Judicial Politics in the European Union: Its Impact on National Opportunity Structures for Gender Equality

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Abstract

The paper investigates the proposition that the impact of European judicial politics on national modes of governance in the field of gender equality is influenced by domestic mobilisation. Domestic mobilisation refers to activities in EU member-states aimed at ensuring that public and private actors at the national and local level enforce European laws and standards, or to efforts to counteract just such activities. In order to specify the conditions under which domestic mobilisation impacts judicial politics, this study systematically evaluates a set of variables designed to indicate the degree of openness of the national political and judicial systems and, hence, the likelihood of mobilisation in three member states. The analysis assesses the extent to which these factors constitute either favourable stimuli and incentives or conflicting structures and adverse forces for the expansion of judicial politics regarding gender equality within the European Community. The paper concludes that it is necessary to rethink the concepts governing the interaction between law and politics in the complex context of this emerging arena of European public policy.

Zusammenfassung

Die Mobilisierung privater und öffentlicher Akteure auf nationaler und lokaler Ebene beeinflußt in entscheidendem Maße die Wirkung des europäischen Richterrechts auf die Regierungspraktiken der EU-Mitgliedsstaaten im Bereich der Gleichstellung der Geschlechter. Dies betrifft sowohl Aktivitäten, die es ermöglichen, eigene Interessen mit europäischen Gesetzen und Standards durchzusetzen, als auch diejenigen Aktivitäten, die solchen Bemühungen entgegenwirken. Um die Bedingungen herauszustellen, unter denen auf diese Weise die Rechtspolitik beeinflußt wird, bewertet die vorliegende Studie eine Reihe von Variablen, die den Grad der Offenheit nationaler Regierungs- und Rechtsprechungssysteme bestimmen und damit die Wahrscheinlichkeit der Mobilisierung in den drei Mitgliedstaaten. Es wird aufgezeigt, inwiefern sich diese Faktoren auf die Verbreitung des europäischen Richterrechts im Bereich der Gleichstellung der Geschlechter positiv oder negativ auswirken. Das Fazit der Studie ist, daß die Mechanismen hinter der Interaktion zwischen Rechtsprechung und Politik neu überdacht werden müssen angesichts der wachsenden Komplexität und Bedeutung der europäischen Politik.

Contents

1 Introduction

The judicial activism of the European Court of Justice (hereafter ECJ) is steering the Community legal order in a supranational direction. Gender equality is an area of Community social policy law that has experienced one of the most dynamic expansions (Hoskyns 1996). In spite of obvious limits related to the predominance of an economic rationale and a certain integrationism, the jurisprudence of the quasi-supreme Court of the European Union undoubtedly questions the accommodation of gender inequalities that generally characterises most European welfare states (Orloff 1996a).

While most observers agree that it is necessary to 'bring the courts back in' in order to understand Community gender policies, few have addressed the essential question regarding the forms and variations of judicial politics in the field of gender equality in the European Union (Volcansek 1986; Leibfried and Pierson 1995). This is reflected by the fact that divergent national reactions towards these new Community norms have not been subjected to systematic inquiry. Both theoretical and empirical research on this issue needs to be conducted.

In an effort to overcome the persisting contentions between legal scholars and political scientists on the issue of the relationship between law and politics (Bourdieu 1991; Shapiro 1994; Caillosse 1994), this interdisciplinary work aims to explain how and under which conditions EU judicial politics influence national modes of governance in the field of gender equality.

This study assumes that a link of causality exists between Community judicial politics, on the one hand, and on-going changes in national modes of governance in the domain of gender equality, on the other. The study investigates the proposition that the impact of the independent variable is influenced by uneven domestic mobilisation in the EU, which, in turn, depends on the degree of openness of the national political and judicial systems. In this paper, the notion of judicial politics not only refers to the law-making power of the ECJ but to judicial policy-making as well. It also includes the crucial political role played by the Community judiciary in steering the Euro-polity in a supranational direction. Changes in

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modes of governance in the field of gender equality concern the emergence of new forms and levels of action in the domain and a redistribution of resources among the actors.

In order to specify the conditions under which domestic mobilisation[1] influences the impact of EU judicial politics, it is necessary to systematically evaluate a set of specific variables designed to measure the degree of openness of the political and judicial systems involved, and hence, the likelihood of domestic mobilisation. The purpose is to assess the extent to which the domestic systems display either favourable stimuli and incentives or conflicting structures and adverse forces for the expansion of Community judicial politics in the field of gender equality. Domestic mobilisation will be examined according to specific criteria inspired by political analyses on social mobilisation and by legal studies on the access to justice.

In the three cases of the United Kingdom, Germany and France, Community gender equality law has provoked substantial changes in the national legislation. There is, however, strong variation in the response of these three distinctive national political and judicial systems towards EU judicial politics.

The United Kingdom has been particularly well receptive to Community judicial politics insofar as British gender equality law and Community legislation have been shaped partially by this interaction. As in every member state, gender equality litigation occurs still relatively seldom compared with the number of dismissals and redundancy claims in the area of employment law. Compared with other domains of Community law, however, the Article 177[2] referral rate of British courts pertaining to sex discrimination cases is certainly one of the highest in the EU.[3] Of course, the degree of interaction between the Community judicial arena and national ones cannot be entirely assessed through the number of preliminary rulings, although this number does provide a sound and verifiable indicator of the nature of the relationships between Community judges and national ones. Not only do British courts make a surprising number of referrals in the

1 Domestic mobilisation refers to activities in EU member-states aimed at ensuring that public and private actors at the national and local level enforce European laws and standards, or to efforts to counteract just such activities.

2 The preliminary ruling procedure, based on Article 177 of the EC Treaty, enables a national judge to refer questions of interpretation of Community law to the ECJ during the proceedings of a national trial.

3 By July 1999, 31 preliminary cases had been brought by the United Kingdom (3 cases are still pending). Compared with the situation of gender equality cases, British courts have very low rates of participation in the preliminary ruling procedure in terms of their population base. UK litigants are only hyperactive in the social field with the exceptional percentage difference of 17.54% (Stone Sweet and Brunell 1998: 84–87).

gender equality field, they also cite ECJ rulings quite frequently. The combination of a high rate of referral to Article 177 and a growing use of Community law by national judiciaries undoubtedly attests to a strong degree of responsiveness in the UK to EU judicial politics.

