The constitutionalisation of the principle of gender equality

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Introduction

The principle of equality is commonly found within European constitutions. It takes a variety of forms, ranging from general commitments to equality before the law, to more detailed provisions on non-discrimination. Equality for women and men is widely recognised as one aspect of the principle of equality. In some constitutions, this is beyond doubt because there is an explicit reference to equality for women and men or, alternatively, ‘sex’ is included as a ground of prohibited discrimination. Nonetheless, even where there is no overt reference to gender equality in the text of the constitution, courts have normally been willing to accept that this flows from the general principle of equality.1

A similar picture emerges within the constitutional law of the European Union. From the outset, the Court of Justice interpreted the founding Treaties as including a general principle of equality2 and, at a later stage, a right to non-discrimination on the ground of sex.3 This was subsequently complemented by various Treaty revisions that advanced a more specific principle of gender equality. The EC Treaty right to equal pay for women and men was strengthened, most notably to include the concept of equal pay for work of equal value.4 Protection for positive action was incorporated5 and a duty to ‘promote equality between men and women’ in all activities was inserted.6

The drafting of the EU Constitution provided an opportunity to consider afresh the place for gender equality. Although the drafters were clearly working in the shadow of the existing Treaties, the wide-ranging discussions coupled with the evocative reference to creating a ‘constitution’ opened space for more radical innovation than the traditional process of Treaty revision. Significantly, the final text is scattered with references to equality, including equality between women and men.7 This paper aims to reflect on the role for constitutions, and in particular the EU constitution, in defining and advancing the principle of gender equality. Three aspects to constitutions and gender equality are identified. First, there is the traditional, legal function of a constitution as a source of rights, such as the right to non-discrimination. Secondly, the constitution plays a role in defining the concept of gender equality; what is meant by ‘equality’ and ‘gender’? Finally, the constitution can be an

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1 For example, the Irish Supreme Court has recognised that non-discrimination on the ground of sex is implicit in the general equality guarantee found in Article 40.1 of the Constitution: Article 26 and the Employment Equality Bill 1996 [1997] 2 Irish Reports 321, 347.
3 Case 43/75, Defrenne v SABENA (III) [1978] ECR 1365.
4 Article 141(1) EC.
5 Article 141(4) EC.
6 Article 3(2) EC.
instrument through which public policy on gender equality is framed. It sets boundaries for the role of law and policy and indicates the degree to which gender equality is considered a cross-cutting objective. In the analysis of each of these categories, reference will be made to the EU Constitution.\(^8\) Although it awaits ratification by the Member States, it already forms a crucial point of reference for the future development of the EU constitutional order.

1. The constitution as a source of rights

In terms of substantive law, constitutions are an obvious source of fundamental rights. As mentioned above, European constitutions tend to include the right to equality or non-discrimination.\(^9\) The EU constitution is no exception and a number of core equality rights are included. These are principally gathered in Part II of the Constitution, which incorporates the 2000 Charter of Fundamental Rights. Article II-81(1) states ‘any discrimination based on any ground such as sex … shall be prohibited’. This is juxtaposed to Article II-83: ‘equality between women and men must be ensured in all areas, including employment, work and pay.’ Finally, a specific provision on the right to equal pay is retained in Article III-214.

The right to non-discrimination on the ground of sex is valuable insofar as it enables a person to challenge discrimination by any of the Union’s institutions or bodies, as well as the Member States when they are implementing EU law.\(^10\) In contrast to existing EU legislation on equal treatment, the constitutional right to non-discrimination applies throughout the material scope of the Constitution. Therefore, it could be invoked in diverse areas such as asylum law or access to EU research funding, rather than the labour market focus of the equal treatment Directives.

