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Equality and
Development
- A gender equality approach to
development co-operation and
trade in the context of EU

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Summary

The connection between human rights and development co-operation in the context of the European Union, which are the matters concerned in this paper, has proven to be both a contentious and complex subject.

Human rights and development co-operation are two areas of practice and law, which in the past of the EU has not had an explicit relationship. Over the passed decade or so, the connection between the two has however, been more and more acknowledged at an international level.

Especially the connection between human rights and trade as incorporated in development co-operation has drawn interest. More and more are realizing that human rights in fact are business and that human rights, trade and development are connected in a way that to some extent make them inseparably.

The aim of this thesis is to present a closer look at the relationship between human rights, in particular gender equality and development co-operation in the context of the EU. Gender equality plays a significant roll in the policy framework of the EU and the EU has committed itself to strive towards gender equality in all areas of the Union. The purpose of this paper therefore is to further examine the extent of the equality approach taken by the EU in the area of development co-operation and to some extent also trade. The purpose is furthermore to show that even if the EU has the attention to strive towards gender equality, the measures taken are inconsistent as well as inadequate.

All EU trade and development co-operation agreements should in my opinion and which I also argue for in this paper, contribute to the promotion of social and gender equality because inequalities may be unintentionally reinforced if trade policies and agreements remain silent on gender equality. Most importantly however, is that legislative proposals are made as well as concrete measures are taken in the area of law to create gender equality in reality.

There are, and always have been, sharp differences between the views and the concerns of member states in the international society, related in part to the values embodied in their own political systems and their own different economic and social situations and histories. Today the large economic differences between rich, poor and transition countries is also reflected and an important part of the different views of countries. The special protection afforded to women under CEDAW for example seems to attract little respect when there is a need for low paid workers engaged in the production of export goods. It is therefore important that EU in its development co-operation make an effort to put forward the right of women as a condition for development co-operation and for trade.

Abbreviations

ACP	African, Caribbean and Pacific states
ASEAN	the Association of Southeast Asian Nations
CEDAW	Convention on Elimination of All Discrimination Against Woman
CFSP	Common Foreign and Security Policy
ECHR	European Convention on Human Rights
EMU	Economic and Monetary Union
EC	European Community
ECJ	European Court of Justice
ECSC	The European Coal and Steel Community
EU	European Union
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IMF	International Monetary Fund
SEA	Single European Act
TEC	Treaty of the European Community
TEU	Treaty of the European Union
UN	United Nation
UNDHR	United Nations Declaration on Human Rights
WTO	World Trade Organization

1 Introduction

The connection between human rights and development co-operation in the context of the European Union, which is the matter of concern in this paper, has proven to be both a contentious and complex subject.

Human rights and development co-operation are two areas of law and practice, which in the past has not had an explicit relationship. Over the passed decade or so, the connection between the two has however, been more and more acknowledged at an international level. Especially the connection between human rights and trade as incorporated in development co-operation has drawn interest. More and more are realizing that human rights, trade and development in fact have a profound connection.

Assessments of the effect of trade liberalization in the context of development have generally been concentrated on how it affects countries' overall economic growth. Few have assessed the potential human rights impact and development of trade liberalization, and governments have carried out little, if any, work, in particular it has not been outlined what complementary measures are needed to ensure that all sectors of society, including the marginalized, the poor and those who experience systemic discrimination can benefit from trade negotiations in development co-operation.

I have chosen to approach development and human rights in the context of EU and in particularly its relationship with African, Caribbean and Pacific states. Until the 1990s, the ACP States were indisputably Europe's most preferred developing country partners, and the ACP– EU relations are the most visible and important component of the EU development co-operation programmes.

I have further chosen to concentrate on the gender equality aspects in development co-operation when exploring what I find obvious, namely that there is a close connection between trade, development and human rights, and that this connection needs to be recognized in order for true development and change to come about.

There are particularly two reasons for choosing development co-operation as central in order to further examine the extent of what I believe to be incoherent in the EU's human rights approach and in particular the approach to gender equality. Firstly, development co-operation has been an important component of the EU's institutional structure ever since the Treaty of Rome. It has formed a focus for external relations and has been invariably affected by the Union's initiatives in foreign policy. Secondly, the field of development co-operation represents one area where the EU confronts its "others", those not of Europe, in a structural and institutional matter. Furthermore, respect for human rights, which implies the equality between men and women, is one of the fundamental foundations on which the EU claims to be built on.

Clearly, there is a connection between the above stated areas of law and practice and I believe that these have an important correlation that is appealing to explore more thoroughly. In addition, it is my opinion that

these rights, laws and policies in fact mutually depend on each other. Therefore enforcing them in such a way that they can support one and another is essential for economic and social development as well as good governance.

Having said that, it becomes clear that legislation as well, as politics and economics are important parts of the relationship between human rights and development co-operation.

1.1 Purpose

The purpose of this paper is to examine if the equality approach taken by the EU in the area of development co-operation and trade is consistent and adequate.

Equality between men and women is a basic legal principle as well as a basic human right, it is however, a right that at times is discussed apart from other human rights and other areas of law. Human rights and development co-operation are all of international character and many States have signed and ratified several international agreements and treaties covering these two areas of law, of which many also contain the principle of equality between men and women. Human rights and development co-operation are also important areas for the EU and they play a major role in the EU's relations with third countries and especially with developing countries. Gender equality also plays a significant roll in the policy framework of the EU and the EU has committed itself to strive towards gender equality in all areas of the Union.

1.2 Delimitations

The topic of human rights and development co-operation in the context of EU is very extensive and has many different and complex facets to it. It covers a variety of factors, including a large number of different human rights and various spectrums of economic activities. Indeed such a study can not be done without creating parameters and boundaries around what I am trying to achieve with this paper.

This paper is concerned with two different areas; equality between men and women and also development co-operation. These two areas are being explored in the context of EU and especially so in the EU's relationship with developing countries. In order to start analyzing the EU equality policies in the area of development co-operation it first must be understood what I mean with the EU, development co-operation and equality.

1.2.1 Understanding EU

Until 2002 there were three European Communities, The European Coal and Steel Community, The European Community, originally called the European Economic Community, and the European Atomic Energy Community. They were all distinct legal entities established by separate

treaties. The ECSC ceased to exist in July 2002, and the European Community assumed its responsibilities and assets. The Treaty of the European Union, signed in 1992, established the European Union as we today know it.¹

Three pillars usually illustrate the activity of the EU; the first pillar is composed of the European Communities, and basically consists of traditional co-operation within the EC. It covers matters pertaining to the Single Market and the “four freedoms”, i.e., free movement of persons, goods, services and capital across borders. Community co-operation also includes matters related to agriculture, the environment, competitiveness and trade policy. The second pillar consists of the Common Foreign and Security Policy, while the third pillar comprises police co-operation and co-operation in the area of criminal law. It is primarily within the first pillar, the Community pillar, that the institutions of EU have regulatory powers, i.e., the right to draw up legal instruments and introduce legislation.²

With regard to the EU’s second pillar, the Common Foreign and Security Policy, the pillar that development co-operation and human rights in relation to third countries fall under. The legal framework is somewhat complex. Under this pillar the Member States share with the European Commission the agenda setting. The European Court of Justice does not have the same powers under this pillar as it has under pillar one. However, the second pillar has over time grown to include more and more legal matters. In terms of Treaty law, CFSP was legalized in the SEA and in the Treaty of EU (hereinafter referred to as TEU) and the Amsterdam provisions revision of the Treaty of EU. Furthermore, EC law and ECJ rulings have to some extent come to be recognized by Member States as legally binding under the second pillar as well.³

One of the most important issues in relation to the external powers of the EU is the question of who has the competence to negotiate and conclude agreements with third countries and external organizations. Article 133 Treaty of the EC (hereinafter referred to as TEC) states that on matters that concern the common commercial policy, the Community has exclusive competence to enter agreements with third countries.⁴ The EU does not have such competence and neither does it have a legal personality of its own.⁵

1.2.2 Understanding Gender Equality

In order to understand equality, one must understand the concept of gender. Gender refers to the roles and responsibilities of men and women that are created in our families, societies and cultures. The concept of gender also

¹ Craig, Paul and de Búrca, Gráinne, 2003. *EU Law, Text, Cases and Materials*, p. 36.

² Id, p. 36.

³ Smith, E. Michael, 2001. *Diplomacy by Decree: The legalization of EU Foreign Policy*, p. 82 and 90-93.

⁴ Article 133 TEC.

⁵ Olsen, Egelund, Birgitte, Steinicke, Michael and Sörensen, Engsig, Karsten (e.d.), 2006. *WTO Law from a European perspective*, p. 96.

includes the expectations held about the characteristics, aptitudes and likely behaviors of both women and men.

Gender roles and expectations are learned. They can change over time and they vary within and between cultures. Systems of social differentiation such as political status, class, ethnicity, physical and mental disability, age and more, modify the gender roles. The concept of gender is vital because, applied to social analysis, it reveals how women's subordination (or men's domination) is socially constructed. As such, the subordination can be changed or ended. It is not biologically predetermined nor is it fixed forever.⁶

Gender equality, on the other hand, means that women and men have equal conditions for realizing their full human rights and for contributing to, and benefiting from, economic, social, cultural and political development. Gender equality is therefore the equal valuing by society of the similarities and the differences of men and women, and the roles they play.⁷

Sometimes the idea of equality is connected to gender in such way that the concept of equality tends to overlook the socially constructed nature of differences. Equality then comes to associate differences with disgrace, and to exalt similarities as the ideal. The equality ideal takes on a meaning that keeps referring to the male norm and it has resulted in the fact that male norms have been used when creating legal framework and is thereby hindering real equality. For example, many laws, conventions and international agreements have in the past referred to man instead of human beings. It was originally believed that man, in the context of the law, was gender neutral. Man was used in the generic sense to mean person or human being. However, the problem with that is that man is not generic except to other than men.

1.2.3 Understanding Development Co-operation

Development co-operation in the context of EU will be explored in this paper mainly through the Lomé Conventions, now called the Cotonou Partnership Agreement. This agreement is the framework for the EU co-operation with the ACP countries and historically it is the most fundamental relationships EU has with developing countries. This relationship was at the beginning more an economic and trade development co-operation agreement than a social development agreement. Therefore, aspects of international free trade will also be dealt with in this paper in order to understand the evaluation of views around development co-operation in the EU.

While international trade has been present throughout much of history, its economic, social, and political importance has been on the rise in recent decades. International trade has always been an important part of states' foreign policies and equally so for the EU. The EU is one of the world's leading trading powers, accounting for more than a fifth of all

⁶ Bender, Leslie in Weisberg, D. Kelly (e.d.), 1993. *Feminist Legal Theory*, pp. 61-62

⁷ Id, pp. 61-62.

global imports and exports. The EC has for decades also been one of the key players in the context of free trade, first in GATT and later in the WTO.⁸ The liberalization of trade and its connection with development is furthermore taking place within the overarching structure of globalization. Globalization, in this paper, refers broadly to the process whereby power is located in global social formations and expressed through global networks rather than territorially based States. Trade, as an important aspect of globalization and a major source of growth and development, may have strong implications, both positive and negative, for gender equality. Trade and development co-operation are, in this paper, therefore connected to each other. This complex interface between trade, economic growth and social development has received increasing attention over the past decade in the EU and has become a large part of its development co-operation policies.

