

*****Draft*****

**THE INSTITUTIONALIZATION OF SEX EQUALITY FOR EUROPE:
WOMEN ACTIVISTS AND THE EUROPEAN COURT**

**Rachel A. Cichowski
Department of Political Science
University of California
Irvine, CA 92697-5100
rcichows@uci.edu**

Paper prepared for Laguna II Project, Laguna Beach, CA, 13-14 November 1999.

In the last forty years, we have witnessed the evolution of an unprecedented form of supranational governance in western Europe. The European Court of Justice (ECJ) has played a powerful integrative force in this transformation. This chapter examines how the ECJ has operated to expand the integration project and has done so by serving as a forum for political action by national and transnational social movements. This analysis studies this integrative dynamic through the evolution of sex equality policy in the European Union (EU). The purpose of this chapter is two fold. First, I will examine the Court's expansive development of this EU policy sector through its case law. In particular, I will evaluate whether the policy preferences of national governments have significantly impacted the Court's judicial decisions. Second, I will examine the relationship between the Court and private litigants and women's groups and how this leads to the construction of EU policy through litigation. Specifically, I am interested in tracing the dynamic which has led to the institutionalization of sex equality norms at the European level.

The larger purpose of the analysis is to offer systematic evidence of how activists (both national and transnational) are utilizing European space (as provided by EU institutions) and are doing so to bring about significant national policy changes. Furthermore, this project provides empirical evidence of how EU institutions engage in a mutually empowering relationship with activists. This dynamic interaction leads not only to the expansion of EU competence, but also illustrates how both EU institutions and rules have been used in unintended ways.

THEORETICAL FRAMEWORK AND POLICY CONTEXT

This analysis contributes to a growing body of research examining the Court's role in integration processes (Cichowski 1998; Stone Sweet and Brunell 1998; Stone Sweet and Caporaso 1998). While this research has developed a strong theoretical and empirical basis for its assumptions, specific policy sector empirical research is still needed. Furthermore, a systematic study of social movements and the ECJ remains absent from this literature. The project also grows out of a dissatisfaction with the existing interest group and social movement literature which attempts to understand the new dynamics at work in the EU. To date EU interest group researchers have focused primarily on activity in the technical and agricultural sectors, and conclude that EU interest articulation varies across policy sectors (Mazey & Richardson 1993; Greenwood, Grote & Ronit 1992; Wessels 1997). As the EU is constantly evolving, further sector by sector analyses are clearly needed. Furthermore, these studies focus primarily on the Commission and European Parliament, leaving the ECJ ignored as a venue for policy influence.

Furthermore, in the case of EU sex equality policy, there is an extensive body of literature on equal pay litigation and the resulting creation of social policy for the EU (e.g. Ellis 1991; Hoskyns 1996; Kenney 1992; 1996; Mazey 1998; Prechal and Burrows 1990). My analysis extends these findings by placing the evolution of sex equality in a larger institutional analysis. In doing so, I examine the factors affecting the institutionalization of this policy area, and also the resulting effects of this institutionalization. My analysis does not adopt a normative framework to evaluate whether sex equality policy is currently effective in the EU. While this is an important question, instead, I focus on the process in which formal rules were created to define this policy area.

Conceptualizing Institutionalization and its Causes

Institutionalization can be understood as a set of processes, as laid out in the Introductory Chapter of this volume. This chapter will focus on one process of institutionalization in particular; that process is rule creation. The creation of rules describes the process in which a policy area will be formalized through Treaty provisions, secondary legislation or ECJ decisions. All of these procedures have the effect of clarifying and creating a larger web of formal rules which define and guide behavior within a given policy area. In particular, I will examine how ECJ judicial decisions impacted the development of equality rules in the EU. I take as a starting point the fact that this policy area began as a fair competition Treaty provision (Article 119) governing equal wages and today stands as a well developed social justice policy governing issues such as fair pensions and maternity rights. General debates between integration scholars have questioned who has had the ultimate control over these rule creating processes.¹

Intergovernmentalists argue that the Court's case law serves to codify the policy preferences of the dominant member state governments. Garrett finds that the "decisions of the European Court are consistent with the preferences of France and Germany" and if they weren't, the member state governments would have diminished the Court's power and reconstructed the legal system (Garrett 1992: 556-9). Similarly, Moravcsik argues that while the ECJ wields considerable power, this power is delegated by member state governments and thus, ultimately, it can be retracted (Moravcsik 1995; 1998). On the other hand, a growing body of scholarship grounded in neo-functional theory, suggests that the EU legal regime results from a dynamic interaction between transnational actors, national courts and the ECJ (e.g. Stone Sweet and

Brunell 1998; Mattli and Slaughter 1995). In particular, they emphasize the autonomous nature of this dynamic, to the extent that the Court has created a legal system which is often not in the interests of member state governments. My chapter will test these propositions by providing the historical empirical evidence that allows us to understand the role of member state governments, the European Court of Justice and private litigants and women activists in the development of EU sex equality law.

The empirical analysis in this chapter examines the Court's Article 177 sex equality case law. The Article 177 procedures allow (and in some cases requires) national judges to ask the ECJ for a correct interpretation of EU law if it is material to the resolution of a dispute being heard in a national court. These data are particularly fruitful to my research questions as Article 177 reveals the mechanism in which private litigants, women's groups, national courts, national governments and the ECJ all have the potential to influence policy outcomes. Furthermore, previous research on the ECJ provides us with a set of expectations of how this litigation may develop (Cichowski 1998; Stone Sweet and Caporaso 1998). In particular, which countries will be litigated against and how we might expect the ECJ to decide these cases. This analysis traces the process of institutionalization (creation of rules) through both aggregate litigation data and provides a more detailed case law analysis of a sub area of this policy sector: the creation of EU pregnancy and maternity rights policy.

Throughout this analysis, we are particularly concerned with the factors that cause and shape this institutionalization. Again, as defined in the Introductory Chapter, there are a host of factors which can have the effect of institutionalizing a policy area. In particular, we will focus on policy failures and interest driven contests over policy outcomes (strategic action).

¹ See Caporaso 1998 for further discussion of these debates.

Policy failure results when the existing rules do not “produce the desired results, or generate outcomes that are perceived as dysfunctional” (see Introductory Chapter). This policy failure has played out in two distinct ways in EU sex equality policy. First, the ambiguity embodied in the original Treaty provision (Article 119) allowed for not only the Court’s expansive interpretation of the equal pay principle, but also generated a demand among women and men for detailed specification for an implied set of rights. In its ruling in *Defrenne*, the ECJ identified this general nature of Article 119 and argued that the scope of its main principle would demand further clarification and development (Ellis 1998). This ambiguity can also be traced throughout legislative developments in this field. Social protection has been regarded as a sacred area of national law, and thus, member state governments, the UK in particular, have taken a minimalist approach to creating European rules in this area (Lange 1992; Pierson 1995). Unanimity voting in the Council have also in effect codified these lowest common denominator positions.

Secondly, policy failure has resulted from an inherent tension in EU social protection laws. While the policy area developed to protect national businesses from unfair competition due to differing wages between countries, the equal pay principle also implied a set of rights for women as workers. This tension, between market and women’s interests (economic vs. social purposes), produced a demand for clarity that in effect has led to the unintended expansion of women’s rights under European law.

