The European Court of Justice and Social Policy:
A Mixed Methods Analysis of Preliminary References from the EU-15, 1996-2009

By

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1. Introduction

This chapter will introduce the context of the study. It describes the importance of the Court of Justice in creating an interlinked European legal system. It introduces the preliminary references system of the EU and explains why that system has become an important force challenging the status quo of Member State policy. The uneven distribution of preliminary references across the Member States of the EU, as well as across issue areas, is considered. The theory of how a concentration of preliminary references could steer the jurisprudence of the Court as well as have broader implications for EU social policy is explained. Finally, the structure of the remainder of the thesis is set out.

The Court of Justice (ECJ)[1] has been important in the integration of the EU and has been a key driver in the increasing Europeanisation of social policy. Decisions of the Court have eroded the territorial boundaries of the welfare states in the EU. The Court has chipped away at Member State control over who has the right to receive services under the national welfare state, where those services may be consumed and who can provide those services (Leibfried and Pierson 1995). Thus, national sovereignty over the welfare state, previously thought of as absolute (De Swaan 1994), has become compromised. The EU Member States are only semi-sovereign over their own welfare states (Leibfried and Pierson 1995).

However, the reach of the Court is limited to the cases that are brought before it. It cannot set its own agenda. Its caseload is comprised of enforcement actions brought by the Commission and preliminary references from the national courts

[1] In the Treaty of Lisbon the Court of Justice for the European Communities was renamed. The larger institution is the Court of Justice of the European Union, which is comprised of the Court of Justice, the General Court and specialised courts. The high court, the Court of Justice, is still most commonly referred to in English as the European Court of Justice or the ECJ. In this thesis it will be referred to as the Court of Justice, the Court or the ECJ.

of the Member States. These preliminary references are the only means for cases to be brought to the Court by private parties. Preliminary references have been important in the advancement of EU law. Almost all of the significant rulings regarding EU law have come in decisions in matters that reached the Court of Justice through the preliminary reference procedure (Chalmers, *et al.* 2010, Broberg and Fenger 2010). Preliminary references are unevenly distributed across the Member States of the EU. Moreover, some Member States' preliminary references are concentrated in particular policy areas. The jurisprudence of the Court, and consequently the social policy of the EU, could be steered by this uneven distribution.

1.1 The Court of Justice

The two types of actions before the ECJ are direct actions and preliminary references. Direct actions may be brought by the Commission or by other Member States under Articles 258-260 TFEU[2] in order to enforce compliance by an EU Member State with European laws and policies. The second type of action is a preliminary reference under Article 267 TFEU, which allows, and in some cases requires, the national courts of a Member State to refer questions about the interpretation of EU law with the Court of Justice. Preliminary references can involve questions about the interpretation of European law or challenges to the validity of secondary European law or the laws of the Member States with reference to European law. Lower level Member State courts may make a

[2] The Treaty of Lisbon replaced the existing EU treaty structure with two treaties. One of these is the Treaty on the Functioning of the European Union (TFEU), which replaced the previous TEC, the source of most EU law. It details the competencies of the Union and the procedures to be followed. The other, the Treaty on European Union (TEU) is more expansive, and covers the values and principles of the Union, the institutions, external relationships and more.

preliminary reference to the Court to settle a question of European law (Art. 267(2) TFEU), but courts from which there is no right of appeal are obliged to send a reference (Art. 267(3) TFEU) [3], unless the European law is sufficiently clear to be applied without assistance from the European Court.[4]

The legal order of the European Union is not restricted to the courts sitting in Luxembourg. They are at the heart of a web of courts and tribunals that stretches into every corner of every Member State, all effectively functioning as European courts (Broberg and Fenger 2010). Through the European Union legal framework, Member State courts are empowered to determine that national legislation and policies contravene European law. Because European law is supreme over the law of the Member States in the fields occupied by European law[5], some Member State courts in states without judicial review were empowered to overturn their national laws for the first time. The ECJ has sought to expand this European legal order, permitting many different bodies to send preliminary references. Some of these bodies would be considered regulatory or administrative in their Member State. This has allowed the preliminary references procedure to expand 'irrespective of national precedent or

[3] Article 267(3) TFEU also obliges lower-level national courts if they are refusing a litigant permission to appeal. This would apply in systems such as that of the UK, where permission to appeal must be granted. However, the remedies available to a litigant being denied both a preliminary reference and leave to appeal would be very few.

[4] The doctrine of *acte éclairé* allows a court not to refer if a materially identical matter or one involving the same point of law has already been decided by the Court of Justice. *Acte clair* applies if the provision is 'so obvious that it does not leave scope for any reasonable doubt', and that would be clear to all of the other courts in the Member States, as well as to the Court of Justice. Case 283/81, *CILFIT v Ministry of Health* (1982) ECR 341, para. 16.

[5] Case 6/64, *Costa v. ENEL* [1964] ECR 585; 'Declaration 17 Concerning Primacy' of the Treaty of Lisbon.

hierarchies' (Chalmers, *et al.* 2010, p. 148). There is debate about whether this relationship between the ECJ and national courts is hierarchical or an interaction between equals (de la Mare 1999, Dashwood and Johnston 2001), but the heavily interlinked nature of the system is unquestionable.

The European legal system is therefore integrated with the legal systems of its Member States, with each playing a role in the smooth administration of European law. This has assured compliance with EU law, otherwise enforceable only through a system of international surveillance, by introducing an independent mechanism of enforcement that is removed from political discretion (Broberg and Fenger 2010). Member States are obliged by Article 19(1) of TEU to 'provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.' Through this system, most of the costs of enforcing EU laws are shifted onto the legal systems of the Member States. 'The EU's limited implementation and enforcement capacity makes it tempting for policymakers to effectively privatise governance by enlisting private parties and national courts to enforce EU policies' (Kelemen 2008, p. 33). The process has linked together the legal systems and the policymaking of the Member States in new ways. 'A consequence of the reference process is that litigation in one Member State is now equally legally significant for the legal systems of all the other Member States' (Chalmers, *et al.* 2010, p. 158).

The ECJ is empowered to answer questions of the interpretation of EU law and then to send the case back to the national court for adjudication. It has no authority to declare a Member State law invalid, that power instead being

reserved to the referring court, which has the responsibility to use the ECJ's answer to make its own ruling. However, the ECJ has repeatedly asserted that it has no authority to rule upon the application of an EU law or to decide upon the validity of a Member State's law while at the same time doing essentially that. The Court regularly holds that Member State measures are not in compliance with EU law. Although it is up to the referring Member State court to apply the holding of the ECJ in the preliminary reference to the national measure being challenged, they do so almost without fail. National court compliance with the rulings of the ECJ is very high, with 96.3 per cent of decisions following the ECJ ruling according to the only study (Nyikos 2003). Moreover, a decision of the Court has established that an action for damages against a Member State is allowed if it is manifestly apparent that a national court has failed to comply with its obligations under Article 267(3) TFEU.[6]

Some argue that the docket of the court is skewed (Chalmers, *et al.* 2010). The Court's remit within the EU legal order means that its caseload focuses on challenges to the validity of national measures in reference to EU law. 'Litigation is predominantly about the overturning of national regimes by discontented constituencies which are, otherwise, too isolated to mobilise change domestically' (Chalmers, *et al.* 2010, p. 179). 'Many cases that reach the ECJ through national courts arrive there because other avenues of influencing domestic policy failed' (Alter 2000, p. 393). A study in the UK found that the preliminary reference process was only rarely used by parties seeking compensation for injuries. Instead, litigants were interested in establishing new

[6] Case C-224/01, *Köbler v. Austria* [2003] ECR I-10239.

legal precedents, or interested in regulatory or fiscal politics (Chalmers 2000). If these challenges to national laws or regulations are successful in only ten per cent of cases, the ECJ becomes a powerful body in opposition to Member State *status quo* (Chalmers, *et al.* 2010). In fact, four previous empirical studies of national measures challenged through preliminary references to the ECJ found that the Court ruled that the national measure in question violated EU law over 50 per cent of the time (Cichowski 1998, 2004, Kilroy 1999, Stone Sweet and Brunell 1998).

The distribution of preliminary references is uneven across the member states of the EU. Kuper pointed out that as of 1998 the constitutional courts of no fewer than four of the original signatories of the Treaty of Rome had never made a referral to the Court (1998). There has been little recent work looking at the distribution of preliminary references to the ECJ across the EU, despite the fact that the European legal system has become increasingly interlinked and the decisions of the ECJ have made real impact on Member State policymaking. As will be set out in more depth later, this is particularly true in the area of social policy.

This means that the reach of EU law could be greater into some Member States. Citizens of some Member States will have better access to justice in the European legal system, and be better able to enforce their European rights, whether against their Member State or other private parties. Moreover, it has implications for all of the other Member States. If some Member States send disproportionate numbers of preliminary references, or if those references are concentrated in

particular policy areas, then this will also drive the agenda of the ECJ. Common law case law advances via built-up precedent, where a decision is linked to a string of prior decisions, each of which builds upon the decisions in the earlier cases. Even though the Court of Justice is not a common law court, and does not have a formalised system of precedent, Advocate General Eleanor Sharpston noted the Court may not have 'the exactly the same precedent system as in English law, but we do have a precedent system nevertheless' (Interview 8/9/11). Through 'gap-filling' (Hartley 1998, p. 70), the process by which cases build upon one another to address issues left by previous cases, a line of legal principle is drawn (Martinsen 2006).

A skewed distribution of preliminary references by Member State or issue area will affect the direction of EU legal precedent, and, as a result, policy. The interlinked nature of the EU legal system will then ensure that this established precedent affects every Member State. Which member states are sending preliminary references to the ECJ, and why that distribution should be so uneven, thus become important questions, with implications for the direction of future EU social policy.

1.2 An illustration of the importance of where cases originate

An example of this theory of how the distribution of preliminary references might impact upon EU social policy can be found in the area of cross-border provision of healthcare. This is an illustration of the process of negative integration, whereby 'step by step the EU has been remodeling the national welfare states' (Leibfried 2000, p. 48). Healthcare is a 'less-likely' case for

European integration (Martinsen 2005, p. 1036, 1053) because although it implicates fundamental free movement principles, the Member States retain the competence to organise their healthcare policies and have consistently resisted regulation from the EU. Even this less-likely characterization may be optimistic, as it was the ECJ that ruled that healthcare was a 'service,' and therefore fell under a fundamental freedom. Despite the unlikelihood, an important line of cases, called the *Decker/ Kohll* jurisprudence, around cross-border provision of health care services has greatly expanded the reach of EU law in the area (Obermaier 2008). In the process, a 'European healthcare dimension' has been established 'in that the European patient is empowered by a set of rights to cross-border treatments' (Martinsen 2005, pp. 1035-6).

If we look at the Member States from which the *Decker/ Kohll* cases arose, all of the early cases came from Member States with social security-based healthcare systems. There are two primary types of health systems in the EU: Social security-based and national health systems. Within the social security-based healthcare systems there are two subtypes; those systems that provide cash reimbursement for services (Belgium, France, Luxembourg) and those that provide in-kind benefits (Austria, Germany, Netherlands). The Member States with national health systems are: Denmark, Finland, Greece, Ireland, Italy, Portugal, Spain, Sweden and the United Kingdom (Obermaier 2009).[7] The

[7] Obermaier (2009) examines the impact of the *Kohll/Decker* jurisprudence in France, the UK and Germany. He found that in France and the UK the application of ECJ case law made a major difference in implementation, but in Germany less so. He concludes that, although it did lead to some loss of Member State control over territoriality, the overall effect on Member State health systems has been relatively minor. It is a useful and interesting study, however, when it was

healthcare services provided in social security-based systems, particularly those with cash reimbursement, have a much closer nexus to the market than is true of national health systems. This plays into the market-making justifications for much of EU law. It is in the removal of barriers to a common market, or negative integration, that the Court has played the 'most significant role' (Leibfried 2000, p. 49).

The first two cases in the line arose from a social security system with cash reimbursements. In *Decker*[8], a Luxembourg national sought to be reimbursed for spectacles he had purchased in Belgium without pre-authorization. In this instance the free movement of goods, another fundamental freedom, was also implicated. Similarly, in *Kohll*[9], a Luxembourg national sought pre-authorisation for orthodontic care in Germany, which was refused. In *Decker/ Kohll* the ECJ held that the requirement for prior authorisation was an unjustified impediment on the free movement of goods and services. Moreover, the Court grounded this right in a fundamental freedom – the free movement of services under Article 49. In both cases the services provided were at the periphery of healthcare. Subsequent cases would expand this jurisprudence further.

published in 2009, it was quite early to assess what the impact of *Watts* (decided in 2006) will be on the NHS.

[8] Case C-120/95, *Decker v. Caisse de Maladie de Employés Privés* [1998] ECR I-1831.

[9] Case C-158/96, *Kohll v. Union de Caisses de Maladie* [1998] ECR I-1931.

In the subsequent *Geraets-Smits/ Peerbooms*[10] decision, the Court held that even hospital services were exportable. However, the ECJ upheld pre-authorisations for hospitalisation, as necessary for an orderly, stable planning process for the provision of hospital services. The *Vanbraekel*[11] decision extended the line of cases by holding that services under the European E112 system, previously reimbursable at the state rate of the Member State providing the services should be reimbursable at the home state rate if that is higher.

In *Müller-Fauré/van Riet*[12] the ECJ expanded the jurisprudence further; explicitly finding that benefits were exportable under a social security system based upon in kind provision of services. Cross-border outpatient care did not require pre-authorisation, but it was permissible for cross-border inpatient care. Moreover, in considering undue delay the national authorities had to consider the circumstances of the specific case, such as the degree of pain and whether it prevented the patient from carrying out a professional activity (*Müller-Fauré/van Riet*, para. 90). In *Inizan*[13], the ECJ upheld pre-authorization, but only for inpatient care. Even collateral costs associated with the treatment were reimbursable. In *Leichtle*[14], Germany reimbursed a citizen for thermal care received in Italy, even though he had been refused prior authorisation, but not

[10] Case C-157/99, *Geraets-Smits v. Stichting Ziekenfonds and Peerbooms v. Stichting CZ Groep Zorgverzekeringen* [2001] ECR I-5473.
[11] Case C-368/98, *Vanbraekel v. Alliance Nationale de Mutualities Chretiennes* [2001] ECR I-5363.
[12] Case C-385/99, *Müller-Fauré v. Onderlinge Waarborgmaatshappij OZ Zorgverzekeringen and E.E.M. van Riet v. Onderlinge Waarborgmaatschappij ZAO Zorgverzekeringen* [2003] ECR I-4509.
[13] Case C-56/01, *Inizan v. Caisse Primaire d'Assurance Maladie des Hauts-de-Seine* [2003] ECR I-12403.
[14] Case C-8/02, *Leichtle v. Bundesanstalt für Arbeit* [2004] ECR I-2641.

for the costs associated with travel. The Court found that the German requirement of an assessment by an expert that the services were necessary and more likely to be successful if undertaken in another country was an undue impediment and a deterrent to free movement. In *Keller*[15], the Court held that treatments provided outside the EU on the authorisation of the host Member State as medically necessary must be reimbursed by the home Member State. The decision of the insurance institution in the host Member State as to medical necessity was binding upon the insurance institution in the home Member State.

In *Watts*[16] the Court finally addressed a national health service. Mrs Watts, a UK national, sought preauthorisation to receive a hip replacement operation in France. Her application was refused on the grounds that the waiting time, then a year, for the procedure met national targets. Her case was eventually reassessed, and she was reclassified as a higher priority patient who would likely receive the operation in April or May of 2003. Nevertheless, in March of 2003 she went to France for the procedure and then sought reimbursement. For the first time the ECJ explicitly confirmed that the right to cross-border provision of medical services applied in national health systems[17]. This was true even if the same care would not be reimbursable if sought through private provision in the UK. Moreover, what constituted undue delay had to be considered in light of the

[15] Case C-145/03, *Heirs of Annette Keller v. Instituto Nacional de la Seguridad Social* [2005] ECR I-2529.
[16] Case C-372/04, *The Queen on the application of Yvonne Watts v. Bedford Primary Care Trust and Secretary of State for Heath* [2006] ECR I-4325.
[17] Although Spain, the home country in *Keller*, has a national health system, this was not in question in the matter.

individual case, not national targets. This has potentially huge implications for national health systems, as their primary rationing mechanism is the waiting list.

This line of cases is an excellent demonstration of the importance of where preliminary references originate, and of clusters of preliminary references in particular policy areas. The initial cases were from the type of healthcare system, social security with cash reimbursement, which has the closest connection to the common market. Indeed, the first case dealt with spectacles, which are a good as well as a service. The Court, in deciding the cases, grounded its reasoning in a fundamental freedom, the free movement of services. The series of cases over the next few years, all of which originated in Member States with social security-based health systems, expanded and refined this right to cross-border care by filling in the gaps in what had gone before (Hartley 1998). A clear pathway of precedent was established. When the last case, *Watts*, came to the Court, its reasoning followed this path and the Court held that the right to cross-border care applied even in systems with a much weaker nexus to the market. It is possible that the Court, if it had been presented with *Watts* without the preceding *Decker/Kohll* jurisprudence, might have made the same expansive holding and grounded it in a fundamental freedom. But that would have been hugely controversial and might have roused the Member States to act in a more drastic manner than the earlier cases prompted.[18] The years of cases building up

[18] There was initial resistance from the Member States to the earliest decisions of the Court of Justice on exportability of health services, the *Pierik* cases (Case 117/77, *Bestuur van het Algemeen Ziekenfonds Drenthe-Platteland v. G. Pierik* [1978], ECR 825; Case 182/78, *Bestuur van het Algemeen Ziekenfonds Drenthe-Platteland v. G. Pierik* [1979], ECR-1977), which in part resulted in a legislative

from the social security-based health systems must have made the *Watts* decision more likely. The *Decker* and *Kohll* cases, dealing with services that had an element of goods, in a Member State that reimburses with cash for healthcare services, were the thin end of the market-making wedge. Requiring a national health system to reimburse for care provided in another Member State that would not have been reimbursable if provided privately in the home Member State was the end result. Thus, where preliminary references originate can have real implications for the direction of the case law and the social policy of the EU.

1.3 Research Puzzle

How do we account for the different usage of the preliminary reference process across the member states of the European Union? The theoretical perspective of this study is that the different usage of the preliminary reference procedure arises from the institutional structures of the national legal system and of the welfare state, as well as because of the agency of actors within the national system. This perspective leads to the development of questions to be investigated. How do the institutional structures of a Member State legal system affect usage of the preliminary reference system? How do the welfare state structures of the Member State affect usage of the preliminary reference system in the area of social policy? How do actors within a system, such as lawyers, equality agencies or unions, affect rates of preliminary references?

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response. Regulation 1408/71 was amended to overrule the Court's decision. This is discussed in more depth in Chapter 3.

1.4 Research question

This thesis will use mixed methods to answer the question of what national factors affect the rates of social policy preliminary references to the ECJ. In answering this question, it will consider what helps access to the ECJ and what are barriers to access to the ECJ.

1.5 Contribution

This thesis fills a gap in the literature. First, what accounts for the differing rates of preliminary references from the Member States has been often theorised but less often tested empirically. The more recent studies, Vink, *et al.* (2009), Wind, *et al.* (2009) and Carrubba and Murrah (2005), attempted to explain rates of overall preliminary references using mixed and advanced quantitative methods. However, the jurisdiction of the Court is very broad, and the types of cases that might be referred to it consequently vary greatly. It is difficult to generalise explanatory factors that might account for the difference in rates of references in both the areas of, for example, competition and free movement of persons. The factors that can be chosen are of necessity very general and unrelated to the subject matter of the dispute. Moreover, they have difficulty taking into account the different court structures that some Member States have for different types of actions.

As is suggested by Stone Sweet and Brunell (2008), it may be more profitable to consider preliminary references in a particular sub-area, rather than preliminary references overall. They argued that, 'cross-national variation in reference

activity is not due to variation in factors that operate at the national level.' Stone Sweet and Brunell had themselves tried to explain variation in rates of preliminary references by reference to variation in factors that operate at the national level in earlier studies, but also looked at variation within the issue areas of free movement of goods and social provisions (1998). This study will repeat the overall analysis of all preliminary references of previous studies with an updated dataset, but will primarily focus upon preliminary references in the area of social policy. This allows for a comparison of the effects of various aspects of the national welfare state, along with the aspects of the national legal structure that have been used in previous studies.

Second, this study uses Qualitative Comparative Analysis (QCA), a technique that has only been used in one previous study in this field, Vink, *et al.* (2009). QCA is very well suited to this analysis because it is designed to deal with smaller datasets. It can also explore multiple conjectural causality, or 'causal pathways,' (Seeleib-Kaiser and Fleckenstein 2007, p. 48) where sets of explanatory factors combine together to explain a result, rather than testing the effects of an explanatory variable while holding all others constant, as is the case in most quantitative analyses. The *n* for this study is of necessity very limited, as there are a maximum of 27 European Union Member States, and only 15 for which there is sufficient data.[19] Moreover, as nation states they are very complex units and the ability to test multiple factors simultaneously allows for exploration of some of that complexity. By using QCA with the dataset limited to social policy

[19] There may be a lower rate of preliminary references initially, while a Member State acclimates to the EU legal system. There also is a delay before preliminary references are published in the *Official Journal*.

preliminary references, this study can explore the causal pathways to preliminary references, taking into account elements of the national welfare state, as well as the legal system.

Third, this study contributes two case studies, of contrasting Member States. France and the UK were chosen for the case studies because they will provide the best insight into the research question. They are alike enough to be comparable and yet differ in the outcome. The UK has a high rate of social policy preliminary references, and France has a low rate. The UK and France are comparably sized and have similar long histories with the EU, so more generalised effects of population or familiarity with the EU should not affect their outcomes with the preliminary references process. However, they differ in key ways. They each represent one of the two types of legal systems in Europe and differ on judicial review. France and the UK have different welfare state traditions. Their levels of compliance with the EU policies are different, as well as the common processes by which that compliance is achieved. Through this case selection, these studies will be able to unpack the complexities of how the preliminary references process is working in the Member States.

France is one of the original member states of the EU. It is a top-four user of the preliminary reference process in the overall dataset, but a low user of the preliminary reference process in the social policy dataset. France has the lowest number of social policy references of the original six member states. It is the only large EU Member States to have a low rate of social policy preliminary references. France is a member state from the civil law tradition that is prevalent

throughout continental Europe. It has judicial review and a monist legal tradition. France has a Bismarckian welfare state and low levels of EU migrants. In the Falkner, *et al.* (2005, 2008) typologies, it is classified in the 'World of Transposition Neglect.'

The UK has been a member of the EU since 1973, so it also has a long history with the preliminary references process. It is a top-four user of the preliminary references process in the overall dataset, and is also a high user for the social policy preliminary references. It is one of only two member states with a common law legal tradition, the other major type of legal system in the European Union. Alone in the EU, the UK has no judicial review. It is from the dualist legal tradition. The UK is the original Beveridgean welfare state and has relatively high levels of EU migrants. In the Falkner, *et al.* (2005, 2008) typologies, the UK is classified in the 'World of Domestic Politics.'

The case studies use extensive documentary analysis, as well as elite interviews, to explore why these two cases have such divergent results. None of the previous studies has used interviews with practitioners. Their firsthand experience with the preliminary reference process in their national systems provides much valuable insight for this study.

1.6 Structure of the Thesis

Chapter 1: Introduction

This chapter explains the context of the study. The research puzzle and questions are elaborated. The contribution of the study to the literature is explained. The structure of the thesis is set out.

Chapter 2: Review of the Literature

Chapter 2 reviews the literature related the Court of Justice. The chapter will explore how the role of the ECJ has become increasingly important in European social policy because of the emphasis on regulatory governance in the EU. European social policy, rather than being a more traditional welfare state such as those of the Member States, is instead primarily in the form of social regulation (Majone 1993). Indeed, some European directives on social protection exceed the most protective regimes of the Member States (Majone 1993). With this focus on social regulation, the Court of Justice has a crucial role to play in European social policy. Compliance with social regulations is enforced through the courts.

The chapter sets out how the scholarship related to the European Court of Justice mirrored the path of the research related to the broader European Union. The earlier studies applied neo-functionalist and intergovernmentalist theories to the actions of the Court and tried to assign power to the Court as an independent policymaking institution, or to the Member States as the ultimate holders of all political power in the EU, respectively. However, more scholars have begun to analyse the Court from a domestic and comparative politics frame, taking a more institutionalist approach to considering the working of the Court (Conant 2007).

The institution in question is that of a wider network of courts in Europe. The preliminary reference process links the system together. It is the only method by which European citizens can bring matters to the Court. It is the mechanism by which the most important cases decided by the Court have reached it. It is important to understand how this institutional mechanism functions.

Chapter 2 then discusses the previous studies of the preliminary references process. Scholars have attempted to explain patterns of litigation before the Court and have developed many theories to account for variation in the rates of preliminary references. The hypotheses and previous studies testing them are explored. The chapter also explains several novel hypotheses to be tested in this study and how they were derived from the literature.

Chapter 3: Why Scholars of European Social Policy should care about the ECJ

Chapter 3 is a historical legal analysis of some of important areas of Court of Justice precedents for social policy. It begins by setting out the legal and institutional structure of the Court. There is a brief discussion of the three fundamental doctrines established by the Court of Justice: direct effect, supremacy and pre-emption. The decisions establishing these fundamental doctrines essentially granted *European* rights to citizens.

The EU case law on gender equity is set out. The case law related to gender equity has been described as the 'best example of a European test-case strategy (Harlow & Rawlings 1992, p. 282). The Court has played a 'crucial activist role' in

turning the treaty article into a series of protections for mostly female workers, requiring 'extensive national reforms – though not always to the benefit of women' (Leibfried 2005, p. 248).

Chapter 3 also addresses the Court of Justice case law related to free movement of workers, later persons. The right has evolved and could be considered to have been moving toward a concept of European citizenship even before Maastricht. The Court has established that all European citizens must be treated equally in the matter of social protections. However, the citizenship asserted by the Court is still only equal citizenship, the prohibition against discriminating between national and non-national EU citizens resident within a Member State.

The chapter also discusses the Court of Justice case law related to free movement of services. The Court has repeatedly held that free movement of services is necessary for the free movement of workers. This means that workers who have moved may be able to access services in the home regime. Moreover, it means that people may access services in other Member States, even if they have never exercised their right to free movement of persons.

Chapter 4: Methodology

Chapter 4 sets out the rationale for the research design and the various methodologies employed. The research design for this study uses mixed methods in an 'Explanatory Design (a.k.a. Explanatory Sequential Design)' (Creswell and Plano Clark 2007, p. 72, Creswell, *et al.* 2003, p.225). Collection and analysis of quantitative data is followed by collection and analysis of qualitative data. This

study adds an additional, intermediate, stage with a Qualitative Comparative Analysis (QCA) to determine causal pathways or sets of causation. The data analyses will be integrated at the interpretation phase.

The quantitative analysis is structured as a Time Series Cross-Section (TSCS) analysis of the social policy preliminary references from the EU-15 from 1996-2009. Five hypotheses about factors affecting rates of general references derived from the literature will be tested, along with three novel hypotheses about factors that affect rates of social policy preliminary references. This is followed by a Qualitative Comparative Analysis that will establish causal pathways of sets of conditions that lead to higher and lower rates of preliminary references. Finally, two qualitative cases studies will be conducted, of the United Kingdom and France. These cases were chosen because they are disparate and will shed light on the findings of the earlier methods.

Chapter 5: Quantitative Analysis

This chapter begins by setting out how the datasets used were created. The limits on the Member States and the years included in the study are explained. These limits were chosen because they provided the largest possible pool for the study, while still retaining comparability. The justification for the TSCS methodology and the specific rationale for how the model was specified are explored. Descriptive statistics are employed to describe the social policy caseload of the ECJ. The bases for the hypotheses and how variables are quantified are set out. Five general hypotheses and three novel hypotheses about

factors affecting rates of preliminary references in the areas of social policy are tested and the results are discussed.

Chapter 6: Causal Pathways to the European Court of Justice

Chapter 6 employs a Qualitative Comparative Analysis to determine causal pathways that affect rates of preliminary references to the European Court of Justice. The causal factors that were found to be significant in the quantitative analysis in Chapter 5 are included in the QCA. The analysis looks for necessary and sufficient conditions and the interaction between sets of conditions to determine what recipes of causal conditions lead to high and low rates of preliminary references to the ECJ. The QCA allows for a transition from the variable-driven quantitative analysis of Chapter 5 to the case-driven analysis of the qualitative case studies in Chapter 7.

Chapter 7: Case Studies of France and the United Kingdom

In-depth qualitative case studies of the United Kingdom and France are set out in Chapter 7, and seek to explain further the findings of the TSCS and QCA analyses. The UK and France were chosen because they are disparate cases, and can provide insight into the quantitative and QCA results. In a sequential explanatory design for a mixed methods study, the qualitative information can explain why differences were found with the quantitative analysis, and explore the characteristics of outlier or residual cases (Creswell, *et al.* 2003, p. 225, Caracelli and Greene 1993). This in-depth case analysis will provide an empirical investigation of a complex phenomenon in context (Yin 2009, p. 18).

The case studies use documentary analysis of the cases, supporting materials and news coverage to build a picture of the preliminary references process in the area of social policy in France and the United Kingdom. Twenty-five expert interviews were then conducted in France, the UK, Brussels and Luxembourg to get more insight into these cases. This analysis will address a series of questions. How do the institutional structures of a Member State legal system affect usage of the preliminary reference system? How do the welfare state structures of the Member State affect usage of the preliminary reference system in the area of social policy? How do actors within a system, such as equality agencies or unions, affect rates of preliminary references? The case studies will also look at what factors help access to the Court and what factors are barriers in France and the United Kingdom.

Chapter 8: Conclusion

Chapter 8 synthesises the results from the three different methods brought to bear on the research puzzle. It addresses how the findings from these methods complement one another. The chapter discusses the implications for the jurisprudence of the Court and EU social policy. It sets out the limitations of the study and potential next steps for research.

2. Review of the relevant literature related to the European Union and the Court of Justice

This chapter reviews the relevant literature related to the development of the European Union, European Union social policy, and the Court of Justice. It illustrates how the initial divide in how scholars perceived the integration of the European Union – between neofunctionalism and intergovernmentalism – persisted through the literature and coloured analyses of the Court of Justice. The chapter traces the development of European Union social policy. An alternative institutionalist/ governance approach to understanding the role of the Court of Justice is proposed. The previous empirical studies of the preliminary references process are considered.

2.1 What is the context?

The development of the European Union broke down an 'established division of labour' within the scholarly community, where students of domestic and comparative politics and students of international relations had 'rigidly separated fields of inquiry' (Jachtenfuchs 2001, p. 248). Early analyses were situated in the international relations traditions, and tried to assign the development of the EU into expected trajectories. Competing theories of European integration mostly centred on the debate between functionalists, neo-functionalists and intergovernmentalists. These remained in vogue through the 1990s for scholars trying to situate the Court of Justice in the EU policy framework. After this initial phase, more scholarship in a domestic and comparative politics tradition arose, as studies increasingly focused on the workings of EU institutions. This governance approach in studies of the EU moved the debate from whether and why a European polity exists to how it works. Some of the scholarship has retained the characteristics of the earlier studies, in that attempts to establish whether the EU or the Member States are

supreme persist, but there is an increasingly institutionalist bent to studies that look at processes of joint policy-making (Jachtenfuchs 2001, Conant 2007).

2.2 A brief look at attempts to explain the European Union

Integration Approach

Early studies of the EU attempted to account for this unusual constellation of interests, usually with reference to existing international relations literature and theory. The initial scholarship was an attempt to understand the nature of the new 'Euro-polity' (Jachtenfuchs 2001, p. 245). Two primary overarching theories – neo-functionalism and intergovernmentalism – attempted to account for and predict the path of European integration.

To begin, Mitrany's (1943) functionalism envisioned international cooperation as the way to avoid the consequences of divisive nationalism. In 1958, Haas promulgated his theory of neo-functionalism to address the gaps in functionalism, which seemed to explain some of the integration process that was happening in Europe, but not all. In particular, Haas injected some politics back into the explanation in order to address why political actors were choosing to integrate in some areas, but not others. He focused on political integration, defined as 'the process whereby political actors in several distinct national setting are persuaded to shift their loyalties, expectations and political activities toward a new centre, whose institutions possess or demand jurisdiction over the pre-existing national states' (Haas 1968, p. 16). Unlike Mitrany, Haas did not

envision transcending territorial divisions between states, but rather supplementing that state-based system with new organisations at the European level (Cram 1997, p. 13).

Under the theory, supranational actors and agencies would drive the integration process forward as 'agents of integration,' encouraged by the tendency to seek to maximise their own power (Haas 1968, p. 29). National political elites would support the process once the benefits of integration became clear. This would eventually result in an evolution in national belief systems, which would change to redefine interests as being on a regional, rather than a national level. This 'political spill-over' would result from national elites adjusting their expectations and behaviours in response to the actions of the supranational entities. Thus, neo-functionalism has a new institutionalist flavour — as actors adjust their behaviours to the new policy dynamic of the regional integration, their behaviours self-reinforce that dynamic.

By the 1970s, intergovernmentalism succeeded neo-functionalism as the dominant theory of European integration (Falkner 1998). It is grounded in the realist theory of international relations, which holds the primary actors to be nation-states with a primary goal of security, usually achieved through military means (Cram 1997). If all states rationally try to maximise their power, then equilibrium will be achieved through a balance of power (Morgenthau 1967). In short, intergovernmentalism is a state-centric approach to European integration.

There have been studies that attempt to test these grand theories for European integration. Falkner (1998) studied social policy evolution in the European Union and attempted to assess empirically the impact of any spill-over effects. She carried out three case studies into different social policy areas: the European works-council directive, the parental leave directive, and the directive on atypical work. Her findings were that European polity was characterised by 'multi-level network governance' (Falkner 1998, p. 188). Negotiated agreements between management and labour federations established minimum standards for labour laws, with space for differing implementation and interpretation at the national levels, often influenced by social partners. Falkner also found that the Commission played an important gate-keeper role.

Falkner concluded that neither neo-functionalism nor intergovernmentalism was entirely successful at explaining European integration and social policy making. She determined that neo-functionalism's 'core concept' of spill-over 'is indeed a useful tool if applied as a differentiated concept and not as a simplistic automatism' (Falkner 1998, p. 196). That is, spill-over was based upon both functional pressures and changes at the 'ideational level' (Falkner, 1998, p. 196). She saw examples of functional, political and geographical spill-over. As for intergovernmentalism, Falkner concluded that the current conception did not allow for sufficient influence from EC politics on national actors' preference formation. Her findings are that 'current EC social policy-making is not in principle different from corporatist policy styles prevailing in some Member States' (Falkner 1998, p. 189).

Therefore, a 'grand theories' approach to studying European integration was flawed because 'parsimonious' theories do not allow for complete explanations of such 'complex social phenomena' (Falkner 1998, p. 199). Weiler also noted that these two past overarching theories for the integration of the EU were only partially correct. The Euro-polity has neither moved toward increased centralisation, nor has it become more like a more traditional international organisation (Weiler 1981, 1982). As the scholarship evolved, more accounts moved away from these early attempts to explain why the Euro-polity functioned.

Governance Approach

The next stage in the development of studies of the European Union shifted to studies of how the new Euro-polity functioned. It tried to answer the question of how does the EU make policy? 'In classic integration theory, the Euro-polity is the independent variable, whereas in the governance literature, it is the dependent one' (Jachtenfuchs 2001, p. 250).

William Wallace has stated that the EU is neither a state nor an international organisation, but a collective political system: 'the mutual penetration of law, regulation, even political campaigning deep into what political scientists had long characterized as the core of domestic politics, define a level of politics and of governance which is most straightforwardly described as a political system' (W. Wallace 2005, p. 491). The EU's remit is large and diverse, so there is no one

model of EU policymaking. Helen Wallace (2005) identifies five different models for the EU policy process.

The traditional Community model was the earliest. It involved a strong European Commission involvement in policy design, supported by the Council of Ministers. National stakeholders were enticed with better rewards and national-level agencies administered the regime within their member state. The ECJ occasionally intruded in a 'defining' move to reinforce the legal authority of the Community (H. Wallace 2005, p. 79). The classic example of this process was the Common Agricultural Policy. Although the Commission has been particularly activist in trying to construct a 'significant social dimension' for its European social model (Leibfried 2005, p. 246), the European institutions tend to be conservative and resistant to change (Pierson 2000, Thelen 1999). It is much easier to block legislative efforts than to enact them.

The second model is the EU regulatory mode (H. Wallace 2005, p. 81), wherein the Commission creates regulatory objectives and rules, usually with reference to economic criteria. The Council agrees to minimum standards and the direction of harmonisation. The ECJ and the Court of First Instance (CFI) enforce the rules, ensuring a reasonable level of uniformity across jurisdictions. The European Parliament encourages consideration of non-economic factors, including environmental, regional and social.

The European Union is well suited to regulatory policy-making for several reasons. First, the primary goal of establishing a common market requires considerable regulation to eliminate barriers, usually requiring a high level of specialist knowledge (Jachtenfuchs 2001). Second, regulatory policies require only 'weak legitimation' (Majone 1995). Non-majoritarian institutions, such as the Commission and Court are able to implement them (Majone 1994, 1996). These efficiency-oriented policies require less democratic legitimation because they aim for Pareto-efficient solutions, where more redistributive policies would require a higher degree of legitimation (Jachtenfuchs 2001, p. 253). Third, it requires only a small budget to create a regulatory framework, compared to other types of policymaking. Héritier, *et al.* identified the process as characterised by 'regulatory competition' between Member States, rather than by intentional harmonisation. The contest is decided by *ad hoc* coalitions of Member States and by the strategic interests of the Commission (1996, p. 4). It has been extraordinarily successful, despite this less than organised strategy.

In some areas the European Union has developed regulatory policies that are more advanced than those of the most advanced Member States (Eichener 1997). Falkner (2010) identifies 80 binding norms in the three main fields of EU social regulation: health and safety, working conditions and equality. These are accompanied by 120 'soft law' non-binding regulations.

