

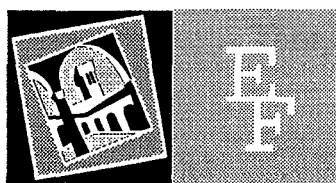
Yota KRAVARITOU (ed.)

The Regulation of Working Time in the European Union

Gender Approach

La réglementation du temps de travail dans l'Union européenne

Perspective selon le genre



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The Issue of Overtime Payments for Part-time Workers in the *Helmig* Case – Some Thoughts on Equality and Gender

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I. Introduction

This paper deals with a recent judgment of the European Court of Justice (ECJ) in a case of alleged indirect sex-discrimination concerning part-time workers.¹ In this judgment, the ECJ denies part-time workers the right to receive overtime-supplements when they exceed their contractually agreed working time. Is this judgment an example of backsliding by the ECJ into a formal approach to the principle of legal equality,² or does it indicate the fundamental problems you encounter when you try to 'solve' systemic 'disadvantage' of women in paid labour with the help of sex-equality law? I will analyse the opinion of the Advocate General (AG) and the judgment of the ECJ from the perspective of this question (Part II). Relevant to answering this question is an examination of several different issues. For example, what idea of 'equality' does the judiciary apply in these texts, and what idea of time? What are the purposes of overtime supplements according to the AG and the ECJ? How is the 'procedure' of establishing indirect discrimination applied in this case? In the following part, I evaluate the *Helmig* case from the perspective of both a formal and a substantive approach to legal

equality (Part III). Although the judgment can be seen as a good example of a strictly formal approach, a closer look at the case reveals that the AG and the ECJ can be accused of having a quite peculiar idea of formal equality, using it as a device to pursue their own objectives. The judgment of the ECJ is also very disappointing from the perspective of a substantive approach. The Court completely neglects the 'real conditions' of women's lives in today's Europe, which more or less compel them to take on part-time jobs and make it very hard for them to work the amount of hours necessary to 'earn' an overtime supplement (the 'normal' working week). It is my opinion, however, that the substantive approaches to legal sex-equality also fails to offer us the right 'tools' to overcome this problem. Both the formal and the substantive approaches to legal sex-equality bring about a number of dangers that might in the end cause a serious backlash against more fundamental changes in gender relations. Three particular flaws of sex-equality law are discussed here: comparability, norm-conformity and lack of (feminist) legal theory (Part IV). I suggest that a more comprehensive approach, based on an analysis of the way in which gender operates in law, is necessary and should be developed in order to overcome these flaws. Thus, it is necessary to develop an analytic tool that is suitable to bring to the surface what is at the root of the 'problem' of part-time workers (often seen as the problem of paid working women). This tool is *the analytic category of gender*, as has been developed in women's studies in other academic fields. In the final part of this paper (Part V), I will explore the possibilities this conception of gender has to offer to feminist legal studies.

II. The Case of Angelika Helmig and Five Other German Women

A. A Summary of the Facts of the Case

Six German women brought cases to their national (regional) judge in which they claimed they had been (indirectly) discriminated against by their employers by the application of a collective agreement in which a surplus to the normal hourly wage was granted in the event that the worker had to work more than the normal working time (which was equated with the working time of a full-time employee). The consequence of this regulation in the collective agreement was that part-time workers only received this extra supplementary payment when they worked more than 38 or 40 hours in a certain week (which was hardly ever the case).

The case illustrates a severe dispute over the concept of time, though the dispute is covered under a thick layer of legal equality talk which makes it quite hard to discover the 'true' nature of the conflict at stake. What the women in essence argued was that for them it was as 'inconvenient' to work extra hours (that is hours beyond the agreed and fixed working time per week) as it was for full-time workers. Demanding that an employee work overtime (which, in most legal systems, an employer may do) interferes with what the worker has planned to do after working hours. This may be sleeping, swimming, watching T.V., or playing with the kids (as most full-time male employees do after working hours),³ or it may be fulfilling other 'duties' in life, such as looking after sick parents, taking care of the house-work or caring for children. Individuals organize their lives 'around' working hours (which are very often fixed, though increasingly employers demand a great amount of 'flexibility' from their employees) and any (unforeseen) change of working hours means that all kinds of arrangements have to be changed. It is this 'inconvenience' that these six women wanted to be compensated for in the form of overtime-supplements.

Because the women (in fact their lawyers on their behalf) brought their case as a case of indirect *sex*-discrimination, (constituting a breach of the 'principle' of equal pay, as laid down in article 119 of the Treaty) they had to formulate their view of the conflict in terms of the law (especially in terms of the case-law as developed by the ECJ). As I will show later on in this paper, this also meant that their argument was weaker; in other words, they took the sting out of their grievance against the employers by bringing a case of alleged (indirect) discrimination, as a result of which, they could not effectively bring forward the *systemic* nature of the disadvantage they suffered. How, in effect, was their complaint 'translated' in order to make it 'fit' with the ECJ case law on indirect discrimination in equal pay matters?⁴ In essence, their lawyers and the German judges formulated three questions, which can be summarized as follows:⁵

1. Is there indirect discrimination of the kind prohibited by article 119 of the Treaty and the directive where a collective agreement provides for overtime supplements only for the overtime worked in excess of the normal full-time working hours, with no supplements for overtime worked by part-time employees – who are primarily women – short of that threshold?

2. If so, is such discrimination justified on objective grounds unrelated to discrimination on the basis of sex in view of the fact that for full-time employees (i) the burden is greater and (ii) leisure time is restricted?
3. If part-time employees are entitled to a supplement for each hour worked over the contractual hours, how should that supplement be calculated?

As you can see, nowhere in these questions is the systemic nature of the 'disadvantage' of part-time working women mentioned; on the other hand, right from the beginning of the procedure, there is room for defence (from the employers): possible objective justifications they might have are mentioned in full!⁶

The European Commission supported the view of the six women, especially their point that there are no objective justifications for withholding the supplements from part-time workers, because there is no greater burden for full-timers.⁷ Something of the 'original' conflict can be retraced in the way the Commission rejects the justifications that were brought forward by the employers. The UK intervened in the case, in strong support of the argument of the employers against granting overtime supplements to part-time workers. The position of the UK government reflects a purely economic view of the subject of (alleged) sex-discrimination: if employers were to pay these supplements part-time work would become too costly, which – in the end – would be to the detriment of women, because they depend on the availability of part-time work more than men. (This is not the first instance in which women are advised not to bring a case of equal treatment 'for their own good'.) Now, let us see how the judiciary deals with these three questions. First, we will give the floor to the AG.

B. The Rationale of the Advocate General

I will not recapitulate the whole opinion of the AG here. Instead, I will draw your attention to some remarkable points in his reasoning in this case:

'Equal or unequal, that is the question'

The interesting part of the opinion begins at paragraph 26, where the AG starts to 'wonder' whether the claimants can seriously mean that they think the overtime hours of part-timers should be paid at the same rate as

over-time hours of full-timers. He describes their point (which he – in paragraph 27, in a very brief ‘observation’, summarizes as a ‘puzzling statement’) as follows:

“To claim that exceeding the contractual hours of a part-time employee must systematically bring entitlement to the supplement is equivalent to saying that the employee whose contract stipulates that she must work five hours is entitled to the supplement from the sixth hour onward. Yet that hour is to be paid without a supplement not only to full-time workers but also to part-time workers whose contractual hours are more than five.” (para. 26)

What is very ingenious, I think, of the AG, is that he spreads the seed of doubt as to the ‘rationality’ of the equality-claim brought by the part-time workers: how could they ever claim equality or equal treatment if this obviously would lead to the *unequal* treatment of other part-timers (those who agreed to work more than five hours in his example)? Here, it seems, the AG has a good point: if you claim equality you will (always) have to claim it for *all*; otherwise, it could not be ‘rational’. For most individuals, who reason from a ‘common sense knowledge’ of equality (or who reason from a moral perspective on equality), this rings very ‘true’. The AG plays very effectively on these ‘sentiments’, though it has little to do with a *legal* approach to equality, independent of whether you are an proponent of formal or of substantive legal equality. In neither of these approaches is it proscribed that under no circumstances should there be inequality or unequal treatment. Even the formal approach leaves plenty of room for unequal treatment, as long as the cases are (deemed to be) unequal.⁸ This refers to the second part of the classical Aristotelian formula, much used in legal equality theory, which states that unequal cases should be treated unequally in proportion to their inequality.⁹ The ‘irrationality’ that the AG accuses the claimants of is thus only irrational if you deliberately want to overlook ‘differences’ between workers which may ‘justify’ a different treatment. In effect the AG here plays a formidable trick, a card he plays again in paragraphs 29, 30 and 31.

