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Commentary

Strategic Silences in the Brexit Debate: Gender, Marginality and Governance

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Abstract

This article explores some of the medium term implications of the EU Referendum on the position and future of women's rights in the UK. Using process tracing, the article explores the complex relationship between EU and UK legislation in the area of maternity rights. Specifically, it argues that considering the UK government's opposition to the original Pregnant Worker Directive (1992) and later to the abandoned Amendment Directive, we can expect these regulations to become watered down. The economic and political environment that shaped the EU Referendum campaigns will frame the UK's negotiations to leave the EU in favour of de-regulation. The UK's withdrawal from European institutions increases the vulnerability of marginal groups and interests as layers of representation are taken away. Moreover, the invisibility of gender issues and the largely strategic deployment of women in the actual campaigns is likely to compound the impact of the well-established position of the UK on equality matters, as highlighted by negotiations on the pregnant worker directives.

If the contentious lead-up to the EU Referendum in the UK has revealed anything, it is the degree of misinformation regarding the relationship between European and national legislation and decision-making processes. 'Brussels' has long been used to shift blame for unpopular decisions, e.g. austerity, from the national sphere to the European level (Schäfer 2004). This is particularly important in relation to widespread perceptions about Europe's imposition of red tape and 'unnecessary' regulations on British employers (Heath 2016). As women's employment rights fall in this category, it is imperative to take stock of the impact of this highly charged campaign on social cohesion, both in the UK and Europe more widely. One of the main omissions in current discussions about post-Brexit Britain is the impact of the UK withdrawal from the EU on the position of women's rights as a policy agenda. When thinking about silences there is no better lens than gender to provide a detailed analysis of the long-term impact of European disintegration on less powerful demographic groups.

Discussions around the Referendum, and now the UK's exit from the EU, highlight the marginality of equality as a political issue. Considering the historical role played by European legislation in promoting gender equality in the member states, it is more than a little surprising that the 'Remain' campaign did not actively adopt this discourse, so widely deployed by European institutions themselves, as a hook for a wider discussion about social Europe, social justice and fundamental rights.

This article will present the case for a feminist analysis of Brexit, calling for both policy makers and organised civil society to ensure that equality is not pushed off the agenda, for its absence provides an opening for economic and political actors seeking to re-negotiate the scope of equal rights policies in the UK (Elgot and Walker 2016). The EU Referendum has thrown both British and European politics into a whole new level of crisis. As Walby explains in relation to the 2008 financial crisis, 'a crisis is a moment when there is the possibility of large-scale change consequent upon a small event in a narrow window of time. The lack of proportionality between cause and consequences is inherent to the definition of crisis' (Walby 2015: 34). What we have learnt from the 2008 financial crisis is that policy measures enacted to deal with 'crisis' often have unintended gender consequences. The asymmetrical impact of the financial crisis on women is blind to women's sustained contribution to the formal and informal economy. Couple this with ideologically loaded prescriptions, the discourse of 'crisis' legitimises the implementation of exceptional measures that

are disproportionate in relation to the impact they have on social cohesion and vulnerable groups (Guerrina 2015; European Women's Lobby 2012).

THE IMPORTANCE OF CONTEXT: EUROPEANISATION OF GENDER EQUALITY POLICES

The role of the EU as a gender actor is largely undisputed. From a very humble beginning with the inclusion of Article 119 setting out the principle of equal pay for men and women in the Treaty of Rome, equality policies are now one of the most widely developed areas of European social policy (Kantola 2010; Abels and Mushaben 2014; Woodward and van der Vleuten 2014). This is an interesting story about the way equality norms were originally instrumentalised for pursuit of higher economic priorities, but were then adopted by feminist activists within the institutions (femocrats) and civil society organisations in order to advance the position of working women across Europe. European legislation has therefore provided the overarching framework for the development of women's employment rights across Europe since 1957 (Hoskyns 1996; Kantola 2010; Lombardo and Forest 2012).

