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I. Introduction

The role Éliane Vogel-Polsky played in the development of a social European Union (EU) can't be easily ignored. As a lawyer, academic and expert on European law, politics and gender equality, she contributed greatly to shaping what the EU has become today. Her work contributed to create a more social EU that goes beyond the market politics and addresses issues of justice and equality of women and men[1]. However, although the impressive contributions Éliane Vogel-Polsky did to the development of the EU, her work has remained, until now, quite obscured[2]. She is still known only by European social policy and gender equality experts. Current studies show that often, the achievements and contributions done by women have been made invisible (Criado Pérez, 2019), and the figure of Éliane Vogel-Polsky has been an example of that lack of proper recognition -at least- until very recently. In the field of EU studies and EU literature, the attention to key women figures for the EU has also remained low (Di Nonno, 2016)[3].

Now, the increased attention to gender dimensions and women's contributions to history, science and other social fields is enabling us to appreciate and learn from the extraordinary work women like Éliane Vogel-Polsky have done. Only in the last years, we find some examples acknowledging her work to the progress of the EU. In 2018, a documentary about her life and contributions directed by Haleh Chinikar and Agnès Hubert was released: "Eliane Vogel-Polsky champion of the cause of women in Europe"[4]. In 2020, E-Legal, the Journal of Law and Criminology of the Université Libre de Bruxelles, issued a special dossier to pay her tribute[5]. Even more recently, the College of Europe has named Éliane Vogel-Polsky as its patron for the generation of students of the 2021-2022 academic year[6].

The main objective of this paper is to examine from a feminist perspective some of the key ideas and actions of Éliane Vogel-Polsky on various but interconnected fields of research, such as EU Law, social policy, gender equality, Antidiscrimination Law, EU politics and democracy studies. The aim is not to review concepts in-depth, but rather to reveal the intertwined relations of the different areas in which Éliane contributed so

[1] Beyond the realm of the EU, she has substantially contributed to the development of Antidiscrimination Law in Europe too, as explained later.

[2] In this regard, Agnes Hubert (2018), a recognised EU gender policy expert, denounced that after Éliane Vogel-Polsky sadly passed away, only the French newspaper "Le Monde" (and one month after her passing) covered the news and paid some tribute to her.

[3] The various references to the "founding fathers of Europe" by several key institutions are also an example of the neglect of key women figures who also contributed to shaping the EU. See, for example, https://www.coe.int/en/web/about-us/founding-fathers . Di Nonno's (2016) "The founding Mothers of the European Union" won the *Altiero Spinelli Prize for Outreach: spreading knowledge about Europe* (1st edition, 2017).

[4] More information about the documentary: https://www.genderfiveplus.com/copy-of-parity-democracy-eu-2019 [26-11-2021].

[5] E-Legal (2019) "Dossier: Hommage à Eliane Vogel-Polsky" vol 3. It is accessible online at: https://e-legal.ulb.be/volume-n03 [4-12-2021].

[6] I have written this article after the College of Europe's invitation to give a lecture on the contributions of the new patron, in the lecture series "Library Talks" of 2021. The original lecture has been adapted for publication.

that we can better understand the relevance of her contributions. Finally, the paper tries to contribute to the academic and public recognition of Éliane Vogel-Polsky[7].

Éliane Vogel-Polsky was a jurist and lawyer[8]. Already when she studied Law in the late 50ties, she took a deep interest in the European Law which was created with the Treaty of Rome. She experienced being a jew during the war and had faith in Europe to bring a fairer world. She developed a deep knowledge of the new legal (European) tools and their potential to fight inequalities in general and improve the fate of women on the labour market. Indeed, she had witnessed the precarious conditions under which women worked in industry, and this contributed greatly to her feminist conscience (Gubin, 2008). She wanted to use her knowledge about Law in a way that could serve social progress. In the first years of her career, her work focused on EU law and labour law, as an academic and lawyer. Even if she did not call herself a feminist, she deeply felt that the Law was a major instrument to progress in the political field, and thus, she worked in the intertwined fields of law and politics. The way these two fields intersect from a feminist perspective is explained thorough this article.

Exploring Éliane Vogel-Polsky's ideas about the meaning and functioning of Law and the EU is necessary to better understand her ideas on gender equality and the EU and connect the diverse fields that were key to her work. To that end, this paper tries to cover first the vision Éliane Vogel-Polsky had about Law and her facet as a creative lawyer. It then progressively connects her ideas and actions on law with those on politics such as her key concepts on democracy and parity. First, this paper examines some of the basic legal feminist premises and the view Éliane Vogel-Polsky had on the role of law to foster equality of women and men. She believed that we should be using all the available legal tools to advance gender equality and get decision-makers to keep to their commitments, and to that end, she was a pioneer in using the antidiscrimination provision of Article 119 of the Treaty of Rome. Second, it analyses Éliane's strategic litigation actions and particularly the *Defrenne* cases and their political impact. It also addresses some of her ideas on EU Antidiscrimination Law and politics. Third, the paper examines her contributions to the theories on democracy and to the political participation of women across Europe and within the EU institutions. Finally, the article provides some conclusions.

