COMMON MARKET LAW REVIEW

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Although for over 35 years now women have formally had the right of equal access to paid work (in the EU context through Directive 76/207/EEC, now incorporated in Directive 2006/54/EC), they have in fact not yet gained an equal position to men in this area. Year after year Eurostat figures show that European women earn less than men, are over-represented in particular low-skilled and low-earning segments of the labour market, and hardly have access to higher managerial functions. This is partly due to the way paid work is still structured in terms of working hours, working conditions and places to work: such structural features of paid work are based on the idea that for most of the day there is someone available at home who does the unpaid care work in order for the breadwinner to be free to dedicate himself/herself to paid work. Apart from this structural discrimination, a great hurdle to the equal and successful participation of women on the labour market is the fact that most women in Europe still bear a disproportionate share of all necessary care work at home or in private relationships. This situation of *de facto* unequal opportunities for women calls for the solution of what in the EU social policy context has become labelled as the “conflict between paid work and unpaid care” or the “need for the reconciliation of work and care”. Busby, a senior lecturer in law at the University of Sterling, UK, has sought the solution in the construction of “a right to care”. However, from the fact that she has put a question mark to this right in the title of her book it already becomes clear that the author herself is hesitant in this respect: does such a right exist, and if not, (how) could it be constructed in the context of European employment law?

Let me start this review with my main conclusions after having read her book: Yes, a right to care does indeed exist in EU Law. This right is situated at an abstract or highly principled level. It may be derived from the general principle of sex equality that is laid down in the European legal order (including the Charter of Fundamental Rights), from Article 33(2) of the Charter in which a fundamental right to reconcile family and professional life has been enshrined, and/or from the general social policy objectives of the EU as phrased in Article 3(3) TEU. But (alas) no: this right will not solve the conflict between paid work and unpaid care as long as it stays at this highly abstract or principled level. In other words, as long as a right to care is not given a more concrete content and meaning in the area of European employment law it will, at least in my perhaps pessimistic view, not have (much) real impact on the daily lives or women (and men!) who struggle to combine paid work and unpaid care work. And it is exactly at this point that the book, although is offers many important insights and ideas, is disappointing. I kept hoping to come to a point where Busby would develop concrete proposals as to where and how to “materialize” the abstract and general (or even constitutional) right to care. In which of the existing EU Directives in the area of gender equality and health and safety at work (e.g. in the Directives on Equal Treatment in Employment (76/207 – 2006/54) and in Social Security (79/7), on Pregnancy and Maternity protection (92/85), on Parental Leave (96/34 – 2010/18) and on Part Time Work (97/81)) could or should concrete and precise (and therefore justiciable) new provisions be added in order to lift the double burden or to solve the conflict between work and care? Should there be a new or additional Directive in this area? If so, on what legal basis? And what kind of provisions should it contain? What other type of measures might be even more effective in solving this conflict than EU Directives? Who would have to take the burden of any
such new measures: Member States through tax paid benefits to carers or the employers? The
author describes various provisions in already existing EU Directives (mentioned above) that
might have an impact on solving the conflict between paid work and unpaid care (particularly
in Ch. 5). However, these legislative and policy measures can not be seen as an expression of a
right to care as such. Rather, they stem from the sex equality norm or from health and safety
regulations. It is not the ambition of Busby to simply put together all these existing measures
and create a “European Code of Care Rights” (p. 93); instead she wants to add something to
them, which she consequently calls “the right to care”. Again: how should one construct such a
right?

