
Theorizing the Gendered Politics of Working-time Regulation in Multi-level Contexts

1.1 Introduction

In this chapter, I propose a conceptual framework for analysing the European Union (EU) and Polish working-time regimes and the regulations that comprise them from the perspective that is attentive to their multi-faceted, relational, and embedded quality and their gendered character. A key point of departure is that such a study requires a broader conceptual toolkit than that offered by traditional legal analysis. While the latter is also crucial to this project, it alone cannot capture the way in which the law and policy or legislative processes are conceptualized here, or the types of legal norms and regulatory interactions that I examine; nor can orthodox legal analysis alone support the task of gendering labour law. For these reasons, the particular socio-legal approach I adopt draws on conceptual tools and insights from a range of disciplines, such as gender theory, feminist political economy, comparative institutionalism and policy studies, political science, labour law, and labour history. Here, I show how these various concepts assembled together form a theoretical lens through which regulatory choices and their gender consequences can be revealed, critically analysed, and assessed.

The chapter proceeds in three sections. I argue that the task of uncovering the shared meanings and normative assumptions underlying legal norms, and the law's constitutive role or transformative potential, requires that these norms be examined as embedded within a particular context, and with the view to the complex interactions and struggles that (re)produce them. Hence, in examining the EU and Polish working-time regimes – their emergence, institutionalization, and ways in which they have at once persisted and changed – I will be attentive to their political, discursive, and institutional context, and the roles of various actors involved in their development. In this chapter's first section I conceptualize these processes at the broadest level of abstraction by

drawing on the concept of the ‘universe of political discourse’ developed in the work of Jane Jenson (1986, 1989) and Pierre Bourdieu (1991). This conceptualization of the political and policy-formation processes, with its focus on the role of social actors – their agency and its limits – in shaping dominant societal paradigms and, through them, the associated legal norms, will provide a continuous thread linking my analysis of the historic and contemporary working-time regimes operating at the EU and the national levels, as these are discussed in the book’s subsequent chapters.

The second section shifts to consider the multi-level character of labour regulation and employment policy in EU context, capturing the dynamic nature of which also requires going beyond legal orthodoxy, and indeed, reaching beyond the EU space itself. As I explain, this is accomplished in two ways. First, I complement insights from EU (and broader) labour law scholarship, some of which is itself informed by other disciplinary perspectives, with key insights from political science studies on conditionality and Europeanization of national politics and policies. Second, in analysing how working-time regulation and gender equality in the EU and Polish contexts have been framed and how they influence each other, I also draw on the premise articulated by labour lawyers like Diamond Ashiagbor (2004) or Kerry Rittich (2002b, 2006a, 2010a), that to grasp these complex discursive and regulatory interactions we must also attend to the broader context of transnational governance within which national and supranational debates occur.

Finally, the third section, which comprises the most substantial portion of this chapter, explains and draws on the concepts of ‘social reproduction’, ‘gender order’, ‘gender regime’, and ‘gender contract’, ‘working-time regime’, and the ‘standard employment relationship’ (SER) to frame a gender-focused analysis of working-time standards and regulations based upon them. Building on and extending the work of several feminist legal scholars, the goal here is not only to unpack the gendered nature of labour and employment standards, including those governing working time, but also to provide the tools needed to analyse the contemporary working-time regimes from the perspective of equality and social and economic sustainability more broadly. In doing so, my work responds to the call for legal scholarship that genders the existing labour law standards, which, from a strategic perspective, constitutes an important step towards making the space for new visions of labour law to emerge (Conaghan 2005: 19) that better respond to the living and working realities of women and men.

1.2 Contextualizing Legal Norms in the Universe of Political Discourse

My focus in this book is on particular legal standards concerning working time: their operation, interaction, and impact. However, I am equally interested in the historicity of these standards, how they have evolved, changed, or persisted, and how they embody and help to reproduce particular gender relations or, alternatively, whether they can help to transform these relations by taking account of the differences between workers and responding to their varying needs. At a conceptual level, a very useful framework for capturing the relational and constitutive role of politics and law, and their transformative potential, is that offered by Jane Jenson (1986, 1989) in her work on political discourses and historic social policy developments. Particularly appealing is the manner in which Jenson conceptualizes the roles of social actors and their competing claims in shaping the political discourses and, in turn, the process of social policy (and law) formation. In this view, all norms and institutional arrangements emerge out of complex struggles over meaning, representation, power, and legitimacy in which social actors engage, with the context for these struggles being the ‘universe of political discourse’ (Jenson 1986, 1989), or the universe of thinkable political possibilities delineated by the ‘political field’ (Bourdieu 1991).