II. Legal feminism and gender equality law and politics in the European Union

It is interesting to place this research on the area of legal feminism and explore some of its basic premises. In Law, as in other disciplines, there are basic premises or ideas upheld by most experts in that area. Legal feminism analyses Law from a feminist perspective and reviews the traditional or hegemonic ideas about Law through feminist

[7] Also, considering that the dimension of gender equality is often overlooked in EU studies (Kantola, 2010, 4), this paper contributes to filling that gap too.

[8] To some, jurist and lawyer might mean the same, but in the majority of, at least, European countries, a jurist is a legal expert, while a lawyer is someone who represents clients in court. According to the *Legal Information Institute* of the Cornell Law Scholl of Cornell University "it should be noted that although a jurist can be a lawyer, and a lawyer can be a jurist, the two terms are not necessarily interchangeable. The jurist is a legal scholar who studies, analyzes, and comments on the law. Indeed, their entire work can be done inside a law library. On the other hand, the lawyer is representing clients and performs the work for the satisfaction of their clients' interests". Accessible online at: https://www.law.cornell.edu/wex/jurist [03-01-2022]
Éliane Vogel-Polsky was a jurist as she was a legal scholar and expert in law, but she was also a lawyer because she represented clients in court.

theories and practice (Smart, 1989). When referring to "Law", I uphold the understanding of Law advanced by Alda Facio (1992, 2000), a recognised feminist jurist. Law should be understood in broader terms, considering that Law is not only written norms, regulations and institutions, but it also contains an institutional and cultural dimension that are closely intertwined (Facio, 1992). Thus, in the legal knowledge and research it is necessary to study not only what is written or the actual legal system or institutions, but "the contents converted into unwritten laws that people give to the laws and their application through traditions, customs, the knowledge and use that they make" (Facio, 1992, 86). In this regard, the concept of Law is understood here in general or broader terms, and it is intrinsically linked to the dimensions of power and politics, as this article will show.

A. Origins in Modern Law and questioning of legal positivism

To explore Éliane Vogel-Polsky's views about Law and politics, it is important to identify first the main characteristics of the European legal regimes. It will also help place the context in which Éliane Vogel-Polsky acted decades later. Our legal culture today derives from the legal regime that originated with the Modern State, at the time of the French Revolution (Costa, 2016). In 1789, the *Declaration of the Rights of Man and the Citizen* was proclaimed by the French National Assembly. It was a relevant legal text not only in its time but also afterward due to the great influence it has had on the subsequent development of our legal systems. A little later, in 1791, the French Constitution was promulgated. The Declaration is taken as a legal text of universal aspiration, but it is already well-known that when it refers to the "rights of the man" it effectively refers only to the rights of men because women were not included. Other social groups were also legally excluded. Indeed, those who didn't fall under the category of white men with incomes or properties, adults, not-disabled, etc, were not considered real citizens.

The legal text claims to be universal[9], but it can be observed that there are social groups that were excluded from the legal world, rights, and citizenship. Already at that time, some denounced the legal exclusion of women[10]. However, these criticisms were not taken into account by the power that was established after the French Revolution and in subsequent years, and women were not considered full subjects in modern legal regimes (Costa, 2016). Perhaps more interesting is that the ideas of the French Revolution created a new model of Law, where the Law that came from "God" (Divine Law) or from customs that reigned in the Old Regime no longer served. At this time, the new Law model promulgated a "true" Law, which was written in Constitutions and other norms adopted by the so-call "sovereign people". The "sovereign people" were represented in structures such as the Parliament and other institutions. One of the issues was that this notion of "sovereign people" excluded many social groups.