1.3 Method and Material

In order to achieve the above stated purpose and to find some sort of answer to the question if there is incoherence in the gender equality approach taken by the EU and its relationship with developing countries, I feel it necessary to apply different approaches to my choice of subject.

My starting point is a traditional dogmatic approach. Interpretive method for legal research in addition to a descriptive and analytical study of legal sources is the main methods used in this essay. However, since my thesis is concerned with gender equality, legal questions, as well as philosophical questions about gender equality and how to achieve equality using the law will be addressed using an underlying feminist perspective as well as interpretative method for legal research. I will in Chapter 2 explain the feminist perspective in greater detail.

The guiding principles of human rights, trade and development co-operation are not just legal matters, but also matters of political character. Therefore, political aspects to some extent will also be considered in this paper.

Choosing to analyze development co-operation does raise some methodology problems. Development co-operation policies usually consist of a package of politics. These policies have, as a rule, undergone serious political compromising and taken years to form. This does not necessarily have to be a problem, since I am mainly interested in examining how gender equality is incorporated and approached in the EU's development co-operation today. However in order for me to do this, the policies and practices need to be examined from a historical perspective also to get an idea on how they have evolved up to the present.

The material used in this paper mainly consists of traditional sources of law, academic commentaries and doctrine, books and articles from various legal reviews. In addition, non-legal books and articles have been used in the process of writing this paper. The Internet has been an important

⁸ Olsen et al, fn. 6, p. 93.

starting point in my search for sources and material, especially concerning the work of the European Commission.

EC legislation, including articles in the TEC and the TEU, together with some case law have been analyzed to examine and understand the depth of the legal framework of the Union's development co-operation and gender equality approach. The Lomé Conventions and later the Cotonou Agreement are greatly influential in understanding development co-operation. International law in the form of conventions and agreements have also been analyzed and referred to in the assessment of the gender equality in the EU development co-operation policies.

The gender analysis material of the impacts that trade and development has on women is not as extensive as one would have hoped for conducting a paper like this. However a lot of doctrine on the different disciplines exists and I have therefore tried to study an extensive group of doctrines to receive the broadest knowledge possible and gain an understanding from different dimensions of my combined subject matter of gender equality, trade and development. Also, due to the nature of the subject it has been hard to remain completely objective throughout the thesis, but to promote intersubjectivity I have purported to explain perspective as thoroughly as possible as well as make it clear to the reader when my opinions, perspectives and interpretations are expressed and when others have been cited.

1.4 Structure

This first chapter of the paper has been focused on introducing the problem and purpose of the thesis as well as attempting to give an introduction to the different areas that constitutes the base of this work. Methodological and material aspects have been discussed in the first chapter to give a more profound understanding of the scope of the paper.

The following chapters will further analyze the perspective upon this thesis is built, as well as discuss the concept of equality both internationally and in the context of the EU. Development co-operation will be explored from a present, as well as a historical perspective. In the Chapter 4, covering development co-operation, different areas will also be explored, connecting development co-operation to gender equality as well as to matters of trade.

In the following chapter, it will be discussed how to further incorporate gender equality and achieve gender equality in development co-operation.

Throughout the paper, analytical elements will be woven into each respective chapter rather than being gathered under one singular heading at the end, and my empirical findings will complement my thoughts and arguments. The final chapter of this work, however, consists of a conclusion where I hope to connect the different points that I have made throughout the paper as well providing a summary of my standpoint on the issue of concern in this paper.

2 Feminist Perspectives

Feminist theory is the extension of feminism into theory or philosophical ground. It encompasses work done in a broad variety of disciplines, prominently including the approaches to women's roles and lives and feminist politics in anthropology and sociology, economics, gender studies, feminist literary criticism, philosophy and of course the law. Feminist theory aims to understand the nature of inequality and focuses on gender politics, power relations and sexuality. While generally providing a critique of social relations, much of feminist theory also focuses on analyzing gender inequality and the promotion of women's rights, interests and issues.

In this chapter I will briefly present different position taken by feminists when studying the subject of law. This chapter is included in this essay because I believe it to be a valuable foundation to stand on for further reading of the paper. Gender equality can be approached in different ways and it is important to understand that while feminists agree that equality is the goal the different approaches taken by feminist vary in how this is to be achieved. This debate over the meaning of equality has been central to the development of both feminism and feminist legal theory.

2.1 Feminist Legal Theory

There have been many developments concerning women and law over the past decades, and different formations have been formed, but all feminist theories share two things. First, feminists recognize that men, particularly white men, possess a large share of powers and privileges and have for this reason shaped the world. All feminist legal scholars emphasize the rather obvious point that nearly all public law in the course of history has been written by men. Secondly, feminists believe that women and men should have political, economical and social equality.

The notion of equality has, however, taken on a different meaning in different historical periods and according to different philosophical traditions. Though feminists share common commitments to equality between men and women, feminist jurisprudence is not uniform. There are three major schools of thought within feminist jurisprudence. These will briefly be presented in order to show different possibilities on how to approach equality in the context of EU development co-operation.

2.1.1 The Equality Treatment Theory

Equal treatment theory (also called liberal feminist theory) is based on the theory of formal equality, to be exact: that woman is entitled to the same rights as men. The equal treatment theory is quite simple; the law should not treat a woman differently from a similar situated man. In addition, the law

should not base decision about individual women on generalizations about women as a group.⁹

The equal treatment model is adherent to an individualistic approach to equality and it operates from within the liberal legal paradigm and generally embraces liberal values and the rights based approach to law, though it does take on issues with how the liberal framework has operated in practice. This model focuses on ensuring that women are afforded genuine equality, as opposed to the nominal equality often given to them in the traditional liberal framework. It seeks to achieve this either by way of a more thorough application of liberal values to women's experiences or the revision of liberal categories to consider gender.¹⁰

2.1.2 The Special Treatment Theory

Special treatment theory or cultural feminist theory is unlike the equality treatment theory, based on a substantive thought of equality. Cultural feminists argue that gender neutral laws can subordinate women further if they do not acknowledge women's different experiences and perspectives. This theory emphasizes the significance of the differences between men and women and holds that these differences should not be obscured by the law, but should be taken into account by it.¹¹

Only by taking into account the differences can the law provide adequate remedies for women's situation, which in fact is distinct from men's situations. The special treatment model is in direct opposition to the liberal theory. To the equal treatment feminist, this approach of employing women's differences in an attempt to acquire greater rights is ineffective and places emphasis on the very characteristics of women that have historically precluded them from achieving equality to men.¹²

2.1.3 The Domination Theory

The dominance model rejects liberal feminism and in some ways the special treatment model as well. It views the legal system as a mechanism for the perpetuation of male dominance. Sexuality is central to this account. The theory argues that women's sexuality is socially constructed by male dominance and that woman's subordination results primarily from the sexual dominance of men by men.¹³

A major line of critique of the dominance model is that it leaves no room for women's agency since women are victims due to their lives being fundamentally shaped by male dominance.¹⁴ The difficulty of the dominance model, in my opinion, is that it leaves little or no space for women's genuine independence or activity. The domination model is too

⁹ Verchick R. M. Robert and Levit, Nancy, 2004. *Feminist Legal Theory*, p. 16.

¹⁰ Finley, M. Lucinda in Weisberg, fn. 6, p. 191.

¹¹ *Id.*, p. 192.

¹² Verchick et al, fn. 9, p. 18.

¹³ Weisberg, fn. 6, p. 211.

¹⁴ *Id.*, p. 214.

occupied with trying to reveal the sexual dominance in order to achieve actual equality between men and women.

2.2 Theory and Practice

In the subject of law, theory is usually not given much space or attention. The law is seen as an instrument, and even if it has a value of its own, it is primarily a means to an end. Problems arise when we seek agreement on what the end is or ought to be.

The dilemma of the equality and difference debate is that it crosses both theory and practice. In theory legal equality and achieving equality is not a difficult task, but in practice, it is a different story all together. Objectivity, therefore, may become the basis for inequality, since law, and the language which is its medium, is a system of classification. Characterizing similarities and differences amongst various situations is a key step in legal judgments and in legal assessments.¹⁵

Attempting to be objective in every situation concerning inequality would in my opinion defeat the purpose of trying to create equality between men and women. Rather what is needed and required to create equality is disclosing inequalities and put them right, and further, deciding what differences are relevant for any purposes does not actually require objectifying. In fact, the more abstract and universal a law is the more it will fail to relate to the lived reality of many women.

Clearly, there is a discrepancy between legal theory and practice in the area of equality between men and women. Women are still in many areas of the practice of the law being treated differently from men. Progress has been made in some areas but result and achievements, as well as effort, differs form country to country. The problem is that theory can only bring us so far. I believe that real equality can be achieved in practice as well as in theory by recognizing that the law, though it might appear to be gender neutral, still in many aspects treats men and women differently. If law and practice recognizes the differences, appropriate measures can be taken in the correct areas and real equality can actually be achieved in reality instead of just remain a theory with a strategic aim.

¹⁵ Weisberg, fn. 6, p. 49.

3 Equality and Human Rights in the EU

The promotion and protection of human rights does not figure among the objectives of the European Union, as listed in article 2 in TEU¹⁶, and neither did it in any of the originating Treaties of the EEC. Nevertheless, in 1992 the Treaty of Maastricht modified the TEU and confirmed the principal developed by the ECJ¹⁷ and therefore article 6(2) TEU now states that the “Union shall respect fundamental rights, as guaranteed by the European Convention on Human Rights and as they result from the constitutional tradition common to member states as general principal of Community law”.¹⁸

Furthermore, in 1997 the Treaty of Amsterdam proclaimed in an amended article 6(1) TEU that the “Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms”.¹⁹ Also since amended by the Treaty of Nice in 2000 there is now an article 7 TEU that provides a process by which the Community can bring sanctions against any Member State that is guilty of a serious and persistent breach of those principles stated in Article 6(1) TEU.²⁰

Beyond these textual advancements, convergences of social, political and economic challenge have highlighted the relevance and importance of human rights for the EU.²¹ However, the human rights policy in the EU is somewhat of a paradox. On the one hand, the Union is a strong defender of human rights in both its internal and external affairs. On the other hand it lacks a comprehensive and coherent policy at either level. Fundamental doubts persist whether the institutions of the Union process adequate legal competence in relation to the wide range of human rights issues arising within in the framework of the different policies.²² There is however, a universal claim for human rights that seems to be effecting the Union’s strive for human rights and the equality of human rights both in its relationship with Member States and with non-Member States.²³

3.1 International Equality

Equality of rights for women and men is a basic and fundamental principle of the UN and therefore of the international community, which includes the EU²⁴ and its Member States.

¹⁶ Article 2 TEU.

¹⁷ Williams, Andrew, 2004. EU Human Rights Policies: A Study in Irony, p. 139.

¹⁸ Article 6(2) TEU.

¹⁹ Article 6(1) TEU.

²⁰ Article 7 TEU.

²¹ Williams, fn. 17, p. 3

²² Alston, Philip, (e.d.) 1999. The EU and Human Rights, p. 6.