A network analytic approach is necessary to explain the multi-level governance of European Union policymaking. It explains why EU policymaking has escaped

Scharpf's joint decision trap, as negotiators have 'flexible mandates,' unlike in more hierarchical systems (Jachtenfuchs 2001, p. 253). 'The EU, with its sectoralization, the functional differentiation and fragmentation of policies, as well as the dominance of corporate actors in a horizontal web of inter-organizational relationships at the negotiating level … appears almost the ideal area of application for policy network analysis' (Héritier, *et al.*, 1996, p. 7). These European networks are heterogeneous and multi-layered, and vertical coalitions between sub-national actors and supra-national actors are important in policy formation (Héritier, *et al.*, 1996). Decision-making is not monopolised by the Member State governments. Sub-national actors operate at both national and supra-national levels (Hooghe and Marks 2001, p. 4). The state's role is more as an 'activator' (Eising & Kohler-Koch 1999, p. 5).

The third model for EU policymaking is the EU distributional model (H. Wallace 2005, pp 82-83). This is the process whereby the Commission designs programmes in partnership with more localised agencies and interests, and provides financial incentives for participation. It gelled into a model with the primary mechanism of the 'structural funds' co-financing development programmes designed to be redistributive and increase cohesion. The spending was primarily concentrated in the less-developed areas of the EU. It gave the EU the ability to influence national policy developments through financial incentives (H. Wallace 2005). Falkner (2009) points to the European Social Fund and others targeted at regional and social disparities, such as the European Regional Development Fund, European Agricultural Guidance and Guarantee Fund and

Financial Instrument, the Financial Instrument for Fisheries Guidance, the Cohesion Fund and the European Adjustment Fund for Globalization. Falkner notes that, 'the EU's social dimension is less regulatory than is often assumed' (Falkner 2009, p. 7). However, while these direct expenditures are large in terms of the European Union budget, they are small compared to national welfare states (Falkner 2009).

The fourth model is policy coordination (H. Wallace 2005). These new methods of governance were developed in 'reaction to the imminent risk of deadlock in Community decision-making' (Kohler-Koch and Rittberger 2006, p. 36). The best known is the 'soft law' technique of the Open Method of Coordination (OMC). The OMC may be increasing the penetration of the EU into social policy matters even further, though it leaves ample room for 'national contextualization' (Ferrera, *et al.* 2002, p. 227). (Treib, *et al.* 2011) identified a shift away from hard law measures to soft law measures in the European social dimension over a period from 1971 to 2006.

Coordination between Member States was established by the Maastricht Treaty with regard to national economic policies through 'broad economic policy guidelines' and recommendations of the Council (Hodson and Maher 2001). It was again used in the Amsterdam Treaty to develop a coordinated strategy for employment, which was put into action after the Luxembourg Summit of 1997. The Lisbon Summit introduced the generic label of OMC and expanded the competencies to which it might be applied to include social protection and social

inclusion. As defined at Lisbon, the OMC involves setting guidelines, establishing qualitative and quantitative indicators and objectives, the transportation of these guidelines and objectives to national policies, and a periodic monitoring and peer review process (European Council 2000b). The Council envisioned this decentralized approach as being respectful to the principle of subsidiarity, with many different levels of European government and society working in partnership to set standards (European Council 2000b).

The common features of the OMC are first that policy remains at the national level, and those national policy choices become matters for common concern, and second, that efforts are made to reach consensus across the Member States on common objectives for each state's policies (Scharpf 2002). Coordination is reliant upon voluntary cooperation, and there are no formal sanctions against Member States that do not meet the agreed-upon common objectives. The OMC allows Member States to share policy experiences and practices, rather than creating common standards (Hemerijck 2002). An emphasis on benchmarks, peer review and best practices are intended to spread policy learning through the Member States (Kohler-Koch and Rittberger 2006). Eberlein and Kerwer characterise the method as 'democratic experimentalism,' a system of 'decentralised and coordinated participatory rule-making' (2004, p. 123).

However, questions have been raised about both the effectiveness and the democratic legitimacy of the OMC. Szyszczak (2006) noted a lack of empirical work on the efficacy of the OMC and a tendency to select successful case studies

when assessing policy impact. A lack of hard sanctions makes the OMC unlikely to be able to create change where there is a large degree of misfit between national institutions and EU policies (Kröger 2009). Büchs (2007) found that if the OMC played a role in influencing policy, it was through changing frameworks and justifications for policies. Büchs assessed the arguments for effectiveness of the OMC from OMC 'optimists' and 'pessimists' and looked at the development of EU social policy. She concluded that while there 'whilst "policy learning" may have taken place, it occurred in less voluntary and more confined ways than assumed by the "optimists" (2009, p.12). Although the OMC does 'openly promote' retrenchment, its policy processes are shaped in such a way that it is open to interpretations compatible with retrenchment (2009, p. 12).

Moreover, Büchs (2008) argues that the direct participation of stakeholders does not increase democratic legitimacy. Participants are more akin to special interests than some sort of representation of the democratic will of the population. Therefore, the participation of civil society actors can impede legitimacy. Kröger also assessed the democratic legitimacy of the OMC on four dimensions: participation, representation, deliberation and accountability. She concludes that 'this OMC clearly does not live up to the demands of liberal democracy' (2007, p. 578). There is no formal right to participation. Bureaucratic representativeness often prevails over political representativeness. Finally, a lack of transparency and deliberations behind closed doors lead to a lack of accountability (Kröger 2007).

The fifth model for EU policymaking is 'intensive intergovernmentalism' (H. Wallace 2005, p. 87), where the interaction is primarily between national policymakers. However, the Council is involved in setting overall policy direction, and the Council of Ministers ensures cooperation. It is primarily seen in areas such as economic and monetary affairs, security and defence, and police and judicial cooperation (Kohler-Koch and Rittberger 2006). It 'breeds special forms of policy coordination that allow Member State governments to retain considerable control but still transform the ways in which states traditionally go about business' (H. Wallace 2005, pp. 80, 87-9).

2.3 The European Union and Social Policy

Mary Daly, in assessing the state of European social policy after the Treaty of Lisbon, concluded that the literature around European social policy was 'generally fragmented' (2006, p. 462). However, she did identify three main strands of literature, largely divided by disciplines. The political science literature has concluded that the European Union has, at best, a 'social dimension.' It has not achieved either systematic changes in national social policies or a supra-national social policy (2006, p. 462). The social policy literature identifies European Union impact on social policy in a number of key areas, including worker protection, employment and equal opportunities, and credits 'at least a logic and integrity' to EU social policy (Daly 2006, p. 463). Sociology scholars see a European engagement with a 'European social realm,' allowing it to 'fashion key aspects of social identity, institutions and social

relations in the Member State … that transcends national boundaries' (Daly 2006, p. 463).

A hurdle to building a European social policy is the diversity within the Member States. There is no one model for a 'European' welfare state. Esping-Andersen famously perceived three distinct regimes of welfare states within western Europe alone: liberal welfare states, conservative-corporatist states, and social democratic states (1990). More recent commentators have argued for the addition of other ideal regime types, such as a southern model (Ferrera 1996). However, none of these criticisms of regime theory is suggesting that the there are too many types of regimes. Rather, they are arguing for narrower and narrower classification. The diversity of the European national welfare states would guarantee that attempts to harmonise some sort of European welfare state would be bound to fail (Majone 1993).

Moreover, there are practical constraints to building a European welfare state. There is no budget to support supranational welfare institutions. The redistributive policies within the European Union are primarily from more developed Member States to lesser-developed Member States. There are insufficient resources to fund social protection measures and no authority to tax to raise revenue.[20]

[20] In 2010, a report from the European Parliament's Employment and Social Affairs Committee recommended that the Commission present an initiative to call upon Member States to establish a minimum income as an anti-poverty

Is there a European Social Model?

If there is no one European welfare state, is there perhaps a 'European Social Model' (ESM) that is a coherent model for the region? There has been much discussion of the idea of a European Social Model, that somehow there is a Europe – or European Union – wide model of what social policies should exist. Although the idea of an ESM is often promulgated by the institutions of Europe, its existence or definition are often debated in the academic literature.

The term European Social Model was popularized during the Delors presidency of the European Commission in the 1980s. As an alternative to US-style market capitalism, the European Social Model envisions that economic and social progress must be achieved together. In a 1994 European Commission White Paper the ESM was described as a set of common values, even though the policies to execute those values differed from state to state. 'Contributions from all sides stress that there is a European social model. It is a cornerstone of our society, even if the levels of social protection differ from country to country. This model is based on negotiation, solidarity and a high level of social protection. The quality of it should be protected and improved' (European Commission 1994).

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measure (European Parliament 2010). However, at present, the likelihood of such a measure being enacted is low.

According to the European Council, 'the European Social Model is based on good economic performance, a high level of social protection and education and social dialogue' (European Council 2002). This was a further enunciation of the most famous characterization of the ESM, the March 2000 Lisbon strategy, which set out Europe's strategic goal 'to become the most competitive and dynamic knowledge based economy in the world, capable of sustainable economic growth with more and better jobs and greater social cohesion' (European Council 2000). Lisbon is 'at least an intervention that addresses the dichotomy between economic and social policy at the EU level,' if not a re-coupling of them (Wincott 2003, p. 544). The original Lisbon report from the Commission stresses European economic interests in addition to the European social policy traditions. The central thesis was that Europe could compete with the United States economically by using the 'European model' of social policy.

The Report did not define clearly what precisely comprises this European Social Model, given the differing welfare states regime types present within the Member States. Instead, it contrasts the European situation with that of the US, emphasizing both economic weaknesses and social strengths (European Commission 2000). In December 2000 the Nice European Council turned the Lisbon report into a series of objectives meant to measure progress in eliminating poverty and social exclusion over the next decade. Growth and jobs were designated as the new overarching strategies. After what Scharpf (2010, pp. 211-12) refers to as 'decades of cheap talk about the 'social dimension' of European integration or the superiority of the European social model,' Article 3.3

of the Lisbon Treaty wrote into law the commitment of EU Member States to establish a 'highly competitive social market economy.'

Scharpf (2002) noted that the means available to governments to control and regulate their economic and social structures were severely limited by economic union, which led to increased emphasis on the ESM. 'It is no wonder, therefore, that countries and interest groups that had come to rely on social regulation of the economy and generous welfare state transfers and services are now expecting the European Union to protect the 'European social model' and thus to re-establish the constitutional parallelism of economic ('market-making') and social-protection ('market-correcting') interests and policy purposes that had existed at the national level before the takeoff of economic integration' (Scharpf 2002, p. 649).

However, Alber (2006, 2010a, 2010b) looked at the empirical evidence for a ESM as distinguished from the American model and found that support for a ESM was very mixed. In most dimensions, 'European countries do deviate from the U.S. in the sense of higher social spending and a higher GDP share of public revenues, but within Europe there is much diversity with different families of nations or welfare regimes, and there is no convincing evidence for convergence or the development of one uniform social model in Europe' (Alber 2010b, p. 13). The difference between the levels of spending for United States and the mean levels of spending for the European states was less than the difference within the European states (Alber 2006, 2010a, 2010b). Moreover, the gap between the

European states was not lessening and the gap from the U.S. was not widening (Alber 2010a). Some elements of what could be described as 'Americanization' could be seen in the policy discourse in Europe, and some elements of 'Europeanization' could be seen in that of the U.S. (Alber 2010b).

Toward a more European social policy

'The most surprising feature of European Union social policy is, perhaps, that there should be any at all' (Cram 1997, p. 30). It is widely perceived that social policy in the EU is the province of nation states (de Swaan 1994). Until relatively recently, the consensus in the literature was that national governments are dominant in the social policy process and that they have resisted the expansion of the EU's social remit (Cram 1997). Part of the difficulty is that more traditional conceptions of social policy built around a welfare state do not fit with the European Union's capabilities. 'European social policy is most hollow in the domains that are considered the core of social policy at the national level, that is, social protection and income redistribution.' Instead, social policy at the European level primarily follows the regulatory mode of governance, and is focused on labour mobility, unemployment, workers' rights, health and safety and gender equality (Daly 2006, p. 463). 'Ambiguity about what comprises the 'social dimension' of Europe accounts for the wide range of opinion about social Europe' (Majone 1993, p. 153). The European Union was a 'welfare laggard' under traditional ideas of welfare state development, but in terms of social regulation its progress has been 'so remarkable that some … EC directives exceed

the most advanced national measures, in the level of protection they afford' (Majone 1993, p. 155-6).

Social regulation is not synonymous with traditional ideas of social policy, for example Titmuss's (1963) division into state, fiscal and occupational provision, but the distinction is not absolute. 'Social policy and social regulation are historically and institutionally related; they belong to the same 'policy area' – a policy area that it is impossible to make useful descriptive or analytic statements about one of the policies without taking the other elements of the set into consideration' (Majone 1993, p. 158). Where the normative and practical barriers make the creation of an EU welfare state unlikely, the limited resources available are 'sufficient to set up ambitious programmes in social (and economic) regulation' (Majone 1993, p. 159). Moreover, the costs to enforce the regulatory regimes are shifted onto the Member States.

Many of these regulations have been enacted in the areas of social protection. Therefore, the increasing integration of Europe has affected national sovereignty over social issues (Leibfried and Pierson 2000). 'The process of European integration has eroded both the sovereignty (the legal authority), and autonomy (de facto regulatory capacity) of Member States in social policy.' (Leibfried 2005, p. 244).

Mary Daly (2008) has identified three growth spurts in EU social policy, the most recent of which has been in the past decade. The first was in the early 1970s

social action programme's focus on full employment and upgrading of working and living conditions. It resulted in a leap forward in gender equality and in the area of health and safety. The second growth spurt was during the Delors presidency in the late 1980s and early 1990s. A focus on the 'social dimension' was grounded in the perceived need for markets to be socially regulated (Streeck 1995, p. 43). The resulting Maastrict protocol on Social Policy expanded the EU's powers over social policy. The third growth spurt has been in the Lisbon period since 2000. The Open Method of Coordination, previously employed in employment, was expanded to address social inclusion.

The aims of European social policy are different from national social policy. Rather than being a process of state-building, it provides 'the underpinnings for a European integration project that is envisioned foremost as market integration' (Daly 2006, p. 463.) Europe is not a state, but the process of market-building has certainly increased integration in areas not closely related to the market, and it might lead to more. In a recent talk, Stephan Leibfried (2010) quoted Delors's famous 'you don't fall in love with the common market; you need something else.[21]' Leibfried further quoted Delors to the effect that attempts to expand social Europe would give Europe a 'soul.' Moreover, he noted that in both the United States and in England building a market meant building a state and an identity.

Scharpf (2010) argues that the increasing intervention of the European Union into the domain of social policy bodes ill for the social market economies (SMEs)

[21] Quoted in Laggan (1996).

of the European Union Member States. The more generous SMEs are more vulnerable to challenges based upon European mobility, competition and non-discrimination than are the privately provided social services more characteristic of the with liberal market economies (LMEs). He concludes that European integration through law is bound to create asymmetric pressures that will disproportionately force social market economies to liberalise their social protection systems (2010).

The current European Union framework does not then fill this gap. Leibfried (2005) noted that EU market liberalisation norms had forced Member States to give up more sovereignty than the EU was able to assume. Scharpf states that 'the immediate effect' of decisions from the ECJ in cases brought by individual plaintiffs challenging national restrictions on mobility 'is to deregulate existing national regimes. What the Court cannot do is establish a common European regime that would respond to some of the values and policy purposes, which as a consequence of its decisions, and no longer be realized at the national level' (2010, p. 223).

2.4 Assessing the Role of the European Court of Justice

The literature pertaining to the European Court of Justice has followed a similar trajectory to that looking at the European Union as a whole. The earlier literature focused on the role of the Court in European integration. Observers have struggled with how to characterise the impact of the Court within the EU. As

there is no precedent for an international court behaving in the way that the ECJ has, scholars have debated what role the Court has played in integration and whether it acts as an independent policymaker or a tool of the Member States. The debate mirrors much of the 'grand theories' approaches to studying EU integration.

Neofunctionalists

As in the wider EU integration debate, neofunctionalists focus on the role of the Court as a supranational actor to drive the integration process forward. Neofunctionalists assert that the Court has been a crucial driver of integration. Pierson noted that, 'in the process of European integration, the European Court has taken an active, even forcing, stance, gradually building a remarkable base of authority and effectively 'constitutionalizing' the emerging European polity' (Pierson 1996, p. 133).'Until recently, (Falkner 1998, Falkner *et al.* 2005) political scientists paid scant attention to this area of 'low politics,' entranced by the world of 'high politics' and 'high conflicts' in treaty bargaining. The topic was left to a small set of European labor law, welfare, and social security lawyers and national government officials who monitored another centre of policy-making: the courts' (Leibfried 2005, p. 256-257).

The neofunctionalists asserted that the ECJ's jurisprudence transformed the Treaty into a 'supranational constitution' granting rights to individual citizens despite the fact that there is no evidence that the signatories to the Treaty had any such intention (Lenaerts 1990, Mancini 1989, Stone Sweet and Brunell 1998,

Weiler 1981, 1991). Stone Sweet calls the ECJ 'the most effective supranational judicial body in the history of the world; on any dimension, it compares favourably with the most powerful constitutional courts anywhere' (Stone Sweet 2003, p. 18). The European legal integration, spearheaded by the decisions of the ECJ, has 'progressively enhanced the supranational elements of the EU and undermined its intergovernmental character, federalizing the polity in all but name' (Stone Sweet 2003, p. 18, see also Cappelletti, Seccombe and Weiler 1986, Lenaerts 1990, Mancini 1989). It is 'well-documented in the literature that the Court's constitutional doctrine is an example of the Court enhancing its own power relative to member governments' (Cichowski 2002, p. 70, see also Mattli and Slaughter 1998).

The power this granted to the ECJ was not without limits. 'The Court could not outrun its constituency without losing its legitimacy' (Mattli and Slaughter, 1998, p. 181). The Court used the Commission as a 'political bellwether' of its political limits (Burley and Mattli, 1993, p. 71, Mattli and Slaughter, 1998). 'Certainly, courts have political limits, some area of 'acceptable latitude,' beyond which they cannot stray. Indeed, all political actors are ultimately constrained to stay within an 'acceptable latitude' (Alter 1998, p. 138).

Intergovernmentalists

The intergovernmentalists asserted that Member States can impose limitations on supranational actors such as the ECJ (Mattli and Slaughter, 1998, p. 178).

Garrett and Weingast analysed the power of the ECJ through a principal-agent frame under delegation theory (Garrett, 1992, 1995, Garrett and Weingast, 1993). The theory holds that because the authority of an agent is delegated from its principal, the principal is able to abrogate that authority if the agent acts in a manner in opposition to the wishes of the principal. Under the intergovernmentalist theories, the Court will follow, or at least not very directly oppose, the preferences of the veto players, who can act to limit the Court's mandate or change the legislation. Pollack offered a more synthesised approach to the intergovernmentalist and neofunctionalist approaches. He characterised the intergovernmentalist view as 'the ECJ as the agent of the Member States, on a short leash,' while the neofunctionalists present the Court as 'a more independent and sophisticated strategic actor' (Pollack, 1997, p. 120). According to Mattli and Slaughter, 'Much of Pollack's analysis is concerned with identifying the factors that determine the length of the leash' (Mattli and Slaughter, 1998, p. 181).

The principal and agent framework seems inadequate when we consider the grant of authority from the Member States to the Court, which is more extensive than might be expected for a pure principal-agent analysis. There is an explicit grant of authority, such as in the Articles 258, 263 and 267, but there is also an implicit grant of authority in that the Court has discretion to interpret the Treaties and the secondary legislation in light of incompleteness or changing circumstances (Stone Sweet 2001). Moreover, the Member State Principals have delegated to the Court the authority to govern Member State compliance and to punish them for non-compliance. Because of the multiplicity of interests within

the Member States and the differing time horizons of the various actors involved (Alter 2001) the Member State principals have a very difficult time in reining in the actions of the Court as Agent. Majone (2005) instead proposed a model of 'trusteeship' for situations where the Member States have transferred to EU institutions all political power and have no ability to block that institution from taking action. In light of this atypical power afforded to the Court under the transfer of authority, other scholars have grappled with how to characterise this relationship (Pollack 2003, Tallberg 2002a, Alter 2008).

Maduro (1998) suggested that the Court would be willing to constrain the scope of the application of Treaty provisions to follow a 'majoritarian activism' consensus amongst the Member States. Under the theory, the Court will be more willing to rule against a defendant Member State where the Member State's regulations are not in line with those of a majority of the Member States. The Court would be more likely to rule for the Member State, and uphold its regulations, where the regulations in the majority of the Member States were similar.

Höpner and Schäfer assessed the impact of European integration through a Varieties of Capitalism approach (Hall and Soskice 2001) framework. They concluded that the integration attempts advanced in large part through the efforts of the Court of Justice 'systematically challenge the institutions of organised capitalism' (2010, p. 344). The Court has been instrumental in effecting these changes. They point to several examples, such as the Services Directive, where political opposition forced compromises in the Commission's

original strongly integrative proposal. However, the Court then 'stepped in and partially adjusted political outcomes to the Commission's initial aims' (Höpner and Schäfer 2010, p. 345). They argue that the principal-agent relationship frame is incomplete for describing European integration because it focuses in levels of decision making, rather than the policy implications of delegation. Delegation in the European context has resulted in a push toward liberalisation, rather than re-regulation. Both Commission and the ECJ 'do not limit their actions to their initial tasks' but rather 'turned into 'engines of liberalisation' that push for a transformation of national production and welfare regimes' (2010, p. 349). Of late, levelling the playing field has meant removing any institutional characteristics that could potentially be a barrier to economic integration. The Court and Commission were not deterred by substantial public outcry or resistance on the part of the Member States (2010).

Mattli and Slaughter sum up the intergovernmentalist versus neofunctionalist debate as, 'what emerges … is that the story of European legal integration cannot be told without an account of the interrelationship between neofunctionalist and intergovernmentalist factors. Neither framework is fully satisfactory on its own terms; both must stretch to explain anomalies highlighted by the other' (Mattli and Slaughter 1998, p. 183).

Various empirical studies have tested these grand theories by attempting to assess to what extent the Court is an independent actor or subject to the will of the Member States, with mixed results. Most found that the Court acts

independently to a certain degree, and is constrained by member state political preferences to a certain degree.

Stone Sweet and Brunell (1998) attempted to determine the influence of the Member States and the Commission upon the outcomes of cases before the ECJ. They found that in 91 social policy cases the ECJ ruled against Member States in 53 per cent of decisions and ruled in accordance with the policy preferences of the Commission in 88 per cent of cases (1998, p. 50). Similarly, Cichowski (2004) examined 88 ECJ preliminary rulings related to social provisions between 1971 and 1993 and found that the Court ruled to invalidate a national provision in 56 per cent of judgements, including 57 per cent of cases against the four largest Member States. The Commission's position predicted the outcome of the case in 91 per cent of cases. Cichowski also created a scale indicating the degree of political and financial impact, although she did not quantify how she set the levels. She used the number of observations[22] by Member States as a proxy for how impactful the case was politically and financially. She found that the ECJ invalidated the law in 100 per cent of cases with the highest magnitude ranking, but only 52 per cent of cases with the lowest magnitude ranking. This supported the neofunctionalist argument that increased legal integration had empowered individuals and diminished member state control. However, Cichowski only counted observations in these cases, rather than determining who sided with whom.

[22] Member States may file observations with the Court, which are legal briefs indicating how the Member State wishes the case to be decided.

Cichowski (1998) analysed 36 environmental protection preliminary references to the ECJ from 1976 to 1996 and found that the ECJ invalidated member state provisions in 47 per cent of cases, and sided with the Commission in 97 per cent of cases. Cichowski also found that when presented with a conflict between environmental protection provision and free trade, the ECJ ruled in favour of free trade 66 per cent of the time (1998, pp. 396-7).

Kilroy (1999) studied the relationship between member state preferences and ECJ decisions through a dataset of 293 cases on free movement of goods and social provisions. She included both preliminary references and direct actions. Her dependent variable was the likelihood of the Court declaring a violation of EU law by the member state. Similar to Stone Sweet and Brunell and Cichowski, Kilroy determined that the ECJ found a violation of Community law in 55 per cent of cases, upheld national law in 36 per cent of cases, and took an intermediate position in the remaining cases.

Kilroy did not find that the ECJ had a bias toward the preferences of the more powerful Member States. However, a member state observation (by any member state other than Italy) in favour of the national law decreased the likelihood that the Court declared a violation (1999, p. 400). Kilroy's main hypothesis was that the ECJ would be more constrained by a threat of non-compliance than by a threat of legislative override. She argued that her findings supported this hypothesis because a simple majority, a blocking minority, and smaller coalitions had a statistically significant effect on the likelihood of a particular decision, when none of those would have been sufficient to legislatively override the

Court. The probability of the ECJ upholding a national rule was only 23 per cent when there were no member state observations in support of the national policy, but increased to 73 to 96 per cent with a simple majority of observations in support, and 56 per cent with the support of a blocking minority (Kilroy 1999, pp. 405-6).

Kilroy rejected what she refers to as the 'so-what objection,' that when there is a compelling legal reason to support a particular ruling all actors, not just the Court, recognise it. Therefore, 'despite the statistical evidence … it cannot be concluded that the ECJ's decision-making is sensitive to political considerations. Instead, these findings are consistent with the parsimonious and elegant Legalist explanation of court behavior — That courts consistently apply a set of rules — 'the law' (Kilroy 1999, p. 452). In order to reject this hypothesis, Kilroy used a qualitative legal study of paired cases arising under the same policy area, but where the ECJ reaches a different conclusion depending upon 'a different constellation of Member States' preferences' (Kilroy 1999, p. 452). She finds 'very strong qualitative evidence that the ECJ is in fact sensitive to the Member States' preferences in rendering its judgments' (Kilroy 1999, p. 452).

Kelemen (2001) also found evidence to support the hypothesis that the ECJ is a strategic actor that seeks to maintain its legitimacy by avoiding overruling by non-compliance. He used a qualitative analysis to compare the ECJ to the General Agreement on Tariffs and Trade/ World Trade Organization dispute resolution panels. His first hypothesis was: 'The greater the political threat posed by a state's or a group of states' potential defiance, the more likely the court is to

adjust its jurisprudence to suit the state's or states' preferred outcome'(2001, p. 625). Because a court's legitimacy is in many ways dependent upon perceptions of its consistency in following precedent and ruling according to the rule of law, his second hypothesis was: 'The greater the clarity of treaty requirements, precedents, or legal norms in support of a particular judgment, the greater the likelihood that the court will make that judgment, regardless of political costs' (2001, p. 625). He found that the ECJ acted strategically when member state pressure was high and legal reasons to act differently were weak. However, he was only able to include six environmental cases in his analysis.

In the most recent study, Carrubba, Gabel and Hankla (2008) tested the effect of political pressure on the outcomes of cases before the ECJ. They used a dataset of all ECJ decisions, including preliminary references and direct actions, from 1987 through 1997. Rather than focus on the cases as a whole, they coded each legal issue raised separately, for a total of 3176 legal issues[23]. They then tested whether member state observations in favour of a particular outcome were predictive of the ECJ's decision. Their hypothesis was that the threat of override by the Member States will influence the Court to rule in accordance with the preferences of the Member States. They found that the probability of a particular outcome was increased when the weight of member state observations supported that outcome. They concluded that the ECJ is sensitive to member state pressure, and that these pressures have a substantively large effect on rulings. There is an important methodological concern with this study. Carrubba,

[23] However, it is not clear how this was possible with the information supplied in the dataset.

et al. weight Member State interventions by the number of votes that Member State controls under the Qualified Majority Voting (QMV) procedures.[24] They assume that in every case the threat of override will be based upon QMV, stating that they cannot distinguish between issues that would be overruled by QMV and those that would require unanimity for an override (Carrubba, *et al.* 2008, p. 440). However, pre-Lisbon (as was true of their entire dataset) the overwhelming majority of issues would require unanimity, not QMV. If unanimity is required, then the balance of the Member State observations, although suggestive, cannot be evidence of a credible threat of override.

As a control, Carrubba, *et al.* tested the Legalistic argument, namely that the Court is merely responding to the quality of the legal argument presented to it, and that the member state observations may act as indicators of government preferences, but equally could signal the quality of a litigant's case on the merits (Granger 2005, p. 29). They included a variable in their model that reflected the position recommended by the Advocate General[25] (AG) in the particular case.

[24] QMV is the procedure followed by the EU when it cannot reach consensus on an issue. It establishes the conditions under which a legislative proposal can be passed without unanimity. Each Member State has a number of votes in the Council of the European Union. The number of votes is roughly proportional to national population, but weighted to award more votes to Member States with smaller populations than they would have under a strict division by population. Under the Treaty of Nice system, which was in effect until December 2009, in order to pass a proposal had to be backed by a majority of Member States and receive 255 votes out of 345 (74%). In addition, the majority of Member States that backed the proposal must comprise at least 62% of the population of the EU. If a proposal was not backed by the Commission, it needed to be supported by 2/3 of Member States. This has been amended by the Treaty of Lisbon, which adopted a 'double majority' system to pass proposals, and allows four Member States to block a proposal by objecting to it.

[25] A Court official known as the Advocate General is assigned to offer an advisory opinion to the Court, based upon the submissions of the parties and an analysis

Because the AG's opinion is independent, based upon the submissions in the case and taken in isolation from the deliberations of the judges, they used it as a proxy for the 'correct' position based upon the law. They found that the AG's opinion agreed with the opinion of the Court in 79% of their sample (Carrubba, *et al.* 2008, p. 448). The AG's opinion swung the likelihood of a pro-plaintiff ruling by 60 percentage points, which was 'comparable to the influence of a fairly large shift in the balance of government observations on a legal issue' (Carrubba, *et al.*, p. 448). This was equivalent to the effect of four large Member States shifting their preferences.

Even putting aside the concern over the use of QMV weighting in all cases, Carrubba, *et al.* seem to rather over-promise in their conclusions. Although Carrubba, *et al.* assert that they can reject the Legalistic argument, their results indicate that the Court is in fact making the 'correct' legal decision a large majority of the time, regardless of member state pressure. In only 21% of instances did the opinion of the Court diverge from the recommendation of the AG. There must be some variance in how reasonable judges would decide any particular case, especially as the legal issues that reach the Court are novel, and therefore usually matters of genuine debate. It is not clear that Carrubba, *et al.* have proved to what extent the Court is subject to political pressure.

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of the law. The Advocates General are appointed using the same criteria as for ECJ judges and are intended to be impartial observers. Advocates General used to give an opinion in every case, but since 2003 they have only given an opinion if a case involves a new point of law.

Therefore, the empirical studies have confirmed neither the neofunctionalist nor the intergovernmentalist positions about the independence of the Court and its ability to act as a policymaker. The conclusion that can be drawn from the literature is that ECJ is a court with considerable independence that is, like all courts, constrained to a certain extent to not outrun its legitimacy by getting too far ahead of popular opinion. Pollack (2003) compared the independence of the ECJ and the constraints upon it to national courts and concluded that the ECJ has greater autonomy. However, rather than focussing on evaluating the relative powers of the Court and the Member States, this study will look at the Court through an institutionalist or comparative politics frame.

An Institutionalist/ Governance Approach

A parallel development to the broadening of the larger EU debate to focus on governance and processes has happened in the literature related to the European Court of Justice. Conant (2002, 2007) has argued for abandoning the debate over neofunctionalism versus intergovernmentalism in favour of analyzing the ECJ through a comparative politics frame, drawing comparisons to domestic legal systems. 'Specifically, scholars have begun to ask new questions that are marginal to integration theory and derive instead from the more general judicial politics literature as they explore the factors that condition access to justice, influence the impact of law and affect the EU's democratic legitimacy' (Conant 2007, p. 58). Studies of the interaction between layers of a political system 'need not declare the permanent supremacy of any single layer of government' (Conant 2007, p. 62). Similarly, Paul Pierson advocated a historical

institutionalist approach to situating the Court within the larger EC polity. He 'incorporated key aspects of neofunctionalism while offering a stronger and expanded analytical foundation for an account of member-state constraint' (Pierson, 1996, p. 147).

There is debate as to what extent court decisions can have an impact on policy. Rosenberg (1991) argued that the impact of even very powerful courts is limited by the need for implementation. He considered the impact of the U.S. Supreme Court's landmark *Brown v Board of Education*[26] decision on desegregation policy and concluded that it was the federal government's use of the power of the purse that led to desegregation. It wasn't until the government conditioned some federal education funds upon desegregation that there was movement. Most of the arguments centre on a lack of agents to enforce decisions. Conant (2002) assessed the impact of ECJ decisions on national level policy in France, the UK and Germany in four issue areas. She described the result as 'justice contained.' The Commission played an important role and the ability of concerned NGOs and other interest groups to transform a legal victory into policy change was a crucial determinant.

This follows the literature on the varying successes of one-time litigants and 'repeat players'– groups that pursue many cases, in what are often coordinated litigation strategies (Galanter 1974). It is an important distinction, as follow through to a successful decision is often the crucial determinant of whether a Court decision actually effects a policy change (Alter and Vargas 2000). Well-

[26] *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954).

established groups, such as trade unions, have greater success than individual litigants, because they have greater incentive to push forward after their victories to influence policy change. However, Alter and Vargas noted that the irony is that those groups have other means of effecting political change, and tend to be more reluctant to pursue a litigation strategy (Alter and Vargas 2000). On the other hand, individual litigants need to pursue litigation to get a positive result, but are then less likely to follow through after a victory in court, unless the individual as a wealthy or well-connected firm, or part of a trade union that may join their cause (Alter and Vargas 2000, p. 478).

The relationship between national courts and the Court of Justice will be a crucial determinant of the impact of a Court decision. Obermaier (2008) evaluated the role of national courts in the Member States in influencing the implementation of the *Kohll/Decker* cases. Looking at the UK, France and Germany, he found that national courts were 'the sword of the ECJ in implementing the *Kohll/Decker* jurisprudence' (2008, p. 751). He concludes that, 'the behaviour of national courts has to be at the very centre of investigation when looking at compliance with EC law, and particularly ECJ rulings.' (2008, p. 752). National courts are very compliant in applying Court decisions to the underlying case once a judgement has been made. Nyikos found that 96.3 per cent of decisions following the ECJ ruling (Nyikos 2003).

However, national court compliance doesn't tell the whole story. Obermaier (2009) examined the impact of the *Kohll/Decker* jurisprudence in France, the UK and Germany. He found that in France and the UK the application of ECJ case law

made a major difference in implementation, but in Germany less so. He concluded that, although it did lead to some loss of Member State control over territoriality, the overall effect on Member State health systems has been relatively minor. It is a useful study, however, when it was published in 2009, it was quite early to assess what the impact of *Watts* (decided in 2006) will be on the NHS. It is not a straightforward linear process of court decision in, policy output out, and it is important to attempt to account for compliance.

The role of the Court is essential to a governance-based account of the development of the European Union social dimension, especially in terms of regulatory policy-making. Institutions play an essential role in the development of policies and a polity. 'By shaping not just actors' strategies, but their goals as well, and by mediating their relations of cooperation and conflict, institutions structure political situations and leave their own imprint on political outcomes' (Thelen and Steinmo 1992, p. 9). The evidence for an important role for institutions in shaping EU policy through purposive action is considerable (Cram 1997). As Cram has stated, 'the question is no longer do institutions matter but how do they matter and in what respects do they influence the policy process and ultimately the process of European integration?' (Cram 1997, p. 27).

The regulatory model must predict that the ECJ will be a primary driver of the direction of future EU social regulation. 'The 'Social Europe' of the future – the outlines of which are beginning to emerge clearly from the jurisprudence of the Court of Justice… - will be not a supranational welfare state, but an increasingly

rich space of social-regulatory policies and institutions' (Majone 1993, p. 168). Kelemen (2010) has identified the rise of 'adversarial legalism' as a dominant mode of governance in the EU. Kelemen asserts that the EU has replaced national level regulation with 'juridicial re-regulation' at the EU level. Scholars of governance and European social policy should be interested in the Court as an institution.

However, the institution that should be considered is broader than the European Court in isolation. The Court itself has sought to integrate member state national legal systems and the EC legal order. This is a classic multi-level governance or network system, characteristic of those seen throughout the European Union polity. It has integrated sub-national actors, i.e. Member State courts and tribunals, into a supra-national system. There is an assumption on modern systems theory that larger systems are comprised of sub-systems that function by autonomous logic (Luhman 1995). The larger system of the European Court of Justice includes all Member State courts, as well.

Wincott noted that the court 'sought to create a (decentralized) system in which a wide variety of actors are drawn into the Community system' (1995, p. 133). The Court has allowed national institutions, such as regulatory bodies, that are not considered part of the judiciary in their Member States to make preliminary references.[27] Rasmussen attributed the rise in preliminary reference usage in

[27] But see Case C-196/09 *Paul Miles and Other v European Schools* [2011], a recent judgment where the Court held that The Complaints Board of The European Schools, which is required to apply EU law was not a 'court or tribunal' for purposes of Article 267 TFEU.

part to a concerted campaign on the part of the ECJ to integrate the legal systems of the EC and the Member States. In 1969 the Court launched an informational campaign that brought national court judges to Luxembourg to see firsthand their *Palais de Justice* and to familiarise national court judges with the preliminary reference process. The relationship between the ECJ and national courts became increasingly interlinked. The Court has continued to reach out and build relationships with national courts. The TAIEX programme was designed to facilitate the integration of the new EU Member States. One Advocate General reported having spent 'quite a lot of time' providing training to the judiciary in the 2004 accession states on the preliminary reference process (Interview 08/09/11). The ECJ has thus 'been able to extend the practical scope of community law … in a manner which a single institution sitting in Luxembourg would not have been able to manage alone' (Wincott 1995, p. 133).

