

IMPORTING GENDER: FEMINIST ANALYSES OF EU LAW

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This paper is *very draft*. In particular, it is as yet sparingly referenced, without sufficient acknowledgement of its intellectual debts and foundations. It also lacks adequate empirical exemplification of many of the points made (or, better, asserted). Comments, questions and criticisms are very welcome.

I INTRODUCTION

The context of this paper could be said to be a dual intellectual turn within aspects of European Union studies. Limiting the range of observation in the first place to law alone, one can first point out that there has been a move away from European Community law practised as a discipline involving essentially and largely exclusively the description and analysis of the positive law. Influences from integration theory and legal theory have made their presence strongly felt, and what has emerged is a more open textured discipline which I have elsewhere characterised as 'European Union Legal Studies'. This paper seeks specifically to deploy some arguments drawn from feminist legal theory, and feminist theory more generally.¹ Secondly, in the wider terrain of European Union studies more generally – itself already an interdisciplinary enterprise – there has been a noticeable turn towards 'normative theory', or meta-theory as some would have it. In other words, there is a widespread acknowledgement that in examining the process, context, form and substantive content of European integration, recourse needs to be had to more than theories which account for the behaviour of actors including Member States, EU institutions and other sub-state and non-state actors, but also theories which engage with the normative underpinnings of a polity-formation process in postnational conditions. That normative theory itself could so easily – like much normative political theory generally – be subject to feminist analysis.

It is against that background that this paper attempts to consider the intersection of gender and EU law. It does so in the context of the endeavour to go 'beyond Article 119'. In other words, it looks beyond the most obvious engagement of EU law with the legal status of women (and men) as actors within the market place for labour, which takes the form of a treaty-based and fully legally enforceable guarantee of equal pay for equal work, plus an associated legal framework for equal treatment in other aspects of employment and related matters. That is not to say that the whole realm of sex discrimination law should suddenly be dismissed as unimportant. On the contrary, inevitably the legal regulation of equality and the creation of a regime to guarantee non-discrimination on grounds of sex under the law will feature prominently in any analysis of the gendered nature of EU law. However, the basic proposition from which I start in this paper is that there is a substantial difference between, on the one hand, studying, analysing and presenting a field of law defined by reference to specified legal categories such as 'non-discrimination' or 'the right to equality', and, on the other hand, beginning an analysis with a non-legal category such as 'gender'.

¹ A brief comment is needed on why the term 'feminist' is deployed throughout this paper and in its title. Analyses problematising 'gender' do not necessarily have to be 'feminist'; this paper, however, self-consciously acknowledges a debt to an essentially political project to address the situation of women within state, society and economy, and the associated sensitivity to the question of difference and the issue of equality. Jenny Chapman, 'The Feminist Perspective' in David Marsh and Gerry Stoker (eds.), *Theory and Methods in Political Science*, London: Macmillan, 1995 is rather helpful on this point. Once the point about feminism is clear, I feel no need to be apologetic about indulging in my penchant for normative theory.

II IMPORTING GENDER INTO EU LAW: SOME PRELIMINARY THOUGHTS

What is meant by 'importing gender' into EU law?² In this context, I take it to be the endeavour to uncover the (hidden?) 'gendered character' of aspects of the legal order, legal actors and legal processes of the European Union.³ It is easy to consign the 'gendered approach' to being 'just' another 'strand' of thinking, for example, about laws, institutions, processes, concepts, etc. Two essential points need to be made here: 'gendered' approaches must not be ghettoised as merely providing, for instance, useful insights in relation to a limited range of social or political institutions (such as the family or the household); on the contrary, they offer potentially a wholly different perspective on institutional behaviour, suggesting, for example, relationships between institutional settings and individual actors which are structured by connexity, associability and trust, rather than by choice, preference-formation and maximisation, and the conceptual separation, even cleavage, between actor and institution.

Second, there is no single universal approach to 'importing gender'. Indeed, the controversy of 'feminist method' has sustained many lengthy academic debates.⁴ Particularly in the context of legal scholarship, feminist analyses of any kind remain a form of transgressive if not downright deviant scholarship, in that in any form they challenge 'the neutrality which has a central place in the framework of modern thought and in the modern ideal of the rule of law'.⁵ If only as a political point (and in keeping with a general scepticism about 'grand theories' which pervades EU studies as much as it does feminist theory), it is essential to avoid a reciprocal false universalism in feminist approaches. The feminist canon – if there is one – is a canon in which dialogic processes of interactive learning between different approaches, perspectives, methods and theories is to the fore. So, for example, the importation of gender might include (amongst other approaches) something as simple as the critique of doctrinal concepts such as equality and non-discrimination and their instrumentalization by courts which operate within the paradigm of a society, an economy and a polity in which women suffer structural disadvantage as well as, from time to time, personal prejudice;⁶ this could well involve, for example, the attempt to show why 'equality' should be construed in substantive rather than in formal terms. Or it might involve the deconstruction of sexual stereotypes and the critique of sexism in law;⁷ or the challenging of dominant ideologies about women, motherhood, family life, and the sexual division of labour;⁸ or indeed the transgression of women's

² I have used the term 'EU law' instead of 'EC law', as I want to include some issues subject to forms of (sometime soft) legal regulation right across the three pillars of the European Union, such as the treatment of women as refugees, the securitisation agenda, issues of human rights, concepts of 'foreign' and 'security' policy, etc. etc.

³ See generally Reg Graycar and Morgan, *The Hidden Gender of Law*, 1990.

⁴ For a concise review of the issues raised in relation to law see the section on 'Feminist Epistemology' in Graycar and Morgan, op. cit. *supra* n.3 at p56 *et seq.*

⁵ Nicola Lacey, 'Feminist Legal Theory Beyond Neutrality', in Nicola Lacey, *Unspeakable Subjects. Feminist Essays in Legal and Social Theory*, Oxford: Hart Publishing, 1998, p188.

⁶ Gillian More, 'Equality of Treatment in European Community Law: The Limits of Market Equality', in Anne Bottomley (ed.), *Feminist Perspectives on the Foundational Subjects of Law*, London: Cavendish Publishing, 1996 and other work by Gillian More.

⁷ See Leo Flynn, 'The Body Politic(s) of EC Law', in Tamara Hervev and David O'Keeffe (eds.), *Sex Equality Law in the European Community*, Chichester: John Wiley, 1996.

⁸ E.g. Clare McGlynn, 'Ideologies of Motherhood in European Community Sex Equality Law', paper delivered to the SLSA 1999 Annual Conference and the SPTL EC Section Workshop on *The Limits of EC Social Policy*, Oxford, March 1999.

marginality in law, under law and as legal subjects, or assessments of the impact of laws upon women's (real) lives, including the attempt to 'predict the impact of policy'.⁹ One might also suggest, as I have done in the past,¹⁰ that the essence of feminist method – whatever uncertainties it might generate – is to begin with the 'primacy of women's experience'. In doing so, however, it would be important to stress the relevance of the diversity of women's experience, in order to avoid the trap of essentialism. Similarly, in the sphere of international law, the groundbreaking analyses challenging the previous 'immunity' of international law to feminist analysis have demonstrated how international laws and the international legal order has *systematically* favoured one sex over the other.¹¹ Thus the impact of much feminist work on law can be to expose the ways in which a body of knowledge - i.e. legal doctrines and legal practices - is constructed in a way which tends to exclude the interests of the less powerful, in particular women (but also other 'marginal' groups).¹²

One other preliminary point is vital. It is obviously important, when developing feminist analyses and gendered perspectives of EU law to go beyond the realm of equal treatment law. The traditional domain of equality law, defined initially by Article 141 EC on equal pay (Article 119 EEC as it was in the original Treaty of Rome) and subsequently through the key 1970s Directives on equal pay and equal treatment, has itself expanded quite considerably in scope in recent years. That expansion in scope is in turn matched by the evolving range and complexity of scholarship which seeks to analyse that body of law. Thus, equality principles are applied also to state social security and occupational pensions, and to the self-employment as well as the employment domains. Atypical workers, who are predominantly women, are increasingly the subject of EU-level regulation. The specific health and safety concerns of women in the context of reproduction and motherhood are dealt with in the Pregnancy Directive, and through the extension of equal treatment principles to the issue of pregnancy and maternity. Broader 'family-friendly' issues are dealt with in measures such as the Parental Leave Directive, and numerous soft law measures, and 'family-friendliness' is increasingly becoming a *leitmotiv* of the Court of Justice's case law on equality, even if – as Clare McGlynn contends – within the framework of a 'traditional' dominant ideology of motherhood which restricts women's autonomy and choices and views them within a discourse of 'protection'.¹³ Most recently, the Treaty of Amsterdam which came into force on May

⁹ See the TSER funded project on *Predicting the Impact of Policy: A Gender Impact Assessment Mechanism for Assessing the Probable Impact of Policy Initiatives on Women*, University of Liverpool, Feminist Legal Research Unit, building on the earlier work of Fiona Beveridge and Sue Nott, 'Gender-Auditing – Making the Community Work for Women', in Hervey and O'Keeffe, above n.7.