The constant flow of British references to the ECJ is frequently explained by two crucial factors: striking inconsistencies between Community and national law, on one side, and the fact that the Convention of Human Rights is not part of domestic law, on the other. From this perspective, British judges and litigants are said to be simply forced to use EC law (O'Keeffe and Hervey 1996). The gender pay gap in the UK is wider than in Germany and France. Women's gross hourly wages – full-time earnings, bonus excluded – equals 73.7 percent of men's in the UK, 76.6 percent in France and 89.9 percent in the new *Länder* of Germany (compared to 76.9 percent in the old *Länder*). The EU average is 76 percent (Eurostat 1999). Certainly there is some truth to the argument that the member states with acute employment law problems have experienced both the highest litigation rates and the greatest innovation in equality litigation procedures. I do not deny that the impact of Community judicial politics rests partly upon a reactive basis to grievances on gender equality issues brought to the attention of the relevant bodies. It must be noted, however, that while gender equality norms in most member states seldom meet Community standards, the majority of EU countries still exhibit low litigation rates in this field (Prechal and Senden 1997). Inconsistencies or 'misfits' between national law and Community law are a necessary but not a sufficient condition for domestic mobilisation. In this paper, I present empirical evidence that domestic mobilisation in the field of gender equality crucially depends on the openness of the political and judicial systems.

In Germany, the influence of Community norms, combined with the dynamic jurisprudence of the Federal Constitutional Court, have led to an application of the constitutional gender equality principles that had existed on paper for decades. This impact is not due, however, to a sudden open-mindedness of the German executive or legislator. Like the majority of member states, Germany has interpreted Community directives in a rather minimalist way. The real channels of this influence have been through the large number of German references to the ECJ. Germany's litigation rates are the highest in the European Union.[4] More-

4 By July 1999, 37 preliminary rulings had been brought by Germany before the ECJ (11 cases are still pending). Germany exhibits low activity in the social field (–6.28%) whereas it is very active in agriculture (13.54%) and external policy (15.8%). As far as the extent to which each member state accounts for the share of all European litigation in the social field (Articles 117–122 EEC), German references, like British ones, equal 24%. Whereas total references from the UK to the EJC make up 6 % of all EU litigation, German total references amount to 30% (Stone Sweet and Brunell, 1998, 84–87).

over, judgements are based on EC law in 20–30 percent of cases. Unlike the UK, Germany does not display any particular gender equality forum which would explain these litigation patterns. The conditions and forces that facilitate Community judicial politics in the field need to be specified. It should also be pointed out that, in absolute terms, litigation based on Article 177 occurs in Germany more often that in other member states; but in relation to the frequency of litigation on the whole in Germany, the number of Article 177-based cases is still quite low. Another distinctive feature of the German case is that such judicial developments are focused upon a relatively small number of issues. In contrast with the British cases, which touch upon equal pay, equal treatment, social security, pension, pregnancy, homosexuals' rights, etc., more than 80 percent of the German preliminary rulings raise the question of indirect discrimination against women, especially in connection with part-time work, pensions and affirmative action. German cases relate to very specific and distinctive provisions of German employment law that are increasingly revealed to be incompatible with Community legislation (Schiek 1998). Such a pattern may indicate the existence of a strategy to use EU-level litigation selectively.

France, like many member states, had equality laws[5] on the books before the Community equality directives were passed (Gardiner 1997). The existence of the now legendary Article 119 is mainly due to the French government's pressures during the negotiations of the Rome Treaty. France has also played a leading role in supporting the adoption of EU-level protective legislation for female workers as mothers. Nevertheless a significant bulk of the contemporary French national legislation has been enacted in order to comply with European law, once France joined the EU.

Unlike in the United Kingdom and Germany, European legal integration in the field of gender equality has not triggered much mobilisation in the judicial sphere in France. Gender equality litigation barely exists in France both at the national[6] and Community levels.[7] It is true that French gender equality norms are comparatively high. There is a high rate of full-time employment of women combined with a high birthrate. The existence of more comprehensive child-care facilities

5 Gender equality provisions in French law date from 26 October 1946, since the preamble of the French Constitution guaranteed equal rights to women in all fields.

6 During the period 1983–1993, the *Cour de Cassation* decided four cases relative to equal value, two handled by the Criminal Chamber and two dealt with by the Social Chamber. *Cass. Soc*. 16 March 1989; *Cass. Soc*. 19 February 1992; and *Cass. Crim*. 31 May 1988; *Cass. Crim*. 6 November 1990.

7 Only three preliminary rulings have been brought by France. While France's total preliminary references equal 17% of all European litigation, they equal only 4% in the social field. French litigants are overly active in the field of competition (13.72%), while their activity in the social domain equals –12.90%.

and more special protective legislation for women than in most member states partly explains these very low litigation levels for a country of this size. Thus, France largely fulfils Community requirements in the field of employment law. However, the French model of gender equality, in which the state intervenes by passing measures to protect women both as workers and as mothers in the private and public spheres of society, clearly contrasts with the Community's formal conception of equality, notably its very restrictive approach to differential treatment and its refusal to deal with the 'private sphere' (More 1993). Until now, only two cases have raised the question of this essential inconsistency between Community law and national law. Another aspect of the peculiar French situation is that Community gender equality norms are invoked by employers and not by female workers. Essentially, French gender equality legislation is being challenged by litigants who are not supposed to be its main beneficiaries. The very limited number of gender equality cases is all the more perplexing since France offers channels in the civil and criminal judicial systems that would potentially enable a wide range of actors, from individuals to associations and trade unions, to bring gender equality cases before the courts. Such a configuration may indicate the existence of a genuine strategy of contention on the part of certain national private and public actors towards the Community judicial arena.

It is worthwhile to solve the puzzles posed by these three member states and assess the extent to which variations in the degree of openness of the national political and judicial systems account for these different litigation profiles. I begin with the analysis of an initial set of variables to assess the degree of openness of the national political systems. Subsequently, I examine a second cluster of factors to measure the access to justice. After showing how and under which conditions the degree of openness in the national political and judicial systems and, hence, the likelihood of domestic mobilisation influence the impact of EU judicial politics in these three countries, I consider the general characteristics of the cases and point out the uneven and difficult context of the mobilisation of Community law in the European Union. I close by considering the relevance of the identified mechanisms for the analyses of EU legal integration.