Stein (1981) and Weiler (1981, 1990, 1994) have emphasized how the incentives of the ECJ and national courts were intertwined and each tended to advance legal integration. Stone Sweet and Brunell termed this a 'virtuous circle,' and noted how constitutionalisation was 'driven almost entirely by the relationship among private litigants, national judges, and the EC interacting within the framework provided by Article 177' (1998, p. 65). Thus, the ECJ enlisted national judges as 'agents of the community order … The ECJ obliges national judges to uphold the supremacy of EC law, even against conflicting subsequent national law; encourages them to make references concerning the proper interpretation of EC law to the ECJ; and empowers them (even without a referral) to interpret

national rules so that these will conform to EC law and to refuse to apply national rules when they do not' (Stone Sweet and Brunell 1998, p. 66).

Through the Article 267 TFEU (ex 234 EC and 177 EC) preliminary reference process, national court judges gained the power to review national policies, some for the first time, and were able to do so while attributing the necessity of their actions to a higher authority (Cichowski, 2007, p. 32). While this power was not always welcomed (Burley and Mattli, 1993), some national courts have used the opportunity to circumvent their national legal *status quo*. For example, the lower German national courts have repeatedly sent cases to the ECJ for preliminary rulings, circumventing more conservative legal precedents from the higher German courts (Leibfried and Pierson, 2000). German courts lead all other countries in references to the ECJ on issues involving social provisions.

Divergent interests are present within Member States, with actors at various levels that have differing motivations. The ECJ gave some of these actors opportunities for influence within the community legal system (Mattli and Slaughter, 1998, p. 180). This fits into the research looking at how national actors use the European integration push in national policy processes (Jacquot 2008, Caune, *et al.* 2011). Here these actors include individual litigants and their lawyers interested in changing policy, and lower national courts interested in enhanced power within national legal systems (Mattli and Slaughter, 1998, p. 180). This created a 'self-sustaining dynamic' of 'policy feedbacks' that had political consequences and 'can reconfigure the inner workings of the polity itself' (Stone Sweet and Brunell 1998, p. 64).

2.5 Patterns of Litigations before the ECJ

The preliminary reference process of the ECJ rulings can provide a new space for litigants to challenge national laws (Alter 2000, 2009, Cichowski 2007). But the rates of preliminary reference vary widely from Member State to Member State. Litigants may ask for a reference but national courts must agree to send it. Any national court may send a reference to the ECJ if it is necessary to interpret a rule of EC law, but member state courts from which there is no ability to appeal must refer any questions of EC law to the Court. Some Member States, such as Germany and Italy, send many references per year but others, such as Ireland and Portugal, send very few. Also, some Member States send more references in a particular issue area than in others. For example, Austria sends many preliminary references in the area of free movement of persons, while the UK sends more European citizenship preliminary references.

The reasons for the variation in preliminary references have been much theorised but less often tested. Stone Sweet and Brunell (2004), in their note on the primary dataset in the field, which is the base for the dataset used in this analysis, argue that, 'cross-national variation in reference activity is not due to variation in factors that operate at the national level.' They assert that the puzzle is more profitably studied at the issue level, as specific court structures in different policy domains may explain variation. They were perhaps beforehand in their categorical dismissal of broad national factors, especially as two of the

authors who have published empirical studies of the effects of broad national factors on rates of preliminary reference. However, the main thrust of this study is directed to the social policy domain, thereby avoiding this stricture about the use of their dataset.

Quantitative Studies

Potential explanations for variation in rates of preliminary references have been hypothesised, but seldom tested. Because nearly all previous studies have not been specific to an issue area, the potential explanations are general and relate to the legal system as a whole. This study is specific to the issue area of social policy, and therefore can consider issues related to social policy structure in the Member States, as well. Vink, *et al.* (2009) state that the hypotheses found in the literature can be divided into two schools. Institutionalist hypotheses consider domestic legal framework and traditions. Functionalist hypotheses consider broader cross-societal factors (Vink, *et al.* 2009, p. 8-9). This is a largely useful framework, however, some of the hypotheses are difficult to classify according to this dichotomous structure.

'Institutionalist' hypotheses look to the structure of domestic legal systems and try to explain variation in terms of legal doctrine and court usage. One frequently asserted explanation is the 'friendliness' of a member state legal system to litigation (Alter 2000). Another explanation concerns whether the Member State has a monist or dualist legal system. A third considers the existence of a right of judicial review. A sub-explanation in the judicial review tradition is that internal

power struggles within a national legal system might influence rates of references. A fourth hypothesis looks to the perceived legitimacy of the European Court of Justice within a member state.

The first factor, the 'friendliness' of a national legal system to litigation, is comprised of a number of different elements. Practical limits on litigation, such as a lack of class actions, limited standing to sue by public interest groups and the availability of organizational support can be expected to affect access to justice before the ECJ (Conant 2007, p. 58, Alter 2000). This is linked to the literature that examines the varying successes of one-time litigants and 'repeat players'- groups that pursue many cases, in what are often coordinated litigation strategies (Galanter 1974). Studies in various issue areas have indicated that 'commercial enterprises, societal interest organizations and public enforcement agencies are most likely to gain access to court to enforce EU legal norms because they are most likely to possess the knowledge and financing necessary for litigation' (Conant 2007, p. 59). Powerful interests are more able to use the opportunities presented through litigation processes. Member States can overcome this by generous provision of legal aid, lower court costs, and institutions designed to advance minority interests. EC rules on gender equality and social security were advanced through public support of the Equal Opportunities Commission, Social Security Tribunals and Citizens' Advice Bureaux (Alter and Vargas 2000, Harlow and Rawlings 1992, Conant 2001, 2007).

The second potential institutionalist explanation considers whether Member States are of monist or dualist legal traditions for how the national legal system is structured vis-à-vis international law. In pure dualist systems, international law and domestic law occupy separate spheres. In monist systems, international and domestic law are part of a 'universal legal order,' and domestic courts make use of international sources of law and precedents in their decisions (Hillier 1998). In monist systems, international law is enforceable in national courts directly, whereas in dualist systems, international law is enforceable in national courts only as it has been transposed into national law. Monist legal systems, which allow for direct enforcement of international law, and where courts are accustomed to non-national precedents interfering in domestic cases, might generate more preliminary references (2005, p. 404). Vink, *et al.* note that thirteen out of the first fifteen preliminary references made were from courts in the Netherlands, which had the most monist legal culture of the original six Member States (2009, p. 9). The legal structure hypothesis is that Member States with monist legal systems will have higher numbers of preliminary references than dualist legal systems (Alter 1996, Mattli and Slaughter 1998, Carrubba and Murrah 2005). Carrubba and Murrah (2005) tested whether Member States with a monist legal system had higher rates of preliminary references in a dataset that covered the Member States of the EU-15 from 1970 to 1998. They found that monist legal systems were negatively correlated with the rate of preliminary references. The fact that the effect of monist and dualist legal traditions can be hypothesised in either direction rather undermines its potential explanatory power.

Vink, *et al.* pointed out that the monist/ dualist distinction might affect preliminary references in a different manner to that predicted by Carrubba and Murrah. They propose a 'reversed legal doctrine hypothesis: monist states on average should make fewer references than dualist states' (2009, p. 10). Their reasoning was that courts in monist legal systems would already be experienced in interpreting and applying non-national sources of law and would not need further assistance. Courts in dualist systems, now presented with an entirely new requirement to apply non-national sources of law, would be more inclined to seek assistance from the European Court (Vink, *et al.* 2009). They tested this hypothesis with an OLS regression analysis of a dataset comparing the annual preliminary references for the countries of the EU-15 from 1995 to 2006. They found that a monist legal system was again significant, but negatively correlated with numbers of preliminary references.

The presence or absence of a right of judicial review is widely theorised to be an important factor in predicting rates of preliminary references. Alter (1996) and Mattli and Slaughter (1998) expect judicial review to be positively correlated with rates of preliminary references, but did not test this empirically. The theory is that in Member States where courts are already empowered to adjudicate on the constitutionality of legislation they are comfortable with the idea that laws should be reviewable. The preliminary reference procedure might be viewed to be a natural extension of the judicial review system already in place. Carrubba and Murrah (2005) and Vink, *et al.* (2009) also advanced hypotheses related to judicial review. In both studies the authors distinguished between concrete judicial review and abstract judicial review. Concrete judicial review takes place

in the context of an actual case and abstract judicial review is exactly that, a review of the constitutionality of legislation in the absence of a case or controversy.

The difficulty with hypotheses related to the presence or absence of a right of judicial review is that the 'interests' of courts in a national legal system are far from clear. Even though they are unfamiliar with the processes of using judicial review, courts in legal systems with no judicial review may find themselves empowered by this new ability and avail themselves accordingly. Moreover, the different levels of courts within a legal system may well have different interests from one another. The extension of the right to review legislation to lower courts might lead to those courts using the preliminary reference procedure to circumvent established legal hierarchies, as Leibfried and Pierson assert happened in Germany (Leibfried and Pierson, 2000). A further distinction may exist between countries where there is a concrete right to review legislation, but it may only be exercised by a constitutional court, and those countries that permit concrete review by ordinary courts. Vink *et al*. point out that constitutional courts may also be a 'catalyst' for ordinary courts to use the preliminary reference process when they are expected to. The German Constitutional Court has not made preliminary references, but also considers that the German constitution obliges the ordinary highest German courts to make references (Vink, *et al.* 2009, p. 12).

Carrubba and Murrah (2005) generated two hypotheses, depending upon whether countries had abstract or concrete judicial review. They expected

concrete judicial review to be positively correlated but found no correlation. They expected abstract judicial review to be negatively correlated and found that it was. However, Vink, *et al.* rightly point out that the problem with Carrubba and Murrah distinguishing their hypotheses thus is that only one EU country, France, has abstract review but not concrete judicial review (2009, p. 11). Moreover, only one EU country, the UK, has no judicial review at all. This makes it very difficult to test the impact of judicial review using a quantitative method.

Vink, *et al.* also test a hypothesis that judicial review leads to a greater number of references, but put it into operation differently. They build an independent variable that distinguished between abstract judicial review and two different types of concrete judicial review, one where it is exercised only by constitutional courts, and the other where concrete review is exercised by ordinary courts (2009, p.17). They find that an abstract right of judicial review is significant but negatively correlated. Concrete judicial review is not significant. However, the flaw with this operationalisation is that it's not clear why abstract judicial review should be important for Member States' usage of preliminary references. Preliminary references always arise from actual controversies or cases, and would therefore be concrete judicial review.

Wind, *et al.* (2009) tested for the effect of majoritarian democracy, as compared to constitutional democracy. In their estimation, majoritarian democracies rely upon parliamentary supremacy and limit the role of courts. In contrast, constitutional democracies 'embrace judicial review and view it as a constitutive aspect of what it means to be a true democracy' (2009, p. 74). They identify

Denmark, Sweden, Finland and the UK as majoritarian democracies, and the rest of Europe as constitutional democracies. They find that in the majoritarian democracies rates of preliminary references are lower than in constitutional democracies. However, the concept of majoritarian democracy seems to be very diffuse for such a dichotomous characterisation. As Wind, *et al.* describe them, the countries in each of the two camps are not especially similar to one another in terms of legal or governmental tradition. All of the majoritarian democracies other than the UK in fact have constitutions that guarantee judicial review. In the constitutional democracies group, the interaction between monism versus dualism and judicial review differentiate the countries.

A fourth potential institutionalist explanation for rates of preliminary references is national legal culture. Schepel and Blankenburg (2001) point to national legal cultures as a crucial factor in the use of public policy litigation. 'The idea that litigation could be a powerful democratic instrument is totally alien to French political culture' (Cohen-Tanugi (1985), p. 158, cited in Schepel and Blankenburg (2001), p. 42). Thus, perceptions of citizens of Member States about the legitimacy of the Court may be crucial determinants of whether they will look for redress from the courts. An earlier cross-national study of citizen perceptions of the ECJ by Gibson and Caldeira (1998) found that the ECJ had little perceived institutional legitimacy. Moreover, while national high courts had greater perceived legitimacy, there wasn't evidence that they could lend that legitimacy to the ECJ (Gibson and Caldeira 1998). Studies from the US legal system found that if citizens lacked confidence in their courts they were likely to look elsewhere for redress (Dougherty, *et al.* 2006). Grosskopf (2001) studied

support for established constitutional courts, such as the U.S. Supreme Court and the West German Federal Constitutional Court, and emerging courts, such as the ECJ. She found that the ECJ has lower levels of institutional legitimacy because it is new, but national courts could transfer legitimacy to the ECJ. This study will measure support for the European court using EuroBarometer survey data.

Vink, *et al.* compared different legal cultures by using rates of litigation per 100,000 residents of a Member State. Alter (2000) has also hypothesised that perhaps some Member States are simply more litigious than others. However, Vink, *et al.* put into operation their independent variable based upon a measurement of rates of litigation in the EU-15 that was available for only one year of their study. This may be an interesting area to include, but there is not sufficient consideration of the potential that rates of litigation might vary within a member state over a period of time. After all, they point out that the rates of preliminary references vary dramatically in some Member States from year to year (Vink, *et al.* 2009, p. 5). There are no data available on rates of litigation on an annualised basis across the EU-15.

The second set of hypotheses could be termed functionalist. They are not related to the legal structure or the courts directly, but rather to broader societal factors that might also impact upon take up of the preliminary reference process. The previous empirical studies tested various measures of the interconnectedness of a Member State economy to the European Union, as well as population size and GDP. This study proposes three novel functionalist hypotheses that are more closely related to social policy. The first of these is that the rate of preliminary

references for social policy-related cases will be positively correlated with the degree to which a Member State's social services are based upon employer and employee contributions, or are 'Bismarckian' in nature. The second is that the rate of preliminary references will be positively correlated with the degree of union density in a Member State. Third, the level of a Member State's 'compliance' with the EU will be correlated with the rate of preliminary references.

In the prior studies, Stone Sweet and Brunell (1998) attempted to explain the different pattern of references across the Member States by testing the explanatory power of differing levels of transnational exchange, cross-national measures of 'diffuse popular support' (1998, p. 67) for the EC, population and GDP. Mattli and Slaughter (1998) also hypothesised that popular support for the EU would have a positive correlation with rates of preliminary references, but did not test this assumption. Stone Sweet and Brunell found a strongly positive linear relationship between the levels of transnational trade and the number of references that Member States send to the ECJ. They attributed this to increased transnational exchange producing more conflicts between national and EC law. Under their theory, this would create a need for more supranational rules to regulate the transnational exchange, and the increased dependence on such rules will feedback to fuel more transnational activity (1998, p. 67). However, they did not limit their dataset to cases involving transnational trade, so 'the model includes spurious correlation' (Conant 2007, p. 49). In contrast, Golub (1996) correlated indicators of societal interconnectedness, such as the volume of trade and migrant worker populations, to preliminary references in fields directly

related to those areas and found a weaker relationship. Pitarakis and Tridimas (2003) tested the effects of intra-EU trade on increased preliminary references (as a measure of legal integration) and found the relationship to be in the opposite direction – increased legal integration led to higher levels of intra-EU trade. Wind, *et al.* (2010) did not find a causal relationship with intra-EU trade in either direction.

Vink, *et al.* tested a hypothesis that Member States with larger populations will have higher rates of reference to the Court. They found that population size, GDP and intra-EU trade had a high degree of inter-correlation, which led them to question Stone Sweet and Brunell's conclusion that transnational trade 'widely outperforms' other variables for country size, such as GDP and population size (Vink, *et al.* 2009, p. 16). Therefore, Vink, *et al.* created a new measure of interconnectedness of the Member State to the EU, which is the ratio for intra-EU trade to GDP. They found that the relationship between this variable and rates of preliminary references was not statistically significant. They also tested a hypothesis that higher levels of support for EU integration would have a positive correlation with rates of preliminary references, and found that there was a statistically significant positive relationship (Vink, *et al.* 2009, p. 18).

Stone Sweet and Brunell (1998) also compared the rate of preliminary references for free movement of goods and social provisions. They used the rates of litigation for each member state in the overall dataset to predict what percentage of references in each policy area should come from each member state. Free movement of goods represents an area where the EC polity has

negatively integrated, by removing barriers to the free movement. Therefore, their model predicted that there would be more references from the dominant Member States in this area than would be expected based upon the rate of references in the overall dataset, as those would be the markets that traders in other Member States would wish to access. They found that this was supported.

Social provisions are an area where the EC law has positively integrated the polity, by creating new policies that establish standards for national rules. Therefore, Stone Sweet and Brunell's model predicted that there would be a pattern of preliminary references that challenged the states with the lowest common denominator approach to social provisions. Those Member States would have the greatest degree of policy misfit. They found that 24 per cent of the cases in the subset attacked the social policies of the UK. They attributed this to the fact that the UK had consistently been a veto-player with regard to expansion of EC social provisions, and 'found that the ECJ had used Article 177 references to legislate, by judicial fiat, provisions vetoed in the Council' (1998, p. 77). However, a number of important social policy cases have arisen around issues to do with the removal of barriers to free movement of persons and services. This study will consider a broader set of preliminary references related to social policy.

The first novel functionalist hypothesis to be tested by this study is that the degree to which a national welfare state is 'Bismarckian' will be positively correlated with an increase in the number of social policy preliminary references. The theory is that the structure of the national welfare state may

have an impact upon the rate of references in the area of social policy. The structure of social services offered by Member States may make it easier for some citizens than others to enforce those rights through legal action. Although a national social security system is extremely complex and does not readily permit of a quantitative analysis, a broad distinction between Bismarckian and Beveridgean social security systems can be drawn.

Bismarckian social security systems are primarily financed through social insurance contributions by employers and employees. They are focused on horizontal redistribution across the recipient's lifespan, rather than vertical redistribution in society. They are earnings-related and the right to receive benefits is tied to work or its equivalent. Non-workers can receive benefits through their association with a worker, such as a spouse.

In contrast, Beveridgean social security systems are primarily financed through taxes, generally involving flat rate universal benefits. They are vertically redistributive. Bonoli identified two types of Beveridgean welfare states, high spending ones such as the Nordic countries, and low spending ones such as the UK and Ireland (1997). In the low-spending Beveridgean welfare states, benefits are often residual and designed to ensure a subsistence level of existence. The right to receive benefits in Beveridgean welfare states is linked to residency and may be means-tested, especially in the low-spending states.

The degree to which a system is financed by employer and employee social insurance contributions, rather than taxation, is the 'best approximation' of how

Bismarckian a system is (Bonoli 1997, p. 360.). Bismarckian welfare systems will create rights that are more akin to property rights (Titmuss 1976, Hinrichs 2003) and as such, this hypothesis is based upon the assumption that the entitlements in a Bismarckian welfare state will be more easily enforceable in courts.

The second novel functionalist hypothesis is that greater union membership density in the population of a member state will result in more social policy preliminary references. This is based upon the theory that bringing a case to enforce social policy rights in a national court, and then to have the knowledge and the ability to request a reference to the Court of Justice, requires a degree of information and support that is not available to everyone. Having the support of a union might make this a more viable option. This hypothesis puts into operation Galanter (1974)'s concept of the importance of 'repeat players' in the use of the legal system.

The differing compliance with European Union law in the Member States may also be a factor affecting rates of preliminary references. However, it is a complex calculation to establish which Member States are 'compliant.' Various studies have attempted to estimate compliance patterns across Member States. Recent studies have attempted to assess the 'degree of fit' or 'misfit' between an existing domestic institutional structure and the Community rules and regulations (Börzel 1999). The idea was to consider the 'institutional filter' and how far it could explain the implementation of various pieces of community law (Knill and Lenschow 1998, p. 610-11, 2001, p. 121-4). Maestenbroek and Van

Keulen (2006) added the politics back in, and found that favourable governments may help to overcome the problems with the misfit hypothesis.

Quantitative studies have looked at various different measures to estimate the degree of compliance with the rule of Community law across Member States. Falkner (2008, p. 10-11) surveyed the previous quantitative studies: common measures that were used as indicators included the numbers of Commission infringement proceedings (Börzel, Hofmann and Sprungk 2004, Tallberg 2002), transposition measures as reported by Member States (Lampinen and Uusikyla 1998), and transposition measures as reported by the Commission (Borghetto, Franchino and Giannetti 2006) and domestic legal databases (Mastenbroek 2003), member state domestic politics (Lampinen and Uusikyla 1998), and popular support for Europe (Lampinen and Uusikyla 1998, Mbaye 2001). However, their results are often contradictory and confusing. Falkner (2008) concluded that various aspects of member state administrative capacities are the only factors that are sustained throughout the various quantitative analyses (2008, p. 11).

In response, Falkner, Treib and Hartlapp (2005) used extensive qualitative interviews and legal analyses in each of the EU-15 Member States to create a typology of the compliance regimes within the EU in the area of social policy. They studied the implementation of six social provision directives in each member state, creating 90 case studies. They tested a number of hypotheses suggested by the existing literature against these cases, and found that they weren't very explanatory. They then re-examined their cases and found that

while they didn't confirm any of the hypotheses, they did suggest some similarities between Member States.

The initial (2005) typology identified three types of regimes. In the first, 'the World of Law Observance,' compliance usually overrides all other factors. In this 'compliance culture,' directives are transposed in a timely manner, even if there is a conflicting national policy. Moreover, application and enforcement are usually successful. The three Nordic EU countries occupy this 'world': Denmark, Finland and Sweden. In the second 'World of Domestic Politics,' domestic political factors often trump compliance if there is a conflict between national policies and the EU directive. In these countries the administrations and judiciaries tend to be efficient, so it is only domestic resistance that prevents enforcement of EU policies. Six EU countries inhabit this 'world': Austria, Belgium, Germany, the Netherlands, Spain and the United Kingdom. In the third 'World of Transposition Neglect,' compliance with the EU is not a goal at all. The intervention of powerful supranational actors is often required for transposition. Even though compliance may be swift after such an intervention, problems in enforcement and application are common. The most characteristic reaction to EU actions is inactivity. The countries that make up this category are: France, Greece, Luxembourg and Portugal.

In 2008, Falkner and Treib elaborated on the typology to add a fourth class to the typology to encompass some of the new accession states, as well as the remaining EU-15 states. They conducted a further series of qualitative interviews and analyses around three directives in each member state. The fourth ideal-

typical set that they identified is the 'World of Dead Letters,' where the enactment and enforcement of EU directives is characterised by both national resistance to policies and extreme non-compliance with enforcement. Moreover, directives are often transposed directly, without consideration to national laws or policy, resulting in problems of fit. Falkner and Treib attributed Ireland, Italy, Czech Republic, Hungary, Slovakia and Slovenia to this land of non-compliance. Leiber (2007) also attributes Poland with these characteristics.

The third novel functionalist hypothesis of this thesis is related to the Falkner, *et al.* and the Falkner and Treib typologies. It is an attempt to specify how policy fit or misfit, coupled with efficient or inefficient administration of justice, will combine to affect rates of social policy preliminary references. Member States with lower levels of compliance with the EU, i.e. those outside of the 'World of Law Observance' can be expected to have higher numbers of preliminary references, as it is less likely that EU law will be effectively applied. However, those in the 'World of Dead Letters' are also expected to have very low numbers of preliminary references, because the combination of national resistance and extreme non-compliance will be an insuperable barrier. The highest numbers of references can be expected from Member States in the second-most compliant category – the 'World of Domestic Politics' – because while there might be more problems with compliance in the next category – the 'World of Transposition Neglect' – the domestic barriers will be a much higher hurdle in these Member States with no desire to come into compliance with the EU. [28]

[28] It has been pointed out that the direction of causality should be considered here, i.e. that the relationship between levels of Member State compliance and

Vink, *et al.* (2009) also did the first study of the variation in take up of the preliminary reference procedure using a qualitative comparative method. Still using the EU-15 countries from 1995-2006, they created truth tables for their institutionalist and functionalist hypotheses. They found that none of the factors that they had tested in their quantitative analysis was a sufficient explanation. The combination of a large population size and a high national rate of litigation, perhaps unsurprisingly, predicted a high number of rates of reference (Vink, *et al.* 2009, p. 20). However, the lack of a high rate of litigation could be overcome by low support for European integration. They also found that countries without any form of concrete judicial review referred relatively often, as well as dualist countries with concrete review by constitutional courts (Vink, *et al.* 2009, p. 22).

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rates of preliminary references might go in either direction. However, the hypothesis is more complex than that. Those Member States that were the most and the least compliant both had very low rates of references. It is the interrelationship between policy misfit and efficient administration of courts and justice that drives rates of preliminary references. For the most compliant Member States, those in the 'World of Law Observance,' this is because they have a high degree of fit with European law. For the least compliant Member States, those in the 'World of Dead Letters,' this is despite the fact that they have a very high degree of misfit with European law. Instead, their resistance to enforcement prevents the usage of the justice system to redress this degree of misfit through the preliminary reference process.

2.6 Conclusion

Scholarship on the European Union has struggled to account for the development of the EU under pre-existing theories in international relations. Neofunctionalism and intergovernmentalism have both been employed to explain and interpret European unification, with mixed results. More studies have now taken an institutionalist or comparative politics framework focussing on governance to try to explain how the Euro-polity functions, rather than why. A similar divide has persisted in the literature related to the Court of Justice. All of the literature agrees that the Court has played a crucial role in European unification. Rather than joining the debate about the 'length of the leash' (Mattli & Slaughter 1998) afforded to the Court's autonomy, this study will address an important question for the institutional legitimacy of the Court.

One of the primary mechanisms by which the European Union makes policy is through the regulatory pathway (Majone 1993). This is particularly true in the area of social policy. The EU lacks resources to create a supranational welfare state, and the diversity of welfare state structures in the Member States makes it unlikely that a consensus model could be created at the European level even if the resources existed. However, the expanding network of regulations and case law (See Chapter 3) at the European level are increasingly affecting national social provisions (Leibfried and Pierson 2000). European precedents now control many elements of the national welfare states, including who may receive services, what services must be provided, where those services may be consumed and who provides the services. In this environment of increasing

'juridicial re-regulation' (Kelemen 2010), with European regulations replacing national-level regulation, the Court of Justice will only become more important to the direction of social policy in Europe.

However, the Court does not control what matters reach it, nor is there the ability for European citizens to enforce these European regulations directly in the European courts. This must be accomplished via the preliminary reference system from the national courts of the Member States. There is a wide variation in the rates at which the various Member States send preliminary references to the Court. Moreover, some Member States send more preliminary references in some areas than in others. This means that some citizens of the European Union will have differing access to European-level justice when raising questions of European law. This is an important concern for the legitimacy of the European legal system. Moreover, the skewed distribution by Member State and issue areas could steer the direction of the Court of Justice's jurisprudence and, as a result, European social policy. What accounts for this variation across the Member States?

The previous empirical studies that attempted to explain the variation in rates of preliminary references across the European Union have left important questions unanswered. At the general level, it is not surprising to learn that Member States with larger populations and higher rates of litigation send more preliminary references to the European Union. The culture of the Member States also might help to account for the variation. Do negative perceptions of the European Court of Justice among Member State population lead to lower levels of references? If

so, perceptions of the legitimacy of the Court and European institutions in the newer accession states may offer crucial insight into the future of the Court's interactions with Member State legal systems and European policy. Can the structure of Member State legal systems, even at the level of broad legal doctrine, such as a monist tradition or judicial review, affect rates of references? This might also offer insight into the future direction of the Court.

In addition to repeating the broad approach to all preliminary references employed by most previous analyses, this study will focus in a particular issue area: preliminary references in areas related to social policy. This will allow for testing hypotheses that are more related to the subject matter of the cases. It is of interest to learn if rates of preliminary references in the social policy area are correlated with aspects of the national welfare state. Does a more Bismarckian welfare state structure offer better access to enforcement via the European legal system? If so, this will influence the future of social policy in the regulatory welfare state that is the European Union. Because the case law of the Court is developing via strings of decisions that build upon one another, if many more cases reach the Court from particular types of welfare states, then that will affect the direction of the Court's jurisprudence in the area of social policy. Because pursuing a European litigation strategy is a sophisticated option for affecting policy change, the existence of actors that enable such a strategy may affect the ability of European citizens to access European law. In the area of social policy, does greater union density in a Member State affect rates of preliminary references in the area of social policy? Do higher numbers of EU migrants in a Member State translate to more social policy preliminary references? How does

Member State compliance with the EU affect rates of social policy preliminary references? All of these questions have implications for the direction of EU social policy, a well as for what will happen in the newer accession states as they adapt their oftentimes less-developed welfare states to the European regulatory regime.

This thesis will use a mixed methods design to examine the variation in the rates at which Member States in the EU-15 send preliminary references in the area of social policy. First, a time series cross-section analysis will examine the social policy preliminary references from the fifteen Member States from 1996-2009 quantitatively. This econometric analysis will test various hypotheses about the effects of member state factors on the rates of preliminary references, as well as three new hypotheses that are more relevant to social policy. Second, a qualitative comparative analysis (QCA) will be used. QCA is very appropriate for this study as it is designed for small sets. The QCA will also allow for an analysis of how various factors combine to affect the rate of social policy preliminary references. In the third section a qualitative study of the United Kingdom and France will further explore the themes that developed in the first two sections. Chapter 4 sets out the methodology for this study in detail.

Before the study of why rates of preliminary references differ so widely by Member State, Chapter 3 will address the threshold question of why scholars of social policy in the European Union should care about the European Court of Justice. It answers the questions through a qualitative study of legal doctrine and case law. It begins with an exploration of sources of EU law, and the crucial

doctrine of direct effect, whereby the Court unilaterally created the idea that European citizens had European rights, which were enforceable not only against Member States but also against other parties. Chapter 3 concludes with a discussion of some issue areas in which the European Court of Justice has been a particularly important policymaker in the EU. ECJ case law in gender equality, free movement of persons and European citizenship, and free movement of services will be explored.

3 Why scholars of European social policy should care about the European Court of Justice.

This chapter will employ a historical study of legal doctrine and case law to answer the threshold question: 'why should scholars of European Social Policy care about the European Court of Justice?' The chapter begins with a discussion of the foundations for EU law and the structure of the EU legal system. The groundbreaking Court-created doctrines of direct effect and supremacy, which extended European rights to Member State nationals, will be explored. This is followed by an analysis of key Court decisions in the area of equality, free movement of persons, European citizenship and free movement of services. The chapter concludes with a discussion of how ECJ decisions are eroding the territoriality of the national welfare state, affecting who is entitled to receive services, what services they receive, and where they may receive those services. However, the results have not always been to the benefit of European workers.

3.1 Foundations and Structure of the European Union Law

Treaties

The European Communities were established by three treaties. The Treaty establishing the European Coal and Steel Community (ECSC) created cooperation on coal and steel was signed 18 April 1951 in Paris and came into force on 23 July 1952. The ECSC Treaty expired 23 July 2002 and its responsibilities were merged under the other treaties. The Treaty Establishing the European Economic Community (EEC) created better economic co-operation and was signed in Rome on 25 March 1957, and came into force 1 January 1958. It is commonly referred to as the Treaty of Rome. The Treaty establishing the European Atomic Energy Community (Euratom) was signed in Rome along with

the EEC Treaty. Although there are differences in institutional rules between the three treaties, the institutions created to administer the system were merged in 1967, creating a single Commission and a single Council of Ministers. The Court of Justice of the European Communities (ECJ) was founded with the ECSC Treaty in 1952 and adjudicates matters arising under all three treaties.

The three foundation treaties, subject to various amendments, were incorporated into a fourth treaty, the Treaty on European Union (TEU), which was signed in Maastricht on 7 February 1992 and came into effect on 1 November 1993. This is commonly referred to as the Maastricht Treaty. Article A (now 1) of the TEU states, 'This Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as closely as possible to the citizen.' Maastricht created a three-pillar structure of political as well as economic dimensions that comprises the European Union. Titles II, III, and IV of the TEU incorporated the EEC, ECSC, and Euratom communities into the First Pillar of the EU, the European Community (EC). Title IV incorporated the co-operation on Common Foreign and Security Policy (formerly European Political Co-operation under the Single European Act) into the Second Pillar. Title VI established co-operation on Justice and Home Affairs as the Third Pillar.

The treaties have been amended by special conferences of the EU Member States, referred to as intergovernmental conferences. In addition to the amendments with the addition of every new Member State, some key agreements have amended the treaties to reform the institutions of the European Union and to

increase its areas of competency. The Single European Act (SEA) was the first fundamental modification of the original treaties and came into force on 1 July 1987. It adopted measures intended to complete the single common market by the end of 1992 and to coordinate monetary policy. The SEA also established the Cooperation Procedure and extended Qualified Majority Voting (QMV)[29] to new policy areas. The Treaty of Amsterdam entered into force 1 May 1999. It extended the powers of the EU to more areas involving individual rights, increased powers to the European Parliament, and increased interaction on social and employment policies. The Treaty of Nice came into force on 1 February 2003, and amended the EU's decision-making systems and institutional structures in the run-up to further enlargement. The draft Constitutional treaty was signed in October 2004, but failed to gain ratification by all Member States.

Finally, the Treaty of Lisbon amending the Treaty on European Union and the Treaty Establishing the European Community, known as the Treaty of Lisbon or the Reform Treaty, was signed 13 December 2007 and entered into force 1 December 2009, upon the ratification of all 27 Member States. It amended the

[29] QMV is the procedure followed by the EU when it cannot reach consensus on an issue. It establishes the conditions under which a legislative proposal can be passed without unanimity. Each Member State has a number of votes in the Council of the European Union. The number of votes is roughly proportional to national population, but weighted to award more votes to Member States with smaller populations than they would have under a strict division by population. Under the Treaty of Nice system, which was in effect until December 2009, in order to pass a proposal had to be backed by a majority of Member States and receive 255 votes out of 345 (74%). In addition, the majority of Member States that backed the proposal must comprise at least 62% of the population of the EU. If a proposal was not backed by the Commission, it needed to be supported by 2/3 of Member States. This has been amended by the Treaty of Lisbon, which adopted a 'double majority' system to pass proposals, and allows four Member States to block a proposal by objecting to it.

TEU (Maastricht) and the TEC (Rome) to include many provisions of the rejected European Constitution. It also abolished the three pillar structure of Maastricht, bringing all three pillars under a single framework. Member States did attempt to 'draw some of the teeth from the unification of the pillars' by the insertion of a new proviso limiting matters concerned with national security to the Member States (Chalmers, *et al.* 2010, p. 46). Of interest in the area of social policy, Protocol 26, the result of Member State pressures, states that, 'the provisions of the treaties do not affect in any way the competence of the Member States to provide, commission or organize non-economic services of general interests.' These should include 'social services,' which constitute the 'institutional core' and 'some of the periphery' of national welfare states (Ferrara 2009, p. 227). Moreover, Article 48 TFEU allows for a Member State to institute a proceeding in the Council to suspend the legislative process granting social entitlements to migrants if it would have a negative effect on that Member State's welfare system. The TEC, the source of most EU law, was renamed the 'Treaty on the Functioning of the Union' (TFEU). The TFEU includes a reference to the Charter of Fundamental Rights of the European Union, which legally incorporates that Charter, but does not include the language of the Charter as the failed Constitution did. Thus, the TEU, (now) TFEU and the Charter comprise the three legal bases for EU law. Poland and the UK have been granted opt-outs from the Charter.[30]

[30] Protocol (No 7) On the Application of the Charter of Fundamental Rights to Poland and to the United Kingdom provides:

Article 1

1. The Charter does not extend the ability of the Court of Justice of the European Union, or any court or tribunal of Poland or of the United Kingdom, to find that the laws, regulations or administrative provisions, practices or action of Poland

Secondary Legislation and Other Authorities

In addition to the Treaties, the other primary source of EU law is secondary legislation adopted by the legislative institutions. Article 288 TFEU states: 'To exercise the Union's competences, the institutions shall adopt regulations, directives, decisions, recommendations and opinions.' According to Article 288, regulations are binding in their entirety and directly applicable to the Member States. They have general application, rather than being addressed to particular Member States. No national implementing measures are required for regulations to take legal effect in the Member States. They normally have direct effect and create individual rights that must be upheld by Member State governments against individuals and Member States.[31]

Directives are binding 'as to the result to be achieved' (Article 288 TFEU) upon the Member States to which they are addressed. However, the decisions as to how to transpose and implement the directive are left to the government of each

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or of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it reaffirms.
2. In particular, and for the avoidance of doubt, nothing in Title IV of the Charter creates justiciable rights applicable to Poland or the United Kingdom except in so far as Poland or the United Kingdom has provided for such rights in its national law.

Article 2

To the extent that a provision of the Charter refers to national laws and practices, it shall only apply to Poland or the United Kingdom to the extent that the rights or principles that it contains are recognised in the law or practices of Poland or of the United Kingdom.

[31] Case 65/75 *Tasca* [1976] ECR 291; Case 94/77, *Zerbone S.n.c. v Italian Finance Administration* [1978] ECR 299; Case 93/71 *Leonesio v Italian Ministry of Agriculture and Forestry* [1972] ECR 287.

Member State. Governments are given a time period in which to create new law to amend existing law to comply with the directive. Directives thus 'effect approximation of national laws' (Kilroy 1999, p. 128). In other words, directives create similarities but not uniformity across the national laws of Member States in the areas required to affect the result mandated by the directive. Although directives are not directly applicable they can have direct effect if a Member State fails to implement them in time or correctly[32] and if its provisions are 'unconditional and sufficiently clear and precise'[33]. The line of cases that established the doctrines of direct effect and supremacy of EU law has affected the applicability of directives to Member States and individuals. This case law will be addressed later in this chapter.

Decisions of the Council or the Commission that specify to whom they are addressed are binding only upon those parties (Article 288 TFEU). They may be directed to Member States or to private organizations or individuals. The EU uses decisions to implement individual administrative acts.

Recommendations and Opinions have no binding force under EU law (Article 288 TFEU). However, they are an important source of 'soft law,' by which the Commission sometimes sets policies or guidelines (Kilroy 1999).

[32] Case 152/84, *Marshall v Southampton and South-West Hampshire Area Health Authority* [1986] ECR 723, 748; Case 103/88 *Costanzo v Città di Milano* [1989] ECR 1839.
[33] Case 9/70, *Franz Grad v Finanzamt Traustein* [1970] 825, at para. 90.

