Equal treatment, social protection and income security for women

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Ensuring income security is a major function of social protection.[1] Arguably, that is its defining task. However, the ability of social protection to provide an adequate and reliable source of income for women is problematic — partly because of the other functions that, historically, social protection has been required to perform. These include the promotion of specific forms of financial dependency which are rooted in and characteristic of gender and employment relations in the wider society.[2] These relations of dependency provide a fragile source of income for women; this fragility is then imported into the social protection systems giving them effect. The insistence on sex- and gender-based equality[3] in the field of social protection can minimize or even eliminate this fragility, depending on how the notion of equality is defined and its purpose construed, and there are many ways of doing this. Which of these definitions dominates legal and political discourse at any one time depends on prevailing views of the proper role of social protection and the appropriateness of the pattern of income provision and dependency to which this role relates. It also crucially depends on the changing nature of cultural and economic practices which ultimately set new limits in this sphere.

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[1] Here defined as social insurance, social assistance and private schemes, the premia for which are not wholly market determined.

[2] Social protection systems may also reinforce non-financial aspects of gender and employment relations by, for example, facilitating the recruitment, retention and disciplining of labour. Additional functions of social protection include: encouraging social cohesion and stability and the avoidance of public disorder; promoting growth of capital markets and financial services; facilitating economic growth (through expansion of demand or, alternatively, by encouraging saving).

[3] The term "gender" is seldom, if ever, used in national and international instruments prescribing equality, equal treatment or non-discrimination between men and women. The term normally used in this legal context is "sex" and this applies especially to instruments adopted by the European Community (hereinafter the EU) which are the main legal focus of this article. Claims to equality under the relevant EU legislation must be made in terms of sex rather than gender and this, rather than any insistence on "biological differences" accounts for use of the term alongside gender which, for all other purposes in this article, is the more appropriate term.

This article first explores the links between income security, sources of income support, and definitions of sex and gender equality in social protection. The focus is social protection as provided in developed countries, particularly those of western Europe; reference is made to developing and transition economies where possible. Next, the article identifies the different types of discrimination still to be found in social protection systems, applying the definitions of equality developed in the preceding section. Discriminatory practices are selected for examination from among recent developments in those systems for what they show of shifts towards greater or lesser discrimination. Finally, the article examines the relationship between equal treatment, social protection and income security, concluding with some normative thoughts on which of the various definitions of equal treatment is to be preferred, and with some ideas on how sex and gender equality may be secured in social protection.

Income security and social protection

In everyday terms, the two important aspects to income security are: the amount and adequacy of income; and the regular flow of income. In other words, income security means that there should be a constant flow of income adequate to live on. Probing further, it is clear that both adequacy and reliability are contingent on the source of the income, that there is more than one possible source, and that one source may be more effective than another. In developed, western economies, there are three main sources: sexual relationships between cohabiting married or non-married partners of the opposite sex; social protection systems; and employment and self-employment.[4] Income derived from employment may take the form of pay or benefits. Benefits derived from the employment relationship may be regarded both as deferred pay and as a form of social protection.

However, these main income sources are not immutable; nor is the pattern of use made of them by individuals and groups. As the economic activity of married women in most west European states has increased in recent years, so has their reliance on paid employment as an income source. There is, however, one fairly constant feature in the pattern of use. People caring at home for children, the elderly or persons with disabilities (i.e. not as part of a commercial arrangement) are precluded from engaging in paid employment during that period and thus from access to income from this source. Such people, therefore, must look either to their partner or to social protection for material support so long as they are engaged in this activity. However, they are not free to choose in this. Social protection systems are generally structured in such a way as to ensure that a partner is the first port of call in these situations. There is, for example, no social insurance benefit to cover the risk involved in giving up

[4] A developing country and transition economy perspective would require the list to incorporate wider "family" relationships, national and international aid organizations, and employment relationships in the informal economy.

paid employment to care for children, the elderly, people with disabilities, etc.[5] Someone engaged in informal unpaid caring work of this kind is assumed to have a partner who is a paid worker (a "breadwinner") and, therefore, able to provide for them. Only if the breadwinner partner is not engaged in paid work (because of unemployment, sickness, old age, etc.) can an unpaid worker have recourse to social protection. However, being regarded as a dependant, the unpaid worker tends not to receive the money directly, and payment is made to their breadwinner partner on their behalf.

The gender-based nature of social protection systems has been much discussed[6] but bears repeating here because of its relevance to the adequacy and reliability of income sources and hence to *people's* income security. (The switch of focus to the income security of *people* rather than *women* is deliberate.) The gender-based nature of social protection systems and the income insecurity to which this gives rise are rooted in the designation of the unpaid care worker as a dependant of the paid worker-provider. Unpaid caring work, not the sex of the unpaid worker, is the clue to understanding why social protection systems prove a fragile source of income for women.

The lack of income security of unpaid workers in social protection systems arises in two related sets of circumstance. First, because the partner concerned may be engaged in low-paid, erratic employment, he/she may not pass on income he/she may have, or may do so only on terms which are unacceptable for sexual, emotional or physical reasons. Moreover, income flow from a partner may be terminated at any time by separation, divorce or death. Second, the lack of income security for unpaid workers arises because their other source of income (social protection) imports — through the gender-based structure outlined above — most if not all of the insecurities associated with the financial relationship between an unpaid worker and their "breadwinner" partner. The United Kingdom's cohabitation rule which provides for withdrawal of benefit from widows and single parents immediately they form a new sexual relationship, irrespective of their financial or other circumstances,[7] is perhaps the clearest example of the fragility of the support offered to unpaid workers by the social protection system.

Another aspect to the relation between income security and social protection and how this produces insecurity for women concerns paid employment. Even in the present state of fluctuating labour markets, this income source can produce adequate and reliable incomes for some categories of workers. There are many, however, for whom periods out of employment and periods in employment in part-time or low-paid work with little prospect of enhancement are the norm. For these workers — men or women — paid employment offers

[5] Although there are care allowances, short-term maternity and parental leave which enable paid and unpaid leave to be taken for care purposes.

[6] In relation to northern European and north American schemes, but not in relation to southern European schemes. For a contribution filling the latter gap, see Addis (1999).

[7] These circumstances include participation in the New Deal for Single Parents training scheme, a place on which, in practice if not in accordance with regulations, is immediately lost (along with benefit) if a single parent is held to be cohabiting.

neither an adequate nor a reliable income source. More to the point, for present purposes, social protection systems tend to reproduce these insecurities rather than remove them.

This is because entitlement is conditional, in respect of occupational benefits, on employment with a specific employer and, in respect of many social insurance benefits, on having been in paid work (in order to be able to pay contributions). For both occupational benefits and social insurance, entitlement may be further restricted because it is conditional on beneficiaries being in paid work for a certain number of hours or earning a certain amount per week. Even where the existence of a low-earnings threshold does not in effect exclude low-paid workers from access to schemes, if the method of calculating benefits is geared closely to earnings their benefit payments will be low. People who move in and out of employment will have difficulty satisfying the lengthy contribution periods required to qualify for benefits such as pensions. Intermittent employment involving periods of low pay or no pay can also affect the amount of retirement pension awarded, depending on the calculation formula used. Finally, movement in and out of work for different employers makes it difficult for workers to build up entitlement to occupational benefits, particularly pensions.

This income insecurity in social protection systems is rooted in unpaid work and in either non-employment or employment in forms of work which are not full time, relatively highly paid and continuous over a working life. It follows that these systems tend to provide an unreliable and inadequate source of income for persons in such situations. Moreover, and this is where women are re-introduced into the analysis, groups with these unpaid work and precarious labour market characteristics are largely — though not entirely — made up of women. For women continue to undertake most unpaid caring work, whilst entering the labour force in increasing numbers. They also continue — more than do men — to move in and out of employment and to dominate part-time,[8] low-paid jobs in many economies,[9] being obliged in many instances to seek these precarious and peripheral forms of employment because of the demands of their unpaid caring work.[10] This link between unpaid work activity and participation in precarious forms of employment is crucial to explaining why social protection systems fail to provide women with an adequate and reliable source of income.

The next part of the article analyses the relationship between equal treatment and social protection by looking at the various ways in which equal treatment for men and women in social protection has been defined. One im-

[8] In the EU, 83 per cent of part-time workers are women (Commission of the European Communities, 1998a, p. 15).

[9] In 15 countries in the early 1990s, the proportion of women in low-paid employment was consistently higher than the proportion of men and in some countries considerably so. For example, Japan 37.2 per cent women, 5.9 per cent men; the United Kingdom 31.2 per cent women, 12.8 per cent men; Switzerland 30.4 per cent women, 6.8 per cent men; and Germany 25.4 per cent women, 7.6 per cent men (OECD, 1996, table 3.2, p. 72).

[10] On the economic inactivity and part-time work rates of women and men with children under 17 years, see Commission of the European Communities (1998a), pp. 4-5.

portant question underpinning the analysis is whether women's income insecurity in social protection systems is considered relevant to the definition of equal treatment — whether poverty is regarded as an equality issue.

