafts of the act, the proposed solutions and recommendations were difficult to understand for non-specialists without a legal background. In order to be able to better comprehend the consequences of the proposed solutions, representatives of various organisations occasionally met with those who had more expertise in the field (i.e. lawyers from the Polish Society of Anti-Discrimination Law) and discussed the proposed regulations (Interviews 1, 2, 4).

Opinions and comments sent to the DWFCD by the women's organisations differ in terms of their generality and the scope of explanation provided. This is partially because to understand the act fully, one required some level of legal expertise. In most cases women's organisations pointed out that the proposed act insufficiently transposed the records of equality Directives. Their main complaint was about the lack of an independent body responsible for execution of the new law. They also criticised the blurring of issues related directly to gender discrimination issues. However, on the DWFCD's website and in the justifications for the proposed versions of the act there is no information whether and to what extent the comments and suggestions from the organisations and bodies involved in consultations were taken into consideration.

In my discussions with the representatives of women's organisations the argument was often raised that the proposed bill was not sufficient to address the problems encountered in Poland and focuses only on the limited provisions of the Directives. However, they did not offer any proposals on what else should be included. Also the comments and opinions sent to the Ministry focused mostly on criticism of proposed regulations rather than offering or demanding new, wider regulations. The situation was slightly different when the Polish Society of Anti-Discrimination Law representing the Coalition for Equal Opportunities started to take part in the consultations. Because of their legal expertise they were more proactive in proposing changes to the draft bill.

To what extent did participants in deliberation show respect for the groups affected by the decision?

The principle of recognition requires that participants come to the discussion with an open mind. Since there are no reports or minutes from the deliberations and discussions that took place during the process of constructing the new versions of the acts, it is almost impossible to assess if the principle of recognition was respected. Difficulties also stem from the fact that the new act has a horizontal character and is supposed to implement the recommendations of a number of European Directives on equality, therefore affecting various groups (e.g. women, LGBT, ethnic and religious minorities, workers). The focus of this research was mostly on the gender dimension of the proposed act, so the collected material did not allow an assessment as to whether respect to all groups affected by the decision was shown.

As regards the wider public sphere, there seemed to be no evidence of a lack of respect and recognition for the groups affected by the proposed law. However, the topic was not discussed that often in the print media. Some negative comments appeared in the right-wing daily *Rzeczpospolita* calling the introduction of the equality law for gays and lesbians an example of imposing the values of minorities on the majority (Wildstein 2009).

Conclusion

This chapter has sought to present the findings of the analysis of the democratic quality of the legislative processes in Poland. The assessment was carried out by testing the democratic character of the transposition process relating to the Goods and Services Directive in Poland. The picture emerging from this analysis is quite negative. Generally speaking it seems that the deliberation practices associated with this process had a rather limited scope and that they barely followed the central principles of gender democracy: inclusion, accountability and recognition. Firstly, women's organisations were mostly excluded from the process of deliberation and their voices and criticisms were not taken into consideration in the legislative process. Secondly, access to information and the quality of information was rather poor. On the side of government, there was insufficient information about the progress and scope of work on implementation of European laws on equality. A similar claim may be made in the case of women's organisations – there was rather limited information

available on their websites regarding their involvement in the process of introduction of the equality law and on the more general issues of European equality law.

Research also seems to confirm that all deliberations had a somewhat limited scope and were restricted to the enclaves of specialists (e.g. NGOs dealing with equality issues or governmental bodies). There were no signs of inclusion of the wider public in discussions regarding the process of constructing the equality law, nor were those issues often present and discussed in the public sphere (i.e. mass media). Moreover, looking at the substantive involvement of women's organisations in the process of consultation, their responsive rather than active role is striking. Despite some declarations, women's organisations did not try to put pressure on or advocate introducing more specific regulations reflecting women's interests into the discussed act. Their comments and remarks seemed to concentrate more on making sure that the proposed regulations would be at least in accordance with the EU Directives. There seem to be plausible explanations for this strategy, however. Taking into account the reluctance of political elites to engage on issues of gender equality and the history of rejections of the proposed acts on equality, it would seem that women's organisations had become disillusioned and cynical regarding opportunities for cooperation with the government and for their opinions, suggestions and expertise to be taken into account. The prolonged preparation of the bill and the government's lack of interest in the opinions of civil society were likely to have contributed to this disenchantment. Furthermore, the act was introducing broad anti-discrimination issues and women's organisations, especially during the final stage of consultations, cooperated in coalition with other organisations, so the various agendas needed to be compromised.

The research on the transposition of the Goods and Services Directive into the Polish legal system allows for some reflection on the functioning of the multi-layered polity. Women's organisations frequently appealed to the national institutions, but, not having serious partners at the national level interested in the equality policy and combating gender injustice, they referred to the EU institutions in order to put pressure on the Polish government. It seems that, in light of the indifference of the national institutions and politicians, the EU is often perceived as a more relevant level of governance for

rectification of injustice and the elimination of gender inequality. The EU became – despite the ambiguous attitude of women's organisations to its actions and equality policies – a new point of reference, a new scale for solving local problems and a source of values and laws considered as crucial for a democratic system. However, analysis points to the dominance of the domestic level of politics, strongly influencing the scope and effectiveness of the implementation process. Even the interventions of the EU to the European Court of Justice seem to have not significantly changed the pace of reform. Naturally, in this context, the question occurs if this is peculiar to this specific case, where the implementation of the gender equality provisions is at stake, or if such an observation could be made more generally. However, to provide an answer to this question, comparative research on the implementation of other Directives would need to be carried out.

The findings also provide some observations regarding the process of Europeanisation. Strategies employed by women's organisations in using the EU to exert pressure at a national level could be interpreted as an example of the changing institutional opportunity structure resulting from the integration process. This also seems to confirm earlier findings that 'it will be those interest organisations that are policy outsiders in the member states that will act at EU level in order to seek political compensation' (Eising 2008: 171). On the other hand, resistance to introducing EU gender equality provisions into the Polish national legal system indicates the slow change of the national regimes and underlines the filtering role of the national institutions, including their norms and shared understandings, in the face of exogenous change (Guiraudon 2008: 299).

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Appendix 7.1

List of interviewees, meetings, and correspondence with representatives of NGOs involved in the consultations processes

Interview 1	Representative of PSF Women's Centre/Polish Feminist Association (<i>PSF Centrum Kobiet</i>)
Interview 2	Representative of Feminoteka
Interview 3	Representative of Feminioteka
Interview 4	Representative of Center of Women's Rights (<i>Centrum Praw Kobiet</i>)
Interview 5	Participation in the meeting with representative of Polish Society of Anti-Discrimination Law (<i>Polskie Towarzystwo Prawa Antydyskryminacyjnego</i>) and discussion on, among others, the equality law in Poland and implementation of Goods and Services Directive.

Email correspondence with the Representative of Campaign Against Homophobia (*Kampania przeciw Homofobii*)

Email correspondence with the representative of Polish Federation for Women and Family Planning (*Federacja na Rzecz Kobiet i Planowania Rodziny*)

Chapter 8

Gender democracy in Spain The domestication of European law

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Introduction

This chapter evaluates the democratic quality of the processes transposing European Union (EU) Directives on gender equality into Spanish law. The analysis focuses on the Law for Effective Equality between Women and Men 2007, a comprehensive gender equality law that also transposed EU Directives 2002/73/EC¹ and 2004/113/EC².

The Law for Effective Equality between Women and Men 2007 (hereinafter the Gender Equality Law) is wide in scope – it incorporates the principle of gender mainstreaming, its provisions involve all public policies at national, regional and local levels, and it extends the norm of gender equality to the public and private realms. In addition, it provides a legal framework for the introduction of positive action to achieve substantive equality between women and

¹ Directive amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions.

² Council Directive implementing the principle of equal treatment between men and women in the access to and supply of goods and services.

men. In this regard, one of its main innovations is the inclusion of measures designed to achieve gender-balanced representation in public decision-making. In addition to transposing the different EU Directives on gender equality, the Gender Equality Law incorporates the jurisprudence of the Spanish Constitutional Court and the European Court of Justice (ECJ), and also the gender equality laws already enacted in several of Spain's autonomous regions.³ (For a summary of the principal measures introduced by this law, see Appendix 8.3).

The analysis assessing the democratic quality of the process leading to the enactment of the Gender Equality Law was guided by a series of indicators – formulated in a question format – derived from the main principles of deliberative democracy as discussed in Chapter 1 of this report. Data for the analysis were collected from a very wide range of documentary sources i.e., newspapers and press releases, transcripts of parliamentary debates, consultation responses, position papers, annual reviews and website contents. However, for some of the indicators, there were significant lacunae of information even after all the available documentary material had been searched. To compensate, a number of semi-structured interviews with key informants was conducted (see Appendix 8.2).

The chapter is divided into three sections. The first section offers an overview of the political and institutional context in which the legislative process discussed took place. In doing so, it undertakes a general review of the literature on gender equality policy in Spain in the context of EU membership. Section two presents the results of the process-tracing analysis for each of the three indicators of democratic quality, paying special attention to the variety of actors and institutions involved at each of the different stages and recording any changes in the quality of decision-making. Finally, section three summarises the main findings, discusses them in the light of the literature reviewed in section one, and offers some conclusions as to the gendered quality of Spanish democracy.

³ Gender equality laws had previously been enacted in the autonomous regions of Navarra (2002), Valencia (2003), Castilla y Leon (2003), Galicia (2004) and País Vasco (2005).

The political and institutional environment

When Spain became a member of the European Union on 1st January 1986, there was a general expectation that accession would consolidate the recently-established democratic institutions. It was hoped, too, that normal relations with European neighbours would be restored, and the Spanish economy modernised. In other words, EU accession was taken to symbolise a political maturation and an irrevocable return to democratic politics (Díez-Nicolás 2003).

Few studies analyse how well Spain has adjusted to EU norms on gender equality, and they generally find that the rate of compliance has been high, and that 'far from lagging behind, Spain has moved in tandem with, and even in advance of, the EU' (Threlfall 1997: 18; Valiente 2003a, Lombardo 2004). Furthermore, in a recent comparative study examining the level of compliance with gender equality norms among different countries, Spain was found to be a leader, with Sweden, among six largest Member States, with a better record of transposition than Britain, France, Italy or Germany (Liebert 2003: 259).