3.2 European Union Law and Member State Legal Systems

The EU had its genesis in international treaties. In traditional international law, the application of international laws upon a nation's legal system is dependent upon that domestic system's constitutional rules (McCorquodale 2003). As was briefly discussed in Chapter 2, one common distinction in international law is between monist and dualist legal philosophies. In pure dualist systems, international law and domestic law occupy separate spheres. International law has no impact upon domestic law unless the national government transposes the international law into the domestic legal system, even if that nation's government has agreed to an international treaty or rule. In monist systems, international and domestic law are part of a 'universal legal order' (Hillier 1998). Therefore, international law automatically becomes a part of domestic law through the doctrine of incorporation. In monist systems, international law is enforceable in national courts directly, whereas in dualist systems, international law is enforceable in national courts only as it has been transposed into national law. This may create gaps between the law as transposed and the international rule that nation has ratified. There are hybrid situations, such as Germany and Italy, where the Head of State must obtain parliamentary approval before agreeing to international treaties.[34] However, these are more akin to the monist tradition, as the law approving the international agreement also transforms its provisions into domestic law (Kilroy 1999).

[34] Article 25 of the Constitution of the Federal Republic of Germany and Article 10 of the Constitution of Italy.

3.3 The Structure of the ECJ

The ECJ is comprised of one judge for every Member State, at present 27. Each Member State nominates a judge, and they are 'appointed by common accord of the governments of the Member States' (Article 19 TEU) for six-year terms. The judges' independence must be 'beyond doubt' (Article 19 TEU), and they should have qualifications and competence for the highest judicial position in their home countries. The Court's function is 'to ensure that in the interpretation and application of this Treaty the law is observed (Article 19 TEU). Because the treaties and secondary legislation are often imprecise or incomplete, the ECJ has had the power and opportunity to 'significantly contribute to the corpus of Community law' (Davies 2003, p. 43).

The Court usually sits in chambers of five or three judges. Occasionally, when deciding cases that are more significant, the Court sits as a 'Grand Chamber' of thirteen judges. The ECJ is assisted by eight Advocates General (AG), who are appointed by the same standards as the judges of the court. The AG issues an advisory opinion to the Court after the parties submit and before deliberations. Following the French legal model, the AG represents the public's interest by making an impartial and independent submission in cases brought before the Court. (Article 252 TFEU). In other words, the AG is an independent adjudicator for the Court of the decision that is correct on the legal merits. The AG prepares his or her opinion independently and does not participate in the deliberations of the Court (Rasmussen 1998, p. 68; Tridimas 1997). To prevent an appearance of bias, AGs are not assigned to direct actions arising from their Member States and

are generally barred from preliminary references arising from their Member State (Rasmussen 1998, p. 68; Tridimas 1997, p. 1356). This is presumed to insulate the AG from most political pressure. Additionally, as Carrubba, Gabel and Hankla note, '…given that AG terms of office generally do not coincide with those of the appointing government, even a highly political AG would find it difficult to anticipate the desired opinions of the government responsible for reappointment' (2008, p. 448).

In addition to the submission of the AG, Member States and the Commission may submit Observations with the Court. These are written briefs presenting legal arguments for how cases should be decided. The Observation procedure was little used in earlier years of the ECJ, but has come to increasing importance.

The Court's jurisdiction is general under Article 19(1) TEU, but there are three important exclusions. It has no jurisdiction over Common Foreign and Security Policy (Article 24(1) TEU, Article 275 TFEU). In the area of freedom, security and justice, the Court has no jurisdiction 'to review the validity or proportionality of operations carried out by the police or other law-enforcement services of a Member State or the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security' (Article 267 TFEU). If procedures are undertaken over a serious breach by a Member State, the Court may rule on the procedure, but not the substance (Article 269 TFEU).

There are two primary types of action before the ECJ, direct actions and preliminary rulings. Enforcement proceedings may be brought against Member States under Articles 258-260 TFEU. Article 258 provides:

> 'If the Commission considers that a Member State has failed to fulfil an obligation under this treaty, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations.
>
> If the State concerned does not comply with the opinion within the period laid down by the commission, the latter may bring the matter before the Court of Justice.'[35]

Similarly, a Member State that considers another Member State to have breached the treaty may bring action for enforcement before the ECJ (Article 259 TFEU). This, however, is extremely rare, and the vast majority of direct enforcement proceedings before the ECJ are under Article 258. An action may be brought for breach of the provisions of the Treaty as well as secondary legislation adopted in accordance with those provisions. EU agreements with non-Member States or international organisations may also be enforced against the Member States via this mechanism, as such agreements are binding on all Member States.[36] Failures by all entities of the state are subject to direct action, including the legislature, the executive, constitutionally independent public authorities, local or regional authorities and independent states in a federation, private parties under state control, and national courts (Shaw 1993, p. 122).

[35] Article 258 TFEU.
[36] Case 104/81, *Hauptzollamt Mainz v Kupferberg* [1982] ECR 3641; Case 181/73 *Haegeman v Belgium* [1974] ECR 449.

The second primary method by which cases are brought before the court is the preliminary ruling mechanism, under Article 267 TFEU, which allows, and in some cases requires, the national courts of a Member State to raise questions about the interpretation of EU law before the ECJ. Article 267 TFEU provides:

> 'The Court of Justice shall have jurisdiction to give preliminary rulings concerning:
>
> (a) the interpretation of the Treaties;
>
> (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;
>
> Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.
>
> Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.'

The ECJ has ruled that the preliminary reference procedures are 'essential for the preservation of the Community character of the law established by the Treaty and has the object of ensuring that in all circumstances the law is the same in all States of the Community.'[37] This has been affirmed in a long line of cases. The ECJ is empowered to answer questions of the interpretation of EC law and then to send the case back to the national court. It has no authority to declare a Member State law invalid. The Court has repeatedly asserted that it has no authority to rule upon the application of an EU law or to decide upon the validity of a Member

[37] Case 146/73, *Rheinmühlen-Düsseldorf v Einfuhr und Vorratsstelle für Getreide und Futtermittel* [1974] ECR 33.

State's law while at the same time ruling upon those exact things.[38] The referring court instead has the ability to judge the validity of the Member State law.

As was argued in the introductory chapter to this thesis, the preliminary reference process has increased the integration of the European legal system and policymaking. Member State laws and policymaking could be affected by challenges to laws and policies in other Member States. Litigation in any Member State 'is now equally legally significant for the legal systems of all the other Member States' (Chalmers, *et al.* 2010, p. 158).

The docket of the Court is skewed toward cases that are challenges to national policies, rather than individuals seeking compensation. It is becoming a vehicle for challenging national policies by constituencies that cannot effect change in other ways (Chalmers, *et al.* 2010, Alter 2009, p. 176). Chalmers studied the preliminary reference process in the UK and found that the preliminary reference process was primarily being used by litigants that were interested in establishing new legal precedents, or interested in regulatory or fiscal politics (Chalmers 2000). If these challenges to national laws or regulations are successful in only ten per cent of cases, the ECJ becomes a powerful body in opposition to Member State status quo (Chalmers, *et al.* 2010). In fact, four previous empirical studies of national measures challenged through preliminary

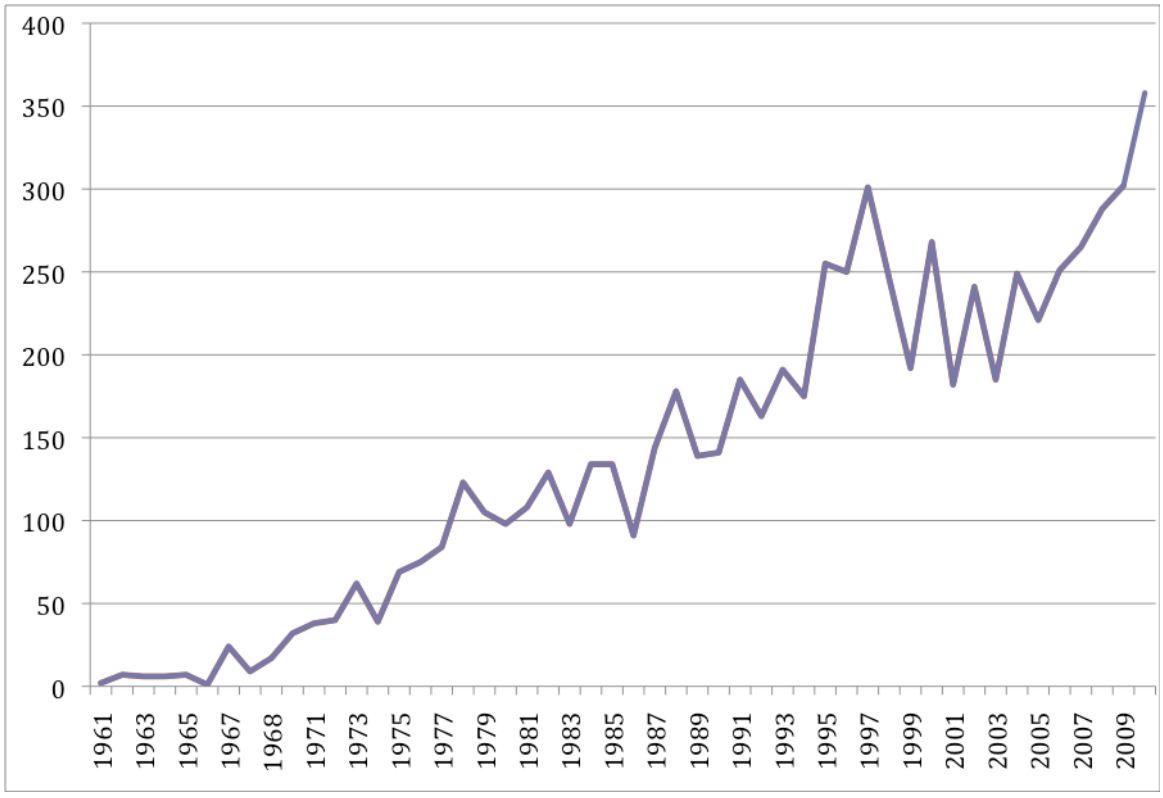
[38] See, for example, Case 6/64, *Costa v. ENEL* [1964] ECR 585, finding that the treaty prohibited the Member States from enacting laws that provided for more severe rules for non-nationals of that state than for nationals; Case 311/85, *Vereniging van Vlaamse Reisbureaus* [1987] ECR 380, concluding that Belgian laws requiring authorized travel agencies to offer tours at the rate fixed by tour operators 'were incompatible with the obligations of the Member States.'

references to the ECJ found that the Court ruled that the national measure in question violated EU law over 50 per cent of the time (Cichowski 1998, 2004, Kilroy 1999, Stone Sweet and Brunell 1998).

Weiler argued that Europeans have missed the political dimensions of the ECJ and the comparison to the U.S. Supreme Court (Weiler 1982). Harlow and Rawlings examined this argument and concluded that the comparison is imperfect, and that the ECJ does not occupy the same position in Europe that the Supreme Court does in the United States (1992). They cited the Court's procedural hostility to collective actions, due the difficulty of establishing standing to sue to enforce rights. However, they noted 'signs that the ice could be beginning to crack' and that groups had successfully gained standing to sue in a few cases, and the importance of references from national courts with more generous procedures for the granting of standing to sue based upon a collective grievance (Harlow and Rawlings 1992, pp. 280-1).

Though the restricted standing to sue might have limited the ECJ in theory, the massive increase in Article 267 TFEU preliminary references has greatly increased the power of the ECJ over national decisions and policy in practice. In 1970 there were only 32 preliminary references from national courts to the ECJ. From the 1990s onwards, national courts were sending over 200 references a year, on average. In 2010 there were 385 preliminary references, the highest ever figure historically. This exceeded the 302 preliminary references in 2009, at that time the highest ever number (ECJ 2011).

Figure 1: Number of Preliminary References to the Court of Justice from National Courts by Year



Source: Compiled from Stone Sweet, A and T. Brunell, (2007) 'The European Court and National Courts: Data Set on Preliminary References in EC Law (Art. 234), 1961-2006' and updated from Curia website

The ECJ was founded by Member States sharing civil law traditions.[39] Neither international nor civil law systems recognise the legal concept of precedent, and

[39] The two main types of legal systems worldwide are the common law and civil law systems. Common law systems are derived from the legal system of England and are prevalent in Britain and its former possessions, including the United States. Common law systems give value to the decisions of courts as interpreters of the law, with abstract legal rules being derived from court decisions about the meaning of statutes. Subsequent and lower courts are theoretically bound by these 'precedents' through the concept of '*stare decisis*.' In contrast, civil law systems are the prevalent type of legal system in the world. In civil law systems, it is statutes and codes that provide the legal rules, and courts act as the 'mouth of the law.' It is archetypal that civil law jurisdictions have a more exhaustively codified law, and court decisions tend to be shorter and not cite former case law. In practice, there are many different variations, as some civil law systems have not codified their laws, such as in Scandinavia, and some common law has been extensively codified, i.e., the United States Commercial Code. Moreover, in

therefore the Court is free to depart from its earlier decisions. However, it seldom does (Davies 2003). The Court's decisions do have a precedential value for courts of the Member State legal systems. This is based upon three extraordinary legal doctrines of the EU law system that have evolved over time and set it apart from the expected relationship between an international entity and Member States: direct effect, supremacy and pre-emption.

3.4 Direct Effect, Supremacy and Pre-emption

These doctrines were an extension of the reach of the EU to its citizens at quite an early stage. The cases themselves dealt with establishing a free market, and could have been decided without extending rights to citizens directly. However, the ECJ enunciated principles that linked citizens directly to the EU in a way that they had previously only been linked to their Member State. European law was now inserted into the previously exclusive relationship between Member States and their citizens (Durand 1979). These cases essentially granted *European* rights to citizens. They were the beginning of the Court's evolving jurisprudence in the area of European citizenship, and the crucial step in expanding rights to citizens beyond those endowed by their Member States.

Direct Effect

The first of these fundamental principles of EC law is that of direct effect. In 1963 the ECJ decided the *Van Gend en Loos* case and held that the provisions of the

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Germany, a civil law jurisdiction, court opinions are often lengthy and cite legal decisions and scholarship (Kilroy 1999).

Treaties were capable of creating legal rights that were directly enforceable by parties in the national courts of Member States:

> 'The Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields and the subjects of which comprise not only Member States but also their nationals. *Independently of the legislation of Member States, community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage.* These rights arise not only where they are expressly granted by the treaty, but also by reason of obligations which the treaty imposes in a clearly defined way upon individuals as well as upon the Member States and upon the institutions of the community.' (emphasis supplied) [40]

There are two sorts of direct effect: the direct effect of primary law, e.g. the Treaties, and the direct effect of secondary law, e.g. regulations, directives and decisions.

In order for a primary law to be directly effective, the criteria in *Van Gend en Loos* must be met. The treaty provision must be clear and precisely stated, be unconditional or non-dependent, and confer a specific right on which the citizen may base his or her claim.[41] Initially, there was only vertical direct effect, i.e. provisions were enforceable by individuals in national courts against the Member States. However, in *Defrenne II*, the ECJ found that there was also horizontal direct effect in some circumstances.[42] In other words, private parties

[40] Case 26/62, *NV Algemene Transporten Expeditie Onderneming van Gend & Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1, at para. 3.
[41] Case 26/62, *NV Algemene Transporten Expeditie Onderneming van Gend & Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1.
[42] Case 149/77, *Defrenne II* [1978] ECR 1365.

could enforce their rights as established by the treaties against other private parties in national courts.

The direct effect of secondary legislation depends on the type of measure in question. Regulations are in their nature directly effective (EC Article 189). They need not be transposed into national law and create obligations for both Member States and private parties. They are therefore directly effective both vertically and horizontally. Decisions apply only to the Member State to which they are addressed. However, in the *Leberpfennig (Franz Grad)* case, the ECJ held that if decisions are not implemented within the allotted period, they become vertically directly effective, in other words, enforceable against the Member State.[43] If a directive is not implemented by a Member State by the time of its expiry, the ECJ held in *Van Duyn*[44] that it became directly effective: 'It would be incompatible with the binding effect attributed to a directive (…) to exclude, in principle, the possibility that the obligation which it imposes may be invoked by those concerned.' A directive may be directly effective if 'the nature, general scheme and wording of the provision in questions are capable of having direct effects.'[45] In *Becker* the ECJ held that the directive must be 'unconditional and sufficiently precise.'[46] If the entire directive is not unconditional, those parts that are unconditional may be directly effective, as individuals may rely upon those.[47]

[43] Case 9/70, *Franz Grad v Finanzamt Traustein* [1970] ECR 825.
[44] Case 41/74, *Van Duyn v Home Office* [1974] ECR 1337.
[45] Case 41/74, *Van Duyn v Home Office* [1974] ECR 1337, at para. 2.
[46] Case 8/81, *Becker* [1982] ECR 53, at para. a.
[47] Case 8/81, *Becker* [1982] ECR 53.

Member States have also been prevented from taking actions contrary to the terms of a directive during the period in which they are supposed to be implementing the directive. The ECJ held that the directive has legal effect upon a Member State from the moment of its notification.[48] From that time a Member State may not take actions that impair its ability to implement the desired measure. Thus, in some situations directives can be directly effective even before the expiry of the implementation period.

Over time, the ECJ's jurisprudence has referenced what is essentially an estoppel argument, that to allow a Member State to rely upon its own failure to meet its obligations in order to deprive its citizens of the benefits offered by the directive would be unfair.[49] In addition to when a Member State has not adopted a directive in time, this also applies when a Member State has implemented a directive incorrectly. Although the form and method of implementation of a directive is left to the discretion of Member States, in the interest of uniform application of EU law, this discretion is reviewable by the ECJ.[50] However, where a measure has been correctly implemented by the Member State its benefits will be extended through the implementation measure, and therefore it is not directly effective.[51] The directive need not be adopted verbatim. In some cases adopting the context of a directive will be sufficient, so long as the

[48] Case C-129/96, *Inter-Environnement Wallonie* [1997] ECR I-7411
[49] Case 148/78, *Publico Ministerio v Ratti* [1979] ECR 1629; Case 152/84, *Marshall v Southampton and South-West Hampshire Area Health Authority (Marshall I)* [1986] ECR 723.
[50] Case 38/77, *Enka v Inspecteur der Invoerrechten en Accijnzen* [1977] ECR 2203; Case 51/76, *Verbond Nederlandse Ondernemingen v Inspecteur der Invoerrechten en Accijnzen* [1977] ECR 113.
[51] Case 8/81, *Becker* [1982] ECR 53; Case 270/81, *Felicitas* [1982] ECR 2771.

implementation is sufficiently clear and precise and guarantees the full application of the directive.[52]

The ECJ has also made movement toward horizontal direct effect for regulations, i.e. making them enforceable against private parties. It has expanded the definition of the state in *Marshall I*, holding:

> 'Where a person involved in legal proceedings is able to rely on a directive as against the State, he may do so regardless of the capacity in which the later is acting, whether employer or public authority. In either case it is necessary to prevent the State from taking advantage of its own failure to comply with Community law.'[53]

The state has also been broadly interpreted to include quasi-public authorities, as in *Foster v. British Gas plc*, where the ECJ found that the defendant was 'an emanation of the state.' The Court held:

> '… a body, whatever its legal form, which has been made responsible pursuant to a measure adopted by the State, for providing a public service under the control of the State and has for the purpose special powers beyond those which result from the normal rules applicable in relations between individuals is included in any event among the bodies against which the provisions of a directive are capable of having direct effect may be relied upon.'[54]

Kilroy has observed that the nature of these standards, e.g. whether a directive is 'sufficiently clear and precise,' contains a clear policy objective or has been correctly implemented, are subjective and leave 'wiggle-room' (1999, p. 141).

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[52] Case C-433/93, *Commission v Federal Republic of Germany* [1995] ECR I-2303.
[53] Case 152/84, *Marshall v Southampton and South-West Hampshire Area Health Authority (Marshall I)* [1986] ECR 723, at para. 49.
[54] Case C-188/89, *Foster v British Gas plc* [1990] ECR I-3313, at para. 20.

This opens the door for interpretation by the ECJ and allows the opportunity for discretion on the part of the Court.

Supremacy

The second of the principal legal doctrines of the European Union is that European law is supreme to that of the Member States. The ECJ first set out this 'supremacy' doctrine in *Costa v. ENEL*. The Court held:

> By creating a Community of unlimited duration, having...powers stemming from a limitation of sovereignty, or a transfer of powers from the States to the Community, the Member States have limited their sovereign rights, albeit within limited fields, and thus have created a body of law which binds both their nationals and themselves. [55]

In *Internationale Handelsgesellschaft*, the ECJ found that not even Member State constitutions that guarantee fundamental rights not granted by EU law were supreme over what was then EC law. EU law was 'an independent source of law,' and required a uniform and effective application. [56] Furthermore, in response to the concern that the ECJ was undermining the protection of fundamental rights to citizens of Member States, the ECJ read general principles of fundamental rights into EU law (Kilroy 1999, p. 154). '[R]espect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice.[57]' The ECJ further held in *Simmenthal*[58] that EU law would take

[55] Case 6/64, *Costa v ENEL* [1964] ECR 585, 593.
[56] Case 11/70, *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratstelle für Getreide und Futtermittel* [1970] ECR 1125, at para. 3.
[57] Case 11/70, *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratstelle für Getreide und Futtermittel* [1970] ECR 1125, at para. 4.

precedence even over national laws passed subsequent to the adoption of the EC law. The existence of the EU law precluded the valid adoption of national laws to the contrary. There was considerable debate over acceptance of the doctrine of supremacy by the national courts of the Member States. However, it was eventually accepted by the constitutional court, or equivalent, of all Member States. In 2007, in the Treaty of Lisbon, the Conference of the EU Member States finally made an official declaration of the concept of supremacy.[59]

If a subsequently enacted law is incompatible with EU law it is not rendered non-existent, but inapplicable.[60] However, any national provisions that give rise to legal uncertainty must be amended or repealed by the Member State legislative body.[61] Supremacy also requires that the Member State not only dis-apply national measures that contradict EU law, but also supply a remedy that does not exist under national law.[62]

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[58] Case 106/77, *Amministrazione delle Finanze dello Stato v Simmenthal SpA* [1978] ECR 629.
[59] 'Declaration 17 Concerning Primacy' of the Treaty of Lisbon: 'The Conference recalls that, in accordance with well settled case law of the Court of Justice of the European Union, the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of Member States, under the conditions laid down by the said case law.' Available at: http://eur-lex.europa.eu/en/treaties/dat/12007L/htm/C2007306EN.01025602.htm, last accessed 28 February 2011.
[60] Joined cases C-10 to C-22/97, *Ministero delle Finanze v IN.CO.GE.'90 Srl and others* [1998] ECR I-6307; Case 106/77, *Amministrazione delle Finanze dello Stato v Simmenthal SpA* [1978] ECR 629.
[61] Case 167/73, *Commission v France* [1974] ECR 359.
[62] Case C-213/89, *Factortame and others* [1990] ECR I-2433.

Pre-emption

The final EU legal principle that has been developed is pre-emption. The ECJ has held that where the EC has exclusive competency in a field, a Member State is pre-empted from enacting legislation in that field, even where it does not conflict with EC law.[63]

3.5 Why should scholars of European Social Policy care about the ECJ?

As is set out in much more detail in Chapter Two, the ECJ is a key actor in European governance. The ECJ's decisions on direct effect, supremacy and pre-emption allowed individuals to enforce new EU-guaranteed rights in their national courts and provided a basis for legal action against their governments (Cichowski 2002, Alter 2001). Kelemen (2010) has identified the rise of 'adversarial legalism' as a dominant mode of governance in the EU. The EU relies upon judicial monitoring of compliance, delegating a great deal of authority and power to lawyers and judges (Kelemen 2010). Kelemen asserts that the EU has replaced national level regulation with 'juridicial re-regulation'- at the EU level. The process of lawmaking and litigating create feedback loops that are self-reinforcing (2010). The ECJ's judicial review of national policies in light of EU law has allowed it to develop a formidable body of case law on matters related to

[63] Case C-22/70, *Commission v Council (European Agreement on Road Transpor*t) [1971] ECR 263.

social policy. Thus, the ECJ has become a policymaker in its own right in the area of social policy.

ECJ case law has established important precedents for equality. Furthermore, the ECJ has built up paths of jurisprudence in the areas of free movement of persons, European citizenship, and free movement of services that have substantially eroded the territoriality of the national welfare state. The Court has chipped away at Member State control over who has the right to receive services under the national welfare state, where those services may be consumed and who can provide those services (Leibfried and Pierson 1995). Thus, national sovereignty over the welfare state, previously thought of as absolute (De Swaan 1994), has become compromised. The EU Member States are only semi-sovereign over their own welfare states (Leibfried and Pierson 1995). The European Court of Justice case law in several important areas is set out below.

Gender Equality

One of the earlier important areas of the Court's jurisprudence in social policy was in expanding the reach and scope of EU law related to gender equity (Mattli and Slaughter 1998, Leibfried 2005), and no account of the impact of the ECJ on European social policy would be complete without it. ECJ case law on gender equity arises out of Article 157 TFEU (ex 119 and 141 EC). Article 157 states in part, 'Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied.' This provision and its predecessors arose out of French fears that low-paid female

labour in the Netherlands would create an unfair trade advantage (Cichowski 2002). Efforts to enforce women's rights under Article 157 of the Treaty have been described as the 'best example of a European test-case strategy' (Harlow & Rawlings, 1992, p. 282). The ECJ has played a 'crucial activist role' in turning Article 119 into a series of protections for mostly female workers, requiring 'extensive national reforms — although not always to the benefit of women' (Leibfried 2005, p. 248). Subsequent case law related to the Directives on equal treatment in employment has expanded the protections.

Feminist scholars criticised the development of gender equity case law initially because the provisions were primarily concerned with building a common market, rather than originating in a rights-based frame. They pointed out that this market-based approach inherently leaves out work outside the market economy, which traditionally has been a female province (Rossilli 1997, Scheiwe 1994). The earlier Directives enforcing equal treatment for male and female employees, and addressing direct discrimination, included Equal Pay (75/117) expanding the definition to equal work from same work, Equal Treatment in access to employment, training and working conditions (76/207) ruling out direct and indirect discrimination based upon sex, including marital status, statutory social security systems (79/7), and occupational social security (86/378). This criticism of the EU regulatory scheme's focus on a traditional worker model is now a bit dated. Even though the EU policies in the area of gender equity arose out of the regulatory framework for market-making, they have addressed non-standard work as well as other gender equality concerns.

More recent EU Directives have also demanded the equal treatment of part time employment and nonstandard work. Additionally, Directives have banned discrimination against pregnant women or those who have recently given birth (1992), and mandated parental leave (1996) (Walby 2004). The Employment Directive (2006) also prohibited discrimination on the basis of sexuality, including sexual orientation. Article 157 and the Directives have been the subject of a number of significant European Court of Justice decisions that have extended and clarified the doctrines.

The celebrated *Defrenn*e decisions are among the most significant ECJ decisions on gender equity. An activist Belgian lawyer, Elaine Vogel-Polsky, saw Article 119 as a vehicle to advance gender equality in national courts (Cichowski, 2002, 2007, Harlow & Rawlings, 1992). She brought a series of test cases on behalf of an air hostess with the Belgian state airway, Sabena, alleging that the airline policy of forcing air hostesses to retire at age forty when no one else on the flight crew was forced to do so was discriminatory (Hoskyns, 1996).

The first of the cases to reach the Court, *Defrenne I*[64], concerned a pensions scheme whereby all members of the flight crew, other than air hostesses, retired with what was essentially a full pension. The Court held that the pension scheme in question, as part of a statutory social security scheme, fell outside the definition of which pensions counted as pay under Article 119. However, the mood of the Court seemed to indicate an uneasy feeling with the judgments and signalled that occupational retirement schemes would likely be within the scope

[64] Case C-80/70, *Defrenne I* [1970] ECR 445.

of the Article (Hoskyns, 1996). The *Defrenne I* decision helped to lay the foundation for expansion of EU legislation on gender equity. Hoskyns notes that, 'on the one hand, it made clear that an expansion in the scope of Article 119 was needed if its objectives were to be achieved, and on the other, that given more appropriate legal questions the court was likely to rule that Article 119 was directly applicable, thus opening the way, as in fact happened, for a stream of new cases' (1996, p.74).

In the years immediately following *Defrenne I*, the Equal Pay Directive was adopted. A combination of factors, including an announcement by the Commission that information on occupational pensions would be collected and considered as a result of *Defrenne I*, and the Sullerot Report, a groundbreaking study by a French sociologist emphasising the extent of women's disadvantage throughout the Member States, combined to create a new environment for the negotiations (Hoskyns, 1996). When the *Defrenne II* [65](1976) case reached the ECJ, only Britain and Ireland submitted arguments in opposition to the plaintiff's allegations of wage discrimination. Although there was an increased emphasis on social provisions throughout the EU, the Commission still maintained that Article 119 had no direct effect, and Britain and Ireland argued that the new Equal Pay Directive confirmed that the Article was enforceable only against states (Hoskyns, 1996). The Court rejected these interpretations and held that Article 119 was directly enforceable, though the Court declined to apply it retroactively. Thus, the *Defrenne II* decision transformed the economic provision intended in the original Treaty into a rights provision, by allowing individuals to

[65] Case C-43/75, *Defrenne II* [1976] ECR455.

sue in national courts throughout the EU. However, the ECJ limited the direct enforceability of Article 119 to 'direct and overt' discrimination, while 'indirect and disguised' discrimination would require further legislation to address it. *Defrenne III* [66](1978) completed the trio by declaring that equality is a fundamental right in the EC.

The Court has held that a discriminatory effect is sufficient. In the *Bilka*[67] decision, a German department store excluded part time employees, who were disproportionately women, from its occupational pensions scheme. The ECJ held that benefits under the occupational pensions scheme in question were governed by the employment contract and not a statutory pensions scheme, and were therefore 'pay' covered by Article 157. The ECJ ruled that it was up to the national court to determine via findings of fact whether or not the impact of the scheme was so disproportionate between genders as to be discriminatory and to evaluate whether the defendant company had sufficient 'objectively justified economic grounds' to justify the scheme.[68] The Member States had previously adopted statutory provisions that expressly excluded occupational pensions schemes from the 'pay' covered by Article 157. After the *Bilka* decision the Council of Ministers adopted the Directive on Occupational Social Security (86/378), but again allowed for differing retirement ages for men and women.

[66] Case C-149/77, *Defrenne III* [1978] ECR 1365
[67] Case C-170/84, *Bilka Kaufhaus GmbH v Karin Weber von Hartz* [1986] ECR 1607
[68] Case C-170/84, *Bilka Kaufhaus GmbH v Karin Weber von Hartz* [1986] ECR 1607, at para. 36.

The Court re-addressed this differing retirement ages issue in the *Barber*[69] decision, and applied Directive 86/378. The male plaintiff in that case had been made redundant at the age of 52. Under the private pensions scheme of his employer men were entitled to an immediate pension upon redundancy if they were 55 years of age. Women were entitled at 50 years of age. The ECJ ruled that British occupational pensions were classified as pay under Article 119 and therefore were required to be equal. Thus, the pension scheme in question was in violation of the Treaty. In response, the so called '*Barber* Protocol' was inserted into the Maastricht Treaty, partially reversing the Court's decision by declaring that occupational pension schemes that refer to work periods instituted before the ECJ ruling should not be affected by the ruling. This restricted the scope of the Court's ruling to future pensions schemes.

In the *Vroege*[70] and *Fisscher*[71] decisions (1994) the ECJ explicitly rejected the argument advanced by the United Kingdom and Belgium that the restrictions on prior schemes adopted by the *Barber* Protocol applied in other instances of indirect discrimination. It reiterated the *Bilka* criteria that a scheme is discriminatory if it 'affects a considerably higher number of women than men, unless the company is able to establish that the said measure is explicable by factors objectively justified and unrelated to discrimination on the grounds of

[69] Case C-262/88, *Barber v Guardian Royal Exchange Assurance Group* [1990] ECR I-1889.
[70] Case C-57/93, *Vroege v NCIV Instituut voor Volkshuisvesting BV* [1994] ECR I-4541
[71] Case C-128/93, *Fisscher v Voorhuis Hengelo and Stichting Bedrijfspensionenfonds voorde Detailhandel* [1994] ECR I-4583

sex.'[72] Because the *Bilka* precedent had not been limited by the time limitation in *Barber*, the Court held that Article 157 could be relied upon to claim retroactively violations of equal treatment with regard to occupational pensions schemes back to the date of the *Defrenne II* decision in 1976.

It is important not to lose sight of the fact that responses to gender equality harmonisation can be negative. When the ECJ rulings forced the UK to equalise state pensionable ages, the UK reacted by raising the age for women's retirement, rather than lowering the men's retirement age. The ECJ pressure allowed the government to escape much of the blame for this change (Leibfried & Pierson, 2000).

In a recent case that may have significant impact on paternity schemes throughout the EU, the ECJ held that it constitutes sex discrimination to have different maternity benefits for women than are available for men. In *Roca Álvarez* (2010) the Court held that a Spanish scheme where a woman who has a child is entitled to maternity benefits outright, but a man is only entitled to paternity benefits if the mother is also employed was discriminatory treatment based upon sex. The Spanish law could not be justified on grounds that it was intended to protect women's re-entry to the workplace post-childbirth, because the law had become 'detached from that purpose' and now attached to workers based upon parental status. The Court found that the scheme was 'liable to

[72] Case C-57/93, *Vroege v NCIV Instituut voor Volkshuisvesting BV* [1994] ECR I-4541, at para. 17.

perpetuate a traditional distribution of the roles of men and women by keeping men in a role subsidiary to that of women in relation to the exercise of their parental duties.' [73]

Free Movement of Workers

A second area in which the ECJ has been very influential in expanding social protections is related to the free movement of persons (Leibfried 1993). The original freedom was for free movement of workers, as this was required for the establishment of the free market. However, over time this has become the free movement of persons, and the persons protected frequently have little, if any, connection to the market. This has meant that Member States may no longer limit receipt of most social benefits to their citizens. As Leibfried notes, this is a very significant development for the EU, as ''citizen-making' through social benefits- demarcating the 'outsider'- was a watershed in the history of state-building on the continent, especially in France and Germany' (Leibfried 2005, p. 263.) The more recent Court jurisprudence was moving more toward a concept of European citizenship, especially after Maastricht.

The Court has held that all European citizens must be treated equally in the matter of social protections. In the *Martines-Sala*[74], a Spanish woman residing in Germany applied for the German child-rearing allowance. The plaintiff had

[73] Case C-104/09, *Roca Álvarez v Sesa Start España ETT SA* [2010]
[74] Case C-85/1996, *Martinez-Sala v Freistaat Bayern* [1998] ECR I-2691.

entered Germany as a worker but subsequently had been unemployed for over a decade. She had applied for a residence permit but it had not been granted. She then applied for the child-rearing allowance, which was refused on the grounds that she did not have a proper residence permit. The Court held that she was entitled to the benefit because she was a European citizen. To require citizens of another European Member State to fulfil an additional criterion, in this case having a residence permit, that was not required of German national, constituted discrimination based upon nationality. This was a break of the nexus between prohibition against discrimination against citizens of other Member States and the market-building justifications of the past.

The Court expanded on this theme in *Grzelczyck*[75], which involved a French national studying in Belgium applied for the *minimex*, a minimum assistance allowance available to Belgian students who were similarly circumstanced. The Court held that Belgium's legislation requiring migrants to be able to support themselves must be read in the context of the fundamental right of citizenship. European citizenship was 'the fundamental status of nationals of the Member States.' The Court for the first time recognised that citizenship could have a positive element, and the right to reside in another Member State was given direct effect. Belgium could not automatically deny financial assistance unless the support requested constituted an undue burden on the state.

[75] Case C-184/99, *Grezlczyck v le Centre Public d'Aide Sociale d'Ottignies-Louvain-la-Nueve* [2001] ECR I-6193.

These expansive views of European citizenship were affirmed in the *Trojani*[76] case. The plaintiff, a French national, was resident in a Salvation Army hostel in Belgium and performed approximately 30 hours of work per week as part of a 'personal reintegration program.' He applied for the *minimex*. The Court directed the Belgian Court to consider whether the sort of program that the plaintiff was involved with might constitute economic activity, but even if it did not, 'a citizen of the European Union who does not enjoy a right of residence in the host Member State under Articles 39 EC, 43 EC or 49 EC may, simply as a citizen of the Union, enjoy a right of residence there by direct application of Article 18(1) EC.'[77] As such, the plaintiff was entitled to social assistance on the same terms as Belgian nationals.

In *Baumbast*[78], the Court held that EU nationals did not have to be workers or even economically active in order to claim the rights afforded to them by the Treaty. Mr Baumbast, a German national, had been employed in the UK, and his wife, a Colombian national, and children had moved to the UK with him. Mr Baumbast then left and was employed outside of the EU, but his family continued to reside and the children to attend school in the UK. In *R*, a joined case with B*aumbast*, the plaintiff, Mrs R, was a United States national married to a French citizen. They moved to the United Kingdom and their two children, with French and American citizenship, began school. The parents divorced, and both

[76] Case C-456/02, *Trojani v Centre Public d'Aide Social de Bruxelles* [2004], ECRI-7573
[77] Case C-456/02, *Trojani v Centre Public d'Aide Social de Bruxelles* [2004], ECRI-7573, at para. 46.
[78] Case C-413/99, *Baumbast and R. v Secretary of State for the Home Department* [2002] ECR I-7091.

continued to reside in the UK, although the father ceased working. Mrs R applied for indefinite leave to remain on behalf of herself and her two children, which was granted for the children but refused for Mrs R. The Court held that Article 18 of the Treaty was directly effective and gave independent residence rights to EU citizens who were not workers. Moreover, family members should be protected even where the worker no longer lived with the family or in the Member State. These *Baumbast* rights have been an important basis for future cases from the UK, as will be seen in Chapter 7.

