Gender Equality, Legal Mobilization, and Feminism in a Multilevel European System

Dia Anagnostou and Susan Millns[1]

This special issue probes the ways in which legal processes and entitlements are mobilized by individual and collective actors on behalf of gender equality, their causes, as well as their consequences for social, political, and policy change in Europe. While far from a unique phenomenon, such processes are distinct in Europe: they largely take place in the frame of multilevel European Union (EU) governance, defined by a multiplicity of legal and judicial mechanisms coexisting alongside supranational institutions and a *sui generis* system of law. From the 1970s onwards, EU law has expanded the arsenal of rights to gender equality that can be claimed before national courts and the Court of Justice of the EU (CJEU). Over the past ten years, the adoption of anti-discrimination legislation by the EU has further strengthened the relevant body of legal norms. It has also expanded the (quasi-) judicial and non-judicial fora where gender equality claims can be advanced in the multilevel European system. In this changing context, individuals and other actors have increasingly challenged state laws and policies in court for compatibility with gender equality norms enshrined in national constitutional and EU law.

In exploring the uncharted terrain of legal mobilization in pursuit of gender equality rights and reforms in Europe, this special themed issue seeks to fill an important analytical as well as empirical gap in existing law and society scholarship. While the subject of flourishing academic study in the United States and Canada, there has been relatively little research in European comparative legal and political analysis of whether, and the extent to which, citizens pursue their interests and seek to influence the political processes through the legal and judicial system. Yet, ample evidence suggests a growing trend of public interest litigation, accompanied by social mobilization by NGOs and more recently supported by a variety of equality bodies, at both the national and the European level. Furthermore, the EU anti-discrimination directives envisage a strengthened role for civil society actors to engage in judicial and/or administrative proceedings in pursuit of equality goals.

[1] Dia Anagnostou, Senior Research Fellow, Hellenic Foundation for European and Foreign Policy (ELIAMEP) and Assistant Professor of Comparative Politics, Panteion University of Social Sciences, Athens, danagnos@eliamep.gr; Susan Millns, Professor of Law, University of Sussex, S.Millns@sussex.ac.uk.

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The emergence of European Community (EC)[2] equal treatment legislation specifically on behalf of women since the 1970s has been—quite unusually for the European Economic Community (EEC) at the time[3]—the result of growing demands and activism pursued by individual and collective actors. For most part, the awareness, convictions, and activities of those actors cannot be understood outside of the second-wave feminism of the late 1960s and 1970s that had spread across different countries in Europe.[4] From their initial adoption in the 1970s onwards, the equality directives both reflected and in turn reinforced the progressive emergence of transnational coalitions of activists, lawyers, bureaucrats, and experts. While sharing a broad feminist orientation, they often espoused diverse and conflicting goals. Such transnational coalitions formed the basis for, and influenced the creation of, a variety of EU-level organizations such as the European Women's Lobby (EWL), the European Network of Women (ENOW), and the Committee of Women's Rights in the European Parliament.

Civil society activists, lawyers, and policy entrepreneurs, including those with a feminist orientation, have often found in the EU an alternative and, for a variety of reasons, a relatively receptive (to gender equality claims) legal and judicial system.[5] They have developed a variety of strategies simultaneously at the national and at the European level to promote the application of EU gender equality norms. Through the creation and growing activism of such transnational networks, ideas and policy approaches originating from particular national settings were transmitted to the European level and at times exerted a decisive influence over the formulation of EU laws and policies.[6] For instance, the 2000 race anti-discrimination directives were predominantly influenced by and conformed to the UK and Dutch approaches.[7] In turn, the evolving norms of EU equality legislation have exerted an increasingly inescapable and formative influence over the configuration of national agendas and legal norms of equality, which extended far beyond the domestic contexts from which they originated.

However, despite the unmistakable and growing trend of legal mobilization and judicial rights claiming in Europe, we still have limited knowledge of this flourishing activity and its consequences for political participation, feminism, and democratic politics. There is a lack of empirical studies regarding the extent to which legal tactics have been employed by women's organizations in the judicial or

2 The European Community is now named the European Union, following the Lisbon Treaty that entered into force in December 2009.

3 The European Economic Community became known as the European Community with the adoption of the Treaty of Maastricht, which came into force in November 1993.

4 Catherine Hoskyns, *Integrating Gender—Women, Law and Politics in the EU* (London: Verso, 1996); Sonia Mazey, "The EU and Women's Rights: From the Europeanization of National Agendas to the Nationalization of a European Agenda?" *Journal of European Public Policy* 5/1 (1998): 131–52 at 131–32.

5 On the factors that enabled feminists to exert pressure on the EC Commission in the 1970s, as well as on the receptivity of the Commission to their demands, see Sonia Mazey, "The EU and Women's Rights," 138.

6 Sonia Mazey, "The EU and Women's Rights," 134.

7 Andrew Geddes and Virginie Guiraudon, "Britain, France and EU Anti-Discrimination Policy: The Emergence of an EU Policy Paradigm," *West European Politics* 27/2 (2004): 334–53.

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political system, and the extent to which, as well as the multifaceted ways in which, they have influenced policy reform and broader social-political changes.

We furthermore have limited knowledge of the institutional and social-legal factors that account for variable patterns of legal mobilization across different member states, which have important consequences for citizens' participation and for legal integration in the EU. Legal rights and judicial rulings have the potential, even if contingent, to affect the formation and enforcement of public policy. In this regard, legal mobilization has for a long time now been recognized as a form of political participation. In its essentially individualized nature, it can be more immediately available in so far as it is unhampered by collective action problems, or by the absence of an anointed group that may be necessary for the individual to access the government.[8]

While not focusing on the EU context, a burgeoning literature has explored how the transfer of competences at the supranational level or its devolution subnationally alters and often expands the opportunities for women's mobilization. Yet less attention has been paid to the consequences of multilevel structures of decision making, especially of the legal arrangements and the judicial institutions that shape them, for feminist politics and women's mobilization.[9] In the EU, the multilevel nature of formulating gender equality law and policy has already been clearly and amply recognized. Yet the domestic processes and bottom-up social, legal, and political dynamics that form the groundwork for European developments are not well known or understood.