These findings are at first surprising, since they run counter to initial expectations that the country – one of the poorest in the EU, with a much younger democracy than the majority of other member states, and imbued with conservative values regarding gender roles – would be a potential laggard in incorporating the EU social acquis. More specifically, given that Spain could be classified at the time as a 'strong male breadwinner regime' (Ostner and Lewis 1995) these findings question the thesis that different gender regime typologies are a key explanation for cross-national variation regarding compliance with EU gender equality norms.

Given this evidence, the question is: how can Spain's success in adjusting to EU gender equality norms be explained? While there is no systematic research answering this question, it is possible to identify a cluster of influencing factors. Firstly, by the time Spain joined the EU, equal opportunities institutions and policies were already in place, having been developed during the transition to democracy (1975-1982). By 1986, Spanish legislation was already aligned with EU requirements in the field of equal opportunities (Valiente 2003a: 187). Furthermore, the development of state

feminism in the country also predated accession. The main national equal opportunities agency, the *Instituto de la Mujer*, was set up in 1983 by the social-democratic party (PSOE) and was tasked with helping to implement the body of equal opportunities legislation already in place (Valiente 1995).

A second and related factor is that, during the first ten years of EU membership, the PSOE was in government. It was generally supportive of a social Europe, and was sympathetic to feminist demands. Hence, this government was willing to sign up to EU norms and policies on gender equality (Threlfall 1997).

The third factor is that the EU project enjoyed a high level of support among the Spanish public and the political elite. This strong pro-European stance may be rooted in the perception that EU membership represented a unique opportunity to finally get rid of an image of Spain as an isolated and backward state – a burdensome legacy of the authoritarian regime. The extent to which the concept of gender equality is associated with ‘modernity’ may explain why ideological support for EU norms in this field has been particularly steady. Although a recent study uncovers a certain amount of ideological resistance to the adoption of EU social policy Directives (Falkner et al. 2005: 323), supporting gender equality in the workplace (the area covered by EU legislation) has been characterised by a general, though not unanimous, political consensus (Valiente 2003a: 187; Lombardo 2004).

While this broad political consensus facilitated swift compliance with EU norms, one can question its impact on the quality of political deliberation on these matters. Thus, in a study of political activity connected with the inclusion of EU gender Directives in Spanish law, Valiente (2003a) found a virtual absence of political and policy debate, with legislation passed without discussion or amendments. In the rare cases where there was some debate on an equality bill, she found that the EU was not referenced. This public silence carried into media reporting, for the processes of transposition attracted little attention.

These findings raise a question concerning the democratic nature of the transposition processes themselves. Although the ‘broad social

consensus' thesis may go some way towards explaining the lack of political debate, questions can be asked about who was included and excluded in those processes and how informed the public was about the decision-making accompanying transposition of the gender equality Directives. Thus, the main question guiding this research is: To what extent can we describe the processes of gender Directive transposition in Spain as 'undemocratic compliance'? The analysis of the 2007 Gender Equality Law in Spain provides some answers to this question.

Before proceeding to the case study, however, two contextual points need to be made. First, a word must be said about the representation of women's interests in Spanish politics. Contrary to conventional assumptions, women's interests have been more successfully organised and represented by trade unions and political parties than by women's civil society organisations. The origins of this phenomenon can be traced back to the end of the Franco regime. At that point in time, women willing to participate in the transition to democracy chose to combine membership of a women's organisation with membership of a political party or a trade union. These formally constituted organisations provided activist women with more political opportunities to advance gender equality than membership of a women's non-governmental organisation (NGO). This strategy, however, hindered the development of a strong civil society-based women's movement, since party ideological differences were perceived as being too wide for the creation of a politically diverse yet united women's movement (Valiente 2003b: 35).

Second, the political context in which the Gender Equality Law was enacted requires brief mention. The origins of this law can be traced to 1997, when the largest federation of women's associations, *Federación de Mujeres Progresistas*, issued a manifesto entitled *A New Social Contract between Women and Men*.⁴ The purpose of this document was to generate public debate on the need for women and men to share power as well as family and work responsibilities. This manifesto contained not only a list of objectives inspired by feminist theory and practice, but also a plan of action with concrete proposals to realise them. Some of these proposals would be later incorporated

⁴ 'Nuevo Contrato Social Mujeres-Hombres: Para Compartir Responsabilidades familiares, Trabajo y Poder'.

into the Gender Equality Law though, as we will see, not without a considerable amount of controversy.⁵ At any rate, the *New Social Contract* was not only endorsed by women's organisations but also by other organisations and numerous high-profile individuals including politicians, academics and journalists. Moreover, the PSOE endorsed this manifesto in their 34th Congress of 1997, and again, at the party's 35th Congress of 2000.⁶

Two years later, the long gestation of the Gender Equality Law took a new turn with the enactment of the 2002 EU Directive on equal treatment. Although Member States did not have to transpose this Directive until 2005, the PSOE brought a proposal for its transposition to parliament in April 2003. The measure, which contained some elements that went beyond mere compliance with a European Directive, received the support of a number of political parties⁷ yet it was defeated by the governing conservative Partido Popular (PP)⁸. The two main objections to the proposal were that its legal composition was rushed, and that it was not necessary to comply with European law at that point in time.⁹ The following year, however, the PSOE returned to power. In its electoral programme, the party had promised the introduction of a gender equality law 'that goes beyond formal equality in order to guarantee equal opportunities between women and men in all areas of life' (Partido Socialista Obrero Español 2004: 93). In describing this law, the document also made reference to some aspects of the 2002 Directive such as the need to define the concepts of direct and indirect discrimination and to set up mechanisms to guarantee equality of outcome. Later that year, another EU gender equality Directive (on equal treatment in access to goods and services) was also passed,

⁵ The sharing of caring responsibilities and decision-making.

⁶ A commitment to parity democracy is included in the resolutions of the 34th Congress, where the voluntary party quota is increased from 25 to 40 per cent. in addition, the resolutions of the 35th congress contain a reference to the *New Social Contract* (source PSOE <www.psoe.es>. Accessed in September 2009).

⁷ The PSOE proposal was supported by the United Left (IU), and the largest nationalist parties in the Basque Country, Partido Nacionalista Vasco (PNV), and in Catalonia Convergència i Unió (CiU).

⁸ The only other party voting against this proposal was the Nationalist Party of the Canary Islands (CC).

⁹ *Diario de Sesiones del Congreso de los Diputados, Pleno y Diputación Permanente, VII Legislatura*, num. 262, 24 Junio 2003. Available at: <www.congreso.es>. (Accessed in August 2009).

which meant that the new Gender Equality Law had to incorporate the transposition of this one as well.

All in all, the process leading to the enactment of the Gender Equality Law lasted over two years. The first public announcement that a draft law was being developed was made in early 2005 by Prime Minister Zapatero, in a speech during the campaign in favour of the EU Constitutional Treaty.¹⁰ It was approved in March 2007 with the support of most political parties and the abstention of the opposition PP.

Before proceeding to discuss this two-year long legislative process, it is important to highlight certain features of the political and institutional context. The legislative process in Spain consists of three distinct stages: *anteproyecto*, *proyecto*, and *ley* (Appendix 8.1). While the first two stages require cabinet approval only, the *ley*, or law, stage requires majority approval in both the lower and upper houses of parliament. The second aspect to take into account is that, when the Gender Equality Law was being developed, consultation with women's organisations was not institutionalised – in other words, there was no formal channel of dialogue between government and representatives of women's interests in civil society. Finally, it needs to be noted that one of the most salient features of the 2004-2008 legislature was the high level of confrontation and polarisation between the two main parties in the parliament¹¹, the PSOE and PP, which precluded the possibility of a negotiated agreement on almost any policy initiative. As we will discuss below, this party polarisation had an important impact on the deliberative nature and quality of this initiative.¹²

¹⁰ Speech made on 12 February 2005, reported in *El País*, on 13 February 2005.

¹¹ The distribution of seats in the parliament (lower house) during this legislature was as follows: PSOE: 164 seats (46.86 per cent) PP: 148 seats (42.29 per cent).

¹² Journalists have termed this as the *legislatura de la crispación* – 'a legislature of tension', which started off with mutual accusations between the two main political parties of having exploited the Al Qaeda bombings in Madrid (which took place only 3 days before the general election) for electoral purposes (See Pappell 2008).

The democratic quality of the process enacting the Gender Equality Law 2007/3

An empirical application of the concept of gender justice draws on a feminist interpretation of deliberative democracy, and yields a range of indicators based on three key principles: inclusion, accountability and recognition (see Chapter 1 in this report). In this section, we apply these principles and their accompanying indicators to the decision-making process that led to placing the Gender Equality Law of 2007 on the statute books.

Inclusion

The principle of inclusion is primarily concerned with the extent to which women's representatives participated in the deliberations connected with decision-making (descriptive representation), and how far their interests were incorporated into the deliberative agenda and the final text of the law (substantive representation). For these purposes, this section examines the participation of women's representatives – not only that of NGOs, but also trade unions, political parties and women's policy agencies – from the drafting stage all the way to legal enactment.

The participation of women's representatives in the making of the Gender Equality Law varied significantly across the different stages of the process. During the drafting stage their participation was low, as evidenced by the fact that some women's organisations, trade unions, employers' representatives and political parties publicly complained about the extent and the overall quality of dialogue with the government during this stage of the process. The lack of dialogue between government and civil society was echoed in an opinion report prepared by the State Council, which took note of the very limited time that the government had allocated to consultations, requiring civil society groups to provide rushed responses.¹³

¹³ The State Council, or *Consejo de Estado*, is the highest consultative body of the Spanish government. The government must consult the State Council on draft bills aimed at transposing EU legislation into Spanish law. See Consejo de Estado, *Dictámen Anteproyecto Ley Orgánica de Igualdad entre Mujeres y Hombres*, 2006, available at: http://www.boe.es/aeboe/consultas/bases_datos_ce/doc.php?coleccion=ce&id=2006-803. (Accessed in June 2009).

