

Gendered Capital and Litigants in EU Equality Case-Law

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This article problematises the gendered dimension of litigation in EU equality case-law. Relying on feminist readings of Bourdieu's concept of capital, it introduces the notion of gendered capital as an explanatory framework to illustrate and evaluate the distinct experiences between women and men litigants in the legal field. The article puts this framework to the test by undertaking a macro-level mixed-methods study of 352 preliminary references on EU non-discrimination law, drawing on the *Equality Law in Europe: A New Generation* database. The findings confirm the plausibility of this framework, with gendered capital varying depending on the period when and the Member State where the case was lodged, as well as on the ground of discrimination raised. As a result, by looking at the role of litigants' gender in EU equality case-law, this article joins the emerging field of mixed-methods studies offering novel insights into the effectiveness of judicial decision-making.

Keywords: equality, non-discrimination, European Union, litigation, gendered capital

INTRODUCTION

In the 'Force of Law' French sociologist Pierre Bourdieu extrapolated some of his theories, concepts and frameworks to the legal field.¹ Therein, he distanced his writings from both formalist and instrumentalist jurisprudence by advancing a sociology of law that considers the latter 'an entire social universe, which is in practice relatively independent of external determinations and pressures'.² That universe constitutes the legal field, a social space with its own distinct modus operandi and power relations, where 'actors and institutions [are] in competition with each other for control of the right to determine the law'.³ The field is a useful concept, reflecting the social practices underpinning the perennial struggles to control the law.

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1 P. Bourdieu, 'The Force of Law: Toward a Sociology of the Juridical Field' (1987) 38 *Hastings Law Journal* 805. Note that although the official translation uses the term juridical field in its broadest sense, more recent works drawing on the piece prefer to use the term legal field to avoid any confusion with narrower definitions of the term juridical.

2 *ibid.*, 816.

3 *ibid.*

The social universe of the legal field requires specificity in order to reveal the power struggles taking place within its bounds, reflected in the use of the concept to observe ‘specialised areas of practice’.⁴ European integration has featured among those areas, albeit mostly in relation to its institutional and constitutional elements.⁵ This article focuses instead on a specialised area of European integration, examining European Union (EU) equality and non-discrimination law as a distinct legal field. More specifically, the enquiry is centred around EU equality case-law, facilitated by the *Equality Law in Europe: A New Generation* project’s database, which comprises all pertinent cases involving grounds of discrimination and registered between 1970 and 2018.⁶

The Court of Justice of the European Union (CJEU/the Court) has been portrayed as a catalyst in the delivery and promotion of equality and non-discrimination in the EU. Although power struggles have taken place between the institutions and stakeholders involved in formal law-making at EU level, the emphasis on judicial decision-making stems from the use of – often strategic – litigation before the CJEU as a means of precipitating change, and the associated need to better understand the power relations among the actors involved in this specific and distinct legal field, in their quest to influence the determination of the law.

The article sheds light on an underexplored area, by choosing to focus on the characteristics of litigants and their impact within the field of EU equality case-law. Studies on other legal fields tend to focus on lawyers,⁷ whereas interdisciplinary analyses examining how judges’ characteristics influence judicial decision-making have investigated the relationship between gender and judging at EU level.⁸ In contrast, the influence of litigants’ characteristics on the adjudicative processes of the CJEU has for the most part been overlooked.⁹ This could be attributed to the Court’s structure. It seems that the

4 Y. Dezalay and M.R. Madsen, ‘The Force of Law and Lawyers: Pierre Bourdieu and the Reflexive Sociology of Law’ (2012) 8 *Annual Review of Law and Social Science* 433, 441.

5 A. Cohen, ‘Bourdieu Hits Brussels: The Genesis and Structure of the European Field of Power’ (2011) 5 *International Political Sociology* 335; N. Kauppi, ‘Bourdieu’s Political Sociology and the Politics of European Integration’ (2003) 32 *Theory and Society* 775. Although note the following analysis for a more comprehensive delineation of the European legal field: A. Vauchez, ‘The Force of a Weak Field: Law and Lawyers in the Government of the European Union (For a Renewed Research Agenda)’ (2008) 2 *International Political Sociology* 128

6 C. Kilpatrick and J. Miller, ‘EU Equality Law Court of Justice Database’ Academy of European Law, EUI at <https://equalitylaw.eui.eu/database/> (last visited 15 March 2022).

7 Y. Dezalay and B. Garth ‘Law, Lawyers and Social Capital: “Rule of Law” Versus Relational Capitalism’ (1997) 6 *Social and Legal Studies* 109; Y. Dezalay and B. Garth ‘“Lords of the Dance” as Double Agents: Elite Actors in and Around the Legal Field’ (2016) 3 *Journal of Professions and Organization* 188.

8 S.J. Kenney, *Gender and Justice: Why Women in the Judiciary Really Matter* (London: Routledge, 2012).

9 With some exceptions, albeit of a more general nature, such as: C. Harding, ‘Who Goes to Court in Europe? An Analysis of Litigation Against the European Community’ (1992) 17 *European Law Review* 105; A. Stone Sweet and T.L. Brunell, ‘Constructing a Supranational Constitution: Dispute Resolution and Governance in the European Community’ (1998) 92 *The American Political Science Review* 63. Also note that the litigation process as one of the drivers of positive change in the area of gender equality was en vogue in the 1990s. See S. Prechal and N. Burrows, *Gender Discrimination Law of the European Community* (London: Dartmouth, 1990); S.J. Kenney, *For Whose Protection? Reproductive Hazards and Exclusionary Policies in the United States and Britain*

predominantly indirect way individuals can access the CJEU leaves little room for a detailed examination of the litigants' role, in contrast to courts based on more participatory models.

Nonetheless, the fact that certain characteristics of the litigants, such as their gender, are made known still allows for meaningful observations to take place from an empirical and/or quantitative point of view. Accounts, for example, may elucidate patterns that emerge, depending on the litigants' gender, in relation to their success in launching disputes and in pushing their claims through a multi-tiered court system. To do so, locating these actors within the context of a specified legal field is not enough. To properly appreciate the complex area of EU equality (case-)law and the impact litigants can have therein, another Bourdieusian concept comes into play, that of capital, which is interdependent with the notion of field (and that of habitus) as constituent components of the same system.¹⁰

Capital defines the power dynamics between the actors within the delineated field. The various forms of capital (economic, cultural and social) are tantamount to species of power within that field, with capital denoting their distribution among the field's actors. The possession of capital in its various forms 'commands access to the specific profits that are at stake in the field'.¹¹ In the field of EU equality case-law, the profits revolve around control over the determination of the law, but also, especially for litigants, the power to gain access to this arena, by bringing a case before the CJEU. Capital might be a prima facie gender-neutral concept, yet, when focusing on litigants in equality case-law, a feminist reading that locates the role of gender within the formulation and operation of capital is essential to better reflect and understand how this characteristic influences their power in the field.¹²

This article aims to take a step towards filling the afore-mentioned gap in the literature by engaging in a mixed-methods analysis of the *Equality Law in Europe: A New Generation* project's database. It focuses on the litigants' gender and its corresponding capital in the legal field of EU equality case-law, with particular emphasis on the preliminary reference procedure. Cases where individuals can bring their claims directly before the CJEU are the minority. Therefore, it is important to examine how gender is implicated in the most common enforcement route, that of a case indirectly reaching the CJEU as a preliminary reference. Why are there discrepancies on the gender breakdown of litigants in EU equality case-law across the Member States? Are there certain grounds of discrimination associated predominantly with men or women litigants? How has the situation developed over time? The article undertakes a mixed-methods macro-level study, which uses quantitative analysis to shed light on such questions. At the same time, it introduces the concept of gendered capital,

(Ann Arbor, MI: University of Michigan Press, 1992); C. Hoskyns, *Integrating Gender: Women, Law and Politics in the European Union* (London: Verso, 1996).

10 P. Bourdieu and L.J.D. Wacquant, *An Invitation to Reflexive Sociology* (Chicago, IL: University of Chicago Press, 1992) 97.

11 *ibid.*, 97.

12 L. McCall, 'Does Gender Fit? Bourdieu, Feminism, and Conceptions of Social Order' (1992) 21 *Theory and Society* 837.

inextricably linked to a litigant's gender, as an important explanatory framework to spell out the divergent trajectories between women and men litigants.

Undertaking a mixed-methods study, which combines Bourdieu's theoretical insights with quantitative analysis of the pertinent case-law, is an important tool to better understand the complexities of equality litigation in the EU, but also more broadly. EU equality (case-)law is a distinct legal field, a social arena where the power relations between its agents define the outcome of the adjudicative process, often with knock-on effects on legislative and policy development. Litigants in this field have much to gain from successful judicial pursuit of their claims, and organisations active in strategic litigation are vested in supporting such causes.

By examining the patterns emerging from all preliminary references in the field, discussed under the prism of gendered capital to flesh out the extent of litigants' power therein, the article offers new insights on legal practices, which, in turn, can influence how actors exploit the law in that regard. The development of EU (equality) law 'is influenced, among other things, by ... a system of reproduction, because of the ways in which it offers the means for securing and converting social positions in a continuously evolving class structure that extends to the international level'.¹³ Looking at litigants' capital, therefore, sheds light on patterns of reproduction within EU equality (case-)law, but also offers opportunities to utilise one's capital in ways that manage to shake up long-standing class structures and social positions.

The structure of the article is as follows. It begins by setting out in more detail the Bourdieusian notion of capital within the legal field. It then maps out the development of the specific field under examination, that of EU equality law, tracing the CJEU's contribution to it as part of its wider integrationist agenda. It then moves on to explore the role of litigants in EU equality case-law from a theoretical standpoint. This is followed by an account of gendered capital and its use as an explanatory framework for the study. Next come the presentation of the dataset and the article's methodology, to continue with the macro-level case-study, which features an interwoven discussion of quantitative statistics under the prism of gendered capital. Finally, the conclusion summarises the key findings and ponders possible avenues for future research in the area.

CAPITAL AND THE LEGAL FIELD

Bourdieu characterises capital as 'a *vis insita*, a force inscribed in objective or subjective structures, but ... also a *lex insita*, the principle underlying the immanent regularities of the social world'.¹⁴ Capital, therefore, is pervasive in the day-to-day interactions of those fallen victim to discrimination in their employment, but also underpins the societal structures that frame the objects and subjects of the law. Possessing capital gives its holder a head-start, in terms of

13 Dezalay and Madsen, n 4 above, 439.

14 P. Bourdieu, 'The Forms of Capital' in J. Richardson (ed), *Handbook of Theory and Research for the Sociology of Education* (Westport, CT: Greenwood, 1986) 241.

not being discriminated against, or even if they are, an advantage in pushing their claim successfully through the hurdles of the judicial system in place, and the flawed ordered vision of the social whole that the latter's stakeholders hold as *communis opinio doctorum*.¹⁵

Capital, according to Bourdieu, goes beyond its economic manifestation to other forms, namely cultural (or symbolic) and social, all of which are inter-related.¹⁶ In this tripartite structure,¹⁷ economic capital refers to anything that has direct monetary value, some of which is institutionally depicted as property rights. Cultural capital, on the other hand, takes three forms: that of the embodied state, which includes one's mental and bodily dispositions; the objectified state, which includes cultural goods; and the institutionalised one, stemming from but different to its objectified peer and which refers to education and other qualifications and skills.¹⁸ Cultural capital could be acquired or inherited in more subtle ways than its economic counterpart, taking the guise of symbolically important legitimate competences that boost one's status.¹⁹ Finally, social capital centres on interpersonal connections, institutionalised in memberships in powerful and/or closed groups.²⁰

All three forms of capital are important, for not everything can be the object of a purely economic exchange. They create a three-dimensional space.²¹ Likewise, they intersect and manifest themselves differently, depending on the examined field. Dezalay and Madsen observe that, indeed, 'a field constructs its own particular symbolic economy in terms of the valorization of specific combinations and forms of capital'.²² A field, following Bourdieu's reflexive approach is an autonomous social microcosm 'of objective relations between positions'.²³ The relations between the participants in a field are determined, among others, by how power – or capital – is distributed among them.²⁴ A participant's capital becomes the defining factor of their role in that field, yet this is assessed holistically as it may evolve over time, given the vested interests in increasing or maintaining one's capital.²⁵

Although a field is not easily delimited,²⁶ the existence of a legal field as such has not been proved problematic. It has been coined as 'a symbolic terrain with its own networks, hierarchical relationships, and expertise'.²⁷ Initially atrophic,

15 P. Bourdieu, n 1 above, 819.

16 Note that culture and social capital can be observed as immaterial, transubstantiated forms of economic capital. Bourdieu, n 14 above, 242.