²³ Id, p. 71.

²⁴ The EU has as stated before no legal personality, the Union is however bound by the universality of human rights through its Member States.

Article 1 of the UN Charter proclaims that one of the purposes of the UN is to achieve international co-operation in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to sex.²⁵ By the terms of the Charter, which is the first international instrument to refer specifically to human rights and to the equal rights of men and women, all members of the UN are legally bound to strive towards the full realization of all human rights and fundamental freedoms.²⁶ The Charter, however, does not in general mention protection for human rights, but rather it talks about promotion of human rights. Nevertheless, there are several binding conventions and agreements, which all have their basis in the UN charter, which deal with the protection of human rights and equality for men and women.²⁷

The ICESCR and the ICCPR, both of 1966, translate the principles of the non-binding UNDHR of 1948 into legally binding form, and clearly states that the rights set forth are applicable to all persons without distinction of any kind and put forth sex as such a ground of impermissible distinction. In addition, each covenant specifically binds acceding or ratifying States to undertake and to ensure that women and men have equal right to the enjoyment of all the rights that the two covenants establish.²⁸ In addition, the ECHR, which is the human rights covenant most closely linked to the EU, contains provisions stating equal rights for men and women.²⁹ The ECHR also clearly states that discrimination, either direct or indirect, due to sex is prohibited.³⁰

There is no doubt that there is a well-established ground and right to claim equal rights for women and men, and this does not just entail a general abstract idea of equality. However, in order to fight discrimination, on any ground, it is important that the national law, when implementing the international conventions into national legal binding instruments, embrace a version of equality that focus on the real issue of domination, disadvantage, and disempowerment, instead of on the interminable issue of differences between sexes. The issue is not freedom to be treated without regard to sex; the issue is freedom from systematic subordination because of sex.³¹ The national legislature has in many aspects the responsibility to both enforce equality between men and women as well as to disclose inequality between men and women.

The Convention on Elimination of All Discrimination Against Women adopted in 1979, is the convention that by far is the most effective international legal protection for women. The convention is at an international level exclusively ensuring equality between men and women.³² The CEDAW contains economical, social, political and cultural rights, overlapping both the ICCPR and the ICESCR. The CEDAW also differs from other international conventions in that conventions are often not

²⁵ Article 1(3) UN Charter.

²⁶ Bohlin, Pennegård, Ann Marie, 1999. Kvinnans rättigheter, p. 6.

²⁷ Nowak, Manfred, 2003. Introduction to the International Human Rights Regime, p. 73.

²⁸ Bohlin, fn. 26, pp. 9-13.

²⁹ Article 14 and 23 ECHR.

³⁰ Article 14 ECHR, and the additional protocol 12 to the Convention

³¹ Scales, C. Ann in Weisberg, fn. 6, p. 49.

³² Nowak, fn. 27, p. 86.

formulated so that it gives rights to women; instead the CEDAW puts an obligation on State Parties to ensure that women have the same rights as men.³³ Discrimination is defined as all discrimination of women's human rights, irrespective of whether it is intentional discrimination or if it is the effects of an action that leads to discrimination.³⁴ The purpose of the CEDAW is not only to formally and legally prohibit discrimination against women; the elimination is to be carried out in practice. However, the CEDAW does not expressly put an obligation on States to actively adopt measures to prevent discrimination against women. Although such an obligation could be said to be implied in order to achieve the purpose of the convention.³⁵ The purpose stated as being the elimination of all discrimination against women.

The approach adopted by the CEDAW is essentially an equal treatment position, in line with the equality principal (see below). Attempts to resolve conflicts arising from substantial reservations have not been met with much success.³⁶ Obviously the equality principle and approach is not taking into account the different lives and experiences of women, and hence is not working on an over all level. More reservations³⁷ and declarations of understanding have been entered by State Parties to the CEDAW than to any other international human rights instrument.³⁸

At the UN Fourth World Conference on Women held in Beijing, China in 1995 the Beijing Declaration and Platform for Action was adopted, which pointed out a number of strategic objectives and actions, notably on the role of women in the economy. The Beijing Declaration identified the need for more analysis on the impact of globalization on women's economic status. Many actions were recommended in order to promote women's independence and economic rights, including access to employment, appropriate working conditions and control over economic resources. Governments were also advised to seek to ensure that national policies relating to international and regional trade agreements do not have an adverse impact on women's economic activities.³⁹

More recently, in 2000, the Millennium Declaration adopted by Heads of State at the Millennium Summit reaffirmed the primacy of gender equality as a development goal.⁴⁰

Clearly equal rights between men and women is a right that has international bearing and which is, intended to be enforced, as well as implemented, by States in national legislation.

³³ Thulin, Hedlund, Kristina, 2004. *Lika i värde och rättigheter*, p. 177.

³⁴ Article 1 CEDAW.

³⁵ Wadstein, Magareta, 1990. *FN-konventionen om avskaffandet av all slags diskriminering av kvinnor*, p. 14.

³⁶ Gearty, Conor and Tomkins, Adam (e.d.), 1999. *Understanding Human Rights*, p. 484.

³⁷ For the full text of the reservations, see <http://www.un.org/womenwatch/daw/cedaw/reservations-country.htm>, 2007-05-29.

³⁸ Gearty and Tomkins, fn. 36, p. 482.

³⁹ Tran-nguyen, Anh-Nga and Zapetti, Beviglia, Americo (e.d.), 2004. *Trade and Gender, Opportunities and Challenges for Developing Countries*, p. 1.

⁴⁰ *Id.*, p. 1.

3.1.1 The Principle of Equality

Equality as an expressed principle in legislative form often manifests itself as an individual right, exercisable against other individuals, based on a comparison between two individuals. The individualism of equality is problematic because it prevents the law from grappling with the collective dimension of discrimination.⁴¹

The Council of Europe states in its explanatory report to Protocol No. 12 to the ECHR, that the principle of equality needs to be legally enforced considering that a legal norm to that effect is one of the prerequisites for achieving “de jure and de facto” equality.⁴² The principle of equality and equality in the liberal legal sense is usually tied to a male norm and with the idea that a general abstract standard of equality should be applied to the law.⁴³ This is why the principle of equality, while good in theory, has little if any effect when it comes to create real equality for women.

Equality as an ideal has played a central and valuable role in the struggle to emancipate women, and it still does. These achievements should not be undervalued. However, since discrimination of women still is a fact, the principle as it looks today needs to be re-evaluated and it needs to contain direct and concrete ways of dealing and prohibiting discrimination.

3.1.2 The Principle of Non-Discrimination

The principle of non-discrimination is connected to the principle of equality and it has found expression across various fields of international law, including human rights, labor, education, migration, investment and trade law.⁴⁴

The principle of non-discrimination is a part of the right to equality between men and women in international law,⁴⁵ yet at the same time, it is a principle applicable to all human rights alike. Most general human rights treaties include a so-called accessory prohibition of discrimination,⁴⁶ whereby all State Parties commit themselves to ensure the rights of the relevant treaties for everyone without discrimination whatsoever, and furthermore to counteract certain forms of distinctions on the grounds of race, color, language, birth, religion, gender, national and social origin.⁴⁷

However, distinctions for the above mentioned and other reasons are only considered discrimination if they cannot be objective. Of course, it is difficult to say what differences are objectively justified as far as human rights are concerned, because they always depend on the social values,

⁴¹ Gearty and Tomkins, fn. 36, p. 203.

⁴² Council of Europe, explanatory report to Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, <http://conventions.coe.int/treaty/en/Reports/Html/177.htm>, 2007-04-25, paragraph 5.

⁴³ Lundström, Karin, 1999. Jämlikhet mellan kvinnor och män i EG-rätten, p. 33.

⁴⁴ E/CN.4/2004/40, 15 January 2004. p. 4.

⁴⁵ Article 26 ICCPR.

⁴⁶ E. g. Article 2 in ICESCR and ICCPR.

⁴⁷ Nowak, fn. 27, p. 61.

which might change with time, place, culture and religion. The status of women for example, has fundamentally changed in many countries over the last century, and in these countries distinctions that in the past were deemed objectively justified not too long ago, are today generally considered discriminatory.⁴⁸

The primary concerns of the principle of non-discrimination are State laws, policies and practices, but the principle also applies to private actors.⁴⁹ There are, however in this field enormous difference between countries and how they enforce the universal prohibition of discrimination while simultaneously respecting cultural and religious traditions. This is a difficult and sensitive task.

3.2 The Road to Equality

In the European Commission's (hereinafter the Commission) communication: A roadmap for equality between men and women 2006-2010, which is built on the experiences of the communication: Framework strategy for equality between men and women 2001-2005, the Commission states that gender equality is a fundamental right, a common value of the EU, and a necessary condition for the achievement of the EU objectives of growth, employment and social cohesion. The Commission further states that the EU has made significant progress in achieving gender equality, thanks to equal treatment legislation, gender mainstreaming, specific measures for the advancement of women, action programs, social dialogue and dialogue with civil society.⁵⁰

In fact Article 2 TEC present that promotion of equality between men and women is a task of the EC.⁵¹ Article 3(2) further provides that the Community should aim to eliminate inequalities, and to promote equality between men and women in all its activities (also known as "gender mainstreaming").⁵²

Equality between men and women are evidently seen as a fundamental principle of EU, politically, economically and legally, and significant achievements have been made in the area. By specifically addressing certain areas where discrimination against women is visible, the EU has been able to minimize discrimination in some sectors. Especially the right to equal pay has been the main focus for the Union and several binding directives have been implemented and there is also a well established praxis by the ECJ on the subject.⁵³

The EU approach to gender equality is according to the Commission, two-folded, through the strategy of mainstreaming and through specific measures for women. Gender mainstreaming is the process that integrates priorities and needs of women and men of all ages in key EU development and co-operation policies and programs. This process is also

⁴⁸ E/CN.4/2004/40, p. 7.

⁴⁹ Id, p. 6.

⁵⁰ COM(2006) 92, p. 2.

⁵¹ Article 2 TEC.

⁵² Article 3(2) TEC.

⁵³ The Council's annual report on human rights for 2000, p. 4.

supposed to be reinforced by specific measures to support the empowerment of women through their economic, social, political and environmental roles.⁵⁴

3.2.1 Gender Mainstreaming

The concept of bringing gender issues into the mainstream of society was established as a global strategy for promoting gender equality in the Platform for Action adopted at the Fourth World Conference on Women in Beijing. It highlighted the necessity to ensure that gender equality is a primary goal in all areas of social and economic development. The Beijing Platform for Action defines gender mainstreaming as “governments and other actors should promote an active and visible policy of mainstreaming a gender perspective in all policies and programmes, so that, before decisions are taken, an analysis is made of the effects on women and men, respectively”.⁵⁵

The UN defines gender mainstreaming as “it is the process of assessing the implications for women and men of any planned action, including legislation, policies or programmes, in any area and at all levels. It is a strategy for making women’s as well as men’s concerns and experiences an integral dimension of the design, implementation, monitoring and evaluation of the policies, and programmes in all political, economic and societal spheres so that women and men benefit equally, and inequality is not perpetuated. The ultimate goal is to achieve gender equality.”⁵⁶

Gender mainstreaming also seems to be the preferred action by the EU when coping with gender equality. The Commission for example, often speaks of the importance of gender equality in institution policies and programmes. Mainstreaming is in fact an explicit goal, affixed in the TEC as mentioned above, and supported by resolutions. The approach of the Commission is defined as “incorporating equal opportunities for women and men into all Community policies and activities.”⁵⁷ This formulation however links up with a focus on equality rather than difference, but informal formulations after the Treaty of Amsterdam leaves room for a policy that also recognize difference and diversity, extending the gender equality approach by the EU.⁵⁸

The EU strategy for bringing forward gender equality is obviously missions gender mainstreaming. This is, however, only supported by “soft law” through various action programmes that are advisory rather than “hard law” interventions, that is, those that are judicially enforceable. This together with the loss of focus implied by mainstreaming, limits the effect of the interventions.⁵⁹

⁵⁴ http://ec.europa.eu/employment_social/gender_equality/index_en.html, 2007-04-18.