2 Exploring the structures of opportunity and incentives in the United Kingdom, Germany and France

The following descriptions do not pretend to be new, and much has been written on the respective political systems of France, Germany and the United Kingdom. However, an analysis of Community court cases that highlights the interactions

between national structures and actors, on the one hand, and Community judicial dynamics, on the other, remains an unusual approach because it breaches conventional distinctions between the disciplines of law and political science (CURAPP 1993; Wincott 1995).

The British, German and French political systems will be examined in the light of various criteria identified by studies on political opportunity structures (hereafter 'POS'), a concept that has been forged for the methodological analysis of political contexts of social mobilisation (Kitschelt 1986; Tilly 1986; Kriesi 1991; Tarrow 1996). Instead of providing a deterministic explanation, this perspective aims to assess the receptivity or vulnerability of a given political system to actions of a challenging group. It explores the distribution of opportunities and incentives for action (Rootes 1997). This type of analysis is particularly interesting with respect to our own research questions.

This initial section focuses particularly on certain elements of the 'POS' analytical model because they appear to be more relevant than others to identifying specifically the conditions, actors and channels that either facilitate or impede, more or less directly, the mobilisation of Community law and the Europeanization of gender equality. It would be interesting, for instance, to grasp the contrarian tendencies that re-assert and specify national standards of gender equality over Community ones. This set of indicators includes the state model, the national patterns of governance, the degree of openness of the national political systems, the position of the judicial branch, relations between state and society, as well as the configuration of alliances in the three countries under discussion.

The United Kingdom and France embody strong, unitary states, although they are neither homogenous, unified nor autonomous (Mény 1987). Both countries are characterised by a high degree of centralisation and concentration. In the particular case of the UK a further factor is the tradition of secrecy. Thus, these political systems are rather closed to their detractors and display very few access points (Mény, Muller and Quermonne 1996). In contrast, Germany, because of its federal structure and strong judicial power, which acts as a co-legislature, would be an 'open State'. It may also be characterised as a 'weak' state.

The domestic judicial systems of the three member states also display cross-country variations (CEC 1998). The United Kingdom has a common law jurisdiction with no constitutional review and is characterised by the absence of a long-standing public law tradition to control administrative action. British political culture values minimal judicial interference in politics. Significant is the fact that British institutions narrowly construe statutory interpretations by judges and subject all judicial decisions to parliamentary overrule. Britain's judicial system is a centralised one. Certain positive factors have nevertheless reinforced the position of the judicial branch, including the particular impact of the American legal model,

notably its emphasis on judicial activism, which is well reflected in Britain's Sex Discrimination Act of 1975 (Posner 1996; Rawlings 1995). Moreover, the interest in public interest litigation and the general enthusiasm for the discourse of rights, as illustrated by the great success of Dworkin's theory of rights, are also influences to be considered (Dworkin 1977). Last but not least, legal aid has always been valued in the United Kingdom, despite the reforms of 1990 and 1993 aimed at reducing access to public funds for litigation. Negative factors have also strengthened the position of the judicial branch. The longevity of a government opposed to social legislation and the doctrine of parliamentary sovereignty have helped confer a very significant role to the judicial arena in social politics. In the United Kingdom, the judicial system seems to be perceived as a battlefield for expressing dissent and exerting pressures for change on the British government (Sunkin 1994). Thus, when assessing the position of the judiciary, a distinction must be made between the formal powers of the judicial branch, on the one hand, and the symbolic status of the judiciary in a given society, on the other (Garapon 1997).

The Federal Republic of Germany is characterised by a political culture that accepts judicial review and authority. The Basic Law and the Constitutional Court, to which individuals can bring cases of alleged infringements of their fundamental rights, assume a central role. Moreover, Germany has a civil law jurisdiction with extensive forms of constitutional review and a well-established tradition of public law that stresses individual protection from arbitrary administration. Last but not least, the German judiciary is a decentralised system. Such distinct features constitute favourable conditions for the development of judicial politics (Landfried 1995). The courts and societal actors involved may be more prone to resort to the Community judicial system because litigation and the language of rights are already part of their terminology and 'repertoire of action' (Tilly 1975).

On the contrary, France has a civil jurisdiction with limited forms of constitutional review, no individual access to the Constitutional court, and a deeply-rooted distrust *vis-à-vis* judges' role in politics (Troper 1980). The country is well epitomised by constant limitations to judicial law-making and a long tradition of public law that would tend to value administrative efficiency over the defence of individual rights and freedoms. French jurisdictions also seem to be characterised by a self-referential legal culture: Community sources are rarely cited in national judicial decisions. However, many factors have helped modify this initial configuration. Breaking with long-standing practices, the *Conseil d'Etat* (State Council) increasingly emphasises the protection of individual rights *vis-à-vis* the administrative authority. The highest administrative judicial authority has also encouraged actions brought by public interest groups. Equally, the unexpected transformation of the *Conseil constitutionnel* must be stressed. Initially meant to be a political organ which validates the laws passed by the executive, this judicial authority now effectively exerts its powers of judicial review and constitutional control

(Stone 1992). As in most Western societies, French judges are also faced with a growing demand for justice: Litigation strategies have been developed by French pressure groups in the domain of agriculture, environmental protection and the rights of migrant workers (Garapon 1996). Despite this significant evolution, the judicial branch remains the weakest branch of the French government.

The configuration of alliances is also very different in these three countries (Katzenstein and Mueller 1987). The United Kingdom offers a very rich configuration of allies and support in the field of gender equality. Public agencies, trade unions and interest groups are extremely active in the field of gender equality litigation.

Germany's configuration of allies in the field of gender equality appears relatively modest compared with its normally high degree of intermediation in the labour and social fields (Nielsen 1993). Although numerous, women's movements are non-institutional and scattered. Traditional organisations, such as unions, have only supported a few gender equality cases, and their attitude toward Community jurisprudence on temporary work remains ambivalent. Governmental initiatives in the domain of affirmative action for women under the auspices of the *Länder* remain controversial. Moreover, they do not always seem to serve the interest of women in the courts.