This was affirmed in the case of *Bidar*[79]. A French national living with his grandmother in the UK attempted to access subsidised student loan benefits available to UK citizens. The Court held that the requirement that recipients be 'settled' in the UK as a condition of receipt was discriminatory. A non-national could not, in the capacity of being a student, obtain settled status in the UK. It was reasonable for the UK to require 'a certain degree of integration' to access the benefit, but it could not require that the student establish a link with its employment market. [80]

The waters are less clear with regard to non-EU national family members of EU nationals. Initially, in the *Carpenter*[81] and *MRAX*[82] cases, this right was extended

[79] Case C-209/03, *The Queen (on the application of Dany Bidar) v London Borough of Ealing, Secretary of State for Education and Skills* [2005] ECR I-2119
[80] Case C-209/03, *The Queen (on the application of Dany Bidar) v London Borough of Ealing, Secretary of State for Education and Skills* [2005], ECR I-2119 at para.61.
[81] Case C-60/00, *Carpenter v R.* [2001] ECR I-6279.

even further to non-EU national family members. In *Carpenter*, the non-EU national wife of a UK citizen had the right to remain in the UK even where she had violated immigration rules. The wife, a Philippine national, had entered the UK on a tourist visa and overstayed. She subsequently married a UK national whose business selling services in other EU Member States entailed a great deal of travel. The Home Office issued a deportation order against the wife. The Court held that if the wife was deported then the husband's freedom to provide services would be infringed because he would have to relocate to the Philippines. Moreover, the UK had to consider respect for the family under Article 8 of the European Convention on Human Rights in addition to security or public policy. Therefore, the deportation could not be justified based upon grounds of public order and security. In *MRAX*, a Belgian requirement that non-EU spouses of Belgian nationals have a special permit violated EU law for free movement of persons. It did not matter if their visa had expired or if they had entered the country illegally. The right to enter a Member State by the non-national spouse of an EU national derived from the family relationship alone.

However, these expansive precedents were undermined in the *Akrich*[83] decision. Mr Akrich, a Moroccan national, who was illegally resident in the UK and was the subject of deportation orders, married a British citizen. He agreed to be deported to Ireland, where he and his wife found employment. After a short period of residence in Ireland he applied for the deportation order to be revoked and for

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[82] Case C-459-99, *Mouvement contre le racisme, l'antisemitisme and la xenophobia ASBL (MRAX) v Belgium* [2002], ECR I-6591.
[83] Case C-109/01, *Secretary of State for Home Department v Hacene Akrich* [2003] ECR I-9607.

re-entry to the UK under Article 10 of Regulation 1612/68, granting non-EU spouses of EU workers legally resident in another Member State the right to relocate with their spouse. The UK argued that Article 10 of Regulation 1612/68 did not apply as, since the stay had been engineered to evade national immigration restrictions, the wife had not been a worker legally resident in Ireland. The Court held that the non-EU national spouse must be lawfully resident in a Member State at the time that they migrate to another Member State with their EU national spouse. However, if the marriage was genuine, respect for family life under Article 8 of the European Convention on Human Rights should be taken into account when deciding whether to admit the third-country national.

Subsequently, the Court reverted to the *Carpenter* and *MRAX* reasoning in deciding *Commission v. Spain*[84]. Spain required non-EU national family members of an EU national to obtain a Spanish visa in their country of domicile before they could apply for the issue of a residence permit in Spain. The Court held that this infringed upon the free movement of the EU national family member and was contrary to the provisions of Directives 68/360, 73/148 and 90/365. The Court also affirmed that the right to enter derives from the family relationship alone.

It was hoped that the case law would be clarified in *Jia*[85]. The plaintiff is a Chinese national. Her son is also a Chinese national, married to a German

[84] Case C 157-03, *Commission v. Spain* [2005] ECR I-2911.
[85] Case C-1/05, *Jia v Migrationsverket* [2007] ECR I-1.

national and living in Sweden. Mrs Jia entered Sweden on a 90-day visit visa. Before its expiration, she applied for a residence permit to remain in Sweden with her son and his wife. In support of her application, Mrs Jia argued that she and her husband were unable to support themselves in China without the financial support provided by her son and his wife in Sweden, and were therefore dependent relatives. The application for the permit was denied, and the Swedish Aliens Board sent the preliminary reference to the Court. The Court held that there was no requirement that Mrs Jia have been legally resident in another EU Member State prior to making her application, as was required in *Akrich*. The Court also had no difficulty with her making the application whilst present on a short-term visitor's visa. In establishing dependence, the Court held that evidence could be required of support being provided and that it was essential to meet basic needs. However, the ECJ left unclear whether non-EU national spouses can be required to have legally entered a Member State before they can take up a right of abode in another Member State.

Recent decisions also have addressed the rights of children in education and their carer parents. In *Texeira*[86], a Portuguese couple moved to the UK and had a child, who began school in the UK. The couple divorced and the child stayed with the mother, who subsequently applied for housing assistance. The assistance was refused on grounds that she could not support herself and was therefore no longer entitled to residence. The Court held that the EU national child had a right of access to education, which had been gained while the family was together and

[86] Case C-480/08, *Texeira v London Borough of Lambeth* [2010]

that once the right was acquired, it could not be challenged. Therefore, the family were entitled to remain. The right of the carer parent to remain would end once the child attained majority, unless the child continued to need the presence of the parent. In *Ibrahim*[87], the non-EU wife of a Danish citizen moved to the UK with her husband and their Danish national children. After a period of working, the husband claimed incapacity benefit. He was eventually declared fit to work, at which point in time he left the UK and the couple separated. The wife remained in the UK with their children, relying on social assistance and was never self-supporting. She claimed housing assistance but her application was refused. Again, the Court held that the right of the EU national children to access education had been established and could not be questioned when the rights of their parents ended.

In the *Ruiz Zambrano*[88] case, Colombian national parents had minor children who were citizens of Belgium. Belgium refused the parent a work permit. The Court, sitting in Grand Chamber, said that Article 20 TFEU precludes national measures that would deprive EU nationals of genuine enjoyment of the substance of their rights conferred by virtue of their EU citizenship. The refusal of the right of residence and the refusal of a work permit for parents of EU citizen children would interfere with those children's ability to enjoy the substance of their rights as EU citizens. However, the Court reached a very different result in *McCarthy*,[89] limiting *Zambrano* while confirming its general principle. The

[87] Case C-310/08, *London Borough of Harrow v Ibrahim* [2010]
[88] Case C-34/09, *Gerardo Ruiz Zambrano v Office nationale d'emploi* [2011]
[89] Case 434/08, *Shirley McCarthy v Home Secretary* [2011]

plaintiff, Mrs McCarthy, was a dual Irish-UK national who had resided all of her life in the UK and was not economically active. She married a Jamaican national and then applied for an Irish passport. With this passport, she sought a right to reside for herself and her husband based upon Directive 2004/38/EC, which was denied on grounds that Mrs McCarthy was not a worker. The Court held that because Mrs McCarthy had never moved within the EU she could not rely on Directive 2004/38/EC. Nor did she have a right under the broader Article 21 TFEU. Although the Article did prohibit national measures that would have 'the effect of depriving her of the enjoyment of the substance of the rights associated with her status as a Union citizen,[90]' the decision in question did not do so. In particular it did not have 'the effect of obliging Mrs McCarthy to leave the territory of the European Union.'[91]

Under the precedents of the ECJ, the protections afforded by the free movement of persons have drifted away from the pro-market justifications. Non-workers and non-EU national family members have gained rights derived from the European citizenship of their family members. Assertions of an idea of European citizenship by the European Court of Justice are primarily assertions of equal citizenship. European citizenship is still derived from national citizenship in a Member State. What is essential is that those Member States cannot discriminate between their citizens and other European nationals. The inability to restrict who is able to receive services under national welfare states is a significant derogation of the sovereignty of Member States.

[90] Case 434/08, *Shirley McCarthy v Home Secretary* [2011], at para. 49.
[91] Case 434/08, *Shirley McCarthy v Home Secretary* [2011], at para. 90.

Free Movement of Services

Lately, the Court has repeatedly ruled free movement of services is also necessary to ensure the free movement of workers (Martinsen 2005). This means both that workers who have moved may be able to access services in their home regime and that states may no longer prevent other social policy regimes from competing directly on their sovereign territory under certain circumstances. 'There are significant prospects for a substantial remoulding of national social policies around this 'market filter,' which absorbs some 7 per cent of the EU15 labour force, and is actually a growing sector in an ageing continent, and has been exposed to some turmoil in recent ECJ history' (Martinsen 2005, p. 266).

The cases focus on a determination of whether the welfare measure in question is 'economic activity,' and whether its institutions are 'enterprises.' While social security benefits are generally exportable unless they are benefits 'in kind,' welfare state measures that are 'solidaristic,' and therefore non-economic activity, are not subject to the competition laws of the treaties. However, the presumption is that services are economic activity, and not welfare state activity. Most of the disputes centre around where the division is between the two (Leibfried 2005).

Family benefits have been a focus, as they often fall into this grey area between social security and social assistance. In *Hughes*[92] an Irish woman resident in the Republic of Ireland was married to a UK citizen who worked in Northern Ireland. Ms Hughes made an application for the UK Family Credit, which was denied on grounds that she was non-resident in the UK. The UK argued that the credit was social assistance and therefore non-exportable. The ECJ held that because the benefit was granted without a means test it was social security and therefore Ms Hughes was entitled to the credit. Similarly, in *Hoever and Zachow*[93], two families that were resident in the Netherlands, but with the husbands working in Germany, claimed the *Erziehungsgeld* child-rearing allowance. The ECJ held that because the benefit was granted based upon criteria that did not include a means test, it was exportable.

As set out in the introductory chapter, there also has been an important line of ECJ cases about the exportability of health benefits. In the process, a 'European healthcare dimension' has been established 'in that the European patient is empowered by a set of rights to cross-border treatments' (Martinsen 2005, pp. 1035-6). Health benefits have been held to fall within the economic fundamental freedoms. Much of the jurisprudence has centred on whether the home Member State can require pre-authorisation before their citizens can seek treatment in

[92] Case C-78/91, *Hughes v Chief Adjudication Officer* [1992] ECR i-4839.
[93] Joined Cases C-245/94 and C-312/94, *Hoever and Zachow v Land Nordrhein-Westfalen* [1996] ECR I-4895.

other Member States. An early overture from the Court was the *Pierik*[94] cases, which involved a Netherlands national seeking repayment for treatment for hydrotherapy in Germany, even though that treatment was not recognized in the Netherlands. The Court held that under Regulation 1408/71 treatments that were recognized as necessary and effective must be authorized even if they were not allowed under the home Member State's regime. There was very strong resistance from the Member States in Court and a swift legislative response to the Court's decision. The regulation was unanimously amended to correct the Court's interpretation (Martinsen 2006). After this the Court was silent for two decades until an important line of cases on cross-border provision of services.

In *Kohll*[95], a Luxembourg national sought reimbursement for dental care in Germany without prior authorisation. Similarly, in *Decker*[96], a Luxembourg national sought to purchase spectacles in Germany and be reimbursed by Luxembourg without pre-authorization. The ECJ held in what is known as the *Decker/Kohll* line of cases that the requirement for prior authorisation was an unjustified impediment on the free movement of goods and services. Moreover, the Court grounded this right in a fundamental freedom – the free movement of services under Article 49[97].

[94] Case 117/77, *Bestuur van het Algemeen Ziekenfonds Drenthe-Platteland v G. Pierik* [1978], ECR 825; Case 182/78, *Bestuur van het Algemeen Ziekenfonds Drenthe-Platteland v G. Pierik* [1979], ECR-1977.
[95] Case C-158/96, *Kohll v Union de Caisses de Maladie* [1998] ECR I-1931.
[96] Case C-120/95, *Decker v Caisse de Maladie de Employés Privés* [1998] ECR I-1831.
[97] Now Art 56 TFEU.

In the subsequent *Geraets-Smits/ Peerbooms*[98] decision, the Court held that even hospital services were exportable. However, the ECJ upheld pre-authorisations for hospitalisation, as necessary for an orderly, stable planning process for the provision of hospital services. The *Vanbraekel*[99] decision extended the line of cases further, by holding that services under the European E112 system, previously reimbursable at the state rate of the Member State providing the services, should be reimbursable at the home state rate if that is higher. In *Müller-Fauré/van Riet*[100] the ECJ held that it did not matter if the health system was based upon benefits in kind or a refund, benefits in kind systems were also affected by the *Kohll/Decker* case law. Cross-border outpatient care did not require pre-authorisation, but it was permissible for cross-border inpatient care. Moreover, in considering undue delay the national authorities had to consider the circumstances of the specific case, such as the degree of pain and whether it prevented the patient from carrying out a professional activity (*Müller-Fauré/van Riet*, para 90).

In *Inizan*[101], the ECJ upheld pre-authorization, but only for inpatient care. Even collateral costs associated with the treatment were reimbursable. In *Leichte*[102], Germany reimbursed a citizen for thermal care received in Italy, even though he

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[98] Case C-157/99, *Geraets-Smits v Stichting Zieckenfonds and Peerbooms v Stichting CZ Groep Zorgverzekeringen* [2001] ECR I-5473.
[99] Case C-368/98, *Vanbraekel v. Alliance Nationale de Mutualities Chretiennes* [2001]
[100] Case C-385/99, *Müller-Fauré v. Onderlinge Waarborgmaatshappij OZ Zorgverzekeringen and E.E.M. van Riet v. Onderlinge Waarborgmaatschappij ZAO Zorgverzekeringen* [2003] ECR I-4509.
[101] Case C-56/01, *Inizan v. Caisse Primaire d'Assurance Maladie des Haut-de-Seine* [2003] ECR I-12403.
[102] Case C-8/02, *Leichte . Bundesanstalt für Arbeit* [2004] ECR I-2641.

had been refused prior authorisation, but not for the costs associated with travel. The Court found that the German requirement of an assessment by an expert that the services were necessary and more likely to be successful if undertaken in another country was an undue impediment and a deterrent to free movement. In *Keller*[103], the Court held that treatments provided outside the EU on the authorisation of the host Member State as medically necessary must be reimbursed by the home Member State. The decision of the insurance institution in the host Member State as to medical necessity was binding upon the insurance institution in the home Member State. Finally, in the *Acereda Herrera*[104] case the Court clarified that while travel costs associated with medical care could be reimbursed they did not have to be reimbursed.

In *Watts*[105] the Court finally addressed a national health service. Mrs Watts, a UK national, sought preauthorisation to receive a hip replacement operation in France. Her application was refused on the grounds that the waiting time, then a year, for the procedure met national targets. Her case was eventually reassessed, and she was reclassified as a higher priority patient who would likely receive the operation in April or May of 2003. Nevertheless, in March of 2003 she went to France for the procedure and then sought reimbursement. For the first time the ECJ explicitly confirmed that the right to cross-border provision of medical

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[103] Case C-145/03, *Heirs of Annette Keller v Instituto Nacional de la Seguridad Social* [2005] ECR I-2529.
[104] Case C-466/04, *Manuel Acereda Herrera v Servicio Cántabro de Salud* [2006] ECR I-5341.
[105] Case C-372/04, *The Queen on the application of Yvonne Watts v Bedford Primary Care Trust and Secretary of State for Heath* [2006] ECR I-4325.

services applied in national health systems[106]. This was true even if the same care would not be reimbursable if sought in private provision in the UK. Moreover, what constituted undue delay had to be considered in light of the individual case, not national targets. Here Mrs Watts's costs were not reimbursable because the delay in place at the time she actually sought care was not unreasonable. Obermaier noted that the *Decker/ Kohll* cases constituted a series of cases because each, 'successively reaffirmed, refined and amplified the preceding cases' (2008, p. 742). The Court also addressed cross border services in national health systems in *Stamatelaki*[107] where a Greek national sought treatment in a private hospital in the UK. The blanket national rule refusing preauthorisation for private hospital care in other Member States for individuals over the age of 14 was held to be an unreasonable restriction on the right to free movement of services. Member States must not distinguish between care provided in a public and a private setting.

Court decisions have also created new rights to cross-border treatments in the area of long-term care benefit. A line of cases following the *Molenaar*[108] decision has addressed their exportability. In *Molenaar*, a Dutch-German couple residing in France had paid into a voluntary insurance plan that provided a long-term care benefit that could be taken either in-kind or as a cash equivalent. Germany argued that the cash benefit was really just a substitute for the in-kind benefit, and was therefore not exportable. The Court held that the benefit was a cash

[106] Although Spain, the home country in *Keller*, has a national health system, this was not in question in the matter.
[107] Case C-444/05, *Stamatelaki v OAEE* [2007] ECR I-3185.
[108] Case C-160/96, *Molenaar v Sozialgericht Karlsruhe* [1998]ECR I-843.

benefit and therefore exportable. Similarly, in the *Jauch*[109] case a German national who had worked in Austria but now resided in Germany was denied a long-term care benefit because he was non-resident. Austria argued that the benefit was a specifically enumerated exception in the Annexe to Regulation (EEC) 1408/71. The Court reclassified the benefit as a sickness benefit paid in cash, as it was granted objectively based upon a legally defined situation, and removed it from the Annexe, which therefore made it exportable. A similar result was reached in *LeClere and Deaconescu,*[110] where the Court looked to the substance of a benefit, rather than its inclusion in the Annexe of exceptions, and reclassified it.

The Court has repeatedly held that any derogation from the exportability of services must be strictly interpreted (Leibfried 2005). The default position is that services are economic activity and therefore exportable. As a result, Member State control over the extent of these services provided under the national welfare state has been substantially eroded (Leibfried and Pierson 1995). Member States can no longer exclusively control what services will be provided, where they are provided or who will provide them. This has been true in family benefits, health benefits and long-term care benefits and has implications for national welfare states. However, 'solidaristic' benefits are not exportable (Leibfried 2005). Accordingly, welfare state structures and the resulting

[109] Case C-215/99, *Jauch v Pensionsversicherungsanstalt der Arbeiter* [2002]ECR I-1901.
[110] Case C-43/99, *LeClere and Deaconescu v Caisse Nationale des Prestations Familiales* [2001] ECR I-4265.

exportability of services will affect whether some EU citizens are able to exercise their rights to free movement, particularly after retirement.

The Court's jurisprudence around free movement of services, coupled with the recent enlargements of the membership of the EU, has put a strain upon Member States' abilities to ensure minimum labour standards. This has been particularly true under the Posted Workers Directive (PWD). In recent decisions of the Court, 'subordinates worker's rights to economic freedoms and accepts that the exercise of fundamental workers' rights applies differently to domestic and foreign service providers' (Dølvik and Visser 2009). In *Laval*[111] a Latvian firm was awarded a building contract in Sweden, and was posting workers to its Swedish subsidiary at well below market rates of pay. The Swedish implementation of the PWD relied upon collective agreements requiring wage negotiations for a particular workplace. In this instance negotiations between the Swedish union and the Latvian parent company broke down, and the union responded by blockading the sites. The Swedish union had been trying to enforce worker protections greater than these required by Article 3(1) of the PWD. Although the Court held that the right to take collective action was a fundamental principle, in the words of Dølvik and Visser, 'some principles are more fundamental than others' (2009, p. 492). Because the Swedish union's action made it 'less attractive, or more difficult' for an entity from another Member State to provide services, it also violated Article 49, not just the PWD (*Laval*, para 99). Article 49 was held to have a horizontal effect against the trade

[111] Case C-341/05, *Laval un Partneri Ltd v Svenska Byggnadsarbetarforbundet*, [2007] ECR I-11767.

union, not based upon a construction of the trade union as a public body, thereby making it 'genuinely horizontal' (Davies 2008, p. 136).

In *Viking*[112] the Court also found that Article 43[113] on freedom of establishment was also directly effective against unions. There, collective action had been threatened to prevent a Finnish firm from reflagging a ship in a lower wage jurisdiction, Estonia. The shipping company applied for an injunction before the High Court in London under the Brussels Regulation (Davies 2008). The Court found that the union's action was a restriction on the freedom of establishment and 'should be subject to the same kind of proportionality test, despite the fact that the company was bound by a Finnish collective agreement and the threatened action was perfectly legal according to Finnish labour law' (Dølvik and Visser 2009, p. 502). The right of the union to strike, though 'fundamental,' is subjected to a strict test about its proportionality. According to Anne Davies, there is a flaw in the starting point in the Court's analysis. Under labour law, the proportionality test is used to assess a state's limitations on the ability to strike. However, the ECJ starts from the point that the assertion of free movement under Article 43 or 49 is fundamental, and therefore, it is the unions' responses to that must be proportionate (Davies 2008). 'Thus, it is the union's industrial action which must pursue a legitimate aim and which must not go beyond what is necessary to achieve that aim' (Davies 2008, p. 141). She also points out that

[112] Case C-438/05, *International Transport Workers' Federation . Viking Line ABP* [2008] ECR I-10779.
[113] Now Article 49 TFEU.

the more effective the collective action is the harder it will be to justify (Davies, 2008, p. 143). Effectively, this constitutes a catch-22 for unions.

The horizontal direct effect set out in both *Laval* and *Viking* may have larger consequences. Many questions remain to be answered about when private activity can be said to infringe upon the free movement of services or the freedom of establishment. 'For example, if a firm from another Member State is discouraged from establishing in the UK because it will be boycotted by a loose coalition of consumers who disapprove of its human rights record, would the leaders of that coalition be vulnerable to an action under Community law?' (Davies, 2008, p. 137).

The *Laval* judgement was reinforced in *Rüffert*[114], where a German state had applied a penalty clause against a contractor for subcontracting work to a Polish firm paying less than the rate required under the Public Contracts law. The Court held that applying such a clause to a foreign firm went beyond the Directive. These cases indicate that if a Member State employment measure exceeds the level of protection afforded by the PWD then it is likely to be contrary to the EU fundamental freedoms for free movement when applied to foreign companies. The Court's reinterpretation of the PWD as a set of maximum allowable standards, rather than as a set of minimum required standards, as is usually the case with European regulations, is a leap. The ECJ continued this logic in

[114] Case C-346/06, *Dirk Rüffert v. Niedersachsen*, [2008] ECR I-1989.

Luxembourg[115], holding that any derogation of the free movement, such as the PWD, must be interpreted strictly. Catherine Barnard observed that *Luxembourg*, along with the rest of the *Laval* quartet, 'cast serious doubts on the territorial application of national labour laws' (2009, p. 122).

3.6 Conclusion

The jurisprudence of the European Court of Justice has very important implications for social policy in Europe. ECJ decisions have linked citizens directly to the EU in a way that they had previously only been linked to their Member State. Decisions establishing direct effect and supremacy were the beginning of the Court's evolving jurisprudence in the area of European citizenship, and the crucial step in expanding rights to citizens. These court-created doctrines have granted *European* rights to citizens. These European rights can be enforced against the Member States and sometimes against other private parties. However, European law flows from an opening principle and the four freedoms present challenges to the traditional structures and functioning of the welfare states. Ferrera calls the welfare state and the European Union 'probably the most salient and distinctive legacies that the 20th century has bequeathed to Europe' (2009, p. 231). The evidence suggests that these two legacies may be on a collision course.

The case law of the ECJ has compromised the ability of Member States to control access to their territories and to their welfare states. ECJ decisions have affected who may settle in Member States and who is entitled to receive benefits. As

[115] Case C-319/06, *Commission v Luxembourg*, [2008]ECR I-4323.

Leibfried (2005) notes, the ability to define the outsider and the citizen had important state-building features, especially in continental Europe. By eroding these boundaries, the ECJ is furthering the idea of a European community that has European citizenship. The concepts of who are insiders and outsiders in the societies of the Member States have been changed radically. Other European citizens must be treated as insiders, despite linguistic boundaries and sometimes deep cultural differences. No tests of language or cultural integration can be required of them as a condition of settlement. To a large extent, Member States cannot even condition the right to reside upon engagement with the market.

The Court's decisions have also eroded Member State control over what benefits must be offered, who may provide welfare state services, and where those services may be consumed (Leibfried and Pierson 1995). The presumption is in favour of exportability of services. This logic of opening creates tensions with the welfare state structure. Recent decisions have limited the rights of Member States to implement national labour laws. European legislation that was considered to guarantee a minimum benefit has instead been interpreted by the Court as creating a cap on the protections that Member States can provide to workers in their territory. With the new accession states opening up vast markets of lower wage costs, perhaps the race to the bottom will become more of a reality. Moreover, politically these newer states have been a voice for market liberalization. One labour lawyer said that with the new judges from the post-accession states on the ECJ the Court had become much more hostile to the interests of workers (Interview, 16/09/11). Through ECJ precedents, the

territoriality of the welfare state has been thoroughly compromised (Leibfried and Pierson 1995). However, the result has not always been to the benefit of European citizens.

Chapter 4 will set out the mixed-methods research design employed by this study to answer the research questions. It will elaborate the Time-Series Cross-Section quantitative model employed to test the hypotheses generated from the literature and the four novel hypotheses. It will describe how the Qualitative Comparative Analysis (QCA) used a Boolean algebraic logic to group the factors found to be significant in the quantitative analysis into 'causal pathways' that lead to higher and lower rates of preliminary references. The QCA helped to transition from the variable-oriented analysis of the quantitative analysis to the qualitative case studies of the final section. These two case studies, of the United Kingdom and France, used expert interviews and documentary evidence to add nuance to our understanding of how national factors affect rates of social policy preliminary references to the Court of Justice.

4. Methodology

This chapter sets out the rationale for the mixed-methods research design employed to approach the research puzzle, along with the methods used. The research design began with a quantitative analysis structured as a Time Series Cross-Section of preliminary references from the Member States of the EU-15 from 1996-2009, which tested six general hypotheses derived from the literature and three novel hypotheses related to rates of social policy preliminary references. A Qualitative Comparative Analysis was then used to transition from the variable-oriented approach of the quantitative analysis to the cases-oriented approach of the last chapter. This analysis looked for sets of conditions, or 'causal pathways' that lead to higher rates of preliminary references. Finally, two in-depth qualitative case studies of France and the United Kingdom completed the study. These case studies used extensive documentary evidence and expert interviews to provide context and nuance to the results from the two previous methods.

4.1 Mixed Methods Design

This study utilised a mixed methods research design. Initially, Chapter 3 was a historical study of European Court of Justice case law and legal doctrine that answered the threshold question of why scholars of European social policy should care about the European Court of Justice. Then, three different research methods were brought to bear on the research puzzle of why different Member States send preliminary references at such disparate rates. Chapter 5 contains a variable-oriented analysis via a Time Series Cross-Section (TSCS) design that tested a series of hypotheses about what national factors affect the rate of social policy preliminary references in Member States of the EU-15 from 1996 to 2009. The next stage, as set out Chapter 6, used Qualitative Comparative Analysis (QCA) to identify 'causal pathways' (Seeleib-Kaiser and Fleckenstein 2007, p. 48) and necessary and sufficient conditions for higher and lower rates of preliminary

references in the Member States. QCA is in itself a truly mixed method (Ragin 1987, 2000) and helped the thesis to transition from the variable-oriented analysis of Chapter 5 to the in-depth case studies of the United Kingdom and France in Chapter 7. This case-oriented analysis used two divergent cases to help to explain the findings from the first two stages of this study.

Mixed methods studies have been defined as: 'those that combine the qualitative and quantitative approaches into a research methodology' (Tashakkori and Teddlie 1998, p. 17-18). They are a developing field in social science research. Creswell and Plano Clark (2007) have typologised the different mixed methods research designs. This research design uses mixed methods in an 'Explanatory Design (a.k.a. Explanatory Sequential Design)' (Creswell and Plano Clark 2007, p. 72, Creswell, *et al.* 2003, p. 225). Collection and analysis of quantitative data was followed by collection and analysis of qualitative data. This study added an additional, intermediate, stage with the QCA analysis. The rationale for this research design is that the TSCS analysis provides a general understanding of the research problem through a variable-oriented designs, the QCA refines this by allowing for a deeper understanding of the complexity of the member states as cases, and then in depth qualitative case studies explain and refine the earlier findings (Ivankova, *et al*., 2006). This research design leads to some 'triangulation' of the research findings, however, the primary purpose is explanatory (Creswell and Plano Clark 2007). The objective of the research design is to further develop and understand the quantitative findings through the QCA and qualitative techniques. This research design allows for what are the often contradictory goals of empirical social science researchers, to gain in-depth

insight into the complexity of the cases while also allowing for some generalisability (Rihoux 2006).

Because the research design is sequential, the data were collected and analysed in stages (Creswell and Plano Clark 2007). There was one stage for each method and the data were analysed separately. First, the quantitative dataset was built and the TSCS analysis was performed. This was followed by building the dataset for the QCA and the QCA analysis. Finally, the qualitative cases studies were performed and the qualitative data analysed. The data analyses are integrated at the interpretation phase. Tashakkori and Teddlie (2002) term this a 'sequential mixed analysis.' The methods were given equal weighting in the analysis.

Research Paradigms

A research paradigm has been defined as a set of beliefs, that condition what should be studied, how the research should be conducted and how to analyse the results (Bryman 2004, p. 453). Creswell prefers the term 'worldview' to 'paradigm,' but defines the idea as a 'basic set of beliefs or assumptions that guide' one's research. (Creswell 1998, p. 74). Included in this worldview are the researcher's ontological and epistemological beliefs (Creswell 1998). Morgan advanced a concept of paradigms 'as systems of beliefs and practices that influence how researchers select both the questions they study and the methods they use to study them' (2007, p. 49). He rejects the concept of paradigms as epistemological stances, and would prefer to reject the term 'paradigm' altogether in favour of 'approach' (2007, p. 65). There is nothing incompatible

with combining research techniques in a mixed method: 'Mixing paradigms is indeed a risky business, but this should not be confused with combining methods within a clear-headed understanding of paradigms' (Morgan 1998, p. 363).

Two of the classical research paradigms are positivist/ postpositivist and constructivist. Postpositivists modified positivism, and 'argue that the external world exists independently of an individual's experience of it, and thus human knowledge is always part of a theory, based upon general foundations' (Wheeldon and Åhlberg 2012, p. 6). Constructivists consider reality to be socially constructed and human understanding to be influenced by experience (Wheeldon and Åhlberg 2012). These paradigms or worldviews often lead scholars in a postpositivist tradition to use deductive reasoning and quantitative techniques, whereas constructivists are associated with inductive reasoning and qualitative techniques. However, Johnson and Onwuegbuzie (2004) argue that although these methods are associated with the paradigms, they are not required to be. 'Although many research procedures or methods typically have been linked to certain paradigms, this linkage between research paradigm and research methods is neither sacrosanct nor necessary' (2004, p. 15). Recently, 'there has been a move toward considering the attributes of these paradigms as 'continua, rather than dualisms' (Greene and Hall, 2010).

Numerous authors have positioned mixed methods research within a 'third way' paradigm of pragmatism (Tashakkori and Teddlie 2003a). Tashakkori and Teddlie defined the pragmatism paradigm as, 'whatever philosophical and/or methodological approach works for the particular research problem under

study' (Tashakkori and Teddlie, 1998, p. 5). Through this approach, 'researchers can arrive at a better understanding of a phenomenon by combining the reliability of empirical counts with the validity of lived experience' (Wheeldon and Åhlberg 2012, p. 120). Morgan (2007) argues that few researchers are purely inductive or deductive. In a pragmatic approach, the researcher uses abductive reasoning to move back and forth between inductive and deductive reasoning (2007, p. 71). 'This particular version of the abductive process is quite familiar to researchers who combine qualitative and quantitative methods in a sequential fashion …, where the inductive results from a qualitative approach can serve as inputs to the deductive goals of a quantitative approach, and vice versa' (Morgan 2007, p. 71). This thesis is situated within the pragmatist approach, as the research design was chosen because it was the best suited to the research problem.

4.2 Legal Analysis

To begin, Chapter 3 employed a historical study of legal doctrine and Court of Justice case law to answer the threshold question: 'why should scholars of European Social Policy care about the Court of Justice?' Courts and court decisions sometimes are thought to be the province of lawyers, rather than social scientists. However, this siloisation ignores the interrelated nature of the European policy process. It is important to consider how court decisions are affecting social policy in Europe. The chapter began with a discussion of the foundations for EU law and the structure of the EU legal system. The

groundbreaking Court-created doctrines of direct effect, supremacy and pre-emption, which extended European rights to Member State nationals, were explored. This was followed by a summation of key Court decisions in the area of equality, free movement of persons, European citizenship and free movement of services. The chapter concluded with a discussion of how ECJ decisions are eroding the territoriality of the national welfare state, affecting who is entitled to receive services, what services they receive, and where they may receive those services (Leibfried and Pierson 1995).

4.3 Quantitative Analysis

The quantitative analysis is contained in Chapter 5. First, descriptive statistics were used to describe the distribution of social policy preliminary references across the EU-15 from 1996-2009. Then a Time Series Cross-Section analysis was employed to test a series of hypotheses about the effect of national factors on preliminary references in the area of social policy.

Descriptive Statistics about Preliminary References

The study was limited to the Member States that comprise the EU-15. The EU 15 member states are the member states that joined before the 2004 enlargement: Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, Netherlands, Portugal, Spain, Sweden and the United Kingdom. The Member States were limited for two reasons. The first is to ensure that the study

is comparing like cases. The Member States of the EU 15 are all advanced western democracies with established legal systems and welfare states. The second reason is because the newer Member States of the EU simply have not been a part of the EU for long enough to have generated many preliminary references.

The time period studied was limited to the years from 1996 to 2009. Austria, Finland and Sweden, the three most recent members of the EU-15, joined the EU on 1 January 1995. Although new Member States are required to be in compliance with the *acquis communautaire* at the time of accession, beginning the study in 1996 allows for a year of adjustment. Often there is a delay before some preliminary references are published in the *Official Journal* or the Curia website, so it would not have been possible to include all of the 2010 preliminary references until at least mid-2011.

The dataset used was derived from a larger dataset developed by Stone Sweet and Brunell (2007)[116], which contains all preliminary references to the ECJ from 1961-2006. Their dataset is publicly available and was developed through the New Modes of Governance project of the European University Institute. The dataset was then limited to the preliminary references only from five areas related to social policy:

[116] Stone Sweet, A and T. Brunell, (2007) 'The European Court and National Courts: Data Set on Preliminary References in EC Law (Art. 234), 1961-2006', *NewGov Project*, accessed at: http://www.eu-newgov.org/datalists/deliverables_detail.asp?Project_ID=26. Last accessed 07/12/11.

- Free movement of persons
- European 'citizenship'
- Social provisions
- Social security for migrant workers, and
- Free movement of services, but only those services that are social policy-related, including health and education.[117]

The dataset was then brought up to date. To do so all the preliminary references published in the Official Journal and the EU's Curia website from 2007 through 2009 were read and classified using the codes from the original dataset. The resulting dataset includes all social policy references originating in the member states of the EU-15 from 1996-2009.

A descriptive statistical analysis was used to describe the social policy preliminary references caseload of the ECJ. Preliminary references were broken down by the Member State of reference and issue areas. Furthermore, the distribution of cases across issues areas by Member State was analysed.

Time Series Cross-Section Analysis

Next, a Time Series Cross-Section analysis was employed to test a series of hypotheses about what factors affect rates of social policy preliminary references. To do so, the data in the dataset created for the first part of the quantitative analysis were restructured as a TSCS dataset. TSCS data look like panel data: the cases (N) are observed at regular intervals over time (T), generating a total of NT observations. In this analysis the fifteen Member States

[117] To make this determination, all free movement of services cases in the original dataset were read and classified.

of the EU-15 served as the cases, or N, and each was observed for each year from 1996 to 2009 (T). The dependent variable was the number of preliminary references per year for a member state ('Number of References'). TSCS data is distinct from panel data because where a panel typically has a very large number of cases observed a relatively small number of times, TSCS has a smaller number of cases, usually observed over a longer period of time. The key distinction is that in TSCS research, the researcher cares about the units. They are the subject of study – the nation states – whereas with panel data the researcher seldom cares about the units (Beck 2009, p. 5)

With TSCS data the researcher can test theories about both cross-sectional and cross-temporal variance, so it allows for greater traction than either a cross-sectional or a cross-temporal data slice. Moreover, to a certain extent the researcher can overcome what is often referred to as the 'small-N problem' – studies of nation states can seldom, if ever, generate enough cases for more traditional statistical techniques. However, the data have to be treated with caution, because 'NT correlated observations have less information than NT independent observations' (Cameron and Trivedi 2005, p. 702).

TSCS data present some challenges to traditional strategies for estimating errors. They 'invariably violate the standard Gaussian error assumptions underlying classic linear regression models' (Shor, *et al.*, 2007, p. 165-6). There are three specific issues that make normal OLS regression problematic, but they all stem from the fact that the cases are not truly independent from one another. First, there are problems of serial correlation, because the same cases (here, Member

States) are observed repeatedly over time. Second, the data may be heteroskedastic. OLS assumes that the variance of the data will be equal, an assumption that is often violated in TSCS data. With TSCS data, the researcher assumes heterogeneity (Shor, *et al* 2007, p. 167). Finally, TSCS data present issues of contemporaneous and spatial correlation. These correlations may be even more important in a study, such as this one, where all the observed nation states are in a small geographic region, have interconnected histories and are part of the same supranational political and legal order.

Different strategies have evolved to take advantage of these error estimation problems. One, to use a unit fixed effects estimator, or to insert country dummy variables into the model, gives too much importance to heterogeneity. By assuming heterogeneity, these models often wash out all of the differences that can be explained by the independent variables, as well. A unit fixed effects model cannot estimate the coefficients of time-invariant variables (Plümper and Troeger 2007). Typically time-invariant variables, such as type of government or economy, are often of interest to political economist researcher. Therefore, fixed effects models are often not very well suited to TSCS work in political econometrics. In data used for this study, most of the variation in the variables is between variation, rather than within variation. We therefore expect that fixed effect estimators will not be very efficient, as they rely upon within variation (Cameron and Trivedi 2009, p. 607).

Some researchers ignore the possibility of unit effects. They reason that what is of interest is the difference between the units (Huber & Stephens 2001). 'Recall that our interest is in the historically determined component of institutions … hence not in the variations in institutions from year to year. As a result, this regression does not (cannot) control for a full set of country dummies' (Acemoglu, *et al* 2002, p. 25). While there is a certain logic to this, it is then impossible to estimate accurately the effects of the independent variables.