In a move towards filling these gaps, this special issue unravels the social and bottom-up processes of mobilization around gender equality law, rights, and legal change. In particular, the articles included in this issue investigate the national factors that promote, or conversely constrain, legal mobilization and its relationship to other forms and strategies of political action. They also explore critically the consequences of law, legal claims, and court decisions pursued by individuals and feminists at the national and the European level in bringing about policy and social change towards gender equality. Among the questions our contributors raise are: What are the patterns of litigation on behalf of gender equality claims? Do they vary across countries, across time and/or different issue areas, and how do courts respond to such claims? To what extent do civil society actors and feminists engage in legal action invoking constitutional and EU equality law? Does EU gender equality law empower social actors at the national level and transnationally, and do these actors in turn contribute to advancing gender equality law and policy in member states?

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8 Frances Kahn Zemans, "Legal Mobilization: The Neglected Role of the Law in the Political System," *American Political Science Review* 77/3 (September 1983): 690–703 at 691–3; Joel Grossman and Austin Sarat, "Litigation in the Federal Courts: A Comparative Perspective," *Law and Society Review*, 9/2 (Winter 1975): 321–346 at 375.

9 Marian Sawer and Jill Vickers, "Introduction: Political Architecture and its Gender Impact," in *Federalism, Feminism and Multi-Level Governance*, edited by Melissa Haussman, Marian Sawer and Jill Vickers (Surrey: Ashgate, 2010), 3–18; Louise Chappell, "Interacting with the State – Feminist Structures and Political Opportunities," *International Feminist Journal of Politics* 2/2 (2000): 244–275.

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Besides mapping the (as yet) uncharted terrain of legal mobilization of gender equality in Europe, the second main goal of this special issue is to critically reflect on the relationship between law, rights, and social change. This relationship has since long ago attracted the attention of law and society scholars and it has also been at the heart of heated debates in feminist politics and scholarship. The controversy over whether law serves well, or conversely, undermines the struggle for gender equality has a long pedigree that goes back to the ambivalent, if not embattled feminist attitudes towards law in the years following the social movement's upsurge of the 1960s and 1970s. It has also been at the heart of the epistemological critique made of conservative and male-centered legal constructs, which has been advanced by feminist scholars.[10] The pursuit of equality rights through legal channels and courts since the 1970s, both at the national and the European level, promises to throw new light on the controversial relationship between law, feminism, and gender equality change.

The first part of this article sets the context for the collection in providing an overview of the EU constitutional and statutory norms on gender equality. The second section explores the institutional channels for national- and European-level rights litigation, and reflects on its consequences for legal integration in the EU. The third part proposes an innovative research agenda for the study of legal mobilization and gender equality rights by bringing into central focus the multilevel nature and dynamics of the EU system of law and governance. Finally, the article concludes with a critical discussion on the potential of law and legal tactics to promote equality between the sexes.

I. Gender equality law at the national and EU level

In the post-World War II period, demographic changes and the entry of large numbers of women into paid employment in Europe set the stage for fundamental transformations regarding traditional gender roles, as well as for state policies to promote equality between men and women. Particularly with the rise of second-wave feminist movements in the 1960s and 1970s, governments across Europe took steps to include women and women's issues in a variety of state institutions and agencies.

While sex equality was initially raised as a problem at the national level in the 1960s, it soon became an EC legal and policy issue, largely thanks to the activities of policy entrepreneurs transmitting policy ideas and goals from the national to the supranational level.[11] The development and evolution of Community law on sex equality was grounded in a treaty provision stating that men and women receive equal pay for equal work. Article 119 of the Treaty of Rome (now replaced by Article 157 of the Treaty on the Functioning of the EU (TFEU))[12] stated that

[10] Catharine A. MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (Cambridge, MA: Harvard University Press, 1987); Catharine A. MacKinnon *Toward a Feminist Theory of the State* (Cambridge, MA: Harvard University Press, 1989); Carol Smart, *Feminism and the Power of Law* (London: Routledge, 1989).

[11] Sonia Mazey, "The EU and Women's Rights," 134.

[12] The Treaty on the Functioning of the European Union was introduced following the Lisbon Treaty in 2009 to replace the Treaty of Rome (or European Community Treaty) of 1957.

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member states (MS) must ensure that men and women receive equal pay for equal work, and it was the sole basis upon which all subsequent policy in this area was founded. Originally, this provision was intended to curb unfair competition created by existing wage disparities across member states and responded to demands made by the French government since equal pay legislation had already been introduced there. Along the way, it became a source of justification for advancing a variety of equality demands for working women targeting national but also supranational institutions such as the European Court of Justice (ECJ, now CJEU) and the European Commission.

On the basis of the equal treatment principle now embodied in Article 157 TFEU, the EC in the 1970s adopted two directives that would become the bedrock of the Union's gender equality policy over the next decades. The 1975 Equal Pay Directive (EPD) provided for the elimination of discrimination in all aspects of remuneration between men and women for work of equal value.[13] Additionally, the 1976 Equal Treatment Directive (ETD) exhorted member states to ensure equal treatment in access to employment and working conditions. The principle of sex equality was subsequently extended in the sphere of social security, where a 1979 Directive vowed to ensure equality of men and women.[14] With its landmark 1976 *Defrenne II* decision, the Court of Justice took a bold step in stating that equal pay for women and men was a right enforceable in national courts, regardless of the existence of national implementing legislation.[15] By doing so, it transformed the respective treaty provision (the then Article 119 EC) into a directly enforceable right that could be claimed by individuals against their own governments.[16] On the basis of Article 157 TFEU (ex 119 EC), the Court also pronounced a general principle of equal treatment, which it subsequently used to justify broader interpretations of EU secondary legislation.[17]

Since those momentous developments of the 1970s, the ECJ/CJEU elaborated and extended the EC/EU primary and secondary legislation on gender equality through its case law in scores of cases.[18] In response to individual complaints, the EU's preliminary reference procedure enabled national judges to refer a large number of gender equality cases to the CJEU. In 2002, as a way of codifying the relevant case law of the ECJ but also the secondary legislation that had been put in place over the previous twenty years, the EU adopted the Equal Treatment in

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13 Council Directive 75/117/EEC of 19 February 1975, OJ L45/19.