France's configuration of alliances in the field of gender equality is distinguished foremost by its mediocrity. The long-lasting distrust toward corporatism and intermediation certainly is an unfavourable condition for the development of a network of non-public actors in the field of gender equality (Cohen-Tanugi 1992). Few women's groups exist in France. Furthermore, the belated concern expressed by the Socialist Party and the Government for the promotion of women's rights does not appear to have had any major effect (Gaspard and Servan-Schreiber 1992). The failure of the French practice of state elitist feminism and the predominance of symbolic politics are being increasingly denounced (Mazur 1995). Neither unions, interest groups nor even informal networks have been very supportive. On the contrary, a diverse assortment of French private and public agents operate as a protective shield against Community norms and devolution in the field of social policy. On the one hand, French government's responses to changes forced by Community institutions are usually the belated introduction of minimal changes necessary to avoid contravening EC law. On the other hand, French judges, lawyers and civil servants as well as social partners generally tend to consider that 'nothing is needed' by way of compliance since the equality provisions in the French Constitution and in national legislation are seen as providing sufficient protection. Opposed to a model of gender equality prevailing among some forces in the Community claiming that workplaces are desexualised and social conditions are completely equal for men and women, they are thoroughly convinced that women still need protective legislation.

Table 1 First complex of variables: Structures of opportunity and incentives in the United Kingdom, Germany and France in the field of gender equality

	United Kingdom	Germany	France
State model	– Unitary – Strong	– Federal – Weak	– Unitary – Strong
Type of polity	Statist polity	Corporatist polity	Statist polity
Access to decision-making	Closed	Open	Closed
Position of the judicial branch	Medium (Parliamentary sovereignty, absence of a codified charter of rights, but litigation is an important element of the repertoire of action of both public and private actors; great influence of Dworkin's doctrine of rights)	Strong (Basic Law, central role of the Constitutional Court, judicial review, high degree of juridification)	Weak (Referred to as the 'judicial authority', strict and rigid separation of powers; judges are the 'mouth of the law'; rejection of judicial interference with politics but recent significant changes)
Sub-national autonomy	Weak	Strong	Weak
Configuration of alliances	Strong	Medium	Weak

In summary, it can be said that the degree of openness of the three national political systems, the position of the judicial branch of each country, and the prevailing patterns of relations between state and society seem to indicate that the German political system and, to a lesser extent, the British one, provide more favourable conditions for domestic mobilisation than the French political system. It is true, however, that the corporatist nature of the German polity seems to disadvantage groups promoting women's rights. Gender issues have to be brought forward through the established organisations, which are reluctant to take up these issues since they need not fear the competition of outsiders as much as do the British unions. British opportunity structures in relation to gender equality are certainly not as closed to the Community judicial politics as it is often argued. The presence of a strong, unitary and centralised state, the doctrine of parliamentary sovereignty and the weak position of the judicial branch tend to prevent access of societal actors to decision-making processes. These contrarian impulses are, however, somewhat counterbalanced by the pluralist nature of state–society relations in the United Kingdom (Boddy and Lambert 1990). Moreover, there is a dense configuration of allies and support in the field of gender equality. In addition, private

and public actors active in the field have undoubtedly succeeded in instrumentalising the judicial sphere. Public agencies, trade unions and interest groups have been particularly active in the field of gender equality and therefore constitute the exception to the rule in comparison with most of the EU member states.

At the other end of the spectrum, France's political opportunity structures betray the greatest number of adverse forces for the expansion of Community judicial politics in the field of gender equality. France is a 'closed state', the position of the judicial branch remains rather weak, and state–society relations are relatively underdeveloped. Moreover, the configuration of allies is especially weak in the field of gender equality. France is undoubtedly a case where the Europeanization of gender equality politics has been strongly counteracted by the legislative, executive and judicial branches of government as well as by a wide range of private and public actors. Actors in the field do not seem to be particularly interested in using the window of opportunity offered by the Community judicial order.

The identification of the favourable versus adverse forces and conditions for the expansion of Community judicial politics in the domain of sex equality politics makes it possible to grasp the uneven political contexts within which the Community judicial process must operate (see Table 1). Next I will examine the second complex of variables relative to the degree of openness of the national judicial systems.

3 Effective access to justice in the United Kingdom, Germany and France: A "no frills" evaluation

The availability of equality litigation channels is a vital factor for the penetration and development of judicial politics: An effective access to justice in the field of gender equality facilitates the mobilisation of law. Despite the presence of equality litigation procedures in all EU member states, it seems that certain national systems are more 'open' than others and better equipped to provide effective and easy access to justice (Cappelletti et al. 1978 / 1979). Access to justice is an important dimension of domestic mobilisation. It thus influences the impact of judicial politics on national modes of governance in the field of gender equality. This argument is worth being further substantiated.

An important element is, of course, the position or attitude of national judges *vis-à-vis* the ECJ, as well as the nature of the dialogue between the national judiciaries. Far from being little more than transmission belts, national courts and tribunals assume a key role in the inception and the conclusion of the Article 177 prelimi-

nary procedure. Any national judge may take the initiative to refer a case to the ECJ. Faced with the request of one of the parties to resort to the preliminary ruling procedure, judges of first-instance courts and intermediate ones are in the position to allow or prevent a case to be referred to the ECJ. As a result of a "process of hybridization", particularly encouraged by the ECJ, national judges are now serving as both national judges and Community ones. There is no doubt that national judges have been empowered by the process of European legal integration (Maher 1998).

The empowerment of national judiciaries does not necessarily lead to a dialogue or a collaboration between them and the Community judiciary. Certain national judicial systems display more signs of resistance than others, although it would be inappropriate to quickly classify a national judicial system as being a 'resistant' or an 'obedient' one. The relationships between the ECJ and the national judiciaries in the UK, France and Germany are marked by numerous conflicts and incidents of resistance. Nevertheless, an examination of case law reveals a significant difference between British and German judiciaries, on the one hand, and the French ones, on the other (Tesoka 1999). While the former do refer cases to the ECJ and frequently quote the Community jurisprudence in their judgements, the latter rarely refer cases to the ECJ and do not cite the case law of the European Court. Access to the Community judicial sphere is certainly more difficult in France than it seems to be in the United Kingdom and Germany.