⁵⁵ E.g. articles 79, 105 and 189 Platform for Action, Fourth World Conference on Women, Beijing, 1995.

⁵⁶ E/1997/66, section IA.

⁵⁷ http://ec.europa.eu/employment_social/equ_opp/gms_en.html, 2007-05-11.

⁵⁸ Woodward, E. Allison, 2001. Gender Mainstreaming in European Policy: Innovation or Deception?

⁵⁹ Walby, Silvia, 2004. The European Union and Gender Equality: Emergent Varieties of Gender Regime, p. 7.

The term equality is a vague objective and it can be hard to define what needs to be done, and even harder to advocate for something that is not well understood by those whom it is advocated to. Therefore gender mainstreaming in order to foster results needs to be given the necessary political will as well as the necessary judicial tools behind it in order to create real equality.

3.2.2 Action

Putting gender relations and gender equality in to practice is more complicated than the construction of a simple scale of inequalities, because there are different possible standards and goals of equality. In the context of the EU, the question of whether the strategy towards gender relations is too extensive that it in fact becomes too narrow and only deliver equality for those women whom are able to act in the same way as men can be raised.

The nature of the powers of the EU on gender inequality has two key components. First, although the EU has considerable power to regulate the economy, its powers over several other domains relevant to gender relations might appear limited, not least by the principle of subsidiarity, i.e. decisions are to be taken at the most local level practically possible. The second component concerns the relationship between globalization and States. There are two schools of thought. One is that the powers of States are eroded in the face of globalization, leading to the homogenizing of political and social structures and the curtailing of welfare and other policies for equity and justice. The latter holds that there is a distribution of equal rights values around a developing world policy and both positions suggest a process of junction of increasing homogeneity.⁶⁰

The problem with these strategies is that women as a group is not homogenous and further more it is in my opinion not possible to treat it as such because this would only enhance the inequalities between men and women. The situation for women differs tremendously depending on what country or society women live in. Trying to achieve gender equality without recognizing the differences would fail to distinguish what differences are relevant. Specific areas of the law instead need to acknowledge the existence of discrimination in order to get to the core of the predicament of inequality. For example the different directives of equal pay for women and men in the EU, have been semi-successful in decreasing the inequalities between women's and men's salary because these are specific directives that concerns a specific problem.

3.3 High on Rethoric

The laws of the European Community rest on liberal theories and perceptions and this extends to the equality laws within the Community.⁶¹ However, the Treaty of Amsterdam amended the TEC and marked the

⁶⁰ Id., p. 5.

⁶¹ Lundström, fn. 43, p. 28.

beginning of a new stage in the development of gender equality policy in the EU.

What was often termed the “women’s policy”, before Amsterdam, was extrapolated from a relatively “thin” constitutional reference point on equal pay for men and women in Article 141 TEC (ex Article 119).⁶² The absence of the “exposed” equal treatment approach have been recognized in the public discourse of the European Union institutions, and the Court of Justice pointed to this in the *Marschall* case, stating that even if female and male candidates are equally qualified, male candidates tend to be promoted in preference to female candidates particularly because of prejudices and stereotypes concerning the role and capacities of women in working life.⁶³

The Treaty of Amsterdam introduced changes to what is now Article 141 TEC to create a greater space for the adoption of positive action measures at national or regional level without disregarding the liberal equality principle. To this end, it is interesting to note that the Commission, in its Framework Strategy on gender policy 2001-2006, and in its Roadmap for Equality Between Women and Men 2006-2010, continue to invoke the liberal equality approach before the law. Its main approach is to combine the adjustment of policies or gender mainstreaming with the implementation of specific “positive” actions to improve the position of women in society.⁶⁴

In the 2001 communication, the Commission states that although progress has been made in affirming equality between men and women, gender equality is in day-to-day life still being undermined by the fact that women and men do not enjoy equal rights in practice. The Commission further states that this structural discrimination can be tackled efficiently by integrating gender mainstreaming into all activities and practices of the Community. The Commission is with this communication intending to operationalise the gender mainstreaming approach adopted by the Commission in 1996.⁶⁵

In the 2001 communication the Commission also identifies five areas of intervention to all policies which must, in some way, be related: namely, economic life, equal participation and representation, social rights, civil life and gender roles and stereotypes.⁶⁶

In a comparison between the Commission’s communications, A Roadmap to Equality 2006-2010 and the Framework Strategy on Gender Equality 2001-2005, it becomes clear that the Commission is committed to promoting and enforcing gender equality as well as it is trying to actually achieve this by various actions and programmes. But the fact remains that very little has changed in reality.

The Communication from 2006 is somewhat more specific in its outlining of the six priority areas for EU action on gender equality for the period 2006-2010, but they are very much still the same as in the previous Communication: equal economic independence for women and men; reconciliation of private and professional life; equal representation in

⁶² Williams, fn. 17, p. 9.

⁶³ Case C-409/95 *Marschall v. Land Nordrhein-Westfalen*, at paras. 29-30.

⁶⁴ COM(2000) 335, p. 3.

⁶⁵ *Id.*, p. 3.

⁶⁶ *Id.*, p. 4.

decision-making; eradication of all forms of gender-based violence; elimination of gender stereotypes; promotion of gender equality in external and development policies.⁶⁷

This gender mainstreaming approach by the Commission shall not be underestimated, and changes have surely been made in some areas due to the incorporation of mainstreaming. But, mainstreaming by itself cannot deliver “gender equality”, not even if the disagreement of social actors about the meaning of “equality” could be resolved. What it provides, however, is an empowering frame of reference to bring gender equality into the public sphere, as a matter of public debate.⁶⁸

With that said though, it would be wrong to exaggerate how far the mainstreaming agenda has been brought within EU public policy making. The Commission’s activities have been subject to criticism for perceived inadequacies, for example, on the part of the European Parliament, which wishes to see further action on proposals such as the draft directive on equal treatment of the sexes in sectors other than employment and the assessment of policies such as those on childcare and the reconciliation of family life and employment. Moreover, there are areas of EU institutional activity into which mainstreaming has yet to enter. The ECJ, for example, has not, so far, been confronted by the mainstreaming agenda.⁶⁹

⁶⁷ COM (2006) 92, p. 2.

⁶⁸ Shaw, Jo, 2001, European Union governance and the question of gender: a critical comment.

⁶⁹ Id.

4 The Context

Looking at current practice it becomes clear that there is a linkage between human rights, development and trade, and that this connection also has a legal basis. This linkage does not only exist in soft law, which might be the case in some instances, but also in hard law. Human rights are made a condition for trade in the EU's internal and external affairs and therefore also for development co-operation.⁷⁰ The EU is, furthermore, both influencing and influenced by developing countries and the Union has an enormous authority in a number of areas concerning development co-operation. E.g. the EU has today the most important export market for many developing countries. The member states of EU has more than a forth of all the votes in IMF, which is more than USA and Japan together, and the EU is also an important aid contributor to developing countries.⁷¹

4.1 The Connection

While it might be controversial connecting development, human rights and to some extent also trade, in the scope of EU, it seems impossible to keep them completely separated. Human rights and trade rules are based on the same values: individual freedom and responsibility, non-discrimination, rule of law, access to courts and adjudication to disputes; promotion of social welfare through peaceful co-operation among free citizens, parliamentary approval of national and international rules etc.⁷²

Trade, development and human rights have also been linked in a way that suggest conditionality of trade preferences and other trade measures in a respect for human rights and other fundamental freedoms in the context of EU through its development co-operation policies.⁷³ Within the EU, there is a clear institutional linkage between market access and human rights, which has been established as a condition of ascension,⁷⁴ and membership in the EU is further conditioned on respect for "the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law".⁷⁵ Sanctions for human rights violation may even result in economic measures by means of withdrawing treaty rights in accordance with article 7 TEU.⁷⁶

The right to development is also an officially recognized concept in the international community since the signing of the UN Declaration on the Right to Development in 1986. The European Community has embraced

⁷⁰ Abbott M. Frederick, Breining-Kaufmann, Christine and Cottier, Thomas, 2006. *International Trade and Human Rights*, p. 21.

⁷¹ Lundh, Karin (e.d), 1996. *Vad den andra handen gör, Om EUs dubbla politik mot U-länder*, p. 7.

⁷² Petersman, Ernst-Ulrich, 2002. *The WTO constitution and Human Rights*, p. 19.

⁷³ Brandtner, Barbara and Rosas, Allan in Alston, fn. 22, p. 700.

⁷⁴ Article 49 TEU

⁷⁵ Article 6 TEU.

⁷⁶ Article 7 TEU.

this concept, and recognized that its purpose is to meet equitable development and the environmental needs of both the present and future generation.⁷⁷

The problem with connecting human rights and trade in the context of development co-operation is that they often are mistaken as representing opposite sides of the same coin. On the one hand, it is claimed that human rights has to succeed everything. For instance, the claim is often made that human rights objectives must triumph trade, relying on the perception that the entire panoply of human rights is a unified field that cannot be distinguished or prioritized. On the other side, some argue that the underlying trade goal of increasing wealth and other goals must be primary, and must prevail over human rights concerns.⁷⁸ If this view is accepted there is, and always will be, an unavoidable clash. Instead human rights and trade should, in my opinion, be recognized as equally necessary means for development.

4.1.1 The Story

The story of development policy in the EU has its origin in the post-war world of the 1940s and 1950s. This was a time when the old regimes of Europe no longer had the resources or the will to operate as colonial rulers, when movements for independence had acquired considerable momentum and new relationships had to be formed between Europe and its former colonies. The notion of “development” took shape in the political and economic uncertainties of that time.⁷⁹

The foundations for an EU development co-operation policy were laid down in the Treaty of Rome, which contained provisions on the relations between the members of the EEC and their colonies in the developing world.⁸⁰ The Preamble of the Treaty of Rome of 1957 stated that one of the Community’s aims is to confirm the solidarity which binds Europe and the overseas countries and to ensure the development of their prosperity, in accordance with the Charter of the United Nations.⁸¹ The reference to the UN Charter should indicate that an acceptance of its promotion of higher standards of living and “economic and social progress and development” and “universal respect for, and observance of, human rights and fundamental freedoms”, as well as equal rights for men and women were to be included in development co-operations.⁸²

The relevant provisions concerning trade with developing countries in part IV of the Treaty of Rome however failed to amplify the connection between human rights, trade and development co-operation. Rather the economic aspects provided the focus, avoiding any direct suggestion of a

⁷⁷ Williams, fn. 17, p. 43.