In 1995 Beck and Katz proposed what has been a widely used solution to this problem. They analysed the Parks (1967) Feasible Generalized Least Squares (FGLS) approach, which had been popularised by Kmenta (1986)[118], and found that it was both inefficient and was not conservative in its error estimation, unless T was a great deal larger than N. They proposed the use of 'panel-corrected standard errors (PCSE).[119]' Monte Carlo studies have shown that this technique provides a more robust estimation of the errors than the Parks FGLS. The technique is based upon the fact that while the researcher knows the data are heteroskedastic, we also know in what ways. We can assume that there is a common variance within a unit's cluster and that the inter-correlation across units also has a known structure. We can assume equal co-variance between any two units for a particular time period of observation. They assert that in TSCS we 'can assume complete homogeneity within units, and thus limit ourselves to models that imply heterogeneity between units' (Beck and Katz 2001, p. 1).

[118] Put into operation via the Stata command xtgls with panels(correlated)
[119] Stata command xtpcse with ar1 correlation.

However, the Beck and Katz PCSE approach may have difficulties dealing with spatial correlation between the units. European member states are closely related units, sometimes sharing historical traditions, especially in the case of those member states in close geographic proximity. There are likely to be complex patterns of mutual dependence (Hoechle 2007). Because the member states of the European Union are of interest in this study, it is not feasible or desirable to randomly or independently sample the units to try to minimise cross-sectional dependence. This creates an additional problem of potential bias in standard error estimates. Driscoll and Kraay (1998) proposed a solution that allows for heteroskedastic and autocorrelation- consistent standard errors that are robust even with spatial and temporal dependence. Hoechle created a Stata estimator[120] that implements the Driscoll and Kraay standard errors, and proved through Monte Carlo experiments that 'Although Driscoll and Kraay standard errors tend to be slightly optimistic, their small-sample properties are considerably better than those of the alternative covariance estimators when cross-sectional dependence is present' (Hoechle 2007, p. 282).

Another potential issue with the data concerns the distribution. Many analytical tools are based upon an assumption that data are normally distributed. Because a member state cannot send fewer than zero preliminary references per year, the distribution of the data in this study is left-censored. Therefore, a tobit analysis (Tobin 1958) may be appropriate. However, the xttobit command in Stata relies 'heavily' upon an assumption of homoskedastic regularly distributed errors which is violated in panel-type data (Cameron and Trivedi 2009, p. 619).

[120] Implemented with the Stata command xtscc.

Therefore, the data presented challenges and suggested an optimal method. Because some of the independent explanations suggested by the literature for the variation in rates of member state preliminary references are time-invariant or slow-moving over time, we cannot rely on a fixed effects estimator or country dummies. Moreover, washing out all country heterogeneity was inappropriate where, as here, most of the variation in the model is expected to be between, rather than within, units (Cameron and Trivedi 2009). The Beck and Katz PCSEs may be a solution, but because the units of the study are related historically and are closely clustered geographically, we have more than the usual concerns about spatial correlation. Therefore, the Driscoll and Kraay standard errors approach is the optimal method. There are concerns that the data may be left-censored, indicating that a Tobit analysis might be appropriate. But, as is discussed above, the data violate the assumption of homoskedascity that Tobit relies upon. Therefore, the Tobit estimation may not be reliable. Although the optimal model is the estimation with the Driscoll and Kraay standard errors, the models were also estimated using a Tobit and the Beck and Katz PCSEs, for comparison, and the results discussed.

4.4 Qualitative Comparative Analysis

The Qualitative Comparative Analysis section of this study is contained in Chapter 6. The QCA analysis used set theory to determine which conditions lead to higher or lower rates of preliminary references from the Member States. The

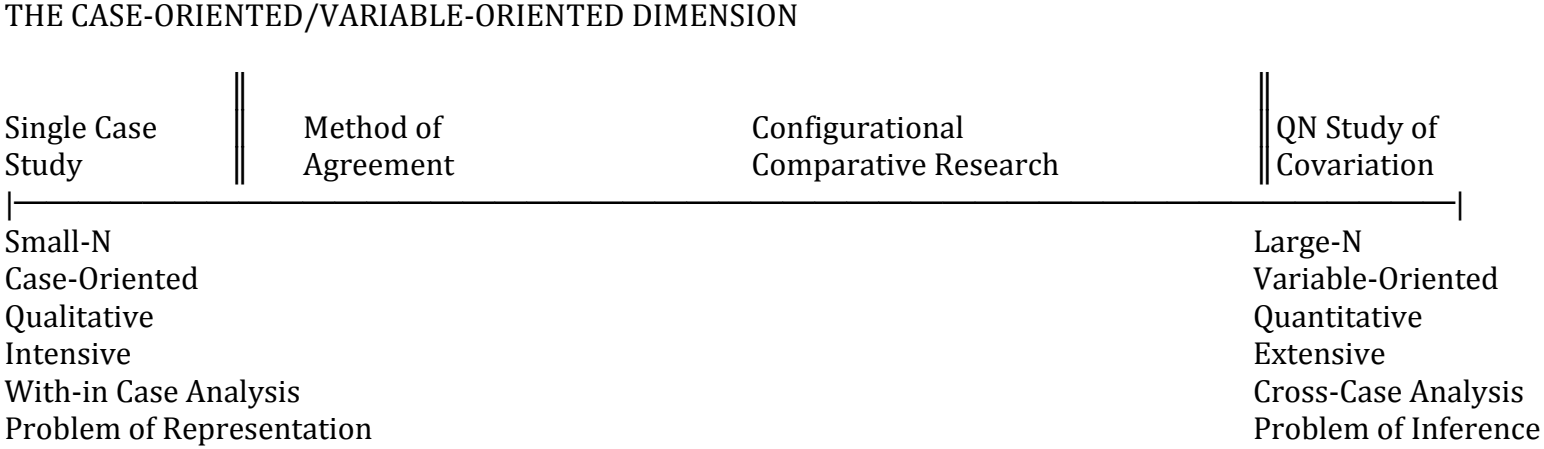
QCA analysis helps to transition from the variable-oriented approach of Chapter 5 to the case-oriented approach of Chapter 7's in-depth case studies.

Objectives and Strengths of the QCA Approach

Qualitative Comparative Analysis, or configurational comparative research, was proposed by Charles Ragin (1987, 2011) and is an attempt to bridge the quantitative-qualitative divide in social science research. The aim is to combine the generalisability and comparative aspects of cross-case comparative research and the depth of understanding of case-based research. Variable-oriented research is concerned with testing the effects of variables determined through deductive theory across multiple cases, often while holding the other factors constant. Among the potential weaknesses of this approach identified by Ragin (2011) are possible poor theoretical specification of the model, the inability to consider multiple causation, and over-simplification of complex phenomena, especially when the unit of analysis, as here, is the nation state. At the other end of the spectrum, case-oriented research attempts to explain a small number of cases, usually selected for their appropriateness in examining a theory. However, although case-based qualitative research allows for gains in the depth of understanding, the analysis usually does not permit generalization to a broader set of cases, and there can be problems with the representativeness of the selected cases. QCA is well suited for smaller and intermediate size studies, where there are insufficient cases, or an insufficient variety of cases, to do large scale quantitative studies. On the continuum between a single case study and a large-N, variable-oriented, quantitative study of co-variation, Ragin (2011)

places configurational comparative research between the two approaches. Figure 1 illustrates Ragin's spectrum.

Figure 2: The spectrum of case-oriented and variable-oriented research



Source: Reproduced from Ragin (2011), *Qualitative Comparative Analysis and Fuzzy Sets.*

As such, QCA combines the strengths of within-case and cross-case analysis. It requires 'familiarity with cases' and 'in-depth knowledge,' while still allowing for examination of cross-case patterns (Ragin 2011, p. 2). By looking at a case as a configuration of causally relevant conditions, QCA 'respects the diversity of cases and their heterogeneity' (Ragin 2011, p. 2). QCA is also well suited to the causal complexity of interest in much social science research. QCA can determine the different sets of conditions, or causal pathways that lead to the outcome in question. Mackie (1980) referred to these as 'INUS' causes. Each is an insufficient but necessary component of a causal combination that is unnecessary, because there are many potential combinations, but sufficient for the outcome. QCA allows the researcher 'to examine causal complexities under the rubric of multiple conjectural causation' (Ragin 2000). Therefore, QCA can identify multiple, not mutually exclusive, potential 'recipes' of conditions that result in the outcome in question.

A QCA approach is well suited to a study of a set of countries such as the EU-15 (Haverland 2007, p. 69). This is simultaneously few enough cases that statistical techniques are limited, and require specification of a model that can overcome this smaller N, as was explained in Chapter 5, and too many cases to cover practically through case studies. The QCA analysis can accommodate this smaller sample size. It allows for the best of both the qualitative and the quantitative analysis worlds. The QCA technique can analyse the Member States in-depth as whole cases, and consider how the different causal conditions interact to affect rates of social policy preliminary references. At the same time, it allows for

comparisons across the EU-15. QCA 'allows qualitative concepts to be compared quantitatively' (Lee 2008, p. 13).

A crisp set QCA was used, rather than a fuzzy set QCA. For the potential explanatory factors, the results of the TSCS analysis of the quantitative stage were used to winnow the many potential explanatory factors. Although the potential factors to be included in the model were reduced, there are still seven potential explanatory factors remaining. Therefore, in the interests of parsimony a crisp set method is more appropriate. Moreover, as is set out more fully in the justifications for the levels set in Chapter 5, a dichotomous characterisation is appropriate to the data included.

For the QCA analysis, the same dataset employed in the TSCS analysis was used, but the dependent variable was the mean number of cases per year per member state. The level for membership in a particular set for the explanatory variables was set either at the median or, if there was a clear threshold in a particular set of data other than the median, using that level. How the membership level for each explanatory variable was calculated in explained in the chapter. The interrelationship between the independent variables tested in the quantitative analysis was explored to determine what sets of conditions lead to higher rates of preliminary references.

4.5 Qualitative Analysis

The in-depth qualitative case studies of the United Kingdom and France are set out in Chapter 7, and seek to explain further the findings of the TSCS and QCA analyses. The UK and France were chosen because they are disparate cases, and can provide insight into the quantitative and QCA results. 'By the term 'qualitative research' we mean any type of research that produces findings not arrived at by statistical procedures or other means of quantification' (Ritchie and Lewis, 2003). Qualitative methods are suited to 'research questions that require explanation or understanding of social phenomena and their contexts. They are particularly well suited to exploring issues that hold some complexity and to studying processes that occur over time' (Ritchie and Lewis, 2003). In a sequential explanatory design for a mixed methods study, the qualitative information can explain why differences were found with the quantitative analysis, and explore the characteristics of outlier or residual cases (Creswell, *et al.* 2003, p. 225, Caracelli and Greene 1993).

Here, the United Kingdom and France were examined in more detail. This in-depth case analysis will inform the statistical analysis and the qualitative comparative analysis in the previous section. Case studies provide an empirical investigation of a complex phenomenon in context (Yin 2009, p. 18). Because of the complexity of the case that is being studied, i.e. a nation state, it is impossible to isolate and test sufficient variables to explain fully the interactions. Therefore, more sources of data are needed (Yin 2009, p. 2).

As mentioned in the introductory chapter, by using a theoretical proposition developed beforehand, it was possible to guide the collection of data (Yin 2009, p. 18). The theoretical perspective of this study is that the different usage of the preliminary reference procedure arises from the institutional structures of the national legal system and of the welfare state, as well as because of agency of actors within the national system. This perspective led to the development of questions to be investigated during the qualitative analysis. How do the institutional structures of a Member State legal system affect usage of the preliminary reference system? How do the welfare state structures of the Member State affect usage of the preliminary reference system in the area of social policy? How do actors within a system, such as lawyers, equality agencies or unions, affect rates of preliminary references?

Sample Selection

France and the United Kingdom were chosen using a purposive sampling technique because they are the most likely to provide information valuable to the analysis (Kemper, *et al.* 2003). The two member states were chosen after a consideration of the quantitative and QCA analyses. Although both have high numbers of overall preliminary references, France has a very low rate of social policy references, where the UK has a high rate of social policy preliminary references. They also have mixed results in the predictor variables. The quantitative results indicate that having a more Bismarckian welfare state, higher union density, higher reported trust of the ECJ as an institution, a larger population, a lack of the judicial empowerment variable and membership in the

'World of Domestic Politics' in the Falkner *et al.* typologies (2005, 2008) should predict high rates of references. France is alone in the more Bismarckian welfare states for having low rates of preliminary references. The UK is alone in the Beveridgean welfare states for having higher rates of social policy preliminary references. Although the two Member States have similar situations on population, union density, trust of the ECJ and judicial empowerment, one has a high rate of preliminary references and the other a low rate. Seemingly, some of the factors that predict higher rates of references have a different effect in some cases than in others. The different outcomes raise questions about how these predictors interrelate in the complex phenomena that are Member States. These two Member States were chosen as they can shed the most light upon this puzzle.

The QCA identified four intermediate pathways to a high rate of preliminary references. Three pathways include being a member of the 'World of Domestic Politics' (Falkner, *et al.* 2005, 2008). The UK follows the pathway that is defined by a large population, membership in the 'World of Domestic Politics' and not being a member of the 'World of Law Observance.' The remaining pathway was to have a highly Bismarckian welfare state, a large population and high union density. Although France has the most Bismarckian welfare state in Europe, as measured by the percentage of social expenditures that comes from employer and employee contributions, as well as a large population, it cannot take this path because of its lower union density. These causal pathways help us to understand the Member States as whole cases, and how the predictor factors interact to help to explain their differing fortunes in rates of preliminary references. The case studies will add context to the emerging picture.

France

France is one of the original member states of the EU. It is a member state from the civil law tradition that is prevalent throughout continental Europe. It is a top-four user of the preliminary reference process in the overall dataset, but a low user of the preliminary reference process in the social policy dataset. It has the lowest number of social policy references of the original six member states. In terms of the predictive factors for preliminary references, France's indicators are mixed. It has a high score for Bismarckian welfare state structure, which should predict a higher rate of social policy references. However, it has strikingly low union density, the lowest of the EU-15, low levels of reported population trust in the ECJ, a higher judicial empowerment score and in the Falkner, *et al.* typologies (2005, 2008) is in the World of Transposition Neglect, which should predict lower rates of preliminary references. France also has judicial review and a monist legal tradition.

There were 27 relevant preliminary references from France over the period from 1996 to 2009. Four of those were removed from the register or de-published, so further information from the Court was not available. Twenty-three cases remained. One national factor that was considered was the presence of national agents, such as the HALDE (the French equality agency), unions, interest groups or public law firms. Another area of interest was that, given France's bifurcated

court structure, were some types or levels of courts more responsive to requests for preliminary references.

UK

The UK has been a member of the EU since 1973, so it also has a long history with the preliminary references process. It is one of only two member states with a common law legal tradition, the other major type of legal system in the European Union. It is a top-four user of the preliminary references process in the overall dataset, and is also a high user for the social policy preliminary references. Like France, its indicators are mixed for the predictor factors. It has a low score for Bismarckian welfare state, low union density, and scores higher for judicial empowerment, all of which should predict a low rate of preliminary references. Moreover, its population has the lowest levels of reported trust in the EU, which also should predict lower rates of preliminary references. However, it is in the World of Domestic Politics in the Falkner, *et al.* (2005, 2008) typologies, which is the grouping of Member States predicted to have the highest rate of preliminary references. Alone in the EU, the UK has no legal review. It also has a dualist legal tradition.

There were 69 social policy preliminary references from the UK in the relevant period. Seven were removed from the record or de-published, so there is no further information available at the Court of Justice level. Factors that will be

considered in the analysis include the differences between the legal systems of England and Wales and that of Scotland.

Documentary Evidence

The qualitative case studies began with an extensive documentary analysis. A starting point was the cases that comprise the preliminary references sample. The legal documents from the Court, as well as national court documents that were publicly available for the cases resulting in the preliminary references were read and analysed. The case histories and facts were examined. Then legal and news databases were searched in France and the United Kingdom.

In France, searches were conducted in national media and legal databases using LegiFrance: http://www.legifrance.gouv.fr/, http://droit.org/, Gazette du Palais: http://www.gazettedupalais.com/, and Le Journal Officiel Électronique: http://www.journal-officiel.gouv.fr/. In the United Kingdom, searches were made in the British and Irish Legal Information Institute: http://www.bailii.org/, and Butterworth's Direct (via Lexis Nexis): http://www.lexisnexis.co.uk/. The Euro News archives were consulted for relevant news items.

These databases were searched for:

- The case name for every preliminary reference
- The parties to the actions
- The lawyers representing the parties at the ECJ level
- Any other relevant piece of information that could be found in the facts reported in the ECJ decisions or the Advocate General's opinion.

In addition, a wider search was made for:

- Free movement of persons/ *libre circulation des personnes* and the European Court of Justice (ECJ)/ Court of Justice for the European Union (CJUE)/ Court of Justice for the European Communities (CJCE)
- European citizenship/ *la citoyenneté européenne*
- Free movement of services/ *libre circulation des services* and the European Court of Justice
- Standing to sue/ locus standi/ *capacité d'ester en justice*
- CJE/ CJUE
- Court/ Cour and Equality/ *Égalité*
- Court/ Cour and social policy/ *politique sociale*
- Gender Equality/ *Égalité de traitement entre hommes et femmes/ Égalité des sexes*

The documentary evidence primarily informed the context analysis. It produced information that is suited to answer the specific research questions:

- What national factors affect the rates of preliminary references to the ECJ?
- What helps access to the ECJ?

Expert Interviews

After the documentary analysis, 25 semi-structured expert interviews were conducted with lawyers, interest group officials, court officials and legal experts familiar with the history of preliminary references in the Member States. 8 were conducted with lawyers, court officials and parties to the preliminary references in France, 11 with lawyers, court officials and benefits advisers in the United Kingdom, 3 with officials at the Court of Justice, and 3 with officials associated with the Commission in Brussels.[121] The purpose of the interviews was to fill in the gaps in the case studies and to gain insight into the results from the review of

[121] Some interviewees fell into more than one category. For example, a Judge at the Court might also be a lawyer in France of the United Kingdom. In those instances, the individual was interviewed about all of his or her relevant experiences. However, each individual has only been counted once, in what was their primary category.

the documentary evidence. Interviewees were identified using purposive sampling (Lilleker, 2003). The list of potential interviewees was created from the names of lawyers who represented parties and court officials in the cases resulting in preliminary references. If appropriate, parties to the action were approached. Additional searches identified the names of attorneys who specialise in European law. Finally, officials at the Court of Justice and the Commission were approached. Interviewees were approached by email where possible, or by letter if necessary. Follow-ups were made by email and telephone calls. I also posted on an Internet forum for welfare rights advisers in the United Kingdom. Snowball sampling was used to identify additional interviewees, as interviewees were asked if there was anyone else who should be approached. Locating and contacting respondents, as well as finding times that suited their schedules, were particular challenges for this project. This was especially true in France, where the potential pool of respondents was smaller. Asking interviewees to whom else I should speak helped to overcome this difficulty to an extent. Some interviewees volunteered that I could use their name when approaching the other potential interviewees. An attempt was made to avoid bias by casting a wide net for interviewees and interviewing everyone who agreed. However, there is the possibility that the inclusion of the snowball sampling will have introduced additional bias.

The challenges of locating and scheduling the interviews led to some flexibility in the interviewing arrangements. I made two research trips to France and one research trip to Brussels and Luxembourg. I made a number of daytrips to London to conduct interviews. Interviews took place at the interviewee's place of

business as a first preference. However, financial and time constraints, as well as the fluctuating availability of the interviewees, necessitated the use of Skype, telephone calls and in three cases asynchronous online interviews (Flick 2009). In those cases, due to repeated difficulties in scheduling appointments, interviews were conducted by emailing questions to the interviewee, waiting for a response, and then following up as needed with additional questions, also via email.

Open-ended questions were developed in advance of each interview based upon the particular experiences of that interviewee. By tailoring each interview to the participant, 'we gain in the coherence, depth and density of material that each respondent provides' (Weiss 1994, p. 3). Questions that arose based upon the answers to the prepared questions were also explored. The interviews were conducted in English. When the interviewee's first language was not English, I asked confirming questions to ensure understanding on both our parts. The interviews were recorded and transcribed by the researcher.

The expert interviews helped to answer the two research questions that are explored through the documentary evidence, but also to address a third question:

- What are barriers to preliminary references?

This question cannot be addressed in other parts of the research design and the interviews allowed experts to bring their experiences with the interactions between the French and English legal systems and the European legal system to shed light on this question.

Ethics

The study was approved by the University of Oxford Central University Research Ethics Committee (CUREC). A letter to potential participants and an information sheet were approved by the CUREC. Potential participants were informed that their participation was entirely voluntary, and were given the opportunity to determine whether or not to remain anonymous.

Analysis of Qualitative Data

Patton describes the process of qualitative analysis as, 'reducing the volume of raw information, sifting trivia from insignificance, identifying significant patterns, and constructing a framework for communicating the essence of what the data reveal' (2002, p. 432). In this study, a qualitative content analysis was performed, defined as 'a research method for the subjective interpretation of the content of text data through the systematic classification process of coding and identifying themes or patterns' (Hsieh and Shannon 2005, p. 1278). Weber defined content analysis as 'a research procedure that uses a set of procedures to make valid inferences from text' (1990, p. 9). This study used a directed approach to content analysis (Hsieh and Shannon 2005), in that its goal is to inform a theoretical framework developed from the other methods in the mixed methods approach. Using the existing theories from the earlier stages of this study, potential key categories were identified. The documents were coded by hand with these categories. In an initial coding stage, each document and

transcript was read and coded. The process used the literature and the previous methods to inform the analysis while still remaining open to concepts and hypotheses not accounted for in the original framework (Patton 2002, p. 494). Subsequently, as new documents and interview transcripts were obtained, they were compared with the existing documents and transcripts. Themes emerged from this process. As the analysis proceeded, additional codes were developed and the initial categories were refined (Hsieh and Shannon 2005, p. 1286). The themes were further refined and sub-themes emerged.

The themes broadly fall into the three types of explanatory factors that have been used throughout this study, although France and the United Kingdom have differing themes within that framework. First, there are themes related to the underlying policy structure of the Member State. These include the type of welfare state or legislation related to social policy. Second, there are themes related to structural factors in the state. This includes how the Member States comply with the EU, such as the Falkner, *et al.* typologies (2005, 2008). These also include the types of causes that Alter called the 'friendliness' of the legal system to litigation (1990). They might include the right to class actions or legal aid. Both the policy themes and the structural themes are broadly related to the context analysis. Third, there are themes related to the actions of individuals and groups. These actors, whether they are plaintiffs, supporting groups or judges in the national system, affect rates of preliminary references. These themes are related to the conduct analysis.

4.6 Conclusion

The research design will allow for maximum leverage on the research puzzle (King, Keohane and Verba 1994). Using these three methods the inquiry transitions from a variable-oriented approach across the EU-15, which allows for more generalisability, to a case-oriented approach to allow for a more nuanced understanding of the complex systems. Collecting different data to explain the same phenomenon does provide some triangulation, allowing for greater reliability and confidence in the causal connections of the findings. However, the benefits of this mixed methods approach employed here extend beyond triangulation. The QCA and the qualitative approaches expand, explain and illuminate the quantitative findings. The mixed data analysis will increase the 'representation' of the results by increasing the amount of information that can be learned from the data (Onwuegbuzie and Teddlie 2002). This mixed methods research design is the best method to answer the research questions.

5 Quantitative Analysis

This chapter describes the social policy preliminary references to the ECJ from the Member States of the EU-15 for the period from 1996 to 2009. The distribution of references by Member State and by issue area is set out. A Time Series Cross-Section Analysis (TSCS) is used to test a series of hypotheses about what national factors account for variation in rates of preliminary references across the EU-15.

5.1 Introduction

This chapter employs a quantitative analysis to describe the variation in rates of preliminary references to the European Court of Justice across Member States and issue areas. A dataset of rates of social policy preliminary references from the Member States of the EU-15 from 1996-2009 is used. In the second part of the chapter, a Time Series Cross-Section analysis is used to explain the differing rates of preliminary references across the Member States. Five hypotheses about what factors explain the differing rates of preliminary references generally and three hypotheses related social policy preliminary references will be tested.

As was discussed in Chapter 4, the study is limited to the Member States that comprise the EU-15. The EU-15 Member States are the Member States that joined before the 2004 enlargement: Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, Netherlands, Portugal, Spain, Sweden and the United Kingdom. The Member States are limited for two reasons. The first is to ensure that the study is comparing like cases. The Member States of the EU-15 are all advanced western democracies with established legal systems and welfare states. The second reason is because the newer Member

States of the EU simply have not been a part of the EU for long enough to have generated many preliminary references.

The time period studied is limited to the years from 1996 to 2009. Austria, Finland and Sweden, the three most recent members of the EU-15, joined the EU on 1 January 1995. Although new Member States are required to be in compliance with the *acquis communautaire* at the time of accession, beginning the study in 1996 allows for a year of adjustment. Often there is a delay before some preliminary references are published in the Official Journal or the Curia website, so it would not be possible to include all of the 2010 preliminary references until at least mid-2011.

The dataset used is derived from a larger dataset developed by Stone Sweet and Brunell (2007),[122] which contains all preliminary references to the ECJ from 1961-2006. Their dataset is publicly available and was developed through the New Modes of Governance project of the European University Institute. The dataset was limited to the preliminary references only from the five areas related to social policy:

- Free movement of persons
- European 'citizenship'
- Social provisions
- Social security for migrant workers, and

[122] Stone Sweet, A and T. Brunell, (2007) 'The European Court and National Courts: Data Set on Preliminary References in EC Law (Art. 234), 1961-2006', *NewGov Project*, accessed at: http://www.eu-newgov.org/datalists/deliverables_detail.asp?Project_ID=26. Last accessed 07/12/11.

- Free movement of services, but only those services that are social policy-related, including health and education.[123]

The dataset was then brought up to date by reading all the preliminary references published in the Official Journal and the EU's Curia website from 2007 – 2009. The resulting dataset includes all social policy references originating in the Member States of the EU-15 from 1996-2009.

5.2 Describing the social policy preliminary reference caseload of the ECJ

There were 756 social policy preliminary references in total. The breakdown by issue areas from the Member States of the EU-15 from 1996 - 2009 is set out below.

Table 1: Number of Preliminary References by Issue Area

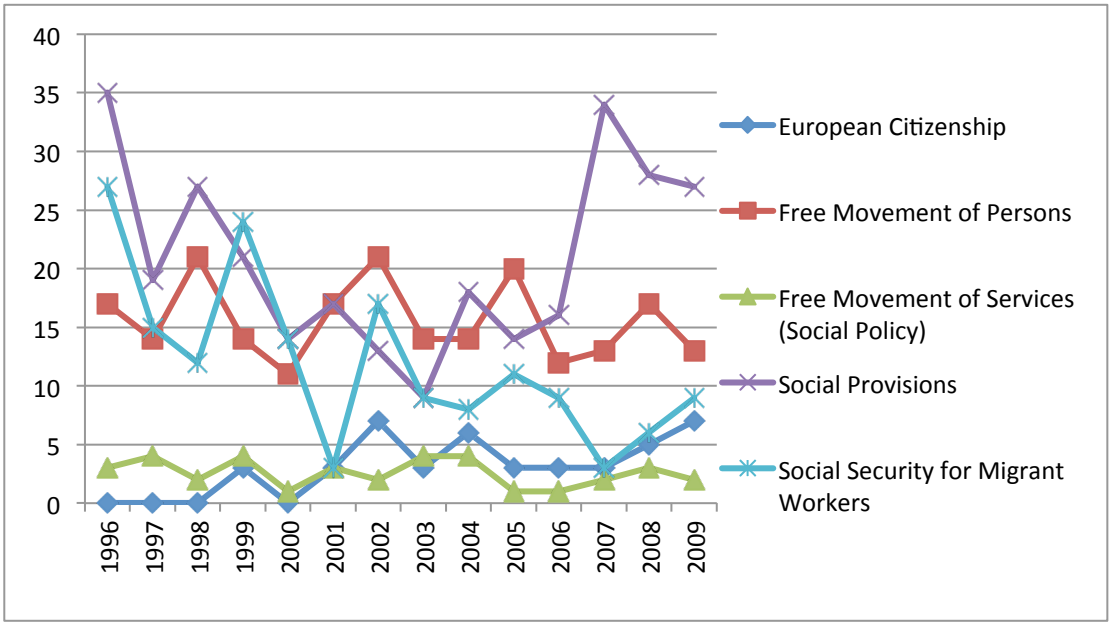
Social provisions	292
Free movement of persons	218
Social security for migrant workers	167
European citizenship	43
Free movement of services (social policy-related)	36

The references by issue area vary over time. The area of European citizenship is a developing area, with the first preliminary references in the dataset in 1999,

[123] To make this determination, all free movement of services cases in the original dataset were read and classified.

rising to seven references in 2009. The largest number of references at the beginning of the period was in the area of social provisions. These references dipped in the early 2000s but have recovered to be the largest area again for 2006-2009. References in the area of social security for migrant workers have declined over time, from 27 references in 1996 to nine in 2009. Free movement of persons and free movement of services references have remained relatively constant, although there are many fewer free movement of services references. Figure 3 illustrates the distribution of references by issue are over the period studied.

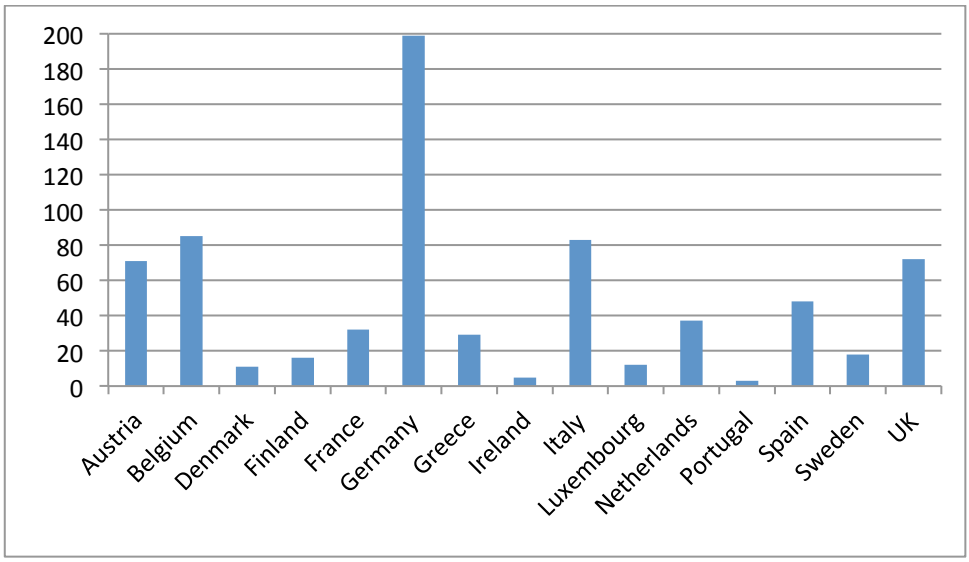
Figure 3: Preliminary References by Issue Area 1996-2009



Distribution of Social Policy Preliminary References by Member State

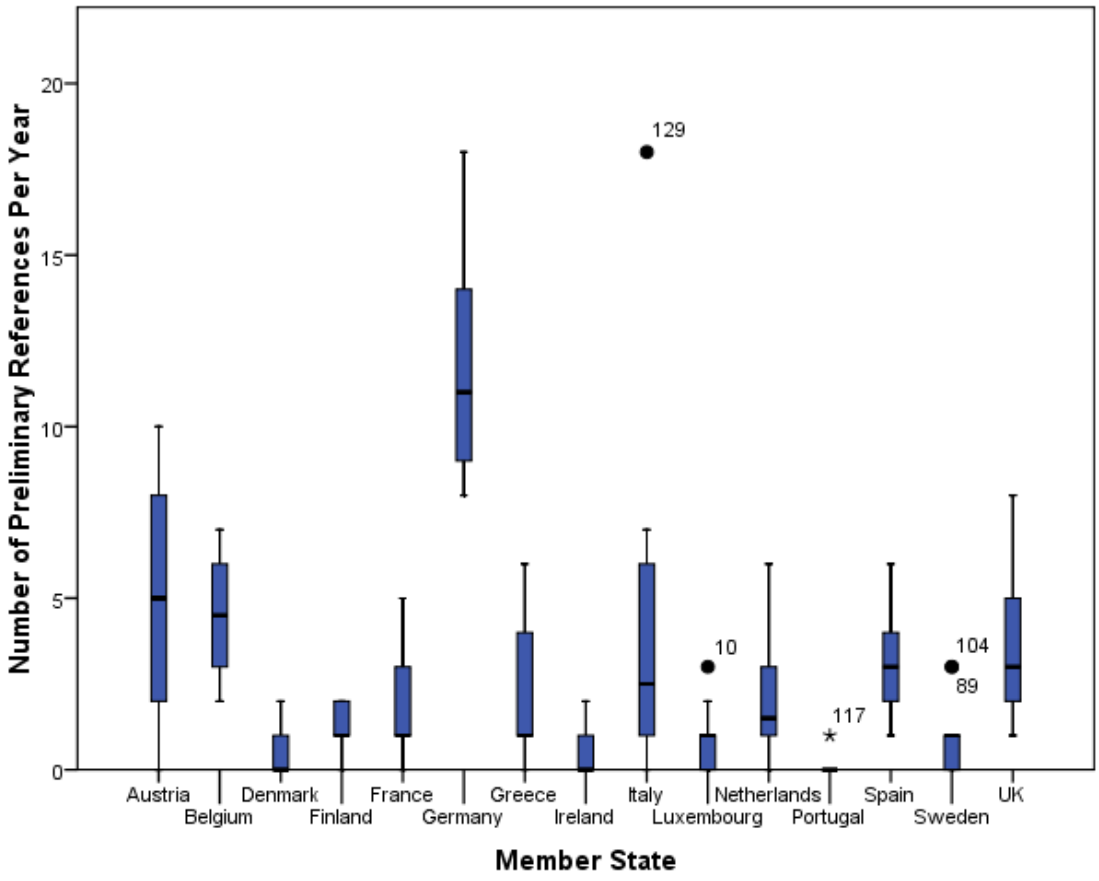
Germany is the member state that sent the most social policy preliminary references, with 199 references over the period. This is over twice as many as the next highest Member States, Belgium and Italy. They are closely trailed by the UK and Austria. France, the second-largest nation in the EU, is in the bottom half of the distribution for numbers of preliminary references. Portugal sent the fewest, with three, followed by Ireland with five. Figure 4 breaks down the distribution by member state over the period.

Figure 4: Preliminary References by Member State



The rate of preliminary references for each member state shows considerable variation by year, as well. Figure 5 is a boxplot of the preliminary references by member state.

Figure 5: Boxplot of Preliminary References by Member State



We might expect that the larger Member States would send more references purely based upon their larger populations. If the number of preliminary references per year is weighted so that they represent the number of references per 100,000 of population of the member state, a different picture emerges. Figure 6 is the boxplot of the weighted preliminary references, with one outlier for Luxembourg excluded. Luxembourg's references, when weighted by population, are much higher than those for any other member state. Germany, the state that sent the most preliminary references, falls below the mean for the EU-15 when weighted for population. France and the UK, the second and third largest nations by population, fall well below the mean. The mean for the data set is indicated with the line on the Y axis.

