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The Women's lawyer: Éliane Vogel Polsky and the Defrenne cases*

Contents: **1.** Introduction. **2.**The years of training: between legal profession and scientific research. **3.** Alongside working women: the Herstal strike. **4.** The beginning of the Defrenne saga. **5.** *Defrenne vs Sabena*: a success for female workers. **5.1.** Written procedure. **5.2.** Oral proceedings. **5.3.** The judgment.

1. *Introduction*

The history of women who have made the EU lives, years later, the same delays that in the Italian historiography marked the story of the "mothers of the Republic"[1]. Except for the book by Maria Pia Di Nonno, the merit and commitment of women who were active in foundation of the Union and the pillars of Community law are still hidden in the shadows and to be discovered[2]. Also in the international bibliography, only recently have been published studies, biographies and catalogues of exhibitions dedicated to the pioneers of the UE. It is also remarkable that the "Council of

* The paper presents the results of a research undertaken at the PRIN 2022 project "Rediscovering European Integration Through Legal Storytelling", coordinated by Prof. Amedeo Arena of the University of Naples Federico II, in collaboration with the University of Rome La Sapienza and the University of Turin. The work published here in English is part of a larger essay in Italian for the proceedings of the project, currently being published.

[1] Rossi Doria, *Diventare cittadine. Il voto delle donne in Italia*, Giunti, 1996; Fondazione Nilde Iotti, *L'Italia delle donne. Settant'anni di lotte e di conquiste*, Donzelli, 2018; Pezzini, Lorenzetti (eds.), *70 anni dopo tra uguaglianza e differenza. Una riflessione sull'impatto del genere nella Costituzione e nel costituzionalismo*, Giappichelli, 2019; D'Amico, *Una parità ambigua*, Raffaello Cortina Editore, 2020.

[2] Di Nonno (ed.), *Le Madri Fondatrici dell'Europa*, Edizioni Nuova Cultura, 2017.

Europe in brief" site devotes a page only to the founding fathers of the Union[3]!

Despite the remarkable progress made in scientific research thanks to the feminist revolution and the impact of *Gender Studies*[4], female ignorance remains in the historical field legal, conditioning knowledge of the institutions and regulatory systems that govern our time[5]. Yet, it is enough to recall a few names to realize that the history of contemporary Europe, its political-administrative organization, Community law cannot do without the contribution of some female figures who have struggled, in often adverse times, for the continent's pro-European and pacifist project. Louise Weiss, Ada Rossi, Maria De Unterrichter, Ursula Hirshmann, Éliane Vogel-Polsky, Jacqueline Nonon, Fausta Deshorme La Valle, Simone Veil Jacob, Sophie Scholl, Sofia Corradi are some women who, in a different way, believed and worked for a united Europe that was, mainly, a common space of sharing and memory of a cultural and intellectual heritage that has oriented the world, raising a barrier against the ever-latent threat of nationalism.

The essay I am presenting was born with the intention of giving voice and visibility back to a protagonist of Community policies on gender equality and social security, that in the European design and in the nascent law of the European Union identified the possible scope for the redemption of women's rights.

2. *The years of training: between legal profession and scientific research*

The name of Éliane Vogel Polsky, in the few available texts[6], is associated with a judicial affair, brought to the attention of the European Court of Justice between 1971 and 1978, with three different legal processes. In the lit-

[3] Https://www.coe.int/it/web/about-us/founding-fathers.

[4] Ago *et al.*, *Sguardi femministi sulla storiografia*, in *Genesis*, XXIII/1, 2024.

[5] Burke, *Ignoranza. Una storia globale*, Raffaello Cortina Editore, 2023.

[6] Gubin, *Éliane Vogel-Polsky. Une femme de conviction*, Institut pour l'égalité des femmes et des hommes, 2007; Irigoien Domínguez, *Éliane Vogel-Polsky: advocate for a social Europe: from antidiscrimination law to Europea politics for gender equality*, Research Papers in Law, 1/2022, Department of European Legal Studies, College of Europe. Tas, *The Court of Justice in the Archives Project. Analysis of the Defrenne II case (43/75)*, Europea University Institute, 2021.

erature we talk about the "Defrenne saga", just to highlight the particularity and uniqueness of the court case.

It all began on 16 February 1968, when a hostess of the Belgian airline Sabena, Gabrielle Defrenne, terminated her employment for having reached the age limit. At the time, the hostess was just 40 years old, but for the art. 5 of the national employment contract for flight crew, which came into force in 1956, women were obliged to retire at the age of 40.

Discrimination between women and men in cabin crew was evident, both regarding retirement age and pension benefits.

The men in the company could continue to work until they reached 55 years of age and enjoy different pension and survivors' benefits, as laid down by the Royal Decree of 3 November 1969 on the right to pension for aircraft crew and special arrangements for the application of the previous Royal Decree of 24 October 1967 on retirement pensions and workers' survivors' pensions[7]. In this respect, art. 1 of the Decree of November 1969 expressly excluded hostesses from the category of addressees. Therefore, female flight crew – for example – were not entitled to an additional pension allowance for those who had reached 23 years of service.

Faced with unequal treatment, Gabrielle Defrenne decided to take legal action to claim her rights. She will meet Éliane Vogel-Polsky and Marie-Thérèse Cuvelliez on his way.

Both were two well-known female lawyers, with already some years of militancy in the Belgian feminist and socialist associations. Éliane and Marie-Thérèse knew each other from the time of the University. They had attended the law course at the Free University of Brussels (ULB) between 1947 and 1950 and were among the very few female students to complete legal studies, which still constituted in the mid-twentieth century a predominantly male prerogative.