An even more relevant issue about the legal system and culture that emerged after the French revolution is that it is in many ways "detached" from society. The Law model that is progressively configured is that of legal positivism. The highest theoretical representative of legal positivism in the XX century is Hans Kelsen (1881-1973), and it is precisely Kelsen's positivist thinking the one that best represents the vision of Law

[9] Indeed, one of the philosophical pillars of that period known as the "Enlightenment" is the premise of universalism.
[10] For example, Olympe de Gouges.

today, that is, the dominant legal culture. In this school of thought, what is relevant is the way in which norms are produced, that rules are promulgated by the established process, emanating from the agreed institutions, and configured as "pure" or free of any morality or ideology. The ideal model of jurist or legal expert that this legal trend of thought defends is someone who studies the structure of the legal system and who is not concerned with questions of justice, ideology, or social nature. In this sense, for legal positivism, it does not matter whether a norm is fair or unfair (this would imply reflecting on the content of the norm) or whether it is effective or ineffective (this would imply reflecting on the relationship of the norm with social reality) (Barrère, 1997, 2019). The Law is understood as an independent body and a neutral system, which does not need to observe the social reality. The legal model that emerges from these ideas has practical consequences in practice and in the realization of equality (Barrère, 1997, 2019).

B. Development from the fifties to the seventies

Since the decade of the fifties and onward, the times when Éliane Vogel-Polsky's actions took place, there was an increase in the critical voices against the dominant legal culture (Costa, 2016; Barrère, 2019). Éliane Vogel-Polsky's contributions could also be integrated amongst these critical voices, which have often been categorised as "critical legal theories". The so-called "feminist theories of law" are placed by some scholars as part of this group of legal theories (Costa, 2016, Smart, 1989). Initially, Éliane thought that the law as it existed could help women through equal treatment, but she progressively became aware that the existing legal system was biased in favour of men, and thus, her ideas lined up -an added interesting points- to the feminist theories of law[11].

In those decades, diverse social protests took place in the U.S. and Europe, such as the movement for Civil Rights and antiracist, feminist, and worker's protests. These were times of big social protests that contributed to changing many aspects of Law (Costa, 2016; Barrère, 1997). Within this social context, feminist legal and political research, and Antidiscrimination Law began to take shape (Barrère, 1997, 2019).

One of the first concerns of legal and policy feminist scholars focused on reforming the Law and positioning women as legal subjects equal to men. Women were at first excluded as legal subjects but progressively entered the legal realm as "minors" or legal subjects with an inferior position in Law compared to men. Still, in the seventies, there were many norms in Europe that directly discriminated against women and put them in an unequal legal position (Costa, 2016). Feminists had hope in Law reformation and believed that changing unequal norms gender equality would be possible in reality. During these years, different European legal systems introduced the principles of equality between women and men and the prohibition of discrimination in their constitutions and other legislations[12].

But very soon, legal and policy feminist experts started to question the efficacy of formal equality, namely, equality between women and men before the Law. They observed that achieving an equal legal position was not enough and that in the end,

[11] For example, she criticised the interpretation of antidiscrimination provisions by courts, as explained later.

[12] See for example the adoption of the Spanish Constitution in 1978 (after almost 40 years of Franco's dictatorship). Article 14 establishes the principle of equality before the law and the antidiscrimination clause.

discrimination and inequality persisted. They lost hope in the ability of the Law to foster gender equality in practice. They suspected legal language, which was presented in "neutral terms" and realised that the alleged neutrality in Law was not really helping equality, as often the legal standard tried to equalise women to men. In other words, to make women fit in the male standard. In fact, they denounced that the "universal", the "neutral" or "abstract" predicated by the Law, in reality, referred to a masculine subject. The "abstract subject" that legislators had in mind, responded to the figure of a white heterosexual man, whose experiences and needs were placed at the centre of the legal system (Costa, 2016).

Éliane Vogel-Polsky became well-aware of these dimensions: the false universalism and the androcentrism of Law. Feminists realised that the Law was not covering the problems and needs of many women. For example, the issue of violence against women and the legal protection for pregnancy, among others, were not yet regulated in many European legal systems. In this regard, Éliane Vogel-Polsky was particularly interested in employment and the persistent economic inequalities of women and men, and that led her to focus her work on Labour Law, employment policies and the structure of the labour market and its harmful effects on women. She was interested in changing the decision-making realm in those areas.

Since the nineties and coinciding with the third feminist wave, feminist legal scholars and political scientists have criticised that the Law does not effectively recognise power systems and the inequalities they create in society (Mackinnon, 1987; Crenshaw, 1989). The rules the Law develops are built upon an ideal society where a reality of equality is presumed and the principle of equal treatment prevails (Mackinnon, 1987; Barrère, 1997)[13]. For example, the concept of intersectionality, -which focuses on the intersection of diverse power systems that create particular ways of discrimination (such as racism, sexism, classism, ableism, and so on) (Crenshaw, 1989)-, is not adequately integrated yet in the European legal realm (Atrey, 2019) and beyond. Power-systems create group or collective-based subordination and discrimination, and the Law has great difficulties in capturing the injustices that are of group or collective basis. In this vein, another criticism of feminists has been the Law's predominant individual approach. Éliane Vogel-Polsky was very aware of this, and she denounced the resistance to address systemic or structural, collective-base injustices in the European legal regimes, stating for example that, "the neutral and abstract assumptions of the concept of legal equality must be wiped out. In addition, it is essential to organize the implementation of the right to equality in its dual nature, individual and collective" (Vogel-Polsky, 1996, 142).