These paragraphs in the AG’s opinion are even more revealing as to the objectives the AG seeks to reach in this case: what he wants to achieve is ‘real’ equality, which could never be achieved if the claimants won the case, as what the claimants (the women) want would, in effect, lead to a ‘real’ inequality. The AG is quite open about this:

“The applicants in the main proceedings go further: for the uniform criterion of the weekly working hours fixed by statute or by collective agreement they seek to substitute a fluctuating one which would vary with the contractual hours and which, on the pretext of removing an assumed inequality of treatment, would in fact give rise to *real inequality* (my italics), because *for the same number of hours worked* (original italics), some workers would be paid the supplement and others not.” (para. 29)¹⁰

After having stated (in paragraph 30) that from other case-law of the ECJ,¹¹ it follows that part-time workers are subject to the same rules as others, but *in proportion to their working hours* (original italics) the AG goes on to stress again that inequality would be the result of granting the claimants what they want:

“There would be unequal treatment conferring an advantage on part-time employees, however, of a significance inversely proportional to the length of their contractual working hours if the supplements were payable as soon as those hours were exceeded.” (para. 31)

It is evident that the AG expends much effort to show that part-timers might be *advantaged* by applying the norm of legal equality, while, at the same time, he does everything to cover the fact that at this moment (the status quo) full-timers are advantaged and part-timers are disadvantaged. Will part-timers ever be able to ‘earn’ the supplements? To do so they would have to put in a far greater ‘effort’ (exceeding *their* normal working hours to a far greater extent) than full-timers.

On second thoughts, it is also disputable what the idea (or principle) of proportionality (the *Kowalska* rule) really entails. One question is particularly important: in proportion to what should the rights of part-timers be established? It is evident that here the (male) norm of full-time work is re-established: every right a part-timer has should be measured against the (established) rights of full-timers. It can never be the other way around!

The purpose of overtime-supplements

The next point I want you to have a closer look at is the way in which AG Darmon stipulates an *a priori*, which is only ‘true’ from a truly ‘male’ perspective on the issue of time. In paragraph 28, he reasons as follows:

“The purpose of the overtime supplements is to recompense the extra effort contributed by the employee and to dissuade employers from making staff work longer hours than those fixed by the collective agreement, *so that, a priori, it would seem to have little relevance to part-time work.*” (my italics)

It is always very difficult to establish a certain *purpose* of a measure or legal rule as *the* purpose. Even if the rule is announced by a formal legislator, who has left written proceedings of the process in which the rule was ‘born’, you will almost never find ‘a’ or ‘the’ purpose of the rule in question, because most rules or regulations in democratic countries come to life after a long process of bargaining (between the parties involved who have conflicting interests in the case) and, in the end, are the result of a complicated process of compromise-making. Rules on overtime-supplements that are laid down in collective agreements are not officially ordained by a certain legislator at a certain time with a *certain purpose*, but – on the contrary – they are the result of a historical process of shifting alliances between employers and employees and of shifting meanings. So an experienced and learned lawyer like AG Darmon should know better than to speak of *the purpose* of the payment of overtime supplements. Anyhow, perhaps for the ‘traditional’ employee (often male) the historical purpose of bargaining for these supplements might have been – as the AG states – to *recompense the extra effort*.¹² Still, the *a priori* that follows this statement on the alleged purposes, ‘colours’ the meaning of extra effort very specifically: an effort is only ‘extra’, and *worth extra payment (!)* when it exceeds the *normal* working week (which is the working week of a full-time employee).

The second purpose mentioned is equally flawed. Employers should be discouraged from requiring employees to work longer hours than the 38 or 40 hours that are fixed in the collective agreements. Why is that? The only ‘explanation’ for this ‘protection’ that I can think of is that the working week of the ‘normal’ worker has been taken to be the ‘utmost’ a person could ‘offer’ to his/her employer; exceeding this amount would ‘over-stress’ the worker too often. In his *a priori* conclusion, the AG presumes that part-timers will not be over-stressed as long as they are not asked to work more than 38 or 40 hours a week. This only holds true if you presuppose that the worker who works part-time has more leisure time than the full-time worker, so ‘stress’ will not occur if a boss asks him or her to work a few hours more than has contractually been agreed to. We all know the reasons why most individuals who work part-time do

this: it is not in order to have more leisure-time, it is in order to have more time to fulfil other tasks or duties, such as unpaid care activities. This information, however, has not yet reached the AG!

The concept of time

Two more statements of the AG are revealing. In the first place, I would like to draw your attention to paragraph 39, in which the AG explicitly affirms the ‘norm’ that time is divided into working time and leisure time. Again, it is useful to quote the AG in full:

“Similarly, the additional fatigue and the reduction in leisure-time caused by working overtime in addition to the ordinary working week constitute objective reasons which may justify the exclusion by a collective agreement of part-time employees from supplements where the overtime they work does not exceed those hours.” (para. 39)¹³

Time is represented here as a dual ‘entity’ which contains two distinctive types of activity: there is working time and there is leisure time. There appears to be nothing else. Only when a full-time worker exceeds the *normal* working time does the additional fatigue and restriction of leisure-time justify overtime payments. The AG does not seem to realize that other activities (such as care work) might also put a claim on the total amount of time a person can spend in a day. As far as these activities are recognized at all, they are discarded as ‘educational commitments’ (paras 40 and 41.) The fact that these commitments exist do – in the eyes of the AG – not offer a possible justification for overtime payments. They seem not to contribute to the fatigue of the worker and the reduction of his or her leisure time. The potential conflicting interests of workers and employers as to the question of how much time can or has to be spent on different types of human activities appears to be a conflict between work and leisure only. In reality, however, for most part-time workers (mostly women) the main conflict lies between different and conflicting time-demands that follow from paid work and from care work. Work-time patterns often do not coincide with care-time patterns, the first being of a linear nature, the second of a cyclical nature.¹⁴ Compensation for the loss of care-time – caused by the employers demand to work overtime – is a justification of overtime-payments for part-timers that is seriously overlooked by the AG.

The separation of public and private life

It is interesting to see how this omission is legally constructed in the opinion of AG Darmon. In paragraph 40 and 41, the AG mentions the so-called 'educational commitments' of part-timers. The plea of the claimants that they should be paid overtime supplements because it is not leisure-time but time to be spent on unpaid care that is taken away by the employer is brought back by Darmon to the single phrase 'educational commitments'. This is all the AG has to say about the argument. The fact that these commitments exist does not deliver an objectively justified reason for a different treatment of part-timers (in the sense that their hourly wage will sometimes be higher). In paragraph 42, the AG repeats his worry that part-timers might have an advantage. Again, he denies them the 'favour', stating that full-timers *may* have the same educational commitments, thereby denying the right to the 'extra' benefit to part-timers. In the end, the argument of the claimants is disregarded with the help of the notorious *Bilka*-formula on the (limited) impact of EC-Equality Law on the relationships between the partners in organizing their household:¹⁵

"Article 119 does not have the effect of requiring an employer to organize its occupational pension scheme in such a manner as to take into account the particular difficulties faced by persons with family responsibilities in meeting the conditions for entitlement to such pension."

With this formula a strong wall has been built between the sphere of employment (covered by the directives and art. 119) and the sphere of 'private life' (the way couples organize their family-work). It is exactly this wall that prevents AG Darmon (and the Court) from seeing behind the 'normality' of the working conditions of full-timers, which normality keeps women from gaining 'true' equality both in the sphere of paid work and in the sphere of unpaid work.

C. The Judgment of the Court

Compared to the opinion of the AG, the judgment of the ECJ is even terser. In a 'staccato' of brief statements, the Court 'runs' to the conclusion that in their case there is no forbidden (indirect) sex-discrimination. The ECJ begins by saying that it must consider whether the contested provisions may constitute indirect discrimination incompatible with article 119 of the Treaty (Para. 22). It then goes on to state that to that end

two separate questions need to be answered. (I go into this detail because this 'legal technique' causes the misfortune of our six brave German women, fighting for their 'right'.) First, according to the ECJ, we must see whether there is a case of *different treatment*. If so, then we can move on to the question of whether women suffer more from this different treatment, so that there might be a case of indirect sex-discrimination (Para. 23).¹⁶

To my knowledge, it is the first time the ECJ has applied this *double* test at the beginning of a case of (alleged) indirect discrimination.¹⁷ In earlier cases, as well as in the proposed EC-Directive on the shifting of the burden of proof, in which a 'definition' of indirect discrimination is given, there is only one question that should be asked (and answered by the claimant) and that is whether the rule or practice in question *disproportionately disadvantages* the members of one sex.¹⁸ The separation of this one question into a set of two separate questions offers the ECJ the verdict in this case. Instead of asking whether the claimants (with the help of statistical evidence) have established the fact that predominantly women are suffering from the negative effects of the contested rules about payments for overtime-supplements, the ECJ now first wants to establish whether there is a *difference in treatment* of the two parties involved (part-timers and full-timers). The end of the story then comes very quickly: no, says the Court, we do not see any difference in treatment, so there is no case of indirect discrimination (Paras 26-30). Like the AG, the ECJ is making a 'comparison' that has the appearance of utmost 'objectivity'.¹⁹ Every single hour a worker gets paid for should be paid for in the same way as any other hour worked by any other worker. So the 19th hour of a worker who contractually has to work 18 hours should be paid the same as the 19th hour of a worker who contractually has to work 40 hours. Otherwise, the full-timer worker could claim to be discriminated against! This 'logic', based on a *presumed identity* or *sameness* of hours, irrespective of the conditions under which they are worked, leads the ECJ to the final conclusion that the six women had no case they could win under article 119 of the Treaty. Thus, the ECJ, by what has the appearance of a correct application of a 'purely' formal type of reasoning,²⁰ *protects* full-timers from 'unfair' unequal payment²¹ and *assimilates* part-timers to the norm of full-time employment. Here you can see how, through a certain legal 'device', protection of the most powerful and assimilation of the least powerful go hand in hand.