17 Symbolic capital is often integrated within a more widely construed notion of cultural capital. For their interaction see R. Moore, 'Capital' in M. Grenfell (ed), *Pierre Bourdieu: Key Concepts* (Stocksfield: Acumen Publishing, 2013) 102-106.

18 *ibid*; Bourdieu, n 14 above.

19 Bourdieu, *ibid*, 247.

20 *ibid*, 250.

21 P. Bourdieu, *Distinction: A Social Critique of the Judgement of Taste* (Cambridge, MA: Harvard University Press, 1984) 114.

22 Dezalay and Madsen, n 4 above, 441.

23 Bourdieu and Wacquant, n 10 above, 97.

24 *ibid*.

25 *ibid*, 99.

26 *ibid*, 100.

27 Y. Dezalay and B. Garth, 'Merchants of Law as Moral Entrepreneurs: Constructing International Justice from the Competition for Transnational Business Disputes' (1995) 29 *Law and Society Review* 27, 32.

research in this area has become more prominent,²⁸ even though arguably it never really took off to become mainstream.²⁹ While this paper focuses on the concept of capital as an explanatory framework for the gendered litigation patterns in EU equality case-law, it is still important to locate the analysis within the realm of that legal field. Litigants are players within the latter and interact with more prominent stakeholders, such as lawyers or other judicial actors.

In *The Force of Law*, Bourdieu himself acknowledged the existence of the legal field.³⁰ Despite it being an esoteric system whose actors fulfil mutual needs, the interests of those participating in that field are often divergent, reflected in the different bodies that are involved, but also within the latter's internal hierarchy, 'which always corresponds rather closely to the position of their clients in the social hierarchy'.³¹ For Bourdieu, litigants' capital exerts some influence in the legal field. That notwithstanding, the studies mentioned above focused mostly on the role of professionals therein, or on the specific context of the criminal justice system. However, this article chooses to investigate the role of capital in relation to the litigants in EU equality case-law, using the concept to explain the different gendered experiences.

EQUALITY AND THE CJEU

The development of EU equality and non-discrimination law

Considering the field under examination, it is crucial to contextualise it, by drawing on its development. This is because 'the actual configuration of any legal field is historically contingent and, thus, a social product that needs to be analysed in light of its historical process of construction'.³² In the EU, the concept of equality was originally used as a motor of market integration, so as to establish and advance the European project, especially in relation to the fundamental freedoms.³³ Even then, the foundational Treaty of Rome contained a provision laying down the principle of equal pay for equal work.³⁴ Lacking a concrete commitment to an all-around protection from discrimination on grounds of sex, the underpinning rationale behind the said provision was primarily economic. Member States were concerned that the internal market would be undercut if some of their counterparts gained a competitive advantage through a cheaper workforce comprised predominantly of women.³⁵ The

28 For example, see *ibid*; Dezalay and Garth, n 7 above; C.K. May, 'Drug Courts: A Social Capital Perspective' (2008) 78 *Sociological Inquiry* 513; V.L. Shammass and S. Sandberg, 'Habitus, Capital, and Conflict: Bringing Bourdieusian Field Theory to Criminology' (2015) 16 *Criminology and Criminal Justice* 195.

29 Dezalay and Madsen, n 4 above, 435.

30 Bourdieu, n 1 above, 819.

31 *ibid*, 821-822.

32 Dezalay and Madsen, n 4 above, 443.

33 G. More, 'The Principle of Equal Treatment: From Market Unifier to Fundamental Right' in P. Craig and G. de Búrca (eds), *The Evolution of EU Law* (Oxford: OUP, 1st ed, 1999) 517.

34 Through what was then Article 119 of the Treaty Establishing the European Economic Community (now Art 157 TFEU).

35 Hoskyns, n 9 above, 49.

driver behind the inclusion of non-discrimination provisions notwithstanding, the latter prodded legal innovation, judicial and legislative alike, in terms of promoting and protecting equality and non-discrimination more generally.³⁶

Gender equality was indeed the first area where the Court genuinely strived to ensure adequate social progress, at a time of inertia by the Member States and the Commission for any concrete action.³⁷ The Court, in line with its conceptualisation of important constitutional principles in the 1960s, seized the opportunity to roll into action once a case enabled it to do so. This case was no other than *Defrenne v SABENA*³⁸ (*Defrenne (no 2)*), wherein the CJEU declared that the provision of equal pay for equal work in what is now Article 157 of the Treaty on the Functioning of the European Union (TFEU) was directly effective. This allowed private individuals, primarily women, to directly rely on the provision before national courts, without having to look for its implementation in national law, turning the content of Article 157 TFEU into a positive right.³⁹ The nature of gender equality was redefined: from a facilitator of economic integration it became a fundamental right under EU law,⁴⁰ also protected as a general principle.⁴¹

Alongside these judicial developments, the ambit of gender equality in the EU was being widened through legislative initiatives. Specifically, Directives 75/117/EEC and 76/207/EEC dealt with equal pay and equal treatment respectively in employment and working conditions. Furthermore, Directive 79/7/EEC expanded the reach of equality to matters of social security. Although there were discussions about mainstreaming equality further, extending its application to fields beyond employment and social policies, these were not followed by binding legal instruments.⁴² There were very few exceptions, primarily the Racial Equality Directive 2000/43/EC, whose prohibition of discrimination on grounds of race covers situations outside of the workplace (social advantages, education, supply of goods and services), and the Goods and Services Directive 2004/113/EC, which governs the application of equal treatment between men and women when accessing or supplying goods and services.⁴³ Both were enacted after the entry into force of the Treaty of Amsterdam, which, through the newly introduced provision of Article 13 EC, formally gave the EU

36 E. Muir, *EU Equality Law: The First Fundamental Rights Policy of the EU* (Oxford: OUP, 2018) 146.

37 A. Stone Sweet, *The Judicial Construction of Europe* (Oxford: OUP, 2004) 153–155.

38 Case C-43/75 *Defrenne v SABENA* ECLI:EU:C:1976:56, which built on the previous *Defrenne* ruling: Case C-80/70 *Defrenne v Belgian State* ECLI:EU:C:1971:55.

39 R.A. Cichowski, *The European Court and Civil Society: Litigation, Mobilization and Governance* (Cambridge: CUP, 2007) 84.

40 C-149/77 *Defrenne v Sabena* ECLI:EU:C:1978:130 at [47]. M. Bell, 'The Principle of Equal Treatment: Widening and Deepening' in P. Craig and G. de Búrca (eds), *The Evolution of EU Law* (Oxford: OUP, 2nd ed, 2011) 615.

41 U. Belavusau and K. Henrard, 'The Impact of the 2000 Equality Directives on EU Anti-Discrimination Law: Achievements and Pitfalls' in U. Belavusau and K. Henrard (eds), *EU Anti-Discrimination Law beyond Gender* (Oxford: Hart, 2018) 7.

42 E. Lombardo and P. Meier, 'Framing Gender Equality in the European Union Political Discourse' (2008) 15 *Social Politics* 101, 104–105.

43 A. Masselot, 'The State of Gender Equality Law in the European Union' (2007) 13 *European Law Journal* 152, 153–154.

the competence to legislate against discrimination in a variety of settings, and for a variety of grounds.⁴⁴

The preceding paragraph discussed the expansive ambit of non-discrimination beyond employment and social policies post-Amsterdam, where one of the new protected grounds was also mentioned; that of race under Directive 2000/43/EC. However, the new grounds did not stop there. Framework Directive 2000/78/EC safeguarded non-discrimination in employment and occupation on grounds of religion or belief, disability, age and sexual orientation. All these, together with the gender mainstreaming clause of Article 3(2) EC introduced by the Treaty of Amsterdam, led scholars to observe that a paradigmatic shift had taken place.⁴⁵

The post-Amsterdam reforms enhanced the guarantees offered to gender equality, by broadening the scope of EU non-discrimination law to cover additional grounds. According to one portion of the feminist literature, discrimination on grounds of gender is interwoven with issues of race, ethnicity, socioeconomic background and sexuality.⁴⁶ These point to the multidimensional, or intersectional approach to discrimination, which sees individuals as each possessing different characteristics ‘some of which might fall into the category of personal features serving as starting points for social exclusion or inequality’.⁴⁷ In that sense, the reforms were promising, although scholars called for follow-up legislation to more effectively combat multidimensional or intersectional discrimination.⁴⁸

The Lisbon Treaty entered into force in 2009 and signalled the latest phase in the development of EU equality law.⁴⁹ It added to the equality-related provisions found both in the general as well as specific parts of the Treaties.⁵⁰ Most notably, the rights-based approach to equality was strengthened by Article 6(1) TEU, which affirmed that the Charter of Fundamental Rights of the EU (CFREU) enjoyed the same status as the Treaties. A whole chapter therein is dedicated to equality, with Article 21 CFREU containing a very wide prohibition of ‘any discrimination based on any ground such as sex, race, colour,

44 *ibid.* Examples of the renewed content of EU equality and non-discrimination law are Directives 92/85/EEC and 2010/18/EU on pregnant workers and parental leave.

45 D. Schiek, ‘Broadening the Scope and the Norms of EU Gender Equality Law: Towards a Multidimensional Concept of Equality Law’ (2005) 12 *Maastricht Journal of European and Comparative Law* 427.

46 D. Cooper, *Challenging Diversity: Rethinking Equality and the Value of Difference* (Cambridge: CUP, 2004); L. Watkins and B. Chancer, *Gender Race and Class* (Oxford: OUP, 2005). Note the omission of socioeconomic background or class from the legislated EU equality policies. For more see M. Verloo, ‘Multiple Inequalities, Intersectionality and the European Union’ (2006) 13 *European Journal of Women’s Studies* 211, 216.

47 Schiek, n 45 above, 440. For more see the seminal work of K. Crenshaw, ‘Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color’ (1991) 43 *Stanford Law Review* 1241.

48 D. Schiek and J. Mulder, ‘Intersectionality in EU Law: A Critical Re-appraisal’ in D. Schiek and A. Lawson (eds), *European Union Non-discrimination Law and Intersectionality* (London: Routledge, 2011) 270.

49 Belavusau and Henrard, n 41 above, 11. Note that the reforms introduced in the context of the EU Pillar of Social Rights, such as the work–life balance Directive (EU) 2019/1158, build on the groundwork laid by the Lisbon Treaty.