The second main factor causing institutionalization in this policy area are interest driven contests over policy outcomes. Strategic actors will seek to exploit what they can from new EU rules and arenas. In the case of sex equality, the EU presents a new policy arena for individuals and groups who might have exhausted all avenues of pressure and change at the national level.

Article 119 and an activist Court created new opportunities for social action on behalf of women. In particular, the Court's case law constructing the "supremacy" of European law over conflicting national laws and rulings which established individual rights directly under EU law have been integral to this political activism.² This strategic action had the effect of creating new sex equality rules, both by expanding the scope of EU law and changing national practices.

Together these two factors activated a dynamic of litigation that ultimately brought the creation of a complex set of rules governing sex equality in Europe. In the conclusions, I will highlight the main feedback effects of institutionalization. In particular, I will address the unintended consequences institutionalization has had both at the national and supranational levels for sex equality law.

EU Sex Equality Policy: From the Treaty of Rome to the Present

The following section provides an overview of the historical development of EU sex equality Treaty provisions and secondary legislation. In particular, I bring attention to how the policy area has been shaped by both inherent policy failures and the strategic political activism by women. Together these two characteristics have activated a dynamic (the Court's dispute resolving function) which has ultimately led to the institutionalization of this policy area at the European level. The empirical analysis later in this chapter will illustrate how the Court's case law led to institutionalization, yet it is equally important for us to understand the underlying factors that in effect demanded the Court's activism.

² See *Costa* Case 6/64 and *Van Gend en Loos* Case 26/62. For a general discussion of the Court's jurisprudence on the principles of "supremacy" and "direct effect" see Hartley 1994 chapters 7 and 8. For a more thorough discussion of these principles in terms of sex equality law see Ellis 1998.

The origins of EU sex equality law are traced back to Article 119 of the Treaty of Rome. It provided that member states ensure and maintain the principle that women and men receive equal pay for equal work.³ It was the French delegation which originally demanded that an equal pay provision be included in the EC Treaty (1957 Treaty of Rome). France was the only country to possess equal pay laws at the time, and French employers saw this as a potential barrier to fair and equal competition between member states. The role of activist women can be traced back to this initial policy stage, of getting the issue on the agenda, for the existence of this French law was a repercussion of political activism amongst French woman in the 1940s (Hoskyns 1996). Yet the Treaty negotiations over equal pay remained strictly focused on fair competition, with the original placement of the principle in the portion of the Treaty dealing with competition distortion. However, the principle ultimately was shifted (though the text unchanged) to social provisions as a result of pressures to develop at least some harmonization of social costs (Mosley 1990).

Stated generally, Article 119 ended up having the potential strength of a policy written to develop the common market (implementation goals in accordance with economic integration priorities took precedent over social policy) yet in reality it was a thinly developed piece of social policy. Citizens capitalized on this ambiguity and began to develop what would later become social justice policy for the European Union. One scholar's insights regarding Article 119 capture the essence of the dynamic this analysis will involve:

³ Full Text of Article 119 from the Treaty of Rome 1957:

Each member state shall during the first stage ensure and subsequently maintain the application of the principle that men and women should receive equal pay for equal work.

For the purpose of the Article 'pay' means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives, directly or indirectly, in respect of his employment from his employer.

Equal Pay without discrimination based on sex means:

- a) that pay for the same work at piece rates shall be calculated on the basis of the same unit of measurement;
- b) that pay for work at time rates shall be the same for the same job.

What is particularly striking about what we know of the debates and maneuvers which produced Article 119 is the level of abstraction at which they took place. At no time are the interests of women considered even obliquely or the issues of social justice raised. The distance from the reality of work or any real struggle seems complete. However, the potential for a stronger implementation of equal pay was embedded in the history of the article and, paradoxically, in the history of the EC itself. It took activist women to realise these possibilities - and switch the debate from one of economic rationality to a demand for rights (Hoskyns 1996, p. 57).

In 1958, Article 119 was framed in terms of economic interests and was not intended to have greater social justice implications. Furthermore, it had the potential of representing a largely ambiguous statement about equality between the sexes.

Until the late 1960s, the member states saw Article 119 as a distant set of ideals. Not one national government had under taken domestic policy changes to enshrine this equal pay principle. However, Article 119 was far from dead, as it was soon to regain life as a result of two types of activism, both taking place in Belgium and both led by women. Along with its importance for developing European sex equality norms, these cases of activism are particularly significant as they paved the way for women's groups and individual women to be active players in the European policy-making process, a process largely dominated by men at the time and largely closed to direct citizen input (Hoskyns 1996).

The first case involved women workers at a Belgian arms factory. There was a strike amongst female employees at the Herstal plant over the inequality of pay between men and women (Belgium had still failed to implement the European principle of equal pay at this time). This was in the spring of 1966 and followed directly after one of the main Belgian labor unions had held a seminar in the Fall in Brussels to discuss the issue of "the problems of women" in the workforce (Article 119 had been a topic of discussion at this seminar). Article 119 was seen to play a direct role in empowering these women by giving them the legal basis to demand equal pay schemes. A group of women who participated in the Brussels seminar returned to the factory and

set up a committee to address women workers' concerns. This exchange of ideas and communication of needs provided the foundation for a well organized strike which included more than 3,000 participants.⁴ Article 119 gave ordinary citizens the ability to change the policies which affected them the most, their basic earnings.

Article 119 also facilitated another type of activism through litigation. A young Belgian lawyer, Elaine Vogel-Polsky, who specialized in social and labor law, saw Article 119 as a stepping stone to expanding women's labor rights. It was largely due to the jurisprudence of the ECJ that the social right embodied in Article 119 was brought to life. Through a series of test cases in the late 1960s, Vogel-Polsky and other lawyers were able to work with the European Court of Justice to expand the scope of the Article and to begin to provide real situations in which Article 119 was applicable.⁵ Almost 20 years after the adoption of this principle, the Court ruled on the "direct effect" of Article 119 and in doing so enshrined community citizens with individual rights enforceable under EC law. The significance of this ruling far surpassed that of expanding sex equality rights, as it in effect helped further transform an international treaty into a supranational constitution.⁶ Yet from the sex equality policy perspective, it also represented a powerful step.

The Court's action initiated an expansion in the scope of Article 119 that became the driving force behind EC sex equality legislation in the 1970s and 1980s. These cases "opened the way for women within the Commission's own bureaucracy to push for stronger policy" (Hoskyns, 1996, p. 74). The repercussions of these landmark judicial decisions continue today as the women's movement throughout Europe now see the European Court of Justice as a new access

⁴ Hoskyns. (1996), chapter 4.

⁵ Case 80/70 *Defrenne I* and Case 43/75 *Defrenne II* are examples of this litigation. See Hoskyns (1996), chp. 4 and Stone Sweet and Caporaso (1998) for an extensive discussion of this case law.

point to influence policy making. Article 119 opened the door to such a supranational policy venue.