While both the social relations and the ‘thinkable possibilities’ are dynamic and always in the state of flux, they can nonetheless take on stabilized forms during certain historical periods and can be reproduced over time (Jenson 1986, 1989: 236). Jenson explains that such stabilization occurs when a compromise within the universe of political discourse renders an emergent ‘societal paradigm’, or a set of inter-connected premises or meaning systems, so widely shared by social actors that it becomes *hegemonic* (Jenson 1989: 238–239). However, since all struggles over meaning and representation are fraught with inequalities in access to power and influence over the discursive universe, those hegemonic paradigms necessarily subordinate or exclude some identities and alternative competing meanings that too are present within the universe of political discourse. This subordination occurs in part because participation in the political field or the political process requires knowledge (of this field), which, along with social position and access to resources, affects one’s ability to participate and have their interests represented (Bourdieu 1991). Absent this knowledge, some meanings and interests get filtered out because the political field ‘produces the effect of censorship by limiting the universe of political discourse, and thus of what is politically thinkable, to the finite

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space of discourses capable of being produced or reproduced within the limits of the political problematic' (Bourdieu 1991: 172).

As Jenson posits, however, the dynamism of the process of political participation means that opportunities do arise for the temporarily subordinated identities to extend their representational reach and strength. Such opportunities surface particularly during periods of 'crisis', which occur when the dominant or hegemonic paradigm's ability to absorb its internal contradictions becomes compromised. Moments of crisis, therefore, are the 'moments of efflorescence in the universe of political discourse'; they can lead to a shift in the hegemonic paradigm and enrich it with contributions from the actors who gained 'new representational strength' during crisis (Jenson 1989: 239).

The concept of the universe of political discourse, then, is useful for understanding the historical processes through which certain rationales, such as those that justify policy choices and legislative activities, become dominant or hegemonic, and why others remain subordinated. It is particularly compelling because without ignoring the role and materiality of institutional structures, norms, and legal rules, it attends to human agency by showing that these very structures (and social and legal norms) can be challenged and transformed given the right historical circumstances and strategic alliances. From this perspective, the key discourses on the role of law, organization of production activities, and regulation of working time that dominate the EU and Polish debates can be viewed as negotiated settlements that reflect historically and contextually specific power dynamics; dynamics which can nonetheless be destabilized over time. In the same way, the extent to which the EU and Polish discursive universes have recognized, represented, and have been open to claims for gender equality, a particular division of responsibilities for production and social reproduction (at the state, society, market, and family levels), or the need to better support women and men in balancing their participation in employment with unpaid family obligations, reflects such power dynamics, yet it too is subject to change.

Who are the actors most pertinent to shaping the working-time discourse? At the EU level, the discursive universe is first and foremost established by the Member States of the EU and the major EU institutions – the European Commission, the Council, the European Parliament, the European Council, and the Court of Justice of the European Union¹ –

¹ However, in this book, I will mostly use the term European Court of Justice (ECJ), because that was the name of the EU's highest court's prior to the coming into force of the Treaty of Lisbon on 1 December 2009, a period to which most of the book's content refers.

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that are responsible for setting the EU agenda, proposing and overseeing EU law and policy, the legislative process, and the Treaty interpretation and application. The European ‘social partners’ are the second set of actors. At the EU level they consist of key organizations representing employers and business on the one hand (i.e. umbrella organizations such as BusinessEurope, formerly Union of Industrial and Employers’ Confederations of Europe (UNICE), and the European Centre of Employers and Enterprises Providing Public Services (CEEP)), and the labour movement and employees on the other hand (i.e. European Trade Union Congress (ETUC), the European Federation of Public Sector Unions (EPSU), and others representing interests of organized labour). In addition to these more formal social partner organizations whose role in shaping the political discourse is particularly important in matters of employment and social policy, various lobby groups operating at the Community level (such as the European Women’s Lobby (EWL)) may also be pertinent to shaping the discursive universe. Even when not officially consulted, these latter actors can have influence through issuing of opinions on EU policy and legislative initiatives and lobbying other ‘friendly’ actors who may have a more direct influence. Similarly, in the Polish national context, the state, different political factions, institutional entities (i.e. various Ministerial authorities and Reform Commissions), the national social partners acting through the Tripartite Commission (the cross-sectorial employers’ organizations and trade unions), as well as other special interest groups (such as the business lobby and associated policy think-tanks, women’s groups, and the Church), all coexist and interact within a shared discursive universe.