50 E. Ellis, ‘The Impact of the Lisbon Treaty on Gender Equality’ (2010) 1 *European Gender Equality Law Review* 7.

ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation’.

Closely linked to Article 21, Article 23 CFREU focuses on equality between women and men. The first paragraph lays down the duty to ensure gender equality in all areas of EU action, while the second paragraph states that equal treatment does not preclude positive action measures. The inclusion of a distinct provision on gender equality in the Charter showcases gender’s long-standing embeddedness in EU law and policy compared to other grounds of discrimination.⁵¹ Taken together, a holistic approach to Articles 21 and 23 would appear to support a teleological interpretation of EU equality legislation so as to prohibit intersectional discrimination.⁵² Notwithstanding that, the Court remains reluctant to change, putting the most vulnerable of women at risk.⁵³ Women are de facto those disadvantaged more by the lack of prohibition of intersectional discrimination, since their gender would intrinsically act as a ground of discrimination in an equality claim, often interwoven with other grounds, as discussed above.

The ambitious framing of Article 21 coupled with the ostensibly limitless field of application of Article 23 highlights their arguably powerful potential, which is nonetheless constrained by the horizontal clauses of the Charter. Article 51 CFREU limits the Charter’s application to situations falling already within the scope of EU law.⁵⁴ Similarly, Article 52(5) CFREU introduces the distinction between rights and principles, with the latter not being enforceable. Such restrictions may explain why Article 21 failed to act as an infill for non-legislated grounds of discrimination, or as a vehicle for legislative overhaul,⁵⁵ as well as why Article 23 has not been widely invoked on its own before the CJEU.⁵⁶

More recently, there has been legislative inertia in the area, apart from the Work–life Balance Directive (EU) 2019/1158, which represents a compromised attempt to encourage equal sharing of leave among parents and to introduce carers’ leave.⁵⁷ The Directive was adopted under the aegis of the European Pillar of Social Rights, the latest attempt to strengthen the social dimension of the EU, which, nonetheless, is unlikely to prompt substantial reforms due to the

51 C. Kilpatrick, ‘Non-Discrimination’ in S. Peers, T. Hervey, J. Kenner and A. Ward (eds), *The EU Charter of Fundamental Rights: A Commentary* (London: Hart, 2014) 582–583.

52 D. Schiek, ‘Equality between Women and Men’ in S. Peers, T. Hervey, J. Kenner and A. Ward (eds), *The EU Charter of Fundamental Rights: A Commentary* (London: Hart, 2014) 656–657.

53 D. Schiek, ‘On Uses, Mis-Uses and Non-Uses of Intersectionality before the Court of Justice (EU)’ (2018) 18 *International Journal of Discrimination and the Law* 82.

54 But see E. Hancox, ‘The Meaning of “Implementing” EU Law under Article 51(1) of the Charter: Åkerberg Fransson’ (2013) 50 *Common Market Law Review* 1411.

55 Belavusau and Henrard, n 41 above, 12–14.

56 Article 23 tends to be invoked together with Article 21 as shown in Case C-236/09 *Association Belge des Consommateurs Test-Achats and others* ECLI:EU:C:2011:100. Nevertheless, there are instances where Article 23(1) could be justiciable on its own, whereas Article 23(2) could be used to assist with the interpretation of Article 21 vis-à-vis positive action measures. Schiek, n 52 above, 649–650, 654.

57 E. Chierigato, ‘A Work–Life Balance for All? Assessing the Inclusiveness of EU Directive 2019/1158’ (2020) 36 *International Journal of Comparative Labour Law and Industrial Relations* 59.

non-binding nature of most of its initiatives.⁵⁸ The legislation enacted in the early 2000s remains the backbone of EU non-discrimination law.

The CJEU's role and interpretative toolkit

Moving on to the CJEU, its influence in promoting equality and non-discrimination has been instrumental, given the – often – abstract terminology creeping into the relevant laws. The legislative landscape has given the Court considerable interpretative wiggle-room, but also power to shape the trajectory of those policies.⁵⁹ Following *Defrenne (no 2)*, the Court further expanded the reach of Article 157 TFEU by adopting a broad definition of pay to cover occupational social security in *Bilka v Weber von Hartz*,⁶⁰ as well as statutory sick pay.⁶¹ Judicial decision-making on equality was not limited to instances of Treaty interpretation either. The Court furthered non-discrimination and even induced policy change through its interpretation of secondary legislation.⁶² Following key CJEU judgments in *Dekker* and *Hertz*,⁶³ maternity rights, initially drawn from the Equal Treatment Directive, are now included in the Pregnant Workers Directive 92/85/EEC, which led to significant changes in the laws of the Member States.⁶⁴ Moreover, Articles 21 and 23 CFREU have been used to annul a provision of a Directive because it was not in conformity with gender equality.⁶⁵

The CJEU has also engaged with the more recent grounds of discrimination, under the Framework Directive. Its seminal judgment in *Werner Mangold v Rüdiger Helm*⁶⁶ (*Mangold*) proclaimed the existence of a general principle of non-discrimination on grounds of age. In relation to the Charter and the horizontal effect of its rights, the Court has recently given hopeful guidance in the context of discrimination on grounds of religion or belief.⁶⁷ These instances notwithstanding, the Court does not always act in the best interests of claimants

58 K. Alexandris Polomarkakis, 'The European Pillar of Social Rights and the Quest for EU Social Sustainability' (2020) 29 *Social and Legal Studies* 183; S. Benedi Lahuerta and A. Zbyszewska, 'EU Equality Law after a Decade of Austerity: On the Social Pillar and its Transformative Potential' (2018) 18 *International Journal of Discrimination and the Law* 163.

59 E. Ellis and P. Watson, *EU Anti-Discrimination Law* (Oxford: OUP, 2012) 21.

60 Case C-170/84 *Bilka v Weber von Hartz* ECLI:EU:C:1986:204.

61 Case C-171/88 *Rinner-Kühn v FWW Spezial-Gebäudereinigung* ECLI:EU:C:1989:328.

62 Nonetheless, given their inferior status compared to the treaties, these are more prone to further changes or overriding. M. Blauburger and S. K. Schmidt, 'The European Court of Justice and its Political Impact' (2017) 40 *West European Politics* 907, 913.

63 Case C-177/88 *Dekker v Stichting Vormingscentrum voor Jonge Volwassenen* ECLI:EU:C:1990:383; Case C-179/88 *Handels- og Kontorfunktionærernes Forbund v Dansk Arbejdsgiverforening* ECLI:EU:C:1990:384.

64 Cichowski, n 39 above, 110; Stone Sweet, n 37 above, 177-179.

65 *Association Belge des Consommateurs Test-Achats and others* n 56 above. Although note that the Court's reasoning has been subject to criticism in terms of not distinguishing between the two Articles. Schiek, n 52 above, 638.

66 Case C-144/04 *Werner Mangold v Rüdiger Helm* ECLI:EU:C:2005:709. In Case C-147/08 *Jürgen Römer v Freie und Hansestadt Hamburg* ECLI:EU:C:2011:286 the Court hinted at the existence of a similar one – albeit in much more muted and qualified terms – in relation to sexual orientation.

67 Case C-414/16 *Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung eV* ECLI:EU:C:2018:257.

discriminated against.⁶⁸ Of particular relevance to women litigants, the Court tends to reject claims framed under the prism of intersectional discrimination.⁶⁹ The inconsistent approach of the Court has given rise to claims about laying down a hierarchy among grounds of discrimination.⁷⁰

Regarding gender equality though, the Court appears willing – for the most part at least – to adopt an expansive interpretative approach to provisions found in both the Treaties and secondary legislation.⁷¹ In particular, it is the preliminary reference procedure that has enabled the CJEU to make the most of its teleological reasoning. It is through this mechanism that EU law doctrines of quasi-constitutional status such as supremacy, direct effect and state liability were conceived.⁷² Teleology often goes hand in hand with expansive interpretations, such as those that prompted the promotion of the non-discrimination principle by the Court.⁷³ Not only that, but cases dealing with equality have also themselves assisted in the development of the said constitutional doctrines.⁷⁴ Take the example of *Marshall v Southampton and South-West Hampshire Area Health Authority* and the emanations of the state test,⁷⁵ or *Von Colson and Kamann v Land Nordrhein-Westfalen* in regard to indirect effect.⁷⁶

As a result of its ever-expanding jurisprudence, the Court may find national practices incompatible with EU law, even in areas originally ‘intended to remain governed mostly by national measures’.⁷⁷ The Court can, thus, achieve positive integration by stealth. In a way, it substitutes almost retrospectively for the formal legislator.⁷⁸ Through its expansive interpretation of equality norms the Court managed to extend the reach of EU law, leading to reforms of pre-existing national measures.⁷⁹ Its seminal judgments defined gender, but also other grounds of discrimination, at EU level, at times making the CJEU the key source of Europeanisation in these areas, and rendering it an attractive litigation platform. The Court’s various rulings had the effect of regulating the

68 For example on grounds of disability. L. Waddington, ‘Saying All the Right Things and Still Getting it Wrong: The Court of Justice’s Definition of Disability and Non-discrimination Law’ (2014) 22 *Maastricht Journal of European and Comparative Law* 576.

69 Case C-443/15 *Parris v Trinity College Dublin* ECLI:EU:C:2016:897; Case C-157/15 *Achbita v G4S Secure Solutions* ECLI:EU:C:2017:203; Case C-188/15 *Boungaoui and ADDH v Micropole SA* ECLI:EU:C:2017:204. Schiek, n 53 above.

70 E. Howard, ‘EU Anti-discrimination Law: Has the CJEU Stopped Moving Forward?’ (2018) 18 *International Journal of Discrimination and the Law* 82.

71 Stone Sweet, n 37 above, 184.

72 G. Conway, *The Limits of Legal Reasoning and the European Court of Justice* (Cambridge: CUP, 2012) 49–50.

73 A.C.L. Davies, A. Bogg and C. Costello, ‘The Role of the Court of Justice in Labour Law’ in A. Bogg, C. Costello and A.C.L. Davies (eds), *Research Handbook on EU Labour Law* (Cheltenham: Edward Elgar, 2016) 120–121.

74 T. Hervey, ‘Thirty Years of EU Sex Equality: Looking Backwards, Looking Forwards’ (2005) 12 *Maastricht Journal of European and Comparative Law* 307, 319–320.

75 Case C-152/84 *Marshall v Southampton and South-West Hampshire Area Health Authority* ECLI:EU:C:1986:84.

76 Case C-14/83 *Von Colson and Kamann v Land Nordrhein-Westfalen* ECLI:EU:C:1984:153.

77 Cichowski, n 39 above, 91.

78 D. Curtin, ‘Scalping the Community Legislator: Occupational Pensions and “Barber”’ (1990) 27 *Common Market Law Review* 454.

79 A. Stone Sweet and J.A. Caporaso, ‘From Free Trade to Supranational Polity: The European Court and Integration’ in W. Sandholtz and A. Stone Sweet (eds), *European Integration and Supranational Governance* (Oxford: OUP, 1998) 121.

relationships among private individuals and state entities, taking on a function which tends to limit the power of the Member States to legislate independently, akin to that of formally-enacted legislation.⁸⁰ It also laid the groundwork for legislative intervention by the EU policy-making institutions, as shown above.

Despite the positive outlook of the Court's overall contribution, problems remain. It was argued above that the same standards do not apply across all grounds of discrimination and that intersectional discrimination is not adequately tackled. But even in well-trodden areas, the Court's reasoning might sometimes replicate anachronistic ideologies; for example, in relation to the division of family tasks.⁸¹ The support of equality claims by the Court has often been associated with an underlying motive of advancing the single market, drawing parallels with the origins of equality as a component of – mainly economic – European integration.⁸² Is this an indication of distorted policy-making?