Three pieces of EC legislation were passed between 1975-1979 which clarified the goals set out in Article 119. They were the Equal Pay Directive, the Equal Treatment of Work Directive and the Equal Treatment in Social Security Directive.⁷ These policies were heavily influenced by a comprehensive study carried out in 1968 on the status of women's employment in the member states. The author was a French sociologist, Evelyne Sullerot, who had pioneered academic studies on women's work in Europe. However, the policy debates surrounding the Equal Pay Directive remained similar to the original discussions of Article 119 as it remained primarily conceptualized as an employment issue. Yet within these negotiations, there was a continual pressure and call to expand the scope of this EC policy area. This pressure and the effect it had on the other two Equal Treatment Directives is depicted in the following account of the policy debate:

“During the course of the equal pay negotiations there were constant reminders from Sullerot, the Commission and in the end even the Court, that this was not a sufficient policy to tackle women's inequality. It needed to be expanded. The next two Directives, while remaining within the employment field, went much wider and began to raise issues such as child care and dependency, which crossed the public/private divide and were therefore more controversial” (Hoskyns 1996, p. 93)

Due to both the decision-making procedures at this time and the sacred nature of these policy decisions, these Directives were all adopted under unanimity voting. In particular, the Equal Treatment Directive failed to bring clarity between issues of discrimination and general equality. The Directive states that “no discrimination whatsoever on grounds of sex” will be allowed under EU law. Scholars have observed that this general “whatsoever” expression has

⁶ See Weiler 1991; Stone Sweet and Caporaso 1998 for a discussion of this transformation.

given ample opportunity to both litigants and the Court to expand the Directive's scope. This includes one Court decision that found protection for transsexuals against dismissal within the scope of Community law.⁸ Furthermore, the Directive failed to clearly provide a definition for the concept at the heart of the legislation, namely, how is indirect discrimination embodied in general equality? This ambiguity would later be at the center of a series of cases heard before the ECJ.⁹

Together Article 119 and these three Directives provided the basis for European sex equality law. The Council subsequently added only two Directives to this policy area in the 1980s,¹⁰ both of which are largely "symbolic." Furthermore, the passage of the Single European Act in 1986 did little to alter equality policy as laid out in the Treaty and secondary legislation (Hoskyns 1996). National governments, in particular the Germany and the UK, continued to exhibit a reluctance in developing this EU policy area. Germany from the earliest discussions regarding Article 119 argued that social costs, in particular wages and prices, should be subject to minimal government interference (Ellis 1998). Germany was reluctant to implement the EC equal treatment measures, and was criticized in a Commission study for adopting too narrow a view of equality.¹¹ However, this narrow implementation has subsequently been corrected through the Court's jurisprudence.¹² Furthermore, this Article 177 litigation has all been directly or indirectly a product of trade union and equality unit activities (Hoskyns 1996). The UK's reluctance differs as it stems not so much from a belief in minimal government interference but more explicitly minimal EU interference in their national social protection law. Yet the outcome has been the

⁷ Directive 75/117/EEC, Directive 76/207/EEC, and Directive 79/7/EEC.

⁸ Case C-13/94 *P v. S and Cornwall County Council* ECR 1996: 2143

⁹ *Bilka v. Kaufhaus GmbH v. Karin Weber von Hartz* Case 170/84 ECR 1986: 1607. MORE

¹⁰ Directive 86/378 and Directive 86/613.

¹¹ COM (80) 832 final 11 February 1981.

¹² *Von Colson*, 14/83, *Harz* 79/83 and *Hofmann* 184/83.

same. As we will discuss further in the case analysis, the UK's attempts to constrain the reach of EU social policy have been trumped by the Court's rulings.

Innovations in EU equality legislation and treaty provisions have experienced a roller coaster ride in the 1990s. The early part of the decade demonstrate an overall reluctance on the behalf of national governments, the United Kingdom in particular, to expand or clarify equality policy. While the Agreement of Social Policy provided explicit equality rights, it was relegated to an Annex of the Treaty on European Union (1992) in order to accommodate the British Government's insistence on their opt-out position on further social protection. Furthermore, some have interpreted the national government's addition of a specific Protocol in the Treaty on European Union to reverse an expansive and costly ruling by the ECJ regarding pensionable age under Article 119, was a way of restricting both the Court's activism and the scope of Article 119.¹³ This time period also witnessed the passage of the Pregnancy Directive (92/85) which pertained to the safety and health of pregnant workers. I will discuss this in more detail later, but generally this Directive illustrates a tendency by member states to equate harmonization with a leveling down of protective EU legislation (Rossilli 1997).

The end of the decade has brought a distinct shift in Treaty based advances in EU sex equality policy. Scholars have suggested that this shift may have been influenced by transnational efforts inspired by the Conference at Beijing (1995)'s strategy of empowerment (Rossilli 1997). With the passage of the Amsterdam Treaty in 1997, all Community members agreed to the formal inclusion of fundamental social rights into the Treaty. The Agreement on Social Policy has now been absorbed into the Treaty after the conclusion of the UK's opt-out position. Article 118 now includes "equality between men and women with regard to labour market opportunities and

treatment at work” in a list of activities that Member States promise to complement and support.

A second enabling provision is Article 6a, which provides:

Without prejudice to other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

Article 119 has also undergone changes which adopt earlier positions taken by the Court, such as the concept of equal pay for work of equal value. Furthermore, Article 119 now includes a paragraph which encourages positive action by providing:

With a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order for the under-represented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers.

This inclusion and expansion of formal sex equality rules in the Treaty bids well for future legislative innovations in this policy sector. In particular, Treaty provisions (Articles 117-122) are now governed by the co-decision procedure in which qualified majority voting is utilized except in proposals regarding social security.

The legislative development of EU sex equality policy has arguably been a slow process. Furthermore, the tensions inherent in this policy area have provided road blocks along the way. These policy failures, both the generalities in principles and tensions between economic and social interests, have led to varying implementation and less coherent EU legislation. However, the evolution of this policy area has also been characterized by strategic social action on the part of lawyers, trade union and equality unit activists to take advantage of opportunities imbedded in these EU rules. This activism and the Court’s willingness to solve these conflicts has led to the

¹³ *Barber v. Guardian Royal Exchange Assurance Group* Case 262/88 ECR 1990: 1889.

institutionalization of this European policy area. As the following analysis demonstrates and as others have documented, even when EU sex equality legislative advancements were at a stand still in the late 1980s and early 1990s, the ECJ actively expanded the scope of this policy area (see also Stone Sweet and Caporaso 1998).

INSTITUTIONALIZATION THROUGH LITIGATION

Against this back drop of policy history, this section provides empirical evidence for the historical development of sex equality law by the ECJ: the creation of EU rules through litigation. In particular we are concerned with how member state preferences impacted this litigation. And which countries are being attacked by litigants. The previous sections provide us with a set of propositions of how this litigation might develop. Intergovernmentalist arguments suggest that the Court's judicial outcomes will reflect the preferences of powerful member state governments. Neo-functional arguments would lead us to expect the Court to rule in a direction that clarifies EU law and in doing so, may expand its scope. Furthermore, following this line of research, we might also expect the countries representing lowest common denominator positions to be the subject of the bulk of litigation.

Methodology

The data utilized in this analysis includes all Article 177 social provisions litigation from 1970 (the first case) to 1998.¹⁴ The Article 177 procedure, as mentioned earlier, involves the ECJ clarifying the compatibility of a national law with European law. The national court sends a

‘reference,’ a question or set of questions, inquiring about the consistency of a national practice with EU law. The ECJ’s response is delivered in the form of a ‘preliminary ruling’ and must be applied by the national judge to resolve the dispute. Integral to this procedure are ‘observations,’ which are written briefs filed by the Commission and the member state governments (regardless of whether the case originates in their legal system) stating how they believe the case should be decided.