According to trade union representatives some aspects of the law were negotiated with the government at the very last minute – just a few days before the government planned to bring the draft to Cabinet. One of the reasons for this haste is that the government was eager to make the approval of the draft bill (*anteproyecto*) coincide with International Women's Day. Not surprisingly, the first reaction of the trade unions was to reject it for 'not being ambitious enough'.¹⁴ After this rejection, and in an effort to arrive at a quick agreement, the government made significant concessions to the unions during two weeks of intense negotiations. By 1 March, the trade unions announced that they were happy with the results, despite the fact that some key demands were not met. One such demand was the extension of paternity leave provisions from ten days to four weeks – a demand that would later become one of the most contentious points of debate during the legislative process.¹⁵

On the other hand, employers' organisations also complained of the lack of inclusion during the drafting stage.¹⁶ On the same day that the draft bill was approved by Cabinet, they issued a public statement criticizing the government for failing to consider any of their proposals and claiming that this 'signified a death blow for social dialogue in Spain'. Employer's representatives were particularly unhappy with the provisions for parity representation in

¹⁴ This response was published by the two main union confederations in Spain: CCOO- *Comisiones Obreras* and UGT- *Union General de Trabajadores*, on 16th of February (only two weeks before the approval of the draft bill by the Cabinet). See *Primeras Observaciones al Anteproyecto de Ley de Garantía de Igualdad entre Mujeres y Hombres*, CCOO-UGT, 16 March 2006, available at: <<http://www.fspugtpv.org/fsp/media/valoracionleypromocionigualdad.pdf>>.

(accessed in June 2009). See also, *El Pais*, 'Los sindicatos rechazan la ley de igualdad por ser poco ambiciosa', 18 February 2006.

¹⁵ However, the negotiations with the government did not satisfy the trade union movement as whole. For example, a section of one of the main trade union confederation in the country published a document in which, distancing themselves from the mainstream view of the organisation, they expressed their discontent with the content of the draft bill as well as the way in which the government had led the drafting process, characterised by a lack of inclusion.

¹⁶ CEOE – *Confederación Española de Organizaciones Empresariales* (Confederation of Employers' and Industries of Spain). This is the top Spanish employers' organisation and the employers' spokesman to the government, civil service, unions, media, and other political and social institutions. These statements were published in the majority of newspapers in the country. See, for example, *El Pais*, 'La patronal dice que la ley de igualdad da un rejoneo de muerte al dialogo social', 3 March 2006.

administrative boards and the compulsory character of the equality plans in private companies. They claimed that the draft bill was the outcome of a unilateral agreement between the government and trade unions – an agreement from which they had been excluded.

Women's civil society organisations were also excluded to a degree from the drafting process and some public complaints were issued about this. It should be noted however, that the picture is more mixed than appears at first sight. As a general rule, the closer the organisation was to the governing PSOE, the more satisfied were its members with the extent and quality of the dialogue between government and civil society during the legislative process; furthermore, these levels of satisfaction seem to be higher in the later stages rather than earlier in the process. In fact, during the early stage of this process, there is no documentary evidence of conversations between the government and women's organisations until the beginning of 2006.¹⁷ However, even after these contacts had been initiated, several organisations complained that their main proposals were not taken on board. This criticism is implied in a manifesto prepared and endorsed by over thirty women's organisations (with some prominent exclusions such as the *Federación de Mujeres Progresistas*)¹⁸ and published on the day that the draft bill was approved by the Cabinet. In this manifesto, it was claimed that the Gender Equality Law 'should not be developed without the inclusion of women's voices'.¹⁹ This complaint, however, seems to be about the lack of substantive, rather than descriptive, representation. In other words, this statement was intended to express their discontent, not for their lack of participation, but rather for the fact that their demand for a political candidate quota of 50 per cent with zipped lists was not included. Nonetheless, these organisations also acknowledged during

¹⁷ 'El gobierno comienza esta semana a negociar la ley de igualdad con las organizaciones feministas', Red Feminista Contra la Violencia hacia las Mujeres, 23 January 2006, available at: <<http://www.redfeminista.org/Noticia.asp?ID=3558>>. (Accessed in June 2009).

¹⁸ In an interview with the President of *Mujeres Progresistas* at the time, Enriqueta Chicano dissociates her organisation from this opinion.

¹⁹ Coordinadora Española para el Lobby Europeo de Mujeres (CELEM) 'Manifiesto de las asociaciones de mujeres ante la ley de igualdad y el 8 de marzo 2006' available at: <http://www.celem.org/pdfs/notas/nota3_06032006.pdf>. (Accessed in August 2009).

the interviews that they did not expect the government to incorporate all their demands in the text of the draft bill.²⁰

The contacts between government representatives and women's organisations during the drafting stage were characterised by a high level of informality. Hence, while representatives of many organisations met with the Secretary General of Gender Equality Policies on various occasions during this stage, these were one-to-one private meetings convened by the General Secretary to inform women's organisations of progress rather than to expressly consult these groups.

We can thus conclude that the input of social actors influencing the deliberative agenda for the Gender Equality Law was low, given the limited amount of consultation at the drafting stage. Only after the draft bill (*anteproyecto*) was approved by the Cabinet did the government open a process of dialogue and negotiation with employers, trade unions, women's organisations, the judiciary, other government departments and regional administrations. After these rounds of consultation, the bill (*proyecto*) was approved by the Cabinet and submitted to Parliament, where the Committee for Women's Rights and Gender Equality played an important role in ensuring that the voices of women were heard. However, as we will see in the following sections, the potential for this degree of descriptive representation to be translated into substantive representation was limited since, as a non-legislative Committee, it could not issue amendments to the bill.

The foregoing discussion indicates a lack of evidence of women's participation in the drafting process, due to their limited access to elite deliberations. Moreover, the interviews reveal that while there were meetings held with government representatives (mainly with the goal to inform); these were quite informal in nature and relied to a great extent on the good personal relationship between

²⁰ See, for example the press release from the Foro Feminista de Castilla y León 'Anteproyecto de Ley de Igualdad: Las opiniones de las asociaciones de mujeres no han sido tenidas en cuenta en la consultas realizadas', available at: <http://www.forofeministacyl.org/spip.php?article6>. (Accessed in August 2009).

spokespersons for these organisations and the Secretary General for Gender Equality Policies at the time.

It is not until the government approved the draft bill on 3 March 2006, that women's organisations were given the opportunity both to speak and to submit documentation in relation to this law. In this regard, there were a few formal deliberative events – both before and after the bill had been submitted to parliament – which deserve some attention. The first was a consultation meeting held in April 2006, in which representatives of women's organisations had an opportunity to discuss their views on the draft law with key government representatives. In preparation for this meeting, 80 women's regional organisations gathered at the Women's Institute in Madrid with a view to articulating a common position. The outcome of this meeting was an opinion document focusing on four key themes: a) parity in electoral lists and decision-making; b) employment and reconciliation of work and family life; c) establishing a national council for women; and d) institutional mechanisms for the advancement of women. It also proposed detailed amendments to the law.

Even though this was the main deliberative session between the government and women's civil society organisations before the bill was sent to Parliament, there were other discussions between institutional feminists and government representatives. These meetings are significant, given the important role that *femocrats* have traditionally played in representing women's interests in Spanish politics. In this regard, it is worth highlighting two meetings that took place in April 2006 between representatives of both national and regional women's policy agencies and the Minister of Labour and Social Affairs where the contents to the draft bill were discussed.

After this round of consultations between the government and relevant social actors, the bill was approved by Cabinet on July 23 2006 and submitted to Parliament. During its parliamentary passage, women's organisations were once again given the opportunity to speak and to submit documentation at several meetings of the Committee for Women's Rights and Equal Opportunities. During these meetings, a total of 18 organisations – including women's NGOs, trade unions, employers' representatives as well as individual experts/scholars and journalists – presented their positions on the

bill, which were then debated with members of the Committee. It should be noted, however, that access to these meetings was not open to any organisation willing to participate, but was by invitation from political groups. Another important feature to take into account is that, since this Committee does not have legislative power, it could not formally propose amendments to the gender equality bill. On the other hand, women's organisations did not have access to the deliberations held in the parliamentary Committee with legislative powers and in charge of reporting on the bill – i.e. the Committee for Labour and Social Affairs.

During the parliamentary process, women's organisations convened meetings with different political groups in Parliament to discuss their proposed amendments to the bill. These organisations concur that this was the best means to exert some influence during this parliamentary phase. Yet, it should be noted that the documents for these meetings were prepared by legal experts working for the organisations in question, which suggests that only those having at their disposal the level of legal/technical expertise required to draft a list of amendments could avail of this opportunity.

The manifesto agreed by women's organisations centred on a number of key demands which were also shared by trade unions and political parties. They were:

- 1) *Parity in decision-making*: Women's organisations argued for a quota of 50 per cent with zipped lists (alternating female and male candidates) in place of the provisions included in the draft bill, which were of a 40/60 quota to be applied to every five candidates. In addition, they wanted to remove a clause whereby municipalities with less than 5,000 inhabitants would be exempted from this requirement. With respect to parity measures in decision-making in the private sector, the draft bill included a deadline of eight years to achieve a target of gender-balanced representation in company boards, while women's organisations wanted to reduce this deadline to four years.
- 2) *Reconciliation of work and family life*: Women's organisations sought to extend the paternity leave provisions of 8 days provided in the bill to four weeks, as well as relaxing the conditions of entitlement to maternity leave of 16 weeks so that this right could be extended

to all workers regardless of their previous employment record. In addition, women's NGOs demanded the inclusion of measures (not included in the draft) aimed at the development of an early education infrastructure and services for children between 0 and 3 years as well as for dependent people.

- 3) *Institutional mechanisms*: Women NGOs lobbied for the establishment of a state body for gender equality with ministerial rank.