With Marie-Thérèse and Odette De Wynter (who will be the first woman to become a notary in Belgium), Éliane builds an extraordinary relationship of friendship and sharing of political, civil and legal passion that will last for years.

With Marie-Thérèse, Éliane takes her first steps into the world of legal

[7] *Arrêté royale determinant pour le prsonnel navigant de l'aviation civile les règles spéciales pour l'ouverture du droit à la pension et les modalités spéciales d'application de l'arrêté royale n. 50 du 24 octobre 1967 relatif à la pension de retraite et de survie des travaileurs salariéa*, in *Moniteur Belge*, no. 238, pp. 11903-11911.

profession. During the three-year traineeship to become a lawyer, the two friends will collaborate with the *Journal des Tribunaux*, for which they will write with a certain regularity, even choosing provocatively a language that declined feminine some "heavy" nouns: for the first time a legal journal will talk about female magistrate and judge.

As a keen reader of Simone de Beauvoir, Éliane spreads her ideas in the forums she takes part in, frequently organized by youth groups.

In 1952, with the inseparable Marie-Thérèse, she decided to challenge the sexism of the Belgian lawyer by presenting herself for the Janson prize, reserved for young lawyers who distinguished themselves for their legal eloquence. Against all odds, Éliane wins the challenge and is acclaimed by the *Journal des Tribunaux* for her oratory skills, talent and elegance.

Éliane will always accompany the exercise of the profession to scientific commitment.

In 1958 he obtained a licence in Labour Law and Sociology at the Brussels Institute of Labour, created to deepen his knowledge of the social and legal problems of post-industrial society. This will be a decisive experience for the future of Vogel-Polsky, who will meet Léon Troclet, a socialist deputy, expert in labour law and workers' conditions, in the classrooms of the Institute. Troclet, who had been appointed to the European Parliament in 1961, transferred two great passions to Éliane: attention to social issues and confidence in a united Europe.

With Troclet, Éliane spent many years studying and researching at the National Centre for the Sociology of Social Law, an independent scientific institution which she herself chaired from 1972. The main aim of the Centre was to draw up proposals for legislation which would focus on the weaker categories of workers, such as women, disabled people, young people and immigrants. Between 1978 and 1983, Cuvelliez will also work at the Centre and study new subjects.

Éliane's scientific career will then be completed by her enrolment at the Institute for European Studies, which was officially opened in February 1964 and from which she obtained a special licence in European studies in 1965.

Within a few years, the fields of interest of Vogel-Polsky are defined, ranging from international social law to comparative and community social law. With this wealth of experience and technical and legal knowledge, Éliane began her academic career at the ULB's Faculty of Law in 1969, taking on

the teaching of international and european social law, and then comparative social law and comparative social history.

The very high competence in labour and social law issues will be at the origin of numerous professional assignments, by the International Labour Organization, the Commission of the European Community and the Council of Europe.

3. *Alongside working women: the Herstal strike*

At the end of the 1960s, two important events marked the professional and intellectual future of Vogel-Polsky. In 1966 she sided with the workers on the great strike at the National Arms Factory in Herstal. In 1968, at the height of student protest, she began to take part in women's liberation movements and to direct her interests towards feminist demands and gender-based social relations.

From now on, Éliane's attention will increasingly be drawn to the issues of women's working conditions and wages, with a comparative and European approach. The theme of gender discrimination will be introduced in her university courses, where she will explore the legal and social aspects of economic equal treatment.

The interdependence of international conventions and the ratification of agreements by different international organisations will also be a priority in her scientific studies. It is precisely the study of these issues that will guide her work on fundamental social and economic rights and inspire the commitment to advocacy.

The great event that marked a turning point in Vogel-Polsky's career was the strike of *women-machines* employed in the National Arms Factory of Herstal[8]. The company had about 13,000 workers, including 3,500 women. Some 2000 women were employed on machines and performed alienating work in precarious, dangerous and unhealthy conditions. The women-machines were underpaid and had no career or training opportunities.

Despite the demands of the trade union assemblies for a new collective agreement for 1966-68, the National Factory did not intend to give in to the change in the conditions of its workers before a new national agreement.

[8] COENEN, *La grève des femmes de la F.N. en 1966. une première en Europe*, POL-HIS, 1991.

On 16 February 1966 a long strike began, involving more than 5,000 male workers. The biggest blow to the factory was the interruption of work by the women-machines, which paralysed the whole company. The initiative provoked heated reactions but did not change the determination of the workers. On the contrary, the unrest soon spread to other Belgian industrial complexes and lasted until 10 May 1966. The strike received the support of feminist associations, which call for the application of art. 119 of the Treaty of Rome establishing the European Community.

The text – as is known – provided that the signatory states of the Treaty would undertake to implement in the first phase (which was to end on 31 December 1961) the principle of equal pay for workers of both sexes who had performed the same type of work and that in future national legislation would maintain equal pay. Although the rule was inspired by economic interests linked to industrial production, a social project of the future European Community could be seen in between. Éliane was immediately aware of this, and when she heard the news of the strike on television and radio, she immediately went to Herstal to support the protest.

The events provoked a new awareness among European intellectuals[9]. In Brussels, the socialist left set up a committee to support agitated workers – of which Vogel-Polsky and Cuvelliez were also members – which launched a petition to the Belgian labour minister for the application of art. 119 of the Treaty of Rome.

Belgium, in fact, had ratified the European Charter in 1958 but had not acted on the provision of art. 119, since it was considered merely a programmatic rule which did not confer any subjective right. Under national legislation, only the social partners involved in joint committees and collective agreements were allowed to intervene on the question of wages.

The principle of equal pay continued to be ignored in Belgium, regardless of the pressures of feminist movements and the protests of socialist parliamentarians.