As broad principles, designed to apply to a wide range of situations, constitutional equality clauses are typically worded in general terms and leave considerable discretion to the courts. In this vein, the EU Constitution does not define ‘discrimination’. Nevertheless, it can be anticipated that the Court of Justice will adopt the familiar Aristotelian formula that equality means ‘treating equals equally and unequals unequally’.\(^11\) This interpretation would be consistent with the Court’s existing case-law on the unwritten general principle of equality, as well as the case-law of the Court of Human Rights under Article 14 of the European Convention on Human Rights (ECHR). Indeed, Article II-112(3) requires provisions of the Charter of Fundamental Rights that ‘correspond’ to provisions of the ECHR to be given the meaning already attached to the corresponding provision under the ECHR.

Although the Aristotelian formula can be anticipated, experience suggests that it is not apt for delivering gender equality.\(^12\) The determination of whether discrimination exists fundamentally depends on the identification of another person in a ‘like situation’ but of a different sex. In some instances, it may be very difficult to locate an appropriate comparator.\(^13\) Occupational sex segregation remains a common feature of European labour markets, notably including those Member States with high

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\(^10\) Article II-111(1).


\(^12\) See further in this collection Reg Graycar.

rates of female employment participation. The comparator requirement may conflict with labour market realities, in particular, the diversification of employment relationships. This was illustrated in Allonby, where a college lecturer contracted to work via an agency sought to compare herself with another lecturer doing similar work, but directly employed by the college. The Court rejected the possibility for comparison on the basis that they worked for different employers. Yet, this ignored the background to the litigation, which revealed that the college had previously employed Allonby, but in order to reduce costs they dismissed a group of lecturers and then re-employed them at lower rates through an agency. The real content of Allonby’s work did not change, but the reorganisation of her employer relationship vitiated the protection of equal pay legislation.

Even where a comparator can be found, the appropriateness of this comparator often becomes the pivotal point of equality litigation. In Österreichischer Gewerkschaftsbund, workers were entitled to a payment on the termination of their employment. The level of this payment varied according to length of service. In calculating length of service, periods of parental leave were not taken into account, yet periods of leave for military service were included. This rule was challenged by an Austrian trade union as indirect discrimination against women, in particular, because 98 per cent of people taking parental leave were women and compulsory military service exclusively concerned men. Nevertheless, the Court of Justice held that men taking military service were not in a comparable position to women taking parental leave. It emphasised that parental leave was a voluntary choice on the part of the worker, whereas military service was, at least initially, compulsory. Moreover, according the Court, the basic justifications for allowing these breaks in employment service were different in nature: ‘the interests of the worker and the family in the case of parental leave and the collective interests of the nation in the case of national service’. Instead, the appropriate comparator was a person voluntarily taking unpaid leave for a reason other than parental leave. As this person’s leave would also not be included in calculating the length of service, there was no discrimination.

The above decision illustrates the manner in which the comparator test can obscure the underlying evidence of disadvantage linked to gender. Even the Court itself admits that taking parental leave was often not a real ‘choice’ for women due to the lack of suitable childcare. Moreover, it was manifest that women were the overwhelming proportion of workers ‘choosing’ to take parental leave. The identification of the correct comparator becomes a preliminary hurdle, a means of filtering out difficult cases. In so doing, the Court circumvents the need for scrutiny of the reasons for the state to prioritise military service over child-raising.

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16 Case C-256/01 Allonby v Accrington & Rossendale College, judgment of 13 January 2004.
17 Para. 47.
18 Case C-220/02 Österreichischer Gewerkschaftsbund, Gewerkschaft der Privatangestellten v Wirtschaftskammer Österreich, judgment of 8 June 2004.
19 There was a minimum compulsory period of leave prior to and immediately after the birth of a child. This was included in the calculation of length of service: para. 7-9.
20 Para. 24-5.
21 Para. 64.
22 Para. 60.
Where an appropriate comparator can be located, then the spotlight turns to the question of possible justification for any less favourable treatment. The flexibility of a constitutional equality guarantee in part rests on the broad discretion accorded to the judiciary in determining the balance between the goal of gender equality and alternative policy objectives. The EU Constitution provides little guidance to the Court of Justice on permissible justifications for sex discrimination. It is likely to draw upon its existing case-law on the general principle of equality: ‘this principle requires that similar situations shall not be treated differently unless differentiation is objectively justified.’ The reference to objective justification strikes an obvious echo with the test for justifying indirect discrimination under EU gender equality legislation. This has frequently proven to be the crucial interface where judges are required to arbitrate between equality claims and other, competing interests.