Looking at the EU more generally, there has been slow progress in advancing gender equality through its policies recently.⁸³ That being said, when compared to other international systems, such as the European Convention on Human Rights, the EU equality regime is rather sophisticated, with a clear set of rules offering substantive as well as procedural guarantees, to which the Court has contributed significantly.⁸⁴ Focusing on the Court, irrespective of its underlying motives, its long-standing – and for the most part constructive – engagement with equality and non-discrimination, and gender equality in particular, has left its mark not only upon the development of its jurisprudence, but also upon EU and national policies on the matter alike. Naturally, this would not have materialised had it not been for the litigants that managed to push their claims successfully through the preliminary reference procedure, making the most of their capital within that particular field.

THE ROLE OF LITIGANTS IN EU EQUALITY CASE-LAW

As a whole, equality and non-discrimination are core manifestations of the Court 'incorporat[ing] substantive standards of justice ... [and] ... supplement[ing] the legislative process'.⁸⁵ Despite some exceptions shown above, it is true that the CJEU has used non-discrimination in order 'to both dismantle discriminatory administrative decisions and justify broad interpretations of

80 Stone Sweet, n 37 above, 164–165.

81 S. Walby, 'The European Union and Gender Equality: Emergent Varieties of Gender Regime' (2004) 11 *Social Politics* 4, 6.

82 P. Alston and J.H.H. Weiler, 'An "Ever Closer Union" in Need of a Human Rights Policy' (1998) 9 *European Journal of International Law* 658, 666–667.

83 European Institute for Gender Equality, 'Gender Equality Index 2017 – Measuring Gender Equality in The European Union 2005–2015' *European Institute for Gender Equality* 2017 at <https://eige.europa.eu/publications/gender-equality-index-2017-measuring-gender-equality-european-union-2005-2015-report> (last visited 15 March 2022).

84 Muir, n 36 above, 147.

85 T. Tridimas, 'Fundamental Rights, General Principles of EU Law, and the Charter' (2014) 16 *Cambridge Yearbook of European Legal Studies* 361, 367.

EU secondary legislation'.⁸⁶ The generally positive trajectory of its equality case-law, particularly regarding gender, makes the Court an attractive option for litigants, who may push for their case to be referred to the CJEU in the context of the preliminary reference procedure. Litigation can become a powerful tool for individuals to safeguard but also gain new rights through judicial decision-making. Insofar as these rights derive from EU law, it would be very difficult for national legislatures to interfere.⁸⁷

At the same time, litigants gave the CJEU the opportunity to conceive its doctrines, through the preliminary references that reached it. The Court is modelled after the French judiciary, with its judgments sharing the same characteristics of being continental, Cartesian and cryptic, handed down in an authoritative yet deductive manner.⁸⁸ The afore-mentioned characteristics of its judgments have enabled the Court to rely on prior case-law 'as the yardstick by which it measures the actions and/or claims of the parties'.⁸⁹ That predictability may, despite the lack of formal precedent, encourage litigants to bring more and more cases before the CJEU.

In an area like equality, where there is significant wiggle-room to argue prior case-law in their favour, litigants may endeavour to take full advantage of the Court's recourse to its previous judgments as quasi-precedent, hoping that their case would be decided along the same lines.⁹⁰ Indeed, the Court's jurisprudence on gender equality in the 1970s was the hallmark of opportunity structures for women.⁹¹ To some, this opportunity was stimulated by the Court itself,⁹² which 'has used its rulings to claim substantial authority over national courts, national law, and the interpretation of the EU treaties'.⁹³ The CJEU's distinct agenda, occasionally running contrary to certain Member States' interests, coupled with the notable policy-making impact and cross-country effects of its rulings, were conducive to making the preliminary reference procedure an appealing litigation route, intended to establish the Court's position at the apex of the judicial hierarchy. In other words, the peculiarities of the EU judicial system 'are also the features which may enable groups and individuals to use EU law as a new site for legal and political mobilisation'.⁹⁴ The expanding ambit of EU

86 R.A. Cichowski, 'Women's Rights, the European Court, and Supranational Constitutionalism' (2004) 38 *Law and Society Review* 489, 503.

87 R.A. Cichowski, 'Legal Mobilization, Transnational Activism, and Gender Equality in the EU' (2013) 28 *Canadian Journal of Law and Society / Revue Canadienne Droit et Société* 209, 211.

88 M. De S.-O.-L'E. Lasser, *Judicial Deliberations: A Comparative Analysis of Transparency and Legitimacy* (Oxford: OUP, 2009) 351–352.

89 *ibid.*, 109.

90 *ibid.*

91 Cichowski, n 86 above.

92 A.-M. Burley and W. Mattli, 'Europe before the Court: A Political Theory of Legal Integration' (1993) 47 *International Organization* 41.

93 C.J. Carrubba, M. Gabel and C. Hankla, 'Judicial Behavior under Political Constraints: Evidence from the European Court of Justice' (2008) 102 *American Political Science Review* 435, 436.

94 M. Dawson, E. Muir and M. Claes, 'A Tool-box for Legal and Political Mobilisation in European Equality Law' in D. Anagnostou (ed), *Rights and Courts in Pursuit of Social Change: Legal Mobilisation in the Multi-Level European System* (London: Hart, 2014) 106.

competences on equality, alongside that of the Court's equality case-law, are factors behind the rise of preliminary references in the area.⁹⁵

Following from the above, the CJEU can be perceived as a platform for advancing equality claims, through but not limited to public interest litigation, with reasonable chances of success, particularly in relation to gender. In other words, none of the defining moments in EU equality case-law would have materialised, had it not been for their litigants. It should be observed that successful litigants were supported by the national courts by means of the preliminary reference procedure. The national courts' willingness to make use of what is now Article 267 TFEU was indeed instrumental in promoting equality. Moreover, sometimes, national courts took on the role of a quasi-public interest litigator, taking advantage of EU law in that regard.⁹⁶

There are various reasons why litigants may choose to rely on EU law to advance their claims at national level. In addition to those relying on positive jurisprudential developments, making a preliminary reference to the CJEU does not require exhaustion of all domestic judicial avenues. Moreover, if successful in gaining a beneficial interpretation of EU non-discrimination law, national authorities' powers to deviate are constrained, since an EU law can only be changed at EU level.⁹⁷ To precipitate positive change through litigation, there are also some prerequisites: EU law must be in place, and positive path-dependence shall exist; litigants should be familiar with and use the relevant EU legalese; national courts have to be receptive; finally, litigants ought to follow up and build on their victory, for otherwise it would have been achieved in vain.⁹⁸ It has also been pointed out that the effective use of opportunity structures depends on a series of social and political factors, in addition to legal ones, which vary across the Member States.⁹⁹

Alter and Vargas have shown how these prerequisites were fulfilled in the case of equal pay public interest litigation in the United Kingdom (UK).¹⁰⁰ When the interests of private litigants, the national court making the preliminary reference and the CJEU align, opposition by national policy-makers is unlikely to fare well.¹⁰¹ The complexities – or sheer luck – in striking a tripartite alignment were occasionally overcome by forum shopping for the most sympathetic court domestically. In the UK, the Equal Opportunities Commission chose to bring claims in the ostensibly more progressive Employment Tribunals in South

95 G. Tridimas and T. Tridimas, 'National Courts and the European Court of Justice: A Public Choice Analysis of the Preliminary Reference Procedure' (2004) 24 *International Review of Law and Economics* 125, 132–133.

96 For example, the German courts. C. Kilpatrick, 'Gender Equality: A Fundamental Dialogue' in S. Sciarra (ed), *Labour Law in the Courts: National Judges and the European Court of Justice* (Oxford: Hart, 2001) 64.

97 K.J. Alter and J. Vargas, 'Explaining Variation in the Use of European Litigation Strategies: European Community Law and British Gender Equality Policy' (2000) 33 *Comparative Political Studies* 452, 453.

98 *ibid.*

99 G. Fuchs, 'Strategic Litigation for Gender Equality in the Workplace and Legal Opportunity Structures in Four European Countries' (2013) 28 *Canadian Journal of Law and Society* 189.

100 Alter and Vargas, n 97 above.

101 Cichowski, n 86 above.

London, Leeds, Gloucester and Southampton.¹⁰² This multi-level synergy, with litigants bringing their claims before national courts that make a preliminary reference to the CJEU, which, in turn, ends up triggering positive policy change through its judgments, led to the rise of women's transnational activism.

Despite its complexities, litigation remains a good option for individuals wishing to claim greater levels of equality.¹⁰³ Simply put, litigating on the basis of EU law is still a potentially powerful tool in achieving equal treatment when the laws and practices in the Member States are lacking. Trying to achieve positive change through directly influencing the legislative process would simply be impossible for most litigants, for it requires significantly more resources than litigation.¹⁰⁴ After all, there have been instances where the adjudicative practices of the CJEU steered subsequent legislative initiatives.¹⁰⁵ EU equality case-law has often acted as a precursor to policy change through judgments which originated in cases brought by litigation at national level.¹⁰⁶ Not only that, the inclusion of provisions that would liberalise legal opportunity structures and encourage strategic litigation was sought by transnational societal interests and supported by European institutions during the law-making process that led to the Racial Equality Directive, showcasing litigation's transformative potential in enforcing equality.¹⁰⁷

Private enforcement at EU level, with its remarkable contribution to policy-making, highlights the gradual empowerment of litigants, including in the areas of equality and non-discrimination law. Their empowerment was achieved through the increasing infiltration of non-discrimination norms in the *acquis Communautaire*, which was often relied on successfully before the CJEU and ended up precipitating positive policy change. Even an ostensibly small case could lead to a paradigmatic shift, due to the various possible outcomes of its eventual adjudication. Despite their distinct positions and motives, both individual litigants, the so-called 'one-shotters', and public interest pressure groups have been prompted by the aforementioned judicial and legislative developments to equate litigation with opportunity.¹⁰⁸ Without them, there would have been neither a rich body of equality case-law to examine, nor positive change in response to the Court's judgments. This phenomenon also highlights how salient it is for a litigant to have their case reach the CJEU, given the discretion national courts on most occasions enjoy in the course of the preliminary reference procedure. Under Article 267 TFEU, national courts may opt not to refer a pertinent matter to the CJEU. They are under an obligation to make a preliminary reference only if there is no judicial remedy available against their

102 Alter and Vargas, n 97 above, 461.

103 Cichowski, n 87 above, 218.

104 Hoskyns, n 9 above.

105 Cichowski, n 87 above, 221–222.

106 For example Directive 92/85/EEC. See R.A. Cichowski, 'Judicial Rulemaking and the Institutionalization of European Union Sex Equality Policy' in A. Stone Sweet, W. Sandholtz and N. Fligstein (eds), *The Institutionalization of Europe* (Oxford: OUP, 2001) 130.

107 R. Evans Case and T.E. Givens, 'Re-engineering Legal Opportunity Structures in the European Union? The Starting Line Group and the Politics of the Racial Equality Directive' (2010) 48 *Journal of Common Market Studies* 221.

108 W. Matli and A.-M. Slaughter, 'Revisiting the European Court of Justice' (1998) 52 *International Organization* 177, 186–187.

eventual judgment on the case, or if they have doubts about the validity of the provision of EU law at issue.