I coded the data in the following manner. The references were all coded by country of origin and EU law pertaining to the case. After examining all of the Court’s judgments included in the time period of this study, I coded the rulings into two categories: (1) either the Court had accepted a national rule or practice as consistent with EU law; or (2) it was declared to be inconsistent with EU law. The written observations were also coded into two categories: (1) either an observation was successful, or (2) unsuccessful at predicting the ECJ’s final ruling. For example, consider a case involving the compatibility of a French environmental law; if the British government filed an observation stating the French law was compatible with EU law and the ECJ ruled that it was incompatible, then the British observation would be coded as unsuccessful. The first measure gives us a general picture of whether the Court functions to preserve national policies or develop supranational policy. And together these two measures reveal the impact of member state government preferences on ECJ rulings.

Data Analysis

¹⁴ These data are taken from a larger set which includes all of the Article 177 references from 1961 to mid 1998 (see Stone Sweet and Brunell 1998a; 1998b).

Table 1 provides an overview of all the Article 177 references in the area of EU Social Protection between 1970 (the first case) and 1998.¹⁵ The sex equality litigation comprises almost sixty percent of this larger policy area. Beyond sex equality cases, this litigation includes cases such as the protection of employees' social benefits (e.g. working hours) and health and safety standards. The laws invoked in this litigation either involve Treaty provisions Articles 117-122 or secondary legislation in the area of social provisions. One of the most interesting parts of this Table, is the gradual increase in this litigation. In particular, it is important to note that at time when member state governments were very hesitant to create policy in this area, the early 1990s, we see a radical jump in the Court's article 177 litigation.

-----Figure 1 about here-----

Table 1 extracts the sex equality data from this larger set to illustrate its development over time. Again, it shows general patterns similar to the larger social protection data, and it also highlights which countries are the subject of litigation. The United Kingdom is experiencing the bulk of the litigation in this area, with 32 % of cases originating from British courts. Furthermore, German laws have since the 1980s steadily been subject to increasing amounts of litigation. References from Germany comprise over a quarter of the sex equality litigation.

-----Table 1 about here-----

Between 1970 and 1993,¹⁶ the ECJ made 71 sex equality Article 177 preliminary rulings. From the data in Table 2, we can see that of these decisions, the Court declared violations (the national practice was inconsistent with EU law) in 46 (65%) of the cases. The ECJ considered the lawfulness of United Kingdom practices in 26 rulings, declaring violations in 14 (53%).

¹⁵ The data includes Article 177 references for the first six months of 1998.

¹⁶ The judicial decisions have been coded for cases through 1993. Documentation following this year did not include written observations and thus, could not be included in this analysis.

Aggregating results from litigation involving “powerful member state governments” (France, Germany, Italy and the UK), the Court declared violations in 24 (60 %) of the decisions. These data also give some preliminary indication that those national legal regimes that enshrine the least integrative rules will be attacked by Article 177 references. Together Germany and the United Kingdom received over half of all the litigation in this policy sector. This is not surprising. As was earlier discussed, Germany has historically favored minimal government regulation in this area (Hoskyns 1996). Furthermore, the UK has continually taken the “opt-out” position to even the thinnest of EU social policy regulations (Lange 1992; Pierson 1995). These data confirm the expectations that litigants will attack national legislation that embodies lowest common denominator positions.

-----Table 2 about here-----

The findings also reveal that the Commission's observations predicted ECJ rulings far better than did observations filed by member state governments. The data presented in Table 3 reveal that the Commission's success rate is 88%, as 84 observations predict the direction of the final ruling. The United Kingdom's rate of success was much lower in comparison at 57%. Similarly, French preferences only predict ECJ judicial decisions 45% of the time. It is interesting to note that while Denmark's success rate is high (78%), in 3 of its observations the Danish Government actually filed an observation which stated it believed their national law was inconsistent with EU law (government preferences in all other cases take a stance to defend or preserve national law) and the ECJ concurred. In general, the findings presented in Table 2 and 3 bring into question claims that the preferences of the most powerful member state governments constrain the Court in a systematic manner. The findings also suggest that the Court's rulings

operate expand EU competence rather than preserve national law. Ultimately, this dynamic has operated to expand the integration project.

-----Table 3 about here-----

In terms of feedback effects, Table 4 demonstrates the national level repercussions of these rulings. This data reveals how the national court rules once the ECJ's preliminary ruling is forwarded back to the national court.¹⁷ The overwhelming response from national courts is to comply with the ECJ preliminary ruling. In 89 % of these cases, the national court implemented the ruling handed down by the ECJ. (More to follow.)

-----Table 4 about here---

Case Law Analysis-

The patterns of sex equality references and the subsequent judicial rulings reveal the Court's active participation in EU rule creation. These data give us a general picture of the dynamic driving this litigation. To understand more precisely how this litigation developed and how the Court addresses the tensions inherent in this policy sector, I rely on the content of the case law. The following section provides an analysis of the Court's case law on pregnant workers. In particular, I focus on the Court's creation of European rules governing pregnancy and maternity, and how this in effect has shaped the outcome of EU legislation. Furthermore, I examine how both policy failures and strategic action led to further litigation.

As the overview above illustrates, the social protection of pregnant workers was largely left to national legislation. However, the aggregate data demonstrate that the Court had no problem finding a distinct set of social rights within this thinly developed area of EC law. The

rights of pregnant workers under Community law were first considered by the Court in *Dekker*.¹⁸ The case was brought before the ECJ by a Dutch court in 1988. In the case, a woman who was 3 months pregnant, applied for a job with a Dutch company, VJV, and after interviewing was found to be the most qualified for the job. While the hiring committee recommended employment, VJV management decided not to employ her for the reason that because she was already pregnant when she applied for the job, VJV's insurer would not reimburse the maternity pay which VJV would be required to pay Mrs. Dekker. Proceedings were instigated against VJV by Mrs. Dekker in the Dutch courts, claiming that she had been discriminated against on the basis of her sex. The case was referred to the ECJ for a preliminary ruling questioning the protection of Mrs. Dekker under Article 119 and Directive 76/207 (Equal Treatment).

The Court was asked to interpret EU law and in its 1990 ruling found that discrimination in employment opportunities on the ground of pregnancy can constitute direct sex discrimination, contrary to the Equal Treatment Directive. Scholars observe that the ruling in effect created new European rules by providing not only explicit protection of pregnant workers under EU law but also creating an advantageous interpretation of sex equality for women, one not reliant on the male norm of comparison, instead emphasizing disadvantage to women rather than comparable treatment with men (McGlynn 1996; Ellis 1994; Bamforth 1993). Later that same day, the Court made a similar ruling in a case originating from Danish courts, the *Hertz* case,¹⁹ concluding that the dismissal of a pregnant employee also amounts to discrimination under EU law. Together

¹⁷ The data was made available by the European Court of Justice's Documentation Center. The total number is 27 (out of a possible 59 cases from 1970-92), as the ECJ's database relies on the voluntary action of national courts to forward their decision back to the ECJ for documentation.