Given that the extent to which particular actors are able to exert influence over the discursive universe and influence concrete policies and institutional forms at either the domestic or supranational level varies over the course of time, the framework I adopt here seeks to capture major shifts in institutional architecture and political economy as significant historic moments during which shared or hegemonic meanings are disrupted and potentially renegotiated with concrete implications for institutions, legal rules, and social (gender) relations. I pay particular attention to key developments at the European level, the process of transition that began in Poland at the end of the 1980s, and the processes of further structural adjustment leading up to Poland’s EU accession. As Chapter 2 elaborates, EU enlargement, successive constitutional amendments, and changes to the EU’s institutional structures, voting rules, and legislative procedures, have led to two major and related shifts, both of which have shaped the

EU discursive universe. First, successive legal and institutional changes have precipitated the progressive expansion of the Community competences over various policy areas originally reserved for the Member States, thereby increasing supranational influence over the (increasing number of) national universes of political discourse (and action) in a growing number of fields, including that of working time. Second, the roles and relative influence of particular European institutions vis-à-vis each other have also changed. As will be discussed in more detail in Chapters 2 and 3, the influence of specific Member States within the Council, and later, the growing role of the European Parliament and the social partners have been crucial to the development trajectory of the Community working-time discourse and regime. Similarly, the path of the Polish political-economic transition, the associated process of institutional change or structural adjustment, and the process of EU accession have also had a significant impact on the power relations between different actors shaping the local discursive universe, privileging certain discourses on working time over others, and thus shaping the Polish working-time regime.

1.3 Political Discourses and Labour Law in Multi-level Contexts

While societal paradigms, with their complementary clusters of institutions, gender relations, norms, and legal rules are historically and contextually specific, the processes of globalization and regional integration, or ‘transition’, provide excellent case studies for examining the impact of supranational standards on domestic regulatory regimes. As these processes also occur in the sphere of discourse, they broaden and complicate the discursive universe or contribute to overlaps and interactions between multiple such universes operating at different levels. In political science, these types of interactions have been examined through various theories of European integration and Europeanization.² Comparative policy

² The process of European integration has been explained by various intergovernmental (Moravcsik 1993), neofunctionalist (Haas 1964), historical institutionalist (Pierson 1996), multilevel governance (MLG) theories (Hooghe and Marks 2001), and social constructivist theories (Kauppi 2003; Rosamond 2002), with the role that the law and the courts play explored by Burley and Mattli (1993), Mattli and Slaughter (1995, 1998), Garrett (1995), Alter (2000), Alter and Vargas (2000), Cichowski (2004), and Beach (2005). Also, rationalist and constructivist theories of Europeanization examine the impact of EU policies and institutions on domestic ‘polities, politics, and policy’ (see Radaelli 2001 and Schimmelfennig and Sedelmeier 2005a for a useful review), with recent literature on implementation combining both approaches (i.e. Falkner et al. 2005; Leiber 2005, 2007; Falkner et al. 2008; Trieb 2008; Toshkov 2008; Sedelmeier 2009 for implementation studies relating to

and institutionalism scholars, for example, have paid particular attention to the impact of EU integration and enlargement, focusing on the extent to which various policy fields and institutional clusters or regimes (be they welfare regimes, gender regimes, employment regimes, industrial relations systems) remain distinct or converge under the influence these processes engender.³ Legal scholars also have been exploring these plural and multi-level governance dynamics. In labour law scholarship, interaction between different types of legal orders and regulations operating at many levels or scales has been long a source of investigation, most prominently addressed through legal pluralism and reflexive law theories,⁴ with the relationship between the EU and domestic labour law regimes becoming one key area of interest.