DOES GENDER MATTER? THE IDEA OF GENDERED CAPITAL

EU non-discrimination law has been relied on successfully in strategic litigation before the CJEU as a tool to ensure equal treatment of women workers, at least initially.¹⁰⁹ Litigation as a group strategy, supported by activist lawyers, public interest groups or equality bodies, helped overcome the significant costs of individual litigation, which were likely to dissuade a number of litigants from independently bringing their claims forward.¹¹⁰ Litigation costs raise issues of access to justice. In the context of EU non-discrimination law, at least until the adoption of the Equality Framework Directive and the Racial Equality Directive in 2000, those bringing such claims to courts were overwhelmingly women.¹¹¹ Although the direct effect of key EU non-discrimination law provisions, such as Article 157 TFEU on equal pay for equal work, mobilised women litigants,¹¹² it did not dramatically improve access to justice.¹¹³

A report prepared for DG Justice of the European Commission in 2011 identified the factors impeding access to justice in EU gender equality and non-discrimination law.¹¹⁴ The length and cost of proceedings,¹¹⁵ the disparate – and often limited – availability of legal aid in the Member States,¹¹⁶ the *sui generis* nature of equality bodies,¹¹⁷ as well as the lack of specialised courts¹¹⁸ and difficulties in the application of the reversed burden of proof,¹¹⁹ still act as impediments to the predominantly women litigants. These bear similarities to overarching issues of access to justice more generally. Even though the impact of some can initially appear to be gender-neutral, in the examined context, these factors are anything but.¹²⁰ For example, although *prima facie* procedural barriers affect both women and men, the fact that often women are in lower-paid or part-time employment makes them more susceptible to rising litigation

109 Alter and Vargas, n 97 above, 455.

110 *ibid*, 466. Albeit, according to 469–471, even this is subject to qualifications. See also text to n 97 and n 98 above with regard to prerequisites.

111 Cichowski, n 87 above, 217–218.

112 Especially if they also have horizontal direct effect. See Cichowski, n 106 above, 135.

113 T. Rees, *Mainstreaming Equality in the European Union: Education, Training and Labour Market Policies* (London: Routledge, 1998) 43.

114 Milieu, 'Comparative Study on Access to Justice in Gender Equality and Anti-discrimination Law' (2011) at <https://data.europa.eu/doi/10.2838/42186> (last visited 15 March 2022).

115 *ibid*, 27–34.

116 *ibid*, 35–37.

117 *ibid*, 15–23. This could be coupled with the often male-dominated trade unions, which create problems for supporting strategic litigation. Alter and Vargas, n 97 above, about UK trade unions.

118 Milieu, n 114 above, 8.

119 *ibid*, 23–26.

120 Committee on the Elimination of Discrimination against Women (CEDAW) Committee General Recommendation No 33 on Women's Access to Justice (2015) CEDAW/C/GC/33.

costs. This is one reason why gendered institutional practices should be at the centre of attention.¹²¹

Indeed, relying on private enforcement through mostly individual litigation in order to safeguard and promote EU equality law is prone to leave the most vulnerable, marginalised or under-resourced without effective means of protection.¹²² This is especially so the case in situations of intersectional discrimination, where claimants that are multiply disadvantaged are more likely to be women. Unlike companies benefitting from the direct effect of EU law in other areas, litigants in EU equality law do not possess the same resources, or capital, constituting the so-called ‘have-nots’ or ‘one-shotters’ who need to mobilise strategically to successfully manage to influence the legal field.¹²³ This is why numerous examples of successful litigation in the field consist of strategic litigation, where ‘one-shotters’ are supported by repeat players, in the form of collective actors, such as associations, unions or even activist lawyers.¹²⁴ Women’s groups across Europe have been heralded as a prime example of transnational activism that enabled women to improve their position in the labour market.¹²⁵ Although transnational activism and strategic litigation improved women’s positions and have been discussed in detail in the relevant literature, it is also important to examine women litigants’ experiences more holistically, especially in light of the gendered impact of access to justice.

Delving further into the gendered impact of access to justice, an explanatory framework needs to be sought. A multidimensional understanding of capital means that a litigant’s economic capital to afford top-notch legal representation cannot be the sole determinant of success. Symbolically, a claimant perceived as educated or successful may positively influence the adjudication of their claim by the stakeholders in the judicial process, who also traditionally enjoy high levels of cultural capital. Similarly, if the victim of discrimination has strong connections, they could mobilise these networks and see a better-rounded support for their claim in the cadre of strategic litigation, backed by collective actors and/or unions. There are important insights that can be gained when discussing the gathered data under this framework.

So far, capital has been portrayed as a gender-neutral concept. In the examples of the preceding paragraph, how does gender interrelate with the different forms of capital? Perhaps one can argue that there are more influential variables than gender, which may explain why the latter was downplayed in Bourdieu’s writings,¹²⁶ and even in the majority of studies applying a Bourdieusian framework to the legal field. However, that should not negate the value of his work

121 M.J. Mossman, ‘Gender Equality, Family Law and Access to Justice’ (1994) 8 *International Journal of Law and the Family* 357, 369.

122 Dawson, Muir and Claes, n 94 above, 108.

123 M. Galanter, ‘Why the “Haves” Come out Ahead: Speculations on the Limits of Legal Change’ (1974) 9 *Law and Society Review* 95.

124 L. Conant, *Justice Contained: Law and Politics in the European Union* (Ithaca, NY: Cornell University Press, 2002) 18. Dawson, Muir and Claes, n 94 above, 119–120.

125 S. Tarrow, *Power in Movement: Social Movements and Contentious Politics* (Cambridge: CUP, 2011) 254–255.

126 At least until the 1990s, with the publication of *Male Domination*. L. Adkins, ‘Introduction: Feminism, Bourdieu and after’ (2004) 52 *Sociological Review* 3.

as ‘a powerfully elaborate conceptual framework for understanding the role of gender in the social relations of modern capitalist society’.¹²⁷

What is needed, therefore, is to adopt a feminist reading, which locates the role of gender within the formulation and operation of capital. Deterministic critiques of Bourdieu focus on the secondary role he assigns to gender as a determinant of class with his seemingly gender-neutral capital acting as the core.¹²⁸ Gender, alongside other variables like age, is not constructed as a form of capital.¹²⁹ According to this view, women are unlikely to be seen as ‘subjects with capital-accumulating strategies of their own’.¹³⁰

However, a non-deterministic approach that interweaves gender with the various forms of capital is also possible. McCall observes that forms of capital can ‘have gendered meanings because they are given form by gendered dispositions’.¹³¹ Accordingly, gender is reflected in the qualities that determine one’s capital. In this context, gender has been posited as a secondary determinant because it is not an overt one. It is precisely its concealed status that makes it so pervasive in society. Consequently, the term secondary should not be interpreted in a way that refers to the degree of gender’s importance as determinant.

At the same time, gender’s pervasiveness and valorisation as a determinant of power in a field stipulate that it shall be perceived as constituting another, covert yet omni-present, ‘universal and natural’, form of capital.¹³² Gender takes on a dual role in the capital discourse, by infiltrating the traditional forms of capital on the one hand, whilst being a distinct additional form of capital on the other. The deterministic approach is, thus, also relevant in order to explain the divergence of capital among women.¹³³ Women litigants would generally be more disadvantaged by reason of their gender, which has a knock-on effect on their concentration of capital.¹³⁴ Yet, some of them, those that possess significant capital due to whatsoever other reason, are likely to fare better in their pursuit of justice because of that.

The different readings of gender’s role in the capital discourse are an outcome of Bourdieu’s ambiguous and relatively underdeveloped writings, insofar as gender is concerned.¹³⁵ McCall argues that ‘Bourdieu simply fails to go far enough in exploring the fascinating as well as tragic drama of gendered social life, even though his conceptual framework and empirical illustrations remain useful and provocative’.¹³⁶ Indeed, these ambiguities should not detract

127 McCall, n 12 above.

128 Bourdieu, n 21 above, 107–108.

129 McCall, n 12 above, 841.

130 T. Lovell, ‘Thinking Feminism with and against Bourdieu’ (2001) 49 *Sociological Review* 27, 37–38.

131 McCall, n 12 above, 842.

132 *ibid*, 844.

133 Focusing on the relationship between women as capital-accumulating objects and subjects. Lovell, n 130 above, 38.

134 For the capital of women in the legal profession, see H. Sommerlad, ‘Researching and Theorizing the Processes of Professional Identity Formation’ (2007) 34 *Journal of Law and Society* 190, 213–215.

135 B. Skeggs, ‘Introducing Pierre Bourdieu’s Analysis of Class, Gender and Sexuality’ (2004) 52 *Sociological Review* 19, 20.

136 McCall, n 12 above, 852.

from capital's potential as a powerful analytical tool to highlight the different, gender-based experiences in litigating EU equality law.

Adopting an approach such as that of McCall, who tries to reconcile the diverse feminist literature with Bourdieu's reflexive sociology, enables gender to be properly framed as a determinant in a Bourdieusian analytical framework. This approach acknowledges both the importance of the traditional forms of capital in determining the dominant players even within the dominated groups, but also 'the workings of multiple gendered dispositions and gendered capitals, all constitutive, rather than derivative of social structure'.¹³⁷

Adopting a gendered approach to capital means that the hurdles faced by litigants in this case-study are dependent on their capital, which in turn is impacted by a litigant's gender. After all, certain kinds of capital are more likely to be accumulated by women than others, with limited opportunities to convert them into other forms.¹³⁸ Gender influences their levels of economic, cultural and social capital that determine their power as clients as well as their position in the hierarchy of the legal field.¹³⁹ Even though powerful women litigants could push their cases through, probably due to them possessing sufficient levels of some or all of the afore-mentioned forms of capital, the stark reality is that many women struggle to successfully put their discrimination case forward.¹⁴⁰ The gendered asymmetries in the accumulation of capital act as a plausible explanation for this, for the reasons set out above. This is reflected in the unequal division of labour, which leads to contributive injustice,¹⁴¹ and which could be argued *mutatis mutandis* has a similar effect in relation to access to justice.

Litigants claiming that they have been discriminated against in their employment make an even stronger case for the explanatory framework propounded by this study. Their alleged discrimination squarely fits within the accounts of the unequal division, or even experience, of labour. Coupled with the gendered division of capital, this means that women litigants are likely to be inherently disadvantaged from the outset.¹⁴² Although materially interested in pursuing their case, their problematic access to material and immaterial resources (i.e. money and/or time) could dissuade them from following through with their claim.¹⁴³ This could be the case even for those ideologically committed and who, as a result, may possess high levels of cultural or social capital. The

137 *ibid.*

138 H. Nowotny, 'Women in Public Life in Austria' in C. Fuchs Epstein and R. Laub Coser (eds), *Access to Power: Cross-national Studies of Women and Elites* (London: Routledge, 1981) 148. Sociologists have coined the women-dominated form of emotional capital, with limited value in the public sphere, for example. Although one may argue that society has – at least somewhat – moved on since their writings: D. Reay 'Gendering Bourdieu's Concepts of Capitals? Emotional Capital, Women and Social Class' (2004) 52 *Sociological Review* 57, 60–61.

139 Bourdieu, n 1 above, 821–822.

140 CEDAW, n 120 above.

141 A. Sayer, 'Habitue, Work and Contributive Justice' (2011) 45 *Sociology* 7, 17.

142 On the need for a disadvantage-oriented framework to decouple gender as a determinant of social inequalities, see D.L. Rhode, *Justice and Gender* (Cambridge, MA: Harvard University Press, 1991) 318.