¹⁰ Jo Shaw, 'Law, Gender and the Internal Market', in Hervey and O'Keeffe, above n.7, p287, citing Cain, 'Feminist jurisprudence: Grounding the Theories', in Bartlett and Kennedy, *Feminist Legal Theory*, 1991 at p263.

¹¹ The *locus classicus* is, of course, Hilary Charlesworth, Christine Chinkin and Shelley Wright, 'Feminist Approaches to International Law', (1991) 85 *American Journal of International Law* 613.

¹² See also Finley, "Breaking Women's Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning", (1989) 64 *Notre Dame Law Review* 886.

¹³ See Case C-243/95 *Hill and Stapleton v. The Revenue Commissioners and the Department of Finance* [1998] 3 CMLR 81; Clare McGlynn and Catherine Farrelly, 'Equal Pay and the "Protection of Women in Family Life"', (1999) 24 *European Law Review* 202; McGlynn, above n.8.

1 1999 makes two key changes: it reinforces through the redrafted Article 141 EC the possibility of national or regional autonomy in relation to the pursuit of positive action schemes, a position largely replicating that now reached by the Court of Justice in the *Marschall* case¹⁴ after its earlier hostility in *Kalanke*.¹⁵ In *Marschall*, the Court adopted a rhetoric on 'real' equality which is markedly more sympathetic to the historic disadvantages suffered by women. As the Court rightly confirmed:

'... even where male and female candidates are equally qualified, male candidates tend to be promoted in preference to female candidates particularly because of prejudices and stereotypes concerning the role and capacities of women in working life and the fear, for example, that women will interrupt their careers more frequently, that owing to household and family duties they will be less flexible in their working hours, or that they will be absent from work more frequently because of pregnancy, childbirth and breastfeeding. For these reasons, the mere fact that a male candidate and a female candidate are equally qualified does not mean that they have the same chance.'¹⁶

The second innovation of the Treaty of Amsterdam, is the possibility (although, I would suggest, not the probability) of 'mainstreaming' the approach to social exclusion which is based on (individual and justiciable) rights and the legal instrument of 'discrimination', which has dominated the EU's policies of gender hitherto.¹⁷ Article 13 EC is a new law-making power allowing the Council, acting unanimously after consulting the European Parliament, and on a proposal from the Commission, to take

'appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation'.

'Beyond equality', scholars have concentrated upon areas of law which have the most obvious gender relationship, in particular in the way in which they organise relationships between individuals and states, and between individuals *inter se*. In practice, this has meant a concentration upon the law relating to the free movement of persons. Louise Ackers, for example, opened an important new line of enquiry when she argued that the provisions on the free movement of workers, in particular, are not gender-neutral in their impact.¹⁸ In particular, she pointed to the relevance of the

¹⁴ Case C-409/95 *Marschall v. Land Nordrhein-Westfalen* [1997] ECR I-6363.

¹⁵ Case C-450/93 *Kalanke v. Freie Hansestadt Bremen* [1995] ECR I-3051.

¹⁶ *Marschall* at paras. 29-30.

¹⁷ It has not been the only policy mechanism used, of course, even within the field of equality: see Jane Pillinger, *Feminising the Market. Women's Pay and Employment in the European Community*, London: Macmillan, 1992; Sonia Mazey, 'The European Union and women's rights: from the Europeanization of national agendas to the nationalization of a European agenda?', (1998) 5 *Journal of European Public Policy* 131; and June Neilson, 'Equal Opportunities for Women in the European Union: Success or Failure', (1998) 8 *Journal of European Social Policy* 64. The example of action for women and girls in relation to education and vocational training is also quite different, bearing in mind the limitations of Community competence; see, on the 'mainstreaming' approach adopted here, Teresa Rees, *Mainstreaming Equality in the European Union*, London: Routledge, 1998.

¹⁸ Louise Ackers, 'Women, Citizenship and European Community Law: The Gender Implications of Free Movement Provisions', [1994] *Journal of Social Welfare and Family Law* 391. See more recently Louise Ackers, *Shifting Spaces. Women, Citizenship and Migration within the European Union*, Bristol: The Policy Press, 1998, Ch. 4. Louise Ackers

differing national welfare regimes – and their gendered impact – within which the legal framework at EU level must be situated. Kirsten Scheiwe compared the law on sex discrimination and on the free movement of workers, and found that they treated the notion of the family quite differently.¹⁹ In a more recent essay, Isabella Moebius and Erika Szyszczak provide an important insight when they critique the *Martinez Sala* judgment in so far as they concentrate upon María Martínez Sala, the woman and lone parent caring for dependent children, rather than upon María Martínez Sala, the mobile European Union citizen.²⁰ Yet it is in the latter terms alone that she is constructed as a legal subject by the Court of Justice.²¹ Moebius and Szyszczak trenchantly criticise the Court of Justice for drawing a distinction between work and care which renders the latter invisible to EC law. This mirrors the Court's famous statement in the *Hofmann* that the Equal Treatment Directive is 'not designed to settle questions concerned with the organization of the family, or to alter the division of responsibility between parents'.²²

In turn, 'beyond the free movement of persons' and the substantive 'free movement' dimension of Union citizenship (an element of what has been termed 'market citizenship'), there is a case for examining closely the gendered impact of many fields of EC and EU law. Other fields of social policy would be obvious contenders, and one could include the impact of the Works Councils Directive upon women's participation in the governance of the enterprise and in unions, the effects of the Acquired Rights Directive on women as employees in restructuring enterprises and industries, and the rapidly growing field of employment policy. There are also good examples to be found within the broad internal market field:

- the law on free movement of services (in particular, now that its application to health care services is wholly clear; one might also cite the liberalisation of pensions and other financial services as relevant areas for research);
- freedom of establishment (the interaction between mobility rights and women's increasingly frequent recourse to self-employment);
- competition law (e.g. as pertains to the regulation of the third sector).

In a work in progress on the concept of 'social solidarity' deployed by the Court of Justice to alleviate some of the harsher effects of the law of the internal market on the voluntary sector and (quasi-)public bodies involved in the provision of health and welfare services, Tamara Hervey is in practice considering many of these questions.

and Helen Stalford have recently undertaken a similar exercise in relation to the impact of free movement rules on children, and the status of children under EC law: Louise Ackers and Helen Stalford, 'Children, Migration and Citizenship in the European Union: Intra-Community Mobility and the Status of Children in EC Law', *The Children and Youth Services Review*, November 1999, forthcoming.

¹⁹ Kirsten Scheiwe, 'EC Law's Unequal Treatment of the Family: The Case Law of the European Court of Justice on Rules Prohibiting Discrimination on Grounds of Sex and Nationality', (1994) 3 *Social and Legal Studies* 243.

²⁰ Isabella Moebius and Erika Szyszczak, 'Of Raising Pigs and Children', *European Law Review*, forthcoming.

²¹ And in those terms that she is discussed by Sybilla Fries and Jo Shaw, 'Citizenship of the Union: First Steps in the European Court of Justice', (1998) 4 *European Public Law* 533.

²² Case C-184/83 *Hofmann v. Barmer Ersatzkasse* [1984] ECR 3047 at para. 24. See generally, on the 'care' question, Tamara Hervey and Jo Shaw, 'Women, Work and Care: Women's Dual Role and Double Burden in EC Sex Equality Law', (1998) 8 *Journal of European Social Policy* 43; Holly Cullen, 'The Subsidiary Woman', (1994) 16 *Journal of Social Welfare and Family Law* 4.