⁷⁸ Id, p. 21.

⁷⁹ Id, p. 18.

⁸⁰ Carbone, Maurizio, 2005. *The European Union and the Third World; Avoiding Responsibility: The Politics and Discourse of European Development Policy and EU Development Cooperation*, p. 979.

⁸¹ http://europa.eu/scadplus/treaties/eec_en.htm#STRUCTURE, 2007-05-11.

⁸² See Articles 1, 55(a) and (c) UN Charter.

wider ethical dimension that might have incorporated a human rights element into the EU's development policies. Part IV of the Treaty of Rome did provide for technical and financial assistance to be provided to the associated States (primarily ACP States), however the primary instruments of co-operation were tariffs and quotas, and not a promotion of political development.⁸³

The absence of human rights or political dimension in this time was in keeping with the general rhetoric employed within the Community at the time of the signing 1957. Human rights were neither evident as a subject of concern within the Treaty of Rome, nor the early practices of the Community, in either its internal or external affairs.⁸⁴

4.1.2 The Change

The absence of human rights in development co-operation policies were nevertheless challenged in the mid-1970s after it became apparent that gross human right abuses were taking place under the very nose of the Community's development activities. In particular, the events that occurred in Uganda under Idi Amin awakened the Community. Even so, the response to the human rights abuses was not forced, but rather reserved.⁸⁵ Because of the unclear legal basis for human rights in the Community, the EU was not in position to take a strong stand against human rights violations occurring in developing countries.⁸⁶

As human rights have evolved in the EU's internal sphere it has also found its way into the EU's external relationships. Development co-operation and trade policies has become an important and fundamental point of confrontation for the Union with the regard to the global evolution of human rights concept and their relationship with other notions such as good governance, democracy, and the rule of law.⁸⁷

The promotion of human rights and democracy has in fact become an extremely well integrated element of the EU external relations policy, with multiple references to it at various institutional levels. Article 179 TEC specifically states that human rights and fundamental freedoms in development co-operation are to be respected.⁸⁸ However, like many aspects of EU policy-making, decisions about development co-operation are often created by compromises, attempting to get a majority or some kind of compromise position. The results are often either watered down solutions or solutions reached at great expense for one or the other interested party.⁸⁹

The policies has since the signing in 1957 of the Treaty of Rome been changed. From its launch a versatile approach was adopted combining attention to trade and aid, and economic, financial, social and cultural

⁸³ McMahon, A. Joseph, *The Development Co-operation Policy of the EC*, (The Netherlands: Kluwer Law International, 1998), p. 2.

⁸⁴ Williams, fn. 17, p. 20.

⁸⁵ *Id.*, p. 27.

⁸⁶ Fierro, G. Elena, 2003. *The Eu's Approach to Human Rights Conditionality in Practice*, p. 43.

⁸⁷ Williams, fn. 17, p. 4.

⁸⁸ Article 179 TEC.

⁸⁹ Arts, Karin(e.d.), 2004. *EU Development Cooperation: From Model to Symbol*, p. 1.

dimensions of the development process. In the 1990s a clear trend emerged putting stronger emphasis on the political aspects of the development process, including government and human rights issues.⁹⁰

EU's formal relations with the developing world are, as we can see, as old as the Union (more correctly as the EEC) itself and development co-operation remains an important component of the EU's external relations policy.⁹¹

4.2 Rethinking Development Co-operation

EU's traditional view of development has been specific but comparatively limited. The developing world was defined as principally those of former Member States' colonies in Africa, the Caribbean and the Pacific, only this relationship was historical, institutionalized, and comprehensive and based on the principle of non-reciprocity. In contrast, relations with the Indian sub-continent, Asia and Latin America were comparatively new, ad hoc, fragmented and generally more limited in scope. Such a dichotomy based on past practice rather than development criteria, proved difficult to sustain, and became increasingly indefensible.⁹²

Successive enlargements, differential rates of global development, the collapse of communist ideology in Central and Eastern Europe and the reorganization of international trade under the support of the WTO have all contributed to redefining the European Union's external relations with developing countries. These changes are portrayed in the Lomé Convention (1975—2000). This Convention has its origin in the demands by France that, as a condition for joining the Community, a new and special relationship should be established with its dependent territories. This original geographical focus on the relationship with developing countries in Africa has, with subsequent renegotiations of the Lomé relationship, broadened in scope to include some countries in the Caribbean and the Pacific.⁹³

Linking the EU with ACP countries was, at the time of signing, considered the hallmark of the EU policy with developing countries, yet it failed to meet the needs and expectations of the new millennium.⁹⁴ A more inclusive definition of the developing world was needed and the EU recognized the regional discrepancies and sought a common approach to a common problem. Geography and history were no longer an acceptable or sufficient rationale. Consequently, from 1997 and onwards the EU fundamentally reviewed its network of relations with regions of its traditional partners in the developing world (ACP, Asia, Latin America) in an attempt to produce a new policy paradigm that was consistent, comprehensive and common in origin, approach and criteria.⁹⁵

⁹⁰ Id, p. 114.

⁹¹ Arts, fn. 89, p. 1.

⁹² Holland, Martin. *European Union and the Third World*, (USA: Palgrave Macmillan, 2002), p.1.

⁹³ McMahan, A. Joseph, 1998. *The Development Co-operation Policy of the EC*, p. 31.

⁹⁴ Id, p. 1.

⁹⁵ Williams, fn. 17, p. 23.

Article 130u TEU therefore now states that the Community policy, in the sphere of development co-operation, shall foster “the sustainable economic and social development of the developing countries, and more particularly the most disadvantaged among them, the smooth and gradual integration of the developing countries into the world economy, the campaign against poverty in the developing countries,”⁹⁶ rather than having, as the Treaty of Rome put forward, former colonies of Member States as main areas of concern.⁹⁷

4.2.1 Lomé I-IV

The first Lomé Convention (Lomé I) was mainly concerned with the preferential access to Community markets, technical and industrial co-operation, and economic assistance to foster balanced development. Human rights concerns were not a focus in the beginning of the Lomé relationship. However, Lomé I did succeed in providing institutional structures and a new discourse that would have an important bearing on the eventual involvement of human rights practices in the future.

First, it reaffirmed that the basis for development was contractual. The relationship was legally binding, at least in theory, by arrangements negotiated between the parties. A sense of “partnership” accompanied the Convention. Secondly, Lomé I established the Council of Ministers that was supposed to concentrate on fundamental political issues, as well as a Consultative Assembly and a Committee of Ambassadors. These institutions provided an institutional structure within which human rights could at least informally be raised.⁹⁸

This rather sensitive approach to human rights and to human rights abuses continued despite the Commissions attempt to introduce a human rights element into the Lomé II. The consensus from parties to the Convention was that human rights in fact was a concern but that these were matters of internal affairs and had nothing to do with an economic and trade co-operation agreement.⁹⁹

It was not until the Lomé Convention came to be renewed in the early 1980s that any alteration to human rights aspect of development policy was formally addressed. In the preamble of Lomé III, the parties reaffirmed their “adherence to the principles of the UN Charter and their faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and woman and of nations large and small”.¹⁰⁰

Lomé III further proclaimed that ACP-EEC co-operation “must eliminate the obstacles preventing individuals and peoples from actually enjoying their economic, social and cultural rights” as well as to “fight for the elimination of all forms of discrimination.”¹⁰¹ The discourse on rights adopted in the Community’s development policy in Lomé III demonstrated

⁹⁶ Article 130(u) TEU.

⁹⁷ Carbone, fn. 80, p. 979.

⁹⁸ Williams, fn. 17, p. 26-27.

⁹⁹ Id, p. 28.

¹⁰⁰ See the Preamble of Lomé III.

¹⁰¹ Article 4 Lomé III.

a willingness by the Community to consider a broad range of rights concepts, and not just those limited to the European sphere. However, the failure to clarify the nature of the exact rights being protected or promoted in the Convention meant that there was no qualified approach to human rights abuses. Action in the development co-operation policy remained rooted in the economic dimensions of trade.¹⁰²

With the alteration of the global political landscape in the late 1980s, the EU's development policy entered a new phase. Lomé IV, signed in 1989, emphasized a development that entailed "respect for and promotion of all human rights"¹⁰³. Political and civil rights became included into the development policy.¹⁰⁴

However, effective action on human rights concerns remained a distant prospect within the contractual arrangement, essentially because the long-standing methods of doing business had no history of addressing such issues. For the same reason, development policy again remained focused upon the economic elements.¹⁰⁵ Even so, changes were made and there was at least a strengthening in the institutional rhetoric around human rights in the context of EU development co-operation.

4.2.2 Lomé and Women

It was only in the mid-1970s with the introduction of thinking about basic needs, that systematic concern for humane living conditions and human well-being became an active topic for discussion amongst circles of development economists and with this the utilitarian foundations of economic theory began to be questioned. Over the same period, pioneering work began to appear on the role of women in development which contributed to and reflected growing consciousness of the neglect of the contributions of women in development studies, and growing demands by women in both developing and developed countries that analysis of their roles and concerns should become a core focus for development.¹⁰⁶

The last of the Lomé Agreements, Lomé IV, seemed to take a principled standpoint on women. The preamble affirms the signatory States' faith in fundamental human rights and in the equal rights of men and women. Specific measures were even spelled out in a number of articles. The contracting parties committed themselves, among other things, to strive towards elimination of discrimination based on sex. They agreed that EU-ACP co-operation in the agricultural and rural sector should include the aim of increasing the participation of women in their capacity as producers, notably by improving access to all factors of production (land, inputs, credit, extension services and training).¹⁰⁷

¹⁰² Williams, fn. 17, p. 31.

¹⁰³ See the Preamble in Lomé IV.

¹⁰⁴ Williams, fn. 17, p. 31.

¹⁰⁵ Id. p. 32.

¹⁰⁶ Richards, Jolly (e.d.), 2004. UN Contributions to Development Thinking and Practice, p. 11.

¹⁰⁷ Women and the Lomé Convention, http://elin.lub.lu.se.ludwig.lub.lu.se/cgi-bin/linker/ebSCO_local?9708043193, 2007-04-17.

In Lomé IV the States also recognize the “active role [women] play as full partners in the rural production and economic development processes,”¹⁰⁸ and article 143 states, under the heading of social aspects, “the improvement in the status and role of women” shall be taken into account in the appraisal of all projects and programs.¹⁰⁹

Despite these principled commitments from the EU and ACP to improve the status of women, men have been the prime beneficiaries of the various Lomé Conventions. The majority of policy staff and decision makers are men, and, projects and programs are mostly designed and implemented by men. Women did not automatically benefit from development interventions where they did not constitute an explicit target group. Instead projects often had the effect of increasing women’s workload without offering any countervailing benefits.¹¹⁰

The improvements for women in the Lomé agreements should be viewed as a general reminder that since Lomé II the convention has changed from ignoring women or viewing women only in the socio-cultural context to the recognition of women’s important contribution to economic development and the need for women to participate actively in development programs. The emphasis after Lomé II was not only on the need for women to participate on equal terms, but also to ensure that development does not just mean an increased workload for women without proper recognition, decision making power and control of their own income.¹¹¹

As can be seen, the Lomé relationship is a matter of increased recognition of women rather than actual improvement for women in the context of the Lomé relationship, and even if some specific areas are pointed out in the convention, no specific measures on how to resolve the discrimination are spelled out. The need for specific legislative actions remained for the informal and political dimension of the relationship and hence no real actions on women’s situations were able to be enforced.