Other manifesto demands related to issues that were not included in the draft bill, such as improving the care service infrastructure for children and the elderly. The government would later justify the exclusion of these measures on the grounds that it did not fall within the scope of the law, since competences in this area were devolved to regional and local governments. Nonetheless, the three items were finally included in the deliberative agenda, since they were tabled as amendments during the parliamentary process by different political groups. In this regard, the government declared at the beginning of the parliamentary procedure that it was willing to discuss and negotiate different aspects of the bill, but also made it clear that the measures in relation to decision making parity were non-negotiable. In this, the government was countering a demand from the conservative party to remove the quota provisions from the bill. In addition, the government also made clear from the outset that demands regarding the extension of paternity leave to four weeks could not be accepted because the implementation of such a measure would place an undue strain on public finances.²¹

However, while the majority of women's interests were included in the deliberative agenda, the question is to what extent were those demands incorporated into the final text of the law. In this respect, it should be noted that, during the drafting stage, women's organisations succeeded in making the law an organic law²² and in introducing parity in candidate lists. After this, partial concessions

²¹ Diario de Sesiones de las Cortes Generales, VIII Legislatura, Comision Mixta de los Derechos de la Mujer y de la Igualdad de Oportunidades, Sesion num 15, 3 octubre 2006. Available at: <www.congreso.es>. (Accessed in July 2009).

²² The Spanish Constitution requires that some matters, including fundamental rights and freedoms, are regulated by organic laws. These are a special category of statutes which can only be adopted, amended or repealed by an absolute majority in Parliament (in contrast to ordinary laws).

were made during subsequent stages of the process, especially in the area of reconciling work and family life²³ though no relevant changes were made in relation to measures aimed at achieving parity in other decision-making forums. Furthermore, the demand for a 50 per cent quota to be set as a minimum but not a maximum (so that it would not preclude lists where 100 per cent of the candidates are women) was not taken on board.²⁴ Finally, it is interesting to highlight that the demand for the establishment of a body for gender equality with the status of a ministry was not included in the final text, although a body with this feature was set up in 2008, one year after the law came into effect.

Nonetheless, with the exception of some minority voices for which the law in its final versions was not ambitious enough, the general response of women's interests representatives after the law was passed in parliament was quite positive. A general sense of satisfaction was also reflected in the statements provided by the different actors involved. Thus, the president of the Women's Lawyers Association gave a very positive assessment of the law, and emphasised that she could not understand the abstention of the conservative party from the parliamentary vote. Similarly, one of the two main trade union confederations, Unión General de Trabajadores (UGT), stated the Gender Equality Law was a great step forward in Spanish society 'as it puts the country in the lead among its European counterparts in matters of gender equality.'²⁵ Summing up, we can conclude that the majority of women's interests and perspectives were incorporated into the deliberative agenda – possibly helped by the fact that these were largely shared by a variety of relevant actors such as political parties of the left and trade unions – although only a handful of their demands were included in the final version of the law. At any rate, and given the minor role accorded to women's

²³ These included the extension of paternity leave to 13 days (15 days from the day of birth) with a view to further extending it to 4 weeks by 2015, as well as the right to a period of maternity leave of 42 days to all workers who do not have enough contributory credits.

²⁴ Thus, in the first elections following the approval of the law (the municipal elections that took place on 27 May 2007) the electoral board annulled a candidate list made up of women only presented by the conservative party in a municipality in Tenerife.

²⁵ Europa Press TV, 'El Congreso aprueba la igualdad por ley entre hombres y mujeres, con la abstención del PP', 15 March 2007.

organisations during the legislative process, the results of this analysis reveal the importance of women's organisations in other arenas such as political parties and trade unions in advancing the substantive representation of women.

Accountability

As has been already mentioned, women's organisations had access to information about the contents of the law during the pre-proposal stage through informal meetings with the Secretary General for Gender Equality Policies. At the time, consultation with these organisations was not institutionalised. With respect to information on the process available to the public, the important role played by the media should be highlighted, as some newspapers had privileged access to early drafts of the bill and associated relevant information during this stage.²⁶

Access to information on the content and process of the Gender Equality Law became much more readily available after the draft bill had been approved by the Cabinet, since from this moment onwards, the text of the draft bill, together with the proposals and opinions issued by different institutions and organisations, were public documents. This is also the case at the parliamentary stage since the majority of committee sessions, as well as plenary sessions, were public. One exception is the deliberations of the legislative sub-committees (both in the Congress and in the Senate), appointed to produce amendments to the bill, as these meetings were held behind closed doors. Therefore, even though we cannot speak of 'full access' to information during the parliamentary process, the level of transparency was quite good.

An additional aspect to the accountability principle is the quality of the communication between the participating actors and their respective audiences. For these purposes, we inspected the websites of some of the most prominent women's organisations in the country, seeking to identify the type, quality and extent of information they provided on the Gender Equality Law. We found that, with some

²⁶ For example, *El País* newspaper had access to a first draft of the bill as early as April 2005, and published a special report on this law on 8th April. A second special report was published a year later, on 7 February 2006 when another draft was delivered to employers and trade unions for discussions.

important exceptions, the information provided was generally poor. The fact that the Gender Equality Law was over two years old at the time of this research may partly explain the fragmentary nature of the information provided, as the majority of these organisations do not provide annual reports or position papers in relation to their legislative activity. In some instances, organisational websites had little information on the law and on the group's position during its passage through parliament.

Another important assessment of the process relevant to the principle of accountability is in determining how well the public was informed on the link between the Gender Equality Law and the European Directives that it aimed to transpose. A search of the main newspapers in the country revealed that such a link was only mentioned in passing (if at all) and was very rarely explained. For example, the first special report on the Gender Equality Law published by *El País* (during the drafting stage) noted that the concepts of direct and indirect discrimination defined by the law, as well as the concept of harassment and sexual harassment, were a 'carbon copy of the European Directive which this law aims to transpose and to extend.'²⁷ Yet, it does not treat the contents of the 2002 Directive it is referring to in further detail, while it remained silent on the 2004 Directive on Goods and Services. Furthermore, the research found a variety of instances revealing a lack of information (or misinformation) in the media about the links between this law and European legislation – in particular information on which parts of the Gender Equality Law were an automatic transposition of both the 2002 and 2004 Directives and which parts went beyond EU gender equality law.²⁸

²⁷ *El País*, 'Definiciones europeas contra el acoso y la desigualdad', 8 April 2005.

²⁸ This is evidenced in an editorial piece of *El País* newspaper of 8 February 2006 which, while applauding the contents of the draft bill, is much more cautious about the inclusion of the reversal of the burden of proof – one of the measures contemplated in the bill which is a direct transposition of the 2002 Directive. These editorial piece received a reply from the general secretary of the Feminist Network of Constitutional Law in a letter published to this same newspaper only three days later, in which she wrote that the draft bill is 'without some exceptions just a transposition of EU norms on gender equality into domestic legislation' (See 'Igualdad por Ley', *El País*, 8 February 2006, and 'Igualdad por Ley', *El País*, 11 February 2006).

This 'domestication' of European law was also evident in parliament, where the link between the Spanish law and the EU Directives was generally utilised for scoring political points. Thus, there was a lack of discussion regarding how the law related to EU norms of gender equality other than the observation that it went 'way beyond' the obligation to comply with EU legislation (as emphasised by the governing PSOE) or that it 'merely' amounted to an exercise of transposition of those Directives into national law (as pointed out by the conservative party). In other words, while the government had an interest in stressing the pioneering nature of an 'ambitious law' that 'goes well beyond what is on offer in many countries of the developed world and even in Europe'²⁹, the opposition was eager to play this down by bringing in the EU dimension, with the intention of showing that there was nothing novel in it. It is highly illustrative, for example, that the Minister for Employment and Social Affairs clearly downplayed the relationship between the bill and the European Directives in his presentation to the parliamentary Committee for Women's Rights and Equal Opportunities. In his own words:

...we have a law before us which is not a transposition of European Directives; it is a law that goes way beyond that partial aspect provided in those Directives that we have to incorporate to our domestic legislation – I wished many European countries had this kind of legislation in place.³⁰

It is also interesting to note that in the information leaflet published by the party there was not one single mention of the two European Directives that the law was transposing.³¹

²⁹ These words are extracted from a speech by the Minister of Employment and Social Affairs, during his presentation of the bill at the Committee of Women's Rights and Equal Opportunities, on 3 October 2006.

³⁰ 'Diario de Sesiones de las Cortes Generales, Comisión Mixta de los Derechos de la Mujer y de la Igualdad de Oportunidades', 3 October 2006, p. 17. The main two aspects of the law cited by the Minister to show that the law goes beyond EU requirements are the quotas in electoral candidate list, equality plans in the companies and other measures introduced in the law aimed at reconciling work and family life such as paternity leave.

³¹ PSOE, *Argumentario Proyecto Ley Orgánica para la Igualdad Efectiva Entre Hombres y Mujeres*, March 2007. This is a document justifying the legislative initiative and primarily directed at party members and supporters, but also to the general public.

As a rule, good quality information about the relationship between the Gender Equality Law and the two EU Directives was provided by minority political parties who did not profit from exploiting the law for political gains. For example, parties such as the United Left and some nationalist parties were inclined to give more judicious information regarding aspects of the law that were heavily influenced by EU norms on gender equality.³² It is also interesting to note that the quality of information given by government officials was considerably improved when these were in non-political settings. For instance, the Secretary General for Gender Equality Policies publicly acknowledged the strong link between the Gender Equality Law and EU legislation, although this was done during a meeting of Latin American women leaders and not in front of a home audience.³³

Summing up, the quality of information made available to the wider public on the origin, nature and contents of this law was rather poor. It seems that a number of problems acted to hinder the communicative process. The first one is the lack of inclusion of civil society during the drafting stage, and more particularly the fact that this process was carried out with very little discussion with relevant interest representatives. The second one is that women's organisations seem to have concentrated more on lobbying the government rather than mobilising public support through awareness and information campaigns. Finally, the fact that political and media debate concentrated exclusively on the most controversial aspects of the law (mainly electoral quotas and paternity leave) means that other aspects (especially those associated with the EU Directives) were left practically untouched.