At the end of 1961, even though the European Commission had set July 1960 as the deadline for the Member States to comply with the provisions of the Treaty, the implementation of equal pay was still to be achieved in many countries on the continent. It became necessary to convene urgently a con-

[9] Minesso, *Welfare donne e giovani in Italia e in Europa nei secoli XIX-XX*, Franco Angeli, 2015.

ference of the member states to extend the adaptation to the principles of the Treaty until 31 December 1964, with a procedure that violated the content of art. 236 of the Charter itself and which provoked conflicting reactions in doctrine. Among the most severe critics of the political operation was Vogel-Polsky who, from that time on, never ceased to insist on the direct applicability of the rule of art. 119 in the signatory States. However, her voice was almost isolated in the national context. Éliane was aware of this and was looking for a more effective strategy to draw attention to the legal issue. An exemplary legal case could be the right solution to mark a significant turning point.

This is an idea that is particularly strengthened by the day after the end of the Herstal strike, which marked a partial victory for the workers: They obtained only half of the required wage increase and the establishment of a commission to study equal pay and the valorisation of women's work.

In the meantime, the Herstal Women's Support Committee, called "Equal Pay for Equal Work", will continue to fight for effective equal pay, bringing cases of violation of workers' equality to the attention of the courts. Pressed by events, the Belgian government had launched on 24 October 1967 the Royal Decree n. 40 on women's work, which art. 14 recognized the right of women workers to equal pay and the possibility of taking legal action in case of violation of the principle. It is interesting the reference that the Decree makes to the provision of art. 119 of the Treaty of Rome. It is in fact clarified that the equal pay fixed by the Decree is not a consequence of the direct applicability of the rules of the European Charter, nor did it suggest an interpretation of the provision. On the contrary, it emphasizes the need for a uniform reading, valid for all the signatory States of the Treaty and that in rigor of art. 164 only the European Court of Justice could render. The Court was in fact the supreme legal authority of the Community, whose function was to ensure respect for the law in the interpretation and application of the Treaties[10].

An important part of the Court's work concerned the subject of references for preliminary rulings by national courts, whenever there was a controversial question on the interpretation of Community provisions which might affect the decision in the case. In such circumstances, the proceedings had to be suspended pending the decision of the Court of Justice, whose judgments were binding on all Member States and their national courts.

[10] *Arrêté royale n. 40 sur le travail des femmes*, in *Moniteur Belge*, no. 238, pp. 11189-11199.

The centrality of the Court of Justice in the demand for equal pay is a fact that does not escape Vogel-Polsky, for which it is more than ever necessary to seek cases to be dealt with in the courts in order to refer the matter to the Community jurisdiction. It is an appropriate but not easy transition, because it clashes with a certain reluctance on the part of the victims of wage inequality, intimidated by the possible consequences and the general climate of mistrust and suspicion towards women's claims. In fact, despite attending the trade union meetings of workers and women's associations, Vogel-Polsky is unable to find any significant case to bring to trial.

4. *The beginning of the Defrenne saga*

The great opportunity comes with the story of Gabrielle Defrenne.

The defensive line of the first legal action taken by the hostess was to obtain the annulment by the Council of State of the Royal Decree of 3 November 1969, because it was discriminatory in that it laid down special rules on the right to pension from which female airline cabin crew were excluded[11].

Marie-Thérèse Cuvelliez, who signs the defence for Gabrielle Defrenne, invokes the violation of art. 119 of the Treaty of Rome and requests that the national court first refer the matter to the Court of Justice, because of differences in interpretation on the above-mentioned provision. The point at issue concerned the nature of the pension, whether it could be regarded as equal to salary and therefore subject to the obligation laid down in art. 119 of the European Treaty. The defence argued for equality, arguing that the pension allowance was a contribution paid directly to the worker for the work performed. On the contrary, the Belgian government insisted on the political nature of the right to pension, and therefore on the difference in function with respect to remuneration and consequently on the exclusion from the scope of art. 119.

If we read the Cuvelliez's brief carefully, the most interesting passage in the defence is that concerning the interpretation to be given to the expression equal pay, to which the Community provision refers. The Court is asked

[11] Historical Archives of the Europea Union - Court of Justice of European Union (henceforth HAEU-CJEU)-1215, *Dossier de procédure original: affaire 80/70, Gabrielle Defrenne/Belgique.*

to clarify whether that wording refers in general terms to equal treatment of workers of both sexes. In support of this reading, the lawyer Cuvelliez attached a memoir by Éliane Vogel-Polsky which demonstrated how art. 119 should be read in the sense of equal working conditions between women and men engaged in the same type of activity[12].

Vogel-Polsky's opinion focuses on the ambivalence of rights and obligations arising from the principle referred to above[13]. Art. 119 set out a social right but with an obvious economic aim. The author pointed out that its inclusion had been strongly desired by France, to prevent industrial competition from the Member States and a situation of unequal treatment of workers, which would have hindered their free movement.

Many of the comments were based on a letter sent to the Member States by the President of the European Commission on 28 July 1960, which not only clarified the dual social and economic nature of the principle of equality, but also asked for information on the way in which the Member States or the social partners responsible for wages had given effect to the Community provision[14]. For Éliane this document is valuable, because it clarifies the reading provided by the Commission to art. 119, expressly recognizing that equal pay is first and foremost the expression of a right of a social nature which guarantees all women workers in the Community and imposes obligations necessary for the common social policy. The Treaty of Rome imposed itself on the signatories not only in the economic, fiscal and customs fields but also in four other areas of social importance: the free movement of workers, the European Social Fund, vocational training policy and Articles 119 and 120 of the Treaty.