In an early comment on the nature and content of EU labour law itself, Brian Bercusson (1995) suggested that this body of law is a symbiosis between national labour law systems and the law of the Community, with actors at the supranational, national, and subnational levels having important roles in its development, and the Community and national laws mutually influencing each other. Studies on this co-constitutive influence have become even more prevalent and pressing with employment policy and regulation becoming one of the most established areas of EU social policy following the adoption of the European Employment Strategy (EES) in 1997 (Kenner 2003; Ashiagbor 2004; Barnard 2006). As the corpus, reach, and mechanisms of EU labour law and employment policy expanded, more recent studies have examined supranational impact on domestic labour law regimes, seeking to understand whether the pressures exerted by EU norms, policy discourses, or by EU institutions have contributed to Europeanization or some degree of convergence between these national regimes, and some ultimately pointing a more complex reflexive relationship, or dialogue between the two levels.⁵

Already complex, the EU-Member State interaction is further complicated by the fact that it itself takes place within a broader discursive and regulatory context that also encompasses the trans- and international

social *acquis* and ECE Member States). On Europeanization of gender equality policies see Sedelmeier (2009), Kantola (2010), and Velluti (2014).

³ See, for instance: Rubery et al. (1998, 1999), Esping-Andersen (1992, 1999), Perrons (1999), Figart and Mutari (2000, 2001), Walby (2004), and Lewis et al. (2008).

⁴ On legal pluralism, in relation to European labour law, see Flanders (1968), Fox and Flanders (1969), Fox (1973), Clegg (1975) (as cited in La Faro 2000). On reflexive law or reflexivity, see Teubner (1983) and Rogowski (2013).

⁵ See Bercusson (1995), Deakin and Reed (2000), La Faro (2000), Kilpatrick (1998, 2003, 2012), Ashiagbor (2004), Sciarra et al. (2004), Rogowski and Deakin (2011), and Rogowski (2013).

levels. While the norms and discourses promoted by the International Labour Organization (ILO) are one such source of influence that labour lawyers have long engaged with, some have been increasingly attuned to the influence of international economic and financial institutions. Thus, in her study of the EES, for instance, Ashiagbor (2004) goes beyond the relationship between the EU and domestic labour-law regimes (the Netherlands and the UK), to also take account of other policy-shaping transnational institutions. Specifically, she argues that developments in EU policy and governance have been strongly influenced by the Organization for Economic Cooperation and Development (OECD), through OECD's promotion over the last several decades of regulatory discourses based on neo-liberal principles and neoclassical economics. Rittich (2002a, 2002b, 2006a, 2006b, 2010a), another legal scholar, develops a similar argument in relation to key financial institutions such as the World Bank, the influence of which, she maintains, contributed to the progressive re-regulation of labour markets through reforms of national labour and employment regimes. These institutions, Rittich argues, exert their influence by mainstreaming the discourse of deregulation, or the consensus around non-desirability of 'excessive' labour laws and institutions of the labour market, and thus shaping how particular labour market concerns are being presented and solved (i.e. in terms of competitiveness, efficiency, and flexibility) at more localized levels of governance. Rittich has also shown the distinctly gendered impacts of these processes, particularly in the context of post-socialist political economic transition and restructuring (Rittich 2002b), and more recently in the context of policies regarding the nexus between work and family (Rittich 2006a; 2010a).

I find such broader conceptualization of these multi-level interactions compelling and useful for gaining a more complex understanding of both, why EU working-time policy discourse and regulatory regime developed in a way that it has, and in the case of debates on Poland's own working-time regime's development and reform before and after EU accession. Existing research suggests that as in the EU context, in Poland, the pressures and/or incentives to comply with international standards, conditions, and benchmarks – whether those required for 'successful' market transition, membership in the OECD, accession to the EU, or most recently, the goal of EMU-membership – have prompted much policy (Leiber 2005, 2007; Stenning et al. 2010; Shields 2011) and legal change since 1989, including change in labour law (Leiber 2005, 2007; see Chapters 4 and 5 of this study). Indeed, as I show here building on available research and my own findings, the process of political-economic transition in Poland has been also a process of legal

transition; it has been facilitated by legal norms while simultaneously shaping these norms to reflect the dominant neo-liberal ideology and political discourse of the time. What must be pointed out is that while the processes of globalization and ‘systemic’ change have broadened (or changed) the range of discursive and regulatory influence, the impact of multi-level hegemonic discourses and governance structures is certainly not only a post-transition phenomenon in Poland. The ideology of socialism and the political and economic influence of the Soviet Union had also been facilitated by legal norms and political discourses during the People’s Republic of Poland (People’s Republic) period,⁶ which lasted from shortly after the Second World War up to 1989. In Chapters 4 and 5, I will examine the implications of these interactions, both prior to and since the onset of transition, and assess how they have influenced the regulation of working time, gender equality, and the broader process of social reproduction in the Polish context.