There seems, however, no obvious reason to limit 'gender analysis' to fields of substantive law alone; rather, why not subject areas of constitutional and institutional law, much of it deriving from the EU rather than strictly from the EC, to a similar analysis? Important areas to be considered would include the following: human rights, asylum, immigration and refugee law under the new free movement Title as well as the evolving Third Pillar, rules on transparency and openness, rules on representation and participation, including the evolving regulation of civil society, the third sector, and the social partners, as well as the better established ECOSOC and Committee of the Regions. Many of these questions have been the subject, already, of analysis in the context of feminist interventions into International Law.²³

This, then, is an important – and thus far underregarded – form of 'mainstreaming' within the domain of law and legal discourse. It rejects the suggestion that the analysis of gender or a gendered analysis can only ever be 'marginal',²⁴ just because sex equality law, in turn, can itself be perceived as marginal to the mainstream concerns of the EU legal order with its internal market project and increasingly grand ideas of polity-formation and constitution-building.²⁵

Having settled the imperative of expanding the scope of feminist and gender-based analyses, I return to the question of the approach taken in this paper to the issue of gender. In developing this argument, I have an eye both to achieving a greater understanding of the interaction between 'gender' and the integration project in contemporary Europe, but also to the appreciation of the role of law in underpinning gender hierarchy and the task of reconstructing concepts such as justice and equality in a way which is sensitive to the task of accommodating difference.²⁶ 'Gender' is not to be taken as synonymous with 'women'. It adopts a generally accepted definition of gender as implying the social relations between and among the sexes.²⁷ The focus on relationships encourages an awareness of differences of power, especially economic power, between men and women considered as a group. As Williams has argued, feminist analysis has gone beyond the argument that women should be given the same opportunities as men, thus allowing them to assimilate themselves to the situation of men.²⁸ The focus on differences helps to highlight, for example, the feminization of poverty

'which dramatizes the chronic and increasing economic vulnerability of women. Feminists now realize that the assimilationists' traditional focus on

²³ See the review by Christine Chinkin, 'Feminist Interventions into International Law', (1997) 19 *Adelaide Law Review* 13; see also work by Doris Buss.

²⁴ Sex equality law as marginal is implicitly accepted by Ian Ward, who devotes a chapter to the subject in his book *The Margins of European Law*, London: Macmillan, 1996.

²⁵ Although many have located sex equality law firmly in a 'market frame': see Bob Hepple, 'Equality and Discrimination', in Paul Davies *et al* (eds.), *European Community Labour Law: Principles and Perspectives*, Oxford: Clarendon Press, 1996 and Catherine Barnard, 'The economic objectives of Article 119', in Hervey and O'Keefe, above n.7. Once in that frame, it is hard to see how logically sex equality law can be 'marginal'.

²⁶ Lacey, above n.5 at p218-9.

²⁷ Jones and Jónasdóttir, "Introduction: Gender as an Analytic Category in Political Theory", in Jones and Jónasdóttir (eds.), *The Political Interests of Gender*, 1988, London, etc.: Sage, at p6.

²⁸ "Deconstructing Gender", in Bartlett and Kennedy, *Feminist Legal Theory*, 1991, Boulder etc.: Westview Press.

gender-neutrality may have rendered women more vulnerable to certain gender-related disabilities that have important economic consequences.²⁹

I argue that 'importing gender' is the task of engaging with 'embodied difference' within law, legal institutions and legal processes, especially (but not exclusively) in the ways in which individuals relate to or interact with these laws, institutions and processes. As Moira Gatens argues,³⁰ 'feminists have shown that sexual and racial differences are embodied differences that have far-reaching effects on the way individuals are able to engage with institutions'. And, one might add, other differences based on class, religion, ethnic origin, and sexuality. Such an approach rejects the disciplining effects of the dominant public/private divide within much liberal theory. As Carl Stychin has argued, this divide is a key spatial marker which has facilitated patterns of exclusion within polities, especially in terms of gender and sexuality.³¹ But, 'beyond the divide', as it were, it is possible to envision the constant negotiation and renegotiation of difference in a context where affinity overcomes cruder notions of identity and identification. In similar terms, I have argued elsewhere,³² in the context of relational approaches to terms such as citizenship and constitutionalism in the EU, for the spaces and voices which these terms connote to be viewed as sites of continuing contestation and negotiation between 'agents of states and members of socially-constructed categories: genders, races, nationalities and others.'³³ Thus a gendered analysis, understood in terms of 'embodied difference', is not the task of reading a fixed category onto EC/EU law, but of engaging in continued discourse and debate about meanings and effects of legal rules, categories, institutions and processes. In that sense, it is also a form of 'contextualised difference'. A politics of difference posits, moreover, an inclusive definition of those entitled to contribute to that debate, and grants to them the necessary recognition of the relevance and validity of their claims (and their claim to articulate such claims in their 'own' language).³⁴

²⁹ Ibid, at p95.

³⁰ Moira Gatens, 'Institutions, Embodiment and Sexual Difference', in Moira Gatens and Alison Mackinnon (eds.), *Gender and Institutions: Welfare, Work and Citizenship*, Cambridge, Cambridge University Press, 1998, p1.

³¹ Carl Stychin, 'Dis-integrating Sexuality: Citizenship, Space, and the European Union', Paper prepared for a workshop on *Rights, Identities and Communities of the European Union*, Leeds, April 30 1999.

³² 'The Problem of Membership in European Union Citizenship,' in Zenon Bańkowski and Andrew Scott (eds.), *The European Union and its Order*, Oxford: Blackwell, 1999; 'The emergence of postnational constitutionalism in the European Union', Special Issue of the *Journal of European Public Policy*, 1999, no. 3 (edited by Thomas Christiansen, Knud-Erik Jørgensen and Antje Wiener).

³³ To borrow from Charles Tilly, 'Citizenship, Identity and Social History', in Charles Tilly (ed.), *Citizenship, Identity and Social History*, Supplement 3, *International Review of Social History*, Cambridge: Cambridge University Press, 1996, at p6.

³⁴ This approach derives a good deal from the work of James Tully, in particular *Strange Multiplicity. Constitutionalism in an age of diversity*, Cambridge: Cambridge University Press, 1995 and, more recently, 'Freedom and Disclosure in Multinational Societies', in Alain Gagnon and James Tully (eds.), Charles Taylor (Preface), *Justice and Stability in Multinational Societies*, Cambridge: Cambridge University Press, 2000, forthcoming and 'Identity Politics and Freedom: The Challenge of Reimagining Belonging in Multicultural and Multinational Societies', Conference on Reimagining Belonging, School for Postgraduate Interdisciplinary Research on Interculturalism and Transnationality, Aalborg University, Denmark, May 1999.

III DEFINING A RESEARCH AGENDA

In the next part of the paper, I want to suggest two different ways of proceeding further with this approach: through qualitative socio-legal empirical work on law and legal institutions (in the classic vein of work which looks beyond 'law in the books' to see the 'law in action'); and through work of a more conceptual nature which works through feminist critiques of the classics of political theory, and which relies upon studies of case law and other textual material (e.g. legislation including soft law, treaty texts, and less formal texts such as reports, etc., from both public and private or quasi-public bodies (e.g. campaigning reports from NGOs and similar texts are what I have in mind here)).

In relation to the contribution of socio-legal studies to 'importation of gender', the work of Louise Ackers is very instructive.³⁵ She has gone beyond simply critiquing the case law in a manner which draws upon concepts of citizenship, welfare and dependency informed, in particular, by the discipline of social policy. In addition, Ackers also presents and draws upon a substantial body of empirical evidence based on a comparative six-country cross-national study involving in depth interviews with women who migrated within the EU.³⁶ In keeping with the subject matter of the work (migration), Ackers uses a metaphor of 'shifting spaces' to illustrate her overall approach, and comments upon the complementarity of migration studies and gender studies as *both* require (and reward) an interdisciplinary approach. Work such as this, based on qualitative research methods, not only evaluates the 'law-in-action', and highlights disjunctures between assumptions about women's migration (they follow a male breadwinner) and the realities (not as true as might have been expected), but also tells us a great deal about the relevance of concepts such as citizenship 'as a vehicle for the evaluation of women's lives and about the problems of operationalising the concept.'³⁷

This approach also appears to invite intensified study of the EU institutions. Beginning with the Court of Justice, there is, of course, the obvious point about the absence of women judges and Advocates General,³⁸ except more recently in the Court of First Instance. However, in terms of the Court as a 'gendered institution', it is relevant also that women participate directly in the work of the Court as *référéndaires*³⁹ and as lawyers appearing before the Court. One can also examine the role of women as litigants and as givers of evidence. Certainly, it has been the case that the focus of much Anglo-American research on women and courts, and on the judicial and forensic processes, has concentrated on a critique of how women are constructed, e.g. as good or bad mothers, deserving or undeserving, as victims in domestic violence cases. Women even seem to be subject to stereotypical construction as witnesses; many in the UK will be familiar with the famous comment by the

³⁵ Check Harm Schepel work.