A key variable of the justification test is how searching and rigorous the Court is willing to be in scrutinising competing claims. Fitzpatrick refers to this as the Court’s ‘safety valve’, which allows to it to neutralise the potential for gender equality to provoke structural reform, for example, in the organisation of state welfare provision. Much of the existing case-law concerns conflicts between gender equality and national social policy objectives. A crucial test for the Court, however, lies in its resolution of conflicts between gender equality and other European Union policy objectives. In *Rinke*, the complainant challenged as indirect sex discrimination a refusal by the German authorities to grant her the status of general medical practitioner on the ground that she had completed her training on a part-time basis, whereas a minimum of six months training on a full-time basis was required. In their defence, the German authorities relied on the fact that they were implementing the requirement for a period of full-time training in accordance with the relevant EU Directives regulating medical professional qualifications. This placed the dispute firmly in terms of a conflict between the objectives of EU gender equality legislation and EU legislation on the mutual recognition of qualifications. In an important signal for the future interpretation of the EU Constitution, the Court clarified that the unwritten general principle of equality extended beyond instances of direct sex discrimination: ‘compliance with the prohibition of indirect discrimination on grounds of sex is a condition governing the legality of all measures adopted by the Community institutions’.

The strength of this starting point is then undermined by the low level of scrutiny applied in assessing justification. The Court notes that the harmonisation of medical training conditions:

not only facilitates the free movement of doctors but also contributes to a high level of public health protection in the Community. In pursuit of these objectives, the Community legislature must be allowed a wide margin of discretion …

This fails to interrogate whether any objective evidence existed to uphold a connection between the quality of medical training and the full-time requirement. Vague reference is made to the need for doctors to follow the development of

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23 Para. 7, Cases 117/76 and 16/77 *Ruckdeschel* [1977] ECR 1753.
26 Case C-25/02 *Rinke v Arztekammer Hamburg* [2003] I-8349.
28 Para. 28.
29 Para. 38-9.
patients’ conditions over time,\textsuperscript{30} but without any demonstration of why this was incompatible with part-time working. Indeed, given that the relevant Directives allowed the training to be split between periods of part-time and full-time activity, it does not seem obvious why, in principle, the whole training could not be satisfactorily completed on a part-time basis. Rather, the Court allows deference to the objective of free movement and mutual recognition of qualifications to trump the competing interest of gender equality.

It is not contested that equality rights are a vital element of any constitutional framework for gender equality. Yet, their impact and substantive contribution to realising gender equality depends heavily on their subsequent interpretation and application by the courts. This brief discussion has illustrated the obstacles that individuals can face to framing their complaints in the manner required by the courts and the risk that the goal of gender equality is displaced by other public policy objectives. This process of interpretation begins to reveal the underlying constitutional concept of what is meant by ‘gender equality’, which is considered further in the next section.

2. The constitution and the concept of gender equality

The dominant concept of gender equality shared within the polity is likely to be influenced by a wide range of factors, such as social attitudes, the role of religion and education. Nonetheless, the constitution plays a significant role within this framework; Jo Shaw refers to ‘the undoubtedly foundational character of constitutional law and discourse for any polity’.\textsuperscript{31} This section will focus on the role of the constitution in shaping the understanding of ‘gender’ and ‘equality’.