In sum, feminist theories have shed light on the fact that the legal and political systems are part and product of power (political, economic, social, and others), and in that regard, the Law contributes to (gender and other) inequalities and plays a big role in maintaining the *status quo* and the reproduction of inequality and discrimination. However, any society needs to be governed by some rules (social and legal, written and unwritten…) as they are necessary to regulate people's relations and establish concrete socio-political organisations. In this sense, the Law can be presented as a double-edged sword, since, on the one hand, it is an instrument to protect the order of

[13] See, for example, the discursive formula of Article 20 of the *Charter of Fundamental Rights of the EU* on equality before the law.

the powerful, but on the other hand, it can be a valuable instrument to ensure the rights of individuals and groups too (Williams, 1987). Consequently, a feminist revision of the Law becomes fundamental to advancing equality and justice. Éliane Vogel-Polsky was aware that the Law was built and used by those in power (Rubin, 2008). However, she had hope, and believed that some legal tools -together with concrete political actions- could help the general objective of gender equality.

C. Gender equality in European Union Law and politics

Éliane Vogel-Polsky was particularly interested in EU Law and how it dealt with equality of women and men. She was aware of the potential of EU regulations to foster social progress but denounced that EU law and politics were particularly resistant to regulate and make a compromise for social progress and gender equality (Vogel-Polsky, 1996). In fact, she clearly denounced that the foundations of the right to equality of women and men in EU Law were fragile and ambiguous, considering that many legal experts had questioned their certainty "were they principles? Rights? Social politics? Market politics? Proclamatory declarations without binding legal value?" (Vogel-Polsky, 1996).

In this regard, Éliane Vogel-Polsky claimed that the formulas often found in EU legal and policy texts regarding equality expressed a lack of political will to address gender inequality seriously. For her, the formulas such as "state members commit themselves to promote equality between women and men", reflected the lack of political will on the part of governments and legislators to recognize a right of direct application, having immediate and concrete effects for women, a right to be checked, justiciable and accompanied by severe penalties in the event of non-execution (Vogel-Polsky, 1996). On the contrary, these expressions were built as moral intentions to achieve some accommodations or partial reforms, but without real obligations to achieve and guarantee equality (Vogel-Polsky, 1996).

Against this general approach to equality, a key idea of Éliane Vogel-Polsky was the existence of the right to equality of men and women, which she tried to demonstrate through her career as a lawyer and legal scholar, and after as a political thinker. Éliane Vogel-Polsky was a strong advocate for the right to equality of men and women. This equality is equality in status, in power, in positions in society, and it is not equality that means that women need to be equalised with men and their standards. Equality of women and men is different from the equality between women and men (Vogel-Polsky, 1996). Éliane was very clear that the right to equality was not a principle, nor a declaration or EU aspiration, it was (and ought to be so in reality) a right, of direct application and which had concrete effects for women (Vogel-Polsky, 1996).

She noted how the formulation of the expression equality between women and men in EU law and policy documents had created a limited and perverse logic, based on the comparison and equalisation of women to men (Vogel-Polsky, 1996). And what is more, she demonstrated how the principle of equalization (of women to men) continued to be the reference tool of the European institutions. Indeed, instead of legally recognising the right to equality of women and men, the legal and policy EU references were formulated with discursive expressions along the following lines, "equality between women and men", "the enjoyment by any person of the guarantee of a particular right enshrined in law, "equal treatment without discrimination based on

a series of criteria" and others (Vogel-Polsky, 1996). In sum, although Éliane Vogel-Polsky was an advocate for Europe and believed in the development of a social Europe, she also denounced that the EU was taking a minimalist approach with regards to gender equality and that its political compromises were not deep enough (Vogel-Polsky, 1996). While she worked thoroughly with these concepts as a given in European law, she became increasingly critical of the concepts of "equal treatment" and "equal opportunities" that were established in EU law and policies[14].

III. Strategic litigation and the European Union's antidiscrimination framework

A. Article 119 of the Treaty of Rome

Éliane Vogel-Polsky gave many lectures and wrote articles advocating for a European right to equality of women and men, and particularly, for the direct application and self-executing nature of article 119 of the Treaty of Rome. However, her legal arguments became a reality thanks to the strategic litigation she pursued. In fact, she realised that she had to prove herself right in Law and the way to do that was to find a case and convince the courts for a favourable ruling with regards to article 119 (Vogel-Polsky, 2003).