Another important topic of the paper is the content and limits of equal pay. Drawing on its international and comparative law expertise, Vogel-Polsky used excerpts from the UN Covenant and the Declaration on the Elimination of Discrimination against Women to argue for a reading of the concept of pay that was not limited to wages alone, but more broadly all conditions of treatment of workers (such as occupational safety and health, maternity,

[12] HAEU-CJUE-1215, *Dossier de procédure original: affaire 80/70, Gabrielle Defrenne/Belgique*, paper 15, *Memoires pour Melle Gabrielle Defrenne*, p. 4.

[13] HAEU-CJUE-1215, *Dossier de procédure original: affaire 80/70, Gabrielle Defrenne/Belgique*, annex to n. 15, *Consultation*.

[14] The letter is attached to the memorandum signed by the legal adviser of the European Commission, paper 17.

vocational training, the dignity of the worker). It is significant that she states, with a provocative note, that wage equality, taken in isolation, does not exist, it is a myth! There can be no reading other than that which alludes to equal treatment in employment[15].

The move to extend the stipulation of art. 119 to the right to a pension is the consequence of the overall reasoning. The old-age pension is a part of the salary paid to an employee, which includes all sums paid because of the employment contract. More precisely, the right to a pension constitutes that social wage which is not dependent on economic, cultural, sociological and technical factors linked to the way in which direct wages are fixed, and for this reason must be subject to the principle of equal pay.

The argumentative efforts of Vogel-Polsky and Cuvelliez will not be enough to convince the European Commission, which will clarify its position in the brief filed by legal adviser Italo Telchini, by which it will reject the argument of retirement pension as an indirect benefit for the worker and the extension of the principle of equal pay to the regulations on the pensionable age of civil aviation personnel.

The final decision of the Court of Justice will declare the legal defence of Gabrielle Defrenne unsuccessful[16]. The judges will accept the arguments of the Commission and the Belgian government, excluding the equating of social security benefits with pay. The literal formulation of art. 119 of the Treaty of Rome did not permit the rule to be extended to social security schemes and benefits directly governed by law, outside any concertation. These schemes grant rights to workers not so much based on the employment relationship as based on social policy considerations. The employers' contribution to the financing of these schemes could therefore not be considered as a direct or indirect payment of a benefit. The old-age pension, in conclusion, as a social benefit could not be understood as an advantage paid to the worker and remained foreign to the provision of art. 119.

[15] HAEU-CJUE-1215, *Dossier de procédure original: affaire 80/70, Gabrielle Defrenne/Belgique*, annex to n. 15, Consultation, p. 9 ff.

[16] The judgment of the Court of 25 may 1971, https://e-justice.europa.eu/ecli/-ECLI:EU:C:1971:55.

5. Defrenne vs Sabena*: a success for female workers*

The disappointment and bitterness over the outcome of the first proceeding will not discourage neither Gabrielle Defrenne nor her lawyers, Vogel-Polsky and Cuveillez, who will continue the legal action taken also against the Sabena Flight Company, for wage discrimination and compensation for loss resulting from the termination of employment.

Almost five years have passed since the Court's ruling, but the climate in Europe is changing profoundly. Strikes for equal pay have resumed and the feminist movement has regained momentum[17]. The Conference of Heads of State and Government of the European Community was held in Paris on 19-20 September 1972, setting out new guidelines for Community policy and integration. In 1974, almost confirming the changed outlook in the Community, the European Council adopted the resolution of 21 January on the social action programme which, in several passages, stresses the need to improve the free movement of workers, social security and measures to equalise the treatment of workers in general, including migrants[18].

In the wake of the new commitments made by Europe, important directives are introduced by the Commission which concern women's work: Directive 75/117 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women[19]; the subsequent Directive 76/207 on the implementation of the principle of equal treatment for men and women and concerning access to employment, training and promotion as well as working conditions[20]; finally, Directive 79/7 on the implementation of the principle of equal treatment for men and women in matters of social security[21].

In a politically and ideologically more favourable context for change, the second chapter of the Defrenne saga is inserted, which will become one of the most important cases in the history of the formation of Community law.

The judicial affair, which enabled the Court of Justice to play an active

[17] Facchi, Giolo, *Una storia dei diritti delle donne*, Il Mulino, 2023.
[18] Https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:31974Y0212(01).
[19] Http://data.europa.eu/eli/dir/1975/117/oj.
[20] Http://data.europa.eu/eli/dir/1976/207/oj.
[21] Http://data.europa.eu/eli/dir/1979/7/oj.

role in launching the Community's social project, crystallised the principle of equal pay for men and women, and established the criterion of direct horizontal effect of certain provisions of Union law.

The court case arrived at the Court of Justice after a preliminary passage before the courts of Belgium. Defrenne's legal strategy had changed completely since the previous experience, which ended in 1971. On this occasion, Gabrielle Defrenne sued her employer, the Sabena Company, for wage discrimination and for the losses she had suffered because of compulsory retirement, which had affected her career.

Access to the voluminous *dossier de procédure* offers the scholar a very rich archive, useful for the history of legal thought, the language of European law, for the theory of Community law and for a better understanding of the comparative approach to legal experiences, which is the common trait of all actors in Defrenne II.

The *dossier* is divided into two "bundles", for the written procedure[22] and for the oral procedure[23], and consists in both cases of a very large number of documents (in total there are about 1100 cards), as proof of the interest and relevance of the questions on which the Court was called upon to rule.

But we follow the narrative of the dossier.