Although important, the attitude of national judges does not sufficiently ensure an effective access to justice. The conditions, actors and channels that facilitate or hinder access to justice in the field of gender equality may be further assessed by analysing a cluster of factors that have been forged by legal works on access to justice (Blom et al. 1995; Verwilghen 1993). These factors include, first of all, the nature of the competent judicial institutions in the field of gender equality. The 'user-friendly' character of the structures concerned is an important consideration here. A second factor is the *locus standi*, a notion that relates to the range of private and public actors who may file a claim and appear before the competent courts. A third factor is the existence and forms of gender equality law forums. This relates to the presence of public space for debate and legal action in the field of gender equality. Fourth is the factor of the availability of legal aid. Fifth, the legal status of collective agreements in the member states is taken into consideration. The question of the justiciability of these agreements is inevitably raised.

The United Kingdom and the discovery of the Eurolaw game

There is no tribunal in the UK devoted specifically to gender equality issues. The competent jurisdictions in gender equality matters are the British Industrial Tri-

bunals, the Employment Appeal Tribunal (EAT), the Court of Appeal and, finally, the House of Lords. The industrial tribunals have jurisdiction over a wide range of disputes regarding statutory rights and, for example, claims for breach of contract if a contract has been terminated. An industrial tribunal consists of a legally qualified chairman, a union member and an employer's representative. Appeals are referred to the EAT. Cases not resolved by the EAT are referred to the Court of Appeal (England) or the Court of Session (Scotland) and, from there, to the House of Lords. In Northern Ireland, there is no EAT; appeals are sent to the Northern Ireland Court of Appeal and then to the House of Lords. Since the Industrial Tribunals only have jurisdiction over specified statutory rights, cases related to employment contracts fall within the jurisdiction of ordinary courts. It is worth noting that the Industrial Tribunals, the courts in which gender equality cases start, are generally perceived as well-versed in EC law and willing to apply it. This perception is substantiated by the growing enthusiasm of the tribunals to refer a significant number of cases to the ECJ. It is also interesting that the House of Lords and the English Court of Appeal exhibit a rate of preliminary references that is comparable to those of the Industrial Tribunals. This 'user-friendly' attitude is often contrasted with that of the first and second instance appellate courts, i.e., the Employment Appeal Tribunal and the Court of Appeal. In the United Kingdom, first-instance courts and courts of final appeal seem to act as 'user-friendly' structures for gender equality litigation (Kilpatrick 1998).

The British judicial system offers a medium-range system of *locus standi*. While interest groups in general cannot bring a gender equality case before national jurisdictions, the Citizen's Advice Bureau, trade unions and the Equal Opportunities Commissions are entitled to do so.

On the question of the existence and forms of a gender equality forum, the United Kingdom presents a rather unique situation compared with the other EU member states. Two equality agencies, the Equal Opportunities Commissions for Great Britain (hereafter EOC) and for Northern Ireland, assume litigation and quasi-judicial functions. The EOCs were created by the Sex Discrimination Act of 1975 as quasi-autonomous non-governmental organisations in charge of the efforts to eliminate discrimination. They were given a great deal of authority pertaining to research, education and public relations. They are permitted to grant assistance to complainants and also have the power to conduct formal investigations into an organisation where institutionalised discrimination is suspected. In both cases, non-discrimination notices may be issued by the respective agencies. Employers then have time to appeal to the Industrial Tribunals. Ultimately, an injunction from the traditional court system can be obtained to prohibit persistent discrimination.

It seems that the EOCs became progressively aware of the potential offered by EC law as a vehicle for challenging discriminatory practices in Great Britain (Barnard 1990). They strategically select the targets to focus upon and the claimants to support. The modest financial resources of the EOCs require them to be particularly selective when 'choosing' the cases they will fund. Cases supported by the EOC represent about one third of all references heard by the European Court of Justice on matters relating to equal pay and equal treatment at the workplace.

Although on a different scale, the British unions are also involved in equality litigation. They devote a substantial amount of funding and expertise to appealing cases relative to equal pay and equal value issues. From this perspective, their behaviour clearly differs from that of their European counterparts: While in every member state the trade union movement has the potential to assist its members in litigation, it rarely supports gender equality cases, with the possible exception of the Irish and the Danish unions (Bercusson and Dickens 1996). Last but not least, litigants in the UK do benefit from the support of pressure groups (Kilpatrick 1996). Community cases on the respective issues of transsexualism and homosexuality, for instance, have been the object of particular involvement on the part of Stonewall, a gay rights lobby group (Bell 1999). British interest groups, such as the National Council of Civil Liberties, are also becoming increasingly involved. Some of them, however, such as the Women's Legal Defence Group Fund, ran into financial difficulties and collapsed. The British arena is also characterised by informal connections between the EOCs and a variety of people working on equality issues or the judges and academics, which certainly indicates that there are networking patterns in the judicial sphere. The diffusion of European law equality principles is facilitated by the large number of references from British courts, and by the widespread reporting and analysis of the impact of Community case law on British legislation. Among these publications, the periodical 'Equal Opportunities Review' is specifically devoted to national and supranational discrimination law developments. It regularly produces reports on gender equality law and practices in the UK and comments on relevant ECJ decisions.

Regarding the question of the availability of legal aid, there is no provision at all for financial assistance before the Industrial Tribunals, although free legal advice is available and costs cannot be awarded against a losing party. Applicants can represent themselves or be represented by any other person such as a trade union official or Citizens' Advice Bureau volunteer. In addition to the legal advice and the financial assistance that may be provided by the EOC, financial assistance can also be offered by the Commissioner for Protection against Unlawful Industrial Action in certain circumstances. Legal aid is available for actions before the Employment Appeal Tribunal and the ordinary courts. Employers are requested to pay their own costs. In order to maintain the informality of the system and to

avoid a paradoxical situation where an unsuccessful employee would have to pay the employer's expenses, costs are not recoverable for a successful party in cases that come before the Industrial Tribunals. Legal aid is nevertheless available at later stages of the judicial process, that is to say when cases reach the appellate courts. Despite this glaring absence of financial assistance at the first stage of the judicial process, Great Britain is the only member state to allow semi-public equality agencies to assist litigants in the judicial process. The system seems to be relatively effective if one considers that most of the British landmark cases in the field of Community gender equality law have been funded by the EOC.