Article 119 of the Treaty of Rome read: *"Each Member State shall during the first stage ensure and subsequently maintain the application of the principle that men and women should receive equal pay for equal work".* Although the article should have been applied already for the end of the first transitory period in 1960, the European institutions and national governments overlooked it and transformed it into a clause concerning social policy (Vogel-Polsky, 1992, 735). In Éliane's words, "the resolution of the so-called Conference of Representatives of Member States of 1961 cleared the way for a painless transition from the first to the second phase and thereafter paralysed implementation of equality of men and women inasmuch as it was no longer deemed necessary at an institutional level to verify the achievement and the preservation of the guarantees recognized by article 119 before advancing to the third phase" (Vogel-Polsky, 1992, 735). This new assigned "social policy" character of the article made possible its delay on application and finally, its non-compliance. Éliane Vogel-Polsky denounced this legal manoeuvre and was clearly saying that it was a violation of the Treaty and that it had been a trick by those in power. She denounced that the Treaty had never been violated like that before and that it was women how had to pay the price (Gubin, 2008, 73). Indeed, the application of the article remained a dead letter for many years.

So, Éliane Vogel-Polsky realised that she needed the Court of Justice of the European Communities[15] to take a stand on the interpretation and application of article 119. Therefore, she started to look for a case that could serve that goal. Eventually, she found the case of *Gabrielle Defrenne* and brought it before the courts. This kind of legal action could be categorised as, what many call today, strategic litigation. Strategic litigation is understood as a legal strategy that lawyers and advocates for

[14] Due to the time and space limits, it is not possible to cover the ideas of Éliane on the concepts of equal treatment and equal opportunities used in EU law and policies. Exploring these could be an idea for further research.

[15] In 2009, with the entry into force of the Treaty of Lisbon, the court system obtained its current name Court of Justice of the European Union.

human rights often undertake to make courts analyse and make a judgment about a case which, in reality, is an example of systemic or structural injustices. The goal is that using a case as a paradigmatic example of a concrete injustice, it will serve to change the interpretation or paradigm used until then and impact future cases[16].

B. The *Defrenne* legal cases

Éliane Vogel-Polsky, as the lawyer of Gabrielle Defrenne, used her case strategically to make the court speak out about the interpretation and application of Article 119. Gabrielle Defrenne was a Belgium hostess working in the airline Sabena. She worked for more than 15 years in the company, but according to the companies' policy, the contract of women workers automatically ended when they reached the age of 40 years old, unlike their male counterparts. This created a situation of clear discrimination between men and women at work.

On 8 April of 1976, the court in the case known as *Defrenne II*[17], discussed the scope of Article 119 regarding the situation of individuals, and affirmed its direct effect and the possibility of asserting their right to equal remuneration directly before the national judge, regardless of the behaviour and the acts of execution adopted or not by the Member States and Community institutions. In sum, the ruling established that equality of men and women was a principle of the EU and "of direct effect" (enforceable before national courts). It explicitly recognized that gender equality in its economic and social dimension was a "founding principle" of the now EU, which opened the way to spillovers beyond the workplace (Irigoien, 2018, 5; Rubio-Marín, 2012). After this historic caselaw, the EU adopted several legal instruments and policies with regards to equality of women and men, particularly on equality at work. Of particular importance are now the *Recast Directive (2006/54/EC) on equal opportunities and equal treatment of women and men in employment and occupation*, and the current *EU's Gender Equality Strategy for 2020 2025*, among others. Indeed, the ruling of *Defrenne II* is considered one of the most important rulings for the development of gender equality legislation and policies in the EU.

In this regard, it is interesting to note the creativity and persistence of Éliane Vogel-Polsky. She brought 3 different cases regarding the work situation of Gabrielle Defrenne before courts, and these produced 3 different rulings, which are known with the name of *Defrenne I*[18], *Defrenne II*, and *Defrenne III*[19]. Lawyers and legal practitioners surely know that achieving three rulings of a European court is not easy. In the ruling of *Defrenne I* of May 25 of 1971 Éliane Vogel-Polsky argued that the obligation to retire at the age of 40 deprived the worker Gabrielle (and all women workers in Sabena) of the benefits of a special, more advantageous retirement recognized for the rest of the navigation personnel (men workers) who could remain active until the age of 55. However, the court rejected the plaintiff's claim that the special retirement benefits were indirect wages. Nor did it admit that the establishment of different retirement ages for female flight personnel affected the equal remuneration

[16] For further reading on Éliane Vogel-Polsky and the impact of her work as a 'legal activist', see, for example: Jacquot, S. (2020) "Activisme juridique - Pourquoi les arrêts Defrenne sont-ils restés orphelins? Ou, pourquoi le Lobby Européen des Femmes n'a-t-il jamais déployé de stratégie d'activisme judiciaire?", *e-legal, Revue de droit et de criminologie de l'ULB*, Volume n°3.