143 Mattli and Slaughter, n 108 above, 189.

additional obstacles, and expenses, involved in bringing a claim before the CJEU through the preliminary reference procedure only make things harder.¹⁴⁴

GENDERING EU EQUALITY CASE-LAW: THE CASE STUDY

Against this background, the study draws data from the *Equality Law in Europe: A New Generation* database¹⁴⁵ to showcase how the gender of litigants has influenced the litigation of non-discrimination claims in the context of the preliminary references submitted to the CJEU. Preceding sections have already elaborated on the specifics of the preliminary reference procedure as an indirect route to accessing justice at EU level. The study focuses on this judicial mechanism due to its nature as a most powerful private enforcement tool.¹⁴⁶ Uniquely compared to other international law jurisdictions, national courts of any level may choose to ask questions regarding the validity or interpretation of EU law.¹⁴⁷ It is in this context that divergences in patterns of litigation can be better observed. The claimants are still easily identifiable, and, based on the discussion above, this is the main EU battlefield for non-discrimination claims to be adjudicated.

The indirect nature of the preliminary reference procedure may complicate the conclusions that can be drawn from a quantitative study. Indeed, previous studies have underscored the diverse variables that come into play. Variations in transnational economic activity, in public support for integration and political information, in legal culture and the availability of judicial review, as well as whether the Member State is monist or dualist, all infiltrate the preliminary reference matrix.¹⁴⁸ Although some of them might be beyond a litigant's control, looking at the EU legal field as a whole, the capital disparities among litigants, often gendered as discussed in the previous section, are influenced by such variations. The more capital a litigant possesses, the more likely they are to navigate this complex field successfully. The explanatory framework of gendered capital employed by this study incorporates the methodological insights of Bourdieu's reflexive sociology.¹⁴⁹ This renders it a powerful framework in that a seemingly mono-causal argument such as gender is transcended to a multidimensional analytical lens.

Elaborating on that, this study uses gendered capital as an explanatory framework to read through the data and fill any gaps by hypothesising on the

144 D. Chalmers and M. Chaves, 'The Reference Points of EU Judicial Politics' (2012) 19 *Journal of European Public Policy* 25, 36-37; T. Pavone, 'Putting European Constitutionalism in its Place: The Spatial Foundations of the Judicial Construction of Europe' (2020) 16 *European Constitutional Law Review* 669, 687.

145 Kilpatrick and Miller, n 6 above.

146 M. Broberg, 'Preliminary References as a Means for Enforcing EU Law' in A. Jakab and D. Kochenov (eds), *The Enforcement of EU Law and Values: Ensuring Member States' Compliance* (Oxford: OUP, 2017).

147 J.H.H. Weiler, 'The Transformation of Europe' (1991) 100 *Yale Law Journal* 2403.

148 For an overview, see C.J. Carrubba and L. Murrain, 'Legal Integration and Use of the Preliminary Ruling Process in the European Union' 59 *International Organization* 399, 402-406.

149 Skeggs, n 135 above, 21.

reasons behind any discrepancies between women and men litigants. The sectoral character of the study is a deliberate choice, in that the context of non-discrimination renders the gendered dynamics of litigation even more relevant. The fact that there are many cases where attempts were made to reach the CJEU but failed, which, in turn, means that these did not make their way to the database, is in itself not a hindrance, but confirmation of the hurdles litigants are confronted with. This study, therefore, adds to the existing scholarship by providing valuable insights and a novel analytical framework, which offer a much-needed bottom-up understanding of aspects of the preliminary reference procedure.¹⁵⁰

Dataset and methodology

The *Equality Law in Europe: A New Generation* database has been composed by researchers based at the European University Institute and is publicly available online through a dedicated website.¹⁵¹ The database includes three datasets (one main and two additional). The one used in this article includes all preliminary references registered between 1970 and 2018, which involve grounds of discrimination identified in Article 19 TFEU (n = 352). Namely, these are preliminary references that involve discrimination based on ‘sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation’.¹⁵² The database constitutes an exhaustive account of all preliminary references lodged before the CJEU between 1970 and 2018.

The dataset contains information regarding the case number and name, the date it was entered into the registry, the existence and date of judgment or order, the legal base(s) cited, the ground(s) of discrimination, the Member State where the reference originated,¹⁵³ the litigant’s gender, some identification of age for age discrimination cases, whether a collective actor was involved, the existence of an Advocate General Opinion, the Chamber of the Court deciding the case, as well as the name of the referring national court.¹⁵⁴

Moreover, the dataset incorporates cases that were either removed from the registry or joined together. Despite the information provided in the codification of removals, this was at times inconsistent, and, as a consequence, it was thought best to retain these cases in the database. After all, the fact alone that a preliminary reference was lodged showcases the success in navigating the domestic justice system of a Member State and persuading the national court adjudicating the case to make a preliminary reference to the CJEU. Likewise, joined cases were also accounted for individually in the analysis of the data, since this article

150 Carrubba and Murrah, n 148 above, 414–415.

151 Kilpatrick and Miller, n 6 above.

152 Art 19 TFEU.

153 The UK is included as a Member State, since it had not formally left the EU in the period examined by the dataset.

154 For more information see ‘Equality Law: A New Generation CJEU Database User Guide’ at <https://equalitylaw.eui.eu/wp-content/uploads/sites/43/2019/01/Anti-Discrimination-Law-Codebook-as-of-12-March-2019.pdf> (last visited 15 March 2022) 2–3.

focuses on the process of litigants reaching the CJEU, without evaluating the substantive impact of its judgments.

The article draws on the dataset for the purposes of a mixed-methods analysis of the impact a litigant's gender and the capital associated with it have in terms of bringing a non-discrimination case before the CJEU. The research combines doctrinal and non-doctrinal elements to offer a more holistic approach,¹⁵⁵ similar to the mixed methodology used elsewhere in social sciences.¹⁵⁶ This is so because the account of EU equality case-law and the theoretical framework of gendered capital set out earlier are complemented by a quantitative analysis of certain variables of the *Equality Law in Europe* database. The quantitative analysis relies on descriptive statistics. The large and exhaustive size of the sample, covering all preliminary references in the field lodged between 1970–2018, is well-suited to this particular strand of quantitative research.¹⁵⁷ More specifically, the article uses frequency tables and cross-tabulations due to the categorical nature of the examined variables, as well as line graphs, where the chronology of the preliminary references lodged before the CJEU is examined.¹⁵⁸

Mixed-methods analyses have started to become more mainstream in legal scholarship. For example, Blackham combined doctrinal, content and quantitative methods in her work on age discrimination in Employment Tribunals of England and Wales, and Scotland.¹⁵⁹ The objectives of this article, to develop a new interdisciplinary analytical framework and associate it with patterns that emerge through a quantitative analysis of the *Equality Law in Europe* database, render mixed-methods analysis an ideal choice. Moreover, the nature of the dataset, with the overwhelming majority of the data being categorical or nominal, ensures that the descriptive strand of quantitative methodology is aptly suited to serve the objectives of this macro-level study.

More specifically, the article focuses on the following variables identified in the dataset: the litigant's gender and its association with gendered capital, the year when and the Member State where the preliminary reference was lodged, as well as the ground of discrimination cited in the reference. The analysis was undertaken using IBM's SPSS Statistics software package. The original dataset being in Excel format, it was necessary for the data to be recoded to facilitate their use in SPSS.¹⁶⁰

155 L.B. Nielsen, 'The Need for Multi-method Approaches in Empirical Legal Research' in P. Cane and H.M. Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (Oxford: OUP, 2010) 952–953.

156 P. Ishwara Bhat, *Idea and Methods of Legal Research* (Oxford: OUP, 2020) 470–471.

157 L. Epstein and A.D. Martin, 'Quantitative Approaches to Empirical Legal Research' in Cane and Kritzer, n 155 above, 913.

158 S. Halperin and O. Heath, *Political Research: Methods and Practical Skills* (Oxford: OUP, 3rd ed, 2020) 396, 400, 458.

159 A. Blackham, 'Enforcing Rights in Employment Tribunals: Insights from Age Discrimination Claims in a New "Dataset"' (2021) 41 *Legal Studies* 390.

160 Further information on the recoding is available upon request.

Table 1. Litigants' Gender

Litigants' Gender	Frequency	Percent
Women	201	57.1
Men	110	31.3
Mixed/Not-identified	41	11.6
Total	352	100.0

Case study

Looking at the sample as visualised in Table 1, of the 352 preliminary references, 201 involved women litigants (57.1 per cent), 110 (31.3 per cent) men and 41 (11.6 per cent) either a mix of litigants or litigants whose gender could not be identified.¹⁶¹ This *prima facie* aligns with the expectation that women would constitute the majority of litigants in EU equality case-law given their long-standing disadvantaged position in terms of employment and working conditions that EU legislation sought to remedy.¹⁶² EU non-discrimination law presented a unique opportunity to empower women in a patriarchal society.¹⁶³ Considering the accounts of women's transnational activism resulting in a series of multi-cited judgments,¹⁶⁴ one would expect the proportion of women litigants to be even higher, particularly given the general lack of similar accounts referring to men litigants.

Taking into account that grounds of discrimination other than gender were only introduced with the Treaty of Amsterdam, and that the majority of cases with a collective actor as claimant were brought after 2000, renders the fact that women litigants do not represent more than 57.1 per cent all the more surprising. It also corroborates the significant role played by gendered capital in preventing more women from bringing preliminary references in EU equality case-law successfully.¹⁶⁵ The women that succeeded have been portrayed as supported by activist lawyers, public interest groups, trade unions or other collective actors. For every Defrenne, there would have been other women who, due to their inherently lower levels of capital, could not fight their claims through.

Given that the expansion of grounds of discrimination and the rise in the number of collective actors as litigants took place relatively recently, it might be useful to focus on the temporality of the gender breakdown, by comparing the following line graphs. Graph 1 shows the gender breakdown per year when the preliminary reference was lodged across the whole sample. Graph 2 focuses on the preliminary references where gender was the ground of discrimination raised.

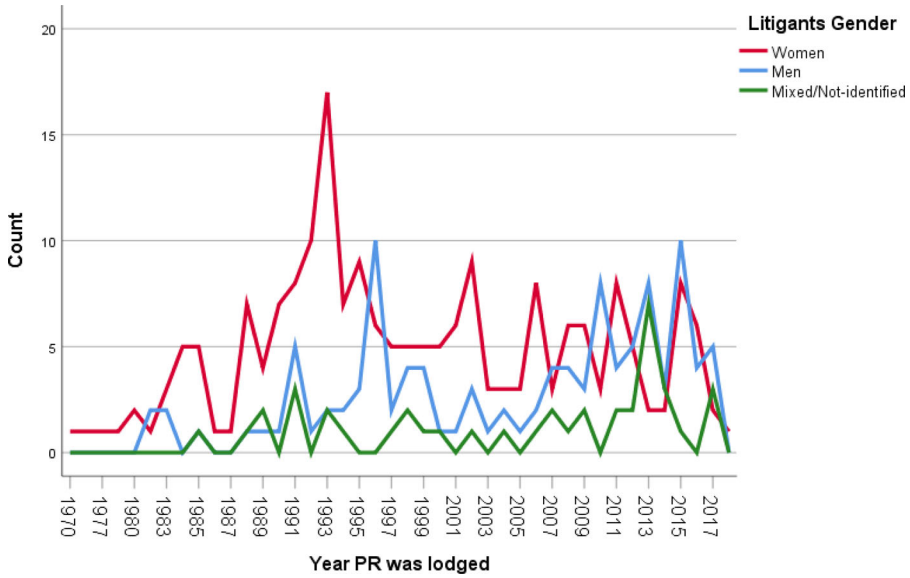
¹⁶¹ This category includes collective actors as standalone litigants.