14 Council Directive 79/7/EEC of 19 December 1978, OJ L6/24.

15 Case 43/75, *Gabrielle Defrenne v. Société anonyme belge de navigation aérienne Sabena* [1976] ECR 455.

16 Council Directive 76/207/EEC of 9 February 1976, OJ L39/40. The ECJ/CJEU decides on a statute-by-statute basis whether EU law creates direct effect, taking into account the clarity and specificity of the particular statute. EU regulations are directly applicable at the national level, while EU directives only sometimes create direct effects if they are sufficiently clear, precise, and unconditional (Case 26/62) *Van Gend en Loos* [1963] ECR 13). See Karen Alter, "The EU's Legal System and Domestic Policy: Spillover or Backlash?" *International Organization* 54/3 (2000): 489–518 at 496.

17 See Rachel Cichowski, "Women's Rights, the European Court, and Supranational Constitutionalism," *Law and Society Review* 38/3 (2004): 489–512 at 501–503.

18 See Catherine Barnard, "Gender Equality in the EU: A Balance Sheet," in *The EU and Human Rights,* ed. Philip Alston with Mara R. Bustelo, and James Heenan (Oxford: Oxford University Press, 1999), 215–79; and the special issues on EU gender equality law of *Feminist Legal Studies* (2006, issue 10) and the *European Law Journal* (2007, issue 13/2).

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Employment Directive.[19] Two years later, it also extended the prohibition against sex discrimination beyond employment in the access to and supply of goods and services.[20] Substantial amendments of the 1976 Equal Treatment Directive have added definitions of indirect discrimination and sexual harassment. They also require member states to set up equality bodies to promote, analyze, monitor, and support equal treatment between women and men. Generally, in the EU system of governance, it is member states that have the obligation to implement the European directives, including those pertaining to gender equality. Directives are a legal instrument that must be transposed in the national legal and political orders of member states in order to effectively enter into force. There is substantial cross-national variation in the nature and scope of legal norms and policy instruments that governments adopt to transpose them.

The Treaty of Amsterdam in the second half of the 1990s marked a new stage in the evolution of gender equality policy in the EU. Considering the evident and widely analyzed inadequacies of the equal treatment approach, as well as in light of conceptual and jurisprudential elaborations in the CJEU case law in the preceding years, the Amsterdam Treaty took a notable turn. By introducing changes in what is now Article 157 TFEU (formerly Article 119 EC), it acknowledged the need for positive measures to promote equality between the sexes. To be sure, such measures had been authorized, albeit in a very limited way, under the ETD (Art. 2(3) and 2(4)). The Amsterdam Treaty also instituted a "mainstreaming" principle (under the then Article 3(2) EC and now Article 8 TFEU), with which the Community acknowledged a positive obligation to dismantle persisting inequalities between men and women in all its activities.[21] These new elements were seen as a move towards "constitutionalizing" a more proactive approach with regard to gender equality on the part of the Community.[22]

The diversity of legal-constitutional orders and judicial systems across EU member states, along with the decentralized transposition of EU equality legislation, have resulted in uneven levels of rights protection, which in turn has been seen as a barrier to the fundamental right to free movement. At the same time, they have also been a constant source of pressure, pushing for the adoption of common EU laws and policies including with regard to anti-discrimination.[23] Following the adoption of the Amsterdam Treaty, gender equality (along with nationality-based differences) became a point of reference for developing a wider principle of equal treatment, and more broadly, for developing the Community's fundamental

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19 Council Directive 2002/73/EC, *Equal Treatment Directive* [2002] OJ L269/15. See also Christa Tobler, *Indirect Discrimination. A Case Study into the Development of the Legal Concept of Indirect Discrimination in EC Law* (Antwerp and Oxford: Intersentia, 2005).

20 Council Directive 2004/113/EC.

21 Mark Pollack and Emilie Hafner-Burton, "Mainstreaming Gender in the European Union," *Journal of European Public Policy* 7/3 (2000): 432–56.

22 Susan Millns, "Gender Equality, Citizenship and the EU's Constitutional Future," *European Law Journal,* 13/2 (2007): 218–37.

23 Mark Bell, *Anti-Discrimination Law and the European Union* (Oxford: Oxford University Press, 2000); Mark Bell, "The Principle of Equal Treatment: Widening and Deepening" in *The Evolution of EU Law*, 2nd ed., eds. P. Craig and G. De Búrca (Oxford: Oxford University Press, 2011), 611–39; Isabelle Chopin, "The Starting Line Group: A Harmonised Approach to Fight Racism and to Promote Equal Treatment," *European Journal of Migration and Law* 1 (1999): 111–29 at 113 .

rights doctrine. A legal provision defining an obligation for member states to combat discrimination (then Article 13 EC, now Article 19 TFEU), also introduced with the Amsterdam Treaty, has led to the widening of the purview of equality policy. It formed the ground for the adoption of three new directives prohibiting discrimination on grounds of race and ethnic origin beyond the narrow confines of employment.[24] These have extended the prohibition of employment-specific discrimination to grounds such as religion, sexual orientation, disability, and age[25] and have introduced an obligation to ensure gender equality in access to goods and services in the public and private sectors.[26]

With a view to consolidating legislation and tidying up existing provisions, the EU adopted its "Recast" Equal Treatment Directive in 2006.[27] This measure systematizes the existing legislation on equal pay, equal treatment, occupational social security, and the burden of proof. It also incorporates relevant rulings of the CJEU into legislation. As such, the Recast Directive now governs equal treatment in access to employment and promotion, vocational training, working conditions (including pay), and occupational social security. It includes provisions on remedies and enforcement, adequate compensation, recourse to judicial and conciliation procedures, and the burden of proof, and it comprehensively sets out member-state obligations to ensure the adoption of appropriate penalties, prevention of discrimination, protection against victimization, gender mainstreaming, and dissemination of information.[28]

Marking a significant shift away from gender equality in employment and towards a more holistic view of equality as a fundamental right, the EU made legally binding its Charter of Fundamental Rights with the Lisbon Treaty, which came into force in December 2009. The Charter (which was originally drawn up in 1999/2000) contains a basic equality before the law guarantee (Article 20), as well as a provision which is similar to that in Article 19 TFEU (Article 21) and a reference to positive action provisions in the field of gender equality (Article 23). The adoption of the Charter itself was a significant development, and despite criticisms of its content, it marks a step forward for the legitimacy, identity, and human rights commitment of the EU.