Crucial as it is, attention to the influence of broader discourses and governance regimes in shaping EU policies and those of its Member States should not overshadow the fact that such influence requires local translation and may be either rejected or welcomed depending on how consistent it is with local institutional structures, interests, and the discursive universe. There is evidence that some national systems of labour and employment law have been remarkably resistant to change, while others have more or less readily complied with EU policy directions. The Austrian political scientist Gerda Falkner’s (et al.) research on the domestic implementation of EU labour law Directives in the ‘old’ (Falkner et al. 2004, 2005) and ‘new’ Member States (Falkner and Trieb 2008; Trieb and Falkner 2008), for example, identifies at least three different ‘worlds of compliance’, with the political elites receptive to EU norms in some national settings yet resistant to some aspects of Europeanization in others, either by active opposition to specific measures, or by, what Falkner and her colleagues term ‘opposition through the back door’ (Falkner et al. 2004: 452; 2005: 278). The fact that such ‘back door’ opposition is necessary, however, suggests that domestic actors nonetheless feel *some* compulsion or obligation to comply, even if this compliance remains merely formal or on the surface.

The degree to which EU policies and regulations are consistent with the local interests tends to be decisive. Or indeed, the supranational policies themselves may be a reflection (or reflexion) of shifting preferences in some national contexts, as the contributors to the edited volume by Silvana

⁶ See fn. 18 of the Introduction for explanation of this nomenclature.

Sciarra et al. (2004) demonstrate in relation to the EU regulation of part-time work. Of course, not all Member States will be in the position to participate equally in this reflexive process, as the ability to inform supranational policy or resist it will depend on a state's relative power and political sway within the EU. Newer members, such as Poland, or countries in the process of accession certainly lack such ability, since EU membership depends on adoption of pre-existing policies and laws these states had no role in developing. Unsurprisingly, political science research on the impact of accession conditionality points to high compliance in ECE in general (Schimmelfennig and Sedelmeier 2005b), and in Poland in particular (Leiber 2005, 2007; Toshkov 2008).

Nonetheless, as a study on Czech Republic, Hungary, Slovakia, and Slovenia shows (Falkner et al. 2008), *prompt* adoption of the *acquis* does not necessarily translate into *effective* adoption. The study revealed a 'gulf between law and action', showing poor record of subsequent enforcement of the Europeanized policy in those four countries (Trieb and Falkner 2008: 165). At the same time, these results were not necessarily inconsistent with the compliance patterns of the 'old' EU members, as they fit into the 'world of dead letters', a subset of one of the three worlds of compliance characterized by highly politicized transposition process and also identified in Ireland and Italy. While Poland's example does not precisely fit into this 'world of dead letters' (162), Simone Leiber (2005, 2007) also shows that Poland's often at-the-last-minute and minimal compliance was not always followed with proper administrative and enforcement support either.

Thus in addition to external pressures and influences coming from the EU or the broader transnational governance space, domestic or endogenous conditions are also significant to whether compliance with or assimilation of EU policies is achieved, and whether it is meaningful. The presence of local actors who are motivated to facilitate this process is one variable highlighted in institutionalist literature on Europeanization, both by scholars employing rationalist and constructivist models (Radaelli 2001: 127–128; Schimmelfennig and Sedelmeier 2005a; Sedelmeier 2011 for a useful review). Indeed, actors are seen as conduits of the process of Europeanization, whether, as rationalists contend, their decisions to comply and adopt EU rules, or defy them, are seen to be made on the basis of a politically motivated, rational cost-benefit analysis⁷ (Schimmelfennig

⁷ According to this model, actors will be guided by the logic of consequence and will consider factors such as the clarity of the rules, power imbalance, and the size and proximity of potential rewards (Schimmelfennig and Sedelmeier 2005a: 10–17). Actors who see the