What I said before about the *appearance* of a correct application of formal legal equality needs further explanation. I will come to that in the next part of this paper, in which I evaluate the *Helmig* judgment from the perspective of both formal and substantive equality.

III. Formal and Substantive Equality

There are two points I want to discuss here: first, can this judgment be seen as a (correct form of a) formal approach by the ECJ?; secondly, what might the outcome have been if the ECJ had taken a (more) substantive approach?

A. Formal Equality

A 'true' understanding of the meaning of legal equality always entails the understanding of the *normative* character of that concept.²² Equality in the sense of sameness or identity can – except for the abstract world of mathematics – never be found in the 'real' world. So, in order to apply the already mentioned Aristotelian formula, the legislator or the judge must establish on a case by case basis what persons or what situations are *considered to be (un)equal for the purpose of the rule or regulation in question*. In this way to *decide* or *choose* what is equal and what is different is a *relative* matter, that is, relative to the ends or purposes of the legal rule or practice. What should be kept in mind is that law-making is a constant process of classification, in which the law(yer) differentiates between individuals and groups that do – and those that do not – fall under a rule. In order to ban discrimination in society, a vast number of countries have accepted rules that put a 'ban' on certain classifications, like classifications on the basis of race, religion, ethnic origin or sex. If a citizen or a law(yer) wants to classify along those lines, this is strictly forbidden or strictly scrutinized. In these instances, the problem as to which cases are to be treated alike has been solved once and for all: individuals of different race, sex, religion, political parties or ethnical origin *are* equal before the law. From this, it follows that *direct* discrimination on the basis of sex, etc., is forbidden (non-justifiable) unless the law itself makes certain exclusions to this norm.²³

In the case of *Angelika Helmig* and the five other German women – a case of alleged *indirect* discrimination – the judge did not have such a stronghold. Whether a case of unequal treatment of part-timers occurs and whether this unequal treatment amounts to discrimination on the basis of sex, depends on a number of *choices* the judge makes, which – in order

to be 'rational' – must be related to the purposes of the contested rule or practice. What I have said above (section II.B) about the (false) analysis the AG makes of the purpose of overtime-supplements is particularly relevant with respect to this observation of how formal legal equality 'works': if one of the parties (deliberately or not) brings forward a purpose or purposes that are not (fully) 'true', the choice of what is deemed to be (un)equal subsequently lacks a firm basis and becomes arbitrary.

On both points (the choice and the purpose(s)), both the AG and the ECJ, though apparently 'neutral' and 'objective', are operating in a dubious way. About the purposes I have said enough, about the choice I want to make one more (final) point: both the AG and the ECJ assume that they can compare and assimilate (like $a=a$ in mathematics) one hour worked by a part-timer to one hour worked by a full-timer. This is only possible if you have a very limited idea of time. That this is the case is most apparent in the opinion of the AG (see my remarks on paragraph 39). The normative concept of time that they apply causes an apparently correct application of the principle of formal equality. If they had applied another normative concept of time, it could have resulted in a different choice as to the question of what they considered to be (un)equal in that respect. This leaves us with the conclusion that both the AG and the Court could have come to an altogether different conclusions, still applying the rules of formal legal equality 'correctly'.

To summarise: formal legal equality does not tell us anything about a possible outcome of a case, it only tells us something about the *procedure* towards equality: a *rational choice* as to who or what is considered to be (un)equal should be made on the basis of a *correct analysis* of the purposes of the rule that is/has to be applied. Any choice that does not fulfil this condition leads to arbitrariness and thus can never be said to lead to equality at all.

It is impossible here to go into the reasons why the ECJ takes this formal stance in the *Helmig* case. In a very recent article, Fenwick and Hervey present a convincing theory about the limitations of EC-equality law as far as a more substantive approach is concerned.²⁴ It is their opinion that the ECJ does not have the courage to step over the limits that economic or market values lay down. In other words, the ECJ does not really make a choice between the free market and equality. In the last paragraph of their article, they phrase this problem as follows:

"[...] the concept of sex-discrimination in EC law is premised upon a particular market-related philosophy; thus furtherance of equality in the context of market forces creates a contradiction which can be evaded for a time but which eventually has to be addressed. In addressing it, a choice will tend to arise between formal and substantive equality. To choose substantive equality may be to create a more severe disruption of 'natural' market forces and the Court seems to be indicating its reluctance to make such a choice."²⁵

The reluctance of the ECJ to go further on the route towards substantive equality can be seen as a reluctance not only to contravene economic forces, but also strong societal forces, such as the existing gendered patterns of life, in which both work in the labour market and work in the home have their own 'valuation'. As one of my students observed:

"To recognize the right of part-time workers to supplementary overtime pay would be to strike a blow at the established structure of the workplace, would shake the foundation of the male 'gendered' system and would introduce [...] for the first time a recognition of the double burden borne by women and the reasons why they feel forced to take part-time work."²⁶

This leaves us with the question *why* the Court is so reluctant to go against those economic and social forces and whether, by applying a (more) substantive approach to equality, it really could have reached this 'recognition'.

B. Substantive Equality

Among feminist legal scholars who are active in the field of EC sex-equality law, it is rather 'common' to be in favour of a (more) substantive approach to equality. I do not belong to this group. That is not to say that I would not favour a (more) substantive approach by the ECJ (or by legislators at EC and at national level), but it is to say that I am not as optimistic about the possible results of this approach as many of my colleagues are. Both the concept of indirect discrimination and the concept of positive action are seen as signals that EC Equality Law leaves room for a (more) substantive approach to equality. This, however, should not lead us to think that the substantive approach to equality is nothing more (or less) than applying the concept of indirect discrimination and developing (and justifying) positive action programmes.²⁷

This paper is not the right place to explain in full detail what is meant when lawyers develop a plea for substantive equality. In short, one could say that this approach adds one essentially important feature to the two features of legal equality that appeared in my analysis of formal legal equality (choice and purpose). Where the formal approach stays procedural, in the sense that it only tells us (us lawyers) to make rational choices on the basis of a proper evaluation of the purposes involved, the substantive approach also tells us a lot about *what choices* should be made as to who or what is to be treated (un)equally and – this is an important addition²⁸ – *what the nature of the (different) treatment* should be (how one is to be treated in order to achieve equality). The basis on which these choices can (and should!) be made is that of the evaluation and valuation of social, economic and cultural conditions in which a given rule/practice operates or has to operate. So one could say that the substantive approach adds the notion of *effect* to the notions already mentioned.²⁹ By this is meant that in order to bring about ‘true’ equality’ each and every (contested) legal rule or social practice should be evaluated in terms of the effect it has on the (un)equal relations between the sexes. What these effects are or will be is measured against the context in which the rule is applied or in which the practice occurs. In this sense, the substantive approach is also called (by some) a *contextual approach*. It is clear that applying formal legal equality is a normative matter, however, it is also clear that applying substantive equality is an even more normative activity.

In order to give a brief insight into the political-philosophical background of the debate between adherents of formal and substantive equality, I will, in a very simplified way, describe the most essential presuppositions of both approaches.³⁰

The crucial ‘division’ runs along the following two lines, from which the first (A) has a political-philosophical nature and the second (B) has more of a legal nature.

A 1: Do you perceive the function of the principle of legal (constitutionally guaranteed) equality as a *shield* against the State or against other citizens (liberal idea of constitutional rights as constituting negative obligations for the State); or

A 2: do you perceive the function of the principle of legal (constitutionally guaranteed) equality as a *vehicle* to bring about more ‘real’ equality in social, economic, cultural life (social idea of constitutional rights as constituting positive obligations for the State)?

B 1: Do you stress that the role of law does not go further than to establish the necessity of *procedural devices* that will prevent governments (or others in power) from arbitrariness (and subsequent unfairness); or

B 2: do you (also) stress that law(yers) should constantly be *evaluating the results* in practice of any ('neutral') rule that will occur under the given social conditions (which are unequal!) in order to help bring about more 'true' equality?

With the risk of offending some of the participants in the debate (individual scholars never like to be classified!) I would say that the formal approach has characteristics A1 and B1, and that the substantive approach is correctly typified by A2 and B2.