The expansion of legally codified and enforceable rights in the area of gender equality and non-discrimination have, significantly, been the result of feminist mobilization, and they have in turn broadened the space for rights politics both at the national and at the European level. By "legal mobilization," we understand the processes whereby legally codified norms and provisions, but also "soft" law instruments, are invoked and employed by interested actors to pursue particular demands. A central avenue of legal-rights claiming is litigation in court, but the

[24] Council Directive 2000/43/EC, [2000] OJ L303/16.
[25] Council Directive 2000/78/EC, [2000] OJ L303/16.
[26] Council Directive 2004/113/EC, [2004] OJ L373/37.
[27] European Parliament and European Council Directive 2006/54/EC, [2006] OJ L204/23.
[28] Gender-specific EU legislation includes a variety of other directives such as the Directive on Pregnant Workers (92/85/EEC), the Directive on Parental Leave (96/34/EC), and the Directive on the Burden of Proof (97/80/EC). For an up-to-date overview, see Ann Numhauser-Henning, "EU Equality Law—Comprehensive and Truly Transformative?" in *Labour Law, Fundamental Rights and Social Europe*, ed. Mia Ronnmar (Oxford: Hart Publishing, 2011), 113–36.

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invocation of legally codified rights can also form the centerpiece of public and/or political campaigns to pressure decision makers for legislative and policy change. At times, individuals and collective actors use a test-case strategy, selecting cases with a favorable factual background to take to court, with the aim of bringing to the surface and contesting particular issues, as well as of pushing for broader social change. Besides seeking to challenge existing laws and policies, strategic litigation has also been aimed at clarifying laws, promoting a rights consciousness, changing public attitudes, documenting injustices, and empowering vulnerable groups.

Whether strategic or not, legal mobilization on behalf of gender equality in the EU has taken place in multiple levels of law and governance that mutually interact and influence one another. It has also involved far-reaching transnational connections and dynamics among experts, academics, administrators, and policy advocates, as well as feminist activists across EU member states (but also non-EU states). Such legal mobilization, and the judicial responses that it has triggered, have had important consequences for the evolution of equality regimes in national legal and political systems, and also for the construction of the EU's legal and governance system as a whole.[29] The next section explores the legal and institutional channels for legal mobilization on behalf of gender equality through courts in the EU and its member states.

II. Gender equality, litigation, and legal integration between the national and the EU level

National governments have transposed, even with delays, the expanding EU/EC gender equality legislation, however, they have often done so in less than perfect ways. "Minimalist" member states such as the United Kingdom have contested the more expansive EC sex equality laws and policies. As studies show, domestic transposition and implementation of gender equality law (and of EC/EU law more broadly) is often mediated by national ideologies and political traditions, leading to substantial gaps in practice. Studies highlight that through domestic transposition and implementation, national and regional governments often seek to evade or re-steer EU law.[30] In general, the European Commission is the institution responsible for overseeing member-state compliance with EU law.[31] A main instrument that it has to enforce EU law is the initiation of infringement proceedings against a state in the ECJ/CJEU for failure to comply.[32] For instance, in the late 1980s Commission-initiated infringement proceedings brought the first two gender equality cases against France in the CJEU. Involving female rights and benefits in collective agreements and equal treatment for public sector employees, these proceedings led to condemnations and sparked a litigation dynamic domestically in a country where EC law had, until then, remained virtually dormant in this area.[33]

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29 Rachel Cichowski, *The European Court and Civil Society* (Cambridge: Cambridge University Press, 2007).

30 Lisa Conant, *Justice Contained—Law and Politics in the EU* (Ithaca: Cornell University Press, 2002).

31 Article 17 TEU.

32 Article 258 TFEU.

33 Claire Kilpatrick, "Gender Equality: A Fundamental Dialogue," in *Labour Law in the Courts—National Judges and the ECJ*, ed. Silvana Sciarra (Oxford: Hart Publishing, 2001): 31–130 at 67–68.

For the most part, though, enforcement of EC/EU law, including in the area of gender equality, has relied upon decentralized processes of litigation and legal mobilization by individuals and collective or institutional entities. A particular institutional characteristic of the EU legal and governance system that has been critical for the enforcement and diffusion of the EC/EU law in the domestic legal systems of member states is the existence of the preliminary reference procedure (Article 267 TFEU).[34] Designed to promote uniform interpretation of EU law, this procedure enables the CJEU to provide preliminary rulings following questions raised by national courts concerning the interpretation and validity of EU law. The preliminary reference procedure has been instrumental in shaping the opportunities and dynamics of legal mobilization in the EU multilevel system in light, also, of the supremacy and direct effect of EU law. According to the doctrine of direct effect, certain provisions of EU law directly confer rights and obligations upon individuals and public authorities without the need for national implementing legislation.[35] As it has already been mentioned, this was the meaning that the CJEU attributed to the equality clause of the Treaty of Rome (Art. 119 EC, subsequently Art. 157 TFEU). In conjunction with the fact that EU law has supremacy over national law and domestic judges are obliged to give primacy to it,[36] direct effect allows individuals to challenge national legislation for compatibility with EU law, and it also enables domestic courts to exercise judicial review of national legislation in this regard.[37]

The volume of preliminary reference rulings related to gender equality has tended to vary greatly across member states. Such variation raises questions about the political, institutional, or legal factors and conditions that enhance or, conversely, restrict the ability of individuals and collective actors to invoke EU law in order to challenge national law and claim gender equality rights.[38] National legal institutional parameters such as rules of and restrictions in legal standing, the existence of legal aid, and the availability of resources, time limits for raising cases, and rules regarding the burden of proof, are some factors (among others) that are influential in this regard.[39] Equally important may be factors such as political ideology or the extent

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34 On the preliminary reference mechanism, see Clifford J. Carruba and Lacey Murrah, "Legal Integration and the Use of the Preliminary Ruling Process in the EU," *International Organization* 59 (Spring 2005): 399–418; Takis Tridimas "Knocking on Heaven's Door: Fragmentation, Efficiency and Defiance in the Preliminary Ruling Procedure," *Common Market Law Review* 40 (2003): 9.