The focus of these developments revolves largely around women's relationship to the market, either in the context of employment rights or in terms of access to services. Beyond the opportunities and constraints of the European gender *acquis*, this analysis is important insofar as it provides useful insights into patterns of influence. The literature on Europeanisation, when applied to the analysis of gender equality policies, highlights the impact of national gender regimes on the member states' negotiating positions at the European level. Whereas supranational institutions have acted to expand the reach of the gender *acquis*, member states often act as a break arguing that an enhanced legislative/regulatory framework inhibits employers' freedom. In so doing, member states have sought to limit the scope of EU equality policies (MacRae 2010). This is especially the case for the UK that has long favoured negative integration and deregulation over establishing a comprehensive regulatory system for promoting equality at the European level (Masselot, Caracciolo di Torrella and Burri 2012). Although this cannot serve as a predictor of the future policy behaviour of member states, it highlights the importance of European legislation and opportunities for judicial recourse, to provide a safety net for traditionally marginal groups, e.g. women, that struggle to influence policy at the national level.

The European gender *acquis* is highly commodified, as it revolves largely around women's relationship with the employment market. Actors operating both within the Commission and the Parliament have consistently worked to ensure that gender is part of the policy agenda, thus expanding the reach of key policies and principles. Working together with the European Women's Lobby, European institutions have provided enhanced opportunities for feminist advocacy (Helfferich and Kolb 2001). From a humble beginning in the Treaty of Rome, the European Equality Agenda now includes a range of legally binding provisions and soft policy measures aimed at encouraging sharing of best practice. But perhaps above all, the development of the gender *acquis* is a tale about the competition between national and European interests. Whereas European institutions have pushed to expand the scope of women's rights, member states, especially the UK, value competitiveness above social justice and cohesion (Eurofund 2015).

The outcome of the UK Referendum on EU membership is thus a critical juncture. Feminist institutionalists have long argued about the importance of understanding the impact of critical junctures on promoting, or conversely impairing, the development of women's rights (Waylen 2009). As such, it is imperative that we develop a detailed, and gender sensitive, assessment of the impact of Brexit on women's position in the UK as workers and as citizens.

MATERNITY RIGHTS – A TALE OF CONTRADICTIONS AND EU POLICY ENTREPRENEURESHIP

The development of maternity rights at the European level is a useful example of competition between the Commission and member states discussed previously. In order to understand this complex relationship, it is necessary to unpack the negotiations that led to the ratification of the 1992 Pregnant Worker Directive 92/85/EEC (Council of the European Union 1992) and the now defunct proposal for an Amendment Pregnant Worker Directive (European Commission 2008). The 1992 Pregnant Worker Directive is one of the EU provisions that had a marked impact on the development of UK legislation in matters of maternity rights. When looking at the expansion of national provisions in the 1990s and 2000s, it is clear the Pregnant Worker Directive was a catalyst for these developments (Guerrina 2005; Masselot, Caracciolo di Torrella and Burri 2012).

Member states', and specifically the UK's, 'troubled' relationship with European equality legislation is highlighted by the government's position during the negotiations of the Pregnant Worker Directive and the now shelved 2008 Proposal for an Amendment Directive. The negotiations that surrounded both policy proposals highlight the tension between establishing a minimum threshold of rights for working mothers, and the 'national' interest, as defined by the governments of the time (Guerrina 2005; Eurofund 2015; PA 2011).

The way the Directive came into being, however, is illustrative of both the role of the EU as a gender actor and the way substantive equality is often relegated to an issue of second order importance when in conflict with 'national', perhaps more specifically business, interests. The negotiations surrounding the introduction of this Directive highlights both the role of the European Commission as policy entrepreneur in order to advance a key policy agenda and the member states' pushback against the expansion of an area of employment legislation that needs to be highly regulated in order to achieve its stated objectives (Guerrina 2005; Mazey 2012: 134-5).