In relation to this indicator, we concentrated our analysis on the quality of responses provided by the government to criticisms, appraisals and appeals coming from political parties, trade unions and other relevant civil society actors during the process leading to the enactment of the Gender Equality Law. In undertaking this

³² It is interesting to note that the general perception of these parties was that the most important aspects of the law were those by which EU Directives are transposed at the same time that the novelty of the other measures was downplayed since, in their view, they are measures which had been already introduced in many similar (or even more advanced) gender equality laws operating at the regional level.

³³ Soledad Murillo, 'La efectividad del principio de igualdad: La ley de igualdad', *II Encuentro de Mujeres Líderes Iberoamericanas*, 30 September - 7 October 2006.

analysis we decided to focus on the two most debated issues, paternity leave and candidate gender quotas in electoral lists. Thus, we asked the following questions: What was the quality of the government's arguments when defending their position vis-à-vis this legislative initiative? Were these arguments properly justified through a reason-giving practice?

First, the government resisted pressure from trade unions, political parties and women's organisations for an extension of the period of paternity leave, arguing that it would be too expensive and detrimental to employment rates, as employers would have to contribute to part of these costs. Nonetheless, the government showed a general willingness to negotiate the length of leave (within some set limits) with key actors as well as making some concessions and commitments for the future. However, while the overall quality of argumentation in relation to these measures was good, this was not the case in relation to quota measures. To begin with, the government announced from the outset that it was not prepared to negotiate on these measures if the goal was to dilute them. However, there was little explanation from the government as to why a quota system was necessary beyond the general assertion that such a measure would help to improve the quality of democracy. On the other hand, the government also offered little explanation in response to calls from representatives of women's interests that the quota law should be raised to 50 per cent (with no upper limit for women) and that candidate lists should be zipped. The only justification provided was a strategic one: that, given the polemical nature of this measure, to acquiesce to the requests of women's organisations (and others) would polarise positions even further, generating some degree of unrest that the government wanted to avoid at all costs. Thus, they opted for a more moderate quota law and a more pragmatic position.

Nonetheless, there was a significant difference in the quality of the reasons given to justify the measures provided in the law depending on the arena in which the debate took place, as well as the level of knowledge and expertise of individual participating actors (irrespective of their affiliation). Thus, the quality of deliberation was found to be better in low-profile parliamentary Committee sessions

than in plenary sessions³⁴ and when the discussion included participants with a history of feminist activism or of feminist scholarship.³⁵

Notwithstanding these exceptions, however, the debate was overshadowed by a climate of permanent confrontation between the party in government and the main opposition party, as this took place in the context of a legislature that was characterised by a strong polarisation of positions between those two parties. As a result, the questions and replies coming from other political parties during parliamentary debates were not adequately addressed, since the government mainly concentrated on responding to attacks from the conservative party. As we will see, this had a significant impact on the levels of recognition afforded to participants and their views.

Recognition

In order to assess the democratic quality of this legislative process according to the principle of recognition, the analysis concentrated on three selected debates in parliament. The first one is a debate that took place at the Committee for Women's Rights on 3 October 2006, in which the Minister for Employment and Social Affairs presented the Bill. The second one is a debate on the amendments to the bill which took place at the Committee for Employment and Social Affairs on 12 December 2006. Finally, the third debate is a plenary session of 21 December before the bill was passed to the Senate.

The analysis of all three debates found no instance of disrespect towards women as a group, or towards the principle of gender

³⁴ In this respect, the quality of deliberations during the sessions of the parliamentary Committee on Women's Rights and Equal Opportunities in which a number of representatives of women's interests were invited to present their positions was better than either other sessions of this same Committee when the Minister for Employment and Social Affairs was present, or the plenary sessions in which the bill was being debated.

³⁵ Thus, a simple read of the transcripts of the deputies' speeches makes it rather clear who is knowledgeable of the issues being debated and who are not, as the quality of argumentation varies enormously. See, for example, the speeches of Virtudes Monteserín Rodríguez, a PSOE deputy with a history of activism in the feminist movement. It should be highlighted that some debating sessions on the Gender Equality Law held at the Committee for Women's Rights were not only integrated by Members of Parliaments (MPs) but also by representatives of women's organisations, journalists and scholars.

equality in general. As already mentioned in the introduction, there is a broad political consensus both about the existence of gender inequalities in Spanish society and about the need to eradicate them, yet parties differ on how to go about this. This is clear in the case under investigation, as in their speeches, conservative politicians insist over and over again that their discontent is not with the idea of introducing an all-encompassing gender equality law 'which aims to achieve substantive equality between women and men' but with the nature of some of the measures contemplated in this particular law, such as gender quotas.³⁶

Given this, instances of disrespect for another actor's position during parliamentary deliberations were mainly found between representatives of the two main political parties, PSOE and PP. For example, in the first debate examined – held at the Committee for Women's Rights meeting – there were five interruptions to the speech of the Minister for Employment and Social Affairs³⁷, all of them coming from a PP³⁸ representative. These interruptions were short interjections questioning the veracity or trustworthiness of what the minister was saying. In addition, there is also one interruption to the speech of this Member of Parliament (MP) from the PP, coming from a PSOE³⁹ deputy.

There were also several instances in this debate where the deputy from the PP questioned the competence of the Minister, his education and his ability to participate in a parliamentary debate. The following excerpt illustrates the nature of these exchanges: Camarero (PP): 'I am not going to allow you to call us irresponsible. You are the worst Minister for Employment since the restoration of democracy (...). Monteserín (PSOE) (interjection): 'And what about Zaplana?'⁴⁰ Camarero (PSOE): 'You are an incompetent and inefficient Minister (...) If we want a good gender equality law that is agreed by all the political groups in this House, you had better be sacked...'

³⁶ Diario de Sesiones del Congreso de los Diputados, VII legislatura, sesión plenaria num 209, 21 diciembre 2006, p. 11469, available at: <www.congreso.es> (accessed July 2009).

³⁷ Jesús Caldera, MP.

³⁸ Susana Camarero Benítez, MP.

³⁹ Virtudes Monteserín Rodríguez, MP.

⁴⁰ Zaplana was the Minister for Employment during the previous government, headed by the PP.

In the final plenary session there were also several interruptions. The first one, at the beginning of the session, came from a PP deputy who interjected 'Not in my name!' when a PSOE deputy was saying that she felt proud to be able to say, on behalf of many women, that the government was fulfilling the electoral promises made to all of them. There were other types of interruptions during this session such as, for example, when a number of PP deputies interrupted the speech of a PSOE deputy several times shouting 'Time, time!' or at the end of the session, when PP deputy Camarero insisted that she wanted to re-open the debate in order to reply to the speech of the Prime Minister even though the president of the parliament had already closed it.

Finally, it is interesting to note that in the parliamentary sessions where there was no government representative present (such as the Minister for Employment, or the Prime Minister) there were no insults or interruptions and the overall quality of the debate was very much enhanced. In this respect, the series of debates with women's interest representatives held at the Committee for Women's Rights, as well as the session at the Committee for Employment and Social Affairs, are worthy of note.

Discussion and concluding remarks

As we have seen, the need to transpose Directives 2002/73/EC and 2004/113/EC into domestic legislation provided the vehicle for enactment of the Gender Equality Law. However, the Spanish government developed an all-encompassing law that went beyond EU requirements and, in this respect, the law owes a great deal to the long-held demands of the transnational women's movement and, more particularly, to the crystallisation of those demands in the 1995 Beijing Platform for Action. Yet, the introduction of a gender equality law with those characteristics and at that particular point in time in Spain was no doubt made possible because of the initiative of national women's organisations to push forward those demands and because the PSOE – a party which has traditionally embraced the principle of gender justice as one of its signature causes and a strong ally of those women's associations in the country – had won the 2004 elections. Thus, it provides us with an instance of domestication of European law rather than the Europeanisation of domestic law.

The foregoing analysis of the process leading to the Gender Equality Law lends further support to studies on national compliance with EU gender equality norms which place this country as a 'leader' among its European counterparts. Nonetheless, one of the most innovative aspects of this study is that, in looking at the democratic quality of transposition processes, it uncovers new aspects concerning the process of transposition of EU gender equality norms which the compliance literature leaves – as a general rule – unexplored. Thus, while previous studies on Spain's compliance to EU gender equality norms tend to depict a rather favourable picture, the foregoing analysis of the democratic quality of the transposition processes reveals a more nuanced picture.

In relation to the principle of inclusion, the analysis found that the dialogue between government and civil society actors at the drafting stage was inadequate, despite the fact that the level of engagement and mobilisation of those actors throughout the process was found to be high. Thus, during interviews with women's organisations it emerged that, although they followed this stage of the legislative process very closely, and although they were kept well-informed on progress by the Secretary General for Gender Equality Policies, they were not 'formally' consulted at this point. This finding reveals that the government gave little space to civil society in setting the agenda, so that the terms of the debate shaping the remainder of the process were defined without taking into account the views of relevant actors like women's NGOs. What were the effects of this lack of inclusiveness on the final outcome of the legislative process? The literature on women's movements and state feminism shows that when governments define the gender policy agenda without the participation of civil society actors, the substantive representation of women – in terms of policy outcomes – will be highly affected (Lovenduski 2005). However, in the case of the Gender Equality Law, the negative impact of a non-participatory agenda-setting process on women's substantive representation was not so obvious, especially given the great satisfaction expressed by the majority of women's organisations when the law was finally approved. In this sense the process leading to the Gender Equality Law in Spain raises interesting questions about the assumed link between democratic quality (understood in terms of inclusive and participatory politics) and the representation of women's interests. Nonetheless, the present

study also reveals that the conditions for a government to succeed in advancing women's interests from the top-down rather than the bottom-up very strongly depends on the ideological disposition of the governing party. If this factor is to be controlled, it is necessary that formal structures allowing a more inclusive policy-making in matters of gender equality are in place, to ensure advances are made irrespectively of the colour of the government that happens to be in power. This is an issue that the Gender Equality Law began to address by setting up a participatory structure for women's organisations, the National Women's Council, though the question of whether this will bring a real improvement in democratic governance very much depends on how this formal commitment is implemented in practice.