Apart from expressing the hope that the ECJ will progressively and leniently interpret the
right to care as it already exits in the above mentioned principled level and apply this right in
concrete cases that are brought before it (p. 176), not much is offered to the reader in this regard.
In fact, Busby only mentions two examples of how the right to care could be given more
concrete meaning by describing the UK’s Disability Discrimination Act, in which an obligation
to provide a reasonable accommodation exists, and the Australian Families Responsibilities
Act, which places a similar duty on the employer as regards employees with care-giving
responsibilities (pp. 183–188). The construction of a right to a reasonable accommodation for
carers in the framework of the right to equal treatment is not particularly new or revolutionary,
since this idea has circulated among feminist legal theorists in the area of employment law for
a long time. However sympathetic this idea may seem, it is wholly placed within the framework
of the construction of an individual’s right to equal treatment, which makes it hardly suitable, in
my view, to overcome the structural discrimination that lies at the root of women’s
disadvantages in the labour market. Much more is needed, especially in terms of structural
adjustments as regards working places and working times. But again: what would that mean in
terms of concrete amendments of the existing EU Directives mentioned above, or in terms of a
wholly new directive or other EU instruments that target this particular problem? Still hoping to
find that answer, I arrived at the last part of the book. Regrettably, this section still does not
contain any such proposals. Instead, Busby turns back to the possible role or function of the
Capabilities Approach (CA) of Nussbaum and Sen, described earlier in her book as the main
theoretical framework for the development of a right to care (pp. 37–39). This role apparently
again lies in the construction of a right to care at an abstract or principled (constitutional) level:
“Nussbaum’s articulation of certain fundamental values on which we should be able to depend
regardless of transient but dominant political ideology or economic circumstances is echoed in
the constitutional promises of the Treaties and the corresponding fundamental principles of EU
law.” (p. 189.) The function of applying Sen’s version of the CA lies in his preference for
reflexive modes of regulation which open the way for the development of a wide range of
different legal and policy measures, including “legislation, soft law, social partner initiatives,
and judgments of the Court, all of which are capable of bringing the constitutional
commitments to life and whose realization will ultimately depend on the moral choices we
should all be free to make.” (p. 190.) This being the last sentence of the book, I felt I had been
launched on a high moral cloud and that I had left the solid ground of concrete legal
entitlements, that for me come with the words “having a right” very far below me.

It was because of my curiosity about such concrete legal entitlements that I kept on reading
this book to its very end. I must confess that there were many moments that I was inclined to put
it aside because, certainly for a non-native reader, its precise content is sometimes quite difficult
to grasp. Busby often uses long sentences with a complicated structure. To give an example:
“Eradication of the relevance of care from the care equation would expose children to a process
of socialization that encompasses the principles of justice and it is in this context that Rawls’s
theory has much to offer through its elimination of individual characteristics in the ascription of
tasks which are distributed justly rather than on the basis of individuals’ perceived suitability.”
(p. 26) How is one to understand such a sentence when a crucial concept in it, i.e. “the care
equation”, is not explained or used before in that particular section of the book?

What the book does offer, and the reason why I do recommend it to readers who might want
or need to engage into further development of a right to care in the EU context or in the national
context of a particular Member State, is a rich and multi-disciplinary approach to the problem of the conflict between work and care. The historical, sociological, economic and even psychological backgrounds of this conflict offer the necessary materials for any lawyer or policy maker that strives for the construction of legislation that may possibly be effective in practice and not just for a new piece of law “in the books”. Busby explains the root causes of the unequal division of care between men and women. In that regard she goes back very far in time, starting with ancient Greek philosophers who put an overemphasis on the biological differences between men and women. From there, she then steps to 18th century Contract Theory, leaving women out of the social contract, and subsequently to Liberalism which sets the parameters for both modern economic relations and for modern theories about distributive justice. Most of these “theories” still offer the philosophical and ideological paradigms that deeply influence our ideas and practices as concerns the division of labour between men (paid work) and women (unpaid care). Although since the latter half of the 20th century the theoretical perspectives on gender differences have changed towards more recognition of the social and cultural factors that determine stereotypically divided sex roles in life, this “classical” thinking about the natural sex difference (and sex inequality) still shapes an “essentialist” gender ideology in the hearts and minds of most Western people today. For lawyers who are not familiar with gender theory and who are more at ease with a thorough analysis of existing legislation and case law, the book also has a lot to offer. Busby adequately describes and analyses the existing EU legal framework of her “right to care”. She thereby indeed demonstrates that such a notion already may be read into the existing EU Treaties. With that valuable contribution, she hopefully inspires lawyers to develop this argument further. Ultimately, a right to care will only make sense when applied in concrete cases where women and men are seeking for a solution of the conflict that they experience while they are expected at the same time to be a worker who has to bring food to the table and a carer who has to prepare the meal.

Rikki Holtmaat
Leiden
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