The European Commission originally intended to put forward a very ambitious proposal, however, in order to forestall opposition in the Council, the Commission revised and watered down the proposal. The UK was particularly vocal in its opposition to these provisions, as they were seen as too costly on employers. Although originally conceived to be under the auspices of Article 119 (Equality), the Directive was ultimately ratified under Article 118a (Health and Safety). The reason for switching Treaty foundation was to bypass the requirement for unanimity in the Council; unlike equality, health and safety provisions were decided by Qualified Majority Voting. The UK government's opposition to the directive was one of the main reasons for changing the focus and watering down the scope of the provision. The work of the Commission and the European Parliament (EP) in trying to ensure a minimum standard of protection for pregnant workers and workers who have recently given birth, is an excellent example of how the equality *acquis*, albeit important, really only provides a mere safety-net (Bego 2015; van der Vlueten 2007; Guerrina 2005).

Over a decade after the implementation of this Directive, the Commission proposed to re-open the question in an attempt to improve working standards for pregnant workers across Europe. The history of this second iteration of the Directive is possibly even more complex and demonstrates even more clearly the impact of enduring tensions between the way member states pursue national interest at the European level and the role of supranational institutions as advocates for women's rights.

The Parliament adopted its position at the first reading stage, and expanded the proposal of the Commission in several areas; two will be discussed here. First, MEPs proposed that workers be entitled to a continuous period of maternity leave of at least 20 weeks allocated before and/or after confinement, extending the Commission's proposal of 18 weeks and the 14 weeks set out in the 1992 Directive. Additionally, they proposed that maternity leave shall include a compulsory period of

six weeks after birth on full pay, without infringing upon existing national laws which provide for a period of compulsory maternity leave before childbirth. The six-weeks period of compulsory maternity leave was to apply to all working women, regardless of the number of days worked prior to their pregnancy (European Parliament 2010).

These two issues soon became the battleground for discussions between representatives of these two institutions in the Conciliation Committee. The EP and Council clashed over which set of interests should have priority. In this instance the EP sought to prioritise workers' rights against a narrow framing of national interest put forward by member states. Between the tabling of the Commission proposal in 2008 and the final shelving of the proposal in 2015, the Parliament and Council were not able to arrive at a compromise position. Representatives of the member states voiced concern over prospective financial costs and considered the proposal to place undue economic burdens on national economies. In addition, some states argued that their existing policies functioned better than the amended proposal of the Parliament. For example, the UK released a series of impact assessments stating these two issues quite clearly (HM Government 2012; HM Government 2012a, 2012b, 2012c). The Commission issued an ultimatum: it would withdraw the proposal if the EP and the Council remained deadlocked (European Commission 2014). The disagreement between the Parliament and Council was polarising and led to the stalemate that ultimately led to the formal withdrawal of the Directive on 1 July 2015. The Council's entrenched position on this issue brings into question how the very principle of national interest is constructed and which groups, and interests, are represented by the member states.

The analysis presented here is a clear example of the complex network of interests at play in the European policy-making process. Trying to balance the common interest with those of member states can lead to stagnation and the watering down of legislative measures. The 1992 Pregnant Worker Directive and the (now shelved) proposal for an Amended Pregnant Worker Directive provide important insights into the nature of the relationship between European institutions and national governments, or, to put it more explicitly, the juxtaposition of the common good and national interests. It is also clear that there is ample opportunity for member states and the EP to contribute to this process. This balancing act, however, makes the process much longer and less effective.

Exiting from the European Union will have a negative impact on British women's representation in two ways. First, they will lose access to transnational networks of organised civil society, femocrats and representatives operating in the EP to promote and safeguard women's interests and ensure member states are accountable to less powerful groups in society. Second, they will lose representation in the EP itself, as UK citizens will no longer be able to vote for MEPs to represent their interests at the European level.

CONCLUSIONS

In a post-Referendum Britain, the track-record of different UK governments in negotiating the gender *acquis* becomes all the more important. The EU has, in many ways, been a progressive force in the area of gender and equality for men and women, despite the challenge from its member states in the Council. European institutions have provided an additional layer of representation for groups (e.g. women) and interests that are largely marginal at the national level. Support for this agenda was partly the result of critical actors operating within the institutions (e.g. femocrats) and partly the result of self-interest as the institutions themselves sought to expand their own power and reach. The result, however, was a number of policy developments that have benefited women in Europe.