Secondly, the study found deficiencies in relation to the principle of accountability, since it revealed that the public was not only not informed, but often misinformed. This was particularly evident in relation to some aspects of the law, such as its relationship with the EU Directives it aimed to transpose. Furthermore, findings from the analysis suggest three possible reasons leading to such a lack of information/misinformation regarding the link between this legislative piece and EU norms. First, there is the problem that the main source of information in relation to this legislative process available to the public was the media, which, during the drafting stage, had privileged access to early versions of the *anteproyecto*. However, media reporting concentrated on the most glaring or controversial aspects of the law (i.e. those making good headlines) while the EU dimension was ignored or at best, misunderstood – mainly because of lack of adequate knowledge/information on EU matters on the part of the journalists themselves. Second, the research found that women's organisations – who are endowed with the knowledge, expertise and mobilising tools necessary to inform and educate public opinion – did not play such a role during this legislative process, as their activities at the time concentrated in the area of institutional, rather than public, advocacy (Lang 2009: 6). Last but not least, the main reason for the lack of information available to the public was that politicians simply did not discuss the EU aspects of the Gender Equality Law. Thus, when these aspects surfaced in political debates, it was not as a matter for deliberation but was rather a tool for the opposition party to criticise the law or by the governing

party to congratulate itself. Summing up, a golden opportunity for public education and deliberation on gender inequalities in Spanish society and the role of both the European Union and the national government to redress this problem was missed.

Finally, in relation to the principle of recognition and respect, the analysis found that the overall quality of political deliberation during the legislative process was tarnished by frequent interruptions and contemptuous remarks between the two main political parties. In a similar vein, it was found that the different positions vis-à-vis the content of the law were often unjustified – or at best only partially justified – especially in deliberative arenas where government representatives were acting as participants in the debate. Nonetheless, these features need to be understood in the context of a legislature that was highly polarised between the two main parties – a climate that was not very conducive to good quality political deliberation and which also polluted the debates surrounding the passing of the Gender Equality Law.

The results of this study prompts some interesting reflections about: (1) the prevailing importance of domestic politics and national governance styles vis-à-vis the adoption and implementation of EU policy on gender equality – or to put it differently, the Europeanisation of gender equality norms and; (2) the potential and limitations of putting the principles of deliberative democracy in practice. With respect to the first point, the study serves as an illustration of the impact of new forms of multi-level governance on gender equality policy at the national level. Thus, while it is not possible to understand the origins of the Gender Equality Law without taking into account the EU Directives that it aimed to transpose and similarly all-encompassing laws that had been previously introduced in some Spanish autonomous regions, the analysis shows the extent to which domestic politics continued to be a primary force. While European Union Directives on gender equality place a set of commitments on the Member States, these are minimum requirements which give a lot of leverage as to how these are to be implemented at the domestic level. In the case of the Spanish Gender Equality Law, the way this was done was by introducing a comprehensive law that went beyond those EU requirements, since it incorporated other elements that were developed in the context of

national politics. Yet, the fact that political deliberation concentrated on the 'domestic' rather than on the 'European' aspects of the law means that the democratic quality of the transposition process was rather poor according to deliberative democracy principles.

In sum, the European dimension of this law was pretty much silenced by politicians, the media, and many civil society actors engaged in the process. While interviewees provided some hints as to why this might be the case (e.g. a lack of knowledge and interest about EU matters, a perception of EU norms as 'distant' in comparison with the more 'immediate' domestic aspects of the law such as gender quotas) these findings raise some interesting questions about the possibilities of democratising EU governance at the national level, at least during the transposition phase.

In relation to the second point, the results of the study raise some questions about the possibilities for realising the principles of deliberative democracy in practice. Thus, findings from the analysis strongly suggest that the principles of inclusion, accountability and recognition, while all essential to deliberative democracy, sometimes seem to conflict with one another. For example, the study found that the quality of democracy in relation to the principle of accountability was higher in deliberative arenas where participants with a good level of knowledge/expertise on the issues engaged in a debate that would not attract the attention of the media. In other words, the quality of the debate seemed to improve when 'nobody was watching'. Yet, this relationship between 'secrecy' and democratic quality directly conflicts with the deliberative principles of inclusion and accountability. This finding lends support to empirical research on deliberative democracy at the national level, which shows that the quality of deliberation is enhanced when actors have the opportunity of meeting in secret, without external interference from the media or the general public (Bächtiger et al. 2005). However, this contradicts findings from other empirical research on deliberative democracy at the supra-national (EU) level, according to which the higher the level of inclusion, the higher the quality of deliberation in terms of reasoning practices (Doerr 2007). These apparent contradictory findings come as no surprise once we take into account the important differences between national and EU politics – that is, the fact that debate at the EU level is much less politicised than at the national

level, that it attracts much less attention from the media and the European public at large, and that it has much less of an impact on voting behaviour.

At any rate, the findings of this study indicate that national transposition of European laws can result in a domestic capture of the issues in pursuit of domestic political goals. The democratic quality of this process, in general and in this instance, is influenced by national political forces and pressures. From a gender democracy point of view, the essential components of inclusion, accountability and recognition aid in highlighting the extent to which a national law-making process is attuned to fostering gender equality. In the Spanish case, this is a mixed result: the end of gender equality is supported, but the means, and process, are less open to gender-aware democratic deliberation.

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Appendix 8.1

Table 8.1: Stages and Milestones of the Legislative Process

March 2004	In their general election manifesto of 2004, the PSOE promises the introduction of a Gender Equality Law
February 2005	During their referendum campaign for the EU constitution, the government makes the first public announcement that the Ministry of Employment and Social Affairs is in the process of drafting a Gender Equality Law.
April 2005	<i>El País</i> newspaper has access to an early draft of the law and publishes a variety of articles on it (8 April) Prime Minister Zapatero meets with 60 women's organisations and promises them that the law would include a variety of measures aimed at achieving parity in decision-making (20 April) In an interview with <i>El País</i> , Prime Minister Zapatero confirms that the law will reform the electoral law in order to allow for parity in candidate lists (24 April)
May 2005	Political parties on the left (PSOE, ERC and IU) vote against a legislative proposal from the Catalan nationalist Party (CiU) - supported by the Basque Nationalist Party (PNV) and the conservatives PP - to introduce a paternity leave of four weeks. The main argument put forward against it is that paternity leave would be included in the new Gender Equality Law.
February 2006	The government presents a draft of the <i>anteproyecto</i> to social partners - employers and trade unions- which the trade unions reject because of what they see is a dilution of the original proposals regarding the introduction of compulsory equality plans in private companies (6 February)
March 2006	Negotiations between government and trade unions end up in agreement as the government assumes most of their demands –with the exception of a paternity leave of 4 weeks (1 March). However, employers' representatives (CEOE) do not accept these changes and leave the negotiating table. On 3 March the Cabinet approves the draft law, with the criticism of the main employers' organisation (CEOE), who claim that the government has gone ahead without taking their views into consideration and that this constitutes “a death blow” to social dialogue in Spain. Once approved, the <i>anteproyecto</i> is then submitted to the three main consultative bodies: The State Council (reporting on 23 March), the Economic and Social Council (reporting on 26 April) and the General Council of the Judicial Power (20 April). Apart from this, a round of consultation with key actors and institutions on the text of the <i>anteproyecto</i> takes off.
April 2006	The draft law (<i>anteproyecto</i>) is presented at the Women's Sectoral Committee (6 April) The government meets with 80 women's organisations to discuss the text of the <i>anteproyecto</i> (26 April) The Draft Gender Equality Law is debated at the Women's Sectoral

	Committee which gives their support to it but asks for a lengthening of the paternity leave (27 April)
June 2006	The Cabinet approves the bill (<i>proyecto</i>) on 24 June, which is then submitted to Parliament.
October 2006	The bill (<i>proyecto de ley</i>) is presented at the Parliamentary Committee for Women's Rights and Equal Opportunities by the Minister for Employment and Social Affairs (3 October). Later on, it is debated in this same Committee with representatives of women's interests (women's organisations, trade unions, employers, individual experts and journalists) on 16, 24 and 25 October.
December 2006	On 12 December, the report with amendments to the bill coming from different political groups is debated and approved at the Committee for Employment and Social Affairs. On 21 December the bill is approved by the Congress and elevated to the Senate.
March 2007	The Committee for Employment and Social Affairs of the Senate debates amendments to the bill. Plenary debate in the Senate – Amendments to the bill are submitted to vote. The bill is approved by all political groups with the exception of the PP (7 March) Law is approved in the Congress with the support of all political groups with the exception of the PP (15 March)

Appendix 8.2

List of interviewees

- Susana Brunel, Adjunct Secretary General for Women, Trade Union Confederation *Comisiones Obreras* - CCOO, 19 October 2009
- Paloma Saavedra, President of *Red Ciudadanas de Europa* (RCE), 19 October 2009
- Altamira Gonzalo, President of the *Asociación de Mujeres Juristas Themis*, 20 October 2009
- Marta Ortiz, President of the *Coordinadora Española para el Lobby Europeo de Mujeres*, 20 October 2009
- Enriqueta Chicano, Honorary President of the *Federación de Mujeres Progresistas*, 21 October 2009

Appendix 8.3

The Gender Equality Law – *Ley Orgánica 3/2007 para la Igualdad Efectiva de Mujeres y Hombres*

Summary of principal measures

- Defines concepts of equal treatment between women and men, direct and indirect discrimination and sexual harassment
- Establishes a legal framework for the adoption of positive actions
- Ensures balanced representation of women and men in decision-making
 - Candidate lists in municipal, regional, national and European elections must have a balanced presence of women and men with each of the sexes accounting for at least 40 per cent of the candidates. This proportion will be maintained in each group of five candidates.
 - Companies will ensure a balanced participation between women and men in the boards of directors (40/60) within eight years of the entry into force of the law
 - The principle of gender parity in decision-making should also be observed in the public sector, including: government management bodies, selection bodies and evaluation committees, as well as the designation of government representatives.
- Creates a National Women's Council with a view to guarantee the women's participation in policy-making
- Bans the use of sexist language in public institutions and the media
- Recognises the right to reconcile work and family-life and the promotion of the principle of co-responsibility between women and men in the share of caring obligations
 - Improves existent maternity leave provisions
 - Creates a new maternity leave benefit of 42 days for women who do not have enough employment records

- Introduces a new paternity leave and benefit of 15 days, extendable to 1 month by 2015.
- Obliges employers to formulate and implement measures geared toward preventing gender-based discrimination. These measures will be negotiated in the context of collective agreements. In companies of over 250 employees, these equality measures must lead to the formulation and implementation of an equality plan.
- Bans gender-based discrimination in the access to and provision of goods and services

Chapter 9

Gender democracy across Europe Reflections on explanatory factors and the input–outcome relationship

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The case-studies of this report give insights into the immense variety of culture, history and politics in the East, Central and South European countries under scrutiny. This variety corresponds to the striking diversity in how EU directives are transposed in different national settings – in this case the Goods and Services Directive implementing the principle of equal treatment between men and women in access to and supply of goods and services (2004/113/EC). The studies disprove a view that legal Europeanization and harmonization automatically means legal homogenization and a farewell to national path-dependencies. However, there are also similarities in how the different countries dealt with the transposition of the Goods and Services Directive. Prominently, the transposition process in all countries was characterized by a significant gender democratic deficit; all units score generally, although somewhat variably low on key gender democracy indicators.