Equal treatment and social protection

There are at least five variants of the meaning of equal treatment in social protection. The legal version is that constructed through the practice of legislators and the courts. The other four have been developed by interest groups, policy-makers and academics, with a view to influencing government policy. The first of the political notions seeks to end the disadvantages suffered by women in social protection systems through non-coverage of their unpaid work. The second specifically aims for the financial independence of women. The third regards full social protection rights for women as a means of encouraging their labour market participation, while the fourth seeks to remove those aspects of social protection perceived as acting as a disincentive to women's paid work.

The legal formulation of equal treatment

Many international and national legal instruments espousing the cause of equality could provide the basis for a discussion of the legal notion of equal treatment. However, relatively few of these human rights instruments make specific reference to sex or gender on the one hand and to social protection on the other.[11] Equality instruments adopted by European Union (EU) institutions are rare examples of the latter[12] and form the basis of the legal notion of equal treatment discussed here.[13]

EU equality law defines the principle of equal treatment in terms of a prohibition on discrimination; more specifically, a prohibition on discrimination on grounds of sex and marital status. This ban extends to both indirect and direct forms of discrimination. An example of direct discrimination, once common in

[11] The International Covenant on Economic, Social and Cultural Rights, and the European Social Charter are partial exceptions here. The International Convention on the Elimination of all Discrimination against Women is another partial exception since it specifically mentions discrimination against women. Other more general human rights instruments are the Charter of the United Nations, the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. To complete the picture, regional-based instruments such as the African Charter on Human and Peoples' Rights and employment-based instruments such as ILO Convention No. 156 on the reconciliation of employment and family responsibilities should also be mentioned.

[12] Council Directive 79/7/EEC on equal treatment for men and women in statutory social security schemes (hereinafter referred to as Directive 79/7); Council Directive 86/378/EEC as amended by Council Directive 96/97/EEC on equal treatment of men and women in occupational social security schemes. Despite the existence of the latter Directive, following the *Barber* case (*Barber v Guardian Royal Exchange Assurance Group* (Case C-262/88) [1990] ECR I-1889), Art. 119 of the EC Treaty (now renumbered Art. 141 by the Treaty of Amsterdam) prescribing equal pay for men and women is the principal provision governing occupational benefits, including occupational pensions.

[13] It should be noted that this EU-derived legal formulation does not necessarily accord with interpretations under other international and constitutional instruments.

northern European systems but now largely abolished, is the granting of unemployment benefit to married women at a rate lower than that applied to men and single women (explicitly on grounds of sex and marital status). An example of indirect discrimination is a rule limiting access to benefits to those earning above a certain threshold or working more than a specified number of hours a week. In this case, the same rule is applied to all workers, but it has a differential effect, depending on people's earnings and weekly hours: the effect is adverse on those with earnings or hours below the threshold (i.e. low-paid or part-time workers) since they will be barred from access to benefit. Where a rule of this kind adversely affects more women than men (or men than women), it is said to constitute indirect discrimination on grounds of sex, unless the rule or threshold can be justified on "objective" grounds, i.e. on grounds other than sex.

The basic idea underlying this somewhat technical concept of discrimination is that people in the same situation should be treated in the same way,[14] and people in different situations should be treated differently. The ban on direct discrimination meets the first requirement, to treat like as like. Married women should accordingly be treated the same as men and single women, i.e. granted the same, not a lower, rate of unemployment benefit. The ban on indirect discrimination meets the second requirement, to treat unlike as unlike. Accordingly, the same earnings rule should not be applied both to the low-paid and the highly-paid, since the two groups of workers are not in the same situation.

The treat-like-as-like approach to equality is both elastic and flexible, one reason being the absence from EU equality legislation of specific criteria for determining what constitutes the same and what constitutes different situations. Are persons engaged in paid work in the same situation as those in unpaid work? Are people with high and low earnings in different situations? Although the EU legislation gives some guidelines,[15] the answers to these crucial questions have largely been left to the European Court of Justice to determine in the cases brought before it and to EU Member States when implementing the EU legislation at the national level.

Another reason for this flexibility is the narrow interpretation given by the European Court of Justice and others of what is intended by equal treatment in the social protection field.[16] According to this narrow interpretation, equal treatment has two aims. The first is to ensure that social protection rules treat people as individuals and do not make assumptions about their characteristics

[14] "...women are entitled to be treated in the same manner, and to have the same rules applied to them, as men who are in the same situation..." *Borrie Clarke v Chief Adjudication Officer* (Case 384/85) [1987] ECR 2865.

[15] Directive 79/7 applies to the "working population", thereby seeming to exclude unpaid workers and the non-employed from the scope of the equal treatment principle embodied in it. It applies to statutory schemes covering specified risks — such as unemployment, old age, sickness — traditionally associated with paid employment; caring is not included. These provisions covering the personal and material scope of Directive 79/7 would seem to imply limitation of the Directive and the equal treatment principle to paid work.

[16] The EU equality instruments do not assist a great deal. Directive 79/7 merely states the purpose of the Directive to be "the progressive implementation of equal treatment between men and women in matters of social security".

on the basis of their membership of a particular group.[17] This provided the justification for abolishing the different, and adverse, treatment of married women in social protection schemes, since the adverse treatment involved the assumption that as a group married women did not engage in paid work and were financially supported by their husbands — an assumption that proved to be incorrect in many cases, given married women's increasing labour market activity.[18] A second aim is to ensure that the law relating to social protection accurately reflects socio-economic reality. This argument was also used to justify abolition of the adverse treatment of married women on the basis that the rationale for the treatment (married women's non-participation in the labour market) was an increasingly outmoded assumption no longer in accord with economic reality (see Hoskyns and Luckhaus, 1989).

Seeking to promote the integrity of the individual and to safeguard the integrity of the law are not unimportant aims, but they do not relate specifically to social protection, nor do they seek to alter the pattern of existing financial and social relationships (unlike some of the political notions of equal treatment). Furthermore, they are largely procedural in nature. As a result, when major substantive questions have arisen, e.g. whether equality must be implemented so as to avoid increasing poverty or whether Member States may be required to alter their social policy in order to achieve equality, they have been determined by the European Court of Justice in a negative way.

A narrow interpretation of the purposes of equal treatment in the social protection field was not inevitable. It was open to the European Court of Justice to adopt a more expansive interpretation, using some of the political notions as a guide. And in a different political and economic climate, it might well have done so.[19]

Political notions of equal treatment

In their current forms, the political formulations of equal treatment emerged in political debates at European and national level from the late 1960s onwards. The first of these notions, calling for an end to the financial disadvantages suffered by women in social protection systems, arose out of the detailed and rigorous analyses of these systems carried out by policy-makers, women's groups and academics. This analysis linked women's disadvantaged position in social protection systems to their unpaid work and to their (often connected) participation in the sort of part-time, low-paid, intermittent employment poorly covered by social protection systems. For this reason, the demand for equal treat-

[17] See, for example, the Advocate General's opinion in *Coloroll Pension Trustees Limited v Russell and Others* (Case C-200/91) [1994] ECR I-4389.

[18] See, for example, the Advocate General's opinion in *Caisse d'assurances sociales pour travailleurs indépendants 'Integrity' v Nadine Rouvroy* (Case C-373/89) [1990] ECR I-4243.

[19] In its 1986 judgment in *Drake v Chief Adjudication Officer* ((Case 150/85) [1986] ECR 1995), the European Court of Justice by some clever reasoning managed to bring a benefit for caring within the material scope of Directive 79/7, so enabling the exclusion of married women from that benefit to be held unlawful; see Luckhaus (1986).

ment was specifically framed in terms of equality for *women*. The idea that men would need to invoke the equality principle was not conceivable within that analytical framework. The focus on women's disadvantaged position within social protection also implied a close link between this notion of equality and the avoidance of poverty. This link in turn presupposed that the disadvantages would be removed and equality secured by "levelling up" women's position so that they would enjoy the same degree of income security within social protection systems as men do. Of all the variants of equality discussed here, this formulation gives the greatest priority to securing income security for women.

The second political formulation of equal treatment, the claim for women's financial independence, is again specific to women but the emphasis is on ending the institutionalization of female unpaid workers' financial dependence on their male breadwinner partners. Calling as it does on women to end their financial dependence on men by securing their financial independence through employment, this claim concerns more than social protection alone. This broader claim also incorporates a narrower one (specific to social protection), namely, that the rules and concepts determining entitlement within these systems should be restructured around an individualized model of entitlement rather than the relationship between breadwinner/paid worker and dependant/unpaid worker. In short, this notion of equal treatment seeks to remove the concept of dependency between partners from social protection systems.

The third and fourth political formulations of equal treatment both give priority to promoting women's paid employment and both regard social protection systems as playing an instrumental role in this respect, but the mechanism is different in each case. The third version sees the guarantee to women of full rights to social protection as a way of encouraging them to participate in the labour market in order to secure these rights. Here, social protection is seen as a financial incentive to paid work. This notion has its origin in the late 1960s and early 1970s when there was concern in the EU about labour shortages and their effect on national economies. Interestingly, a variant of this argument focusing on part-time work has recently surfaced in Spain where there is concern in some quarters about both the relative absence of part-time forms of employment and women's low labour market participation. The argument is being made that full social protection rights should be extended to part-time work in order to encourage non-employed women to take up part-time work; see *European Industrial Relations Review* (1999).