³⁶ Louise Ackers, 'Citizenship, Gender and Dependency in the European Union: Women and Internal Migration', in Hervey and O'Keeffe, above n.7. For more details, see Ackers, *Shifting Spaces*, above n.18 esp. Chs. 5-8.

³⁷ Ackers, *Shifting Spaces*, above n.18 at p326.

³⁸ Sally Kenney, 'The Members of the Court of Justice of the European Communities', (1998/99) 5 *Columbia Journal of European Law* 101.

³⁹ Sally Kenney, 'Beyond Principals and Agents: Seeing Courts as Organizations by Comparing *Référéndaires* at the European Court of Justice and Law Clerks at the U.S. Supreme Court', *Comparative Politics*, forthcoming.

presiding judge about Mary Archer as 'fragrant' in a defamation case brought by her husband Jeffrey Archer (the novelist) against a tabloid newspaper.

In the Court of Justice, of course, women's role as litigants and witnesses is at a distance. For these purposes, national courts operate as Community courts, and in the context of an Article 234 EC reference, it will be the national court which is the ultimate arbiter of fact, and hence the taker and evaluator of evidence. Some work has been done about the role of scientific expertise in EU decision-making, including decision-making by the Court of Justice.⁴⁰ It would be interesting to extend such a study to see the extent to which the Court has been influenced by 'expert evidence' where it has made direct statements about gender relations, in cases such as *Hofmann*, *Johnston v. RUC*, *Hill and Stapleton* and *Marschall*, or in order to assist it in applying the indirect discrimination concept in equal treatment and equal pay cases where it is required to evaluate Member State claims of objective justification in relation to measures which disproportionately disadvantage women. Is the Court just 'old-fashioned' in that it denies the march of progress by constantly invoking 'discredited theories' and 'outmoded assumptions' about women, as McGlynn implies,⁴¹ or is there some more sinister manipulation of the Court's available repertory or framework of understandings? It is interesting to note that the Court of Justice is, by definition, a 'multicultural' court – i.e. not only is it composed of judges from many different national legal orders, but it must on a continuing basis negotiate with and relate to those varying national legal orders which feed cases into it via the Article 234 reference (ex Article 177). In other words, one might have expected that such a Court would be embedded in or at least comfortable with a concept of 'difference'.

Turning to the other institutions of the EU, it is clear in this context that the gender impact assessment approach will be extremely useful. Other challenges include identifying the role of women within processes of political participation – towards the politics of presence – and looking at women and negotiation processes, and women within NGOs and other third sector organisations.

Finally, within this first approach, more could be made of understanding the 'form of law', and in particular the propensity to 'regulate' in this field by means of 'soft law'.⁴² We might learn, from such a review, something interesting about legal authority, in view of the common usage of legal forms which are not binding in a traditional normative sense. We can begin to uncover some of the normative assumptions underlying the choice between 'hard' law and 'soft' law, including assumptions about the capacity of law to intervene in social relations and about the appropriateness of such interventions.

The second approach with which this paper is concerned is a form of conceptual analysis, which draws upon traditions of normative political theory informed by

⁴⁰ Joerges/Neyer/Vos.

⁴¹ McGlynn, above n.8.

⁴² Fiona Beveridge and Sue Nott, 'A Hard Look at Soft Law', in Paul Craig and Carol Harlow (eds.), *Lawmaking in the European Union*, London, etc.: Kluwer Law International, 1998.

feminist critique.⁴³ It is not difficult to list the concepts which can be subject to normative reconstruction on the basis of feminist analysis. They include:

- Sovereignty, authority and power (political and legal);
- Constitution and polity (including the notion of a 'republic');
- Legitimacy;
- Market, and in that context in particular 'freedom', 'autonomy' and 'choice';
- Citizenship: relating to *Martinez Sala* – the citizen and the woman;
- Democracy and participation;
- Lower order related concepts: partnership (as possible instrumentalization of participation and democracy); networks; concepts of efficiency;
- Openness and transparency;
- Social inclusion/exclusion;
- Rights (the invocation of and problematisation of), including fundamental rights, but also market rights, political rights and social rights.

Each of these concepts is a 'site of contestation'. In each case, the process of contestation can be 'unpicked' or rendered less opaque through case study analysis, whether of case law or other texts, such as legislative materials, or official or unofficial reports, etc.⁴⁴ Often, it might be useful to map these sites of contestation against the construction of the public/private divide which occurs so often within EC law. In international law, feminist analysis has led to the drawing of a parallel between the international/domestic jurisdictional boundary, and the oft-used public/private divide. In contrast, in the context of EU law, there has been a deliberate attempt by the Court of Justice to deploy the public/private divide specifically in order to delineate the division between Community and national competence in the context of sex discrimination law (*Hofmann*).

The final section of this paper comprises an example of such a conceptual analysis, largely drawn from an earlier paper on the internal market.⁴⁵

IV LAW, GENDER AND THE INTERNAL MARKET

The proposition explored through conceptual analysis in this section is that the law of the internal market embodies a set of values and principles which are inimical to the interests of women. To support this argument, the proposition must be accepted that law of the internal market does indeed carry gendered content or reflect a gendered perspective best understood if one deploys the notion of embodied difference. This argument will be examined at the end of this section and will be used to examine some of the assumptions which underlie the political objective of integration, which lies at the heart of the project to create an internal market within the EU. It might be thought that the project to create the internal market is of rather historical interest today, now that the emphasis has shifted onto Economic and Monetary Union, the creation of Euroland, the emergence of an Employment Policy, the incorporation of the Schengen *acquis* and the pursuit of a heavy agenda of securitisation, the possibilities of constitutionalised flexibility, and the medium-term prospect of

⁴³ I have learnt a lot, in particular, from Nancy Hirschmann and Christine Di Stefano (eds.), *Revisioning the Political: Feminist Reconstructions of Traditional Concepts in Western Political Theory*, Boulder, Col.: Westview Press, 1996.

⁴⁴ See analysis of the Report of the International Lesbian and Gay Association Europe, 1998, *Equality for Lesbians and Gay Men: A Relevant Issue in the Civil and Social Dialogue*, Brussels, ILGA Europe (<http://inet.uni2.dk/~steff/report.htm>) in Stychin, above n.31.

⁴⁵ Shaw, 'Law, Gender and the Internal Market', above n.10.

enlargement. However, I would contend that if one were to search for a *leitmotiv* to some up the successes and failures of the first forty or so years of the Treaty of Rome, it would have to be the internal market.

Consequently, in what follows, I shall endeavour not only to offer a gendered analysis of the internal market, but also to assess the impact of the internal market and its legal framework upon the citizenship of women. So far relatively little of the politico-legal work on the foundations and structures of Union citizenship – a notion closely linked to the so-called ‘market citizen’ who is the vigorous, combative and competitive inhabitant of the internal market – has specifically considered the gender aspects of citizenship. To that end, I consider the two related questions:

- can women be ‘market citizens’? and
- does the impact of ‘market citizenship’ make it impossible for women to be European Union citizens?

At one level, the creation and management of an internal market is the relatively straightforward core of the integrationist project conceived in Western Europe in the 1950s, and developed since then in terms of scope and geographical spread. The terminology of the original Treaties might refer to a ‘common market’, but the two concepts can be taken for most practical purposes as synonymous. The creation of a market within the EU, without internal frontiers, in which goods, services, labour, enterprise and capital may flow freely clearly goes to the very heart of the integration process itself.⁴⁶ At that level, enquiring into the impact of the internal market upon women requires medium range historical assessment of the change in the economic situation of women since the inception of the European Communities. One difficulty might be in separating out the specific impact of the integration processes on women’s economic status, just as it is difficult for economists to assess the impact of integration as a whole upon patterns of trade and wealth creation. The other level of analysis is to view the internal market specifically as a political opportunity seized in the 1980s for the relaunch of an ailing and stagnated EC integration project. The momentum created by the so-called ‘1992 project’ may even still continue today, albeit at a much more attenuated level.