Figure 6: Boxplot of References by Member State by 100,000 Population

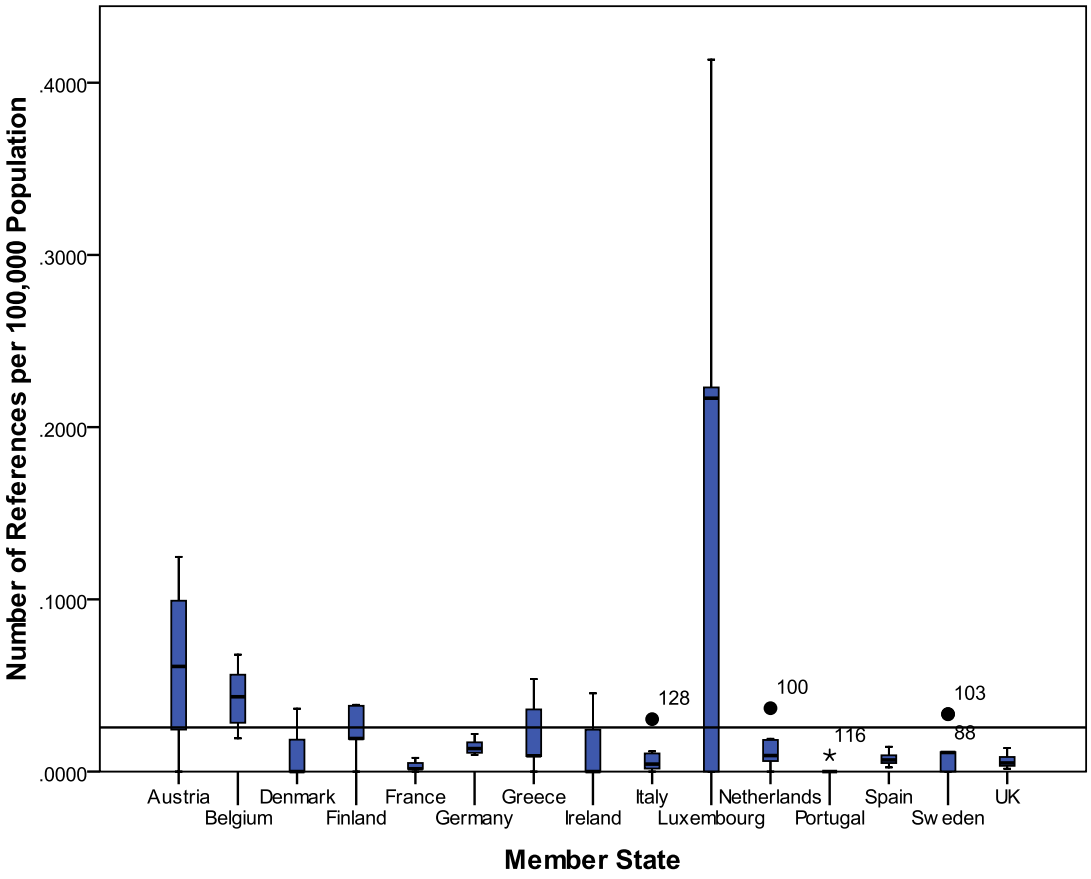
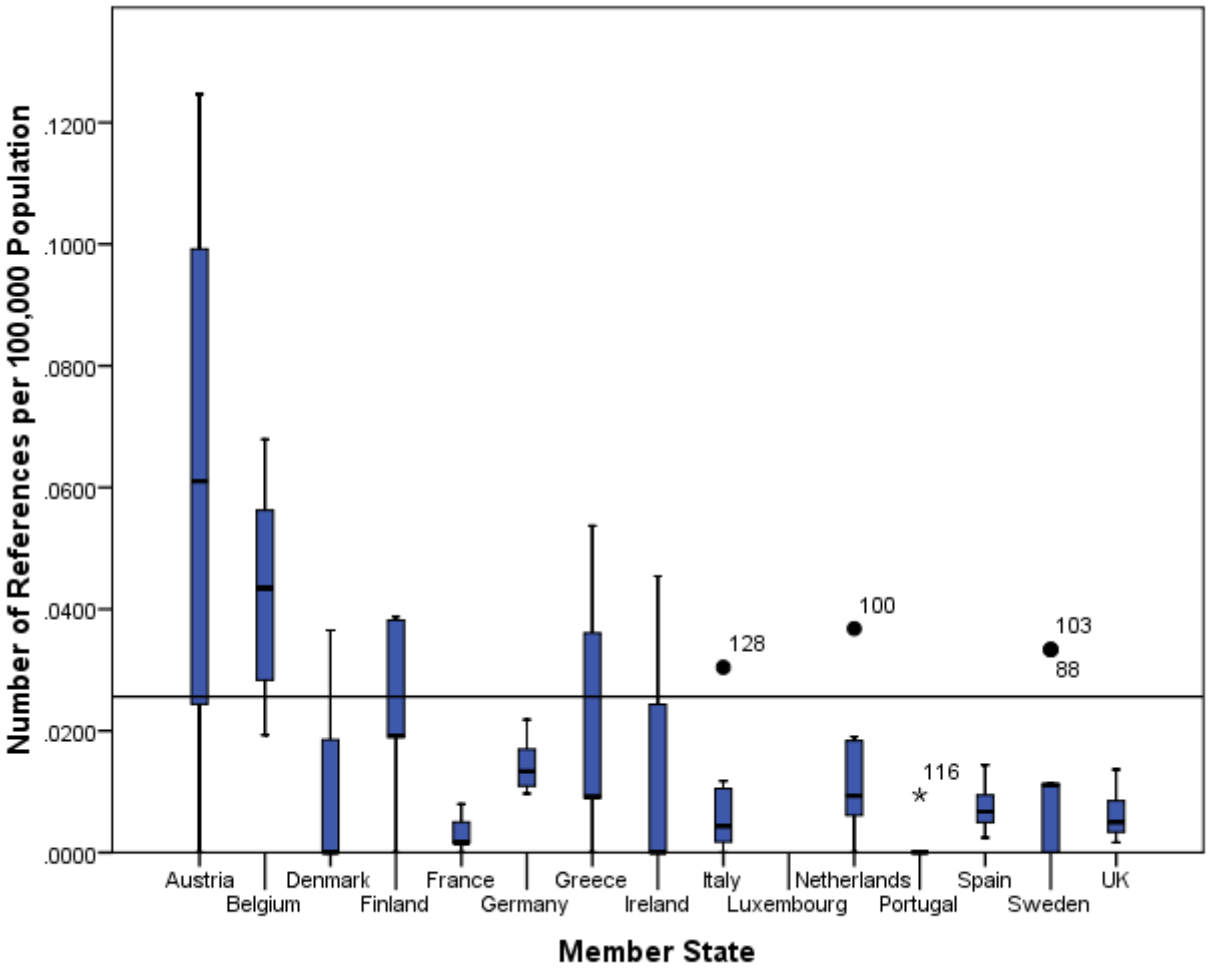


Figure 7 illustrates the boxplot of the preliminary references by member state per 100,000 population if Luxembourg is excluded. Luxembourg's numbers, when preliminary references are weighted for population, are so inflated that it skews the data and that it is difficult to see the detail for the other Member States when it is included. Again, the mean for the entire EU-15 is indicated with a line on the Y axis.

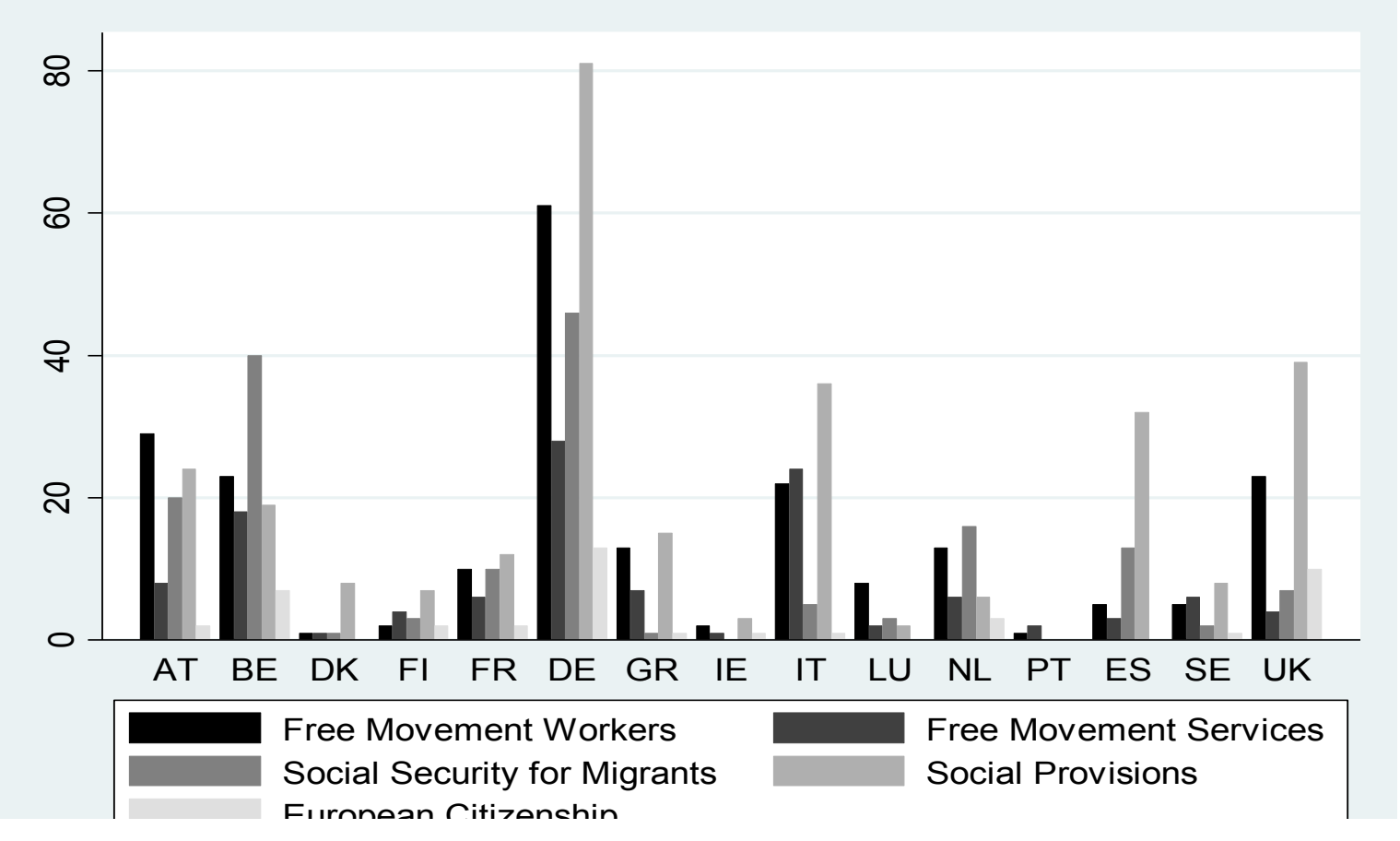
Figure 7: Boxplot of Preliminary References per 100,000 Population, Excluding Luxembourg



Distribution of Preliminary References by Subject Matter through the EU-15

There is also an uneven distribution between the Member States in the areas in which they send preliminary references. Germany, with the highest number of preliminary references overall, has the highest number in every subset, as well. However, the relative distributions are interesting and suggest that variation in Member State circumstances dictates the areas in which they send preliminary references. Figure 8 illustrates the breakdown of preliminary references by Member State and issue area.

Figure 8: Preliminary References by Member State and Issue Area



In the area of free movement of persons or workers, Germany sends over twice as many preliminary references as the next highest member state, Austria. But Austria's numbers are very high when compared to its population. Belgium, the UK and Italy follow. The number of references from Belgium is also much higher than might be expected by population distribution. France is in the bottom half of the distribution.

In comparison, Austria has sent very few preliminary references in the area of European citizenship. The UK has sent the second-highest number after Germany. Belgium has sent the third highest number of references, again outperforming what might be expected from its national population. Denmark, Luxembourg, Portugal and Spain have never sent a reference in this area.

In the area of free movement of services, Italy, with 24, has sent nearly as many references as Germany, with 28. They are followed by Belgium, Austria, Greece and the Netherlands. In comparison, the UK has only ever sent 4 preliminary references.

For social security preliminary references, a different pattern is observed. Belgium has sent nearly as many preliminary references as Germany, followed by Austria and the Netherlands. Belgium's high number of cases is related to the many challenges to Belgium's restrictions on who may receive the *minimex* benefit. UK and Italy have sent relatively few, and Ireland and Portugal have never sent a reference in the area of social security.

In the area of social provisions, the UK, Italy and Spain follow Germany. France is again in the bottom half of the distribution. Portugal has never sent a social provisions preliminary reference. Denmark, Finland, Ireland, Luxembourg, Netherlands and Sweden have all sent fewer than ten references over the fourteen years.

Because Germany sends the most references to the ECJ, even if it is below the mean when weighted for population, there will be many more opportunities for the ECJ to make decisions in areas that relate to a corporatist, Bismarckian welfare state. Moreover, Austria and Belgium also send many more preliminary references than might be expected based upon population, especially in the areas of free movement of workers and social security, reinforcing this Bismarckian path. As for the Beveridgean and Social Democratic states, they send few references overall. The most prolific user of the ECJ from this grouping is the UK, which sends more references in the areas of European citizenship and social provisions and few in the areas of social security or free movement of services. Therefore, this preliminary analysis of the distribution of the preliminary references by member state and subject area creates the expectation that the degree to which a national welfare state is Bismarckian or Beveridgean will be predictive of the national rate of preliminary references.

5.3 Explaining variation in rates of preliminary references

What explains the variation in national rates of preliminary references to the ECJ? This stage of the empirical research uses a Time Series Cross-Section (TSCS) design to test a series of hypotheses derived from the literature, as well as three novel hypotheses that are specific to social policy preliminary references, using a dataset that compares the Member States of the EU-15.

Time Series Cross-section Analysis

TSCS data look like panel data: the cases (N) are observed at regular intervals over time (T), generating a total of NT observations. In this analysis the fifteen Member States of the EU-15 serve as the cases, or N, and each is observed for each year from 1996 to 2009 (T). The dependent variable is the number of preliminary reference per year for a member state ('Number of References').

TSCS is a popular technique in political econometrics, and has become the primary technique for inter-country analyses over the past two decades. With TSCS data the researcher can test theories about both cross-sectional and cross-temporal variance, so it allows for greater traction than either a cross-sectional or a cross-temporal data slice. Moreover, to a certain extent the researcher can overcome the 'small-N problem,' namely that studies of nation states can seldom, if ever, generate enough cases for more traditional statistical techniques. By observing a nation state over time the researcher can increase the number of observations in a dataset. However, caution is required because 'NT correlated

observations have less information than NT independent observations' (Cameron and Trivedi 2005, p. 702).

As was discussed in more depth in Chapter 4, it is difficult to accurately estimate errors for TSCS. They 'invariably violate the standard Gaussian error assumptions underlying classic linear regression models' (Shor, *et al.*, 2007, p. 165-6). There are three specific problems with using OLS regression, but they all are derived from the fact that the cases are not truly independent of one another. First, there are problems of serial correlation, because the same cases (here, Member States) are observed repeatedly over time. An observation of France in 2000 is different from an observation of France in 2001, but they are not independent of one another. All of the built-up elements that make France, France will persist from one observation to the next. The second problem is that the data may be heteroskedastic. OLS assumes that the variance of the data will be equal, but that cannot be assumed for TSCS data. Instead, with TSCS data, the researcher assumes heterogeneity (Shor, *et al* 2007, p. 167). Finally, TSCS data present problems of contemporaneous and spatial correlation. The observation of France in 2001 may not be independent of the observation of Belgium in 2001 if there was some exogenous event that affected both Member States that year. These 'time shocks' may be even more important in a study, such as this one, where all the observed nation states are in a small geographic region. Moreover, the Member States have interconnected histories to a greater or lesser degree and are all part of the same supranational order, the European Union.

Strategies have been created to solve these error estimation problems. One, to use a unit fixed effects estimator, or to insert country dummy variables into the model, gives too much importance to heterogeneity. By assuming heterogeneity, these models often wash out all of the differences that can be explained by the independent variables, as well. Also, a unit fixed effects model cannot estimate the coefficients of time-invariant variables, such as type of government or economy (Plümper and Troeger 2007). Therefore, a fixed effects model would not be very well-suited to this analysis.

Beck and Katz proposed the use of 'panel-corrected standard errors' (PCSE), which has become the most-used solution.[124]' The technique is based upon the fact that while the data are heteroskedastic, they are heteroskedastic in predictable ways. The technique assumes a common variance within a unit's cluster and that the inter-correlation across units also has a known structure. It assumes equal co-variance between any two units for a particular time period of observation. In TSCS we 'can assume complete homogeneity within units, and thus limit ourselves to models that imply heterogeneity between units' (Beck and Katz 2001, p. 1). The technique has been widely debated in the literature.

In this study there is a problem with using the Beck and Katz PCSE technique because it may have difficulties dealing with spatial correlation between the units, here the Member States. The Member States of the EU-15 are closely related units, sometimes sharing historical traditions, especially in the case of those Member States in close geographic proximity. There are likely to be

[124] Put into operation with Stata command xtpcse with ar1 correlation.

complex patterns of mutual dependence (Hoechle 2007). It is not feasible or desirable to randomly or independently sample the units to try to minimise cross-sectional dependence. This creates an additional problem of potential bias in standard error estimates.

The solution was proposed by Driscoll and Kraay (1998). Their technique allows for heteroskedastic and autocorrelation-consistent standard errors that are robust even with spatial and temporal dependence between the units. Hoechle created a Stata estimator[125] that implements the Driscoll and Kraay standard errors, and proved through Monte Carlo experiments that 'Although Driscoll and Kraay standard errors tend to be slightly optimistic, their small-sample properties are considerably better than those of the alternative covariance estimators when cross-sectional dependence is present' (Hoechle 2007, p. 282). Since the sample in this study is small and there is a high likelihood of spatial and temporal dependence between the Member States, the Driscoll and Kraay (1998) technique is the preferred approach.

There is also a concern that the data do not have a normal distribution. Many statistical techniques rely upon an assumption that data are normally distributed. Because a member state cannot send fewer than zero preliminary references per year, the distribution of the data in this study is left-censored. Therefore, a tobit analysis (Tobin 1958) may be appropriate. However, the xttobit command in Stata relies 'heavily' upon an assumption of homoskedastic

[125] Implemented with the Stata command xtscc.

regularly distributed errors, which, as we've seen, is not the case for panel-type data (Cameron and Trivedi 2009, p. 619).

Therefore, the data in this analysis present challenges. Because some of the factors in the hypotheses are time-invariant or slow-moving over time, we cannot rely on a fixed effects estimator or country dummies. Moreover, washing out all country heterogeneity is inappropriate where, as here, most of the variation in the model is expected to be between, rather than within, units (Cameron and Trivedi 2009). The Beck and Katz PCSEs may be a solution, but because the units of the study are related historically and are closely clustered geographically, we have more than the usual concerns about spatial correlation. Therefore, the Driscoll and Kraay standard errors approach is the optimal method. There are concerns that the data may be left-censored, indicating that a Tobit analysis might be appropriate. But, as is discussed above, the data violate the assumption of homoskedascity that Tobit relies upon. Therefore, the Tobit estimation is not reliable. Although the optimal model is the estimation with the Driscoll and Kraay standard errors, the models will also be estimated using a Tobit and the Beck and Katz PCSEs, for comparison, and the results discussed.

Hypotheses

The prior studies in this area and their results were set out in more detail in Chapter 2's review of the literature. The hypotheses tested here are divided into broader hypotheses based upon previous studies that relate to all preliminary references and more focused hypotheses related to social policy preliminary

references. They were tested separately and then the factors found to be significant were combined in one model.

Previous empirical studies tested the effect of larger populations on rates of preliminary references (Stone Sweet and Brunell 1998, Vink, *et al.* 2009, Wind, *et al.* 2010). It is not surprising, perhaps, that Member States with larger population had higher rates of preliminary references. Population was included in this model as a control.

Hypothesis 1: Member States with larger populations will have higher rates of preliminary references to the ECJ.

The second hypothesis tested by this study concerns the effect of national legal culture on rates of preliminary references. Schepel and Blankenburg (2001) point to national legal cultures as a crucial factor in the use of public policy litigation. Perceptions of citizens of Member States about the legitimacy of the Court may be crucial determinants of whether they will look for redress from the courts. An earlier cross-national study of citizen perceptions of the ECJ by Gibson and Caldeira (1998) found that the ECJ had little perceived institutional legitimacy. Moreover, while national high courts had greater perceived legitimacy, there wasn't evidence that they could lend that legitimacy to the ECJ (Gibson and Caldeira 1998). Studies from the US have found that if citizens lack confidence in their courts they were likely to look elsewhere for redress (Scherer, *et al.* 2010, Dougherty, *et al.* 2006). This study used EuroBarometer survey data to measure national support for the Court of Justice.

Hypothesis 2: Higher levels of 'trust' of the ECJ reported by citizens of a Member State in the EuroBarometer will predict higher numbers of preliminary references.

The third hypothesis relates to whether Member States are of monist or dualist legal traditions. In pure dualist systems, international law and domestic law occupy separate spheres. In monist systems, international and domestic law are part of a 'universal legal order,' and domestic courts make use of international sources of law and precedents in their decisions (Hillier 1998). In monist systems, international law is enforceable in national courts directly, whereas in dualist systems, international law is enforceable in national courts only as it has been transposed into national law. There are two potential interpretations of the effect this distinction in legal doctrine might have upon rates of preliminary references. The first is that monist legal systems, which allow for direct enforcement of international law, and where courts are accustomed to non-national precedents interfering in domestic cases, might generate higher numbers of preliminary references than dualist legal systems (Alter 1996, Mattli and Slaughter 1998, Carrubba and Murrah 2005). The second potential interpretation is that Member States with monist legal systems will make fewer references, because courts will already be experienced in interpreting and applying non-national sources of law and would not need further assistance (Vink, *et al.* 2009). Courts in dualist systems, now presented with an entirely new requirement to apply non-national sources of law, would be more inclined to seek assistance from the European Court (Vink, *et al.* 2009).

Hypothesis 3: Member States from 'monist' legal traditions will make fewer preliminary references than 'dualist' Member States.

The fourth hypothesis to be tested by this study relates to the interrelationship of judges in Member States. The presence or absence of a right of judicial review has been theorised to be an important factor in predicting rates of preliminary references. Alter (1996) and Mattli and Slaughter (1998) expected judicial review to be positively correlated with rates of preliminary references, but did not test this empirically. However, Vink, *et al.* (2009) also advanced an opposing hypothesis, that judges in a system without judicial review would find themselves similarly empowered through this new ability and send more references. Leibfried and Pierson (2000) assert that the extension of the right to review legislation to lower courts led to lower courts in Germany using the preliminary reference procedure to circumvent established legal hierarchies.

Some studies have tried to distinguish between concrete and abstract judicial review (Carrubba and Murrah (2005) and Vink, *et al.* (2009). Concrete judicial review takes place in the context of an actual case and abstract judicial review is a review of the constitutionality of legislation in the absence of a case or controversy. However, it is not clear from a theoretical perspective why judicial review should be important for preliminary references, which always arise in the context of an actual controversy. Moreover, distinguishing quantitatively between the Member States of the EU-15 based upon judicial review is not very meaningful, as every state other than the UK has some form of judicial review, and only France has only abstract but not concrete judicial review.

The difficulty with hypotheses related to the presence or absence of a right of judicial review is that the 'interests' of courts in a national legal system are far

from clear. Moreover, the different levels of courts within a legal system may well have different interests from those of other courts. Scharpf called the new ability of ordinary national courts to review national legislation, 'which may have been particularly attractive for lower court judges', 'the most convincing explanation' for the interaction of judicial review with rates of preliminary references (2010, p. 216). This complements Leibfried and Pierson's theory that lower courts in a judicial system will take advantage of a new ability to review legislation to circumvent resistance in higher-level courts (2000).

This judicial empowerment is tested in this study via a constructed variable. The percentage of preliminary references from lower level courts was calculated for each member state using data from the Curia website. Lower courts were defined as courts from which there is an appeal to another higher member state court. Under Article 267 TFEU, lower courts may send a preliminary reference if a question of European law arises, but courts from which there is no right of appeal must send preliminary references. If there is resistance in a member state legal system to preliminary references, then we might expect that those Member States with higher percentages of references from lower courts will have lower levels of preliminary references.[126] Therefore, the judicial empowerment variable should be negatively correlated with higher rates of preliminary references.

[126] This cannot fully account for systems such as that of the UK, where a lower court must approve an appeal to the next level. In this situation, a lower court that was refusing to grant leave to appeal would be functioning as the court of last resort and would be obliged to grant a preliminary reference. However, there is no practical way to include this nuance in the measurement of the variable. It is a limitation.

Hypothesis 4: Member States with a higher percentage of references from lower level national court will have lower rates of preliminary references to the ECJ.

The fifth hypothesis tested by this study concerns the impact of differing compliance with European Union law and different levels of efficiency in the national administration of European law in the Member States. The theory is that perhaps some Member States have more preliminary references because they are less compliant with EU law.[127] However, it is difficult to establish which Member States are 'compliant.' Various studies have attempted to estimate compliance patterns across Member States. This study used the Falkner, Treib and Hartlapp (2005) and Falkner and Treib (2008) typologies as a proxy. The Falkner, *et al.* typologies are especially on point as they used extensive qualitative interviews and legal analyses in each of the EU-15 Member States to study the implementation of six social provision directives in each member state, creating 90 case studies (2005, 2008).

The initial (2005) typology identified three transposition regimes. In the first, 'the World of Law Observance,' a 'compliance culture' ensures that directives are transposed in a timely manner, even if there is a conflicting national policy.

[127] As was mentioned in Chapter 2, the direction of causality could be considered here. However, the hypothesis is more complex, so it is difficult to construct an inverse relationship. Those Member States that were the most and the least compliant both had very low rates of references. It is the interrelationship between policy misfit and efficient administration of courts and justice that drives rates of preliminary references. For the most compliant Member States, those in the 'World of Law Observance,' this is because they have a high degree of fit with European law. For the least compliant Member States, those in the 'World of Dead Letters,' this is despite the fact that they have a very high degree of misfit with European law. Instead, their resistance to enforcement prevents the usage of the justice system to redress this degree of misfit through the preliminary reference process.

Application and enforcement are usually successful. The three Nordic EU countries occupy this 'world': Denmark, Finland and Sweden. In the second 'World of Domestic Politics,' domestic political factors often trump compliance if there is a conflict between national policies and the EU directive. In these countries the administrations and judiciaries tend to be efficient, so it is only domestic resistance that prevents enforcement of EU policies. Six EU countries inhabit this 'world': Austria, Belgium, Germany, the Netherlands, Spain and the United Kingdom. In the third 'World of Transposition Neglect,' compliance with the EU is not a goal. The intervention of powerful supranational actors is often required for transposition. Compliance may be swift after such an intervention, but problems in enforcement and application are common. Inactivity characterises the response to most EU actions. The countries that make up this category are: France, Greece, Luxembourg and Portugal.

In 2008, Falkner and Treib elaborated on the typology to add a fourth class to the typology to encompass some of the new accession states, as well as the remaining EU-15 states. The fourth regime that they identified is the 'World of Dead Letters.' Here there is both national resistance to policies and extreme non-compliance with enforcement to EU directives. Moreover, directives are often transposed directly, without consideration of national laws or policy, resulting in problems of fit. Falkner and Treib assign Ireland, Italy, Czech Republic, Hungary, Slovakia and Slovenia to this land of non-compliance.

The fifth hypothesis of this thesis is related to the Falkner, *et al.* (2005) and the Falkner and Treib (2008) typologies. Member States with lower levels of

compliance with the EU, i.e. those outside of the 'World of Law Observance' can be expected to have higher numbers of preliminary references, as it is less likely that EU law will be effectively applied. However, those in the 'World of Dead Letters' are also expected to have very low numbers of preliminary references, because the combination of national resistance and extreme non-compliance will be an insuperable barrier. The highest numbers of references can be expected from Member States in the second-most compliant category – the 'World of Domestic Politics' – because while there might be more problems with compliance in the next category – the 'World of Transposition Neglect' – the domestic barriers will be a much higher hurdle in these Member States with no desire to come into compliance with the EU.

Hypothesis 5: Member States from the 'World of Domestic Politics' will have higher rates of preliminary references. Member States from the 'World of Law Observance' and the 'World of Dead Letters,' will have lower rates of preliminary references.

Social Policy Hypotheses

This study also tested three novel hypotheses that are specifically related to rates of preliminary references in the area of social policy. The sixth hypothesis tested is that the degree to which a national welfare state is 'Bismarckian,' will be positively correlated with an increase in the number of social policy preliminary references. The structure of social services offered by Member States may make it easier for some citizens than others to enforce those rights through legal action. Bismarckian social security systems are primarily financed through social insurance contributions by employers and employees. They are focused on

horizontal redistribution across the recipient's lifespan, rather than vertical redistribution in society. They are earnings-related and the right to receive benefits is tied to work or its equivalent. Non-workers can receive benefits through their association with a worker, such as a spouse. In contrast, Beveridgean social security systems are primarily financed through taxes, generally involving flat rate universal benefits. They are vertically redistributive. Bonoli identified two types of Beveridgean welfare states, high spending ones such as the Nordic countries, and low spending ones such as the UK and Ireland (1997). In the low-spending Beveridgean welfare states, benefits are often residual and designed to ensure a subsistence level of existence. The right to receive benefits in Beveridgean welfare states is linked to residency and may be means-tested, especially in the low-spending states. Under this theory, Bismarckian welfare systems will create rights that are more akin to property rights (Titmuss 1976, Hinrichs 2003). As such, the entitlements under Bismarckian welfare systems will be more easily enforceable in courts.

Hypothesis 6: Member States with more Bismarckian welfare states will send more social policy references to the ECJ.

The seventh hypothesis is that greater union membership density in the population of a member state will result in more social policy preliminary references. Bringing a case to enforce social policy rights in a national court, and then to have the knowledge and the ability to request a reference to the European Court, requires a high degree of information and support. Union support for enforcing rights might make this a more viable option.

The availability of organizational support can be expected to affect access to justice before the ECJ (Conant 2007, p. 58, Alter 2000). This is an element of the 'friendliness' of a member state legal system to social policy preliminary references. Unions are classic 'repeat players' (Galanter 1974) and pursue many cases in sometimes coordinated litigation strategies. Studies in various issue areas have indicated that 'commercial enterprises, societal interest organizations and public enforcement agencies are most likely to gain access to court to enforce EU legal norms because they are most likely to possess the knowledge and financing necessary for litigation' (Conant 2007, p. 59). Powerful interests are more able to use the opportunities presented through litigation processes. The availability of powerful interests to intermediate on behalf of citizens is put into operation here by rates of union membership in a Member State.

Hypothesis 7: Higher union density in a Member State will result in more social policy references to the ECJ.

The eighth hypothesis tested concerns the effect of higher levels of intra-EU migrants in a member state on rates of preliminary references. As many European protections for workers arise out of the free movement of workers and persons, a higher rate of intra-EU migrants in a member state might lead to higher numbers of preliminary references to enforce rights for those workers. Golub (1996) correlated migrant worker populations to preliminary references in directly related fields and found a weak relationship.

Hypothesis 8: Higher populations of intra-EU migrants in a Member State will result in more social policy preliminary references.

Dependent Variables

The analyses were run with two different dependent variables. First, a dependent variable for all preliminary references was calculated from the summary data published on the European Court of Justice's Curia website ('All References'), and includes all preliminary references per year from a member state. Second, the annual social policy preliminary references per member state dependent variable was calculated from the dataset described earlier and in the methodological chapter, which includes all preliminary references in the five areas related to social policy ('Social Policy References').

Independent Variables

The following independent variables were used in the models:

- *Population* is the annual population of the member state, in increments of 100,000. Source: Eurostat: Population and Social Conditions.
- *GDP* is the Gross Domestic Product, normalised for purchasing parity. It was included as a control in the models. Source: Eurostat: Population and Social Conditions.
- *Trust ECJ* is the percentage of a member state's population that says that it 'trusts' the ECJ. If multiple surveys were conducted in a year, then the mean result over the period was used. Source: Annual Eurobarometers.

- *Monist* is whether member state has a monist or dualist legal tradition. Source: European Commission's European Judicial Network in Civil and Commercial Matters summary of member state legal orders. Available at: http://ec.europa.eu/civiljustice/legal_order.
- *Judicial Empowerment* is the percentage of preliminary references from a member state from lower-level courts. Lower courts were defined as those from which there is a right of appeal to a higher member state court. Source data from *2009 Annual Report, European Court of Justice*, available at: http://curia.europa.eu/jcms/jcms/Jo2_11035/rapports-annuels.
- *Migrant Population* is the number of intra-EU migrants per 100,000 population of a member state. Source: Eurostat: Population and Social Conditions.
- *Type of Compliance* is based upon the Falkner and Treib typologies (2005, 2008). Member States are classified as belonging to one of four ideal types:
    - *World of Law Observance*: Denmark, Finland and Sweden
    - *World of Domestic Politics:* Austria, Belgium, Germany, the Netherlands, Spain and the UK
    - *World of Transposition Neglect:* France, Greece, Luxembourg and Portugal
    - *World of Dead Letters:* Ireland, Italy

  It was put into operation using dummy variables, with World of Transposition Neglect as the omitted category.

- *Bismarckian* is a measure of how Bismarckian a national welfare state is in a particular year. It was calculated by the percentage of total social expenditures that are contributed by insured and their employers. Source: Eurostat: Living Conditions and Welfare.
- *Union Density* is the number of union members per 100,000 residents. Source: OECD *Trade Union Members and Union Density in OECD Countries*. Accessed at: http://stats.oecd.org/Index.aspx?DataSetCode=UN_DEN

Model specification

Model 1: A pooled ordinary least-squares regression with Driscoll and Kraay (1998) standard errors, estimated using the xtscc command in Stata. 'These standard errors are heteroskedasticity consistent and robust to general forms of cross-sectional (spatial) and temporal dependence' (Hoechle 2007, p. 284).

In order to check the model's robustness, the models were re-estimated using two other methods:

Model 2: a Tobit (Tobin 1958) analysis was used to take into account the potential left-censoring of the data.

Model 3: This model was constructed following Beck and Katz's (1995) recommended procedure, for a Prais Winsten estimation using panel-corrected standard errors with an auto-regression correction for serial auto-correlation.

Because there is some trend to the data, a lagged dependent variable was not employed (Achen 2000). Using the auto-regression correction addresses serial auto-correlation by including a lagged dependent variable in the right hand side of the equation (Beck and Katz 2004, p. 16-17). Country-level dummies were not included because they are not appropriate for models where time-invariant factors are included, or where the level of the independent variable is predicted to have an effect on the level of the dependent variable (Plümper, *et al.* 2005, p. 330-334).

Results All References Dependent Variable

The model was estimated using the all references dependent variable to test the first five, general, hypotheses. The overall model was highly significant, with an R^2 of .754. Population and reported trust in the Court of Justice were highly significant and positively correlated with higher rates of preliminary references. GDP was highly significant and negatively correlated. The 'Worlds' of the Falkner *et al.* (2005, 2008) typologies were all significant and in the expected directions. Membership in the 'World of Law Observance'[128] and the 'World of Dead Letters' was significant and negatively correlated. Membership in the 'World of Domestic Politics' was significant and positively correlated. The judicial empowerment variable was significant and in the expected direction. In terms of the size of the effects, trust of the Court has largest effect on the model, followed by GDP, population, and membership in the 'World of Domestic Politics'. Table 2 shows the coefficients.

[128] See following discussion of standard error estimates.

Table 2: Estimates of Determinants of Rate of All Preliminary References

Variables	Model 1 (Pooled OLS with Driscoll and Kraay SEs)	t	Model 3 (Prais-Winsten with PCSEs)	z
Population	.037	7.35	.037	7.35
	(.005)***		(.005)***	
GDP	-.070	-12.15	-.066	-5.60
	(.006) ***		(.012)***	
Trust ECJ	.893	20.42	.867	6.98
	(.044)***		(.124)***	
Judicial Empowerment	-.059	-2.42	-.085	-1.82
	(.026)*		(.046)	
Monist	-10.872	-2.62	-10.048	-1.68
	(4.149)		(5.99)	
World of Dead Letters	-11.649	-3.18	-11.001	-2.16
	(3.668)**		(6.461)	
World of Law Observance	-16.468	-3.69	-15.651	-2.75
	(4.464)***		(7.256)**	
World of Domestic Politics	9.355	6.56	9.227	3.47
	(1.427)**		(2.658)***	
Common rho			.427	
Constant	-23.922	-4.91	-35.254	-4.30
	(4.876)***		(13.185)*	
R^2	.7538		.556	

Note: The dependent variable is all preliminary references per member state. Model 1 analysis is is a pooled OLS estimation with Driscoll-Kraay standard errors, Stata command xtscc. Model 3 PCSE with an AR1 correlation. Entries are panel-corrected standardized coefficients. *p ≤ 0.05 **p ≤ .01 ***p ≤ .001.

Model Specification – Social Policy Preliminary References

The three novel hypotheses related to social policy were tested using the dependent variable of all social policy preliminary references in the dataset. The models were estimated in the same manner as for the all preliminary references dependent variable. Model 1 is again pooled ordinary least-squares regression with Driscoll and Kraay standard errors is estimated using the xtscc command in Stata (Hoechle 2007). In order to check the model's robustness, the models were re-estimated using two other methods. Model 2: as there are 32 left-censored observations, a tobit (Tobin 1958) analysis was used to take into account the potential left-censoring of the data. Model 3: a Prais Winsten estimation using panel-corrected standard errors with an auto-regression correction for serial auto-correlation with panel-corrected standard errors (Beck and Katz 1995).

Results Social Policy Preliminary References Dependent Variable

The combined model for the social policy factors was highly significant and had an R^2 of .439. The population variable was highly significant and positively correlated with higher rates of social policy preliminary references. Population was included as a control, and in terms of the relative effect, it has the largest effect on the model. The variable estimating the degree to which a national welfare state is Bismarckian was also highly significant and positively correlated. It has the second largest effect on the model. Union Density was highly significant and positively correlated with higher rates of social policy

preliminary references. Migrant labour was not significant, and its coefficient was not in the expected direction. The other two models estimated similar results. Table 3 sets out all of the results.

Table 3: Estimates of Determinants of Rate of Social Policy Preliminary References

Variables	**Model 1 (Pooled OLS with Driscoll and Kraay SEs)**	**t**	**Model 2 (Tobit)**	**z**	**Model 3 (Prais-Winsten with PCSEs)**	**z**
Population	.009	11.24	.012	4.38	.009	4.68
	(.001)***		(.003)***		(.002)***	
GDP	.013	0.81	.055	1.45	.012	.50
	(.016)		(.038)		(.024)	
Migrant Labour	-.032	-0.56	-.019	-1.37	-.023	-.23
	(.057)		(.176)		(.096)	
Union Density	.049	7.29	.068	1.93	.052	2.28
	(.007)***		(.035) *		(.023)*	
Bismarckian	.116	10.74	.174	3.06	.117	5.46
	(.011)***		(.057)**		(.022)***	
Common rho			.407		.466	
Constant	-9.05	-3.63	-18.676	-3.21	-9.106	-3.25
	(2.49)***		(.5.813)***		(2.799)***	
R^2	.439				.305	
Log Likelihood			-283.307			

Note: Model 1 is a pooled OLS estimation with Driscoll-Kraay standard errors, Stata command xtscc. Model 2 is Tobit estimation, Stata command xttobit. Model 3 analysis is PCSE with an AR1 correlation. The dependent variable is all preliminary references per member state. Entries are panel-corrected standardized coefficients. *p ≤ 0.05 **p ≤ .01 ***p ≤ .001

Social Policy Models re-estimated with significant factors from All References Models

In order to test further the robustness of the hypothesised explanatory factors from the social policy preliminary references models, the models were re-estimated including the significant explanatory factors from the All References Models. The combined model was highly significant. The R^2 increased from .439 to .607.

For the factors from the general references model, population was highly significant and was positively correlated with higher rates of preliminary references. Trust in the European Court of Justice was also significant and positively correlated. Judicial Empowerment was significant and negatively correlated with higher rates of references.

The Falkner, *et al.* (2005, 2008) 'Worlds' again found support. Member State membership in the 'World of Law Observance' was significant and negatively correlated with higher rates of references and membership in the 'World of Domestic Politics' was significant and positively correlated. Membership in the 'World of Dead Letters' was not significant.