¹⁶² For example, looking at the preambles to Directive 75/117/EEC.

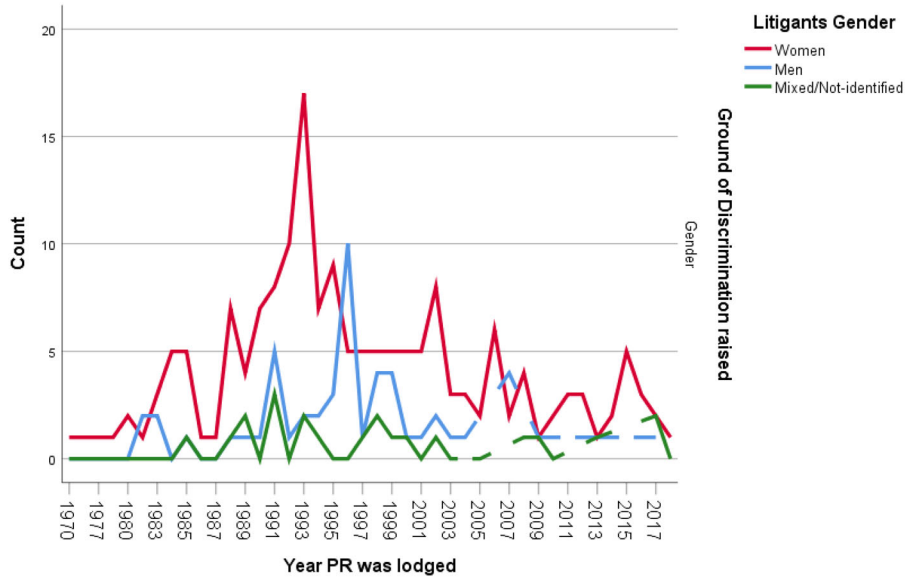
¹⁶³ C. Hoskyns, 'Women's Equality and the European Community' (1985) 20 *Feminist Review* 71, 73.

¹⁶⁴ Cichowski, n 87 above, 217–218.

¹⁶⁵ With success measured in their claim reaching the CJEU.



Graph 1: Gender breakdown per year when preliminary reference was lodged (includes all grounds of discrimination). [Colour figure can be viewed at wileyonlinelibrary.com]



Graph 2: Gender breakdown per year when preliminary reference was lodged (includes only gender as the ground of discrimination raised). [Colour figure can be viewed at wileyonlinelibrary.com]

Looking at Graph 1, the number of preliminary references on any non-discrimination grounds lodged by women peaked in 1993 and has remained more or less stable at lower levels ever since the late 1990s. On the other hand, men became litigants in EU equality case-law a decade later than women, in the early 1980s, with two peaks in 1996 and 2015. Moreover, it seems that the gap between women and men litigants has shrunk from the mid-1990s onwards,

with women and men alternating as the majority since the 2010s. This explains why most of the landmark cases of women's transnational activism are from the 1980s and 1990s.¹⁶⁶ Opportunity structures, which are linked to higher levels of capital for women, seem to have been stronger during that era, hence the prevalence of women as litigants.

At the same time, the data show a slight increase in the number of preliminary references where there is a mix of litigants, or whose gender could not be identified, linked to the rise of collective actors as stand-alone litigants. A possible explanation for the change in the gender breakdown of litigants is the mainstreaming of non-discrimination claims under the Equality Framework Directive, which will be discussed in more detail below.

Another notable observation is that, even before the changes brought by the Treaty of Amsterdam, which extended the possible grounds of discrimination beyond gender, there were years where men still represented the majority of litigants, albeit as a rarer occurrence compared to the 2010s. Graph 2, which focuses on gender as the ground of discrimination, helps to evaluate this further. Accordingly, men overtook women as the majority of litigants in EU gender equality case-law in 1981, 1996 and 2007. Admittedly, 1981 might have been an unusual year given the low overall number of preliminary references of that era.¹⁶⁷

On a different note, the predominance of men litigants in 1996 and 2007 is largely due to joined cases. *De Vriendt and others v Rijksdienst voor Pensioenen (De Vriendt and others)* dealt with alleged sex discrimination in pensionable age, whereas *Molinari and others v Agenzia delle Entrate* in qualifying age for tax advantages.¹⁶⁸ Taking into account the fact that post-2005 preliminary references by men raised gender equality only intermittently, it could be argued that older case-law showed a manipulation of gender equality claims by men for the lack of a justiciable alternative. Indeed, comparing the two line graphs, the proportion of preliminary references that include gender as a ground of discrimination raised by men litigants vis-à-vis all other grounds has become notably lower recently than in the case of women litigants.

The preliminary references on pensions showcase how laws primarily conceived for the benefit of a particularly disadvantaged group (women) were harnessed by men to promote their own interests.¹⁶⁹ The unequal distribution of capital has enabled men litigants to explore – and exploit – the rules in place as 'symbolic weapons'.¹⁷⁰ It is telling that *De Vriendt and others* as a set of joined cases has the highest number of grouped litigants (eight) across the whole

166 Cichowski, n 87 above, 217–218.

167 Plus, in one of the two cases brought by men, the EU non-discrimination law at issue, Directive 79/7/EEC, had only an auxiliary nature. Case C-275/81 *Koks v Raad van Arbeid* ECLI:EU:C:1982:316.

168 Joined Cases C-377/96 to C-384/96 *De Vriendt and others v Rijksdienst voor Pensioenen* ECLI:EU:C:1998:183; Joined Cases C-128/07 to C-131/07 *Molinari and others v Agenzia delle Entrate* ECLI:EU:C:2008:15.

169 S. Fredman, 'The Poverty of Equality: Pensions and the ECJ' (1996) 25 *Industrial Law Journal* 91.

170 Bourdieu, n 1 above, 827.

sample.¹⁷¹ Although strategic litigation has been featured as a *sine qua non* for the success of women litigants, the synchronised influx of preliminary references by men litigants cannot be dismissed as anything but strategic either. Litigation driven by men has relied on a formal understanding of gender equality in relation to pensions, which fails to properly account for the disadvantaged position of women and has enabled the Court to pursue its own agenda of protecting financial arrangements, with minor gains for men and no redress for women.¹⁷² The structure of EU equality law with its often ‘genderless liberal rhetoric’ may magnify that, accentuating the gendered division of capital in the field, which seems to spill over to the judicial arena too.¹⁷³

The post-Amsterdam legislative landscape, which prompted the introduction of Directives 2000/43/EC and 2000/78/EC, opened up the ambit of EU equality law significantly. Evident in the line graphs above is a shift in the dynamics of litigation, which took place once these Directives became justiciable. It seemed as if men litigants were provided with more ammunition, leading them to almost exclusively rely on the newly introduced grounds, no longer using gender as a workaround. Looking at the gender breakdown for each ground of discrimination raised in the sample according to Table 2,¹⁷⁴ women litigants dominate in the following grounds: gender (68.8 per cent), religion (75.0 per cent) and multiple (66.7 per cent).¹⁷⁵ They represent a fraction of litigants in age (16.3 per cent) and race (14.3 per cent) and have made no claims solely relying on sexual orientation as a ground of discrimination. Women are level with men in disability (45.5 per cent) claims. Men litigants, on the other hand, are the overwhelming majority in age (72.1 per cent) and sexual orientation (66.7 per cent) claims. They are also joint first, together with gender-mixed litigants, in the case of race (42.9 per cent).

These statistics cannot help but reaffirm the gendered division of capital among litigants in EU equality case-law. Whereas men litigants have moved away from gender to make use of the new grounds, women still need to rely on gender in their preliminary references.¹⁷⁶ The idea of intersectional or multidimensional discrimination was raised earlier in this article. Women are often multiply disadvantaged due to a combination of characteristics such as those protected by the two afore-mentioned Directives.¹⁷⁷ In the gendered legal field of EU equality (case-)law, the fragmented and piecemeal nature of the legal provisions themselves, on which the litigants seek to rely to advance their claims and which fail to clearly establish links between discrimination grounds, is yet

171 Note that there are cases brought by a group of litigants from the outset. These do not feature as joined cases.

172 Fredman, n 169 above.

173 J. Mulder, *EU Non-Discrimination Law in the Courts* (Oxford: Hart, 2017) 47.

174 Note the large gap between the most pleaded ground of discrimination (gender) and the second one (age). Also, the remaining grounds have less than 20 cases each.

175 The category of multiple discrimination includes all preliminary references that raised more than one ground of discrimination. Accordingly, such cases were not counted again in any other category.

176 According to the dataset, all preliminary references brought by women litigants and classified under the ‘multiple’ ground included gender amongst the grounds of discrimination raised.

177 Crenshaw, n 47 above; Cooper, n 46 above; Schiek, n 45 above; Verloo, n 46 above.

Table 2. Ground of Discrimination raised * Litigants' Gender Crosstabulation

Ground of Discrimination raised		Litigants' Gender			Total
		Women	Men	Mixed/Not-identified	
Gender	Count	172	57	21	250
	% within Ground	68.8%	22.8%	8.4%	100.0%
Age	Count	7	31	5	43
	% within Ground	16.3%	72.1%	11.6%	100.0%
Disability	Count	5	5	1	11
	% within Ground	45.5%	45.5%	9.1%	100.0%
Sexual Orientation	Count	0	4	2	6
	% within Ground	0.0%	66.7%	33.3%	100.0%
Religion	Count	3	1	0	4
	% within Ground	75.0%	25.0%	0.0%	100.0%
Race	Count	1	3	3	7
	% within Ground	14.3%	42.9%	42.9%	100.0%
Multiple	Count	8	4	0	12
	% within Ground	66.7%	33.3%	0.0%	100.0%
Ground unclear	Count	5	5	9	19
	% within Ground	26.3%	26.3%	47.4%	100.0%
Total	Count	201	110	41	352
	% within Ground	57.1%	31.3%	11.6%	100.0%

another impediment.¹⁷⁸ Whilst the data show that women can reach the CJEU by drawing on multiple grounds of discrimination in their claims, gender ostensibly has to feature as a ground, a testament not only to the continuous discrimination experienced by women, but also to the notion of gender stereotyping.

Drawing on the above, it appears that women litigants cannot effectively rely on or persuade national courts to lodge a preliminary reference that does not include gender as a ground of discrimination, despite the intention of certain EU equality laws to liberalise the available opportunity structures.¹⁷⁹ If true, this is deeply problematic from a gendered capital perspective, as it showcases the weaker position of women litigants in the social hierarchy.¹⁸⁰ The latter can be manifested in the stereotyping of women litigants in equality case-law.¹⁸¹ Other studies have observed a similar trajectory, where women are less likely to bring an age discrimination claim, more likely to withdraw it, and with lower chances of it being successful in the end.¹⁸² The gendered implications of law-making and the stereotypes in its interpretation seem to require additional capital from women litigants for their claims to be viable. This additional capital is likely to be lacking in areas where grounds of discrimination other than gender are involved, given the increased vulnerabilities coupled with resource and information asymmetry some of these grounds are traditionally associated with.¹⁸³

Naturally, the design of EU non-discrimination law is not the sole culprit behind the gender discrepancies in litigation. Especially in the context of indirect actions like preliminary references, the framing of national procedural rules and how national courts respond to claims are also important.¹⁸⁴ As set out earlier in the article, national courts at times took advantage of the opportunity structures present within the European judicial architecture, aligning with the litigants' interests.¹⁸⁵ Following from the discussion of gendered capital, it is likely that the interests of a particular gender might have exerted more influence on – certain – national courts. Table 3 includes a breakdown of the litigants' gender per Member State where the preliminary reference originated.