Much was, of course, made of the opportunities of ‘1992’ in official and quasi-official propaganda.⁴⁷ Significant wealth creation was envisaged. That is not to say, however, that the anticipated impact of ‘1992’ upon women was in any way ignored by the EU institutions.⁴⁸ The Commission had a document drawn up on the impact of the completion of the internal market on women in the European Community, with conclusions that were far from sanguine.⁴⁹ It accepted that women’s unemployment

⁴⁶ See Article 14 EC (ex Article 7A).

⁴⁷ Cecchini, *The European Challenge 1992: The Benefits of a Single Market*, 1998. But see also the sustained critique provided by Cutler *et al*, *1992 - The Struggle for Europe. A Critical Evaluation of the European Community*, 1989, Oxford: Berg.

⁴⁸ See also the academic commentary: Whitting, ‘Women and 1992: opportunity or disaster?’, (1989-90) *Social Policy Review* 214; Springer, ‘Women - Winners or Losers in the New Europe’, in Templeton (ed.), *A Woman’s Place?*, 1993, Edinburgh: St. Andrew Press; Catherine Hoskyns, ‘The European Community’s Policy on Women in the Context of 1992’, (1992) 15 *Women’s Studies International Forum* 21.

⁴⁹ *The Impact of the Completion of the Internal Market on Women in the European Community*, Working Document prepared for DGV, CEC, Equal Opportunities Unit, Doc V/506/90-EN, 190.

was higher and that they were more vulnerable to many aspects of restructuring, particularly in service industries. The European Parliament, in a similar vein, adopted a Resolution calling for the conditions to be put in place in which men and women could enter 1993 on equal terms.⁵⁰ The political conclusions reached by the institutions have been well backed up by a wealth of statistical evidence, particularly on women in the labour market.⁵¹

Moreover, a similar tone has been maintained since 1993, as the EU has entered a new period in which unemployment rather than growth has been the first preoccupation, and management and administration rather than regulation and policy initiation have been the leitmotifs of the Commission's work. There was nothing in the Green and White Papers on Social Policy,⁵² in the material produced by the Commission in Social Europe, or in the general flow of 'soft law' from both Council and Commission (action programmes, resolutions, and the like) to suggest that the specific concerns of women are not, at least at some general level, being taken into account in the policy making process.

There is much in the rhetoric to commend. Many noble statements about 'real' equality of opportunity, combating secondary labour markets, protecting atypical work, developing enhanced training strategies, promoting proper and effective child care, and such like, are to be found. It is perhaps unfortunate that the Delors White Paper on Growth and Competitiveness⁵³ appeared to make little of sex differences in patterns of unemployment - a point recognized by the ECOSOC in its Opinion on that document.⁵⁴ The point was also picked up by a Resolution of the Council and of the Representatives of the Member States meeting within Council of December 1994 on equal participation by women in an employment-intensive economic growth strategy within the European Union.⁵⁵ The upbeat rhetoric is best captured by the very last paragraph of a 1994 Council Resolution on a European Union social policy which is to include⁵⁶

by means of an ongoing process, specific matters relating to women and men and to equal opportunities for them, in the definition and implementation of all Community policies and, to this end, to strive towards developing methods for the ongoing integration of equal opportunities for women and men in economic and social policies.

Is it fair, in the light of the forgoing, to suggest that there is really a problematic relationship between the category of gender and the values of the internal market? At a simple practical level, there is a marked failure on the part of the EU institutions to live up to the principles established at a rhetorical level. A detailed examination of EU

⁵⁰ Resolution on the 1992 Single Market and its implications for women in the EC (OJ 1991, C48/222); see also Report drawn up on behalf of the Committee on Women's Rights on the 1992 Single Market and its implications for women in the EC (Rapporteur van Hemeldonck), EP Doc. 143.485/fin, December 6 1990.

⁵¹ See for example EUROSTAT, *Women in the European Community*, 1992, Luxembourg: OOPEC.

⁵² COM(93) 551; COM(94) 333.

⁵³ Bull. EC Supp. 6/93.

⁵⁴ OJ 1994 C295/57; OJ 1994 C295/62.

⁵⁵ OJ 1994 C368/3.

⁵⁶ Council Resolution OJ 1994 C368/6.

measures shows that the objective of ensuring that women's interests are incorporated is not always achieved. For example, measures on the training and mobility of researchers adopted as recently as 1994 under Framework Four failed to make specific reference to women, although in fact the Commission has embarked upon an evaluation programme specifically concerned with measuring the impact on women, and in Framework Five, equal opportunities questions are mainstreamed more effectively. However, these are first and foremost matters to be addressed by 'audit', which falls outside the scope of this paper. Instead, we shall concentrate on the embedding of values within the legal system. To develop such an argument it is important to define and delimit briefly the law of the internal market, a task which is slightly more complex than one might first assume, given continuing uncertainties about the nature of the *acquis communautaire* in legal terms.⁵⁷

Simply put, the legal structure of the internal market composes three principal elements. In the first place, freedom of movement is guaranteed by primary principles contained in the Treaty (Articles 28, 39, 43, 49 and 56 EC (ex Articles 30, 48, 52, 59, and 73B EC)), subject to certain exceptions and limitations, such as those contained in Articles 30, 39(3) and 46 EC (ex Articles 36, 48(3) and 56) (principally, but not exclusively, reasons of public policy, and public health and safety).

Secondly, there exists a very significant body of interpretative case law generated by the Court of Justice which in itself contains important principles giving a broad meaning to the rules of primary EC law. For example, the *Dassonville* case gave a wide definition of what may constitute a measure having equivalent to a quantitative restriction on trade in goods within the meaning of Article 30.⁵⁸ Any measure actually or potentially restricting interstate trade will fall within the scope of that provision, and will require some form of justification to escape prohibition. Similarly, in the context of freedom to provide services, the Court of Justice case law now appears to support a broad interpretation of Article 59 as covering, in principle, any form of restriction on freedom to provide services.⁵⁹ On the other hand, however, these points do need to be viewed in the light of the Court's apparent retreat in respect of the impact of EC law principles on national measures which appear to have a relatively tenuous link to interstate trade and which do not actually discriminate against non-national goods. A good example is Sunday trading rules, apparently after *Keck* deemed by the Court to fall outside the scope of Article 30, although originally considered to be within Article 30 but capable of justification by reference to national policy.⁶⁰ The point to be made here is the power of the Court to define the proper limits of the internal market, to identify what might be termed a reserved area of 'local police powers' for Member States, and to police residual Member State autonomy, which permits them to regulate without restriction certain aspects of economic life.

⁵⁷ Gialdino, 'Some Reflections on the *Acquis Communautaire*', (1995) 32 *Common Market Law Review* 1089; Stephen Weatherill, 'Safeguarding the *Acquis Communautaire*', in T. Heukels *et al* (eds.), *The European Union after Amsterdam*, London, etc.: Kluwer Law International, 1998.

⁵⁸ Case 8/74 *Procureur du Roi v. Dassonville* [1974] ECR 837.

⁵⁹ Case C-275/92 *Customs and Excise v Schindler* [1994] ECR I-1039; *Alpine Investments; Gebhard*.

⁶⁰ Cases C-306/88 etc. *Stoke-on-Trent City Council v B & Q plc* [1992] ECR I-6457; see also Cases C-267 and 268/91 *Criminal Proceedings against Keck and Mithouard* [1993] ECR I-6097.

The Court of Justice has also had a considerable impact upon the third source of internal market law - EU legislation. In the first place, it has defined the balance between measures of liberalisation (contained principally in the Treaty), and the necessary scope of measures of harmonization which will operate where liberalization alone is insufficient to secure a single market. In particular, the *Cassis de Dijon* decision in which the Court both articulated and defined the limits of the so-called mutual recognition principle highlighted fairly precisely the extent of legislation needed to secure the possibility of freedom of movement in the light of the need to protect recognised values such as consumer safety and the protection of the environment.⁶¹ To put it another way, the Court has secured the boundary between market or negative integration and positive integration. Secondly, the Court of Justice has intruded in a significant way into the legislative process through its case law on the legal basis of measures. It has attempted, for example, to define the difference between a measure concerned with the internal market which should be based principally on Article 95 EC (ex Article 100A) and one concerned with the environment for which Article 175 (ex Article 130S) is the appropriate legal basis.⁶²

In what respect might it be argued that the law of the internal market, as presented, reveals a problematic relationship with gender, used as a category of analysis?