Assisted by Marie-Thérès Cuvelliez, Gabrielle Defrenne, after the dismissal of the claim for compensation for wage discrimination and violation of the Treaty of Rome by the Labour Court of Brussels, she appealed to the Labour Court, which acknowledged the merits of the application in that it raised the question of "self-executing" of Art. 119 of the European Charter, that is to say if the principle had become directly applicable in the signatory states of the agreement. On 23 April 1975, the national court ordered a stay of judgment and a reference to the European Court for a preliminary ruling so that it could rule on the two critical points: whether article 119 directly introduces the principle of equal pay for male and female workers performing the same work, as well as the same right to bring legal proceedings before national courts in order to obtain compliance with the principle, and, where appropriate, from what date; secondly, whether art. 119 had become applicable in the Member States on the basis of acts adopted by the European Community (in which case, from what

[22] HAEU-CJUE-1696, *Dossier de procédure original 1: affaire 43/75.*
[23] HAEU-CJUE-1697, *Dossier de procédure original 2: affaire 43/75.*

date) or if there was exclusive competence of the national legislator in this respect.

On 2 May 1975, the application was entered in the Court's register under reference number 43/75. In the following days followed communications pursuant to art. 20 of the Statute of the Court, which provides for information to be given to interested parties, the European Commission, the Council and the Member States for the purpose of sending written observations on the preliminary ruling.

On 6 May, the President of the Court, Robert Lecourt, appointed Pierre Pescatore as Judge-Rapporteur and Henri Mayras as Advocate General. On 12 May, the Registry of the Court then informs the lawyer Cuvelliez of the entry in the register of the judgment Defrenne vs Sabena.

Here the first curiosity is born.

In the literature, the case Defrenne vs Sabena is presented as the masterpiece of Éliane Vogel-Polsky! Yet, in no document of the whole procedure does her name appear. One can only speculate on the reason for this "apparent" absence, which could be justified by the intense collaboration with the Commission, the Council of Europe and the Belgian government on major labour issues. There is no doubt, however, that the ideas of Vogel-Polsky constitute the technical basis of Cuvelliez's arguments in the defense of Defrenne.

The other surprise in the judicial affair is the replacement during the trial, and before the oral hearing, of the Advocate-General, an appointment that is assigned to Alberto Trabucchi.

5.1. *Written procedure*

During the written procedure, four parties submitted remarks: the defence of Defrenne, the European Commission and the governments of England and Ireland. On the fact that only these two States have addressed observations, the literature puts forward a hypothesis[24]. The Defrenne II case came to the attention of the Court three years after the two states joined the European Community. A possible pronouncement of retroactivity of the principle of equality referred to in art. 119 would have had serious economic consequences, especially in countries where the employment and exploita-

[24] Tas, *cit.*, pp. 6-7.

tion of female labour was important. Both the British and Irish governments considered that art. 119 was not directly effective for the Member States, albeit with partially different arguments.

The British government invoked the *criteria* developed by the Court itself, according to which the directly applicable provision must impose a clear and precise obligation, without limitations that would make it necessary for the implementation of the principle by the Member States. Art. 119 of the Treaty gave rise to many uncertainties about the use of expressions such as *salary* or *equal work*, to the point that it had been necessary to include in art. 1 of Directive 75/117 the expression *the principle of equal pay between men and women outlined in art. 119*, for clarity. Also to highlight the generic formulation of the rule of the Treaty, the British government recalled the previous case Defrenne, which was born from the request of the Belgian Council of State to have a unique interpretation of art. 119 and its extension to pensions and social security benefits. The attribution of direct effect to art. 119 could have created many problems of confusion and uncertainty in national law and between it and the Community law. But since it was the task of the Member States to achieve the EU's objectives, governments had an obligation to do so through national legislation. Whether a provision whose wording is doubtful and uncertain were to be made effective immediately, conflicts with the rules of national law would inevitably arise.

Even more frightening are the practical and economic consequences of the direct effect of the Treaty provision on the status of workers in the Member States. In England the principle of equal pay was enshrined in the 1970 Equal Pay Act (annexed to the observations), which became fully effective on 29 December 1975. The law provided that employers, both public and private, would receive funding until the end of 1975 to eliminate wage discrimination, in accordance with a timetable consistent with the deadlines of Directive 75/117. If the provision of art. 119 had been retroactive for the United Kingdom, this would have led to confusion and the adjustments could have resulted in an increase in labour costs. Many employers would be at risk, the creditworthiness of many companies would fail and rising labour costs would drive inflation. However, in the event that the Court would have wanted to recognise the direct effect of art. 119, the British Government's wish was that this should be limited to relations between individuals and Member States, based on the reasoning

that States are directly obliged to implement the principle of equal pay. If they failed, they would have been responsible to the citizens for their inaction.

The Irish Government also took a similar position, stating that art. 119 of the Treaty imposed an obligation solely on the States, which were responsible for removing obstacles and restrictions to the free movement of workers. The implementation of obligations could justify measures under national law which also affected legal relations between private individuals, but the binding nature of the Community provision did not affect citizens. Art. 119, in contrast to other provisions of the Treaty of Rome which were deemed directly applicable, formulated a social objective that the Member States had to implement in the interest of only one category of citizens, namely women workers. Based on these arguments, the conclusion was the exclusion of the direct effect of art. 119 and the recall of Directive 75/117, which required Member States to take appropriate measures to eliminate discrimination between workers within one year of notification thereof.

The position of the European Commission was placed in the middle of the interpretations provided by the defence of Defrenne and the British and Irish governments.

On the one hand, the Commission excluded the direct effect of art. 119 stating that the actual text of the provision referred to a precise date by which the obligations assumed would be implemented, namely 31 December 1961 (the first expiry of the transitional period). Moreover, the resolution adopted by the conference of the Member States on 30 December 1961 extended the initial deadline to 31 December 1964.