(a) The concept of gender

The first observation here is that ‘gender’ is not a term often found within constitutional texts. The EU Constitution is no exception in this regard. It refers to ‘equality between women and men’;\textsuperscript{32} ‘equal treatment of women and men’;\textsuperscript{33} non-discrimination on the ground of ‘sex’;\textsuperscript{34} but there is no mention of ‘gender’. Notwithstanding this absence, it remains helpful to distinguish between ‘sex’, as the biological differences between women and men, and ‘gender’, as the socially-constructed differences in the roles, expectations and behaviour assigned to women and men.\textsuperscript{35} Although the Constitution omits any express reference to gender, this cannot be taken as a conclusive indicator that its provisions are limited to a narrow concept of sex.

The existing case-law of the Court of Justice sends rather mixed signals on the scope of ‘sex’ discrimination. Evidence of an attention to discrimination based on gender can be found in the application of the principle of indirect discrimination. In particular, this has been deployed to combat disadvantage experienced by women

\textsuperscript{30} Para. 40.
\textsuperscript{32} Articles I-2 and I-3(3).
\textsuperscript{33} Articles II-14(3).
\textsuperscript{34} Articles I-81(1).
based on different patterns of occupational activity from men. The less favourable treatment of part-time workers is an obvious example in this context. The high representation of women within part-time work undoubtedly reflects gender role pressures on many women to balance work with other family responsibilities. For example, in Badeck, the Court recognised the legitimacy of employers attaching positive value to skills acquired in (unpaid) family work when making assessments of job applicants’ qualifications. At the same time, the Court has erected problematic distinctions between equal treatment in the labour market and employment benefits concerned with the ‘organisation of family life’ (such as access to paid leave after the birth of a child). It treats the latter as outwith the scope of equal treatment legislation, despite the crucial connection to realising gender equality in practice. Similarly, the EU Constitution distinguishes between the ‘right to paid maternity leave and to parental leave’. The implicit reinforcement of the role of women in childcare suggests a thinner concept of gender equality.

Tensions can be found elsewhere in the Court’s negotiation of the boundaries of ‘sex’. On the one hand, the Court has drawn a firm line between sex discrimination and discrimination linked to sexual orientation. On the other, in two cases (P v S and Cornwall County Council and KB), it has confirmed that non-discrimination on the ground of sex includes discrimination related to gender reassignment. In one sense, the latter cases are entirely bound up with narrow conceptions of biological sex. Nonetheless, they fit within the broader idea of gender equality, because the Court is providing protection to individuals who have challenged the supposed stability and incontrovertible nature of biological sex. Although the Court is willing to carve out a niche of protection for those who cross gender boundaries, this appears conditioned by the need for these persons to then fit within the pre-existing categories of ‘man’ and ‘woman’. In KB, the Court affirms that ‘it is for the Member States to determine the conditions under which legal recognition is given to the change of gender’.

In the negotiation of the EU Constitution, ILGA-Europe proposed the inclusion of ‘gender identity’ as a ground of prohibited discrimination. This could have signalled that gender equality is not simply concerned with the consistent treatment of women and men, but that it is also a project to challenge existing norms and stereotypes about appropriate gender roles. This proposal was not, however, adopted in the final text.

(b) The concept of equality

Section 1 has already indicated that the Court’s starting point on equality is a comparative test focusing on the equal treatment of women and men in like situations.