[17] ECJ ; *Defrenne v. Societe Anonyme Beige de Navigation Aerienne*, 1976, C-43/75 [ECR 455].

[18] ECJ ; *Defrenne v. État belge*, 1971, C-80/70.

[19] ECJ; *Defrenne v. Societe Anonyme Beige de Navigation Aerienne*, 1978, C-149/77.

established in article 119 because it implied an inequality in employment conditions and in the exercise of the right to work that was not contemplated in Article 119. In the ruling of *Defrenne III* of June 15 of 1978, the court declared that the respect of fundamental rights was part of the general principles of the Union's law and that discrimination based on sex was part of those principles but denied the plaintiff's right to receive a compensation arguing that at that time only the programmatic provisions contained in Articles 117 and 118 of the Treaty existed within the framework of the Union's law. And according to the court, those articles alluded to the need to promote the improvement of workers' living and working conditions, to achieve greater equality through the collaboration between States, but they had no direct effect.

Before the *Defrenne* cases, Éliane Vogel-Polsky had already tried and litigated the issue of equal pay and article 119 on several occasions (Hubert, 2018). One of these was the *Mertens* case[20]. In this case, Éliane Vogel-Polsky succeeded in making the unemployment allowance system recognized as unfair. Although both women and men workers contributed equally to the unemployment fund, the unemployment benefits workers received were established according to categories of sex, age, and family expenses. The system ended up allocating lower benefits to women workers (Hubert, 2018, 155; Gubin, 2008, 87). The Minister of Labour, although being a former trade unionist, did not appreciate the additional public spending at the benefit of women created by this jurisprudence and after the ruling, decided to change unemployment benefits' rules and write them neutrally, proportional to wages (Gubin, 2018, 89). That negatively impacted the benefits women earned in the end (Gubin, 2018, 89). Éliane Vogel-Polsky failed to achieve its main objective in this trial: unemployment benefits to be considered part of the remuneration, the question could not have been referred to the Court of Justice of the European Communities (Hubert, 2018, 155).

The litigation efforts and strategies Éliane Vogel-Polsky developed are an example of determination and perseverance. Although the results were not always successful, she persisted and chose the case of *Defrenne* strategically because she could demonstrate the discriminatory effects and argue for the direct application of article 119 in several ways[21]. She believed fiercely in the direct application of article 119, and eventually, the Court confirmed its importance in EU law. In sum, the diverse legal actions on article 119 show how Éliane Vogel-Polsky was keen to use all the existing provisions of the EEC Treaty in a strategic way to foster the objective of gender equality. More broadly, Éliane used litigation in order to get decision-makers to keep to their commitments, as in this case, a European Treaty -or legislation- contains commitments which have to be implemented. With the *Defrenne* rulings, she also contributed to the attention and further development of the Antidiscrimination Law in Europe.

C. The Anti-discrimination framework

As recently seen, the *Defrenne* cases and Éliane's strategic litigation are linked to the legal concept of discrimination. European Law has been essential to the development

[20] About the Mertens case and the bitter-sweet result, read Gubin, E. (2008) pages 86-89.

[21] Not only because of the termination of the contract at the age of 40 for women but also because of other related aspects, such as retirement rights, as explained before.

of antidiscrimination frameworks across the EU and in member states' legal regimes and policies (Fredman, 2011). An example of a classical antidiscrimination provision can be found in article 21 of the *Charter of Fundamental Rights of the European Union*. The article reads as follows: "*21.1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited*"[22]. The norms that prohibit discrimination are usually formulated in similar terms.

For feminist jurists and lawyers, it is very important to analyse if the Antidiscrimination Law that we have in place answers adequately to the phenomenon of discrimination in reality. Unfortunately, there is an extended understanding among antidiscrimination and feminist jurists that the dominant Antidiscrimination Law, including in the EU, leaves much to be desired in that regard because often it fails greatly in giving adequate answers to the victims of discrimination in society (Morondo et al., 2021; Barrère & Morondo, 2011). Éliane Vogel-Polsky, as explained so far, believed that the Law could be used to foster equality and tackle sex and gender discrimination. However, she was very critical of the Antidiscrimination Law that was developed in Europe (and beyond).