¹⁸ *Dekker v. Stichting Vormingscentrum voor Jonge Volwassen Plus* Case C-177/88 ECR 1990: 3941

¹⁹ *Handels- og Kontorfunktioneres Forbund (Hertz)* Case C-179/88 ECR 1990: 3979.

these two rulings established protection against the refusal to employ or dismissal of pregnant workers in EU law.²⁰

This question of protection against dismissal was further raised in a case originating from Germany in 1992. *Habermann-Beltermann v. Arbeiterwohlfahrt*²¹ concerned the dismissal of a pregnant woman who has been employed on an indefinite contract to work at night, despite the national law which forbade night work by pregnant women. The Court decided the case by emphasizing that the national law affected only a limited duration in contrast to the unlimited nature of the contract and found that dismissal under these circumstances was contrary to the Equal Treatment directive. While this clearly represented an expansion in protection of women, it also defined the limitation of this protection:

The termination of a contract without a fixed term on account of the woman's pregnancy...cannot be justified on the ground that a statutory prohibition, imposed because of pregnancy, temporarily prevents the employee from performing night-time work.²²

This ruling begs the question of what protection is provided in EU law for pregnant women with fixed term employment. The question presents an ambiguity that may be the subject of future litigation.

The Pregnancy Directive of 1992 was born out of this litigation.²³ In particular, legal scholarship suggests that Article 10 of the Directive “codifies and amplifies the European Court’s decision forbidding discrimination on account of pregnancy in the *Dekker* case” (Ellis 1993, p. 66, see also Hoskyns 1996; McGlynn 1996). Yet the political processes that inflicted the passage of

²⁰ Advocate General Damon in his joint opinion for *Dekker* and *Hertz* highlights that the principles involved in the two cases require the Court to decide what place maternity holds in European society. Prior to these rulings, protection for pregnant workers remained an unelaborated right in the Equal Treatment Directive. Article 2(3) of the Directive states: “This Directive shall be without prejudice to provisions concerning the protection of women, particularly as regards to pregnancy and maternity.”

²¹ Case C-421/92 ECR 1994: 1657.

²² ECR 1994: 1677.

this Directive, in particular the production of lowest common denominator outcomes, ultimately led to legislation that went little further than the general rights of protection introduced by the Court's earlier rulings. Subsequently, this has led to, by not absolving potential conflicts, another series of litigation demanding a clarification of women's and employers rights in the this area of EU law.

The text of the Directive is based on Article 118A of the Treaty which governs policy on the health and safety of workers. Directives adopted under this article permit the Council to act in the field of qualified majority voting. While the principle of majority voting suggests the potential for passage of legislation that not all member states agree to, the legislative history of the Pregnancy Directive illustrates why this is not necessarily true in practice.

The text originally proposed by the Commission's equality unit was "far-reaching" (Ellis 1993, p. 63). Similar to much of the legislation stemming from the 'Social Action Programmes,' progressive women were behind the development of the proposal. The Advisory Committee on Equal Opportunities for Women and Men helps the Commission formulate the original proposals. Prior to this, they established formal information exchanges with both the European Women's Lobby and national women's groups in order to produce inclusive policies (Ellis 1998). The Directive provided for 16 week paid maternity leave, replacement services for self-employed women, paternity leave, and a reversal of the burden of proof in cases arising out of these rights. The proposal was adopted by the Commission in September 1990 was considerably weaker; it reduced the minimum leave to 14 weeks and omitted references to paternity leave and replacement services. Furthermore, the burden of proof issue was removed and instead member states were instructed to review their legal rules in this area (COM (90) 406 final). The proposal

²³ Council Directive 92/85/EEC of 19 October 1992, OJ no. L 348/1, 28/11.92

elicited varying reactions. The UK government protested that the Directive was too far reaching. In particular, the British Employment Secretary, Michael Howard, at the Social Affairs Council in June 1991, argued that only the aspects of the draft concerning issues regarding exposure to harmful substances falls under Article 118 and thus, only this portion should be governed by majority vote, with all other aspects utilizing unanimity. The Commission threatened to withdraw the proposal for fear of fragmentation. Ultimately, a common position was arrived at in December 1991.

However, both the United Kingdom and Italy abstained from this position, with the later doing so on the grounds that the proposal was now too thin to be effective.²⁴ The proposal experienced considerable “last minute horse trading,” between the more stringent amendments proposed by the European Parliament and the UK’s reluctance to accept such expensive changes. Finally, on 19 October 1992, the Directive was passed (with abstentions from both the UK and Italy) in a form that largely reflected the minimalist ambitions of the UK and also suggested a set of rights that come in conflict with current national law and existing EU equal treatment legislation (Ellis 1993). The three main areas of potential conflict surround the issue of night work, maternity leave pay and general discrimination protection. Furthermore, while the UK abstained from the vote, it was not able to prevent the Directive’s adoption. The relevant provisions were implemented into British Law at the last possible moment, October 1994.²⁵ Ultimately, the Directive did little to clarify the complexity of rules that the Court had begun to create forbidding discrimination based on pregnancy. The Council’s adoption of this Directive

²⁴ Unanimity was necessary at this point, under EEC Article 149(1) because the Council was amending the Commission’s proposal, yet unanimity does not preclude abstentions under Article 148(3). See Ellis 1993 for a discussion.

²⁵ The Directive required Member States to implement the measure within 2 years of the October 1992 adoption date.

could be understood as “parallel” legislating (Hoskyns 1996, p. 160), as the Court continued to expand this area of EU law before and after the Directive was implemented into national law.

A closer look at the previous ECJ case law reflects many unanswered questions regarding pregnancy and discrimination. In particular, when is pregnancy to be regarded as the determining factor in discriminatory treatment? A now pivotal case in the development of EU equality law, the British House of Lord’s referred a set of questions in the *Webb*²⁶ case to the ECJ asking for clarification. Ms. Webb, a pregnant woman, had her indefinite employment contract terminated when her employer found out that she would be absent from work during the same period as another pregnant employee who she was hired to replace. The House of Lords found that while Ms. Webb had no rights under UK law, she might under the Community law (Directive 76/207) and so asked for a preliminary ruling. The ECJ framed the problem as:

The national court is uncertain whether it was unlawful to dismiss Mrs. Webb on the grounds of pregnancy or whether greater weight should be attached to the reasons for which she was recruited (paragraph 14 ECR 1994).

The Court reaffirmed its early ruling in *Dekker* and found that “dismissal of a pregnant worker on account of pregnancy constitutes direct discrimination on grounds of sex” (paragraph 19). The Court continues to argue that the need for special protection of pregnant workers is embodied in the Equal Treatment Directive and also in the Pregnancy Directive: “the Community legislature provided...for special protection to be given to women, by prohibiting dismissal during the period from the beginning of their pregnancy to the end of their maternity leave” (paragraph 21).

Therefore, the Court concludes “greater weight” cannot be attached to the reasons for recruitment. The defendant’s argument of hardship is viewed not as the reason for dismissal, but

²⁶ Case C-32/93 ECR 1994: 3567.

as justification for the discriminatory treatment. Under Community law, once direct discrimination is established, it cannot be justified (Boch 1996).