For the Commission as well, art. 119 fell into the category of prescriptions not equipped with "self-executing", because it needed clarification by internal rules. However, the Treaty made it incumbent on the signatory States to ensure that equal pay was implemented by the end of 1964 and then to prevent forms of pay discrimination. In summary, for the Commission it was necessary to distinguish between the vertical and horizontal effectiveness of the provision of art. 119: in fact, if the immediate applicability to relations between private individuals, with reference to relations between States and citizens, was to be ruled out, after the expiry of the time allowed for ensuring the principle of equal pay the provision became directly applicable.

Finally, a few comments on Defrenne's defensive memory.

Contrary to what was claimed by the other parties, Cuvelliez acknowledged the clarity and completeness of the provision in art. 119: "*Elle precise une obligation de faire dont la signification est non equivoque*"[25].

The principle of equal pay did not give rise to any doubts or uncertainties, especially in the case of Belgium, whose Constitution under art. 6 guaranteed the principle of equality before the law. The meaning of the concept of equality was clear to the Belgian jurists. The terms of art. 119 were obvious and, therefore, from the beginning of the first phase of implementation of the Treaty there was an obligation for States to apply the principle of equality. In the case of Belgium, the obligation was imposed by the law ratifying the Treaty, from 4 January 1958, and from that date it had to be guaranteed also by the national courts. Nor was the resolution of the Conference of the Member States of 30 December 1961 to be invoked, because that was a political and diplomatic decision taken by an assembly not provided for in the Treaty and therefore not empowered to amend its provisions.

The defence of Defrenne also took a critical position on the reference to Directive 75/177. Excluding the emphasis on making more understandable the principle established by art. 119, should be seen as a further Community initiative to follow up the provision of the Treaty.

Finally, Cuvelliez stated that it was only by recognising the direct effect of art. 119, it would have had a meaning, a social utility, a raison d'être, a positive effect on the working women. Without direct effect, the rule would have remained a dead letter.

The variety of readings and proposals for interpretation provided by the parties in the written procedure led the Court to address several questions to the British and Irish governments and to the European Commission. The judges asked Ireland and the United Kingdom to investigate the economic consequences of the direct effect of art. 119, in particular by indicating which firms would be most penalised; which category of workers and with what numbers; the extent of wage differentials; which category of workers and with what numbers; the extent of wage differentials. In addition, it was also asked to clarify whether the decision taken by the representatives of the governments of the Member States at their meeting on 30 December 1961 fell

[25] HAEU-CJUE-1696, *Dossier de procédure original 1: affaire 43/75*, c. 581.

within the scope of the agreements provided for in art. 3 of the Act of Accession to the Community and, if so, because the decision had not been applied in 1973.

More detailed requests addressed to the Commission, from which the Court requested five clarifications on the concept of remuneration and equal work; on the legal nature of Sabena (whether it was a private or public company); the decision taken on 30 December 1961 and the legal grounds for amending the Treaty without recourse to the ordinary procedure; on the implementation of the principle of equal pay in the Member States and the legal grounds for Directive 75/117.

It is clear from the wording of the questions that the Court's uncertainties were precisely related to the difficulty of reconciling economic interests and the common market with the social and solidarity objectives of the Community project.

The difficulty also seems to emerge from the answer to the questions given by the European Commission, which introduced the issue of the separation between workers in the public and private sectors. The Commission's view was that it would be easier for public servants to ascertain what the salary and the same work were, since classifications according to type and degree of activity were available. For the private sector, there was a lack of references. An important argument which would have prompted the Court to give serious thought.

In addition to the expected replies, the in-depth discussions produced a substantial number of annexes to the arguments put forward by the parties.

The UK government has presented studies showing that labour costs increase by at least 3.5% in the case of equal pay. In support of its claims, it attached the results of a survey conducted in 1969 by the Department of Employment and Productivity on a sample of firms. The documents were completed by tables on the number of men and women employed in different industrial sectors, as well as on wages and salaries paid to men and women. All in all, a material which was to demonstrate the negative repercussions for the English economy if the principle of equality of wages had been recognised retroactively.

The core of documents which are more substantial is that accompanying the Commission's reply. It includes the text of the resolution of 30 December 1961, as well as several reports from the Commission to the

Council on the implementation of the principle of equal pay in different years and a statistical report on the structure and distribution of wages in 1966.

Among these annexes, the most interesting is the *V Rapport de la Commission au Conseil sur l'état d'application au 31 décembre 1973 du principe d'égalité entre rémunération masculines et féminines au Danemark, en Irlande et au Royame-Uni*, which offered arguments for the thesis about the diversity between public and private sector workers. The report was divided into three parts: the first, devoted to the analysis and problems posed by art. 119. The second described the situation in the participating States in the public and private sectors, in collective bargaining, in administrative wage-setting decisions and in the social security system; The third part described both the more general condition of women workers and the measures, both legislative and contractual, taken to implement equal pay.

The *Report* on the implementation of equality in Denmark, the United Kingdom and Ireland was also cited in the reply by the Defrenne defence, after the parties' written submissions were communicated. Mrs Cuvelliez criticised the proposal to separate the public and private sectors from work as an argument that was not justified from a legal point of view, which would lead to further discrimination between workers. Only women employed in the public sector would benefit from the direct effect of art. 119 of the Treaty, whereas those working in private companies would be affected by the legislative initiative of the States. Furthermore, the defence of Defrenne wondered why the Commission, which had given itself so much work to draw up studies and reports on the subject, decidedly useful but not very incisive, had not resorted to the infringement procedure as provided for by art. 155 and 169 of the Treaty. Finally, Cuvelliez invited the Court to examine carefully the findings of the Report, particularly in Denmark, whose experience showed that the implementation of equal pay, while creating difficulties, was possible and that the goal could also be achieved in England and Ireland. In essence, a firm stance, especially towards those economic arguments which were the real obstacle to the elimination of pay discrimination.