35 Case 26/62 *Van Gend en Loos* [1963] ECR 13.

36 Case 26/62 *Van Gend en Loos* [1963] ECR 13; Case 11/70) *Internationale Handelsgesellschaft* [1970] ECR 1125.

37 See Lisa Conant, "Europeanization and the Courts: Variable Patterns of Adaptation among National Judiciaries," in *Transforming Europe*, eds. Maria Green Cowles, James Caporaso, and Thomas Risse (Ithaca: Cornell University Press, 2001), 97–115. The question of the enforceability of EU law against private parties (called horizontal direct effect) as opposed to state bodies (vertical direct effect) has proven rather more difficult. In essence, directives do not have horizontal effect and therefore cannot be used in disputes between private individuals. However, the CJEU has found a variety of ways to address this anomaly, including an expansive definition of the state and the concepts of "indirect" and "incidental" effect. See also Sacha Prechal, *Directives in EC Law*, 2nd ed. (Oxford: Oxford University Press, 2005); Michael Dougan, "When Worlds Collide! Competing Visions of the Relationship between Direct Effect and Supremacy," *Common Market Law Review* 44 (2007): 931.

38 Karen Alter and Jeannette Vargas, "Explaining Variation in the Use of European Litigation Strategies," *Comparative Political Studies* 33/4 (May 2000): 452–82.

39 Karen Alter, "The EU's Legal System and Domestic Policy," 496; Alter and Vargas, "Explaining Variation in the Use of European Litigation Strategies," 457.

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to which a litigious culture exists, which may promote or limit the willingness to resort to courts. Last but not least, the case of the United Kingdom demonstrates the importance of independent and active equality agencies with a mandate to engage in litigation. The Equal Opportunities Commission (now subsumed in the broader Commission for Equality and Human Rights) has actively employed EU law in a strategic fashion to pursue legal proceedings in sex equality cases and to advance domestic equality law and doctrine.[40] It provided institutional support to individual litigators and advanced compelling arguments before domestic courts to interpret equality and discrimination claims in accordance with EU norms.[41]

The frequency with which national courts have requested that the CJEU issue preliminary reference rulings in response to domestic equality claims (often invoking EC/EU equality norms to challenge national law) has also varied widely across but also within member states. Up until 2000, hardly any actors outside of the United Kingdom had turned to EC equality law through national litigation that led to preliminary reference rulings. As shown in a comparative analysis, besides the United Kingdom, from which the bulk of such references originated until 2000, some also came from Germany, a small number from France and Denmark, while hardly any references were initiated by courts in Spain and Italy.[42] Overall, the preliminary reference rulings on gender equality encompassed a broad range of issues, yet certain issues tended to predominate in some countries, for instance, discrimination against part-time workers in Germany.[43]

In general, lower courts have tended to submit the bulk of preliminary reference rulings to the CJEU, arguably as a way to assert their authority and bypass the higher courts. The argument, though, that such a competition for power between higher and lower courts drives legal integration[44] has been challenged in gender equality cases. In a study on national courts' participation in the preliminary reference mechanism in the area of gender equality, which covered the period until the late 1990s, this was shown to hold true for Germany but not for the United Kingdom, where higher courts used much more frequently the preliminary reference mechanism.[45] In the same study, Kilpatrick argued that characteristics of the legal-judicial system such as its degree of centralization or decentralization, often a reflection of state structures, influence when and why national courts raise preliminary references and the specific communicative style in which they do so. The highly decentralized and pluralistic judicial structures in Germany rendered it possible for social, legal, and judicial actors at the state and local level to pursue EU-oriented gender equality action, in contrast to the United Kingdom judicial system, which is relatively centralized and orderly.[46]

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40 James Caporaso and Joseph Jupille, "The Europeanization of Gender Equality Policy and Domestic Structural Change," in *Transforming Europe*, eds. Maria Green Cowles, James Caporaso, and Thomas Risse (Ithaca: Cornell University Press, 2001), 21–43 at 29–31.

41 Alter and Vargas, "Explaining Variation in the Use of European Litigation Strategies," 461.

42 See Claire Kilpatrick, "Gender Equality: A Fundamental Dialogue," 41.

43 Ibid., 46.

44 Karen Alter, *The European Court's Political Power* (Oxford: Oxford University Press, 2009).

45 See Claire Kilpatrick, "Gender Equality: A Fundamental Dialogue," 45.

46 Ibid., 48–50.

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Preliminary reference rulings requested by national courts have provided an indispensable pool of disputes and legal questions from which the CJEU has drawn to elaborate on and expand its gender equality case law. Yet they comprise only a fraction of the gender equality litigation taking place in member states, including litigation that invokes EU law. As has been rightly noted, the volume of preliminary reference rulings can be highly misleading as a measure of national level gender equality litigation, as well as of legal integration in the EU, and it is certainly incomplete.[47] Gender equality litigation invoking constitutional guarantees (often in conjunction with EU law) is much more widespread in domestic courts. National judges have increasingly interpreted national laws and claims in reference to the EC equality legislation, even if they have shied away from the "judicial dialogue" provided for through the preliminary reference mechanism. For instance, while until 2000 Spanish courts had not requested any preliminary reference rulings in gender equality, EC/EU law was increasingly invoked before the Spanish Constitutional Court. Even though it has paid close attention to EC/EU norms, the latter nonetheless maintained its distinct vision of gender equality, which has been substantially distinct from that projected by the CJEU.[48] In sum, while harder to identify and comparatively examine both in quantitative and qualitative terms, national-level litigation invoking EU and constitutional equality norms comprises the bulk of legal action in the multilevel system of European governance.