At this point, I would like to go back to the question of *why* the ECJ is reluctant to embrace a (more) substantive approach to equality. Apart from economic and societal 'forces' (discussed above), I think there is more to it than that. If you have a closer look at the presuppositions (A2 and B2) as I described them, you will realize that embracing the concept of substantive equality presupposes deeply held 'beliefs' in the political and moral values of a social welfare state, in which the role of law is a progressive one, steering and engineering social change on the basis of distributive justice. I think that this opinion is not to be expected from most lawyers in the near future, especially not from judges! Instead, judges are better situated in the liberal political and restrictive legal tradition that fits perfectly with the model of formal legal equality.³¹

Would the outcome of the case of *Angelika Helmig* have been very different if the Court had been ready to apply a (more) substantive approach, in particular by fully applying the test for indirect discrimination (known as the *Bilka* test)?³² I seriously doubt that it would. We all know from the many indirect discrimination cases the ECJ has dealt with that the outcome of the *Bilka* test is very uncertain. Much depends on the way the ECJ perceives (wants to perceive) the 'facts' of the case.³³ In a long series of very detailed articles and in several voluminous books on the subject of how the ECJ deals with cases of indirect discrimination³⁴, it has been made clear by feminist lawyers and feminist legal scholars that the ECJ does not go very far in this respect. Particularly, the objective justification test, which forms a hard core of the concept of indirect discrimination, leaves a lot of room for defendants (employers) to bring forward circumstances (even economic circumstances) that will – in the

eyes of the judges – justify the disproportional negative impact women suffer from applying (so called) neutral rules or practices.³⁵

What is most important to realize is that in the substantive approach even more normative evaluations are required than is already the case in the formal approach. On the one hand, this is a favourable condition for women who want to bring their claim: they can thus bring forward the circumstances (or context) and establish that the effect of the rule or practice is that they are ‘disadvantaged’ (I will come back to that term). In this sense, one could say that the substantive approach opens up possibilities for women ‘to tell their stories’.³⁶ But the negative side of this is that it leaves the judiciary more space to be normative in their own way. As we have clearly seen in the analysis of the AG and the ECJ in the *Helmig* case, very often those normative choices are presented as objective ‘truths’, which disregard the context that has been brought forward by the claimants. In the *Helmig* case, as we have seen, the women’s claim that they were working a double shift, was reduced – only by the AG, the ECJ did not even mention a word on it – to two words: *educational commitments*. Of course, it would have been wonderful if the ECJ had taken the women’s claim more seriously and had taken the context into account. That could have meant that the ECJ would have come to another conclusion as to the question of whether you can consider the 19th hour of a part-time working women to be the *same* as the 19th hour of a full-time working man. But you can never be sure that with this the final result would have been different. In this case, the Court could still have concluded that the employers’ ‘story’ offered sufficient objective justification for the difference in treatment. (AG Darmon concluded that this actually was the case.) This means that there is no guarantee whatsoever that had the Court taken the substantive approach, the outcome would have been one bit more favourable for the women involved in the case.

So making legal proceedings more, rather than less, normative does not automatically mean you will get a ‘better’ (or more ‘equal’) outcome. Whether this happens or not depends to a great extent on the power that the involved parties (claimants, defendants, lawyers and the judges) have in defining what is *relevant* in this specific legal case. As I have shown in my analysis of *Helmig* the matter of legal relevancy is determined by two major factors: (1) *the way a concept is defined* (see section II.A, in which I showed that the women had to phrase their ‘problem’ in terms of the concept of indirect sex-discrimination) and (2) *the way a procedure is established* (illustrated by the effect of the fact that the Court suddenly

separated a certain question into two different requirements that had to be fulfilled; see section II.C.). On both points, it is important to influence the judicial process. However, it is questionable whether it is possible to have this influence without possessing 'the power of definition'.³⁷

My findings, concerning the possibilities of both the formal and the substantive approach, are quite negative. Nevertheless, I certainly see the necessity of a choice for the substantive approach *if* you want to proceed towards more just and better (in the sense of advancing 'the good life') social relations between individuals with the help of the claim for (more) legal equality or equal rights.

IV. Why Sex Equality Law is Dangerous

In this part of this paper, I want to discuss the issue of the limited possibilities of legal sex-equality. This is not a complete inventory of all the pitfalls one might encounter when attempting a strategy of legal equality.³⁸ Instead, I have chosen to concentrate on three main issues. In my 'critique', I will stay close to the example of the *Helmig* case, in order to avoid a merely abstract and theoretical position in the debate.

A. Comparability

In the vast literature on sex-equality and on the ECJ's equality-cases, much has already been said about the problems you will always encounter in relation to the *comparison issue*. That is to say, in order to apply (formal or substantive) legal equality one should establish that some individual or some group of individuals *compared* to another individual or group of individual is worse off or better off. This leaves you with the crucial problem of the standard of comparison.³⁹ Though most writers on substantive equality are aware of the fact that the standard usually is a male standard (which can also be illustrated by the AG's comparison of hours in *Helmig*!), they nevertheless believe that their emphasis on effect and context will correct that problem. I do not think that this is the case. As the opinion of the European Commission in the *Helmig* case shows us (see section II.A.), comparability is also an essential feature of the substantive approach. *In casu*, the Commission thought the situation of part-timers could be compared to that of full-timers. In that comparison, as in all comparisons in legal equality cases, the last situation constituted the dominant norm: the norm that could or could not be applied to the 'other' group. So what happens is that this specific norm is not problematized.⁴⁰ A working week of 38 or 40 hours is considered to be *normal*. What legal

equality – almost by definition – fails to do is *to problematize normalities*, which are exactly the normalities that constitute the so-called systemic disadvantage or institutional discrimination of women.⁴¹ Comparison to the dominant norm in this way comes down to assimilation to that norm. For, in effect, what the adherents of a substantive approach would have wished to happen is that the ECJ would have deemed the situation of the part-time worker to be comparable – in the sense of *fit to be equated* – with that of the full-time worker. This presupposes that sameness or identity is a pre-condition for equality or equal treatment. With that, *difference* is – again – subordinated to equality.⁴²

B. Norm-conformity

In the second place, there is the already mentioned danger of *conformity to the established social norms and practices*, including gendered practices. This danger does not only occur if you apply formal equality (though it then is more evident), it occurs as well within a substantive approach. Norm-conformity does not only come about through the mechanism of comparison of cases (as discussed above), but also as a result of gender stereotypes that lie at the basis of the description of the ‘real lives of women’ (as used in substantive theories). If the Court in the *Helmig* case had taken the context of part-time working women into account, it would have had to do so on the basis of a broad generalization of the double burden borne by working women. In doing so, it could easily have re-established the ‘norm’ that *all* women always do all the housework and that’s why they *all* are said to be ‘forced’ to take on part-time work, and overlook other ‘facts’, such as the fact that research shows that young people have different work ethics and make different life-choices on that basis. Part-time work (at least in Holland) is no longer a ‘women’s solution’ to ‘women’s problems’. Many young people work part-time from free choice (because they have a different ethic of work) or do so because there is no full-time work available at the labour market. In other words, when the problem of the disadvantage of part-time workers is defined as a problem of women, a) a stereotyped picture of women’s labour is reaffirmed, and b) social reality is, in part, neglected.

As far as point a) is concerned: substantive equality theory thus contributes to the preservation of existing representations of ‘working women’ that are based on the existing (unequal) power-relations between the sexes. This point is best illustrated by the fact that in a lot of writing on substantive equality the writers use terms such as ‘the real lives of

women' whenever they refer to the so-called *context* that should be taken into account.⁴³ In other words, the context of the case – including gendered patterns of behaviour of men and women – is accepted as a pre-given (and, as such, not to be changed or changeable) 'fact'.⁴⁴

By equating the category of the part-time worker with the category 'working women' (which is a gendered category), one pursues a dangerous strategy in which a (presumed) social reality (the statistical evidence that more women than men engage in part-time work) is transferred into a sexualized or gendered category. By this, I mean (as I will explain further in part 5 of this paper) a category that is a 'constitutive element of social relationships based on perceived differences between the sexes and ... a primary way of signifying relationships of power'.⁴⁵ Neither formal nor substantive legal equality can escape from this 'trap'. The judicial process in which sex-equality law is applied forces us into the use of dichotomies in which pairs of fixed categories always have to be compared (see above) in order to make it possible for the legislator and the judges to make their choices as to *who* or *what* is to be given the same or equal right.⁴⁶ In the end, the legal process simply aims at saying a categorical YES or a categorical NO to any rights-claim that is brought to it. This process forces you into stereotyping and generalizing. So, in our case, Angelika Helmig (and her representatives) were forced to present their problem (which they felt to be an injustice), namely the fact that part-timers did not get the overtime supplements, as a claim of sex-discrimination, which, in turn, forced them to categorize part-time work as women's work. If they had taken a more nuanced stance, they probably would not even have had the opportunity to bring the claim at all.⁴⁷

If there is any escape from this, it must lie in the element of *purpose* that is of eminent importance in both legal equality approaches. As I explained above, the choice as to what or who is (un)equal must be based on purpose, and – in turn – the choice of the *relevant* purpose is a key point in the whole process of establishing or granting legal (in)equality. This means that in sex-equality cases, the alleged or even established purpose of the rule or practice involved is just as important as its context or effect. It is my opinion that, in substantive equality theory, the accent lies too much on effect and context and not enough attention is paid to the element of (contested) purposes of rules. In discussing purposes, a shift of meaning and a shift of power should, and perhaps could, take place that could be favourable for the condition of women.