Scholars have both lauded and criticized the Court's decision in *Webb*. The ruling clearly emphasized and expanded the Community's goal of protecting pregnant workers from discriminatory action, despite the harmful costs inflicted on employers and member state governments.²⁷ Yet the ruling also highlights a significant area of equality law that would need further clarification in the future. The relationship between Article 5 of the Equal Treatment Directive and the Pregnancy Directive remain speculative (Ellis 1998). In both the *Webb* and *Hertz* decisions, the Court implied that the Equal Treatment Directive leaves unanswered whether pregnant women in fixed term employment are protected. While the Pregnancy Directive is not explicit about unlimited coverage, the Court in the *Larsson*²⁸ decision concludes that Article 10 of the Directive does in fact offer such blanket protection. Interestingly enough, in this case originating from Danish courts, the Court found that the dismissal of a woman due to pregnancy related illness was in fact lawful under the Equal Treatment Directive (again, the facts of the case were prior to implementation of the Pregnancy Directive) when the dismissal took place after the end of her maternity leave. The Court's clarification of the Pregnancy Directive and the extension of protection came as a side remark stating that had the Directive been in force the Court would have found the action unlawful.²⁹

²⁷ The *Webb* decision helped form the foundation for settlement claims involving pregnant women discharged from the British armed forces. After the dismissal of more than 5000 women between 1978-90, British courts began awarding settlements in the figures of £33,000-£173,000 per claimant. See Current Survey 1994.

²⁸ Case C-400/95 ECR 1997: 4135.

²⁹ The Court remarked: "It is clear from the objective of Article 10 that absence during the protected period, other than for reasons unconnected with the employee's condition, can no longer be taken into account as grounds for subsequent dismissal." ECR 1994 paragraph 25. Furthermore, the distinction pertains to the fact that in *Larsson* the dismissal on grounds of "lengthy absence" from work was calculated in reference to time taken while on maternity leave, as well as time exceeding this period. The Court implies that in the future this "protected period"

This remark clearly foreshadowed the Court's future ruling in a case referred from the British House of Lords. In a similar case dealing with dismissal, the *Brown*³⁰ case, the Court reversed the *Larsson* decision. Instead, it upheld its earlier contention that dismissal due to pregnancy related illness was contrary to European law. Mrs. Brown was absent from work for over 6 months during her pregnancy for pregnancy related reasons. Her employer, Rentokil Ltd., contained a clause in their employment contracts, for both men and women, stating that absences due to sickness for 6 months justified dismissal. Accordingly, Mrs. Brown was dismissed. The Court held, in an explicit reversal of the *Larsson* decision, that it was contrary to the Equal Treatment Directive to dismiss a woman for pregnancy related illnesses during her pregnancy.³¹ Scholars have rightfully argued that this reversal has done little to clarify EU rules in this area, as it contradicted its earlier interpretation of the Equal Treatment Directive (Ellis 1999).³² However, one could argue at least the Court has brought past interpretations of EU equality laws (in particular, the Equal Treatment Directive) into conformity with the new norms governing European maternity and pregnancy rights (as established through the Court's expansive reading of the Pregnancy Directive). Furthermore, we are able to see the how the Court actively brings

(ie. from the beginning of pregnancy to the end of maternity leave) can not be included in such calculations of unlawful time absent from work.

³⁰ Case C-394/96 *Brown v Rentokil Ltd.* ECR 1998: 4185.

³¹ As in the *Larsson* case, the facts of this case arose before the Pregnancy Directive came into force and thus, the Equal Treatment Directive was the only instrument available to the litigants.

³² In particular, the Court's adherence to the rule that where the discriminatory treatment is based up on the fact of pregnancy, since only women can become pregnant, this must amount to discrimination based on sex. The *Brown* decision takes this a step further by arguing that pregnancy related illness is inseparable from the fact of pregnancy and therefore similar treatment as a result of this condition is also discrimination on grounds of sex. Mainly, this is problematic because it again reduces pregnancy to the status of illness and also this reliance on illness rather than absence as the cause for dismissal removes the employer's interests from the situation. Concerns with the link between pregnancy and sickness was also echoed by the European Parliament when reviewing the Council's amendments to the Pregnancy Directive proposal. This later logic could dilute the complexity of the situation and thus, impede the Court from its job in balancing all the interests in the dispute at hand. See Ellis 1999 for a further discussion.

national law into conformity with these new rules, even after these appeal cases were previously turned down by numerous national courts. (McGlynn 1996).

The final set of cases I will discuss demonstrate the Court's further expansion of pregnancy rights in areas other than dismissal and refusal to hire. In particular, these cases involve the further clarification of employment rights of pregnant workers. Again, the facts involved in the first case were prior to implementation of the Pregnancy Directive, and thus rely on the rights provided for pregnant workers under the Equal Treatment Directive and also Article 119. Yet both of these cases provide an example of the Court's "parallel" legislating, which in effect provided more stringent requirements than the Directive. In *Gillespie*, the Court was referred a set of questions regarding the applicability of Community law to levels of maternity pay. The referral came by way of a Northern Irish appeals court after the case of 17 plaintiffs had been dismissed by the lower Industrial tribunal. The plaintiffs all had been on maternity leave from their employment with various offices of the Northern Ireland Health Services during a period in which a proposed back pay increase was to be given. The maternity leave received by Health Service employees consists of a percentage of their given wage. The plaintiffs instigated proceedings on the grounds that they had suffered sex discrimination because they did not receive the full benefit of the back dated pay raise due to the fact that they were receiving a reduced amount of their wage. The Court ruled in favor of the plaintiffs and in its judgment further clarified how national maternity policies must be interpreted in light of Article 119 and the subsequent Equal Pay Directive.

Far more than the individual back pay amounts allotted to the plaintiffs, the *Gillespie* ruling had a more general financial impact on UK maternity pay policies. Almost, two years after the transposition of the Pregnancy Directive into national law, this 1996 ruling created the very

maternity pay requirements which the UK government was careful to remove from the Directive. While the Court concluded that neither Article 119 or the Equal Pay Directive lay down a criteria to determine the amount of pay required, they do guarantee a minimum level:

“The amount payable could not be so low as to undermine the purpose of maternity leave, namely the protection of women before and after giving birth” (paragraph 20). Prior to this ruling, the UK’s statutory maternity pay system was calculated on the basis of length of employment and weekly hours worked prior to commencement of the maternity leave, and was figured in terms of relevant statutory sick pay. In practice, the UK laws left some pregnant workers in a position of receiving no maternity pay during their leave. Many part-time employees, who do not earn more than the national insurance threshold, do not qualify for UK statutory sick pay. Therefore, they do not qualify for maternity pay. Maternity leave without any pay may pressurize an employee to return earlier to work, and thus undermine the real “purpose” in the 14 week leave period. The UK’s lowest common denominator position was ultimately shifted upwards by the Court.

The second case involves the protection of employee rights regarding assessment and evaluation while absent on maternity leave. It is worth mentioning that while the facts of the *Thibault*³³ case took place after the implementation of the Pregnancy Directive, the only instrument which can be relied upon where unfavorable treatment takes a form other than dismissal or refusal to employ is still the Equal Treatment Directive. The case arose when Mrs. Thibault registered a complaint with the Labor Tribunal in Paris against her employer for failing to perform her annual performance evaluation (which is linked to a minimum 2% pay raise and promotion) due to the fact she did not fulfill the requisite for six months of attendance within the evaluation year. Mrs. Thibault was on maternity and pregnancy related leave for 7 months of this

time and she argued that failure to assess her performance based on absences related to maternity leave was discriminatory. Despite the observation submitted by the UK government stating that the employer's action did not constitute sex discrimination under EU law, the Court expanded the rights under the Equal Treatment Directive by concluding that it was unlawfully discriminatory to deny a woman the right to possible promotion because of her absence on maternity leave.