4.2.3 Trade and Women

There is an increasing consensus in the literature that trade policies and programs affect men and women differently, and that trade performance is affected by different locations and command over resources within the economy. Increasing gender equality can have a significant positive impact on maximizing the potential of women to benefit from increased trade liberalization and to support trade expansion.¹¹²

Trade, while an essentially economic phenomenon obviously has significant consequences for gender equality. For example, trade can positively influence the distribution of income between men and women by creating new employment and business opportunities. By expanding markets and increasing production, trade is also a window of opportunity for

¹⁰⁸ Article 42 Lomé IV.

¹⁰⁹ Article 143 Lomé IV.

¹¹⁰ Women in Development Europe, http://elin.lub.lu.se.ludwig.lub.lu.se/cgi-bin/linker/ebSCO_local?9611020043, 2007-04-17.

¹¹¹ Id.

¹¹² Tran-nguyen et al, fn. 39, p. 4.

women, as workers or as entrepreneurs, and notable progress has also been achieved in some of these areas. Women's participation in the labor force has increased in most regions of the world, women's education at primary, secondary and university levels has also improved significantly and there are signs of a narrowing of the wage gap between men and women in many countries (mostly in industrialized countries). However, in most nations women are still at a disadvantage in terms of their role and position in the economic and political arenas.¹¹³

While trade agreements have created new opportunities for a number of people and can have a positive human rights impact, they have also, at times, been associated with patterns of growing inequality and deteriorating social conditions including denial of human rights for the poorest and most marginalized sectors of the population.¹¹⁴ Unfortunately, women are especially marginalized because of the fact that women, in particular, are in the poorest sectors of society and therefore do not gain from the eventual positive effects that trade might have.

4.2.4 Trade with the developing world

In the history of EU's trading relations with the developing there is a transition from particular and specialized arrangements to a contemporary approach that seeks to treat all countries as much alike as possible, ignoring, to a large degree, differences regarding geography. This change was dictated, in part, by the successive treaty reforms of the 1990s that instigated the new policy objective of integrating the developing countries into the global economic system. More than any other policy sector, trade has become pervasive concerning almost all aspects of EU policy, both internal and external.¹¹⁵

Originally, Europe was able to separate development co-operation from its normal trading perspective. However, this compartmentalization has progressively broken down and trade issues have occupied much of the development agenda of the 1990s, and maybe even the principle focus for EU's relations in the twenty-first century.¹¹⁶

In 2002, the European Commission put out a rather long, learned, frank and detailed policy paper, *Trade and Development: assisting developing countries to benefit from trade*. This paper does not put forth gender equality as a concrete proposal for action.¹¹⁷ It does, however, state that those countries with a higher level of participation in international trade and investment tend to show higher growth rates, and if trade is to have a sustainable, positive impact on poverty reduction, it must be part of a wider, country-owned strategy, which includes a strong element of human capital development and pays attention to the situation of vulnerable groups, *including women*.¹¹⁸ This lack of incorporating a gender dimension into

¹¹³ Id, p. 8.

¹¹⁴ Id, p. 10.

¹¹⁵ Holland, fn. 92, p. 140.

¹¹⁶ Id, p. 140.

¹¹⁷ COM/2002/0513, p. 7.

¹¹⁸ Id, p. 9.

trade and development creates incoherence in the approach taken by EU. The strive for gender equality needs to be taken into account in every aspect of EU policies. If not incorporated into all policies and agreements, the gender equality may be overlooked and ignored.

4.3 Cotonou Agreement

The Cotonou Agreement signed in 2000 emerged at a time when development policy was confronted by new challenges in the form of globalization and liberalization. Clearly, globalization presents opportunities, but also significant risks for developing countries. Subsequently, consensus had begun to emerge on all sides after the last Lomé trading regime had failed to arrest the economic decline of the ACP countries. This, together with the new WTO based economic development overturned the economic philosophy that had underpinned Lomé. Trade liberalization, accompanied by democratic institution building, is the new international context that the successor to Lomé is obliged to recognize, acknowledge and ultimately embrace. Consequently, the Cotonou Partnership Agreement emphasizes the political aspects of development and not just the economic.¹¹⁹

By the year 2000, a new international consensus had also been established about the central importance of people in the process of development. In September 2000, the Millennium Summit was held at the UN in New York and the Millennium Declaration was adopted. In this declaration, heads of States and government reaffirmed their “commitment to the purposes and principles of the Charter of the United Nations, adding that indeed, their relevance and capacity to inspire have increased, as nations and peoples have become increasingly interconnected and interdependent.”¹²⁰

4.3.1 Human Rights Context

The negotiations surrounding the political dimension of the Cotonou Agreement were among the most sensitive. Not surprisingly then, the most that was possible to agree upon, was broad general principles and a limited number of specific issues, but leaving out how these might be implemented and evaluated to future practice and circumstances. For example, Article 8 stipulates that the EU and ACP “shall regularly engage in a comprehensive, balanced and deep political dialogue”. The purpose of the dialogue is similarly vague: to exchange information, foster mutual understanding and develop “agreed priorities and shared agendas”. Areas of “mutual concern or of general significance” that the dialogue specifically mentions are “the arms trade, excessive military expenditure, drugs and organized crime, or ethnic, religious or racial discrimination” as well as “respect for human rights, democratic principles, the rule of law and good governance”.¹²¹

¹¹⁹ Holland, fn. 92, p. 198.

¹²⁰ Richards, fn. 106, p. 12.

¹²¹ Article 8(4) Cotonou

In concern of human rights violations not much have changed from already established practices.¹²² Article 9 Cotonou simply restates that human rights are a vital element of the Agreement.¹²³ In the Cotonou Agreement the principle of respect for human rights is also seen as apart of a whole, instead of a specific area for achieving the whole.

The requirements of EU are however, in the Cotonou Agreement expressed in a more accessible language and the provisions made are outlining possible action in the event of breaches of the essential elements in regard to human rights, democratic principle, and the rule of law, where full suspension from the agreement is seen as a measure of last resort.¹²⁴

4.3.2 Cotonou and Equality

The preamble of the Partnership Agreement is referring to the principles of the UN Charter and is recalling, among many international conventions, the CEDAW.¹²⁵ The Cotonou Agreement does in fact in terms of gender equality divert with past agreements. Among the objectives of the partnership, it is stated that “systematic account shall be taken of the situation of women and gender issues in all areas, political, economic and social.”¹²⁶ The intended informal political dialogue that follows from the agreement shall explicitly “encompass cooperation strategies as well as global and sectoral policies, including [...] gender”.¹²⁷

As before, the main article of the Cotonou Agreement that relates to human rights contains only a reaffirmation of the equality of men and women.¹²⁸ While human rights in general also includes women’s rights, and the latter are thus fully covered by the article concerned, it would have been useful to pay more specific attention to women’s human rights and to the gender aspects to obtain those rights instead of reaffirming a known fact.¹²⁹

Beyond the level of the general principles set out above, Cotonou also contains a few more action oriented gender provisions. ACP-EU co-operation will be based on development strategies and economic and trade co-operation, which are supposed to be inter-linked and complementary to each other. The title on development strategies clarifies that ACP-EU co-operation aim of “promoting human and social development and helping to ensure that the benefits of growth are widely and equitably shared and promoting gender equality”. There is also a commitment to take systematic account of mainstreaming a number of thematic or crosscutting themes, of which “gender issues” is one, into all areas of co-operation.¹³⁰

Co-operation in the area of social sector development, amongst other things, shall be aimed at “integrating population issues into

¹²² Williams, fn. 17, p. 38.

¹²³ Article 9 Cotonou.

¹²⁴ Article 96 Cotonou.

¹²⁵ See the Preamble Cotonou.

¹²⁶ Article 1 Cotonou.

¹²⁷ Article 8(3) Cotonou.

¹²⁸ Article 9(2) Cotonou

¹²⁹ Arts, Karin, 2001. Gender Aspects of the Cotonou Agreement.

¹³⁰ Article 20(1b) and (2) Cotonou

development strategies in order to improve reproductive health, primary health care, family planning; and prevention of female genital mutilation”.¹³¹ The content of this particular statement is a significant improvement over the wording of the population and development provision of Lomé. The inclusion of a specific reference to female genital mutilation is interesting and useful.¹³² It shows intent of actual action being taken in a specific area of concern.

The single most important gender-relevant provision of the Cotonou Agreement is its Article 31, entitled “Gender issues”. It appears under the heading “thematic and cross-cutting issues” within the Cotonou Articles on co-operation strategies.¹³³ It is a significant development that a gender-sensitive approach is promoted at every level of development co-operation, including macro-economic policies.

Many of the issues mentioned above were included before Cotonou, but the wording has been improved. The Cotonou does however not refer to the gender aspects of trade in its economic and trade co-operation provisions. This is in clear contradiction with the very first Article of the Agreement, which states that systematic account shall be taken of the situation of women and gender issues in all areas, political, economic and social.

4.4 Rhetoric and Action

Within the EU, even though the language of universality and indivisibility may remain absent from the Treaties there would nonetheless appear to be a consensus that it forms the foundation of all the Union’s human rights policies.¹³⁴ The many references to the UN Charter should also indicate that the EU is committed to the respect and enforcement of international human rights.

Rhetoric has been institutionally adopted that implies that the EU in fact adheres to a consistent interpretation of human rights principles regardless of context. The promotion of the principle of universality and indivisibility strongly conclude that human rights are assumed to have a visible content that will be applied uniformly in all EU spheres of activity and not only in its internal affairs.¹³⁵

For example, in the Council of Ministers’ Resolution of November 1991 promotion of human rights and democracy was made both an objective and condition of development co-operation. This Resolution has also been progressively followed-up over the past decade by the introduction of human rights and democracy elements into the Council Regulations that govern the array of regional co-operation agreements that the EU has.¹³⁶ Furthermore, a Joint Statement on EU Development Policy by the Council

¹³¹ Article 25(1c) Cotonou.

¹³² Arts, 2001, fn. 129.

¹³³ Part 3 chapter 2 section 4 Cotonou.

¹³⁴ Nowak in Alston, fn. 22, p. 688.

¹³⁵ Williams, fn. 17, p. 80.

¹³⁶ Crawford, Gordon, 2002. Evaluating European Union Promotion Human Rights, Democracy, Good Governance: Towards a Participatory Approach, p. 912.

of Ministers and the European Commission in November 2000 incorporated the promotion of human rights, democracy, the rule of law and good governance as an integral part of development co-operation, indicating intent to concentrate resources on this sector. It was subsequently declared that this joint statement represents a new framework for the European Commission's activities in support of human rights and democratization.¹³⁷

According to the Commission, gender equality is also closely linked to the EU development co-operation. The legal base for this approach is the 2004 Regulation on promoting gender equality in development co-operation.¹³⁸ This regulation replaced the 1998 Regulation on integrating gender issues in development co-operation that expired in 2003.