The fourth political formulation of equal treatment concerns the ways in which social protection systems operate so as to discourage women from taking or remaining in paid employment. Social protection is therefore seen as a disincentive rather than an incentive to women's labour market participation. Concern about the disincentive effects of social protection emerged, in the United Kingdom at least, in the late 1970s and 1980s and initially focused on men rather than women. It coincided with a macroeconomic concern to lower wages and social charges in order to improve competitiveness and reduce unemployment. In the 1990s, as preoccupation with work incentives grew in the United Kingdom, attention turned to women whose partners were unemployed and

claiming social assistance; it was said that women in such situations left the labour market or remained non-employed because it was not financially worth holding on to what could only be — if the argument is to ring true — low-paid employment. One report typifying this preoccupation with the perceived disincentive effect of social protection systems on women's employment explicitly linked it to the issue of women's independent income (see Duncan, Giles and Webb, 1994).

This seemingly innocuous link needs to be examined closely. Though such a task is beyond the scope of this article, two points may be made. One is to note statisticians' growing preoccupation with increasing numbers of households composed of jobless persons of working age in the United Kingdom[20] and many industrialized countries.[21] At one level, the preoccupation arises from concern for the material welfare of people in these households (OECD, 1998a, p. 1); at another, it reflects a desire to identify "labour market slack" (OECD, 1998a, p. 1) and to have data offering some support for the otherwise speculative proposition that social protection systems discourage the female partners of men in receipt of benefits from getting (low-paid) jobs.[22] The second point is that "women's independent income" is likely to be very different from that intended in the claim for financial independence. Since the preoccupation with disincentives coincides with a concern to reduce wages and social charges (and hence with removing people from receipt of benefit), the reference to "independence" in this context probably has more to do with non-reliance on social protection as an income source than with non-reliance on a partner (as is the case with the claim for financial independence). Moreover, given the relatively low rates of benefit (at least in the United Kingdom), the logic of the disincentives argument strongly suggests that this independent income will almost certainly be derived from forms of part-time, low-paid and intermittent employment which provide little, if any, income security for women.

Implications for equal treatment of recent developments in social protection

The various formulations of equal treatment described above provide the criteria for assessing whether, and to what extent, existing social protection systems may be said to be discriminatory. The first part of the assessment deals

[20] In spring 1999, some 17.2 per cent (3.2m) of all working-age households had nobody in work (Cooper-Green, 2000, p. 28).

[21] See OECD (1998a), p. 21. It should be noted that much of the increase is attributable to a growth in households consisting of a single jobless adult, but statistics also show the share of households consisting of two or more jobless adults to be either static or increasing slightly in some countries. The report also makes specific mention of the particular situation of women in the latter type of household.

[22] The OECD report on employment illustrates how this can be achieved indirectly, by explaining the preponderance of what it calls "work-poor" households in terms of "the disincentive effects arising from the interactions of the tax and benefit systems"; see OECD (1998a), p. 21.

with aspects of systems reflecting the concept of dependency and the breadwinner/dependant model of entitlement. The second deals with provisions within these systems that privilege full-time, relatively well-paid, continuous employment patterns and disadvantage more precarious forms of employment and unpaid work. Reference is also made in this part to provisions within a social protection system which may operate to mitigate the adverse effects of the bias elsewhere in the system against precarious employment and unpaid work. The third part deals with two sets of social protection rules — relating to pension age and life expectancy — which raise sex and gender issues.

Social protection and the concept of dependency

This section examines three sets of social protection provisions, all linked through the concept of financial dependency between adult partners (hereafter referred to simply as "dependency"). They are widow's (and survivor's) benefits, social assistance schemes and the rules providing for pension sharing on divorce. *Widow's benefits* are structured around dependency because they link benefit entitlement to contributions by the deceased spouse, because they insure against the loss of a breadwinner-provider, and because they may be withdrawn (as in the United Kingdom) if the recipient enters a new sexual relationship. *Survivor's benefits* are here taken to be benefits granted on the death of a spouse, i.e. to widowers as well as widows. They are based on the same principles as widow's benefit but are not sex-specific. The second set of social protection provisions, *social assistance schemes*, are structured around dependency in so far as entitlement is determined according to the resources and needs of a unit comprising a man and a woman in a sexual relationship. The third set of provisions enabling *pension sharing on divorce* presuppose dependency between the two members of a formerly married couple. They also presuppose that the acquisition of pension rights is uneven between spouses and that the lesser or non-existent rights of the wife will be lost if the marriage is terminated by divorce prior to the retirement or death of the husband.

Widow's and survivor's benefits

Widow's benefits are a long-standing feature of social insurance schemes and of occupational schemes. Two recent developments have been the introduction of survivor's benefits in both statutory and occupational schemes and the conversion of some statutory schemes from entitlement based only on contributions to entitlement based on means testing or a mix of means testing and contributions. The introduction of statutory survivor's benefit is well advanced, at least in the EU. Periodic payments of this kind now exist in all EU Member States except Denmark. In 1992, Denmark abolished the statutory periodic payment to widows and replaced it with the more limited provision of a lump-sum payment to both widows and widowers on the death of their spouse. The United Kingdom is the last EU Member State to remove the special treatment accorded to widows in statutory schemes and is doing so by extending provision — including periodic payments — to male survivors on the same terms as

those applicable to female survivors. The 1999 legislation abolishing widow's benefit and inserting the new system of bereavement benefits is due to come into force in April 2001. As regards occupational schemes in the EU, there is some evidence pointing to extension of widow's benefit to widowers, in the process of reform rendered necessary by a European Court of Justice ruling on the discriminatory nature of occupational widow's benefit in 1993.[23]

The second development concerning statutory survivor's benefit involves its conversion to a means-tested benefit. Governments in France, Italy, Sweden and the Netherlands have all introduced an element of means testing into their schemes (United Kingdom, 1998a, chapter 3, para. 7). The United Kingdom's 1999 reforms adopted a similar approach. In brief, the widow's pension payable on a periodic basis to women aged 45 and over for as long as they remain widows or do not cohabit has been replaced by a bereavement allowance available to both male and female surviving spouses aged 45 and over. However, this allowance is restricted to 12 months' duration. Thereafter, widows and widowers will be able to claim means-tested income support but will only gain entitlement to this benefit if, and so long as, they can demonstrate insufficient income, availability for work and the other conditions applicable to this benefit. In the long term, these new rules are expected to lead to a significant reduction in the level of provision for older widows (United Kingdom, 1998a, chapter 3, para. 5).[24]

An assessment of the equal treatment implications of widow's benefit and the recent developments in their regard is appropriate here. In principle, widow's benefit offends the legal notion of equal treatment since it directly discriminates against men. The restriction of this benefit to female survivors in occupational schemes was held unlawful by the European Court of Justice in 1993, as already noted. This benefit continues to be lawful in EU statutory social protection schemes by virtue of the exemption of the broader category of survivor's benefit under EU equality law.[25] Survivor's benefits under occupational schemes are non-discriminatory since they treat both male and female

[23] *Ten Oever v Stichting Bedrijfspensioenfonds voor het Glassenwassers-en Schoonmaakbedrijf* (Case C-109/91*)* [1993] ECR I-4879. The French AGIRC and ARRCO occupational schemes introduced survivor's benefits in 1994 and 1996 respectively. For trends in occupational schemes in the United Kingdom, see Luckhaus and Moffat (1996), pp. 78-79.

[24] Men and women aged 55 or over when the legislation comes into force and who are widowed in the subsequent five years will be able to claim income support when their bereavement allowance expires without being available for work. They will also receive an additional amount of income support bringing that payment up to the level of the bereavement allowance. This transitional provision will ensure that widows do not lose out financially with the introduction of the bereavement allowance, but this protection is not afforded to those under 55 when the legislation comes into force and who are subsequently widowed.

[25] Art. 3(2) of Directive 79/7. The United Kingdom's decision to reform widow's benefit was prompted in part by legal proceedings begun in 1997 in *Willis v UK* (application No.36042/97 to the European Commission on Human Rights). The absence of widower's benefit was challenged as contrary to the ban on sex discrimination in the European Convention on Human Rights, there being no exemption of survivor's benefit in this instrument, as there is in Directive 79/7.

survivors the same, as dependants. Statutory survivor's benefits also satisfy this non-discrimination principle (subject to the terms being identical for men and women, which is not always the case), but their discriminatory status is not a live issue since, as already noted, they are exempted from application of equal treatment principle by EU equality law.[26] The fact that the means testing of survivor's benefit can result in reduced social protection for some widows raises in stark form the question of whether, according to EU law, equality between men and women can be implemented by reducing provision for some or all groups: in short, whether equality can be implemented in a way which may result in poverty for some or all of those concerned.