The final two cases represent the first opportunities the Court has had to rule on the Pregnancy Directive. In *Boyle*,³⁴ six female employees of the British Equal Opportunities Commission³⁵ applied to the Industrial Tribunal, Manchester, for a declaration that certain conditions of their maternity leave was unenforceable in so far as it discriminated against female employees and was thus contrary to Article 119 of the Treaty or Directives 75/117, 76/207 or 92/85. While the Court reemphasized the provisions in the Pregnancy Directive which afforded national government discrepancy in determining when maternity leave commences, it found that a contract prohibiting a woman from taking sick leave during maternity leave (without returning to work first) was contrary to the Directive. Again, UK laws were the subject of litigation.

In the month following the *Boyle* ruling, the Court gave its second decision involving the Pregnancy Directive in the *Pedersen*³⁶ case. By way of a Danish Commerce Court, the four plaintiffs challenged a national law which stated women who were unfit for work for a reason connected with the pregnancy before the three-month period preceding the birth date were not entitled to full pay. Three women were declared unfit to work while one was only partially unfit

³³ Case C-136/95 ECR 1998.

³⁴ Case C- 411/96 ECR 1998.

³⁵ The national court states "that the EOC is agreed to be an emanation of the State for the purposes, as far as it is concerned, of the direct effect of the directive at issue." It is worth mention that the Equal Opportunities Commission is the UK governmental administrative unit which has been essential to the development of UK equality policies. In particular, the legal experts housed in this unit have been the source of much of the Article 177 litigation in the area of sex equality. (See Alter 1998).

to work during this time period and thus their employer ceased to pay them. The four women claimed this law was contrary to the rights given pregnant workers under Article 119, and Directives 75/117/EEC, 76/207/EEC and 92/85/EEC. The Court ruled in favor of the plaintiffs finding that Danish legislation did not aim to protect women's conditions, but rather favored the interests of the employer. This case represented the first time the Court was asked to interpret the rules governing the duties of employers regarding adjusting the workplace to the needs of pregnant workers. The Pregnancy Directive (Article 4 and 5) requires an employer to introduce temporary adjustments to working conditions (including providing a different job) and hours in response to risk assessment of the pregnant workers situation. The Danish employer failed to provide other opportunities to these women. The Court gave breadth to the Directive by defining the scope of this right.

Together the *Boyle* and *Pedersen* rulings represent an extension of the concept of maternity benefits under EU law. The Court has argued that under certain conditions women have the right to receive maternity benefits before the maternity leave. Furthermore, scholars have emphasized the importance of the Court's interpretation of Article 4 and 5 of the Pregnancy Directive, in that it imposed duties on the employers, and in doing so the Court recognizes that pregnancy and maternity require re-organization of the work place (Caracciolo di Torella 1999).

Overall, the case law in this analysis reveals that the Court does not hesitate to shift the control over maternity and pregnancy away from national competence even when a decision is costly to member state governments. The Article 177 process in general and the behavior of the Court in particular have operated in a predictable pattern. The expansive logic of the Court has required national laws that are not currently in conformity with EU law to be shifted upwards.

³⁶ Case C-66/96 ECR 1998.

CONCLUSIONS

The analysis in this chapter demonstrates how policy failures and strategic social action have led to the institutionalization (creation of rules) of sex equality policy in the EU. We are able to see how women activists were able to exploit both EU rules (Article 119) and EU arenas (ECJ and Commission sponsored networks), in order to influence the clarification and expansion of EU sex equality policy. We are also able to see how the interactions between social actors (legal experts, women's groups and labor union activists) and the European Court of Justice have brought about change in national institutions and practices (reform of national equal opportunity laws) and often in opposition to member state preferences. In particular, the analysis highlighted the significant change in British equality laws which has resulted from the Court's expansive Article 177 rulings.

In conclusion, I would like to suggest possible feedback effects of this institutionalization. The policy dynamic examined in this analysis posits three important unintended consequences of the Court's litigation in the area of sex equality. First, this process of institutionalization highlights the enabling effects that EU institutions (both rules and arenas) have for citizens of the Community. A key component of this analysis demonstrated how once in place, both rules and procedures enable women's groups to participate in the EU policy process in unintended ways.

Second, we can observe how institutionalization has shifted the distribution of gains. Again, Article 119 was created to benefit the business community by ensuring fair competition through equal wages. The historical analysis of this policy area demonstrates how this changed over time resulting in a distinctively different set of policy winners. The Treaty drafters intended

to produce a competition policy which targeted business and perpetuated a norm of elite (business and national government) control over the policy process. Instead, Article 119 served as a social justice provision which empowered women, as individuals and labor activists, and enabled the expansive development of European sex equality policy. Finally, as institutionalization occurs at the EU level we would expect a spread of these rules to other policy spaces. In particular, my analysis highlighted the national level effects of this policy development and how national sex equality laws are altered and transformed in conformity with EU rules.

(More)

Furthermore, this paper provides empirical evidence that brings into question claims that national governments can completely control international policy outcomes. This study serves to bring to the forefront of regional integration discussions interactions between transnational actors, national judges and the European Court of Justice. These relationships serve to construct a legal framework that opens the door to those who have been traditionally closed out of EU decision-making. It also provides a new arena for individuals, who have exhausted domestic legal routes, to challenge or participate in contentious national debates. Women activists, as lawyers, labor union activists and Commission staff, have become integral components in the process of European integration. Although many women's groups have yet to be clearly developed at the supranational level, I would expect them to increasingly utilize the ECJ as their transnational strength is multiplied through this litigation process. These societal actors may not be actively pursuing European integration *per se*, but as the expansive dynamic predicts, the unintended consequences of their actions have a direct impact on the institutionalization of supranational policy and the deepening of integration.

BIBLIOGRAPHY

- Boch, Christine. 1996. Case Law: Court of Justice. *Common Market Law Review*, 33: 547-567.
- Burley, Anne-M & Mattli, Walter. 1993. Europe Before the Court: A Political Theory of Legal Integration. *International Organization*, 47: 41-76.
- Butt Philip, Alan. 1983. Pressure Groups and Policy-Making in the European Community. In J. Lodge (Ed.), *Institutions and Policies of the European Union*. London: Frances Pinter.
- Caracciolo di Torella, Eugenia. 1999. Recent Developments in Pregnancy and Maternity Rights. *Industrial Law Journal*, 28: 276-282.
- Cichowski, Rachel A. 1998. Integrating the Environment: The European Court and the Construction of Supranational Policy. *Journal of European Public Policy*, 5: 387-405.
- Ellis, Evelyn. 1993. Protection of Pregnancy and Maternity. *Industrial Law Journal*, 22: 63-67.
- 1998a. *European Community Sex Equality Law*. 2nd Edition. Oxford: Oxford University Press.
- 1998b. Recent Developments in European Community Sex Equality Law. *Common Market Law Review*, 35: 379-408.
- 1999. Case Law: Court of Justice. *Common Market Law Review*, 36: 625-633.
- Elman, A. (Ed.) 1996. *Sexual Politics and the European Union: The New Feminist Challenge*. Oxford: Berghahn Books.
- Fenwick, Helen and Tamara Hervey. 1995. Sex Equality in the Single Market: New Directions for the European Court of Justice. *Common Market Law Review*, 32: 443-470.
- Garrett, Geoffrey. 1992. International Cooperation and Institutional Choice: the European Community's Internal Market. *International Organization*, 46: 533-60.
- 1995. The Politics of Legal Integration in the European Union. *International Organization*, 49: 171-81.
- Greenwood, Justin, Grote, Jürgen & Ronit, Karsten. 1992. *Organized Interests and the European Community*. London: Sage Publications.
- Hoskyns, Catherine. 1996. *Integrating Gender*. London: Verso.
- Kenney, Sally. 1992. *For Whose Protection? Reproductive Hazards and Exclusionary Policies in the United States and Britain*. Ann Arbor: University of Michigan Press.