The purpose of the 2004 Regulation is to promote gender equality in EU development co-operation policies, strategies and interventions. To this end, the EU shall provide financial assistance and appropriate expertise aimed at promoting gender equality into all its development co-operation policies and interventions in developing countries.¹³⁹

The promotion of equality between the sexes has clearly, according to this regulation, a crucial role to play in fostering social justice and the effectiveness of development efforts. By recognizing the relationship between gender and poverty the EU has made an effort to incorporate gender mainstreaming as an integral part of its development policy. This approach reflects EU policy well. It seems the Commission realizes that, recognizing women's importance as agents of development and ensuring that mainstream development co-operation is fully reflected is needed in order for women's needs and interests to be recognized on an equal basis with those of men.

However, as with most of the regulations and programs of actions, the regulations of 2004 do not specific point to how resolving the fact that women are being discriminated is to be done. The regulation simply restates already known facts, that the equality between men and women is a fundamental human right and a fundamental part of development and poverty reduction. For example, article H of the Regulation states "whereas a large majority of poor people in the world are women and it is this link between gender and poverty which has made the gender factor in development co-operation policy more important than ever".¹⁴⁰

The objectives to be pursued by this Regulation are in accordance with the goal of promoting gender equality and empowering women as specified by the Millennium Development Goals, CEDAW as well as the Beijing Declaration and Platform for Action. The Regulation is further more binding in its entirety and directly applicable to all EU Member States and the Commission.¹⁴¹ Although this continued political and financial commitment demonstrates the importance that the EU acknowledge to integrating gender issues into development co-operation, it does not solve or

¹³⁷ Id, p. 912.

¹³⁸ Regulation (EC) No 806/2004.

¹³⁹ Article 1 Regulation (EC) No 806/2004.

¹⁴⁰ Article H 1 Regulation (EC) No 806/2004.

¹⁴¹ <http://www.eurongos.org/Files/HTML/EuroNGOs/TipsTricks/ec5.html>, 2007-04-18.

commit to solving the problem of inequalities between women and men. By simply stating that gender equality is important does not solve anything.

The program of *Action* (my italics) from 2001 states that the EU has a long-standing commitment to promoting gender equality and that the Community legal framework ensures that women and men are equal before the law. The promotion of gender equality is an important element of the European Union's external relations, of its development co-operation policies and, in particular, the promotion and protection of women's rights is an integral part of the EU's human rights policies in developing countries.¹⁴² Again, it is a matter of restating already known fact, but there is still no commitment to finding a solution.

A significant innovation since 1992 in the EU has been the inclusion of human rights and democracy clauses as essential elements in agreements with developing countries, standardized from May 1995. The Council's annual report on human rights for 2000, the second report on the subject published by the Council, congratulates itself for the insertion of such clauses in agreements with "more than 120 countries" though 77 countries were covered by one agreement that is the Lomé (now Cotonou) Convention.¹⁴³

The annual report does not mention, however, that human rights and democracy clauses remain outstanding in agreements by ASEAN and China with for instance, the opposition of some Asian governments where human rights clauses apparently does not constitute a barrier to ongoing trade and co-operation.¹⁴⁴

There are many arguments for and against conditionality, meaning human rights clauses. In defense of conditionality, the protection of human rights takes a principal stand, but the problem with conditionality is that it seldom can stand on its own. The clauses usually simply constitute a mutual reaffirmation of commonly shared values and principles, a precondition for co-operation in the context of those agreements. Thus, such a clause does not seek to establish new standards in the international protection of human rights. It merely reaffirms existing commitments which general international law already binds all States as well as the EC in its capacity as a subject of international law.¹⁴⁵

¹⁴² COM(2001) 295, p. 2.

¹⁴³ The Council's annual report on human rights for 2000, p. 33.

¹⁴⁴ Crawford, Gordon, fn. 136, p. 912.

¹⁴⁵ Id, p 912.

5 Analys

In this chapter I will discuss if the differences between the sexes are important to acknowledge in order to attain gender equality. Can equality between men and women in all areas of the law and society be achieved unless the different perspectives and experiences of women and men are considered when using the law as a mean to achieve gender equality? I will further discuss if it is possible to separate gender equality from other areas of the law, if gender equality is to be a reality.

5.1 Allowing Violations

To talk about human rights and in particularly gender equality as a recognized and established body of principles and concept in the context of the EU might be a bit misleading. The subject has been and remains controversial. The content and significance of the term gender equality are fluid and very much open to debate. The EU has however an obligation to respect human rights in its internal affairs and in addition the EU is by virtue of article 6(2) TEU also bound to respect human rights in its external affairs. This even though the ECJ has no real jurisdiction to review EU measures in the context of the second pillar¹⁴⁶, as mentioned in the introducing chapter.

The liberal position, upon which the practices of the EU, human rights, free trade and development as well as gender equality measures in much rests, seems to some extent be resisting any suggestion that moral or humanitarian issues take priority over free trade.

Many liberals argue that promoting free trade has a beneficial effect on the human rights records of countries that do not comply with internationally recognized human rights standards. The social contacts generated by the unregulated exchange of goods and services are paralleled by an inevitable and unregulated exchange of moral values. If governments want to enjoy the benefits of free trade, they cannot avoid the transmission of ideas that make people more aware of their rights. Some liberals also argue that, disrupting free trade over human rights issues, perhaps by applying trade sanctions, has no practical value because under the conditions of globalization, targeted countries have little difficulty in making alternative arrangements for the supply of essential goods, either legally or illegally.¹⁴⁷ The problem with this argument as I see it when it comes to gender equality is that women are systematically being discriminated all over the world because of the fact that they are women. If women are to have the same rights as men, the different lives of men and women needs to be recognized. By only applying same rights and arguments for women as for men and avoiding the structural dimension of

¹⁴⁶ Fierro, fn. 86, p. 3.

¹⁴⁷ Evans, Tony in Taylor, Annie and Thomas, Caroline (e.d.), *Global Trade and Global Social Issues*, (London: Routledge, 1999), p. 31.

the discrimination, real equality cannot be achieved. What is important is that the differences between men and women are acknowledged so that women and men in reality can enjoy the benefits of free trade. By simply stating that free trade might have “trickling down” effects on human rights does not mean that women will be afforded these rights same rights.

By (liberal) economists, it is often also argued that human rights are strengthened by free trade, since trade liberation usually lead to higher standards of living, because of an increase in labor opportunities and enhances the real income of nations. Furthermore, it is argued that the growth in real income is necessary to promote human rights. Human rights are in fact, in one or another manner, costly. The protection of rights requires a legal system that is effective and credible, and such a system is usually costly. Moreover, many rights require some additional sacrifices of other human wants minimum wages, minimum environmental standards, and social security systems, for example, all come at the price of an increase cost in goods and services, and or an increase in taxation. Human rights are in this sense similar to ordinary goods and services, in that they cost money and, because of the budget constraint that all individuals and society ultimately face, an increase in spending on human rights must be accompanied by a decrease in spending on other things that individuals might desire.¹⁴⁸

While this might be true, it must also be recognized that the spending on men differs from that on women. In order for women to acquire the benefits from free trade, special measures need to be taken to allow women the returns that the effect of free trade might have on a country. By including gender equality as a strategic and concrete aim of trade as well as within trade itself, women will also in the end be able contribute to the costs of human rights and gender equality.

The difficulties of balancing free trade and human rights in the context of development co-operation are immense and should not be underestimated. The problem as I see it is not that human rights perhaps should prevail free trade but rather that they should have the same influence as free trade arguments.

When raising human rights concerns, gender equality in the context of EU’s development co-operation, the liberal arguments such as those raised above can never be entirely removed, but they can, to some extent, be moderated by making sure that human rights and gender equality arguments are treated appropriately within the same forum. A mechanism that would help to ensure that equality norms and standards are interpreted consistently would be appropriate for human rights and gender equality expertise to be used by any policy forum. Because gender equality is a right that is enclosed in all human rights one might assume that a special gender equality approach to trade and development co-operation is not needed. However discrimination of women is often the cause of rooted structures (exceptions exists) rather than because of particular decisions taken to deny women rights. Therefore a gender equality approach needs to be enclosed in all areas of the law. It is not enough however to simply argue that women are

¹⁴⁸ Abbott et al, fn. 70, p. 71.

entitled to the same rights as men, because this is already a known fact. The concern of women needs to be specifically addressed. The fact is that women in most societies in one way or another are being treated different from men, therefore the law also need to treat women differently than men, to be able to reach the goal of true equality.

A trade sanction would in the case of gender equality probably sooner enforce the discrimination of women rather than create equality. This because cutting a countries income source would affect women more negatively than men. This does not however mean that violation of human rights are to be allowed rather it means that higher demands are to be put on the countries trading. It is essential that the EU in its trade and development co-operation agreements take a principal stand on human rights and on women's equal rights but its far more important that these principal stands are backed by enforceable legal methods of making sure that appropriated measures are taken to ensure and promote equality between men and women. In order for women to enjoy the same rights as men the differences between men and women needs to acknowledge as well as the differences needs to play a part in the creation of agreements and laws.

5.2 The Gender in Trade and Development

On the one hand, liberal feminists view trade liberalization as generally positive for most women, in cases increases in levels of world trade has led to greater incorporation of women into the paid labor force, which liberals assume to be a precondition for an improvement in women's status. In contrast, socialist feminists tend to argue that the benefits to women associated with new employment emerging from trade (when it occurs) are extremely limited, and that the costs are extremely high. Increased access to paid employment does not necessarily improve women's welfare, since entry into the workforce is often a survival strategy adopted by women in response to increased levels of poverty.¹⁴⁹ Despite their differences both positions agree that trade is gendered with a differential impact on men and women, and that most women are currently among the most vulnerable of the world's population.

The root causes of gender inequality often lie in social norms and structures, linked to the traditional reproductive functions of women and manifested by male dominance and authority at home and in the workplace. These factors contribute to weakening women's capacity to earn their own income, especially as they render it difficult for women to access resources such as land and credit and other basic services such as education and health care. Given women's lower role in society, their bargaining power in the workplace is also weak. The outcome, in terms of the role and status of women in the economy, is reflected in insufficient participation in the formal labor market, poor conditions of work and quality of employment, job segregation (occupational stereotypes), lack of empowerment, and wage inequality for the same job as men.¹⁵⁰

¹⁴⁹ Mcdonald, Laura in Taylor et al, fn. 147, p. 55.

¹⁵⁰ Tran-nguyen et al, fn. 39, p. 3.

Structural causes of violations need to be acknowledged, because this will allow us to raise questions about important aspects of the debate, concerning human rights violations and in particular discrimination of women. Since the structures and practices of globalization are the cause of many violations, reliance on a legal system that seeks to apportion blame and punish individuals is misplaced. Therefore the law needs to acknowledge women's different experiences and perspectives. If the law applies only to identifiable actions rather than social institutions and practices, which provides the context for action in the case of discrimination against women nothing can actually be solved.