The differences between the Member States are startling. Before delving into the gender breakdown, the discrepancies in the total number of preliminary references lodged should also be noted. There were no preliminary references on any ground of discrimination brought by courts in seven Member States (Croatia, Cyprus, Estonia, Malta, Portugal, Slovakia and Slovenia).¹⁸⁶ Moreover, in 11

178 D. Schiek, 'From European Union Non-discrimination Law towards Multidimensional Equality Law for Europe' in D. Schiek and V. Chege (eds), *European Union Non-Discrimination Law: Comparative Perspectives on Multidimensional Equality Law* (London: Routledge, 2009) 6.

179 For example the Racial Equality Directive. Evans Case and Givens, n 107 above.

180 Bourdieu, n 1 above, 822.

181 Kenney, n 8 above, 138.

182 Blackham, n 159 above, 399–400.

183 D. Anagnostou, 'Law and Rights' Claiming on behalf of Minorities in the Multi-level European System' in D. Anagnostou (ed), *Rights and Courts in Pursuit of Social Change: Legal Mobilisation in the Multi-Level European System* (London: Hart, 2014) 12.

184 Dawson, Muir and Claes, n 94 above, 111–112.

185 Kilpatrick, n 96 above.

186 This is why these Member States do not appear in Table 3.

Table 3. Member State where Preliminary Reference originated* Litigants' Gender Crosstabulation

MS where PR originated * Litigants' Gender Crosstabulation			Litigants' Gender			Total
			Female	Male	Mixed/Not-identified	
MS where PR originated	Austria	Count	9	13	5	27
		% within MS	33.3%	48.1%	18.5%	100.0%
	Belgium	Count	15	11	4	30
		% within MS	50.0%	36.7%	13.3%	100.0%
	Bulgaria	Count	2	2	1	5
		% within MS	40.0%	40.0%	20.0%	100.0%
	Czech Republic	Count	2	0	0	2
		% within MS	100.0%	0.0%	0.0%	100.0%
	Denmark	Count	8	7	2	17
		% within MS	47.1%	41.2%	11.8%	100.0%
	Finland	Count	3	2	0	5
		% within MS	60.0%	40.0%	0.0%	100.0%
	France	Count	2	8	3	13
		% within MS	15.4%	61.5%	23.1%	100.0%
	Germany	Count	60	27	2	89
		% within MS	67.4%	30.3%	2.2%	100.0%
	Greece	Count	3	1	0	4
		% within MS	75.0%	25.0%	0.0%	100.0%
	Hungary	Count	0	0	1	1
		% within MS	0.0%	0.0%	100.0%	100.0%
	Ireland	Count	5	7	7	19
		% within MS	26.3%	36.8%	36.8%	100.0%
	Italy	Count	8	2	2	12
		% within MS	66.7%	16.7%	16.7%	100.0%
	Latvia	Count	2	0	0	2
		% within MS	100.0%	0.0%	0.0%	100.0%
	Lithuania	Count	0	0	1	1
		% within MS	0.0%	0.0%	100.0%	100.0%
	Luxembourg	Count	1	0	0	1
		% within MS	100.0%	0.0%	0.0%	100.0%
	Netherlands	Count	19	8	2	29
		% within MS	65.5%	27.6%	6.9%	100.0%
	Poland	Count	1	0	0	1
		% within MS	100.0%	0.0%	0.0%	100.0%
	Romania	Count	1	1	3	5
		% within MS	20.0%	20.0%	60.0%	100.0%
	Spain	Count	16	9	0	25
		% within MS	64.0%	36.0%	0.0%	100.0%
	Sweden	Count	0	1	2	3
		% within MS	0.0%	33.3%	66.7%	100.0%
	United Kingdom	Count	44	11	6	61
		% within MS	72.1%	18.0%	9.8%	100.0%
Total		Count	201	110	41	352
		% within MS	57.1%	31.3%	11.6%	100.0%

Member States these ranged only between one and five.¹⁸⁷ Germany dominates with 89 preliminary references, followed by the UK with 61. Next, several older

¹⁸⁷ The very small sample sizes across the majority of the Member States prevented the use of inferential statistics in this study.

Member States sit around the 25–30 mark (Austria, Belgium, Netherlands and Spain). There are many hypotheses that can be drawn as to the reasons behind these discrepancies, which appear largely unrelated to the population of each Member State and more likely associated with legal needs and gender equality indicators, or the entrenchment of EU non-discrimination norms and opportunity structures therein.¹⁸⁸ The foregoing could inform future studies on the matter.

Coming back to the findings of this study, Table 3 evidences that the gendered dimension of capital varies in each Member State. From those with a sizeable number of preliminary references, women are the overwhelming majority of litigants in Germany (67.4 per cent), the UK (72.1 per cent), the Netherlands (65.5 per cent), Spain (64.0 per cent) and Italy (66.7 per cent). This corroborates earlier studies that showcased the efforts of strategic litigation in some of these countries and which it was not possible to replicate elsewhere in the EU.¹⁸⁹ Another explanation, at least for Spain, is that women were mobilised to reach the CJEU by reason of inadequate implementation of EU non-discrimination law at national level.¹⁹⁰ Support by equality bodies, trade unions or activists, including within judicial structures, has been central in increasing the levels of capital for women litigants.¹⁹¹

Women litigants have also been the minority in certain jurisdictions, as is the case in Austria (33.3 per cent), France (15.4 per cent) and Ireland (26.3 per cent). Although the prevalence of age discrimination cases in Austria or the high proportion of mixed litigants in Ireland may explain this occurrence, France is a curious case as most of the preliminary references of the sample concerned gender. Interestingly, the use of EU non-discrimination law by men in the context of pension litigation alone is not enough to explain the data from France. It has been observed that despite opportunity structures, legal mobilisation of women in France remains relatively low.¹⁹² Finally, there are Member States like Belgium and Denmark which show a more equitable distribution of gender among litigants, with women retaining the majority, but by relatively small margins. In Denmark, this is likely the result of comprehensive equality legislation at national level, which is relied on in lieu of EU law.¹⁹³

How far gendered capital plays a role is ostensibly co-dependent, together with the ground of discrimination raised, on the Member State where the litigant's claim originated.¹⁹⁴ However, placing litigants' chances of a proceedable claim on externalities raises questions of unfairness in terms of accessing justice in the EU equality field. This unfairness takes on a gendered dimension in the context of the present analysis.¹⁹⁵ More concrete efforts are needed at EU level

188 For some other determinants see Cichowski, n 39 above.

189 Alter and Vargas, n 97 above, 468; Cichowski, *ibid*; Kenney, n 8 above; Kilpatrick, n 96 above.

190 E. Lombardo, 'EU Gender Policy: Trapped in the "Wollstonecraft Dilemma"' (2003) 10 *European Journal of Women's Studies* 159, 169.

191 Cichowski, n 39 above, 80.

192 Fuchs, n 99 above.

193 Cichowski, n 39 above, 76.

194 Note that in relation to the protection afforded by national law, previous studies concluded that there is no correlation between the degree of protection under national law and the need to rely on EU law to safeguard one's claims. Alter and Vargas, n 97 above, 477.

195 This has also been corroborated in other studies: Milieu, n 114 above.

to ensure equal opportunities for effective litigation across the board. While it could be argued that litigation also depends on how EU non-discrimination law is applied domestically, this does not negate the need for further attention to be paid to an area of predominantly private enforcement, with the difficulties the latter entails for litigants possessing weak levels of capital.¹⁹⁶

CONCLUSION

Non-discrimination is one of the most comprehensive elements of EU social law, with a well-developed body of case-law. This article shifted attention from the main judicial actors to the litigants, in a macro-level study of the *Equality Law in Europe: A New Generation* database. It introduced a new explanatory framework based on the idea of gendered capital in the legal field of EU equality (case-)law, which is rooted in a feminist reading of Bourdieu's work. To highlight the relevance of this framework, some preliminary quantitative analysis was undertaken in the form of descriptive statistics. The data showed the gender breakdown of EU equality case-law varying across the period when and the Member State where a claim was lodged, or the ground of discrimination raised. Gendered capital was used in order to offer a plausible explanation for these discrepancies. Whilst the general view is that women did benefit from EU non-discrimination law, they were still faced with obstacles due to their lower levels of capital compared to men litigants.

The notion of gendered capital, the idea that women have traditionally held lesser amounts of capital, in whichever form, than men has undoubtedly infiltrated the legal field. Consequently, gendered capital can explain the aforementioned divergences. For example, activist lawyers and public interest litigation in the 1970s through to the 1990s, which coincided with waves of the feminist movement, has certainly played a role in the influx of cases brought by women litigants initially.¹⁹⁷ Looking at the significant rise in men litigants that rely on EU non-discrimination law, one has to question whether the interests of the relevant stakeholders in the legal field were aligned with these priorities post-1990s.¹⁹⁸ It has been argued that the opportunity structures provided by EU law can only be taken advantage of once actors have been mobilised domestically within the Member States.¹⁹⁹

However, gendered capital goes beyond the power of legal representation. Bourdieu observed that law 'creates the social world, but only if we remember that it is this world which first creates the law'.²⁰⁰ The social world is one where women are still disadvantaged, and, despite legislative efforts, these disadvantages are likely to remain reflected in the framing of the laws, as well as in the

196 On the difficulties of individual enforcement in age discrimination in the UK, see Blackham, n 159 above.

197 Cichowski, n 106 above, 136.

198 Bourdieu, n 1 above, 850–851.

199 L. Israël, 'Rights on the Left? Social Movements, Law and Lawyers after 1968 in France' in D. Anagnostou (ed), *Rights and Courts in Pursuit of Social Change: Legal Mobilisation in the Multi-Level European System* (London: Hart, 2014) 106.

200 Bourdieu, n 1 above, 839.

enforcement avenues and support available to litigants. Inequalities in access to justice may vary by Member State, but they have certainly not been eradicated. Preliminary references, similar to judgments, enable the litigants who possess sufficient amounts of capital, often men, to make the most of the laws available to them, even if they were not their intended beneficiaries. In turn, the rationalisation process behind judicial decision-making legitimises such litigants' successes.²⁰¹ The fact that a claim managed to reach the CJEU through the preliminary reference procedure can be interpreted as a sign of reproduction of gendered social hierarchies.

On a different note, the ambit of this article is not limitless. After all, its main objective was to introduce gendered capital as an explanatory framework and to undertake a macro-level mixed-methods study to substantiate the latter in the context of EU equality case-law. There are arguably constraints inherent in the data being preliminary references. We only know of the litigants that managed to persuade national courts to make a reference to the CJEU. The dataset also does not evaluate the outcome of the preliminary rulings, if any, and how this was applied to the factual scenario by the national courts.²⁰² Nevertheless, the contrasts between men and women litigants in accessing justice and succeeding within the examined legal field, both inherently linked to the idea of gendered capital, showcase that the gathered data are telling. Follow-up studies could focus on parts of the dataset, evaluate it further and/or dig deeper through inferential statistics as suggested above. Looking at how the current situation can improve, it is much more about gendering – and diversifying more broadly – the decision-making institutions' structures and mindsets than to simply 'gender' those in numbers.²⁰³

201 *ibid*, 828.

202 Mulder, n 173 above.

203 S. J. Kenney, 'Thinking about Gender and Judging' (2008) 15 *International Journal of the Legal Profession* 87, 107.