This has been acknowledged by the Court of Justice: Case C-476/99 Lommer [2002] ECR I-2891.
39 Article II-93(2), emphasis added.
40 Case C-249/96 Grant v South-West Trains [1998] ECR I-621.
42 Case C-117/01 KB v NHS Pensions Agency and Secretary of State for Health, judgment of 7 January 2004.
43 Para. 35.
This concept, frequently referred to as formal equality, is based on a symmetrical view of discrimination as something that may occur equally against men or women. In this respect, it is somewhat divorced from the social context that impelled the development of equality rights. Discrimination is not simply the random occurrence of unfair treatment, but the patterns of disadvantage faced by groups of people, in this instance, women. Whilst anti-discrimination legislation has certainly helped individual women litigants, it has proven less effective in securing full equality for women as a group. Therefore, significant gender disparities remain, not least in the area of pay. Shifting the emphasis towards combating disadvantage and structural inequalities is often labelled substantive equality. Unlike the formal equality concept, substantive equality is willing to depart from equal treatment in individual cases in order to break cycles of disadvantage and with a view to achieving equality between groups. The clearest endorsement of this concept is found in Article III-214(4), which provides legal protection for positive action in order to reach 'full equality in practice between women and men'. Article II-83 also provides a general statement that 'the principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex.' Nevertheless, these provisions are tentative and slightly muddled. Article III-214(4) portrays positive action as a necessary element of achieving equality, whereas Article II-83 is constructed as a derogation from the equality concept.

Most of the existing debate around substantive equality, positive action and EU law has concerned the labour market, reflecting the material scope of EU equality Directives as well as the pattern of case-law. In contrast, the broader canvas of the Constitution draws attention to gender equality in all activities. One of the core functions of the Constitution is to establish the ground rules that govern the institutions of the Union. Indeed, the European Council argued that a key reason for initiating the Convention on the Future of Europe was the need to tackle the disconnection of the Union’s citizens from its political apparatus. Consequently, the Constitution seems an appropriate site in which to address the equal participation of women and men in decision-making, especially with regard to their participation in the Union’s institutions. The Convention that produced the draft Constitution provided a poor example; only 17 per cent of full members were women. It made the very cautious suggestion that in nominating a Commissioner, each Member State should be obliged to submit three names, containing members of both sexes, from which the Commission President would then choose. Even this soft form of positive

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51 See further in this collection Mercedes Mateo Diaz.
action ultimately proved unpalatable to the Member States and it was removed from the final text of the Constitution.

The constitutional concept of gender equality remains based on a traditional core of equal treatment irrespective of sex. There are, admittedly, some departures from this concept. Space exists for (limited) positive action and the Court has indicated its willingness to consider sex as gender on occasions. Nevertheless, the text of the EU Constitution remains rather timid. The opportunity for fresh thinking and a clearer objective of substantive equality has not been taken.

3. The constitution and the gender equality policy frame

The Constitution does not only provide a guide to the concept of gender equality, but it also locates gender equality within the broader legal and political order. It situates gender equality in relation to other equality claims and provides an indication of how gender equality fits within the overall framework of public policy. Naturally, constitutional texts can have a varying impact on the content of policy. It may be that the constitution merely constrains policy choices insofar as it lays down basic rights and freedoms that should not be infringed. Yet, constitutions can also provide an orientation for the direction of policy; they are part of the policy ‘frame’. Bleich defines a frame as ‘a set of cognitive and moral maps that orient an actor within a policy sphere’. It encompasses the underlying norms, beliefs and assumptions that govern a particular policy domain. It constructs the perceived boundaries to the configuration of the issue and gives direction for making policy choices. The argument is not that a mere statement in the Constitution dictates the policy agenda, but it forms an important contribution to the construction of the policy frame.

The EU Constitution is a relatively rich document when considering its role in building policy frames. On the one hand, it contains broad statements of global policy direction, such as the Union’s ‘values’ and its ‘objectives’. On the other, it provides more detailed prescription of specific policy goals, mostly in the context of Part III, which is heavily drawn from the existing EC Treaty. Two aspects can be highlighted when considering how the Constitution imagines gender equality: policy boundaries and integrating gender.