In this chapter, I will first draw attention to some essential aspects of national variation and overlap, and start a discussion of how these patterns may be explained. In the second part of the chapter I will take a closer look at what the six country studies, and also the EU level study, tell us about the relationship between democratic input

in decision-making processes and just outcomes. Does a high score on democracy indicators correspond with a high score on gender equality indicators and vice versa? To what extent does 'more' democracy result in more progressive policies and legislation? And the other way around: to what extent does the gender democratic deficit transform into a gender equality deficit in terms of substantial policies and legislation?

The transposition of the Goods and Services Directive: A discussion of explanatory factors

How can the transposition of one and the same directive lead to substantial, progressive administrative and legal change in one case, status quo in another, and in yet another, a more gender traditional approach? This is the inevitable question to be posed when confronted with the case studies of this report. On the one hand there is Spain, where the Goods and Services Directive was transposed as part of a new and far-reaching gender equality law, incorporating gender mainstreaming as a principle in all public policies in both public and the private realms, and allowing for 'positive action to achieve substantial equality between women and men' (Clavero, chapter 8). The EU's equal treatment measure was treated as a minimum requirement and transformed into ambitious equal opportunities legislation. On the other hand, there is Hungary. Here, the Directive 'gained an inverted significance in the process of equalizing genders' (Vajda, chapter 5). In other words the Hungarian government in the end failed to fulfil even the minimum equal treatment requirement, as the new legislation allows for gender-based discrimination in insurance practices. Despite internal differences, the other countries fall between these two transpositions. In this in-between category nothing, or very little, happened apart from fulfilling the minimum requirement of securing equal treatment in the access to and supply of goods and services. In Lithuania the transposition was 'a mere formality'; no 'reform of national equal law' followed (Matonytė and Bučaitė-Vilkė, chapter 6). In Greece something similar took place. The 'most salient characteristic' of the Act that resulted from the transposition is that it prohibits 'the use of sex as a factor in the calculation of premiums and benefits in insurance allocated after 21/12/2007' (Papageorgiou, chapter 4). The situation was somewhat different in Poland and Austria where the occasion was used to introduce more substantial administrative and

legal reforms. These reforms came, however, with significant limitations compared to Spain. In Poland the implementation of the Directive could be better described as '(non)implementation' (Zielińska, chapter 7) in the sense that it resulted in new equal treatment regulations that excluded the private sphere and failed to establish an independent body of implementing and monitoring anti-discrimination. In Austria the Equal Treatment Law on the one hand became the object of non-trivial expansion outside the workplace. On the other hand, peculiar discrimination hierarchies were introduced: particular grounds of discrimination were excluded (religion/philosophy of life, age, sexual orientation), as were certain areas, like education and the media (Gresch and Sauer, chapter 3).

Why did it turn out like this? A more systematic look at the different explanatory factors that are introduced in the different country studies can perhaps provide us with some insights. How do different factors influence the likelihood of progressive gender equality reforms – or the opposite; status quo or even backlash?

First, what had happened with regard to gender equality reforms before the transposition – *the pre-transposition situation* – plays a central role. When the transposition in Lithuania was 'a mere formality' that did not change status quo substantially (Matonytė and Bučaitė-Vilkė), it is also due to the fact that several gender equality amendments and reforms had already taken place to the extent that the minimum requirements established by the Directive were already in place. The same goes for several of the other countries. However, even if this is the case, the question of why the transposition was conceived of as an opportunity to introduce more radical reform in some countries, but not, or only in highly limited ways in others, remains.

Secondly, there seems to be an *EU-effect* that strikes both ways. On the one hand, one should not overlook the general progressive role of the EU in the field of gender equality and anti-discrimination policies. All the country studies emphasize the EU's significance for the introduction of equality legislation and a state feminist apparatus in member states as a result of the principle of direct effect – EU directives and court decisions must be transposed into member state law – and other relevant mechanisms (from 'shaming and blaming' to deliberation and learning), and in non-member states not least as a

result of their adaption to be considered eligible as members (such as Lithuania in the pre-membership period). On the other hand, the progressive influence from the EU is limited, also because EU law is limited. The Goods and Services Directive process is illustrative: The Directive was in the end narrowed down from a wide scope directive to a directive that covered access to and supply of goods and services only (Clavero and Galligan, chapter 2), leaving only a minimum equal treatment requirement obligatory. The offshoot is of course a more limited positive causal effect of EU affiliation on the level of radical reform. In particular, as soon as a country moves beyond the minimum threshold set by the Union, as in the case of Spain, the EU effect decreases. It can even turn into a negative effect when the fact that a country is fulfilling the EU's minimum requirement or the EU accepts whatever the country is doing, contributes, seemingly, to stall further improvements (Greece) or even to set-backs (Hungary). These latter effects reflect the fact that political elites, at least in these cases, for different reasons are more concerned with satisfying Brussels than with making ambitious gender equality and anti-discrimination policies.

Thirdly, *the political colour of national government* clearly matters. Centre and left parties, socialists, social democrats and representatives of the Green party have a more active and positive attitude towards gender equality and anti-discrimination reforms than conservatives and right-wing populists. At different points in history the political colour of the government has been decisive in all the countries that are studied here, and we see this also in the case of the transposition of the Goods and Services Directive, for example the role of the socialist government in Spain in initiating the ambitious gender equality law. That being said, socialists or social democrats in government are no guarantee of a positive equal treatment law. While being in favour of gender equality, they may still have other issues higher on the agenda, and they can compromise – make 'package solutions' (Gresch and Sauer) – with less women-friendly actors: the conservative parties, state administration and the social partners.

This observation leads to a fourth point. Generally, the case studies present *the social partners* as hampering progress in the field of gender equality and anti-discrimination policies, in particular when it comes to legislation beyond the workplace (see for example Poland and

Austria). On the other hand, the social partners play no less of a role in Spain, the success case *per excellence* among the cases here. However, as it turns out, the Spanish case is no argument against the decisive role of the social partners (only against the claim that their influence is always negative), since in Spain the new law was initiated by, among others, the unions, and not pushed through against the will of the unions. This arrangement is connected to the fact that in Spain 'women's interests have been more successfully organized and represented by trade unions and political parties than by women's civil society organizations' (Clavero, chapter 8).

This fourth point can be analytically distinguished from a fifth point: an *elite consensus* culture among central decision-makers in party politics, state administration and among the social partners making deals and compromises may hinder more radical gender equality legislation, as in the case of for example Austria and Hungary. Struggling for gender democracy in Hungary is like 'making a sow's ear from a silk purse' according to Roza Vajda, referring to what she regards as an 'inhospitable' Hungarian political culture for gender equality. Gresch and Sauer hint at something similar when describing Austrian policy-making as 'politics in the realm of shade', deeply embedded in 'strongly androcentric' patterns of 'consensual parliamentary negotiations' and 'corporatist structures'.

Again, however, the Spanish success story is an example of the opposite. As already mentioned, the new gender equality law was put into force by a socialist government – it was not really a result of non-transparent compromises with the conservatives. On the other hand, the law was clearly the result of elite negotiations, in the sense that the transposition and legislation processes were characterized by a low score on central democracy indicators. For example – and this is a sixth point – *women's civil society organizations and gender experts* were not included, or included only in very limited ways. With regard to this, the story is the same in Spain as elsewhere: In country after country feminist civil society initiatives towards more radical legislation were ignored. This indicates that the transposition processes would have led to more progressive results if women's organizations and gender experts had been listened to, but the example of Spain also shows that in terms of an ambitious legislative outcome, the inclusion of civil society is not necessarily decisive. Furthermore, there are also examples in several countries of women's

organizations that were included in the transposition process, even if insufficiently, but that took no or little initiative during the transposition process.

This is linked to yet another point, namely the broader *discourse* setting; what was conceived as the thematic, conceptual and normative parameters for the transposition process. In Lithuania the transposition of the Goods and Services Directive was framed as a 'technical' directive, and not as a gender equality directive with possibly very wide implications (Matonytė and Bučaitė-Vilkė). We see a similar mechanism in, for example, Greece and Hungary, where the directive was understood and discussed overwhelmingly as an insurance directive. Simply speaking, a main reason why the opportunity to make radical legislation was not seized, was that the situation was not read as an opportunity to make radical legislation. This is also connected to the detailed, technical and legal vocabulary of EU directives. As they stand, if no one highlights and spells out what they 'really' are about – in this case gender equality – they are often difficult for civil society organizations with limited resources, politicians and the public generally to interpret and act upon. Indeed, the case of the Recast Equal Treatment Directive is a classic example of this happening at EU level, in contrast to the high mobilization of societal actors on the Goods and Services Directive (Clavero and Galligan, chapter 2).