Since the 1970s and 1980s, the emergence and expansion of national constitutional and EC sex equality law fundamentally transformed the possibilities for and dynamics of legal mobilization in this field. At the domestic level, individuals have been able to invoke in litigation national statutory or constitutional norms of sex equality, increasingly alongside EC/EU equality law, to challenge state or private acts. National courts in turn are obliged to interpret domestic norms in the light of EC/EU law (and CJEU case law), and they have increasingly done so over time, albeit with substantial variation within and across member states.

Gender equality litigation and the resulting judgments of the CJEU appear to have reinforced one another, promoting over time an extension of EC equality law into more areas, and arguably enlarging the space for the institutional participation of individual and social actors in the EU legal and governance system.[49] Individual litigation and CJEU activism to attribute to treaty-based equality provisions rights enforceable before national courts, has been seen to reflect a neofunctionalist kind of "alliance" between individuals and EU organizations pushing national governments to advance gender equality.[50] From this perspective, the CJEU has been seen as a prime agent of legal integration and constitutionalization in the EU, including in the area of gender rights. By establishing a common body of case law and equality norms, the EU legal system extends its progressive reach across the diverse legal and political jurisdictions of member states. It arguably

47 Ibid., 94.
48 Claire Kilpatrick, "Gender Equality: A Fundamental Dialogue," 105.
49 Rachel Cichowski, *The European Court and Civil Society*.
50 Rachel A. Cichowski and Tanja A. Börzel, "Law, Politics and Society in Europe," in *State of the European Union* 6, eds. Tanja A. Börzel and Rachel A. Cichowski (Oxford: Oxford University Press, 2003).

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empowers individuals and groups by expanding opportunities for them to mobilize and participate in the public sphere, and it augments pressures for national governments to reform national law and policy in accordance with the presumably more advanced sex equality norms contained in EC law and CJEU case law.

The tendency to depict a process of progressive legal expansion that overlooks instances of reactionist litigation and regressive judicial rulings as well as policy responses, has already been noted and questioned.[51] A more important shortcoming, though, in existing studies on legal mobilization in the multilevel legal and governance system of the EU is that what they depict as a "vertically integrated regime, in which individual rights are juridically guaranteed,"[52] is in practice thoroughly shaped and fractured by national and possibly subnational legal and social differences. The diversity in the constitutional equality norms, national law, and government policies transposing EU equality law, is time and again acknowledged. The varying ability of social and equality activists from different national contexts to use opportunities to open up new avenues of exerting pressure and participating in the EU institutions has also been highlighted.[53] However, in the end, the dynamic between national litigation and EU-level judicialization is seen to converge, arguably empowering feminist activists and progressively compelling member states to give up some of their law-making and policy-making power to supranational judicial control.[54]

III. Law and feminist mobilization in the EU multilevel governance: A new research agenda

In the context of the EU multilevel system of law and governance, the interactive dynamic between law and social activism is fractured and asymmetric. In the first place, EU equality law and CJEU case law is transposed, received, and implemented in highly dissimilar ways by the governments and national judiciaries, defining unevenly the nature and scope of opportunities and constraints for legal mobilization and policy change. Secondly, the distinct evolution and orientation of national feminist movements and activists shape their interactions with other social actors domestically and transnationally. Social and civil society characteristics specific to a country also influence the strategies that they employ and their ability to influence legal and policy change at both the national and the supranational level. Such diversity is highly consequential for the actual protection from sex discrimination that individuals enjoy across the member states, but also, more broadly, for the extent to which a community of law and rights can be created in the EU. The social and mobilizational dynamics of this multilevel public participation and policy space in the area of gender equality are messy and fragmented. As a result, the

[51] Karen Alter, "The EU's Legal System and Domestic Policy," 515.

[52] Rachel A. Cichowski and Alec Stone Sweet, "Participation, Representative Democracy, and the Courts," in *Democracy Transformed? Expanding Political Opportunities in Advanced Industrial Democracies,* eds. Russell J. Dalton and Susan Scarrow (Oxford: Oxford University Press, 2003), 192–219 at 203.

[53] Rachel Cichowski, *The European Court and Civil Society*.

[54] See the review of Rachel Cichowski's book *The European Court and Civil Society* by Antoine Vauchez: "Democratic Empowerment through Euro-Law?" *European Political Science* 7 (2008): 444–52.

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emergent set of equality rights at the supranational level, as they are filtered into and contested in the different national legal and political systems, is highly uneven, incremental, and patchy.[55]

The contributions in this special issue thoroughly consider the far-reaching diversity across member states and domestic structural, ideational, and cultural factors and conditions pertaining to the legal and judicial system. At the same time, a fuller investigation into patterns of legal action invoking national and EC/EU equality law requires paying attention to the national and transnational interactions and strategies of the various social actors involved in it, as well as to their simultaneous and interrelated engagement in equality struggles at the subnational, national, and supranational level. Such actors comprise practicing lawyers, who often combine legal action with a public interest commitment, academics and law professors in particular, activist judges (such as those identified in first instance labor courts in Germany or in Spain's Constitutional Court[56]), feminist activists, as well as trade unions, among others. To be sure, not all of these actors are necessarily advocates of feminist goals but may actually mobilize to counter such goals. For instance, the role of trade unions in this regard has been highly contradictory. While in countries like Germany they have tended to take the lead in equal pay cases, in countries like Greece their support in this respect has been at best ambivalent and fluctuating.