To answer this question, it is useful to define the limits of the internal market. At one level, it seems difficult to argue that any EU legislation concerned with socio-economic behaviour or market regulation should be regarded as 'internal market legislation'. However, there are practical and ideological reasons why a core of that legislation is being redesignated as part of the so-called *acquis communautaire*.

The *acquis* - however it might be defined - has a special status under the EU system. It is one of the objectives of *Union* under Article 2 TEU (ex Article B) to maintain in full the *acquis communautaire*. This would seem to indicate that the *acquis* is a body of rules and principles which go to the essence of the integration project as it has been developed and refined since the 1950s. They are the principles and rules which cannot be changed as a matter of party political dogma, for example, but define what it is to be a 'Community'.

For a piece of EU legislation, as opposed to provisions of the constitutive Treaties, being part of the *acquis* would appear to confer some form of entrenchment against repeal for a certain body of legislation. However, there is no judicial definition of the *acquis* and Article 2 TEU is not a justiciable provision before the Court of Justice. Hence, the practical impact of this concept of entrenchment must remain a matter of conjecture.⁶³

Practically, however, as the Union grows geographically, and as new methods for assimilating entrant countries are developed including concepts of flexibility (see Article 11 EC, ex Article 5A), the *acquis* is becoming a useful tool to define the

⁶¹ Case 120/78 *Rewe-Zentrale AG v Bundesmonopolverwaltung für Branntwein* [1979] ECR 649.

⁶² Case C-399/89 *Commission v Council (Titanium Dioxide)* [1991] ECR I-2867; Case C-155/91 *Commission v Council (Waste Directive)* [1993] ECR I-939.

⁶³ See Gialdino, above n.57.

irreducible minimum of internal market legislation which should be introduced by, for example, the countries of Central and Eastern Europe as they attempt to adjust their economies and legal systems to the discipline of EU membership during the pre-accession phase. These processes are governed by the Europe Agreements between those countries and the European Community, and are guided now by an important Communication from the Commission on the preparation for accession.⁶⁴ This Communication adopts a pragmatic approach to the question 'What is the *acquis*?' For the purposes of preparation for accession, which requires a concentration of resources, it is defined as the 'Treaty articles and secondary legislation...[which] directly affect the free movement of goods, services, persons or capital. It is legislation without which obstacles to free movement would continue to exist or would reappear.' It excludes 'other legislation which indirectly affects the operation of the single market, for example because it affects the competitive situation of firms...'⁶⁵

The Commission then goes to make certain specific points about the legislation of the social dimension:

'The social dimension is an essential element of internal market policy. This is explicit in the Treaty. Moreover, much social legislation has an internal market reasoning among its justifications. An uneven approach in national legislation concerning workers' rights or health and safety in the work place could result in unequal costs for economic operators and threaten to distort competition...

At the same time, certain social legislation is not aimed exclusively at achieving a level playing field. High levels of social protection are a fundamental aim of the Union. They are served by, among other things, the economic benefits arising from the internal market...[Included are] those parts of social legislation which affect the functioning of the internal market or which are a necessary complement to other measures identified as key instruments...

What this passage indicates is an ascription of priorities. It confirms the longstanding 'Cinderella' status of social policy⁶⁶ within the pantheon of EU objectives. And yet this conclusion is by no means inevitable, in economic terms, as Pelkmans has argued. For is it right that the EU should be seeking to pursue the objective of economic interpenetration principally by applying

'rigorous scrutiny of the hindrances to the free movement of goods, services and capital, with a multitude of proposals about the minimum harmonisation needed to achieve such freedoms, complemented by a fairly strict competition policy applied to distortions in product and services markets, with, on the other hand, little or not scrutiny of the economic obstacles to the free

⁶⁴ *Preparation of the Associated Countries of Central and Eastern Europe for Integration into the Internal Market of the Union*, COM(95) 163 of May 3 1995.

⁶⁵ *Ibid.*, at para. 3.5.

⁶⁶ See, for example, Erika Szyszczak, 'Social Policy: a Happy Ending or a Reworking of the Fairy Tale?', in David O'Keeffe and Patrick Twomey (eds.), *Legal Issues of the Maastricht Treaty*, Chichester: John Wiley, 1994.

movement of workers or massive distortions of competition in the labour markets.⁶⁷

Can one, he concludes, 'speak of a completed internal market if the national regulatory provisions with respect to the labour market are highly restrictive and diverse.' In similar terms, Beveridge and Nott speak critically of the economic/social divide in what they describe as the 'geometry of Europe'.⁶⁸ The argument that economic and social issues can logically be divided is easy to challenge.⁶⁹ On the other hand, there is a clear bifurcation of treatment in respect of the powers provided under the Treaty. Article 95 EC - strategically introduced as Article 100A by the Single European Act to facilitate the introduction of single market legislation - explicitly excludes from its scope - and therefore from qualified majority voting, measures relating to the free movement of persons and the rights and interests of employed persons (para. 2). Even after the introduction of new qualified majority voting possibilities under the new 'Social Chapter' post-Amsterdam (Articles 136-145 EC) there remain explicit restrictions from QMV for some aspects of social policy, such as social security and social protection of workers. It is clear that many aspects of social policy are regarded as protected domains for the Member States.

While none of these points necessarily indicate any particular 'take' by the EU on the gender question, what it does do is indicate the ways in which the internal market concept is manipulated to achieve specific political objectives. In fact, a number of authors have argued that there is an unhappy fit between category of women, their lives, their work, their social reality, and the ideology and practice of the internal market. Hervey, for example, has argued that despite the universalist terminology of EC law, it is in fact dominant social groups - white men of EU origin - who benefit most greatly from the protections which it confers.⁷⁰ She demonstrates that one mechanism where by this occurs is the 'all-pervasive concept of the 'market'',⁷¹ showing that the operation of free movement rights is highly gendered. This point is echoed also by Ackers⁷² who shows that while women do form almost 50% of intra-EU migrants (contrary to popular perceptions of women as somehow more immobile than men), there is a very strong link between having children and on their ability to participate in the labour market.⁷³

⁶⁷ 'Towards Economic Union', in Ludlow (ed.), *Setting European Community Priorities 1991-1992*, 1991, Brussels: Brassey's Centre for European Policy Studies at p63.

⁶⁸ 'Women, Wealth and the Single Market', Paper presented to the Conference on The Evolution of the Rules for a Single European Market, Exeter, September 8-11, 1994.

⁶⁹ Two good examples of the tensions inherent in the divide are to be found in the case law of the Court of Justice: Case 31/87 *Gebroeders Beentjes v Netherlands State* [1988] ECR 4635 (tension between the principle of non-discrimination and local authority contracting policies aimed at alleviating long term unemployment) and Case C-113/89 *Rush Portuguesa Lda v Office National d'Immigration* [1990] ECR I-1417 (tension between free movement of services and national employment legislation).

⁷⁰ Tamara Hervey, 'Migrant Workers and their Families in the European Union: the pervasive market ideology of Community law', in Jo Shaw and Gillian More (eds.), *New Legal Dynamics of European Union*, Oxford: Oxford University Press, 1995.

⁷¹ *Ibid.*, at p93.

⁷² Ackers, above n.18.

⁷³ See also the detailed study provided by Bhaba and Shutter, *Women's Movement. Women under Immigration, Nationality and Refugee Law*, 1994, Stoke-on-Trent: Trentham Books.

Of course, there has always been a problematic relationship between women and competition.⁷⁴ For nineteenth century women, tradition and a dominant order said it was 'unwomanly'; for twentieth century feminists it might be thought 'unsisterly'!⁷⁵ The point is made by Carole Pateman that women were excluded from the original social contract which not only lies at the heart of political authority in modern society, but also constructs the ability of citizens to operate in the public sphere - including the marketplace.⁷⁶ If women are subjects of the social contract, rather than participants in it, what is their relationship to the market order which lies quite explicitly across that original contract?⁷⁷ The explicit refusal of the Court of Justice to consider the implications of market equality for the sexual division of labour⁷⁸ highlights the extent to which the treatment of sex equality in EC law is simply an overlay upon an existing unchanged system of gendered labour markets, not a reformist project.