The question of the justiciability of British collective agreements has been the centre of controversy between Community institutions and the British government (Daintith 1995). Under renewed pressure from the European Commission, the United Kingdom has introduced interesting changes in the Trade Union Reform and Employment Rights Act of 1993. An individual may now bring an allegedly discriminatory clause of a collective agreement or a potentially discriminatory working condition to the attention of an industrial tribunal. If the tribunal decides that the clause or condition in question would discriminate against the individual, it can then declare the clause to be void as it applies to her. Individuals can thus take preventive action. Nevertheless, no access is available to parties other than individuals and there are no mechanisms to amend a discriminatory provision.

Germany's experience of litigation 'à la carte'

Regarding the nature of the competent jurisdictions in sex equality matters, the first-instance court, the Labour Court, has jurisdiction on every civil dispute, both individual and collective, emanating from the employment relationship, including those of certain public sector workers (Bertelsmann and Rust 1994). The *Landesarbeitsgericht,* which is controlled by its respective *Land,* is the Appellate Labour Court. The *Bundesarbeitsgericht* (BAG, the Federal Labour Court) is competent for final appeals. The labour courts are made up of one or more panels, each of which in turn includes a presiding professional judge, a lay judge from the employees' side and a lay judge from the employers' side. The procedure is divided into two steps: a conciliation session and the ordinary panel session. Certain categories of civil servants may take equality cases to the Administrative Court, but German administrative law only applies to a certain type of civil servants, the *Beamte.* Generally, the German Constitutional Court has been very active in the field of gender equality. Without a doubt, there is an active advocacy coalition that has also used the constitutional arena as a battleground for the promotion of equality between men and women in Germany. Since the mid-1980s, there has been a

steady increase in the amount of gender equality litigation and the German courts, especially first-instance ones, have become more and more willing to refer major gender equality issues, even if the parties are not present when the case is heard. At times, German judges have used the threat of a preliminary reference to the ECJ as a means of forcing employers to agree on a settlement. Some of these first-instance courts, which have been labelled as 'employee-friendly', have been accused of circumventing the more prohibitive intermediate and high courts by often using the option of preliminary rulings. To date, the first-instance labour courts have made 18 out of 37 references to the ECJ. It is interesting that the vast majority of Article 177 references in the field have been made by courts presided by the new generation of German judges who have benefited from a better education in Community law and within which the number of women judges is significantly higher.

In terms of *locus standi*, however, the German legal system is rather restrictive (Pettiti 1993). The labour safety inspector (*Arbeitsschutzbeauftragte*) only investigates health and safety issues and has nothing to do with equality law enforcement, which is the responsibility of the works council (*Betriebsrat*). Unlike in other areas of law, there exists neither access for group interests nor a public agency on equality, whether federal or *Länder* based, which would be empowered to assist litigants and bring (class-action) law suits to court. It is true that German unions have *locus standi* and possess the necessary resources to support cases. While they frequently assist individuals, they are rarely involved in equality litigation and seem to prefer cases dealing with socially unjust dismissals. A case can be also brought by a works council to the labour courts if rights have been infringed. The backing of such an action is not negligible since the opinion and the argumentation of the works council are very useful for an individual who chooses to litigate upon them. Until now, works councils do not seem to have assumed a particular role in gender equality litigation at a Community level.

Unlike the UK, Germany only displays a few gender equality forums. It is true that women's representatives have been appointed to positions in the federal and *Länder* administrations. Nevertheless, their objective is only to inform, monitor and eventually refer a case to the hierarchy. There is a network of women's lawyers which publishes a journal, *Streit*, but they have not developed a co-ordinated litigation strategy *vis-à-vis* the ECJ. Loose affiliations of lawyers, academics and judges, which have been active in the *Länder* of Hamburg, Lower Saxony, Bremen and Schleswig-Holstein, rather than powerful interest groups and agencies, are at the core of gender equality litigation in Germany. While forming genuine advocacy coalitions, these legal professionals and academics, whose growing expertise in EC law is often pointed out, have developed a specific litigation strategy in the field of gender equality. Among them, Ninon Colneric, Klaus Bertelsmann, Heide Pfarr and, recently, Spiros Simitis seem to be leading an intensive information

campaign in support of gender-equality law suits. This informal network is trying to exploit the possibilities of Community law in order to circumvent *certain* German norms and courts (Pfarr and Bertelsmann 1989). Far from operating a general and radical move towards the Community judicial arena, such actors make a selective move toward the ECJ and only target a certain category of cases in which Community standards or institutions are assumed to provide equal rights for women.

The financial resources of legal aid in gender equality cases are very low. This is a particular setback when one considers the various courts involved. While litigants are not required to have legal assistance in the first instance, they must be represented in the *Landesarbeitsgericht* and in the *Bundesarbeitsgericht*. Legal aid is paid out of court budgets either without any contribution or on the basis of instalments from the claimant. Under the *Beratungshilfegesetz*, legal aid is not granted for litigious cases relative to employment. Furthermore, under the Labour Court Act, even a successful claimant must pay her legal costs out of her own pocket in order to avoid the situation in which an unsuccessful employee would have to pay the employer's court costs. Like in Great Britain, employers pay their own court costs. Thus, potential litigants critically depend on the support of unions or interest groups although these are not very interested in such questions.

Any challenge to the provisions of a collective agreement is a highly problematic issue. Encroachments upon the application of the equality principle on the basis of bargaining autonomy have long been seen as acceptable, a position which was indirectly supported by Article 9 of Germany's constitution, the *Grundgesetz*. Although German unions can challenge discriminatory provisions of collective agreements in the Labour Courts, this possibility has not been used in gender equality cases. Works councils can themselves litigate only in defence of their rights to consultation and co-determination and not with regard to some substantive breach of the law by an employer. Community judges recurrently question the non-justiciable status of collective agreements on the grounds that this status prevents sex discriminatory provisions from being challenged in the courts.