The levelling down of provision in the process of implementing equality is a common strategy in both statutory and occupational schemes. In the 1970s and 1980s, in the first cases to come before it in which this point was raised directly or indirectly, the European Court of Justice either proceeded on the assumption that the result of a successful discrimination claim would lead to extension of provision to the disadvantaged group[27] or simply avoided the issue.[28] It then developed a neat formulation of the equal treatment principle, the consequence of which was automatic extension of the privileged treatment to the disadvantaged group.[29] However, when pressed to rule on whether Member State legislatures could implement equality by reducing provision, it responded positively, expanding on the idea, developed elsewhere in its case law, that the practical implementation of equal treatment was a matter of social policy over which Member States continued to retain considerable discretion and control.[30]

To summarize the legal situation, widow's benefits are discriminatory whereas survivor's benefits are not, although statutory widow's benefit is exempted under Directive 79/7 from application of the equal treatment principle. In addition, EU Member State implementation of equal treatment involving a reduction in provision for some or all groups previously entitled to benefit is

[26] Art. 3(2) of Directive 79/7. All exemptions under Directive 79/7 are due to be abolished as a result of the "progressive implementation of the principle of equal treatment". A proposal for a draft directive aimed at completing equal treatment in statutory schemes was introduced in 1987 (COM(87) 494). This proposal suggested exemptions should be abolished by individualizing entitlement in preference to extending dependency-related provisions to men. The proposal was amended heavily in negotiations, and was finally shelved.

[27] In the 1970s' cases on equal pay under Art. 119 of the EC Treaty (renumbered Art. 141 by the Treaty of Amsterdam). The idea that women would take an equal pay claim to secure reduction of men's pay to theirs did not appear to be within the contemplation of the European Court of Justice nor, arguably, of anyone else.

[28] *Teuling v Bedrijfsvereniging voor de Chemische Industrie* (Case 30/85) [1987] ECR 2497.

[29] Women were to have the same rules applied to them as men in the same situation since, where the Directive has not been implemented, those rules remain the only valid point of reference: see *Borrie Clarke v Chief Adjudication Officer* (Case 384/85) [1987] ECR 2865.

[30] *Queen v Secretary of State for Health ex parte Richardson* (Case C-137/94) [1995] ECR I-3407 in respect of statutory schemes and *Smith and Others v Avdel Systems Limited* (Case C-408/92) [1994] ECR I-4435 in respect of occupational schemes.

permissible under EU law. As to the political notions of equal treatment, widow's benefit goes some way to meeting the call for an end to the disadvantages women suffer in social protection systems through non-coverage of their unpaid work activity, although it does so by focusing on sex and marital status rather than on engagement in unpaid caring work (or indeed on participation in the peripheral sections of the labour market). The extension of widow's benefit to male survivors is not compatible with this notion of equal treatment, nor is the levelling down of provision which has tended to accompany that process. The existence of widow's benefit runs directly counter to the ideal of ending dependency in social protection systems, a situation exacerbated by the extension of this status to men in the form of survivor's (widower's) benefit. Finally, the application of means testing to survivor's benefit may raise the prospect of increasing disincentives to work for women, contrary to the notion that equal treatment requires their reduction.[31]

Social assistance

The application of means testing to survivor's benefit is indicative of another development in social protection with implications for equal treatment, namely the expansion of social assistance. A study of the 24 OECD countries showed that social assistance is becoming more important in nearly all the countries, in terms both of expenditure and claimant numbers (Eardley et al., 1996, p. 178). The osmotic spread of means testing to nearly all forms of social protection including in many non-OECD countries is illustrated by its application to contribution-based family allowances in Italy,[32] the introduction in the United Kingdom in the early 1990s of a means-tested in-work benefit for persons with disabilities,[33] and the announcement in Bangladesh in 1998 that a means-tested pension of 100 takas (about 2 US dollars) per month was to be awarded to some 90 people in each of the country's 4,479 districts. State social assistance programmes for the elderly are also run in other parts of Asia, notably India; see ILO/EASMAT (1997), p. 24. A feature common to these programmes, to all the schemes operated in OECD countries and, most likely, to social assistance everywhere, is the testing of means on the basis of a unit larger than the individual seeking entitlement to the benefit. In some instances, the unit may be very large and embrace distant as well as near relatives. In the majority of OECD countries, the unit is restricted to a claimant and his/her spouse (Eardley et al. 1996, p. 65) and, in some cases, to a claimant and the (hetero)sexual partner with whom he/she is held to be cohabiting.

[31] This point is discussed below in relation to social assistance schemes. It has also been suggested that widow's benefit itself provides a disincentive to work since it enables a woman not to have to take paid work if her husband dies.

[32] First introduced in 1934, the *assegni familiari* have had an uneven history, but since 1994 have been favourably regarded and expanded in scope by successive Italian administrations; see Addis (1999).

[33] Called disability working allowance and now replaced by a very similarly structured benefit called a disability tax credit.

Potentially, the implications for equal treatment of this spread of social assistance and the linking of entitlement to these benefits to the resources of both partners are quite far-reaching. The root of the problem with means testing based on a couple's resources is that where women's earnings are considerably lower than men's, as is customarily the case, more women than men fail to establish entitlement to means-tested benefits because their partner's earnings bring the couple's combined resources above the minimum income allowed. Moreover, where a male partner succeeds in establishing entitlement (aided by the low or non-existent earnings of his partner), the element of the benefit intended to meet his partner's needs is paid to him and not to his female partner.

As to the discriminatory status of the dependency notion in social assistance, a number of cases have come before the European Court of Justice seeking to establish that taking into account a partner's income in means-tested schemes constitutes indirect discrimination against women. Acknowledging its adverse effect on women's entitlement, the Court none the less ruled that the practice was not discriminatory because it could be objectively justified on the grounds that provision of a minimum income was an integral part of Member States' social policy and that Member States had a "reasonable margin of discretion" in determining the nature of social protection measures and the actual means by which they were to be implemented.[34] As with its application in relation to levelling down by Member States, this formula nicely illustrates how easily the abstract form of the "treat-like-as-like" approach to equality can be moulded into the proposition now clearly established in this area of EU law that poverty and material well-being are irrelevant to the concept of equality, as interpreted by the Court.

As to compatibility with the political notions of equal treatment, social assistance schemes themselves can be a welcome lifeline for a woman who is not entitled to other forms of social protection because of her unpaid work activity. These schemes do not actually conflict with the call for an end to the disadvantages women encounter in these other spheres of social protection as a result of their unpaid work. However, the treatment of a woman's partner's (usually higher) income as hers tends to displace if not destroy the potential of these schemes to alleviate her income insecurity. At the same time, the income assessment rules bring the schemes into conflict with the equal treatment ideal of ending disadvantages for women arising from their unpaid work activity. In addition, the payment of money to a man to meet his partner's needs runs counter to the principle of equality which regards the financial independence of a woman from her partner as paramount. Finally, means-tested schemes are a prime target for advocates of the notion that equal treatment requires an end to the disincentives to work embedded in social protection schemes. This argument goes as follows: the ten-

[34] *Commission v Belgium* (Case C-229/89) [1991] ECR I-2205; *Moelenbroek v Bestuur van de Sociale Verzekeringsbank* (Case C-226/91) [1992] ECR I-5943. These rulings have the effect of taking poverty-related benefits outside the scope of Directive 79/7 and the equal treatment principle, a point specifically decided by the Court in relation to the United Kingdom's income support in *Jackson and Cresswell v Chief Adjudication Officer* (Case C-63-64/91)[1992] ECR I-4737.

dency for a woman's earnings to be low (or non-existent) permitting her (unemployed, disabled, older) partner to qualify for means-tested benefits results in a disincentive to work for women in (low-)paid employment, because the couple is generally not much better off if the woman does so.[35]

Pension sharing on divorce

A third development in social protection serving to extend further and consolidate the principle of dependency in social protection systems is the practice of dividing the pension rights of spouses on divorce. In principle, pension sharing (or pension splitting, as it is sometimes known) is applicable to all types of pension schemes and has a fairly long history in statutory schemes. It was introduced in Germany in 1977 (Solcher, 1978, p. 308) and in Canada in the following year.[36] It has attracted attention recently in relation to occupational schemes. Pension sharing in occupational schemes was introduced in Ireland in 1996. It was proposed in the United Kingdom in 1997 and in South Africa in 1998. In the United Kingdom, the proposal became law in 1999 when legislation was passed providing for the transfer of pension rights from one spouse to another on divorce. The legislation supplements existing arrangements which can be made by British courts, but which fall short of outright transfer of rights; the main beneficiaries of the 1999 legislation are expected to be women (United Kingdom, 1999). In South Africa, the Law Commission's 1998 consultation paper (South African Law Commission, 1998) suggested pension sharing might be extended to all spouses, including those entering marriage under customary law. Its recommendation following consultation, however, is to restrict pension sharing to marriages recognized as such by existing law (South African Law Commission, 1999). In the United States, a variant of pension sharing (called earnings sharing) is being actively promoted by the Cato Organization as part of a plan to abolish the United States social security system and replace it with a fully funded, defined contribution system financed solely by the individuals receiving the benefit (Shirley and Spiegler, 1998; see also Olsen, 1999).