In view of these points it is important, however, to re-emphasise the practical significance for women of social policy, and of the welfare system. Just because these matters are constructed as questions of *national* competence rather than primarily EU concerns does not necessarily relegate them to lower status. Nonetheless, the choice between a more or less limited concept of 'what is the European Union' is important in terms of gender. Moreover, because of the canonical status of 'market' law within the EU, it must have some message about priorities, embedded values and the allocation of resources. Above all, it restates a fundamental tenet of modern welfare capitalism, namely the consistent undervaluing of the unpaid work done primarily within the home and the family by women.⁷⁹

As with other so-called universal categories, personhood as a state of being has proved to be particularly inaccessible to women.⁸⁰ The absence of women from theories of political obligation or authority, whether based on personal consent or on hierarchy, is not simply a product of a prejudice of the times in which they might have been written, but also symptomatic of systems of thought in which the term 'person' is conditional rather than absolute. Consequently, citizenship, as a refined form of personhood, as well as the definition of the entitlements conventionally linked to

⁷⁴ For thought provoking discussions see Miner and Longino (eds.), *Competition. A Feminist Taboo?*, 1987, New York: The Feminist Press.

⁷⁵ See in particular Longino, 'The Ideology of Competition', in Miner and Longino, op. cit. *supra* n.74.

⁷⁶ *The Sexual Contract*, 1988, Cambridge: Polity; *ibid*, 'Fraternal Social Contract', in *The Disorder of Women*, 1989, Cambridge: Polity.

⁷⁷ See Corneli, 'The Philosophy of the Limit: Systems Theory and Feminist Legal Reform', in Corneli, Rosenfeld and Carlson (eds.), *Deconstruction and the Possibility of Justice*, 1992, New York: Routledge at pp73-74.

⁷⁸ *Hoffmann v Barmer Ersatzkasse ...*

⁷⁹ Siim, 'Towards a Feminist Rethinking of the Welfare State', in Jones and Jónasdóttir, op. cit. *supra* n.27; Lewis, 'Gender and the development of welfare regimes', (1992) 2 *Journal of European Social Policy* 159; Sainsbury (ed.), *Gendering Welfare States*, 1994, London, etc.: Sage.

⁸⁰ Spelman, *Inessential Women*, 1990, London: Women's Press; Naffine, *Law and the Sexes*, 1990, Sydney: Allen and Unwin, esp. 'The man of law'; in the context of legal analysis, the point is made particularly clearly by Sachs and Wilson, *Sexism and the Law: A Study of Male Beliefs and Legal Bias in Britain and the United States*, 1978, Oxford: Martin Robertson.

citizenship, have posed a number of intractable problems when viewed through a perspective of gender.⁸¹ As Phillips has argued:

‘starting with ‘humanity’, moving on to ‘equality’, ‘rights’, ‘freedom’, and ‘democracy’, feminists have queried most of the basic concepts of political thinking, arguing that theorists have always built on assumptions about women and men, though they have not always admitted (even to themselves) what these are. One of the most common tricks of this trade is to smuggle real live men into the seemingly abstract and innocent universals that nourish political thought. The ‘individual’ or the ‘citizen’ are obvious candidates for this form of gendered substitution.’⁸²

There are two significant ‘moves’ in the postwar history of citizenship which can best be recounted in order to locate the question of gender. The first is the reconceptualization of citizenship into stages by the sociologist TH Marshall. Marshall divided citizenship rights into civic, political and social rights. Civic rights are basic civil liberties, gained - if the stages of citizenship are matched against British political/constitutional history - in the eighteenth century. That is, at least for men. Political rights are rights of political participation gained, again at least for men, in the nineteenth century. The twentieth century history of citizenship is a history of increased social and economic rights established by the evolution of welfare capitalism. But as Pateman has noted, once more the development of new rights is gendered. While Marshall might have included a right to employment as part of the pantheon of social rights in the ‘final stage’ of citizenship, he did so just as the architects of the welfare state were constructing the framework of welfare provision around the figure of the male breadwinner and dependent wife.⁸³ The conclusion to be drawn here is that the Marshallian vision of the citizen is one in which women are not fully in focus.⁸⁴

The second dimension of citizenship theory deserving of particular comment in this context is the recent revival of interest in ‘active citizenship’⁸⁵ and the increasing tendency to articulate all manner of social and political questions about power, democracy, freedom and so on, through a prism of citizenship and participation.⁸⁶ In the particular context of gender, the dilemma of active participation in a society has been problematized in the tension between the individual and the group, between difference and belonging. In that sense, it is part of the very large question about the possibility or impossibility of universal citizenship. Is this an unattainable ideal which

⁸¹ See for example, Hernes, ‘The Welfare State Citizenship of Scandinavian Women’, in Jones and Jónasdóttir, *op. cit. supra* n.27; Yuval-Davis, ‘The Citizenship Debate: Women, Ethnic Processes and the State’, (1991) *Feminist Review* no.39, 58; Dietz, ‘Context is All: Feminism and Theories of Citizenship’, in Mouffe (ed.), *Dimensions of Radical Democracy*, 1992, London: Verso; Vogel, ‘Marriage and the Boundaries of Citizenship’, in van Steenberg (ed.), *The Condition of Citizenship*, 1994, London, etc.: Sage.

⁸² Phillips, ‘Citizenship and Feminist Theory’, in Andrews (ed.), 1991, London: Lawrence and Wishart, p76 at p77.

⁸³ Pateman, ‘The Patriarchal Welfare State’, in Pateman, *The Disorder of Women*, 1988, Cambridge: Polity Press.

⁸⁴ See generally Ruth Lister, *Citizenship: Feminist Perspectives*, London: Macmillan, 1998.

⁸⁵ See in particular Kymlicka and Norman, ‘Return of the Citizen: A Survey of Recent Work on Citizenship Theory’, (1993-94) 104 *Ethics* 352; Andrews, *op. cit. supra* n.82.

⁸⁶ Van Steenberg, ‘The Condition of Citizenship: An Introduction’, in Van Steenberg (ed.), *The Condition of Citizenship*, 1994, London, etc.: Sage.

should be abandoned in favour of special group rights of representation and self-government for oppressed categories such as women and ethnic minorities?⁸⁷ Young puts the argument thus:⁸⁸

'In a society where some groups are privileged while others are oppressed, insisting that as citizens people should leave behind their particular affiliations and experiences to adopt a general point of view serves only to reinforce that privilege; for the perspectives and interests of the privileged will tend to dominate this unified public, marginalising or silencing those of other groups.'

While this argument has been criticised for its impracticability at the level of implementation,⁸⁹ what it does do is serve to remind us of the political nature of citizenship. Being a good citizen is more, for example, than being a good mother.⁹⁰ In the feminist context, being a good citizen would involve challenging the gendered division of labour at a political level, rather than simply challenging it on an individual basis within the household.⁹¹

It will be apparent from this discussion that the tradition of critique is alive and flourishing in the broader field of citizenship scholarship, although as Vogel has noted, feminist theories of citizenship do not speak 'with one voice', and there are a variety of different approaches to achieving either common citizenship, citizenship based on women's particular identity, women-centered citizenship or a new 'active citizenship' based on women's involvement in new social movements today.⁹² In contrast, where citizenship and Europe have intersected, the dimension of gender has received very little scrutiny.⁹³ This might be partly because the tradition of critique itself is only slowly emerging in relation to 'European' citizenship. This provides, however, at best a partial explanation. An attempt to remedy this lacuna might best start, it is argued, with the concept of 'market' and in particular 'market citizen', drawing then upon the feminist approaches to citizenship sketched out briefly above.

⁸⁷ Young, 'Polity and Group Difference: A Critique of the Ideal of Universal Citizenship', (1989) 99 *Ethics* 250.

⁸⁸ Young, *op. cit. supra* n.87 at p257.