The law may be capable of even out the consequences, but it cannot address the cause. This is why the differences between sexes are important to recognize to achieve equality. In order to be able to create real gender equality, the fact that men and women are treated differently due to structural causes needs to be identified by the EU in its development co-operation and specific areas where women are being discriminated ought to be addressed by the law and the agreements made. It is not enough to state that gender equality is a goal to strive towards neither is it enough to conclude that women are being discriminated. Actions need to be taken in specific areas of the law, which remains the strongest forum for action in the context of EU.

5.2.1 Promoting Gender Equality

While social norms and structures continues to be the root cause of discrimination, economic growth can in fact play an important role in reducing barriers to gender equality, and eventually contributing to a change in gender-based social norms and perceptions.

Many studies have found a strong correlation between gender equality (often measured as the educational gap between men and women) and economic growth. Studies also shows that as income grow, families are more willing to allocate resources to the education of girls, and growth creates more jobs, which can absorb the entry of more women into the labor market. The rise in the level of education of women allows more of them to be employed.¹⁵¹ In the end, a more active female participation in the labor force will probably contribute to changing social norms and perceptions about men and women's roles in society. Again, however it is important to stress that gender equality cannot be achieved unless it is recognized that a seemingly gender neutral law or action in fact can subordinate women further if the differences between men and women is acknowledge when applying the law.

The overall impact of trade on the economy will affect women in the same way as economic growth and development has a gender impact. An economic downturn, on the other hand, might affect more women than men because, in general, women are a more vulnerable group of the population. Trade law and development co-operation therefore, should be interpreted and evolved in a manner consistent with the hierarchy of norms

¹⁵¹ Id, p. 8-11.

in international law in general, where many basic human rights have the status of custom or general principles, which would normally prevail over specific provisions of a trade treaty, assuming an actual conflict.¹⁵²

The EU in its development co-operation agreements would be better of recognizing that human values related to human rights are fundamental and that free trade rather should be seen as an instrument of basic human values than a separated area of law or policy. In the sense of gender equality this means that women are to be put forward as special group of concern. Women are in international law afforded special protection because of the fact that women as a group are being systematically discriminated around the world. If this is not recognized by the EU and its co-operation partners in development, the EU risks promoting women discrimination instead of promoting equality.

The assessment of the impact of trade law in development co-operation policy is particularly difficult when it comes to equality, as it is generally considered to be gender neutral. However, because international trade in goods and services has a differential impact on women then on men, this highlights the need for well-targeted domestic and international policies and measures, aimed at addressing any negative impact that trade liberalization and development co-operation policies may have on gender equality. Even if we don't find a legal conflict between trade and human right norms in the classic sense, there is nevertheless a need for institutional evolution in the EU. There is furthermore a need to understand the effects of trade laws and development co-operation policies in the broadest sense, and a need to evolve new laws and policies in a manner that overcomes the weak enforcement of real equality between men and women.

5.2.2 Real Equality

Human rights law and equality legislation as well as gender equality policies in general, are often attempting to achieve legal equality between men and women **with a liberal** “add-women-and-stir” approach. Women's situations are simply being added on to male experiences. The problem if we only attempt to change the law as it impacts on women's lives and neglect to ask the questions behind the inequality is that we risk promoting women's oppression instead of stopping it. Any general or abstract approach to solve women's problem is unlikely to have any real structural change.

A general standard of equality instead usually falters in the face of situations such as for example pregnancy, in which women are not like men. The situation of each individual is in fact strongly influenced by her or his gender and the assumption of neutrality in practice obscures the fact that the norm is categorically male.¹⁵³

Instead the legislator should and would be better of identify objectionable aspect of particular situations and argue for particular changes in appropriate forums, which then often will be the law. The CEDAW can in some perspectives be seen to try to do this when its aim is to abolish

¹⁵² McDonald, Laura in Taylor et al, fn. 147, p. 55.

¹⁵³ Becker, E. Mary in Weisberg, fn. 6, p. 221.

discrimination in reality and not just in the legal text. The convention however still embraces a version of equality that is somewhat abstract with no real grave importance behind it, since reservations by countries to several articles are allowed.¹⁵⁴

Both internationally and domestically, human rights for women have come to be based predominantly on the principal of equality as general abstract idea of equality in the liberal sense. Yet women's disadvantages have persisted.¹⁵⁵ The law will continue be inadequate if limited to an abstract universal position. The perception that there is an essential commonality among all women or all men will not only enforce the inequality between men and women but it will also impose even more discrimination. The principle of equality and the prohibition of discrimination ought to reflect the real differences in women and men's realities and in lived experiences. These include differences of race, class, age, physical ability and sexual preferences.¹⁵⁶ It is, however, not enough to name the differences of race, class, and sexuality. The differences must be understood and disclosed in order for the law to promote real equality.

The EU in its development co-operation as well as within the EU itself must embrace a version of equality that makes it possible for true equality to come about. The EU is through gender mainstreaming trying to incorporate gender into the policies of the Union. By using gender mainstreaming the EU seeks to evolve the traditional liberal view on equality and human rights as mainly an individual right and are by applying gender mainstreaming hoping to incorporate women's perspective into the interpretation of laws and agreements. Without actual concrete actions however, gender mainstreaming will continue to simply enforce a general liberal abstract idea of equality rather than actually putting forward women.

5.3 The Interdependency

The life of the law depends on institutions and structures in diverse and complex ways. Rights and legal obligations, whatever their content, remain without impact in a vacuum if not properly enforced. They need to be supported by a large variety of institutions and structure in society, politics, culture, traditions and economies. This is true for both the realization of gender equality and for a functioning liberal trade system and for development to come about. Furthermore, human rights cannot grow without education, without mutual respect and tolerance, nor without a tradition to respect human rights of individuals in society and daily life and gender equality cannot grow without an accountable government and democracy, without economic prosperity and without the courts as guardians of constitutional rights.¹⁵⁷

¹⁵⁴ Article 28(2) CEDAW states that a reservation incompatible with the object and purpose of the present Convention shall not be permitted, but it does not prohibit reservations as such.

¹⁵⁵ Gearty, and Tomkins, fn. 36, p. 197.

¹⁵⁶ Becker, E. Mary in Weisberg, fn. 6, p. 221.

¹⁵⁷ Abbott et al, fn. 70, pp. 93-94.

An open trade system in addition, depends on market structures, international communication, cultural interaction and mutual respect, economic efficiency, but also solidarity and safety nets within a society for those who lose in economic integration, regional or global. Clearly human rights, trade and development all depend on the rule of law. Equally, many of the institutions that can make the dream come true also depend on the law. The relationship of law, politics, social, cultural and economic therefore is one of mutual dependency and interaction.¹⁵⁸

If we conclude that development is dependent of free trade and the strengthening of human rights and that trade and human rights in fact are dependent on each other should there not also then be an institutional and legal linkage and interconnection between the different areas and between human rights and trade as well?

In the context of EU and its development co-operation, attempts have been and are, as we have seen, made to connect the areas of human rights, trade and development in to one, through the different Partnerships Agreements and policies. The connection is however not always done in practice, as well as it is not done consistently. More than once have trade preferences prevailed over human rights issues in the context of development co-operation, which naturally also has consequences for the equality between men and women. Trade can, as we have seen, of course have great benefits for both human rights and for gender equality. Still, however women are not participating nor benefiting at the same terms as men. Women for example do not have the same access to the market, land, or educations etc. If circumstances like theses are not regulated the inequalities between men and women will persist, therefore clearly the difference between women's and men's experiences becomes important and are needed to recognize in order to achieve real equality.

¹⁵⁸ Id, p. 93-94.

6 Conclusion

Policy reforms are usually defined by the search to extend more rights to people but as long as the concept of rights remains based on the value of non-interference we can only travel so far. An equality analysis should in my opinion be designed to do no more than to extend equal rights to people. As it is now the EU through its gender mainstreaming is diverting attention from the incomprehensible deeper nature of the problem leading to the plea for equal rights. Whilst it is important that human rights and equality between men and woman as a fundamental human rights, are being acknowledged and incorporated in the frame work of institutions, it is, in my opinion, far more important that the rights in question are given priority and are being treated not as a part of a whole but as a fundamental condition for achieving the whole. The EU would be better of pointing to specific areas where women are being discriminated instead of a general based approach to the discrimination of women. Real equality between men and women is of course a process but as such, it needs all the support it can get.

The EU is a major trading block and therefore it has a double responsibility, both to women within Europe and to women in those countries with which it co-operates. The Union has made a commitment to respect women's rights and therefore has a responsibility to make sure equality between women and men are being incorporated and enforced in all areas of EU co-operation. Even when structural causes of human rights violations are being acknowledged, the most frequent response to trade related human rights violations is to propose more legally binding codes of conduct or constructing more policies on how to achieve equality through gender mainstreaming.

There are, and always have been, sharp differences between the views and the concerns of member states in the international society, related in part to the values embodied in their own political systems and their own different economic and social situations and histories. Today the large economic differences between rich, poor, and transition countries is also reflected and an important part of the different views of countries. The special protection afforded to women under CEDAW for example seems to attract little respect when there is a need for low paid workers engaged in the production of export goods. It is therefore important that EU in its development co-operation make an effort to put forward the right of women as a condition for development co-operation and for trade. It is important to recognize, however, that the globalization and free trade does not lead to homogenization and changes in trade and development does not have the same effects on women everywhere.

The impact of changes in the international trade regime will vary dramatically between groups of women across the global economy depending upon such factors as region, class, race, ethnicity and State policies. Why, gender mainstreaming needs to be backed by special measures in certain areas of concern in order to put forward women, i.e. special land rights for women and subsidies education for girls.

Policies and measures that promote gender equality and address any possible setbacks needs to be identified as well, bearing in mind the special development needs of developing countries. Furthermore, all EU trade and development co-operation agreements should contribute to the promotion of social and gender equality because inequalities may be unintentionally reinforced should trade policies and agreements remain silent on gender equality. Most importantly however, is that legislative proposals are made as well as concrete measures are taken in the area of law to create gender equality in reality.

What concrete measures can then be taken in the area of EU's development co-operation in order to promote gender equality? The answer to this question is far more complicated than one might think. In order for gender equality to come about, the political will for this to happen have to exist at all levels of co-operation and not just at EU level.

As argued throughout this paper inequalities between men and women are often structural rooted and even if I would point to specific areas of the law that needs to be changed, i.e. equal pay, right to education, right to self-determination etc. the fact remains that the law by itself cannot change the rooted causes of inequality. The law can however and should be used as a mean to get to the end. What is important is that the law imposes a view of gender equality that is enforceable. If gender equality remains as a universal abstract idea, the law by itself cannot change much. It has to be recognized that even if the law seemingly is gender neutral, the law is subject to interpretation and if not concrete enough the law will continue to embrace a version of equality that is not enforceable.

The conclusion that can be made from this paper is that clearly more has to be done in the area of gender equality in the context of EU's development co-operation policies as well of course within the EU. Another conclusion is also that progress in areas has been made. What is important to underline however, is that even though gender equality as a process have and will continue to evolved over time, it cannot be stressed enough that real gender equality can only come about if continually stressed, recognized and enforced at all levels of co-operation and society.

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