Antidiscrimination Law is the legal answer to the social phenomenon of discrimination (Barrère, 2019; Rey Martínez, 2019). It was developed to answer to the increasing social protests against discrimination and inequalities between social groups. It emerged first in the United States, as a response of the Government, (this is, of the power in place), to the important social protests that were taking place in the fifties, sixties and seventies, mentioned above (Barrère, 1997). In Law, equal treatment and the principle of equality before the Law were already established, but equality was a dead letter because, in practice, many social groups and people belonging to groups that were subordinated in society were still discriminated against. The antidiscrimination provisions created expectations that the phenomenon of discrimination was going to be addressed. However, in practice, it has been very difficult to implement it in a way that responds adequately to the widespread phenomenon of discrimination in society. Considering the way Antidiscrimination Law has been formulated and implemented by the Courts and the judicial system, it has been argued that the current Antidiscrimination framework is not able to respond to discriminations that are of systemic and structural nature (Morondo et al. 2021; Fredman, 2011). Éliane Vogel-Polsky was critical of the mainstream antidiscrimination framework and clearly said that Antidiscrimination Law was "designed to fail" (Vogel-Polsky in Morondo et al. 2021). Some of the reasons to fail have already been mentioned when referring to the critics of the hegemonic legal culture by legal feminism.

One of the key issues is that the antidiscrimination legal and policy frameworks do not address the systemic nature of discrimination (they do not consider power systems and structures), lack an intersectional approach, and are significantly individual based. These intertwined issues can be observed in the way the classical or basic antidiscrimination provisions are established: they're prohibitions of discrimination based on some characteristics, such as "sex", "race/ethnic", "religion", "sexual

[22] The treaties also refer to discrimination in various articles.

orientation" and others, but these are presented symmetrically. To illustrate, for example, "race" refers symmetrically to both "white" or "black". But is it the same to be "white" or "black" (or other racialized groups) in our societies? It is difficult to argue that all races are considered and treated equally in our societies, considering the rampant racism that still prevails in Europe and beyond[23]. Antidiscrimination provisions are not configured as prohibitions to discriminate on the basis of "racism", "sexism", "hetero-sexism" and others, for example. This evidences the lack of recognition of power-systems by this area of Law (and in the dominant legal culture extensively, too). How courts have delimited the scope of affirmative actions is also quite telling on the failure of Antidiscrimination Law fighting the discrimination phenomenon in practice. The interpretation of antidiscrimination provisions and affirmative actions -that were established, in the first place, to advance the position of women in society-, have often benefited men complainants by ruling their individual right had been violated, and therefore, restricting the measures that advanced women collectively (Fredman 2011; Barrère, 1997; Ghidoni, 2021). Éliane Vogel-Polsky intelligently showed the limits and consequences of an individualistic legal understanding of discrimination and equality, noting that "as long as we consider the right to equality as an individual right we are in a stalemate" (Gubin, 2008, 142).

Interestingly, Éliane Vogel-Polsky gained awareness about the limits of the Law in advancing gender equality and that led her to develop a greater political conscience and to engage in other discussions that went beyond European and labour law. Derived from her reflections on antidiscrimination and affirmative actions[24], Éliane Vogel-Polsky showed greater interest in the rights of women to political participation, citizenship, and democracy, and started to advocate for what she called a "parity democracy".

IV. Engaging in political thinking and action

A. Women in European politics

Éliane Vogel-Polsky gradually discovered that legal standards contained hidden traps that were only revealed in the field and that engaging in political actions was needed to make changes (including legal) possible. Éliane Vogel-Polsky's contact with a group of women unionists (among which some had worked on Belgium's National Arms Factory of *Herstal*) had a great impact on her feminist conscience (Vogel-Polsky, 2003). She was invited by the FGTB -the General Labour Federation of Belgium- to host a seminar on the European Union and equal pay, and there, she explained the potential of article 119 (Hubert, 2018). Some of the women workers that attended her seminar became the leaders of the great strike at *Herstal* (Chinikar & Hubert, 2018).

[23] The reports of the European Union Agency for Fundamental Rights (FRA) about racism are quite telling in this regard. See: https://fra.europa.eu/en/themes/racial-and-ethnic-origin [4-12-2021].

[24] Considering the prolific career and rich ideas of Éliane, this article cannot cover them all. She also worked on the issue of positive actions. Although these were the proposed tool to correct inequalities at the origin of discrimination, she realised they were marginal measures, and thus, they were limited for achieving equality in practice. The European Commission, concerned about the weaknesses in the area of gender equality within the Union, asked Éliane to draft a first European report on the issue in 1982. The report analysed the strategies developed in the United States and the Scandinavian countries, compared the state of play between the member states, and recommended the Commission to develop binding legal instruments to correct the "inequalities of the past" by giving women the advantage to improve their position in the labour market (Hubert, 2018).