In the *Helmig* case the (alleged) purpose of overtime payments plays a crucial role. What should have been tried was to bring about a shift in the presumably fixed purposes of overtime payments.⁴⁸ Instead of the extra effort for employees working 38 or 40 hours per week (which implicitly is fixed as the most an employer can ask from a worker), one should have tried to get another purpose to be recognized: the purpose of freeing workers from serious inroads on their daily or weekly time-organization (which includes work-time, leisure-time, time to spend with relatives, time to care, time just to be there, etc.). A 'modern' (de-gendered) purpose of extra payments for working overtime can be said to be the balancing of the power of the employers (who may ask you to work overtime) and the employees (who may ask for the extra money in order to compensate for the inconvenience). Bringing forward such a purpose would have contested the dominance of the existing dual model of time, as consisting of work-time and leisure-time, the model of time that (in our world) has *power* over our lives in many respects.

C. The Lack of Theory

The third problem of legal equality theory and strategy involves the use of the 'concept' of *disadvantage* by feminist lawyers who favour the substantive equality approach. The use of this term is directly related to the doctrine of indirect discrimination, in which it has to be established that women suffer disproportionately from certain rules, or that women are 'systematically disadvantaged' by them. With this term, one can pretend to touch upon the level of what is sometimes called *structural or systemic discrimination*.⁴⁹ By this, it is meant that sex-equality law should not only tackle overt forms of discrimination (whether direct or indirect),⁵⁰ but also gendered patterns of life that are deeply rooted (and hidden) in structural features of our societies. As such, the whole structure of labour-relations, in which a divisions exists (or seems to exist) between the public and the private, is often mentioned as an example of such systemic discrimination. Another example is the existing pay structure (in which gender-biased systems of valuation of work are used) which is the hidden cause of pay inequalities.⁵¹

Defendants of a substantive approach are quite optimistic about the potentialities of the concept in reaching this 'level' of discrimination. Fenwick and Hervey, for example, in a review of the *Enderby* case,⁵² state that, though the judgment of the ECJ is, in some respects, seriously flawed, this case gives us an example of the more far-reaching potential

of substantive equality. According to them, the Court here accepts the substantive approach and thereby contravenes the tendency of national courts to neglect ‘[...] a conceptual approach, including consideration of the underlying causes of the discriminatory effect’.⁵³ Some writers are more realistic in this respect. Illustrative is the following remark by Titia Loenen:

“As the *Bilka* and *Rinner* cases show, the fact that the measures at issue affect many more women than men in a negative way makes the exclusion of part-timers from certain benefits ‘suspect’, but it does not resolve the problem of the unequal division of paid work and care.”⁵⁴

From this, she concludes that it is the task of the legislator, not the judge, to tackle systemic discrimination.

In my view, the use of the concept of disadvantage does little more than to reveal that, besides direct and indirect discrimination, another ‘level’ of discrimination can be discerned. It does not help to make a start in abolishing (with the help of law) this type of discrimination. On the other hand, the use of the concept of disadvantage might help to sustain a certain type of legal reasoning, which closely fits the concept of legal equality as such (and that is why it has rooted quite easily, I think, into legal discourse on equality!). Disadvantage is completely concurrent with equality-talk because it contains in itself a notion of *comparison*, which, as you might remember from my discussion of the subject of formal legal equality, is one of the keys to an understanding of how legal equality works. Each and every case in which the (non-)equality of (groups of) persons or cases is contested contains an evaluation of whether the two (groups of) persons or the two cases are comparable in the light of the purpose (formal) and/or in the light of the context (substantive). The concept of disadvantage, in other words, fits perfectly into the sameness/difference test that each equality case always entails. As such, it reaffirms the (presumed) usefulness of that method. In itself, however, this does not explain why I have serious objections to the use of this concept.

The main problem I have with the use of the concept of disadvantage is that it covers the fact that in legal equality theory very often nothing is said as to *the nature or causes of women’s societal, economical, cultural, legal, etc., inequality*. By speaking about *disadvantage*, though it is suggested that we know where inequality stems from, nothing is in fact explained about the actual causes of the inequality between the two genders. The point that I want to make here is that it is dangerous not to

be explicit about the 'theory' of the *nature* or *causes* of women's 'disadvantage'. Such a theoretical silence (or omission) can cause you to suggest 'solutions' that are not in the least adequate, or are even detrimental to women.⁵⁵ It can also cause feminist legal scholars to adhere to one or the other theory in a naïve way. So, for example, in articles on EC sex-equality law, many references can be found to the work of Catherine MacKinnon.⁵⁶ Catherine MacKinnon's theory on the nature of sex-discrimination, however, may be qualified as an 'essentialistic theory',⁵⁷ in which, in the end, both the fixed category of the male (subjugator) and the female (oppressed) are firmly re-established. In her work, MacKinnon does not refer to such things as systemic or institutional *disadvantages* of women, but instead she fixates solely on (different) male and female sexuality as being the sole cause of all oppression of women.⁵⁸ I wonder what one can do with this in the context of EC sex-equality case law! My conclusion is that, at best, in 'theorizing' about substantive sex-equality, the use of the concept of disadvantage serves to cover up this lack of theory.

D. Conclusion

The three points of critique I developed in this part of the paper can be summarized in the sense that my main concern about legal sex-equality and the way it is (and will be) applied by the judiciary, as well as by feminist lawyers and legal theorists, is the fact that the categories of men (male) and women (female) hardly ever are problematized as such. On the contrary, they are constantly used in a non-critical way, thus reproducing the normative discourse on maleness and femaleness through the legal forum. Substantive equality theorists often refer to such 'facts' as 'the real lives of women', thereby not only reproducing these 'facts' but, at the same time, reproducing the category of women as a fixed category.

In law, as in many academic disciplines, the concept of gender is very often used as a substitute for the biological (and sexually defined) categories of male and female. If you want to establish (indirect) discrimination, you just start counting and comparing *numbers*: if more females are negatively affected, the measurement can be discriminatory against females. Apart from the fact that this is a very limited approach to gender (I will return to that below), it is also evident that, in this way, you keep repeating that men and women are different (can and must be counted as

different categories!). It is highly questionable whether this does not do more harm than good!

It is time to turn to the last question which I want to address in this paper: what theory on the nature of inequality of women do I adhere to and what notion or concept of gender fits into this theory.

V. Towards a Gender Analysis of Law

In this final part of the paper, I will present a brief introduction to the theoretical notions (or theory) on gender that I have used in order to analyze the *Helmig* case and the concept of sex-equality in EC Law as I have just done in the previous paragraphs.

In paragraph IV.B above I cited Joan W. Scott and the reference where she gives a definition of gender. Her analysis has been very useful to me, though it is developed within the academic discipline of history and, as such, is not in all respects applicable to legal theory. As I know that her work is not at all well known among (feminist) legal scholars, I will summarize some of her points that seem useful for the development of a more encompassing understanding of how gender operates in law.⁵⁹

A. What Gender Theory is (not) About

In her article *Gender A Useful Category of Historical Analysis*, Joan Scott distinguishes between two important ways in which the concept of gender has a function in theory: it can be merely a way to *describe* the position of women (in relation to that of men) or it can pretend to *offer causal explanations* about the nature of the oppression of women. I think in legal theory, as far as gender is used at all, it is mostly done so in a descriptive way. In this sense, substantive equality theorists sometimes use gender when they describe the *context* of a rule or practice that causes women's 'disadvantage', which is so important in their theory.

It is important to concentrate on the way gender can function in theories that pretend to explain the 'nature' or 'ultimate causes' of the persistent (social, economic, cultural, sexual, etc.) inequality of women. As I said above (section IV.C.), I think feminist legal theory cannot do without such a 'grounding' theory.⁶⁰ The need for theory has been expressed by Scott in the following statement: you need theory because you need a 'synthesizing perspective that can explain continuities and discontinuities and can account for persisting inequalities as well as radically different social experiences.'⁶¹ She also points to the discrepancy between the high

quality results of women's studies and their continuing marginal status in the academic world, arguing that this demonstrates the limits of descriptive approaches that do not address dominant disciplinary concepts.

In her article on the deconstruction of the equality-versus-difference debate, Scott proposes that a theory on gender that might be useful in changing or abolishing gender-inequalities should contain two characteristics. The first is that it should contain a possibility for systematic critical analysis of the way categorical 'differences' work in a process of continuous inclusion and exclusion (of men and women). The second is that this theory should reject any idea of equality as a 'truth' that denies the existence of differences, but instead should contain a recognition of differences as inherently valuable.⁶²

As for the way gender is used in causal theories on the *nature* of women's oppression, Scott rejects all theories that are in any way essentialist. For a historian this makes extra sense: if women's inequality has to be explained on the basis of women's (biologically determined) nature, there exists little room for a historical analysis of gender, it being essentially the same category during the whole of human history. In this case, it is fixed for ever what in *essence* men and women *are*. Fundamental change (both in history and in the future), is excluded in such an approach. For a lawyer, the rejection of essentialism does not flow directly from the nature of the subject studied.⁶³ Whether law is seen as a static or a dynamic institution is a matter of personal preference and of political-philosophical opinions. Only those lawyers engaged in legal theory who think or believe – in one way or another – that the law could and should play a role in *changing* existing gender relations, or even in abolishing gender inequality, are in need of a non-essentialistic theoretical perspective on gender relations. So, this need is more prevalent for those who defend a substantive than for those who defend a formal application of sex-equality in law (see section III.B.)