If pension sharing on divorce is available to men and women on the same terms, it seems to be compatible with the legal notion of equal treatment.[37]

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[35] This is because, in their turn, the women's earnings are deducted from the benefit that would otherwise have been awarded. Whether or not people make employment decisions exclusively on monetary terms is a moot point, not least because women might decide to take employment in order to gain direct access to the money. If one accepts the logic of the disincentives argument, it can only operate in relation to work which is low paid. Women (or men) motivated solely by money are not going to give up the financial rewards of highly paid work for the relatively low levels of income granted to their partners under social assistance schemes.

[36] O'Neil and Ciffin, 1978, pp. 64-77. For details of pension sharing in some EU Member State schemes, see Luckhaus (1994), pp. 147-161. Under the US social security system, a divorced woman is entitled to benefits equal to 50 per cent of her former spouse's benefits provided the marriage lasted ten years; see Shirley and Spiegler (1998).

[37] Although it will undoubtedly benefit more women than men and, by the same token, adversely affect more men than women, it would presumably be held to be objectively justifiable.

Since the aim of pension sharing is to secure a fair division of the wealth acquired during a marriage on the ground that both spouses have contributed to that acquisition through the sharing of paid and unpaid work, pension sharing also seems to conform with the call for an end to disadvantages in social protection systems arising from the non-coverage of unpaid work. Pension sharing is sometimes misguidedly regarded as a means of individualizing benefit rights (establishing the financial independence of one partner from the other). But pension sharing proceeds on the basis of one spouse being financially dependent on the other and so extends and reinforces the principle of financial dependency throughout social protection systems.

In summary, then, financial dependency between partners provides the analytical link between the social protection developments described so far in this article. The striking feature about these developments is the extent to which this form of financial dependency is spreading in both statutory and occupational schemes. Recent attempts at EU level to achieve recognition of homosexual (cohabiting) relationships as equivalent to heterosexual (cohabiting) ones in order thereby to secure for the dependent homosexual partner the financial advantages awarded to the dependent partner in a heterosexual relationship indicate a readiness on some people's part to consider further expansion of this form of dependency in the social protection schemes of the future.[38]

Social protection regulations and different forms of employment

The rules governing the transmission of income security from the labour market to the social protection system are examined in this section, as are rules within the social protection system capable of countering the adverse effects of these labour market rules to some extent.

The labour market rules are: obligation to be in paid work, satisfaction of an earnings or hours threshold, entitlement linked to payment of contributions

[38] In the United Kingdom case of *Grant v South-West Trains Ltd* (Case C-249/96) [1998] 1 CMLR 993, the applicant employee challenged the failure by her employer to grant her female partner travel concessions granted to married or cohabiting heterosexual partners of employees, as a violation of the equal pay principle under Art. 119 of the EC Treaty (renumbered Art. 141 by the Treaty of Amsterdam). The European Court of Justice ruled against this being an instance of sex discrimination but pointed favourably to the new Art. 13 of the EC Treaty (as renumbered by the Treaty of Amsterdam) enabling the EU Council to adopt measures to eliminate discrimination on the grounds of sexual orientation. The implications of (ultimately) requiring the same treatment of homosexual and heterosexual couples in relation to dependency in social protection systems could be far reaching. It seems Belgium already takes into account the income of a homosexual partner for the purposes of assessing entitlement to means-tested supplements: see Royal Decree of 4 August 1996 (Commission of the European Communities, 1997, p. 47). This extension of dependency leads to savings in expenditure on social protection and a loss to the individual who might be deprived of benefit because their partner's earnings are taken into account in assessing that individual's entitlement and to the couple (the couple rate being less than two individual rates). Extending survivor's benefits to homosexual partners and permitting pension sharing on "divorce" (to name just two of the possibilities) would, however, increase expenditure in occupational as well as statutory schemes, a reason perhaps why there may be some reluctance to extend dependency in this sphere.

over a lengthy period, benefit amounts linked to earnings in work and lengthy contribution periods. These rules feature in some statutory and occupational schemes but not in others.[39] The earnings and hours thresholds and the lengthy contribution conditions in statutory schemes are discussed here,[40] partly because of recent or proposed changes and partly because their potentially discriminatory status has been the subject of legal challenge.

An earnings or hours threshold is a fairly common feature of social protection systems. A comparison by the OECD of provision in 21 OECD countries published in 1998 showed that the systems in all but five of those countries — Greece, Hungary, New Zealand, Norway and Spain — operated either an hours or an earnings threshold or a combination of both.[41] Recent developments in relation to these thresholds were mixed. Some involved a reduction in the hours or earnings threshold and thus raised the possibility for part-time or low-paid workers of gaining access to the systems. Thus, in 1994, the threshold applicable to the social protection system in Japan was reduced from 30 to 20 hours a week and in Canada earnings and hours thresholds previously applying to unemployment benefit were abolished from 1997 (OECD, 1998a, p. 172).

In Germany, in 1997 too, the first step was taken to reduce the hours and earnings thresholds governing access to the pension, health and unemployment insurance schemes. This involved reducing the 18-hour threshold, below which people could not gain access to the unemployment insurance scheme. Thenceforth, people could participate in all three schemes — pension, health and unemployment — if they worked 15 or more hours a week or earned more than the minimum earnings threshold. This threshold is fixed at a low level (630 DM per month in 2000) so, in practice, it is this earnings threshold rather than the hours threshold which determines who can participate in the insurance schemes. In April 1999 further changes to the German pension insurance scheme were introduced related to this minimum earnings threshold. The changes are complex but the most important element, for our purposes, is the partial removal of the minimum earnings (630 DM) threshold in relation to pension insurance. Henceforth, employers are obliged to pay contributions of 12 per cent on earnings below this level, while employees (earning between 300 and 630 DM per month) may make voluntary contributions of 7.5 per cent. Employees who do not make the voluntary contributions acquire less than the full

[39] See Luckhaus and Ward (1997), pp. 237-253, for a detailed analysis of rules in statutory and occupational schemes and of how they interact with different forms of employment in EU Member States.

[40] Discussion of their incidence in occupational schemes is hampered by lack of data. Some information concerning hours thresholds in the United Kingdom is to be found in Luckhaus and Moffat (1996), pp. 81-85. Cases concerning hours thresholds in Germany and the Netherlands continue to be referred to the European Court of Justice, which suggests that such thresholds still operate in occupational schemes in those countries.

[41] OECD, 1998a, pp. 170-172. The report referred to the three benefits — public health, old age and unemployment — said to be the most likely to operate thresholds.

range of pension rights. The idea behind these changes was to help low-paid female employees improve their social protection in old age.[42]

Other developments concerning thresholds have been less favourable to low-paid workers.[43] Thus, in Finland in 1996 an income threshold was introduced into the sickness insurance scheme for the first time.[44] In the United Kingdom, the lower earnings limit is gradually being raised to bring it into line with the tax threshold,[45] the possible consequence being an expansion of the 2.6 million people presently excluded from statutory social protection by that threshold.[46]

Rules linking pension entitlement to a specified number of years of contribution have also undergone change, often as part of a general package of government reforms designed to reduce social protection costs (and budget deficits). In general, changes are likely to restrict access to pensions for people with a pattern of intermittent employment. Thus, in Sweden the contribution period required to achieve full pension entitlement was raised from 30 years to total lifetime contributions; while, in Italy, the ability of private-sector workers to obtain a full pension after 35 years of contribution and public-sector workers after 20 years has been removed and replaced by a condition requiring lifetime contributions (Pierson, 1999, p. 25). Changes to pension earnings formulas in these two countries may also result in reduced pensions for this group.[47] In

[42] In addition the reform was aimed at avoiding the creation of jobs with pay set at just below the minimum earnings threshold (Germany, 1999). This was thought to have been encouraged by the absence of a requirement on employers and employees to pay contributions on employment below the minimum earnings threshold, a 20-per-cent tax being levied on employers in respect of this employment instead. The 20-per-cent tax has been abolished now that employers are obliged to pay contributions on employment below the 630 DM threshold.

[43] It should be noted that social protection was excluded from the scope of EU legislation (Directive 97/81) providing for an end to discrimination against part-time workers.

[44] Kuhnle, 1999, p. 17. In 1994, 8.7 per cent of women, compared with 3.3 per cent of men were in low-paid employment in Finland (OECD, 1996, table 3.2, p. 72). This difference between men and women might not be sufficient to establish disproportionate adverse effect for the purposes of an indirect discrimination claim under EU law.

[45] The two-fold aim being (according to the new Labour Government's 1998 Green Paper on welfare): "to increase the incentives for employers to take on staff and to make work pay for all employees" (United Kingdom, 1998b, para. 31, p. 30). The first step in this process was the raising of the limit for payment of employers' contributions to the tax threshold, with effect from April 1999. The second step is the raising of employees' contributions over two stages, so that by April 2001 the level of earnings at which contributions must be paid will be fully aligned with the tax threshold.