In 1966, the women workers of *Herstal* went on strike to demand equal pay and better working conditions. The strike sparked off Éliane Vogel-Polsky's feminist commitment even more (Chinikar & Hubert, 2018). However, the outcome of the Herstal strike was not fully satisfactory as women workers achieved a 50% of increase in their salary, but yet, equal pay (compared to what men workers earned) was not achieved (Verschueren, 2018). It became crystal clear to Éliane Vogel-Polsky that women should be in decision-making positions and be represented in all spheres of life and society, including in companies and -certainly- in politics. She called the attention to the fact that women were not present and represented in the institutions that were governing. Indeed, the under-representation of women in politics appeared as shocking: at the start of the 1990s, on average, only 11% of parliamentarians were women in national parliaments across the Union's member states and only 19% in the European Parliament.

Éliane Vogel-Polsky was very critical of those in power during her time. She denounced for example the "treachery of the authorities", the "conjuring tricks" of governments, the "cowardice" of the Court of Justice in bowing to pressure, or the "shortcoming" of the European treaties to the detriment of women or other disadvantaged groups, on several occasions (Rubin, 2008). The need to have more women in politics became evident. By the nineties Éliane had already realised that discrimination and inequalities were of systemic nature and needed a wider approach that just "legal" corrections on the labour market or in other fields. Her first battle started with equal pay for women and men, and subsequently, she continued battling for democracy and gender parity.

B. The concept of parity democracy

From the nineties and onwards Éliane Vogel-Polsky focused more on equality and politics. She focused particularly on democracy and how European democracies, as well as the European Community, were failing women. Her work contributed greatly to reflect on and review the concept of democracy from a feminist perspective by advocating for parity democracy.

For Éliane, the concept of parity democracy does not limit itself to increasing the number of women in politics, decision-making positions and democratic bodies. Parity democracy entails a transformation of the traditional understanding of democracy, political culture and structures, and a true embracement of equality of women and men as a fundamental principle in which a democratic system is based (Irigoien, 2018, 3). The move towards parity democracy needs to be understood as a structural prerequisite of the democratic state; for example, like the principles of power division, elections and other requisites that are usually looked for in a democracy. Parity democracy is both a concept and a goal which aims to acknowledge the equal value of women and men, their equal dignity and their obligation to share rights and responsibilities, free from prejudices and gender stereotyping. It constituted a radically new approach to gender equality policies, where the correction of past discriminations is complemented by the fundamental right to equality, which becomes a legal requirement (Vogel, 1996; Irigoien, 2018).

As it can be observed, Éliane Vogel-Polsky connected the right to equality of women and men that she had advocated for with the democratic regime of parity democracy.

In her words, “the construction of the right to equality as it has been developed so far is difficult to implement because it is subject to legal systems created without women. If parity representation is recognized to be a necessary condition of democracy rather than a remote consequence, then the rules of the game and social norms will have to change. This could radically transform society and allow for real gender equal relations” (Vogel-Polsky, 1994). This implies that democracy and gender equality should be read together.

V. Conclusions

This article has tried to show the intertwined dimensions of some of the key contributions of Éliane Vogel-Polsky and their impact on EU politics, law and gender equality. It has shown that Éliane Vogel-Polsky contributed greatly to shaping the EU, its gender equality law and policies. However, she saw gender equality as a central part of a bigger goal for her: achieving social justice through a Social Europe. The right to equality of women and men that Éliane Vogel-Polsky defended is entrenched in the EU treaties and has been addressed in diverse EU policy tools through the years. However, the realisation of that right is still not achieved in Europe, although the efforts of many engaged persons, including academics and practitioners like Éliane. At the same time, the right to equality of women and men is a central idea in the theorisation of a European democracy which is of parity nature. What is more, Éliane Vogel-Polsky showed that a political regime that does not guarantee the right to equality of women and men can be difficultly considered a democracy, as it leaves behind half of its population.

Beyond her ideas, Éliane Vogel-Polsky’s actions and personality can leave the reader with other key messages too. To me, she showed us the importance of persisting, keep trying, and believing in our ideas; acting on what we are good or knowledgeable about; and being close to the “ground” or to what is happening in people’s lives. This article has not been able to cover all the extensive publications, conferences, and actions that Éliane Vogel-Polsky undertook during her lifetime. Therefore, future publications could explore further her ideas (for example, on the concepts of equal treatment and equal opportunities upheld in EU law and policies) and their impact on diverse legal and political fields in Europe.

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