According to Scott, the only type of gender theories that are 'causal' but not essentialistic, are the Anglo-American (psycho-analytical) object-relation theories and the French post-structuralist (or postmodern) language theories. After having presented a – in my view unclear – mixture of both theories, Scott ends up with a description of what the content and use of the concept of gender in scientific research could be. As cited above, Scott presents a two-fold definition of gender (see section IV.B.). Gender is:

- 1) a constitutive element of social relationships based on perceived differences between the sexes, and
- 2) a primary way of signifying relationships of power.

She then goes on to state that from the first part of her definition it follows that gender involves four perceived elements.⁶⁴ These are:

- 1) culturally available symbols that evoke multiple (and often contradictory) representations of the male and the female;
- 2) normative concepts that set out interpretations of the meanings of the symbols and that attempt to limit and contain their metaphoric possibilities;
- 3) the notion of politics and social institutions and organizations that lead to the appearance of timeless permanence in gender representation;
- 4) the construction of subjective gender identities.

I think feminist legal scholars can derive inspiration from these four elements mentioned by Scott, to 'tackle' the law, as one of the institutions, but also as one of the systems of meaning, that produce and reproduce gender. A few examples might show how this can be done and what kind of results you may expect from such an analysis.

The first element mentioned can be traced in the law quite clearly. Symbols like strongness and weakness, autonomy and dependency, objectivity and subjectivity, rationality and emotionality, generality and specificity, public and private, rights and needs, *etcetera*, are very common 'denominators' when 'classifying' groups or situations that fall inside and outside the scope of law. These denominators also symbolize a gendered classification: the first of each pair representing the male, the second representing the female aspect. It will come as no surprise that the symbols that represent the male are more closely connected with the law (are inside the law) and that those which represent the female are mostly outside. So law is objective and rational, general and public and 'grants' strong rights to autonomous individuals, while – on the other side of the spectrum – words like dependency, subjectivity, specificity, private life, *etcetera* are used to describe the areas of social life or the groups of people who can not fall within the scope of law. Not surprisingly, these areas are often areas that are of crucial importance to women.⁶⁵

The second element is, in my view, also of great importance to feminist legal theories based on gender-analysis. Scott describes the second point as follows: 'These concepts are expressed in religious, educational, scientific, legal and political doctrines and typically take the form of a fixed binary opposition, categorically and unequivocally asserting the meaning of male and female, masculine and feminine. In fact, these normative statements depend on the refusal or repression of alternative possibilities, and sometimes, overt contests about them take place [...]. The position that emerges as the dominant, however, is stated as the only possible one.'⁶⁶ I will only give one example to illustrate this mechanism, and that is the normative concept of *time* as expressed in different legal doctrines. Time in law almost always refers to a linear, clock-wise idea, which can be divided into such entities as work time and free time. Compare the way AG Darmon referred to time in his opinion in the *Helmig* case. Time, in his story about the case, only serves for work or for leisure. Another example can be found in the Dutch Labour Law. In Holland, women have the 'right' to breast-feed their child at the workplace. (Article 11, paragraph 2 of the Arbeidswet). Consequently the employer must provide for a quiet and private room where she can feed the child and must allow her 'reasonable' time off to do so. The employer is, however, not obliged to ensure that the child is with the mother all day or to provide a space where it can be kept at the workplace. This means that the child must be brought to the mother every time it is hungry, something which is virtually impossible in most situations. The cyclical 'needs' of the child thus have to be 'organised' into a time schedule. At regular times, somebody must pick the child up at home or at the daycare centre and bring it to the mother. The law, although it takes the biological needs of breastfeeding mothers and their infants into consideration, is not considerate of the (not clock-bound!) biological rhythm of infants' hunger. The lack of a provision making it possible to keep the mother and her child physically close (at the workplace) forces both into a linear schedule of feedings.

The third element, mentioned by Scott, is perhaps the least obvious, but is nevertheless of major importance. Scott here refers to 'general' institutions, such as the political system or the law itself, which have a certain 'air' of gender-bias or even gender-neutrality about them. 'Politics' is deemed to be a 'male' institution, 'the family' to be a female institution. The law is 'encoded' with neutrality, also with gender-neutrality since the most obvious instances of out-right sex-discrimination have been

erased and formal equality of the sexes has become the rule (at least in most Western countries). One of the main objectives of feminist legal studies in the past decades has been to 'decode' this kind of 'neutrality' and show the male bias on which it is founded. Though, in some respects, this has been quite successful, the idea of law's neutrality is still all-pervasive and a lot of work still has to be done in that respect.

The fourth element, the construction of subjective gender identities, is also a mechanism that takes place through the law. Carol Smart offers us the examples of the 'unwed mother', the 'female criminal' and the 'prostitute'.⁶⁷ In my own work, I have analysed the construction of the 'legal identity' of the 'welfare mother'.⁶⁸ Thirty years ago, we did not have such a 'phenomenon', but nowadays everybody knows what you are talking about when you use this phrase. Welfare mothers 'experience' to exist, and they often call themselves by this name. The welfare mother's position is of a social but also of a legal nature: what she *is* is defined by the law. From this analysis, it appears that quite subtle and hidden mechanisms are responsible for bringing about this new 'personality' into the legal and societal community we live in. The analysis also shows that we can not substitute the term 'welfare mother' for the term 'welfare father'. As such the legal construct of a 'welfare mother' definitely is a gendered construction.

B. Towards a Gender Theory of Law

I think much work still has to be done in order to develop a more comprehensive understanding of how gender *operates* in law. As I have attempted to illustrate with my analysis of the *Helmig* case, it is 'tricky' to engage in a strategy to bring about greater legal sex-equality, when one is not aware of the gendered nature of the concepts and procedures that are used in the law. This is not to say that I reject sex-equality law as an instrument towards more equal gender relations in the social and economic world.⁶⁹ I only want to stress the necessity of theory, by which I mean theory that offers us new insights in the power of law.

While the four elements of gender theory that Scott brought forward (see above) relate to the first part of her definition (gender as a constitutive element of social relationships), and offer us possibilities in describing the ways in which gender 'operates' in this respect, the second part of her definition (gender as a primary way of signifying relationships of power) perhaps is of even greater importance to gender studies in the field of law. It offers us possibilities of investigating the reason why sex-

inequality is persistent today and how it continues to reproduce itself. These signifiers are also mediated through the law: by using gendered categories in the law, the law itself reproduces and reaffirms the underlying (unequal) power relations between the two genders. With lawyers (especially of the 'formal' and 'liberal' type), it is very hard to discuss the power of law. Nevertheless, I think feminist legal scholars should consequently use this term in relation to their analysis of the law.⁷⁰

As we have seen in the case of Angelika Helmig and her five 'sisters', the *power of definition* and the *power of procedure* are both at work in a legal procedure in which sex-equality is at stake. These two mechanisms are responsible for the way sex-equality law (as it is applied) *excludes*, instead of *includes*, the 'real' experiences of *these* women.⁷¹ The 'story' of the six women, their experiences, their daily 'struggle' to cope with different – and often contradictory – perceptions of time, is not 'heard' by the judiciary. And as far as it is heard (*e.g.* by the European Commission) it is immediately *equated* with the experiences of other workers (the traditional worker, who might not even really exist any more!). Equality then works as a mode of silencing instead of celebrating difference.

Final Remark

I think there is hardly 'one' conclusion to this paper. What I have tried to make clear in my analysis of the case, especially of the wording of the opinion of the AG and the judgment of the ECJ, is that 'strict scrutiny' of case-law can reveal both the gendered nature of the presumptions and the ways of reasoning that lawyers use in order to cover-up the systemic nature of gender-disadvantage in society and in law. The *Helmig* case is no worse than many other (welcomed!) cases, including many cases in which the ECJ adopted a more substantive approach to the legal equality issue. If each of the cases is scrutinized in the way I have scrutinized the *Helmig* case in this paper, feminist legal scholars will be able to find similar instances of gendered law. In the end, and this is the goal I strive for, it must balance the tendency towards assimilation and norm-conformity that is inherent in the legal equality principle as it is structured in today's legal theory and practice.