Many of the debates during and, especially after, the EU referendum have concentrated on issues of 'high politics'. The issue of equality was relegated to a footnote at the end of the campaign when both camps sought to capture women's votes. The assumption at the end of the campaign when women became more visible was that symbolically presenting women in the debates might help to engage this part of the electorate. Ultimately, an analysis of the impact of the UK's referendum on gender issues extends beyond women's equality policies. For instance, little or no consideration has been given to the impact of 'mainstream' policies on gender issues. There is clear evidence that traditionally 'gender-neutral' policies, such as economic and monetary policy as well as security and defence, have unintended gender consequences. (Allwood, Guerrina and MacRae 2013) The invisibility of gender in the discussion is all the more remarkable, considering the impact of austerity and the 2008 crisis on equality in the UK (Annesley & Scheele 2012).

The real question for UK policymakers now is how to ensure that this same body of law is not watered down, to the point that the European safety-net is removed. The Leave campaign's slogan, 'take back control', is not just about Westminster's ability to re-assert its authority over legislative matters, controls on people movement and the UK's territorial boundaries. Couple this trend with the loss of citizens' representation at the European level as the UK will withdraw from the Commission and the EP, it is easy to see how much more vulnerable the interests of marginal groups are going to be to the ideological preferences of the government of the day. In this context, the European regulatory framework on workers' rights becomes synonymous with red tape and an increased burden for business.

Andrea Leadsom's position on maternity rights and pay in 2012 is an example of the level of debate and potential impact of Brexit on the gender equality framework in the UK. 'Taking back control' therefore becomes less about parliamentary sovereignty and more about privileging certain sets of interests in the policy-making process. Consciously or unconsciously, this is a rejection of the EU's inclusion of traditionally marginal groups that has resulted in a more enabling environment for particular policy agendas, including women's rights.

The inclusion of a detailed analysis of gender equality policies and the role of the EU in the development of UK provisions could have helped to develop a more nuanced understanding of the relationship between national and European governance from the standpoint of 'traditionally marginal groups': an understanding that pooling of sovereignty in key areas of social policy, such as gender equality policies, allowed for the emergence of a wider set of initiatives that helped to promote the interest of marginal groups in the national context. An historical overview of the development of the gender *acquis* indicates that femocrats have more opportunities for manoeuvre within a European context than a national one. The emergence of a feminist constellation within European institutions provides institutional actors and civil society organisations a platform for more effective lobbying on issues relating to gender and equality (Woodward 2003).

The long-term impact of the EU referendum campaign and likely Brexit negotiations will be to side-line social policy and equality issues and thus marginalise the interests of women as a core constituency. The emerging crisis will further legitimise the contraction of support structures and activation policies directly aimed at increasing women's engagement with the public sphere and the labour market. We can therefore expect this new 'crisis' to compound the impact of austerity and in so doing to reproduce dominant gender ideologies. The silencing of women and gender, so pervasive during and after the Referendum, ultimately highlights how women, and equality, remain, in the mainstream political imagination, the object of policy rather than subjects of change.

The real question for policymakers in a post-Brexit environment is how to deal with the issue of intersectionality. This article explored the impact of European disintegration on one demographic group, women, whose interests are often relegated to the bottom of the policy agenda. It has

demonstrated the role of supranational organisations in providing organised transnational civil society with a platform for advancing the interests of groups that are silenced and marginalised at the national level. The Commission's entrepreneurial skills and the institutional structure of the EU allowed critical actors operating at the supranational level to circumnavigate the ideological tensions within and between governments. In so doing, they were able to ensure the rights of women in Europe were protected, at least in terms of formal discrimination. It remains to be seen if Westminster, as a site of power and legislative authority will be able to fill this gap. The complexity of disentangling the British legal framework from the EU is likely to crystallise the high-low politics binary at the expense of social inclusion and marginal interests. This is not only damaging for women's rights, but it is a significant step back in the development of a more inclusive policy framework focused on promoting the value and benefits of diversity to society and the economy at large.

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