[46] Of the 2.6 million, 2 million are women and 0.6 million are men; 70 per cent of the men are under 25 (McKnight, Elias and Wilson, 1998, p. vi). It should be noted that the United Kingdom Government has taken steps to try to prevent an increase in the numbers already excluded by the lower earnings limit by providing that people earning above this limit but below the new (tax) threshold will continue to qualify for contributory benefits by assuming "notional payments".

[47] In Sweden, prior to reform the amount of pension was calculated on earnings in the best 15 years and after reform on average earnings over the entire working life. The "best" earnings formula enables years of no or low-paid work to be excluded from the pension calculation and in this way to benefit intermittent and low-paid workers. Italy has modified its pension formula from last five and last one year (private and public sector workers, respectively) to an average of the entire working life. Other European states using the final salary or best earnings formula are also moving in this direction.

France, Portugal, Austria and Finland, the number of years of earnings on which the pension is based has been increased (Commission of the European Communities, 1998b, p. 24). In the United States, there is concern that a proposal to raise the number of years of covered earnings from 35 to 38 in order to gain full entitlement to a pension will have a disproportionate effect on women, the estimate being that fewer than 30 per cent of women retiring in 2020 will have the required 38 years (compared with nearly 60 per cent of men) (Shirley and Spiegler, 1998). In Spain, however, there has been a slight improvement in the number of years part-time workers are required to contribute in order to gain full entitlement to a pension. An agreement between the Spanish Government and Spanish trade unions signed in October 1998 resulted in a change in the method of calculating the contribution years of part-time workers, giving them entitlement to a pension after 21 years rather than 30. Full-time workers continue to gain entitlement after 15 years. As already noted, one aim of this reform is to encourage women to take up part-time work (*European Industrial Relations Review*, 1999, pp. 30-31).

The question needing to be addressed is whether these labour market rules are compatible with the legal and political notions of equal treatment outlined earlier. As regards the legal construction of equality, it is possible that these rules are incompatible with the requirement of equal treatment if a case can be made that they are indirectly discriminatory and that they are not objectively justifiable. Since the low-paid, part-time, intermittently employed workers adversely affected by the rules tend to include more women than men (because of their unpaid work activity), a discriminatory claim may have some chance of success, particularly since the European Court of Justice generally seems prepared to regard part-time (low-paid) workers as being in a different situation from full-time (higher-paid) workers and has not always demanded that detailed statistical evidence needed to establish differential effect be produced in support of the claim. However, the availability of the defence of objective justification gives the Court at EU level and national levels considerable flexibility if it wishes to reject the claim. The discriminatory status of these labour market rules, therefore, remains unknown until a claim is made and the Court gives its ruling. In the meantime, though the rules may be regarded as potentially discriminatory they are none the less lawful.

There is some certainty with respect to the rules excluding part-time and low-paid workers from access to social protection schemes. Here, as with widow's benefit, the legality of the rules differs as between statutory and occupational schemes. In occupational schemes, the European Court of Justice took the view that an hours threshold excluding part-time workers from access to a pension is indirectly discriminatory and cannot be objectively justified.[48] In two cases concerning the mix of hours and earnings thresholds existing, prior to 1997, in the German unemployment, invalidity and old-age insurance schemes, the Court held that their discriminatory effect was objectively justified. The

[48] *Vroege v NCIV Instituut voor Volkshuisvesting BV and Pensioensfonds NCIV* (Case C-57/93) [1994] ECR I-4541.

justification accepted by the Court was that employers should be relieved of the liability of paying contributions on this form of employment (employment of fewer than 18 and 15 hours a week, in which earnings fell below the minimum specified), so that they would be encouraged to create the type of part-time, low-paid jobs covered by these thresholds.[49] It may be noted that the Court is here accepting that equality is not only restricted to those engaged in paid (as opposed to unpaid) work, but also to those engaged in the type of employment — full-time, higher-paid — already privileged within social protection schemes.[50]

So far as the four political notions of equal treatment are concerned, two call for particular comment in the context of these social protection rules privileging full-time, higher-paid continuous employment. Since these rules are a major cause of the income insecurity suffered by women in social protection systems — women's unpaid work being a reason for their non-employment or engagement outside this privileged realm — they are in direct conflict with the notion of equal treatment which calls for an end to the structural features of social protection systems which disadvantage unpaid work activity. To a lesser extent, these structural features are incompatible with the idea that full social protection rights should be accorded to women to encourage them to take up paid employment, since in this way they will gain access to those rights. It could be argued, for example, that knowledge of the lengthy period of contribution and relatively high earnings needed to qualify for a pension, combined with a realization that caring activity will prevent those requirements being met, may prevent the promise of such a pension acting as an incentive to women to enter the labour market.

Attention will now briefly be given to another set of rules some of which, despite the austerity currently ruling European statutory social protection systems, are being preserved and, it seems, slightly enhanced. These rules operate so as to enhance coverage for people engaged in unpaid work either by specific reference to that activity or by breaking the link between social insurance and participation in paid work. The first type targets unpaid caring work either by transforming the work into a form of (non-market remunerated) paid work (as the United Kingdom's invalid care allowance and Finland's home childcare allowance effectively do), or by ensuring that periods of unpaid work do not jeopardize entitlement to social insurance benefits by crediting the individuals' accounts with contributions for the relevant periods of care activity. The latter, termed caring credits, are effective in a number of European states in enhanc-

[49] The assumption being that employers are less likely to create jobs of this kind if they have to pay contributions in respect of them: *Nolte v Landesversicherungsanstalt Hannover* (Case C-317/93) [1995] ECR I-4625; *Megner v Innungskrankenkasse Rheinhessen-Pfalz* (Case C-444/93) [1995] ECR I-4740.

[50] The discriminatory status of the United Kingdom's low earnings threshold was challenged indirectly and unsuccessfully in legal proceedings before the Employment Appeal Tribunal in *Banks v Tesco Stores Ltd and Secretary of State for Social Security*, Judgment 15 Sept. 1999.

ing pension entitlement for carers.[51] Contribution credits were introduced into the (AVS) pension scheme in Switzerland in 1995 along with pension splitting (as it was then called) for married and divorced couples (Bonoli, 1997, pp. 119-122). The United Kingdom and Ireland have implemented a variant of the caring credit in their home responsibilities protection, a measure whereby years of low or no earnings may be disregarded in the computation of pension amount. In 1996, Ireland increased the number of years for which such protection could be available by increasing the age of qualifying children from 6 to 12 (Commission of the European Communities, 1997, p. 50).

It should also be noted that a form of crediting for carers operates in relation to occupational pension schemes where employers continue to make contributions on behalf of employees on maternity (or parental) leave. The extent of this practice by employers is unknown. However, it is a requirement of EU law that contractual rights (including acquisition of pension rights) be maintained during the 14 weeks (normally paid) maternity leave mandatory in the EU.[52] A recent decision of the European Court of Justice paves the way for an expansion of caring credits in occupational systems. The Court ruled that it was unlawful for employers not to continue contributing to their pension fund on behalf of employees on *unpaid* maternity leave, where the pension funds are financed by employers' contributions alone.[53]

Examples of the second type of rule, which breaks the link between social protection entitlement and participation in employment, are non-contributory, residence-based benefits and provisions permitting voluntary contributions. In 1997, Italy combined both the voluntary contribution principle and the targeting of unpaid work by establishing a new fund for homemakers (*casalinghe*), which provides insurance against occupational accidents and old age and which is entirely voluntary.

As to the discriminatory status of these compensatory provisions, it is clear that when they are available to both men and women they are not in conflict with the legal notion of equal treatment — at least as far as the prohibition on direct discrimination is concerned. In practice, their effect may be to advantage more women than men. Even if an argument could be made out that this adversely affects more men than women, rendering the provisions indirectly discriminatory, the Court would almost certainly be encouraged to hold the provisions to be objectively justified. The legal position is different where the compensatory provisions single out women for special treatment by excluding men. The European Court of Justice, again, would almost certainly hold sex-specific provisions of this kind to be in conflict with the ban on direct

[51] Credits are also granted with the benefits for caring, such as the German long-term care insurance and the United Kingdom's invalid care allowance. For further details of these credits in the EU, see Luckhaus and Ward (1997), pp. 249-250.

[52] Directive 92/85 on the safety and health of pregnant or breastfeeding workers.

[53] *Boyle v Equal Opportunities Commission* (Case C-411/96) [1998] All E.R. (EC) 879. The particular point was decided by the European Court of Justice under Council Directive 92/85/EEC concerning the safety and health of pregnant workers, rather than under EU legislation making specific reference to equality.

discrimination,[54] but the point is not likely to arise in relation to statutory schemes because such provisions are exempted from application of the equal treatment principle by EU law itself (Art. 7(1)(b) of Directive 79/7).

The two political notions of equal treatment relevant here, again, are the calls for an end to the disadvantages in social protection schemes arising from peripheral paid work and unpaid work activity and for measures to encourage women to enter the labour market. Provisions targeting unpaid work as part of social protection schemes based on employment (as opposed to residence) — such as caring credits — are particularly apt to satisfy these two notions of equal treatment and hence to produce gender equality. They also sit happily with notions of financial independence of one partner from the other and do not appear to operate as a disincentive to women to take employment. A qualification must be entered here, however, for it is not clear that the level of benefit resulting from provisions such as caring credits and residence-based entitlement will be such as to produce an adequate income for beneficiaries, while voluntary contributions are extremely problematic for those who by virtue of their unpaid work have no source of income other than through their partner.