Notes

- ¹ ECJ 15 Dec. 1994, in joined cases C-399/92, C-409/92, C-425/92, C-34/93, C-50/93 and C-78/93, *Angelika Helmig v. Stadt Lengerig and others*.
- ² It is important to note that we are dealing here with *legal* equality. The principle of equality can also be considered from a political-philosophical vantage point or on a moral level (where it very often is equated with justice). Legal equality means the way in which *positive law* acknowledges the right to be treated as an equal. The way this right is guaranteed varies from country to country. In this paper I only deal with EC sex-equality law.
- ³ There is extended evidence from 'time-survey-studies' (at least in Holland) that men spend their after working hours more on 'leisure activities' than women do, regardless of whether they work full-time or part-time.
- ⁴ Ralph SANDLAND 'Between 'Truth' and 'Difference'', *Feminist Legal Studies* 1995 (1), p.28: 'Life is lost in the translation to law. Meanings are variously selected, rejected and refashioned to make them amenable to legal discourse.'
- ⁵ I derive this summary from the opinion of the Advocate General in the case, A. G. Darmon, who delivered his opinion on April 19, 1994. The three questions correspond with the so-called *Bilka*-test for indirect discrimination, which will be explained in paragraph III.B of this paper.
- ⁶ As we will see later in this paper, this is an extremely important point. The question of whether a substantive approach to equality could ever be successful depends to a great extent on the space claimants get in the legal procedure to tell their 'story'. When legal doctrine (such as the doctrine of indirect discrimination) forces you to phrase your 'questions' to the court in a certain manner, this might mean you have no space to speak and are silenced from the beginning. As such, as well as a close scrutiny of legal concepts from a gender perspective, it is also necessary to scrutinize legal procedures.
- ⁷ As cited in the judgment. The report has not been published. This means that the European Commission was of the opinion that the *situations* of full-timers and part-timers were comparable, thereby justifying equal treatment (as opposed to the ECJ, who thought *hours* were comparable). The problem of comparability will be dealt with in sections III and IV of this paper.
- ⁸ Of course, the big issue is always *how* to establish which cases are equal and which cases are unequal (or 'different'). In each case, the lawyer must make choices, which are normatively (and politically) coloured. The purpose of a feminist approach to law is to show that the choices lawyers make are also choices on the bases of certain presumptions on gender-relations.
- ⁹ 'Things that are alike should be treated alike, while things that are unlike should be treated unlike in proportion to their unlikeness.' As cited by Titia LOENEN, 'Comparative Feminist Scholarship', *Feminist Legal Studies*, 1995, p.76.
- ¹⁰ It should be noticed that the AG treats hours like abstract figures that can be numbered and counted. This he needs to do in order to end up with a formal approach to equality, in which the result of the comparison is often presented as *sameness* or complete *identity*. (See paragraph III.A.) From a theoretical point of view it would also be very interesting to analyse this statement from the perspective of how the AG constructs a superiority of general rules (that work in the abstract) above rules that favour diversity. Regretfully, I do not have the space to go into that subject here.
- ¹¹ The AG here refers to the *Kowalska* case, C-33/89.
- ¹² But then there are other purposes possible. In some lower paid professions, overtime is often worked on a regular basis by full-timers in order to earn a sufficient weekly income! I thank my colleague at the European Forum, David PURDEY, for his observation on this point.

- ¹³ The AG here refers to the second preliminary question. See paragraph 2.1 of this paper.
- ¹⁴ The Norwegian Sociologist Helga Maria HERNES points to the basis of the problems women have with the way time is (legally and socially) structured. In her view, time can be differentiated into cyclical and linear time orders. 'Cyclical time is often considered to be the 'timeless' dimension, the world of the unchanging cyclicity of 'life' itself. Linear time is man-made, historical time, the time we shape. Not surprisingly, different social institutions are associated with each of these: the family – and thus the life of women – mainly with cyclical time; the economic, professional and political sphere – and thus the life of middle class men – with linear time. These two time ordering principles ... impute and socialize us into different logics of action.' HERNES. See: 'Interest and Values Affected by Work Time Reforms'; Paper submitted to the workshop on theories of Gender and Power, ECPR, Gothenborg, April 1986, p.5.
- ¹⁵ *Bilka*, C-170/84. See also the *Hofmann* case in which the ECJ phrased this as follows: 'The Directive is not designed to settle questions concerned with the organization of the family, or to alter the division of responsibility between parents.' (C-184/83).
The point is also discussed in the case *Com. v. France*, C-312/86, in which the French government unsuccessfully tried to challenge this borderline between work in the workplace and work at home. See, for a commentary on both cases, Gillian MORE, 'Equal Treatment of the Sexes in E.C. Law', *Feminist Legal Studies*, 1993 No.1, p.62.
- ¹⁶ See Ralph SANDLAND, *supra* at p.28:
'The preferred strategy of law is the promulgation of a focus on technicalities which bemuses and mystifies and allows law systematically to change the subject, thus giving rise to the possibility of legal non-discourse on sexuality and gender.'
- ¹⁷ See the extensive description of the concept of indirect discrimination as developed by the Court in the article of Sacha PRECHAL, 'Combatting Indirect Discrimination in Community Law Context'; In: *Legal Issues of the European Community*, 1993, pp.81-97.
- ¹⁸ See art. 5(1) of the Proposal for a Council Directive on the burden of proof in the area of equal pay and equal treatment for women and men (88/C 176/09).
- ¹⁹ It is very attractive to think that this type of reasoning is 'objective'. As one of my students (Andrew SKUDDER, from Oxford University) observed in his paper:
'By facing solely on the objective equality of the treatment actually received by men and women in this situation the Court referred to its old liberal approach to the question of equality.'
However, later in his paper he problematized this 'objectivity' by exposing the gender biases on which the reasoning of the Court is based.
- ²⁰ The term 'purely' is often used with reference to formal equality. I use it as well, though I am aware of the danger of doing so: it falsely suggests that formality can be 'pure' in the sense of 'neutral'. In part III of this paper, I will show that this can never be the case.
- ²¹ It should also be observed that the Court here applies a symmetrical approach to equality, also related to as a sex-neutral approach to sex-equality. This means the Court does not ask itself whether a certain group really 'needs' the protection of equality legislation, or whether this legislation might only be designed to remedy inequality (or even dominance!), but applies the norm of equal treatment regardless of the social and economic position of the parties involved. Several feminist legal scholars have pleaded for an asymmetrical approach to equality. See, for example, the work of Titia LOENEN, which will be mentioned below.
- ²² G. RADBRUCH, *Rechtsphilosophie*, Stuttgart, 1973 (1932), p.166:
'Gleichheit ist immer nur Abstraktion von gegebener Ungleichheit unter einem bestimmten Gesichtspunkt.'

- ²³ See, for example, article 4(2) and 4(3) of the second Directive (76/9).
- ²⁴ FENWICK & HERVEY 'Sex Equality in the Single Market: New Directions for the European Court of Justice'; *The Common Market Law Review* (1995) 32, pp.443-470.
- ²⁵ *Ibid.*, at p.469.
- ²⁶ Andrew SKUDDER, examination paper, L.L.M. Equality Course 1995.
- ²⁷ For non-legal readers, it is perhaps useful to explain here that positive action is something quite different from so-called 'special rights'. The first is the result of the (assumed) positive obligation of the State to bring about more social equality (see below under A2). The latter are the result of a recognition that women are in some respects different from men and therefore -according to the Aristotelian formula- should be treated differently. The assertion in some special rights theories that (all!) women *are* different is essentialistic. It fixates sometimes on biological differences, and sometimes also includes cultural or psychological differences. See especially the work of Elisabeth WOLGAST, *Equality and the Rights of Women*, London, Itheca 1980.
- ²⁸ See *supra* note 9, Titia LOENEN, *Feminist Legal Studies*, 1995, No.1, p.77.
- ²⁹ This, however, does not automatically mean that *better* results will be achieved by legal intervention. See Carol SMART, 'Feminist Jurisprudence' in *Dangerous Supplements*, FITZPATRICK, ed., London, 1991, at p.144.
- ³⁰ I am aware of the fact that in the following summary of standpoints, I do not refer to an alleged important difference between the two standpoints relating to the application of the Aristotelian formula of equality. Some proponents of substantive equality (like LOENEN *supra* note 9, pp.76-77) claim that the formal approach only concentrates on the first part of the formula (treat likes alike), while only the substantive approach has an open eye to the second part (unlikes should be treated un-alike in proportion to the way in which they differ). I think this wrongs the formal approach. As a consequence of the procedural nature of this approach, it is evident that the accent will lie on establishing what cases should be treated alike, but that automatically entails an answer to the question of what cases should not be treated alike. What (different) treatment is necessary can not be answered on the basis of a formal approach as is possible on the basis of a substantive approach. The difference between the approaches does not lie in the question of on what part of the formula one concentrates herself, it lies in the different *interpretation* of the second part. This different interpretation, however, follows from the different political and legal choices on which both approaches are based, and which I will discuss in the next lines of this paper.
- ³¹ As FENWICK & HERVEY show in their analysis of four recent ECJ cases, the judges tend to favour the liberal idea of autonomy and free choice. 'The concentration of women in certain types of paid work is seen as a result of *individual* choices, rather than as structural pay inequality to be redressed by the law.' *supra* note 24 at p.444.
- ³² Sacha PRECHAL *supra* note 17, p.84, summarizes the test as follows:
'If the use of a neutral criterion (*i.e.* applying equally to both sexes) affects a considerably larger percentage of persons of one sex, then this amounts to indirect discrimination and is illegal, unless the person suspected of this discrimination proves that his or her way of acting is objectively justified.'
The objective justification test contains two separate sub-tests: the objective pursued must be a legitimate one and the means chosen must be appropriate and necessary to achieve the objective.
- ³³ This is demonstrated in the *Danfoss* case (C-109/88), where the ECJ held that flexibility was (sometimes) a 'suspect' category, while seniority was held to be justifiable in any case. In *Nimz* (C-184/89), however, the ECJ held that seniority may be un-justifiable.