- 1996. Pregnancy Discrimination: Toward Substantive Equality. *Wisconsin Women's Law Journal*, 10, 351-402.
- Mancini, G. F. and S. O'Leary. 1999. The New Frontiers of Sex Equality Law in the European Union. *European Law Review*, 24: 331-353.
- Mazey, Sonia. 1998. The European Union and Women's Rights: >From the Europeanization of National Agendas to the Nationalization of a European Agenda. *Journal of European Public Policy*, 5 (1): 131-152.
- Mazey, Sonia & Richardson, Jeremy. 1993. Introduction: Transference of Powers, Decision Rules, and Rules of the Game. In Sonia Mazey and Jeremy Richardson (Eds.), *Lobbying in the European Community*. Oxford: Oxford University Press.
- McGlynn, Clare. 1996. Pregnancy Dismissals and the Webb Litigation. *Feminist Legal Studies*, IV: 229-242.
- Moravcsik, Andrew. 1993. Preferences and Power in the European Community: A Liberal Intergovernmentalist Approach. *Journal of Common Market Studies*, 31: 473-524.
- 1998. *The Choice for Europe: Social Purpose and State Power from Messina to Maastricht*. Ithaca: Cornell University Press.
- Prechal, S. and Burrows, N. 1990. *Gender Discrimination Law of the European Community*. Brookfield: Gower Publishing Company.
- Rossilli, Mariagrazia. 1997. The European Community's Policy on the Equality of Women. *European Journal of Women's Studies*, 4: 63-82.
- Stone Sweet, Alec & Brunell, Tom. 1998. Constructing a Supranational Constitution: Dispute Resolution and Governance in the European Community. *American Political Science Review*, 92: 63-81.
- Stone Sweet, Alec & Caporaso, James. 1998. From Free Trade to Supranational Polity: The European Court and Integration. In Wayne Sandholtz & Alec Stone Sweet(Eds.), *European Integration and Supranational Governance*. Oxford: Oxford University Press.
- Wessels, Bernard. 1997. European Parliament and Interest Groups. Unpublished manuscript. Wissenschaftszentrum Berlin für Sozialforschung.

Figure 1 Article 177 References in the Field of Social Provisions, 1970-1998

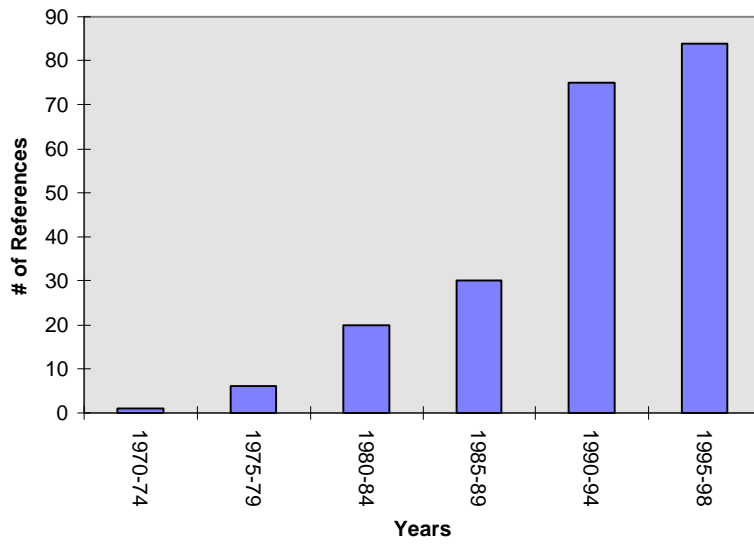


TABLE 1 *ARTICLE 177 REFERENCES IN THE FIELD OF SEX EQUALITY BY COUNTRY, 1970-1998*

	1970-4	1975-9	1980-4	1985-9	1990-4	1995-8	Total
Austria	-	-	-	-	-	2	2
Belgium	1	2	-	1	3	3	10
Denmark	-	-	-	2	1	3	6
France	-	-	-	1	1	2	4
Germany	-	-	4	4	12	12	32
Greece	-	-	-	-	-	1	1
Ireland	-	-	-	3	1	1	5
Italy	-	-	-	-	-	1	1
Netherlands	-	-	3	5	11	-	19
Sweden	-	-	-	-	-	1	1
United Kingdom	-	1	6	4	20	13	44
Total	1	3	13	20	47	39	125

Note: The last time period, 1995-98, only includes data for 3 ½ years, whereas the previous categories contain data for 5 years.

Source: A. Stone Sweet and T. Brunell 1999

TABLE 2 *JUDICIAL OUTCOMES PURSUANT TO ARTICLE 177 REFERENCES
IN SEX EQUALITY CASES, 1970-1993*

	Consistent with EU Law	Inconsistent with EU Law	Total
Belgium	3	3	6
Denmark	1	2	3
France	0	2	2
Germany	4	8	12
Ireland	1	3	4
Netherlands	4	14	18
United Kingdom	12	14	26
Total	25	46	71

N=71

Note: Outcomes were coded as 'consistent' if the ECJ declares the national rule or practice as consistent with EC law, and 'inconsistent' if the ECJ declares the rule or practice to be inconsistent with or in violation of EC law.

Source: Data compiled from the *European Court Reports* by R. Cichowski and A. Stone Sweet.

TABLE 3 *MEMBER STATE GOVERNMENT OBSERVATIONS AND JUDICIAL OUTCOMES PURSUANT TO ARTICLE 177 REFERENCES IN SEX EQUALITY CASES, 1970-1993*

	Successful	Unsuccessful	Total
Belgium	3	4	7
Denmark	11	3	14
France	7	2	9
Germany	12	12	24
Ireland	4	4	8
Italy	6	3	9
Netherlands	12	16	28
United Kingdom	35	26	61
The European Commission	84	12	96
Total	174	82	256

Note: Observations were coded as 'successful' when their argument, to the effect that the national rule is consistent or inconsistent with EC law, agrees with the ECJ ruling. And 'unsuccessful' when their argument, to the effect that the national rule is consistent or inconsistent with EC law, disagrees with the ECJ ruling.

Source: Data compiled from the European Court Reports by R. Cichowski and A. Stone Sweet.

Table 4 *National Court Compliance with Preliminary Rulings in the Field of Sex Equality, 1970-1992*

	Complied	Desisted	Non-Compliance	Total
Germany	7	1	0	8
Netherlands	8	0	1	9
United Kingdom	9	1	0	10
Total	24	2	1	27

Source: European Court of Justice and Nykios 1999.