(a) Policy boundaries

A central feminist critique of law, including constitutional law, relates to the distinction between public and private spheres. Although presented as supposedly neutral, such boundaries tend to be inherently gendered in nature. EU law frequently deploys the requirement for legal competence as a filtering mechanism through which issues are excluded from the policy agenda. This is presented as a neutral and objective yardstick, yet, on closer inspection, the varying interpretations that can be attached to the Treaty provisions reveal considerable space for political

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55 Lacey (above n 45) 30.
EU gender equality law has been characterised by its preoccupation with labour market participation. Article 13 EC opened the door to a broader range of interventions, but the only proposal on gender equality to date relates to the provision of goods and services. This stays firmly within the market participation paradigm and misses the opportunity to address key social policy areas such as education.

The European Women’s Lobby argued for the Constitution to signal a clear departure from the market-driven nature of the existing gender equality policy frame. In particular, they proposed that a part of the Constitution be dedicated to establishing the parameters of a comprehensive gender equality policy, covering issues such as violence against women and women’s access to reproductive healthcare. The Constitution does set the Union an open-ended objective of promoting ‘equality between women and men’. This is complemented by some innovation within the substantive policy provisions in Part III. Article III-271(1) provides a competence to adopt European framework laws on the definition and sanctions for serious crimes, including ‘sexual exploitation of women’. In addition, a Declaration attached to the Constitution states: ‘in its general efforts to eliminate inequalities between women and men, the Union will aim in its different policies to combat all kinds of domestic violence’.

Overall, the Constitution leaves a malleable framework within which a more diversified and comprehensive gender equality policy could be elaborated. It falls short, though, of providing a firm lead in this direction. Transforming the perceived boundaries of gender equality policy may rest more on the political will of key actors.

(b) Integrating gender

Looking beyond the specific content and direction of gender equality policy, the Constitution also addresses the interface with competing policy priorities. Individual policy frames indicate how choices are made based on a pre-existing map of beliefs and expectations. In part, this will concern the relevance of different factors to decision-making. Therefore, if the key actors in, for example, transport policy, do not perceive gender to be relevant to their domain, then the differential impact of policy choices on women and men will not enter into consideration. Experience has confirmed that achieving gender equality demands attention to gender throughout all policies. Transport decision-makers may perceive the design of buses to be a purely ‘technical’ matter, but this overlooks accessibility issues for people (often women) accompanied by young children in pushchairs, as well as those using wheelchairs.

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59 See further in this collection Annick Masselot.
61 Article I-3(3).
62 See further in this collection Heli Askola.
63 Declaration on Article III-116, Declarations to be annexed to the Final Act of the Intergovernmental Conference and the Final Act, CIG 87/04 ADD 2, 6 August 2004.
The integration of gender into all aspects of the policy-making process is normally referred to as mainstreaming. Part III of the Constitution contains a clear mandate for gender mainstreaming: ‘in all the activities referred to in this Part, the Union shall aim to eliminate inequalities, and to promote equality, between women and men’. The importance of such a provision lies in its capacity to legitimise the relevance of gender throughout all policy frames. Indeed, there is a constitutional duty on the Union to ensure that all policies are mobilised to promote gender equality. Having a strong legal obligation for gender mainstreaming may assist in countering resistance from other policy-makers, as well as defending mainstreaming from subsequent shifts in political commitment. Despite these advantages to the constitutional duty, there are various aspects that suggest caution.

The first point to note is that this provision is simply a replica of the existing Article 3(2) EC. Whilst that has underpinned gender mainstreaming within the EU institutions, it has not been sufficient to ensure its full effectiveness. The most notable gap in the constitutional duty is the lack of process for its implementation. Mazey suggests gender mainstreaming is ‘arguably a deceptively simple concept that is likely to be extremely difficult to operationalize’. This seems to be confirmed by early experience with gender mainstreaming in the EU institutions. The Commission established a number of interdepartmental processes through which mainstreaming is implemented; yet the results appear patchy. The Constitution presented an opportunity to move beyond a generalised commitment and to flesh out the further consequences of mainstreaming for the EU institutions. Such detailed specifications might be inappropriate in the context of a succinct constitutional text, but this objection carries less weight given the already long and unwieldy nature of the EU Constitution. In other areas, such as subsidiarity or the role of national parliaments, Protocols have been attached to the Constitution elaborating on the arrangements for implementation. An interesting comparative example can be found in the Northern Ireland Act 1998, which established the system of devolved government for Northern Ireland. This placed a duty on public authorities to have ‘due regard’ for equality of opportunity on a range of grounds, including between women and men. This general duty was accompanied by a Schedule to the Act that prescribed in further detail the obligations that this entailed. Notably, public authorities were required to prepare ‘equality schemes’ that set out their arrangements for implementing the mainstreaming duty.