- ³⁴ The book by Evelyn ELLIS (*Sex Equality Law in the European Community, 1991*) and by PRECHAL & BURROWS (*Gender Discrimination in the European Community, 1990*) contain a very complete overview until the beginning of the 1990's. I will not give you the complete list of articles here, but refer to the articles I mention in my footnotes in which you will find references to other material as well.
- ³⁵ Gillian MORE, *supra* note 15, p.70, comments as follows on the impact of the test: 'Yet, the admission of an objective justification for measures having a discriminatory impact surely destroys the meaning of a disparate impact analysis. [...] the fact that the law or policy may be objectively justified does nothing to remove the unfair burden. The objective justification is yet another abstract legal concept, which enables both lawyer and judge to distance themselves from the concrete reality of the case.'
- ³⁶ In feminist legal studies much attention has been given recently to this aspect of court proceedings. Are women silenced in law or does it offer them the opportunity to communicate their life experiences? A nice example of an article in which this question is addressed is that of Lucy WHITE: 'Subordination, Rhetorical Skills and Sunday Shoes; notes on the hearing of Mrs G., 38 *Buffalo Law Review*, 1, 1990.
- ³⁷ This is also an important point in the work of Carol SMART. See also J. E. GOLDSCHMIDT & R. HOLTMAAT, *Trendrapport Vrouw en Recht*, Den Haag, DCE/STEO, 1993.
- ³⁸ Elsewhere (See R. HOLTMAAT, 'The Power of Legal Concepts; Towards a Feminist Theory of Law', *International Journal of Sociology of Law*, Dec. 1989, No.5, pp.481-502). I have developed a critique of the equality principle as such. I will not repeat that here.
- ³⁹ A classic article on this subject is that of Ann SCALES, 'The Emergence of Feminist Jurisprudence: an Essay', *Yale Law Journal* 95 (1986), pp.1373-1403.
- ⁴⁰ I will deal with the issue of norm-conformity in more detail below, paragraph IV.B.
- ⁴¹ I will return to these terms in paragraph IV.C.
- ⁴² Joan W. SCOTT, 'Deconstructing Equality-Versus-Difference: Or the Use of Poststructuralist Theory for Feminism', *Feminist Studies* 14 (1988) No.1, pp.33-50. I use the Dutch translation here, as published in: *tiende jaarboek voor vrouwengeschiedenis*, Nijmegen p.112.
- ⁴³ See, for an example, FENWICK & HERVEY, in part 1 of their article: 'Substantive equality [...] demands [...] that the real situation of many women which may place them in a weaker position in the market should be addressed.'
- ⁴⁴ Carol SMART, in her critique on existing feminist legal theory goes so far as to say that in the end this ends up in an essentialistic stance. (Carol SMART, 'Feminist Jurisprudence', in *Dangerous Supplements*, P. FITZPATRICK (ed.), London, 1991.) I would not go as far as that, though, as I will show below, there certainly is a danger that – without realizing what they are doing – some adherents of substantive equality enhance quite 'suspect' theories. See also on the point of essentialism in feminist legal studies: Diana BROOKS, 'A commentary on the essence of Anti-Essentialism in Feminist Legal Theory' *Feminist Legal Studies*, 1994 No.2, pp.115-132.
- ⁴⁵ Joan W. SCOTT, 'Gender: a Useful Category of Historical Analysis', in E. WEED (ed.), *Coming To Terms*, London 1989, p.94. The article was first published in the *American Historical Review*, 91 (Dec. 1986) pp.1053-1075.
- ⁴⁶ Joan W. SCOTT brilliantly shows us how this process plays out in equality cases by her analysis of the so-called *Sears* case (brought before the US Supreme Court). See 'Deconstruction' *supra* note 42.
- ⁴⁷ At least, not a discrimination case under article 119 of the Treaty. Perhaps they could have tried to bring a case under a national law that forbids unequal treatment (on any ground) of workers by their employer. Sometimes rather general and vague norms are suitable for this. In Holland, one could try to ban unequal treatment of part-time

workers through the application of the norm that every employer should treat his/her employees 'as a good employer' (art. 7A:1638z of the Civil code).

- ⁴⁸ As I do not have the full dossier of the case at hand while writing this paper, I can not evaluate whether the claimants tried to do this but failed. A further analysis of the case is necessary to clear this point.
- ⁴⁹ OECD, *Shaping Structural Change*, Paris 1991.
- ⁵⁰ Even some forms of indirect discrimination are quite overt, like the concept of breadwinnership or the exclusion of part-time workers. It is not difficult to establish that women disproportionably suffer from these type of categorizations.
- ⁵¹ See Deirdre CURTIN, 'Simple Justice; Steps towards Eliminating Sex-based Wage Discrimination', *Nemesis, Dutch Journal on Women and Law*, 1993, pp.190-198.
- ⁵² *Enderby*, C-127/92.
- ⁵³ FENWICK & HERVEY, *supra* note 24 at p.463.
- ⁵⁴ Titia LOENEN, *Feminist Legal Studies* 1995, No.1, *supra* note 9 p.81.
- ⁵⁵ See my remarks on this point in 'The power of legal concepts', *supra* note 38 p.495, where I take the stance that '[A]ny feminist theory of law should be based on a feminist theory on the nature and causes of the oppression of women.'
- ⁵⁶ The already mentioned article of Gillian MORE gives us an example, as well as the already mentioned article by FENWICK & HERVEY (see footnotes 8 and 78 in their article). See Also S. FREDMAN, 'European Community Discrimination Law; a Critique', *Industrial Law Journal* (1992), pp.119-134.
- ⁵⁷ This is not to disqualify her theory in all respects. It is only to warn that it may entail the danger of reproducing the 'natural' differences between the male and the female as fixed categories. See Diana BROOKS, *supra*.
- ⁵⁸ See, for example, Joan W. SCOTT, *op. cit.*, *supra* note 45 p.86:
'Although sexual relations are defined in MacKinnon's analysis as social there is nothing except the inherent inequality of the sexual relation itself to explain why the system of power operates as it does ... [T]he analysis rests on physical difference. Any physical difference takes on a universal and unchanging aspect, even if theorists of patriarchy take into account the existence of changing forms and systems of gender inequality.'
- ⁵⁹ An author who also works with a more comprehensive understanding of gender and who does so in the framework of feminist jurisprudence is Carol SMART, whose work, though at some points not reflecting all of my views on the 'nature' of law, offers very useful insights in the way law operates as a system of power that – among others – is based on gender. In 1991, I published a review of Carol Smart's main work: *Feminism and the Power of Law* (London, 1989) in *Nemesis, the Dutch Journal on Women and Law*. I particularly disagree with Smart over whether any changes in the fixed gendered nature of the law are possible, about which I am far more optimistic than she is. See also Carol SMART, The Women of Legal Discourse, *Social and Legal Studies*, 1 (1992) pp.29-44.
- ⁶⁰ This is not to say that we should all agree on one and only one theory. It is only to say that those who engage in feminist legal theory should make their ideas about this matter more clear and that an open discussion about different theoretical approaches should take place. Moreover, I do not think one 'grand theory', in which a mono-causal explanation of all forms of oppression in all cultures and in all times is given, does exist or can be developed.
- ⁶¹ Joan W. SCOTT, *op. cit.*, *supra* note 45 p.83.
- ⁶² Joan W. SCOTT, 'Deconstruction', *supra* note 42 p.112.
- ⁶³ E. WOLGAST, for example, quite overtly theorizes on the basis of the natural differences between motherhood and fatherhood, thus justifying Special Rights for women.

⁶⁴ Joan W. SCOTT, *op. cit.*, *supra* note 45 at p.94.

⁶⁵ I analysed this mechanism in great detail, using as an example social security doctrine in which these symbols very often are used to distinguish between areas of life that can be socially insured (by means of State social security provisions) and those areas that can not (and which at the best are 'provided for' by means of social assistance). See my Ph.D. thesis: *Met Zorg een Recht?*, (To care for a right?) Zwolle 1992, with a summary in English.

⁶⁶ Joan W. SCOTT, *op. cit.*, *supra* note 45 at p.94.

⁶⁷ Carol SMART, 'The Women in Legal Discourse', *Social and Legal Studies*, (1) 1992, 1, pp.29-44.

⁶⁸ Bijstandsvrouwen. De discursieve produktie van een nieuw type vrouw in het bijstandsrecht (*Women on welfare. The discursive production of a new type of women through social assistance law*) Paper for the conference on womens studies Amsterdam Nov. 1993, published in 1994 in *Recht en Kritiek*, 20 (3), pp.248-270.

⁶⁹ Thus it is not fruitful to suggest that one should make a choice between the equality approach and other approaches (as my proposal for 'other law'; see 'The power of legal concepts', *supra* note 38). I think this forces feminist legal scholars into a false dilemma. It is not as much a matter of being pro or contra sex-equality law, it is a matter of critical 'involvement' in the law, of which sex-equality legislation forms a part.

⁷⁰ In this respect, the already mentioned works of Carol SMART are very important for us.

⁷¹ I want to stress that, in my view, these experiences should never be translated into the experiences of all women or of women as a certain category (e.g. working women). By using such a general category one – again – excludes difference.