5.2. *Oral proceedings*

During the oral proceedings, the conclusions of Advocate General Aberto Trabucchi, presented at the hearing on 10 March 1976, were of some

interest. After summarising the facts from which the preliminary ruling had arisen, Trabucchi focused on the ultimate aim of art. 119. Included in the title of the Treaty on the social policy of the Community, it aimed to contribute to the improvement of the working and living conditions of the European workforce. Citing the Advocate General of the Defrenne I trial, Trabucchi adopted the conclusion that art. 119 was inspired by the intention to prevent distorted competition between European states through recourse to female labour, which is less expensive than male labour[26].

Entering the substance of the question of the effectiveness of the Treaty provision, the Advocate General set out several decisive points.

First, he cleared the field of all objections to the wording, calling into question the objective of the provision: to prohibit any discrimination against women in terms of pay; imposing a precise obligation on the recipients, without reservation. The obligation imposed on the Member States, to whom the rule was addressed, consisted of a duty to act within a precise deadline, namely the end of the first phase of transition. The resolution adopted on 30 December 1961 to extend the deadline for implementing the principle of equal pay until 31 December 1964 had not amended the Treaty, replacing art. 119 in relation to the question of the time-limit. The resolution was to be seen simply as a political act, expressing the concerns of States to overcome the difficulties arising from the application of the rule.

The second question that Trabucchi clarified concerned the completeness of the standard, a necessary requirement to recognize its direct effectiveness. The Advocate General referred to the case-law of the Court which had given direct effect to articles of the Treaty which imposed an obligation to do, when the obligation was clearly stated, determined in content and not subject to reservations (Lütticke case 57/65).

But the most important passage of the observations was that concerning the application of art. 119 to private individuals. Says about it Trabucchi: *"la discriminazione che la norma vuole vietare sarà, nella maggior parte dei casi, l'opera di un privato imprenditore a danno della lavoratrice"*[27].

States can only intervene directly in the setting of wages in the public sector, whereas in the private sector wage-setting is largely left to the parties'

[26] HAEU-CJUE-1215, *Dossier de procédure original: affaire 80/70, Gabrielle Defrenne/Belgique, Conclusions de M. l'Avocat général Alain Dutheillet De Lamothe*, p. 6.

[27] HAEU-CJUE-1697, *Dossier de procédure original 2: affaire 43/75, Conclusione dell'Avocato Generale Alberto Trabucchi*, pp. 11-12.

bargaining. It was necessary to adopt appropriate internal rules. On these observations, the States had concluded that art. 119 directly bound only the national governments and that obligations on private citizens were to be excluded. The European Commission itself had insisted on a reading of 119 which legitimized a legal initiative by private individuals, but this could only be considered as being founded in the presence of discrimination carried out by the State itself as an employer, or in the case of remuneration systems set by the legislative or executive branch.

All the reconstruction was criticized by Trabucchi, for whom limiting the rule only to civil servants would have meant creating a new condition of discrimination. The argument of the legal nature, public or private, of the Sabena airline also lost interest. Whether it was a private company or a public one, it had little to do with the issue.

Trabucchi stressed the criteria for determining the effects of a Community rule on national law and pointed out that, in this case, it was not the designation of the addressee but the purpose, spirit and objective of the provision. The purpose of article 119 was to eliminate all forms of wage discrimination, not only because of the laws or regulations of the Member States, but mainly because of collective agreements or individual contracts. The obligation to implement equality fell mainly on trade union associations and private individuals, independently of other provisions of domestic law. The principle of equal pay by its very nature concerned individuals and could have effects on them, allowing recourse to national courts in the event of infringement, even in the absence of specific provisions adopted by the States. Certainly, Mr Trabucchi reiterated, it was desirable to adopt administrative and criminal measures that would strengthen the Community rules; but this did not preclude the possibility for the national court to disregard domestic law and any public or private act which was contrary to the principle of equal pay, declaring the absolute nullity of the contractual clause contrary to the rule or of the provision of law conflicting with the principle.

In conclusion, for the Advocate General the rule of art. 119, while mentioning the Member States of the Community, laid down a principle and an obligation for all public authorities competent to implement the provisions of the Treaty, first among all national courts. Its direct effect also applied to private citizens, irrespective of national law. Certainly, the Member States and the European Community would have been called upon, in time, to in-

tervene with legislative and regulatory proposals to broaden the scope of applicability of art. 119. If it had really been limited to equal pay in the strict sense and the same type of work, the ultimate goal of the standard would have been betrayed. Discrimination against women was often hidden behind the pay structure, job classification or description, type of work required in certain sectors, vocational training and general working conditions. The studies and inquiries submitted by the parties to the case provided a wealth of material on this subject.

Referring to the preliminary ruling of the Brussels Labour Court, Trabucchi pointed out that the Belgian Royal Decree of 24 October 1967 had not affected the scope of art. 119 of the Treaty. The right of women workers to apply to national courts in cases of wage discrimination did not come into being until 1 January 1968 but was retroactive to the first date indicated by Community legislation. As the collective agreement between Sabena and its employees fell within the scope of the contractual autonomy of the social partners, situations of unequal treatment contained in the contract could be eliminated only through recourse to jurisdiction and pursuant to art. 119 of the Treaty.

Trabucchi's conclusion was very clear: "*Il principio contenuto nell'art. 119 del trattato è stato introdotto nell'ordinamento giuridico belga non già dal regio decreto di cui si discute, bensì dalla legge di ratifica del trattato CEE approvata il 2 dicembre 1957*"[28].