To summarize, then, social protection rules which penalize unpaid work activity look set to stay, although some minor improvements have been made. These rules — in statutory but not occupational schemes — appear to be compatible with the legal notion of equality but are in conflict with the political ideals of removing disadvantages in social protection schemes arising from non-coverage of unpaid work and of using the offer of full social protection rights to encourage women into the labour market. Compensatory measures, especially those targeting caring, appear to be holding their ground well. Unusually, the compensatory measures appear to conform comfortably with both legal and political notions of equality, except where the measures are available to women only.

Social protection, pension age and life expectancy

The two aspects of social protection discussed here have a demographic link. The first concerns the setting of different pension ages for men and women. The second concerns assumptions about individual life expectancy based on statistical averages and the use of such factors to justify different benefit rates for men and women.

Where there is a difference between men's and women's pension ages, that of men has traditionally been set, seemingly without exception, at the higher level. Thus, in 1995, 15 OECD countries applied the same pension age for men and women and eight applied different pension ages. The situation in

[54] See, for example, the European Court's ruling in *Van Cant v Rijksdienst voor Pensionen* (Case C-154/92) [1993] I-3811 (footnote 56 below). The construction of equality by Constitutional Courts in this context is also of interest. The Austrian Constitutional Court has declared illegal legislation restricting to women the entitlement to an allowance for part-time working up to the time a child reaches 18 months (*Equality Quarterly News*, 1998, p. 28). But see the German Federal Constitutional Court's decision (footnote 59 below) which viewed provisions exclusively for women as justified by past unpaid work activity and hence non-discriminatory.

1961 was roughly the same. In 1995, all but two of the 15 countries (France and New Zealand) operated equal pension ages of 65 or above. Of the EU states operating differential pension ages, six have implemented or propose implementing reform involving raising women's pension age to that of men. These six states are: Austria, Belgium, Germany, Greece, Portugal and the United Kingdom (Commission of the European Communities, 1998b, p. 24). In the case of the United Kingdom and Austria, the equalization process is to be phased in over a long period. Outside the EU, Australia, Hungary and Japan are said to be equalizing by raising women's pension age to that of men (OECD, 1998b, p. 53). Switzerland raised women's pension age from 62 to 64 in 1995 (men's pension age remained 65). Raising the pension age for women therefore seems to be becoming the norm in statutory schemes, a pattern which may be reproduced in occupational schemes, at least in the United Kingdom (Luckhaus and Moffat, 1996, pp. 72-78). It should be noted, however, that the reforms in individual countries can be complex in detail, as governments and employers attempt to combine equalization with the introduction of various forms of "flexible" retirement provision and with transitional measures intended to soften the financial blow for those who would otherwise suffer a concomitant reduction in entitlement. This is part of a wider scenario in which European governments are moving towards raising pension age and extending working life as ways of coping with rising pension costs and increased longevity.

As regards the compatibility of different pension ages with the legal notion of equality, such a difference is precluded, in principle at least, by the ban on direct forms of discrimination. For this reason, the different pension ages in occupational pension schemes were held to be unlawful by the European Court of Justice as from 17 May1990.[55] However, differential pension ages in statutory schemes continue to be lawful by virtue of the provision exempting them under EU law (Art.7(1)(a) of Directive 79/7). In relation to these statutory schemes, the Court has held further that once Member States take action to equalize pension ages (even though unequal ages are exempted) they cannot retain or introduce measures relevant to that scheme which treat men and women differently. In particular, they cannot retain a sex-specific provision, which involves calculating the amount of pension on a more generous basis for women than for men, as the Belgian Government attempted to do when it equalized pension ages at 60 in 1990.[56] In this respect, the Court was unimpressed with

[55] The date of the European Court of Justice's judgment in *Barber v Guardian Royal Exchange Assurance Group* (Case C-262/88) [1990] ECR I-1889, when it was finally and conclusively settled that occupational pensions constituted pay under Art. 119 of the EC Treaty (renumbered Art. 141 by the Treaty of Amsterdam), and that different pension ages breached the equality principle in that article.

[56] *Van Cant v Rijksdienst voor Pensionen* (Case C-154/92) [1993] I-3811. The Belgian Government has since reinstated the previous pension age of 65 for men and provided for the increase in women's pension age from 60 to 65 to be phased in over a 13-year period. The flexible retirement provisions have been retained and women's pensions are still calculated on a more generous basis than men's. The Court has held in *De Vriendt and Others v Rijksdienst voor Pensioenen and Others* (C-377/96 to C-384/96) [1998] ECR I-2105 that the retention of different methods of calculating the amount of pension is permissible under Directive 79/7 while different pension ages for men and women are maintained.

the argument that the more generous method of calculating pension amounts for women was a justifiable means of compensating the women for the disadvantages they encountered in the social insurance system because of their unpaid work activity.

In addition, the Court has held that it is permissible for employers to implement equality in occupational schemes by raising women's pension age to men's, even though this may worsen the women's financial position,[57] and that it is impermissible for employers and pension funds to introduce transitional measures to protect the women who suffer loss of rights because of the decision to implement equality by raising their pension age rather than reducing men's.[58] This nicely illustrates, once again, the point that the legal version of equality is not geared in any way to the social protection function of providing income security and avoiding poverty. So far as the political notions of equal treatment are concerned, the most significant one in the pension age context is the call for an end to the disadvantages for women arising from social protection's non-coverage of unpaid work. On one view, women's lower pension age is fully compatible with this notion of equal treatment, because it can be regarded as a way of compensating women for their past years of unpaid care work and of offsetting some of the disadvantages arising within the social protection system as a result of that activity. Thus the original lower pension age for women was justified in the German Constitutional Court[59] as a means of compensating women for their "double burden" and for the difficulties they encountered in fulfilling the insurance contribution period needed to obtain a pension. By the same token, equalizing pension ages by raising that applicable to women deprives them of this "reward".

It can be argued more pertinently that raising the pension age for women can bring both advantages and disadvantages in financial terms. For women in full-time, higher-paid, highly skilled jobs, the prospect of being able to work longer is likely both to be welcome as an end in itself and to facilitate acquisition of pension rights and, ultimately, higher pension benefits. For women in more precarious forms of employment, however, a higher pension age is likely to mean an exacerbation of the income insecurity they already encounter in employment — and indeed, in the social protection system, through its incorporation of the insecurities attached to precarious forms of employment.

The other demographic aspect concerns the different benefit rules applied on the basis of an assessment of the differential risk to which men and women are said to be exposed. The attribute currently receiving the greatest attention is women's propensity to live longer than men. The result of this differential risk

[57] *Smith and Others v Avdel Systems Limited* (Case C-408/92) [1994] ECR I-4435.

[58] *Van den Akker and Others v Stichting Shell Pensioenfonds* (Case C-28/93) [1994] ECR I-4527.

[59] Ruling of the Federal Constitutional Court of 28 Jan. 1987 concerning Article 3(2) GG and s.25(3) Employees' Insurance Act and s.1248(3) Reich Insurance Act.

assessment is that the same pension cover may cost more for women than for men, or women may receive a lower benefit for the same level of contributions. For technical reasons, some intermediary pension benefits may be larger for women than for men. At the end of the day, however, women's level of pension tends to be lower than men's once actuarial factors linked to differences in longevity are taken into account.[60] The alternative is for pension schemes to ignore these statistical averages and to calculate pension amounts on a "unisex" basis. Men and women in the same situation would then receive the same pension.

A full picture of the extent to which sex-based actuarial factors are used in various types of schemes is not yet available. However, some information is available on pensions and it is clear that occupational rather than statutory schemes are the ones affected. A survey of occupational schemes carried out in the United Kingdom in 1991 showed that sex-specific factors were used in various ways by many of the schemes, although a considerable number of them adopted a unisex approach.[61] In Denmark, in 1996 just under one half of 1.3 million employees were in defined contribution schemes using actuarial factors based on sex. The remainder of the employees were in unisex schemes (Commission of the European Communities, 1997, p. 53). The unisex approach is believed to be widely adopted in insurance and pension schemes in the United States; see, for example, Equal Opportunities Commission (1998), p. 29. When proposals for the new Hungarian mandatory social security system and associated private pension scheme were being discussed in that country, the possibility of incorporating sex-based actuarial factors into the private pension scheme was discussed and rejected. The scheme enacted in 1997 thus requires that when calculating benefits in the private scheme, the mortality rate of both men and women shall be determined according to a *unified* mortality table.[62]

The issue of sex-based actuarial factors gives rise to tricky conceptual and practical problems in the light of the practices adopted by many insurance companies and pension funds and the political weight these interests can bring to bear on EU institutions. Asked to rule on the issue, the European Court of Justice concluded that actuarial factors based on different assumptions about men's and women's longevity do not generally fall within the scope of EU

[60] In a defined contribution scheme, contributions produce a lump sum on retirement which is then used to buy an annuity, the arrangement underpinning subsequent periodic pension payments made until death. The same lump sum will buy a higher pension for a man than for a woman because in her case the lump sum has to be spread over a longer period. The intermediary benefit which has to be larger is the transfer value. This is the amount paid by one scheme to another when a person changes employment and pension schemes. It is based on the expected cost of buying a deferred annuity equal to the pension to be paid. So the transfer value for a woman, taking the same benefits, will be larger at the same age than for a man. See Ward (1994), pp. 108-109.