⁸⁹ Kymlicka and Norman, *op. cit. supra* n.85 at p373 *et seq.*

⁹⁰ Phillips, *op. cit. supra* n.82; Dietz, 'Citizenship with a Feminist Face: The Problem with Maternal Thinking', (1985) 13 *Political Theory* 19; *ibid.*, 'Context is All: Feminism and Theories of Citizenship', in Mouffe (ed.), *Dimensions of Radical Democracy*, 1992, London: Verso. This point is a refutation of so-called 'maternalist' thinking which celebrates the virtue of mothering and of women's role in the private sphere. See in particular Elshtain, *Public Man, Private Woman*, 1981, Princeton: Princeton UP; Ruddick, 'Maternal Thinking', (1980) 6 *Feminist Studies* 342.

⁹¹ These are examples given by Phillips, *op. cit. supra* n.82.

⁹² Vogel, 'Is Citizenship Gender-Specific?', in [...] esp. p78 *et seq.*

⁹³ A good example is the otherwise excellent collection *A Citizen's Europe. In Search of a new Order*, (eds. Rosas and Antola), 1995, London, etc.: Sage. But see however Meehan, whose book *Citizenship and the European Community*, 1993, London, etc.: Sage includes a chapter 'Sex and citizenship' (very largely focused on the EU's sex equality policies); Ackers, 'Citizenship, Gender and Dependency in the European Union: The position of Migrant Women', (1995) *Social Politics* (does not consider the broader implications of EC law for women's citizenship); Close, (....); Ward, Gregory and Yuval-Davis (eds.), *Women and citizenship in Europe. Borders, rights and duties*, 1992, Stoke-on-Trent: Trentham Books (provides little direct critique of EU citizenship).

We turn now to the two questions highlighted above. First, can women be 'market citizens'? The idea of the market citizen is almost archetypically 'male'. The market citizen is the inhabitant of the brave new world of the single European market, who has a positive role in the construction of the future society based around that market. The Court of Justice itself is widely viewed as having generalized the protections and rights contained into the EC Treaty into an incipient form of European citizenship.⁹⁴

The market citizen (sic) appears in two guises: as the active market citizen who takes advantage of free movement (as a trader, as a professional, as a worker), and as the passive market citizen who reaps the benefits of the enlarged choice which results from freedom of movement, generally as a consumer. In the latter context, he is confident and informed.⁹⁵ He is now recognised as an autonomous figure under EC law, in Article 129A EC which was introduced by the Treaty of Maastricht (Article 156 EC post Amsterdam). However, the relationship between women and consumption continues to be problematic, and results in the figure of consumer being a gendered figure. While the gendered division of labour may mean that women are more closely associated with consumption, and men with production, questions of power and access to wealth within the domestic sphere may equally mean that women have little autonomy and choice regarding what they purchase, where they purchase it, and for how much.⁹⁶ The emergence of the consumer as a key figure - at least in symbolic terms - for the success of the single market project adds a new level of complexity to the role of consumer goods and consumption processes as a 'crucial area for the construction of meanings, identities, gender roles, in post-modern capitalism.'⁹⁷

The active market citizen - for example the worker, is - in the image constructed by EC law - unconstrained by restrictions on mobility other than those swept away by the limited family reunion rights and non-discrimination rights contained in Article 12 EC (ex Article 6) and the relevant secondary legislation.⁹⁸ This vision has been the subject of extensive critique,⁹⁹ particularly for its false universalism. While recent research by Ackers is sweeping away the preconception that quantitatively women make less use of mobility rights, it nonetheless emphasises the qualitative difference, for example, in the impact upon fertility rates.¹⁰⁰

⁹⁴ The key cases are *Cowan* and *Gravier* in which the Court extended the protection of the non-discrimination principle to tourists and students respectively; functionally they can be seen as the recipients of services, and therefore as representing the reverse side the coin under which free movement services is protected. The reality, it can be argued, is more than the sum of the parts. See Pollard and Ross, *European Community Law. Text and Materials*, 1994, London: Butterworths, at p592. See also Evans,

⁹⁵ Weatherill, 'The Role of the Informed Consumer in European Community Law and Policy', [1994] *Consum. L.J.* 49.

⁹⁶ See further Close, op. cit. *supra* n.93.

⁹⁷ Bocock, *Consumption*, 1993, London: Routledge, at p96.

⁹⁸ Reg. 1612/68, etc.

⁹⁹ Hervey, above n.70; Ackers, above n.18; Scheiwe, above n.19.

¹⁰⁰ Ackers, 'Citizenship, Gender and Dependency in the European Union; The Position of Migrant Women', (1995) *Social Politics* forthcoming; Ackers, *Internal migration within the European Union: The Presence of women in migration flows and the characteristics of female migrants*, Report to the Equal Opportunities Unit of the European Commission, DGV; Ackers, *Shifting Spaces*, above n.18.

What reveals perhaps most starkly, however, the gendered nature of the 'market citizen' is the imbalance in developmental terms between the market and welfare aspects of the post-1992 European polity. As I argued in Section 3, questions of social policy, and in particular welfare provision, have been constructed primarily as questions of national competence and concern. While aspects of women's citizenship in terms of labour market participation, or dependence upon a male breadwinner, have been 'unionised' and consequently incorporated at least partially into the vision of the European market citizen, questions of dependence upon the state remain strictly 'nationalized'. The strictness of this division has been constructed above all by the Court of Justice's construction of the Social Security Directive¹⁰¹ and its refusal to consider in an integrated way both the caring roles taken by women within the family and their desire or need for continued participation in the labour market.¹⁰²

Does the impact of 'market citizenship' make it impossible for women to be European Union citizens?

It follows from the argument developed above that the position of women as 'European Union citizens' is likely to be highly problematic. This is because the concept of market citizenship dominates the figure of the EU citizen, to the extent that citizenship of the European Union cannot be described as a form of citizenship in the sense in which it is conventionally understood.¹⁰³ Part of the rhetorical and symbolic power of citizenship is its ability to provide a complete system of membership, with comprehensive answers to all questions about civil, political and social entitlements. By definition, EU citizenship does not and probably never could offer that sense of completeness or wholeness. The centrality of free movement and non discrimination at the level of residence and market participation are self-consciously the central pillars of the new provisions of the EC Treaty constituting the European Union Citizen (Articles 8-8E EC).

At one level, great hopes and aspirations have been invested in the possibility and potential of postnational citizenship or membership. It represents the possibility of constructing a moral core for the European Union; a new form of constitutional patriotism which is beyond national identity,¹⁰⁴ a 'public space of fellow-citizenship' in which the ideals of 'building Europe' can be attained.¹⁰⁵ However, at another level what has been achieved so far has proved to be a profound disappointment, in particular as it is functionally grounded in free movement, and not in a human rights pillar. In that sense it carries not just a legacy, but also a gendered legacy, which is characterised by a reluctance to consider afresh what exactly it means to be a 'member' of the European polity. For example, while EU law has so far had some marginal impact upon the profoundly controversial field of reproductive rights,¹⁰⁶ the most distinctive feature of constitutional, legislative and judicial action whenever such questions have been raised has been timidity and a reluctance to face up fully to

¹⁰¹ Council Directive 79/7, OJ 1979 L6/24.

¹⁰² Julia Sohrab, *Sexing the Benefit: Women, Social Security and Financial Independence in EC Sex Equality Law*, Aldershot: Dartmouth, 1996; Christopher McCrudden, *Equality of Treatment between Women and Men in Social Security*, London: Sweet and Maxwell, 1994.

¹⁰³ Michelle Everson, 'The Legacy of the Market Citizen', in Shaw and More, above n.70.

¹⁰⁴ Habermas, 'Citizenship and National Identity', in van Steenberg, op. cit. *supra* n.86.

¹⁰⁵ Tassin, 'Europe: A Political Community', in Mouffe, op. cit. *supra* n.81. See also Soysal, *Limits of Citizenship. Migrants and Postnational Membership in Europe*, 1994, London/Chicago: University of Chicago Press.

¹⁰⁶ Grogan.

the issues of reconstruction thrown up by processes of European integration. Similarly, while the process of economic integration may have changed the formal contours of 'public space' within the geographical boundaries of Europe, it has done nothing to confront the true meaning of public and private spaces for many women, namely the fear of and reality of [male] violence and the associated question of rights to physical and mental security.¹⁰⁷ The conclusion to be drawn, therefore, is Citizenship of the Union is comes little, if any, closer to the realities of women's lives than its progenitor, market citizenship.

¹⁰⁷ See Close, *op. cit. supra* n.93.