The last reflections were reserved for the observations of the United Kingdom and Ireland against the direct effect of art. 119 for probable economic consequences. Trabucchi replied that this type of argument, although useful for the purpose of calculating opportunities, could not have legal relevance. The direct effect of art. 119 for questions relating to remuneration in the strict sense did not justify fears on the part of States, also in view of the fact that many of them had already taken initiatives consistent with the Community principle, that the financial impact would not have worsened the national economy.

[28] HAEU-CJUE-1697, *Dossier de procédure original 2: affaire 43/75, Conclusione dell'Avvocato Generale Alberto Trabucchi*, cit., p. 20.

5.3. *The judgment*

The Court's judgment came on 8 April 1976.

The judges accepted most of the arguments put forward by the Advocate General and Mrs. Cuvelliez.

Art. 119 of the Treaty of Rome was recognised as being directly effective, not only in relations between Member States and citizens, but also in relations between private individuals. In the event of discrimination, the injured party could bring an action before a national court on the basis that the Community principle also applied to private law contractual clauses. As regards the date from which application was to be considered as guaranteed, the Court indicated 1 January 1962 for the original signatory States and 1 January 1973 for those subsequently acceded to the Community. The resolution of the Member States adopted on 30 December 1961 did not alter the first deadline set by the provision of the Treaty of Rome for the implementation of anti-discrimination measures between workers.

The judges ruled that, even in cases where the rule of art. 119 had no direct effect, the provision should not be interpreted as conferring exclusive competence on the national legislator to implement equal pay, since such implementation could result from the concomitance of internal and Community rules.

Finally, the Court, giving in partly to the requests of the English and Irish governments, established that the direct effect of art. 119 could not be invoked for pay periods prior to the date of the judgment, except only for workers who had already brought a legal action or an equivalent claim.

Overall, the Court's decision marked an important stage in the process of recognising and protecting gender equality and gave a social direction to the European project and Community law. It was a further confirmation of the central role played by the case law of the Court in building the Europe of the peoples. Alberto Trabucchi recalled it a few months after the judgment of Defrenne II. In October 1976, as he was leaving the post of Advocate General and member of the Court, Mr Trabucchi gave a brief speech summing up the passion and dedication with which the first judges had accepted the challenge of building a new legal system, Independent of national and international law, which was accepted by the citizens of the Community as a set of rules and principles shared: "*tutti e sempre noi alla Corte abbiamo lavorato con la coscienza che il nostro compito non si esaurisse*

nella pure essenziale funzione del "suum cuique tribuere", avendo invece la mira di far sentire concretamente anche la forza traente del diritto nel nuovo sistema del rapporto comunitario, secondo quelle che sono le funzioni tradizionali del momento giuridico nella vita dei popoli"[29].

As for Éliane, although the ruling was a success for the workers, she knew well that effective equal pay and working conditions were a distant goal. After all, the Court had yielded to economic pressures by limiting the retroactive effects of art. 119. But above all, equal pay was only one of many aspects relevant in the comparison of male and female work. The chapter on indirect discrimination, to which Trabucchi had also referred in his requisition, was still to be written.

It is not surprising, therefore, that the Defrenne affair should again come to the attention of the Court in December 1977[30].

Gabrielle Defrenne, while defending her rights before the European courts, had appealed against the judgment of the Labour Court which rejected the claim for compensation for early retirement and for economic loss in the calculation of the pension. Reached in Cassation, the matter was referred to the Court, still called to decide on the interpretation of art. 119 of the Treaty, in order to clarify whether the principle of equality was limited to pay or included working conditions and limitations on working capacity for reasons of gender. In other words, the judges had to clarify once and for all whether article 119 had laid down a fundamental principle of Community law which could guarantee workers against any form of discrimination.

The judgment confirmed Vogel-Polsky's concerns and doubts.

The Court rejected Gabrielle Defrenne's defence argument that she insisted on the general principle of non-discrimination in art. 119 of the Treaty and therefore for its extensive application[31]. On the contrary, the courts held that, in the context of the social provisions of the Treaty, 119 was to be interpreted as a special rule limited only to wage discrimination and not extendable to other elements of the employment relationship. When asked whether there was a general principle of Community law prohibiting

[29] HAEU-CJUE-2778, *Audiences solennelles de la Cour (10/1976), Discorso dell'Avvocato Generale Alberto Trabucchi*, 7 ottobre 1976, p. 3.

[30] HAEU-CJUE-2112, *Dossier de procédure original: affaire 149/77.*

[31] *Il Foro Italiano*, 1978, 101, parte quarta: giurisprudenza comunitaria e straniera, pp. 491-492, pp. 503-504.

discrimination on grounds of sex in the field of employment, the Court replied with an argument which left no doubt. Respect for the fundamental rights of the individual was certainly an integral part of Community law; the elimination of sexual discrimination was undoubtedly one of the fundamental rights; the European Social Charter of 18 November 1961 and the International Labour Organisation Convention n. 111 of 25 June 1958 laid down the prohibition of discrimination in employment and occupation, however the facts referred to by the applicant Defrenne dated back to a time when the Community had not yet assumed, with regard to national law, a function of monitoring and ensuring equal treatment of workers, and therefore the issue had to be brought under domestic and international law.

For Éliane Vogel-Polsky, the battle for women's rights continued to be an open game.

Abstract

The essay rebuilds the role of Eliane Vogel Polski, a Belgian lawyer, feminist and equal opportunities advocate, in the complicated judicial affair that opposed the hostess Gabrielle Defrenne and the Airline Sabena and that provoked three historic judgments of the European Court of Justice, which sanctioned the principle of equal pay treatment for workers of both sexes.

Keywords

Employment contract, social welfare, equal treatment, EU law, Court of Justice of European Union.