French symbolic politics at work

In France, female workers can bring a claim before the *Conseil de Prud'hommes* (Labour Court, hereafter CPH), the competent organ of judicial adjudication in individual labour disputes. This elected tripartite body hears the cases of employees in the private sector and of some in the public sector. Each *conseil* is divided into several sections. Each section includes at least one conciliation unit. All cases go first to the conciliation unit. If conciliation is not achieved, the procedure

goes forward to the *conseil*. Appeals are taken to the Social Chamber of the *Cour d'Appel* (Appellate Court) and then, on a point of law, to the Social Chamber of the *Cour de Cassation* (the Supreme Court). Disputes concerning collective agreements and the internal works rules are dealt with by the *Tribunal d'Instance* (TI), where a single judge presides over each court, and the *Tribunal de Grande Instance* (TGI), where a panel of judges presides. Criminal proceedings involve the *Tribunal correctionel* for breaches of moderate gravity, and the *Tribunal de police* for infractions of minor importance. Appeals go to the Criminal Chamber of the *Cour d'Appel*, which is presided over by professional judges with no particular labour law specialisation. Final appeals go to the Criminal Chamber of the *Cour de Cassation*. Furthermore, cases may be brought by public servants to the administrative courts. Cases relating to social security come before a special court, the *Tribunal des affaires de sécurité sociale* (Lanquetin et al. 1994).

The *Conseil de Prud'hommes*, which is the court in which sex discrimination cases start, has been sometimes criticised for not being as sympathetic to equality cases as it is to more traditional employment law disputes (Marguerye 1983). The composition of this judiciary seems to be a critical element: It is made up of male representatives from traditional trade unions whose neglect of gender equality issues is frequently mentioned. The CPH does not seem to explore all the possibilities offered by the French Labour Code and the Civil Code. Seldom is a *conseiller rapporteur* appointed or an expert called upon in the few gender equality cases the CPH has to handle. I do not leap to the easy conclusion that the existing 270 *Conseils de Prud'hommes* are against gender equality litigation. However, I think that it is worthwhile to raise the question of the inclination of the social groups which compose these judiciaries.

Penal sanction and labour inspection are also two other powerful devices of employment law. However, criminal courts are certainly not 'user-friendly' for gender equality claims. The levels of expertise among labour inspectors and their rate of enforcement of Community law are so low that they have proven to be rather useless on issues of gender equality, as is the Public Ministry. Furthermore, as in most member states, the labour inspectors do not appear to devote much effort toward dealing with equality questions and focus instead on the enforcement of penal provisions. It is difficult to state precisely the amount of litigation related to sex equality, but it seems to be numerically insignificant. Notification and information relating to cases below the *Cassation* level are not systematically reproduced and depend on articles in labour law journals or in publications by employer organisations and trade unions. Unlike in the UK or Germany, leading labour law journals in the field have rarely published analyses of gender equality litigation. The very parsimonious utilisation and circulation of Community law suggests that the French national judicial system still resists the effective utilisation of EU gender equality rights.

Another distinctive feature in the French system that needs to be demystified is the apparently generous system of *locus standi*. Associations and interest groups can litigate autonomously, but only in the criminal courts. The absence of access to the civil and, particularly, to the labour courts is a serious problem. Moreover, the fact that groups wishing to go the court are required to have been in existence for five years surely prevents spontaneous groups from exploiting the potential of Community law. Since French women's groups have low membership and are not supported by social actors, their power and resources to use such a procedure are rather limited. It is really a 'vicious circle'. French trade unions also have access to justice. They have even wider powers in the judicial arena than other European trade unions. They can act both for members and even for non-members as long as the individual has been informed of the action and has not registered any objection. Moreover, unions may attack discrimination at its source by taking cases before the *Tribunal de Grande Instance* or, in certain instances, the criminal courts. Despite these numerous possibilities, French unions fail to provide adequate support for access to justice in the field of gender equality. It is true that unions may be more comfortable in traditional forums of negotiation or quasi-judicial structures than in courts, and that they are not always really at ease with the legal terminology that is particularly favoured at the EU level. Foremost, French unions remain anxious to protect the collective labour law system from what is perceived as 'alien individual rights'.

Financial assistance is a real problem since legal aid only assists those who are very poor. There is no guarantee that a successful claimant will retrieve all her legal costs from her employer. Hence, individuals are dependent on unions and associations.

As far as the status of collective agreements is concerned, it is nearly impossible for an individual to challenge a collective agreement in France. However, an interested party, including a trade union, is able to challenge discriminatory provisions on the grounds of nullity before the *Conseil de Prud'hommes*. This possible recourse does not seem to have attracted much attention in the field of gender equality. For the public sector, employment regulation can be referred to the administrative courts for nullification. There is, however, no mechanism to amend a provision of a collective agreement or employment regulation.

To conclude, I have shown that the impact of judicial politics on modes of governance in the field of gender equality is influenced by effective access to justice in the three countries concerned. My assessment of access to justice was based on the close examination of a set of specific factors (see Table 2). It appears that high litigation rates and strategic mobilisations of the law are to be found in countries in which an effective access to justice is ensured. In this respect, I have highlighted the significant gap between formal procedures of access to justice, on the one hand, and truly effective access to justice, on the other. The French instance is

Table 2 Second complex of variables: Access to justice in the domain of gender equality

	United Kingdom	Germany	France
Nature of competent jurisdictions	– Industrial Tribunals – Employment Appeal Tribunal – Court of Appeals – English Court of Appeal – House of Lords 'User-friendly' courts: first instance and courts of final appeal	– Landesarbeitsgericht/ Bundesarbeitsgericht – Bundesverfassungsgericht 'User-friendly' courts: courts of first instance	*Civil procedure:* – Conseil des Prud'hommes – Cour d'appel – Cour de Cassation *Penal procedure:* – Tribunal de police – Tribunal d'Instance – Tribunal de Grande Instance 'User-unfriendly' courts
Locus standi	– EOC – Trade unions	– Trade unions – Works councils	– Labour inspectorate – Trade unions – Common interest group that has been in existence for 5 years
Legal aid	Not before the Industrial Tribunals (first instance)	Limited	Very limited (restricted to poor litigants)
Groups with expert legal services	Yes Active involvement	Yes Low to medium involvement	Yes No involvement
Status of collective agreements	Justiciable by trade unions *and individuals*	Justiciable by trade unions and by works councils (on some aspects)	Justiciable by trade unions

rather illustrative. France's apparently generous system of access to justice is in effect a user-unfriendly structure for the mobilisation of sex discrimination law. Contrary to what is often assumed, the British system of access to justice is relatively effective in comparison with other member states. Unexpectedly, Germany does not distinguish itself by a very 'supportive' judicial environment for EU-level litigation in the field of gender equality.