In the first place, while studies have probed into the interactive dynamics between litigation and national or CJEU court rulings, the role of feminist actors, their attitude towards law, and their involvement in legal tactics simultaneously at the national and EU levels, have not been sufficiently and systematically explored. The formation of transnational networks of experts targeting the EU as an alternative arena of struggle have been crucial in altering the structure of legal opportunities, as well as the legal and policy dynamics at the national level. Such networks have been a highly effective vehicle for diffusing knowledge about and awareness of EC/EU law and case law among judges and social actors, as well as a trigger for a more critical and activist approach to national laws and constitutional norms regarding sex equality. For instance, in countries like France and Greece, the participation of female jurists and feminists in the EC Network of Equality Experts was decisive in reversing the longstanding absence (or near absence) of legal contestation of gender equality issues in national and EU courts. In the 1990s, the Greek and French female jurists were pioneers in initiating more active processes of legal mobilization by individuals, lawyers, and women's organizations in their respective countries.[57] Existing studies on gender equality have focused on either the EU or the national level, throwing limited light on the interactions between social and legal actors across member states and across different levels of law and governance.

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[55] Sabrina Tesoka, "The Differential Impact of Judicial Politics in the Field of Gender Equality. Three National Case Studies under Scrutiny" (European University Institute, Working Paper, Robert Schuman Center, No. 99/18).

[56] Claire Kilpatrick, "Gender Equality: A Fundamental Dialogue," 128.

[57] Claire Kirkpatrick (2001), 72–73. On the case of Greece, see the article by Anagnostou in this issue.

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Secondly, in studying legal mobilization and rights politics in the multilevel EU system, we need to extend our analytical and empirical focus beyond litigation by incorporating law and judicial contestation into broader contexts of struggle in order to understand their significance. As it has been emphasized, "litigation strategies are often part of a multipronged strategy designed to gain leverage in extra-judicial negotiations," and they are seldom enough to bring about legal or policy change on their own.[58] Legal mobilization and litigation have very much been part of the repertoire of actions employed by social movements, either in place of, but more frequently in tandem with, political, public campaigns and/or other strategies.[59] While feminist debates have often identified legal tactics with institutional "insiders," juxtaposing them with "outsiders" who engage in protest and are loyal to grassroots organizations, the linkages between these two in practice have been extensive and complex.[60] Indeed, the "legalization of protest" that employs the language of courts and equality rights has marked the second-wave feminism from the 1970s onwards, with its advocates engaging in activism both inside and outside established centers of power.[61]

Courts have a central role to play in reviewing whether state laws and practices conform to gender equality principles. The responses of national courts and their willingness to vindicate gender equality claims tend to change over time, while they also tend to vary across countries and issue areas. Scholars of judicial impact, though, have cautioned against placing too high expectations on the ability of courts to bring about progressive policy or social change, unless there is sufficient support from legislative and executive officials.[62] Their ability to do so is often compromised, conditional, and clearly bounded.[63] Courts lack the ability to enforce their decisions with policy makers, who may seek to eschew rather than conform to them. It is also equally likely that favorable court interpretations may provoke counter-mobilization by opposition actors who resist change.

Judicial pronouncements of legal entitlements may, however, have various unintended but important political consequences more broadly. Even if court decisions do not automatically influence state policy, they still constitute authoritative statements that are drawn upon by interested actors in contesting state policies. Under particular conditions, they may form the cornerstone of political or media campaigns, ascribing legitimacy to the demands of social actors. Furthermore, judicial interpretations of rights can shape subsequent prospects for legal mobilization if they are receptive to particular kinds of claims, but they may, conversely, foreclose further opportunities for litigation if they do not vindicate an initial set of appeals. Existing legal norms and judicial responses are not always on the side

58 Alter and Vargas, "Explaining Variation in the Use of European Litigation Strategies," 462.
59 Paul Burstein, "Legal Mobilization as a Social Movement Tactic: The Struggle for Equal Employment Opportunity," *American Journal of Sociology* 96/5 (March 1991): 1201–1225 at 1204.
60 Mary Fainsod Katzenstein, *Faithful and Fearless—Moving Feminist Protest inside the Church and Military* (Princeton: Princeton University Press, 1998).
61 Mary Fainsod Katzenstein, *Faithful and Fearless*, 41.
62 Gerald Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (Chicago: University of Chicago Press, 1991), 31.
63 Stuart A. Scheingold, *The Politics of Rights* (Ann Arbor: University of Michigan Press, 1974; 2nd edition, 2004), 103.

of gender equality advocates and progressive reforms. In addition, advancing gender equality claims through legal norms and rules may make imperative a narrowing or moderation of such claims, along with giving up other tactics.[64]

With the exception of the UK (and partly the French) case, which have received considerable attention in the literature, and less so of other countries like France, Germany, and the Netherlands, we have little knowledge of legal mobilization in member states. Countries like the United Kingdom, however, have some unique characteristics that may render them more an exception than the rule in the European context. Therefore, our understanding of domestic social-legal mobilization and judicial application of gender rights largely stems from a country with a common law (as opposed to a civil law) tradition (like the United Kingdom), or from countries with an overall more robust and active civil society than Greece and southern Europe. On the other hand, it is the study of a south European case study, that of Spain, that has cast doubt on the argument that EU law empowers individuals to claim their rights before courts. Indeed, individual and collective social actors in Spain have not engaged in litigation before national courts to enforce EU environmental law, even though they could have benefited from doing so, due to their weak action capacity.[65]

At the crossroads of legal and political studies, the five articles (in addition to this introductory article) included in this special issue examine legal mobilization on behalf of gender equality in the context of the multilevel system of the EU. In adopting a bottom-up perspective, they probe into the factors that variably influence the resort of individual and collective actors to legal tactics in pursuit of non-discrimination and gender equality. They are also interested in the extent and ways in which feminist organizations have employed such tactics alongside other forms of political action. Does mobilizing the law and pursuing legal action promote feminist goals, as well as progressive social and policy change? Or, conversely, does it compromise or even substantially restrict the ability to bring about such a change?

Significantly, the country cases that are covered encompass a variety of different legal and judicial systems in Europe and therefore shed light on the range of differences defining the degree and nature of rights mobilization processes that emerge. Besides the case of the United Kingdom (Skeet and Millns) with its common law tradition, unwritten Constitution, and traditional euroskepticism, this special issue also includes a case study on Greece (Anagnostou) that provides a southern European perspective. Apart from its civil law tradition, Greece, which made a transition to democracy in the 1970s, is also characterized by a relatively weak civil society. The case study of Poland (Sledzinska-Simon and Bodnar) is that of an ex-communist country with a recently developed but also highly contested rights culture that has developed in close relation to the country's membership in the EU. The fourth article is a comparative study of four countries (Germany, France, Switzerland, and Poland) (Fuchs) that looks at the very different legal and

[64] Michael McCann, "Law and Social Movements," *Annual Review of Law and Social Science* 2 (2006), 26.