[61] Confederation of British Industry and William M. Mercer Fraser Ltd., 1991, p. 14. See also Luckhaus and Moffat (1996), pp. 80-81.

[62] Act LXXXII of 1997 on Private Pension and on Private Pension Funds, Article 31(2). Unofficial translation of the legislation.

equality law.[63] The Advocate General, advising the European Court of Justice prior to its decision, came to a contrary view. Discrimination exists for him when men and women are treated not as individuals but as a *group*, and unequal treatment for *individual* men and women arises as a result. Thus the treatment of individual women on the basis of assumptions about their life expectancy derived from statistics concerning women as a group was a clear case of direct discrimination. The Advocate General's reasoning here nicely evokes the integrity of the individual and the undesirability of stereotypes which underpin the notion of equality as usually (but not ultimately in this case) applied by the Court.

In so far as sex-based actuarial factors do not, at present, contravene the legal notion of equality as it relates to social protection, the same would seem to apply as regards compatibility of these factors with the political notions of equality. Clearly, however, if women have to pay more to acquire the same pension benefits as men, this is going to compound the disadvantages they already suffer within the social protection system on account of their peripheral labour market activity and engagement in unpaid work.

Conclusion

Women's dependency on men during periods of unpaid work activity and their peripheral connection with the labour market give rise to income insecurities which then tend to be incorporated into and reproduced by social protection systems. The extension of this dependency, the increase in social protection's bias towards already privileged forms of employment signalled by lengthening minimum contribution periods (an increase mitigated only slightly by a relaxation in some earnings and hours thresholds and some extension of caring credits), and the failure to resolve the pension age and longevity issues in a way likely to increase rather than diminish women's access to social protection in old age reinforce the tendency of social protection systems to reproduce wider income inequalities affecting women.

What then of equal treatment? Can its implementation eliminate or alleviate the generally insecure nature of social protection as an income source for women? Certainly, one can conclude that the legal notion of equality is exceedingly ill equipped in this respect. It has had some financially beneficial effects: enabling women to obtain the same rate of unemployment benefit as men is one example; enabling them to gain access to benefits from which they were previously excluded on sex and marital grounds is another. But these effects are

[63] More precisely Art. 119 of the EC Treaty (renumbered Art. 141 by the Treaty of Amsterdam). The Court held, in relation to defined benefit schemes, that these matters were part of the funding arrangements not the employer's promise to pay a pension, the latter being a matter of pay under Art. 119, the former not: *Neath v Hugh Steeper Ltd* (Case C-152/91) [1993] ECR I-6935, *Moroni v Firma Collo GmbH* (Case C-110/91) [1993] ECR I-6591. The legality of using sex-based factors in defined benefit schemes only is reaffirmed by Art. 6 of Council Directive 86/378/EEC as amended by Council Directive 96/97/EEC.

fortuitous in that they depend on the vagaries of interpretation and on the willingness of Member States to implement equality by extending provision rather than by reducing or eliminating it.[64] To be an effective mechanism to combat the income insecurity encountered by women in social protection systems, the legal notion of equality must address the problem of poverty and be concerned with unpaid and peripheral workers as well as those employed in full-time, higher-paid, continuous forms of work. Instead, as it has developed at EU and Member State levels, equal treatment has been fairly effective in its limited aims of preventing the stereotyping of individuals (especially married women), and of helping ensure that social protection law bears some relation to social and economic practices, in particular the increasing participation of married women in the labour market. Its failure to address wider substantive issues, such as poverty and unpaid work, however, ensures that it is also fairly effective at maintaining the status quo.

Four political notions of equal treatment were addressed in the context of income security for women. Two concern financial incentives and disincentives to women working. The equal treatment ideal of using social protection as a financial incentive to women to work is conducive to improving women's position within social protection since the logic of the incentives argument points to an extension and expansion of social protection for women. The re-emergence in Spain of this notion of equal treatment dating from the 1960s-70s — adapted to the modern world of part-time work — is interesting. The more recent interpretation of equal treatment as supporting the removal of financial *dis*incentives to women working appears principally concerned to delimit women's reliance on social protection systems, particularly the means-tested ones, and to urge them into the labour market irrespective of the type of work available to them there. This is the risk — one also carrying with it the risk of perpetuating the pattern of income insecurity presently the lot of many women inside and outside the social protection system.

The financial disincentives variant of equal treatment may well be the dominant political form it assumes in the future. In the mean time, the two notions struggling for hegemony outside the legal sphere are that of remedying women's disadvantage in social protection arising from their unpaid work and that of financial independence of one partner from the other. The first, especially, has women's financial insecurity as a central concern. The second has the removal of dependency on a partner as its central concern partly because this often proves a fragile source of income but also because of the risk, inherent in all forms of dependency, of one partner in the relationship being subjected to the arbitrary will of the other.[65] If social protection provisions can be

[64] Experience in the United Kingdom (in relation to invalid care allowance and the European Court's judgment in *Drake v Chief Adjudication Officer* ((Case 150/85) [1986] ECR 1995) suggests that popular mobilization in support of an extension of benefit is essential in order to prevent a successful equal treatment claim leading to a reduction in provision.

[65] For a discussion of the controversial propositions made here, see Luckhaus (1994), pp. 147-161.

taken to be a measure of the strength of popular and official support for these principles, the continuing spread of dependency-related provisions like survivor's benefit and the comparatively healthy state of measures such as caring credits, designed to end the disadvantages encountered by women because of their unpaid work, suggest that there is slightly more support for ending those disadvantages than for ensuring financial independence for women. However, a realistic rather than an optimistic appraisal of the situation suggests that neither principle has sufficient official support and popular acceptance to overturn the status quo.

The stalemate in the practical sphere is replicated in debates in the theoretical sphere. Proponents of one principle appear to have concluded that advancement of their principle necessarily involves erosion of the other. For example, it is argued that financial independence for women requires the individualization of entitlement. This in turn means abolishing dependency-related provisions, such as survivor's benefit and pension sharing, which currently operate so as to offset some of the financial disadvantages women suffer because of the poor or non-existent coverage of unpaid work in social protection systems. Within this framework, women's financial independence — their autonomy from men — is pitted against their continuing income insecurity — their poverty. The result is theoretical stalemate. There are, however, a number of ways out of this impasse. One is to challenge the assumption that dependency-related provisions are effective in offsetting the poverty which women would otherwise suffer because of social protection's poor coverage of unpaid work. The references in this article to the ways in which and reasons for which a sexual relationship is a fragile source of income for unpaid workers are intended to do precisely this.

Another way is to acknowledge, first, that dependency-related provisions are not the only way of offsetting the disadvantages encountered by women in the social protection system arising from their unpaid work and, second, that they may not be the most effective and efficient way of doing so. Arguably, caring credits, caring allowances and other measures targeted on the unpaid work activity of the non-employed and of those engaged in peripheral forms of employment provide a more effective and efficient way of tackling these disadvantages. As demonstrated, though still in embryonic form, measures of this kind are already a feature of some social protection systems. They may easily be combined with individualization of entitlement. Moreover, so long as they are available to both men and women, they can lay claim to being compatible with all the notions of equal treatment discussed in this paper. There is therefore a way out of the theoretical stalemate between women's financial independence and their poverty — if the political will to jettison dependency is there.

Individualization coupled with caring credits and other measures targeted on unpaid work within social protection systems provide a starting point for advancing the position of women currently caught in the web of income insecurities caused, ultimately, by their unpaid work. But it is limited and does not profess to provide a solution to the income insecurities experienced by

groups such as the non-employed, part-time workers and the low-paid, which are not linked to unpaid work activity. Solutions to these problems are to be found elsewhere and little is to be gained from rejecting individualization, caring credits and other such measures on the grounds that they create inequities between different groups of paid and unpaid workers, all of whom risk sharing the same impoverished state.

Even for unpaid workers, individualization and measures such as caring credits (all of which can be implemented in an incremental, low-cost, way) need to be part of a wider strategy developed in response to the question of how best to provide for caring needs. A strategy focused on producing flexible working hours (without diminution of employment conditions and social protection), on developing and expanding the range of different kinds of caring services of a formal and informal kind, and on providing a similarly wide-ranging and innovative system of financial payments for men and women carers both inside and outside the social protection system may go some way towards providing a satisfactory answer.[66] Only then will it be possible to say that sex and gender equality in the social protection field has been achieved.

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[66] The European Commission, away from the distraction of mainstreaming, is developing an interesting multidimensional approach of this kind; see Commission of the European Communities (1998a).

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