Although the Constitution refrains from any enhancement of the gender mainstreaming duty, it contains an expanded list of similar obligations. Article III-118 states:

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65 See further in this collection Ulrike Leibert and Fiona Beveridge.
66 Article III-116.
68 Mazey (above n 64) 343.
70 Section 75.
In defining and implementing the policies and activities referred to in this Part, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

This effectively extends mainstreaming to include all the Article 13 EC grounds, albeit in terms of combating discrimination rather than promoting equality. Beyond equality mainstreaming, there is a range of other areas where mainstreaming duties can be found: environmental protection, consumer protection, animal welfare, cultural diversity and health protection. Moreover, there is a new, omnibus duty to take into account in all policies ‘the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health’. There are undoubtedly good reasons to support the integration of all of these diverse objectives throughout the policy-making process. The logic that underpins gender mainstreaming can be easily transposed to other issues. To continue with the earlier example, the design of buses will also be relevant to environmental protection. In fact, the origins of gender mainstreaming are at least partially derived from the experience of mainstreaming other policy objectives, such as environmental protection or the promotion of small businesses. The risk for gender mainstreaming is that the proliferation of such duties will dilute effectiveness. Policy-makers may feel submerged amongst these different duties and there is no obvious path for the resolution of conflicts between mainstreaming duties; for example, if a bus with accessible design is less fuel-efficient. Clearly, such challenges cannot be fully resolved within the text of the Constitution. The final document reminds policy-makers of the complexity of decision-making and the myriad of interweaving interests that need to be juggled. The ultimate value of the mainstreaming duties will depend heavily on their future implementation.

4. Constitutionalised or marginalised? Gender and the EU Constitution

In assessing the contribution of the Constitution to gender equality, a number of broad observations can be made. The explicit inclusion of equality between women and men in both the values and objectives of the Union offers a valuable starting point. As high-level symbolic statements, these provisions legitimise both the centrality of gender equality within EU social policy and also the role for a specific gender equality policy that remains distinct from anti-discrimination. This is not a radical departure from the current situation; on the contrary, it tends to confirm the point at which the Union has already arrived.

It is more doubtful if the Constitution marks a significant new departure for gender equality. The impact of existing EU law and policy has been frustrated at times by a limited conceptual framework in terms of the definition of discrimination, the vision of equality and the understanding of gender. There is little in the Constitution that promises any rethinking in these areas. Moreover, the Constitution

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72 Article III-119.
73 Article III-120.
74 Article III-121.
75 Article III-280(4).
76 Article III-278(1).
77 Article III-117.
remains hesitant on the scope of gender equality. The mainstreaming duty and the new references to women in the area of criminal law provide a tentative indication that the role for the Union in gender equality goes beyond market participation. Nevertheless, the Constitution provided a rare opportunity to recast the gender equality policy frame. The failure to address the (un)equal participation of women and men in decision-making is a serious omission.

Given the above conclusions, it may be that the Constitution will have only a moderate impact on the content and direction of gender equality policy. In many respects, it codifies and consolidates what already exists; for example, the right to non-discrimination within the scope of EU law. Consequently, the mainstreaming duty perhaps holds the greatest promise for constructing a comprehensive strategy for gender equality. The constitutionalisation of gender mainstreaming provides a space to re-invigorate and re-imagine the principle of gender equality.