Yet another crucial factor is whether the dominant national culture is imprinted with *gender traditional values* and assumptions. This is an important factor in several of the countries, as in Hungary where nationalism is embedded in 'gender conservative stereotypes' and projects directed towards the 're-feminization of women' (Vajda), and in Poland where 'traditional gender roles have been tightly incorporated in the national project' (Zielińska). Several of the countries in question have also been characterized as 'conservative welfare regime' (Gresch and Sauer), and 'strong male breadwinner regime' (Clavero), or a society in which the family is 'the bastion and the centre' (Papageorgiou). This being said, conservative cultural patterns and regimes may be overturned, as clearly has been the case in the case of Spain. There are also examples of countries where the cultural climate is more gender equality-friendly, such as in Lithuania (Matonytė and Bučaitė-Vilkė).

And this introduces a final factor: how the different countries culturally and politically have dealt with occupation and *past experiences of authoritarian leadership*. An interesting contrast here is between Poland and Hungary on the one hand and Lithuania on the other. In Poland and Hungary gender equally was associated with state socialism and oppression and the democratic transformations after 1989 were thus 'accompanied by the reinforcement of traditional gender roles, sentimentalisation of home and family, and a strong backlash against feminism and women's emancipation, perceived as a remnants of the previous, then discredited system' (Zielińska). In Lithuania, however, there is rather talk of 'positive path-dependencies from the Soviet times' combined with 'impulses coming from European (mostly Scandinavian) and American partners' that created a gender equality-friendly environment.

The relationship between input and outcome

With this discussion of explanatory factors in mind – what can be said about the input-outcome relationship in the context of the empirical studies? The relationship between input (decision-making procedure) and output (the quality of the policy, legislative and organizational outcome) is a contested topic in normative political theory. On the level of ideal-theory, some argue that the definition of justice is internally related to what free and equal persons would accept under certain idealized circumstances (see for example Habermas 1998; Fraser 2009; Forst 2011). Others argue that there is a possible discrepancy between arguably just outcomes on the one hand and the outcomes that even normatively ideal decision-making procedures would produce (Roemer 2006; Nussbaum 2006).

However, more relevant in our context is the question of to what extent democracy as institutionalized in real world settings produces good outcomes. On the one hand, it is a central assumption in much of democratic theory that it does. Democracy is considered as the only legitimate rule and as having independent value, but also as a system of government with real potential to produce high-quality decisions (Goodin 2005). On the other hand, empirical studies show weak, none, or sometimes even negative correlations between democracy, quality of government and human well-being (Rothstein 2011). Democracies do not necessarily deliver better than non-democracies in terms of 'true' or 'right' decisions (Sen 2001).

How do the studies of this book shed light on this issue? Before we can say something about this, we must of course define more closely the meaning of terms such as 'good outcomes' and 'right decisions'. What these studies clearly show is the well-known insight that different political actors may have very different ideas about what a good outcome really is in the field of gender equality and anti-discrimination policies and legislation. Some actors are in favour of equality and anti-discrimination in terms of formal equal treatment legislation; others want more ambitious legislation and policies to achieve real equality of opportunities. Some actors prefer general anti-discrimination legislation, while others want separate legislation and policies on gender equality. Furthermore, gender equality can be measured in terms of gender gaps in the distribution of positions and resources, or in terms of legislation and policies. And finally, there are actors that are sceptic of 'gender equality' altogether, and who stress the importance of maintaining and cultivating gender difference and women's and men's traditional roles. However, what 'good outcomes' will mean in the discussion that follows, is gender equality, and gender equality in the sense of real equal opportunities, whether this aim is implemented by means of general or gender-specific legislation and policies. From this perspective, Spain is clearly the model case of this book.

What then about democracy? If we are to say something about the relationship between democracy and good outcomes, we must also define democracy more thoroughly. The empirical studies referred to above, reporting few, zero, or negative correlations between democracy and good outcomes, define democracy in terms of parliamentary *representative democracy*. However, we could also think of democracy as *stakeholder democracy*; democracy understood as the inclusion of relevant stakeholders in the decision-making process, from enterprises, lobby groups and social partners, to civil society organizations and citizens' initiatives. Yet another conception of democracy would be *deliberative democracy* where institutions and procedures are construed so as to maximize deliberative quality within the limits of democratic standards. Finally, there is the approach to democracy relied on in this report, namely *gender democracy* (Galligan), a democracy that is inclusive and accountable also from a gender perspective and that recognize women's claims and interests on a par with men's.

With this democracy typology in mind – and on the basis of the empirical studies presented in the previous chapters – what can be said about the relationship between democratic decision-making and progressive gender equality policies and legislation? Does a high score on democracy correlate with ambitious aims and measures in the field of gender equality and anti-discrimination? Is there a positive input-outcome relationship? The answer must be both yes and no. First, the story of the EU is arguably the story of a whole lot of feminism-from-above. By means of direct effect, ‘shaming and blaming’, learning and other mechanisms, the Union has brought with it better gender equality legislation and policies, despite a democratic deficit both on the EU-level – measured according to any of the above democracy standards¹ – and in the member states. In this sense, the EU case is a case of democratic shortcomings that are not necessarily translated into bad outcomes; in the field of anti-discrimination and gender equality legislation and policies one has seemingly come a long way with technocracy and less-than-democracy. On the other hand, EU feminism-from-above has been restricted. As in the case of the Goods and Services Directive, the Union typically establishes equal treatment minimum standards, and leaves the pursuance of real equal opportunities legislation and policies to member states – that often fail in this regard.

This opens the question of whether ‘more’ democracy could have produced even better outcomes. It is interesting in this context to compare two mixed models of democracy, meaning models that mix elements of several of the ideal type conceptions of democracy listed above. In terms of gender equality and anti-discrimination, what can the studies of this report tell us about the merits of parliamentary representative democracy in combination with social partners’ democracy relative to the merits of ‘deliberative gender democracy’ (Galligan), a deliberative stakeholder democracy that puts particular weight on including women’s civil society organization, gender experts and other women’s interests pursuers?

Arguably, many of the countries studied here score worse on representative/social partners’ democracy than on deliberative/

¹ Clavero and Galligan (Chapter 2) bring democracy’s shortcomings to the fore with regard to representativeness, stakeholder influence, deliberative qualities and gender.

gender democracy. What several of the studies show is that representative/social partners' democracy is often part of the problem. Social partners' power and elite negotiations between party leaders and powerful stakeholders often limit the scope and opportunities for feminist entrepreneurship in the member states. Add to this national cultures imprinted with gender traditional values and assumptions and the fact that the parties that typically profit from such sentiments are the conservative and Right wing populist parties that typically oppose ambitious gender equality legislation and policies and gender equality initiatives from Brussels in particular. Also on the level of EU decision-making, the Recast Directive process shows that a strengthening of representative democracy – here, by means of strengthening the formal powers of the European parliament – does not necessarily result in progressive outcomes. To be sure, we do not know what a more 'perfect' representative democracy would have delivered in an EU context. However, the Recast case shows that improving somewhat on less-than-perfect representative democracy is not necessarily a sufficient condition to deliver gender equal outcomes.

What then about deliberative/gender democracy? Would outcomes have been better in a deliberative democratic setting that included women and gendered perspectives? There are indicators pointing in this direction. First, given that there are good normative arguments for interpreting 'equality' as a standard of real equality (and not only formal equality) and equal opportunities (and not only equal treatment), there is reason to believe that increased deliberative quality will improve on results. Secondly, since both the EU-level study of Galligan and Clavero and the country studies give us many examples of how women's civil society organizations and gender experts push for more ambitious gender equality legislation and policies, there is also reason to expect some correlation between high scores on gender democracy indicators and high scores on outcome.

Yet, the picture is blurred. For one thing, our model case – Spain – does not fit this conclusion very well. Here the successful outcome did not come about by means of including feminist civil society activists and the women's movement – the transposition process scores generally low in gender democracy indicators – but came about through the more established channels of representative/social partners' democracy. Furthermore, as the Hungarian case shows –

women's civil society organizations and feminist stakeholders have limited resources and expertise and contribute variably with effective arguments and progressive proposals and solutions – there is very often a substantial discrepancy between 'descriptive representation' and 'substantive representation' (Vajda, chapter 5).

This mixed picture with regard to the input-outcome relationship and the merits of different democracy models makes it difficult to draw general conclusions about the short-term implications of democratic reform on both the EU and member state level. There is general reason to believe that 'more' deliberative/gender democracy will improve on gender equality outcomes, but only if we talk of substantially 'more', in the long run, and under the condition that gender democracy is implemented and organized to maximize deliberative quality. The success story of Spain shows, moreover, that a 'gender mainstreamed' representative/social partners' democracy can do a good job as well.

Finally, we must be careful in our normative conclusions – because the empirical picture is complicated and not straightforward, but also generally, in the sense that *even if* the empirical picture had been uncomplicated and straightforward, normative conclusions are not a given. This is because we may regard democracy as the only legitimate form of rule relatively independent of whether it delivers progressive outcomes or not. Or the other way around: Our evaluations of democracy may be intimately connected with democracy's achievements in terms of ambitious policies and legislation. As usual, we are left with more questions than answers – a good outcome of a research process – and new insights into the nature and quality of democracy as in theory and as practice.

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The gendered nature of democratic decision-making in Europe is the focus of this collection. Using the notion of ‘gender democracy’, the contributions critically examine the formulation and transposition of gender equality through the Goods and Services Directive. These studies reinforce the importance of including the ‘qualified and affected’ community in law-making processes: in this case, women. More generally, the contributions bring to light the inbuilt weaknesses of democratic institutions, practices and processes from the perspective of gender equality. As a gender-focused democratic ‘audit’, the report offers important insights into what works and what must be changed if European and national democracies are to deliver on gender equality.

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Reconstituting Democracy in Europe (RECON) is an Integrated Project supported by the European Commission’s Sixth Framework Programme for Research. The project has 21 partners in 13 European countries and New Zealand and is coordinated by ARENA – Centre for European Studies at the University of Oslo. RECON runs for five years (2007–2011) and focuses on the conditions for democracy in the multilevel constellation that makes up the EU.

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