[65] Tanja A. Börzel, "Participation Through Law Enforcement," *Comparative Political Studies* 39/1 (2006): 128–52 at 135.

political opportunity structures in these states to promote gender equality, and the final contribution is a study of gender-related mobilization at the EU level (Cichowski).

Government compliance with EU and national equality law has been the subject of a number of studies.[66] Yet the effects of law beyond its potential policy impact, such as on discourse and actors' consciousness and political strategies, have hardly been explored. The expansion of EU-derived equality rights, as part of the progressive evolution towards a fundamental rights policy on the part of the European Community, could be seen as a vehicle for strengthening perceptions of and discourse concerning a common European citizenship, as well as for bolstering the legitimacy of the EU. However, little research has been done that inquires into the discursive consequences of law and rights. While the contributions of this issue do not pursue this line of inquiry, we identify it as a fruitful and greatly unexplored area of research.[67]

Future research and analyses on law and gender and multilevel governance in the EU can also advance by drawing further analytical insights and empirical findings from the burgeoning literature on gender, state structures, and international governance institutions in different parts of the world. At the same time, the purpose of formulating a research agenda is not to build a generalizable theory about the effects of multilevel governance on women's politics and on gender equality, at least not at this stage. As scholars who have studied this in relation to state architecture and federalism have already concluded, the diversity of federal structures and the way in which they divide up powers and competences between different levels, but also the asymmetrical way in which they may do so among the state units, render it difficult to do so.[68] This difficulty is likely to be even more pronounced in light of the even greater heterogeneity, asymmetry, and complexity of multilevel governance structures.

IV. Conclusions on the possibilities and limits of law for gender equality and feminism in Europe

A central critique of national and EU gender equality law in Europe has focused on the predominance of negative rights as well as on the individualized, "complaints-led," and judicial enforcement approach that runs through it. Such an approach has been seen to be largely inadequate to tackle macro-level substantive inequalities that reproduce structural injustice.[69] Developments such as the application of the concept of indirect discrimination, the reversal of the burden of proof, as well as the obligation to pursue a proactive approach in the form of positive action or preferential treatment measures have all been introduced, mainly following the Amsterdam Treaty, in order to redress such an inadequacy. At the same time,

[66] Lisa Conant, "Europeanization and the Courts: Variable Patterns of Adaptation among National Judiciaries," 97–115.

[67] Michael McCann, "Law and Social Movements"; Carol Harlow and Richard Rawlings, *Pressure Through Law* (London: Routledge, 1992).

[68] Gwendolyn Gray, "Federalism, Feminism and Multi-level Governance: The Elusive Search for Theory?" in *Federalism, Feminism and Multi-level Governance*, 19–33 at 30–31.

[69] Ann Numhauser-Henning, "EU Equality Law—Comprehensive and Truly Transformative?" 126. See also Sandra Fredman, "Changing the Norm: Positive Duties in Equal Treatment Legislation," *Maastricht Journal of European and Comparative Law* 12/4 (2009): 369–97.

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recent CJEU case law applying and interpreting the concept of indirect discrimination arguably takes away equality law from its limited liberal underpinnings and potentially opens the door to what is characterized as a "truly proactive" and "transformative" direction.[70]

It has been convincingly argued that EU gender equality law entails elements both of the traditional rights-based paradigm and of a proactive approach and could therefore evolve in both ways.[71] On the one hand, the CJEU has insisted on a strict individualized approach in applying Article 157(4) TFEU that permits member states to adopt measures to correct women's underrepresentation or to compensate for disadvantages. At the same time, while the ECJ has accepted as permissible quota measures to reserve places for women (e.g., in cases like *Kalanke* or *Marschall*)[72], it has done so under the condition that they be accompanied by a "saving clause" that simultaneously allows for individual consideration to be given to male applicants. On the other hand, the Amsterdam Treaty, as already mentioned, and even more so the EU Charter of Fundamental Rights, endorse a proactive strategy by requiring that "equality between men and women must be ensured in all areas, including employment, work and pay."[73]

The future of gender equality within the European Union and as a result within the twenty-seven EU member states looks both challenging and ripe with potential. As we have demonstrated, strategies for gender equality are tightly linked to strategies for development and European integration more generally. These have developed significantly in shaping European views on the socioeconomic and political advancement of women during the decades of the 1970s, 1980s, 1990s, and 2000s. While the approaches to gender equality expressed through the decades are different ways of approaching the same latent problem, there have been significant shifts in the conceptions and legal instruments used. Now, the EU possesses a whole arsenal of gender equality tools that are at the disposal of interested litigants and include equal treatment, positive action, mainstreaming, and fundamental rights. As all those with an eye for gender justice know, however, there is often a significant gap between law in the books and law in practice.

Enforcement remains a key challenge. It is with a view to putting law in the books into law in action that the present legal mobilization project aims to demonstrate the importance of the complex relationships between the women's movement, feminist activism, litigation strategies, individuals, and civil society groups at the national but also at the supranational European level. We hope that this collection sets the agenda, and demonstrates the need, for further research into social and legal mobilization for gender equality within Europe across *all* the member states, taking into account the very different mobilizing factors in the different countries, together with their different domestic legal opportunity structures and cultures of litigation. With such a wealth of information to hand, a more comprehensive approach to gender justice throughout Europe may be envisaged.

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70 Ann Numhauser-Henning, "EU Equality Law—Comprehensive and Truly Transformative?" 135.
71 Sandra Fredman, "Changing the Norm," 389–91.
72 Case C-450/93 *Kalanke v. Freie Hansestadt Bremen* [1995] ECR I-3051; Case C-409/95) *Marschall (Hellmut) v. Land Nordrhein Westfalen* [1997] ECR I-6363.
73 Article 23, EU Charter of Fundamental Rights.