All the examples presented share a similarity: The mobilisation of Community law remains selective, circumscribed and difficult (Vogel-Polsky 1997). This dimension has been undervalued so far in the ongoing debates on the catalytic ef-

fects of European law (Weiler 1991, 1994). I nevertheless think that it deserves a moment's reflection. Critical changes have taken place in the Community judicial sphere (Ball 1996). Relatively closed to individual litigants and notoriously reluctant toward public interest litigation, the Community judicial arena has evolved into a system where the defence of the rights and freedoms conferred by Community law to nationals of the member states is an essential concern (De Bùrca 1995). Undoubtedly, the Court's constitutionalisation of the treaties, the forging of the direct effect doctrine and the progressive 'enrolment' of national judges have been major factors in the opening up of the Community judicial sphere (Mancini 1993). This enhanced access to Community courts seems to constitute a 'virtuous circle' for it further allows judges to extend their field of action and encourages litigants to bring their cases.[8] The dramatic increase of preliminary rulings relative to gender equality cases and, to a certain degree, of legal actions by the Commission attest to a rising awareness of the potential of Community law among a wide range of private and public actors in the member states, including national judges. Alongside legislative and administrative lobbying, litigation as a political weapon seems to be gradually becoming a more significant component of the repertoire of action in the social field (Bouretz 1991).

While acknowledging this 'successful' facet of EU judicial politics, I also want to emphasise the difficult situation of the litigants in the member states. Gender equality litigation as it exists today is still individual litigation (Lacey 1992). Collective litigation or 'class-actions' are not possible before the ECJ. It thus implies that an individual must prepare and bring a case, which, given the complexity of the law, may prove to be very difficult without expert assistance. Furthermore, relevant information will often be in the hands of a person, such as an employer, who may be reluctant to place it at the disposal of the complainant. Apart from the procedural obstacles to be overcome, a major hurdle is the financial burden of filing a suit, for legal assistance is hardly free of charge. Therefore, it is obvious that for litigation to take place, a private or public organisation – and not just the individual litigant – must be actively involved in the pre-court and court stages of an equal treatment claim. My work also suggests that, unlike the British experience, many gender equality campaigns are not actually mounted by cohesive interest groups employing legal advisers, but rather by loose affiliations of lawyers seeking to transpose into constitutional and justiciable rights certain equality objectives which were not included by the traditional policy-making avenues. Liti-

8 It is my view that, generally, Community judicial politics had a beneficial and constructive influence on gender equality politics in the European Union: However, in this study it is not assumed that the increasing interference of European law with domestic law is necessarily positive or unproblematic. As Scharpf demonstrates, there is no doubt that the problem-solving capacity, and hence the democratic legitimacy, of national governments is being weakened by the dual processes of legal and economic integration in Europe (Scharpf 1999).

gation in the field thus oscillates between a 'frontman' model of representation, on the one hand, and a litigation coalition model, on the other. The pre-court phase is also characterised by the absence of important coalitions. There are no massive concerted campaigns of individual rights litigation aimed at persuading judges to undertake a major change in public policy after legislatures and executives have refused to do so. Therefore, the role of private and public organisations in pushing the Europeanisation of gender politics through constitutional judicial review must not be overstated (Mattli and Slaughter 1998).

Conclusion

In this paper, I have shown that the impact of EU judicial politics on modes of governance in the field of gender equality in three countries is influenced by domestic mobilisation, which depends in turn on the degree of openness of national political and judicial systems. I have singled out a set of variables to measure the openness of the national political and judicial systems under scrutiny. While exploring how and under which conditions EU judicial politics interact with national modes of governance, I have identified distinctive channels for the expansion of judicial politics in the national arena. In my view, the exceptional litigious profile of the major opponent to a social Europe certainly owes much to the litigation strategy which has been developed by a cluster of public and private actors: There is an active and significant equality forum, the EOC has developed a litigation strategy, women's groups and trade unions are lobbying and supporting litigation. Certain national judges have also significantly contributed toward creating user-friendly structures for gender equality litigation at the EU level. One of the major objectives of this 'Eurolaw game' is to open up the British national legal system to Community norms and principles: By removing certain issues from the national arena, it is assumed that, at last, bold changes will be introduced (Rawlings 1993). The case of the UK suggests that the conflict structures of a unitary and 'closed' state may be counterbalanced by the extremely active mobilisation of a wide range of a public and private actors. It thus implies that Community legal developments on gender issues have successfully challenged the imagination of players in the field and provided them with a real window of opportunity for judicial action in the field. 'Unexpected events' do have their place in this study on the configuration of structures of opportunity and incentives in the member states.

My analysis of the German experience explains why, despite the existence of numerous 'predictors of success' for the expansion of judicial politics in the domain

of gender equality, Germany's litigation rates remain relatively low. The presence of an independent, decentralised judicial system, the existence of 'user-friendly' first-instance labour courts and the strong juridification of the German society are mitigated by the critical absence of a real equality forum structure. Partly because of the corporatist nature of the German polity, mobilisation in the area of gender equality remains individually based, non-institutional and scattered.

My examination of the French case also confirms the mediating role of the political and judicial system. France is a unitary state, with a closed political system, which does not favour interest intermediation. The judicial authority is weak. Moreover, French elitist state feminism seems to have prevented rather than facilitated the emergence of grass-roots women's movements. Last but not least, real access to justice in the field of gender equality is in fact very limited: Adjudication and litigation in the field of gender equality are obviously still conceived within framework of a 'traditional employment law model'. Not only has individual litigation failed to develop, but the Community 'acquis' in the field of gender equality has not been integrated by the institutions or the social partners.

Finally, the three empirical cases presented illustrate the complex and somewhat 'messy' dynamics of the new supranational public policy space. The judicial transformation of gender equality politics in a supranational direction is uneven, incremental and patchy. It is the locus of an ongoing interplay between favourable conditions and incentives for the expansion of judicial politics in the field of gender equality, on the one hand, and adverse impulses and conflicting structures, on the other. It would be particularly interesting to further examine the intervening variables that effect the variations and diversity of judicial politics in the European Union. The issue of the feedback effects of changes in the dependent variable 'national modes of governance' on the independent variable 'EU judicial politics' certainly needs to be explored. Equally, it is worthwhile to raise the question of how these feedback effects are influenced by domestic mobilisation and the degree of openness of national political and judicial systems. It is high time that legal integration studies took these aspects seriously.

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