The social policy explanatory factors that were significant in the previous model remained significant. Union density was significant and positively correlated with a higher rate of preliminary references. A more Bismarckian welfare state was significant and positively correlated. Migrant labour was not significant.

In terms of the relative explanatory power, population was the most important, followed by trust in the Court of Justice. Union density was next most important. Then followed the 'World of Law Observance', Judicial empowerment, Bismarckian, and the 'World of Domestic Politics'. Table 4, below, sets out the complete results.

Table 4: Estimates of Determinants of Rate of Social Policy Preliminary References, including general hypotheses

Variables	Model 1 (Pooled OLS with Driscoll and Kraay SEs)	t	Model 2 (Tobit)	z	Model 3 (Prais-Winsten with PCSEs)	z
Population	.012	7.36	.012	5.98	.012	5.98
	(.001)***		(.002)***		(.002)***	
GDP	-.012	-0.66	.023	0.69	-.008	-.38
	(.018)		(.034)		(.022)	
Migrant Labour	-.034	-0.37	-.163	-0.94	-.046	-.48
	(.092)		(.174)		(.099)	
Union Density	.145	3.68	.148	3.22	.144	3.29
	(.039)**		(.046)**		(.044)***	
Bismarckian	.032	2.12	.096	2.13	.030	0.93
	(.015)*		(.045)*		(.032)	
Trust ECJ	.135	5.46	.128	3.0	.127	2.71
	(.025)***		(.043)**		(.047)**	
Judicial Empowerment	-.030	-2.85	-.011	-0.47	-.031	-1.48
	(.011)**		(.023)		(.021)	
World of Dead Letters	-1.214	-1.08	-1.029	-0.52	-1.649	-0.96
	(1.128)		(1.200)		(2.060)	
World of Law Observance	-7.183	-3.26	-6.846	-2.21	-7.238	-2.99
	(2.203)**		(3.094)*		(2.417)	
World of Domestic Politics	1.035	2.10	.830	0.65	1.035	1.27
	(.492)*		(1.274)		(.816)	
Common rho			.095		.243	
Constant	-10.215	-5.99	-19.285	-3.43	-9.916	-2.10
	(1.705)***		(5.619)***		(4.277)**	
R^2	.607				.484	
Log Likelihood			-267.739			

Note: Model 1 is a pooled OLS estimation with Driscoll-Kraay standard errors, Stata command xtscc. Model 2 is Tobit estimation, Stata command xttobit. Model 3 analysis is PCSE with an AR1 correlation. The dependent variable is all preliminary references per member state. Entries are panel-corrected standardized coefficients. *p ≤ 0.05 **p ≤ .01 ***p ≤ .001

Discussion

Rates of all types of Preliminary References

The hypotheses derived from the literature for the overall rate of preliminary reference had mixed results. As previous empirical studies have also found, population proved to be significant predictor of rates of preliminary references. Higher populations were positively correlated with higher rates of preliminary references. It is perhaps not surprising that Member States with higher populations tend to have higher numbers of preliminary references. However, population is only the third most important factor in terms of explanatory power in the model. Previous studies have also found that member state GDP was predictive of higher rates of preliminary references. In this analysis, GDP with purchasing power parities was significant and negatively correlated with higher rates of preliminary references. The purchasing power parities may account for this differing result.

Differences in national legal traditions have been theorised to be an important factor in predicting preliminary references. Various studies have considered the effect of monist legal doctrine as one element of the national legal tradition. Unlike previous empirical studies, this analysis did not find a monist legal tradition to be significant. It is possible that the other factors included in this model account for this difference in our findings, although tests of the variance inflation factor (VIF) indicate acceptable levels of multicollinearity[129]. The standard error for the monist variable was larger, which may be causing the

[129] Belsley, Kuh and Welsch (1980) say that a general rule is that VIF greater than 10 should be investigated. Simon (2004) recommends investigating VIF greater than 4. Here, all are below 3.

insignificance. It is possible that further investigation when an increased sample size is possible would clarify this.

The judicial empowerment hypothesis received support, as higher levels of references from lower level courts were significant and negatively correlated with higher rates of preliminary references. This confirms theories that interactions between levels of judges in a system are important for affecting rates of preliminary references (Leibfried and Pierson 2000, Scharpf 2010).

Other elements of national cultures, including support for the European Union, have been considered in previous studies. This study put into operation national support for the European legal system through a 'trust' variable, constructed from the national Eurobarometer surveys. Measures of national residents' trust in the Court of Justice were highly significant and positively correlated with higher rates of preliminary references. It was the most important explanatory factor in the model. Perceptions of the Court of Justice at the national level do seem to be an important part of understanding differing rates of preliminary references.

Some have attributed differing levels of compliance or adoption of European doctrine with explaining differing rates of preliminary references. Because measuring the degree of compliance with European Directives is enormously complex, few have attempted to measure the effect of compliance empirically. This study used the Falkner, *et al.* (2005) and Falkner and Treib (2008) typologies as a proxy, as they were the most exhaustive treatment available. The

Falkner, *et al.* (2005, 2008) 'Worlds' seem robust and in the expected directions. Member States from the 'World of Law Observance' and the 'World of Dead Letters' were significantly less likely to send preliminary references than Member States in the 'World of Transposition Neglect'. Member States from the 'World of Domestic Politics' were significantly more likely to send preliminary references than those in the 'World of Transposition Neglect'.

However, the standard errors for the 'World of Law Observance' and the 'World of Dead Letters' were large, resulting in a larger possible range for the coefficients (Gelman, *et al.* 2006). Moreover, the 'World of Dead Letters' includes only two Member States. We are able to reject the null hypothesis because the range for the coefficients does not include zero. The standard errors in Model 3 were larger and the null hypothesis cannot be rejected. Although Model 1 was chosen as the preferred model because its standard error estimates should be more efficient than those of Model 3 for this data, these findings should be treated with caution. The different methods used later in this study may shed further light.

Rates of Social Policy Preliminary References

The social policy explanatory variables together explain nearly 44% of the variation in rates of social policy preliminary references. Of the variables used to operationalise the novel hypotheses tested by this study, the union density and the Bismarckian variables seem robust. The union density variable was highly significant. Greater union density in a member state population is positively

correlated with a higher rate of social policy preliminary references. It was the third most important explanatory in the model containing only the social policy predictor variables. This correlates with the theory in the literature that support for litigation, such as could be provided by unions, is an important element to explain rates of preliminary references.

The Bismarckian variable, or the degree to which a Member State's social spending is funded by employer and insured contributions, was significant and positively correlated with higher rates of social policy preliminary references. It was the second most important explanatory factor in the model, nearly as large as that of population. This supports the theory that entitlements that are funded through employer and employee contributions are more closely akin to property rights (Titmuss 1976, Hinrichs 2003) and are therefore more readily enforced via judicial means.

The significant factors from the all references variables were added into the social policy preliminary references model. There was an improvement in the overall model fit, with the R^2 now explaining nearly 61% of the variation in rates of social policy preliminary references. The social policy explanatory factors remained robust, with both union density and Bismarckian significant and positively correlated. Trust in the Court of Justice was highly significant and positively correlated with higher rate of preliminary references from a member state. Population was highly significant and positively correlated. Judicial empowerment was significant and negatively correlated with higher rates of preliminary references.

The Falkner, *et al.* (2005, 2008) 'Worlds' were robust. Membership in the 'World of Law Observance' was significant and negatively correlated with higher rate of preliminary references. Membership in the 'World of Domestic Politics' was significant and positively correlated.

5.4 Conclusion

The social policy preliminary references to the European Court of Justice are unevenly distributed across the Member States and across issue areas. Germany, the United Kingdom, Belgium, Italy and Austria are the countries that send the most social policy preliminary references. Ireland and Portugal send the fewest references. The Member States with the highest numbers of social policy preliminary references tend to dominate the subcategories, as well, but the distribution of preliminary references by subcategory is also suggestive. Germany and the United Kingdom have by far the highest numbers of European citizenship references. However, the free movement of services references are dominated by Germany, Italy and Belgium. The United Kingdom has sent very few free movement of services references. Germany, Belgium and Austria also send the most references in the area of social provisions for migrant workers. Germany and the United Kingdom have sent the most references in the area of social provisions. The second part of the chapter's analysis suggests some potential explanations.

The Time Series Cross-Section analysis has helped to establish the relative explanatory power of the independent variables. In terms of overall preliminary references, population was positively correlated with higher rates in the Member States. This corresponds with the finding in the descriptive analysis that Germany sends the most references to the ECJ. However, it is interesting that France, the second largest EU member state, is such a low referrer in the areas of social policy. Gross domestic product is negatively correlated with higher rates of preliminary references but was only significant in the model with all preliminary references, not the social policy models.

The Falkner, *et al.* (2005) and Falkner and Treib (2008) typologies seem to be robust. Member States from the 'World of Law Observance' were significantly less likely to send preliminary references than Member States in the 'World of Transposition Neglect.' Member States from the 'World of Domestic Politics' were significantly more likely to send preliminary references than Member States in the 'World of Transposition Neglect.'

Other elements that are frequently attributed as causes of differing rates of preliminary references had mixed results. A monist legal tradition was not significant. The judicial empowerment variable was significant and negatively correlated. Interactions between levels of judges in a system do seem to be important. Ordinary judges may well be empowered by the European rights of judicial review (Leibfried and Pierson 2000, Scharpf 2010).

In terms of social policy preliminary references and the novel hypotheses tested in this study, two of the three hypotheses were confirmed. The union density variable was highly significant, and a greater degree of union density per 100,000 is positively correlated with higher preliminary references. This supports the theory that intermediaries that can help litigants to bring cases to court increase the likelihood that a litigant would be able to pursue a court strategy. The Bismarckian variable also was significant and positively correlated. The greater the percentage of social expenditure that is contributed by insured individuals and their employers, the higher the number of social policy preliminary references. This supports the theory that more Bismarckian welfare states create interests for participants that are more closely akin to property rights and are therefore more readily enforceable in court. The migrant labour variable was not significant.

In terms of relative explanatory factor in the final model using the social policy preliminary references dependent variable and including the general and the social policy predictor variables, population was the largest predictor(t=7.36). Trust in the Court of Justice had the second largest impact on the model, followed by judicial empowerment, Bismarckian and the 'Worlds'.

The significance of the union density variable affirms the theories in the literature that support is required for litigants to pursue a European litigation strategy. In the area of social provisions, a union is an obvious potential source of support. The significance of the Bismarckian variable may help to account for the fact that the UK, although a high overall sender of social policy preliminary

references, sends relatively few in the areas of free movement of services and social security for migrant workers. Germany, Belgium and Austria, which have higher degrees of Bismarckian social benefits, have high rates of references in the subcategories of free movement of services and social security. France, which has a low rate of social policy preliminary references, has higher rates of references than the UK in free movement of services and social security for migrant workers, and a higher Bismarckian score for social spending.

These explanations are important for several reasons. First, they indicate that some sorts of benefits or entitlements will be easier to enforce legally in some EU Member States than they are in others. Citizens of different Member States will have different access to justice at the European level if they wish to enforce social rights. Second, as the new accession states begin to interact with the ECJ more frequently, their patterns of preliminary references may follow similar paths. Finally, although the legal system is modelled on European civil law systems, the trend of the development of precedent at the ECJ has followed a more common law trajectory of building up lines of cases, each of which relies upon earlier cases. This means that the sorts of cases that are sent to the Court will influence the development of the jurisprudence. If more Bismarckian welfare systems are more conducive to European litigation, then the case law of the Court will develop in line with the disputes that are triggered by those sorts of systems. The Court will have many more opportunities to rule in disputes from Bismarckian welfare states. Because the EU legal system has so closely linked the legal systems of the Member States, the cases will have equal effect in other

Member States. Therefore, the built-up precedents of the Court will establish a more Bismarckian path.

Also, they indicate that perceptions of the Court of Justice in the population are important. Trust was the second largest predictor in the model. In light of the Eurozone[130] crisis that has engulfed the EU, the population's perceptions of the EU and its institutions may well have been shaken. This could affect future rates of preliminary references.

The Qualitative Comparative Analysis in Chapter Six will determine the combinations of causal conditions in which these explanatory variables interact. The sets of causal conditions that are necessary and sufficient to higher rates of preliminary references from a member state will be identified. Using a set-theoretic approach we can identify the combinations of circumstances that lead to higher and lower rates of preliminary references. The QCA approach is case-sensitive and keeps sight of the fact that the whole case, here a Member State, must be considered

[130] The Eurozone, or Euro area, is an economic and monetary union of 17 EU Member States that have adopted the Euro.

6 Causal Pathways to the Court of Justice

This chapter employs a Qualitative Comparative Analysis (QCA) to determine causal pathways to higher and lower rates of social policy preliminary references to the Court of Justice. The causal factors that were found to be significant in the quantitative analysis in Chapter 5 are included in the QCA analysis. The analysis looks for necessary and sufficient conditions and the interaction between sets of conditions to determine what recipes of causal conditions lead to higher and lower rates of social policy preliminary references to the ECJ. The QCA allows for a transition from the variable-driven quantitative analysis of Chapter 5 to the case-driven analysis of the qualitative case studies in Chapter 7.

6.1 Introduction

This chapter employs a Qualitative Comparative Analysis (QCA) to identify the conditions that lead to higher or lower rates of social policy preliminary references from Member States of the EU-15. The Time Series Cross-Section (TSCS) analysis of Chapter 5 identified variables that independently explain some of the variation in rates of social policy preliminary references. The quantitative analysis found population size, membership in the 'World of Law Observance,' membership in the 'World of Domestic Politics,' a more Bismarckian welfare state, the 'judicial empowerment variable' and the degree of union density to be significant predictors that help to explain the variance in the rate of preliminary references to the ECJ. The QCA analysis helps to transition from the variable-oriented approach of Chapter 5 to the case studies of Chapter 7. QCA uses set theory to assess cases as constellations of causal conditions, rather than viewing each causal condition in isolation across cases. This analysis tested for necessary and sufficient causal conditions and identified 'recipes' of causal conditions that lead to the outcomes of higher and lower rates of social

policy preliminary references. The QCA method allows an analysis of the Member States of the EU-15 more holistically, and can account for combinations of causes and multiple, not mutually exclusive, sets of conditions that lead to the studied outcomes.

6.2 Outcomes and Cases for this Analysis

As outlined by Charles Ragin (1987, 2011), the QCA method unfolds in a series of steps. First, the outcome to be studied is identified and the cases to be included in the analysis are identified. In this analysis there are two outcomes that are of interest: a high national rate of social policy preliminary references and a low national rate of social policy preliminary references. Which Member States belonged in the set of a high rate of preliminary references and which belonged in the set of a low rate of preliminary references was determined.

The Member States included are the same that were used for the quantitative analysis in Chapter 5 – the Member States that comprise the EU-15. The dataset underlying the QCA analysis was constructed using the same dataset of social policy preliminary references used for the TSCS analysis of Chapter 5. It includes all the preliminary references from the five areas related to social policy from 1996-2009:

- Free movement of persons
- European 'citizenship'
- Social provisions

- Social security for migrant workers, and
- Free movement of services, but only those services that are social policy-related, including health and education. In order to make this determination, every free movement of services preliminary reference was read and classified.

From this dataset the average rates of social policy preliminary references for each Member State over the period 1996-2009 were calculated. The Member State with the highest average rate of preliminary references was Germany, with 13.64 annual average social policy preliminary references. The Member State with the lowest average number of social policy preliminary references was Portugal, with .07. The mean was 3.23 and the median was 2.07. Table 1 sets out the average annual social policy preliminary references per Member State. The cut-off point for membership in the outcome of a high rate of preliminary references was set at the median, with Member States above the median belonging to the set of high rate of preliminary references, and Member States at or below the median belonging to the set of low preliminary references.

Table 5: Average Social Policy Preliminary References by Member State and Set Membership

Member State	Preliminary References	Set of High Rate of P.R.	Set of Low Rate of P.R.
Germany	13.64	1	0
Belgium	5.71	1	0
United Kingdom	4.93	1	0
Italy	4.79	1	0
Austria	4.71	1	0
Spain	3.36	1	0
Netherlands	3.29	1	0
Greece	2.07	0	1
France	1.93	0	1
Sweden	1	0	1
Luxembourg	0.86	0	1
Finland	0.86	0	1
Denmark	0.71	0	1
Ireland	0.36	0	1
Portugal	0.07	0	1

6.3 Causal Conditions and Calculations of Cut-off Points

The next step in the QCA method of analysis is to identify the potential relevant causal conditions for the outcome. These are determined by an in-depth knowledge of the cases. As was discussed in Chapters 2 and 5, in this study the literature pointed to a number of potential causal conditions. This study also proposes several potential novel causal conditions relevant to social policy preliminary references, which are included in the QCA analysis. The number of potential causal conditions included was limited to make the analysis more parsimonious. The potential causal conditions that the quantitative analysis in Chapter 5 established to be significant were included in the QCA. The QCA analysis determined how those causal conditions combine together to form pathways to the outcomes.

The data set was then constructed using the causal conditions. Each row of the data set is a case, here, a Member State of the EU-15. Each column sets out a particular aspect of the cases. The column is in itself a set, and sometimes different columns or sets use the same underlying data to define different sets. As an example, the Falkner, *et al.* (2005, 2008) typologies were used to create the sets of membership in the 'World of Domestic Politics' and the 'World of Law Observance,' but there are two other potential classifications of Member States in the typologies: the 'World of Transposition Neglect' and the 'World of Dead Letters.' Therefore, the sets of membership in the 'World of Domestic Politics' and the 'World of Law Observance' are mutually exclusive, as no Member State is a member of both, but they are not merely the reverse of one another. Some Member States are members of neither set.

The QCA analysis utilises the causal conditions that were found to be significant in the preferred Model 1 of the Time Series Cross-Section Analysis for the social policy preliminary references: population size, Member State population 'trust' of the ECJ, membership in the 'World of Domestic Politics' and the 'World of Law Observance' in the Falkner, *et al.* (2005, 2008) typologies, the degree to which a welfare state is Bismarckian, the judicial empowerment variable and the density of union membership in a member state. In the QCA method, membership within the sub-set of a particular causal condition ideally is determined via qualitative and quantitative understanding of the data and the cases (Ragin 2011Table 2, below, displays the set membership for the various causal conditions. Because it

is a binary analysis, a '1' indicates the presence of the causal condition in the Member State, and a '0' indicates the absence. Table 7, below, contains the underlying data. How the cut-off points for each condition were set is discussed following the tables.

Table 6: Set Membership for the Potential Causal Conditions

ms	highpr	lowpr	trust	bismarck	union	dompol	lawobsv	judemp	pop
At	1	0	1	1	1	1	0	0	0
Be	1	0	1	1	1	1	0	1	0
De	1	0	1	1	0	1	0	1	1
Dk	0	1	1	0	1	0	1	1	0
Es	1	0	0	1	0	1	0	1	1
Fi	0	1	1	0	1	0	1	0	0
Fr	0	1	0	1	0	0	0	1	1
Gr	0	1	1	1	0	0	0	1	0
Ie	0	1	1	0	1	0	0	0	0
It	1	0	0	1	1	0	0	1	1
Lx	0	1	1	0	1	0	0	0	0
Ne	1	0	1	1	0	1	0	0	0
Pt	0	1	1	0	0	0	0	0	0
Sw	0	1	1	0	1	0	1	0	0
UK	1	0	0	0	0	1	0	1	1

Key to abbreviations:

highpr: 1 = high rate of preliminary reference
lowpr: 1 = low rate of preliminary references
trust 1 = reported high levels of trust in the Court of Justice
bismarck: 1 = a more Bismarckian welfare state
union: 1= higher degree of union membership
dompol: 1 = Member State is member of 'World of Domestic Politics'
lawobsv: 1 = Member State is member of 'World of Law Observance'
judemp: 1 = high degree of judicial empowerment
pop: 1= large population

Table 7: Data for calculation of cut-off points for causal conditions

MS	Mean P.R.	Trust	Bismarck	Union	JudEmp	Population
At	4.71	52.6	65.4	35.6	51.4	8,355,260
Be	5.71	55.3	69	52.8	76.7	10,753,080
De	13.64	59.7	64.5	23.8	66.8	82,002,356
Dk	0.71	71.9	29.8	73.1	81.6	5,511,451
Es	3.36	46.9	65.9	15.6	88.7	45,828,172
Fi	0.86	57.8	49.9	74.7	41.4	5,326,314
Fr	1.93	45.9	66.8	8.1	82.8	62,473,779
Gr	2.07	57.6	59.5	26.5	65.5	11,260,402
Ie	0.36	55.8	40.3	37.9	37.3	4,450,030
It	4.79	47.3	58.9	34.8	83.4	60,045,068
Lx	0.86	66.9	50.2	42	50	493,500
Ne	3.29	64.2	66.6	22.4	36.5	16,485,787
Pt	0.07	51.9	49.8	22.2	38.2	10,627,250
Sw	1	60.5	48.8	77.9	50.6	9,256,347
UK	4.93	36.2	49.2	29.7	91.6	61,595,091
Median	2.07	55.8	58.9	34.8	65.5	10,753,080

Data sources: Author's calculations from dataset; Annual EuroBarometers; Eurostat: Living Conditions and Welfare; OECD Trade Union Members and Union Density in OECD Countries; *2009 Annual Report, European Court of Justice*; Eurostat: Population and Social Conditions

Member State Population

Previous empirical studies tested the effect of larger populations on rates of preliminary references (Stone Sweet and Brunell 1998, Vink, *et al.* 2009). They found that that Member States with larger populations had higher rates of preliminary references. The Time Series Cross-Section (TSCS) analysis also found population to be significant and positively correlated with higher rates of preliminary references. For the QCA analysis the member states of the EU-15 were divided into a sub-set of those with larger populations (Source: Eurostat: Population and Social Conditions). The average population for the period studied was used. There is a natural grouping by population in the EU-15, with the five most populous member states being Germany, France, the United Kingdom, Italy and Spain, and then a substantial drop-off before the next most populous member state of the EU-15, the Netherlands, which has roughly one-third the population of Spain.

'Trust' of the European Court of Justice

The literature also addresses the importance of national legal culture for rates of preliminary references. Schepel and Blankenburg (2001) point to national legal cultures as a crucial factor in the use of public interest litigation. Whether or not the citizens in a Member State perceive the Court to be legitimate may affect whether they will look to it for redress. Studies from the US have found that if citizens lack confidence in their courts they were likely to look elsewhere for recompense (Scherer, *et al.* 2010, Dougherty, *et al.* 2006).

This study used annual EuroBarometer survey data to measure national perceptions of the legitimacy of the Court. In the EuroBarometer, respondents were asked whether or not they were 'aware' of or had 'trust' for a series of EU institutions. In the quantitative analysis citizen awareness of the ECJ was not significant, but trust was significant across all models. For the QCA analysis the average value of the annual levels for each member state over the period studied was used. Values ranged from a high of 71.9% of the population of Denmark who trust the Court to a low of 36.2% of the population of the United Kingdom (Source: Annual EuroBarometers). Member State membership in the set was determined by a threshold of more than half of the population expressing trust in the ECJ, as there was a natural gap of nearly five percentage points between Portugal, above this threshold at 51.9% and Italy below this threshold at 47.3%. The member states that are members of the set with higher levels of trust of the ECJ are Austria, Belgium, Denmark, Finland, Germany, Greece, Ireland, Luxembourg, Netherlands, Portugal and Sweden.

Compliance with the European Union

The impact of differing compliance with European Union law in the Member States is also considered to be an important factor in determining rates of preliminary references in the literature. This is based upon the idea that more compliant member states will generate fewer references because they have successfully incorporated EU law into national law. However, the literature has struggled to classify how 'compliant' the Member States are. Various studies have

attempted to estimate compliance patterns across Member States. This study will use the Falkner, Treib and Hartlapp (2005) and Falkner and Treib (2008) typologies as a proxy. Falkner, *et al.*'s typologies are especially applicable to this study as the authors used extensive qualitative interviews and legal analyses in each of the EU-15 Member States to assess the implementation of six social provision directives in each member state, creating 90 case studies. Thus, the method of generating the typologies utilises the sort of in-depth case understanding that is the basis of QCA analysis.

As was discussed in Chapters 2 and 5, the initial (2005) typology identified three compliance 'regimes,' based upon the transposition of the EU directives into national law. In the first, 'the World of Law Observance,' a 'compliance culture' ensures that directives receive a timely transposition, despite any conflicts with national policy. Application and enforcement are usually successful. The three Nordic EU countries occupy this world: Denmark, Finland and Sweden. In the second 'World of Domestic Politics,' domestic political factors can prevent compliance if a directive conflicts with national policies. In these countries the administrations and judiciaries tend to be efficient, so it is only domestic resistance that prevents enforcement of EU policies. Six EU countries inhabit this world: Austria, Belgium, Germany, the Netherlands, Spain and the United Kingdom. In the third 'World of Transposition Neglect,' compliance with the EU is not a goal. Supranational intervention is often required to force transposition. Compliance may follow after an intervention, but enforcement and application problems are common. The response to most EU actions is inactivity. The

countries that make up this category are: France, Greece, Luxembourg and Portugal.

In 2008, Falkner and Treib added a fourth class to the typology that accounts for some of the new accession states, as well as the remaining EU-15 states. This fourth regime is the 'World of Dead Letters.' In these states there is both national resistance to EU directives and non-compliance with enforcement. Furthermore, directives are often transposed verbatim, without consideration of national laws or policy. The resulting problems of fit prevent effective merging of EU policies into national law. Falkner and Treib assign Ireland, Italy, Czech Republic, Hungary, Slovakia and Slovenia to this land of non-compliance.

This understanding of compliance and internal processes in the Member States with respect to transposition of EU law creates certain expectations for how national rates of social policy preliminary references will differ based upon ideal types. The typologies suggest that Member States of the 'World of Law Observance' will have lower rates of preliminary references because they will generally be better compliant with EU law. Member States of the 'World of Domestic Politics' ideal type will have worse compliance with EU law, because conflicts with domestic politics will delay or undermine transposition. However, their efficient legal systems will allow their citizens to enforce compliance using their national legal systems and the preliminary references mechanism. Therefore, they will have higher rates of preliminary references. Both the 'World of Transposition Neglect' and the 'World of Dead Letters' will have middling

rates, because although they are not in compliance with EU directives, their domestic systems will not allow for effective use of courts for enforcement.

The Time Series Cross-Section analysis tested these expectations. It found that membership in the 'World of Law Observance' was significant and negatively correlated with higher rates of preliminary references across all of the models. The analysis also found that membership in the 'World of Domestic Politics' was significant and positively correlated with higher rates of preliminary references. The Member States that belong to the set of the 'World of Law Observance' are: Denmark, Finland and Sweden. The members of the set of 'World of Domestic Politics' for the QCA analysis are: Austria, Belgium, Germany, the Netherlands, Spain and the United Kingdom.

Bismarckian Welfare States

The Time Series Cross-Section analysis also tested some novel hypotheses that are specifically related to rates of preliminary references in the area of social policy. The first of these is that the greater the degree to which a national welfare state is 'Bismarckian,' that is, financed by a social insurance contributions, the higher the rate of social policy preliminary references. A distinction is drawn between two general types of welfare states. Bismarckian social security systems are primarily financed through social insurance contributions by employers and employees. They are focused on horizontal redistribution across the recipient's lifespan, rather than vertical redistribution in society. They are earnings-related

and the right to receive benefits is tied to work or its equivalent. Non-workers can receive benefits through their association with a worker, such as a spouse.

In contrast, Beveridgean social security systems are primarily financed through taxes, generally involving flat rate universal benefits. They are vertically redistributive. Bonoli identified two types of Beveridgean welfare states, high spending ones such as the Nordic countries, and low spending ones such as the UK and Ireland (1997). In the low-spending Beveridgean welfare states, benefits are often residual and designed to ensure a subsistence level of existence. The right to receive benefits in Beveridgean welfare states is linked to residency and may be means-tested, especially in the low-spending states. 'Residency' here means being resident for the purposes of eligibility to receive benefits, and is sometimes more complicated than mere physical residence. Bismarckian welfare systems may create rights that are more akin to property rights (Titmuss 1976, Hinrichs 2003). As such, the entitlements under Bismarckian welfare systems will be more easily enforceable in courts, and more Bismarckian welfare states will have higher rates of social policy preliminary references.

The degree to which each welfare state is Bismarckian was calculated using the percentage of social expenditures that are contributed by the insured and their employers (Source: Eurostat Living Conditions and Welfare). The TSCS analysis found that the degree of Bismarckian financing of a national welfare state was significant and positively correlated with higher rates of preliminary references. For the QCA analysis, the average value for the member state over the time period studied was used. The most Bismarckian welfare state in the countries

studied was Belgium, with 69% of social expenditures contributed by insured and their employers. The least Bismarckian welfare state was Denmark, with 29.8% of social expenditures contributed by the recipients and their employers. There is an obvious threshold to the data at the median value of 58.9%, with over an eight percentage point drop below that to the next most Bismarckian welfare state. The Member States included in the set of those with more Bismarckian welfare states are: Austria, Belgium, France, Germany, Greece, Italy, Netherlands and Spain.

Union Density

The last causal factor that was found to be significant in the quantitative analysis was the degree of union membership among the population of a Member State. Bringing a case in national courts and then having the requisite sophistication to request a reference to the European Court requires a high degree of information and support. Union support might make this a more viable option, especially in areas relevant to social policy. The literature expects that the availability of organizational support will improve access to justice before the ECJ (Conant 2007, p. 58, Alter 2000). Unions are classic 'repeat players' (Galanter 1974) that pursue strategic litigation strategies to protect their members' interests. Studies have indicated that 'commercial enterprises, societal interest organizations and public enforcement agencies are most likely to gain access to court to enforce EU legal norms because they are most likely to possess the knowledge and financing necessary for litigation' (Conant 2007, p. 59). Interest groups are better able to use the opportunities presented through litigation processes.

Rates of union membership in a Member State were used as a proxy for the availability of interest groups to intermediate on behalf of citizens. Unions are concerned with social policy issues and union density is tracked cross-nationally. Although there may be variation in how unions and membership are conceived of from state to state, it has less potential variability than other possible measures, such as the presence of an equality agency with the remit to assist in social policy cases. The Time Series Cross-Section analysis found that union density was significant and positively correlated with higher rates of preliminary references. For the QCA analysis, the average annual density of union membership among citizens of a Member State for the time period studied was used. The values ranged from quite high rates of membership in the Nordic countries, to a low of France, with only 8.1% of the population a member of a union (OECD 2010). The median value was used to set membership. The Member States included in the set of higher union density are: Austria, Belgium, Denmark, Finland, Ireland, Italy, Luxembourg and Sweden.

Judicial Empowerment

The judicial empowerment variable was designed to test the theory that lower courts in some Member States are using the preliminary references system to circumvent more conservative higher courts, as Leibfried and Pierson assert happened in Germany (2000). The percentage of preliminary references from lower level courts was calculated for each member state using data from the Court of Justice (European Court of Justice 2009). Lower courts were defined as

courts from which there is an appeal to another higher member state court. [131] Under Article 267 TFEU, lower courts may send a preliminary reference if a question of European law arises, but courts from which there is no right of appeal must send preliminary references. If there is resistance in a member state legal system to preliminary references, then we might expect that those Member States with higher percentages of references from lower courts will have lower levels of preliminary references. In the TSCS analysis the judicial empowerment variable was significant and negatively correlated with higher rates of preliminary references.

6.4 Necessary Conditions

In the QCA method, after the data table has been constructed tests are performed to determine if any of the included causal conditions are necessary conditions. These are conditions that are present all, or nearly all, of the time in the cases that meet the outcome result. However, these causal conditions are not in themselves sufficient to explain the outcome. Necessary conditions were tested for via what is essentially a series of crosstabs of the causal conditions with the outcome. If there is more than 90% agreement that the condition is present, then it can be said to be a necessary condition (Ragin 2011). It is important to identify

[131] This measure has its limitations because court structures are complex and vary enormously across the Member States. It is therefore difficult to construct a uniform measure that can be applied. Moreover, some Member States, such as the United Kingdom, permission to appeal must be granted. Therefore, a lower-level court refusing to grant appeal would be required under Article 267 TFEU to grant a preliminary reference. However, there is no practical way to address this complexity in this analysis.

the necessary conditions, as they are sometimes not included in the 'parsimonious solution' identified by the fsQCA software (Ragin 2011).

The causal conditions included in this analysis were tested to see if any were necessary. There is one necessary condition for the outcome of a high national rate of social policy preliminary references. In order for a Member State to belong to the set for higher rate of preliminary references, it was necessary that the Member State not be a member of the 'World of Law Observance.' In terms of the outcome of a low national rate of social policy preliminary references, it was necessary that the Member State not be a member of the 'World of Domestic Politics'

6.5 Truth Table

Next, a 'truth table' was constructed and minimised, sorting the cases into rows, each of which represents a particular combination of causal conditions (Ragin 1987, 2011). The truth table is the basis for the Boolean algebraic calculations performed by the software. The truth table includes a row for each potential causal combination, even if there is no such combination observed empirically. Such rows with no observed actual cases are also called remainders, and indicate that the set of cases has limited diversity (Ragin 2011). The consistency of the cases within a particular row with the outcome is calculated in the consistency score. Scores of 1 or 0 indicate perfect consistency, either with the presence or the absence of the outcome, respectively. A score of .5 indicates perfect

inconsistency. Rows that are inconsistent or contradictory should be examined to ensure that there is no omitted causal condition. If the researcher is satisfied that there is no such omitted cause, then inconsistent rows and remainders can be eliminated from the analysis. Rows must meet a consistency threshold of at least 80% to be included in the analysis. Table 8 shows the truth table for this analysis.

Table 8: Truth Table

Trust	Bismarckian	Union Density	Domestic Politics	Law Observance	Judicial Empowerment	Population	Number of cases	Consistency	Membership[132]
+	+	+	+		+		1	1	1
+	+	+	+				1	1	1
			+		+	+	1	1	1
+	+		+		+	+	1	1	1
	+		+		+	+	1	1	1
	+	+			+	+	1	1	1
+	+		+				1	1	1
+		+		+	+		1	0	0
+	+				+		1	0	0
+							1	0	0
	+				+	+	1	0	0
+		+		+			2	0	0
+		+					2	0	0

The truth table was analysed using the fsQCA software[133]. The software fi
matches pairs of rows that differ by only one causal condition but noneth
display the outcome. If this is the case, then the condition that is inconsist
eliminated. This continues until no further simplification is possible (Ragi
2011). The remainders, or potential solutions with no empirically observ
cases, can also be employed in a counterfactual analysis, to aid in simplify
patterns. The result of the fsQCA software analysis is a set of causal comb
that lead to the outcome. The analysis yields three potential solutions:

- The Complex Solution avoids using any counterfactual cases, i.e
  remainders.
- The Parsimonious Solution uses any remainders that will lead t
  fewer recipes for causal conditions.
- The Intermediate Solution uses only those counterfactual cases
  the researcher allows, based upon his or her knowledge of the

The fsQCA software generated a complex, parsimonious and intermediate
solution for each of the two outcomes sets: high rates of social policy prel
references and low rates of social policy preliminary references. In this ar
there are so many potential causal conditions that the complex solution le
too many potential causal configurations to provide insight. The parsimor
solution may oversimplify the complexity involved. Charles Ragin conside
as a general rule, the intermediate solution is the best (Ragin 2011, p. 20)

[133] The software was created by Charles Ragin and is made available on h
academic page at: http://www.u.arizona.edu/~cragin/fsQCA/software.sh

6.6 Analysis for the High Social Policy Preliminary References Outcome

The QCA analysis was performed for the high rate of preliminary references outcome. In this analysis the complex solution allowed for too much causal complexity to be beneficial. Five potential 'causal pathways' to high national rates of social policy preliminary references were identified for only seven Member States in the set (Seeleib-Kaiser and Fleckenstein 2007, p. 48).

The parsimonious solution to the fsQCA analysis of the high social policy preliminary references outcome identified two potential causal pathways. The pathways are not mutually exclusive.

Table 9: Parsimonious Solution to High Rate of Preliminary References

Causal Pathway	Raw Coverage[134]	Unique Coverage	Number of Member States[135]
DOMPOL[136]	85.7%	57.1%	6
BISMARCK x UNION	42.9%	14.3%	3

First, membership in the World of Domestic Politics in the Falkner, *et al.* (1998, 2006) typology is a potential pathway to a high rate of preliminary references in and of itself. For Germany, the Netherlands, Spain and the United Kingdom this is their unique pathway under the parsimonious solution. The second potential

[134] 'Coverage' in fsQCA is the proportion of the cases with the outcome that have been explained by the causal combinations. Raw coverage is the percentage of cases displaying the desired outcome with this causal recipe. Unique coverage is the percentage of cases displaying the outcome and this causal recipe, but no other identified causal recipe.
[135] Some Member States follow more than one pathway.
[136] Factors listed in CAPITAL letters indicate their presence. Factors listed in lowercase letters indicate their absence.

pathway is a combination of a more Bismarckian welfare state and higher union density, which is the unique pathway for Italy. Austria and Belgium are covered by both pathways. Between them, these two potential solutions are 100% consistent and provide 100% coverage of the cases displaying the outcome of high social policy preliminary references.

The intermediate solution to high social policy preliminary references identifies four potential causal pathways.

Table 10: Intermediate Solution to High Preliminary References

Causal Pathway	Raw Coverage	Unique Coverage	Number of Member States
POP x DOMPOL x lawobsv	42.9%	42.9%	3
DOMPOL x BISMARCK x TRUST x judemp x lawobsv	28.6%	14.3%	2
DOMPOL x BISMARCK x UNION x TRUST x lawobsv	28.6%	14.3%	2
POP x BISMARCK x UNION x lawobsv	14.3%	14.3%	1

As not being a member of the 'World of Law Observance' is a necessary condition for membership in the set of high rates of preliminary references, all intermediate solutions pathways include lawobsv. The most common pathway is a combination of a high population and membership in the 'World of Domestic Politics,' and is the pathway for Germany, Spain and the United Kingdom. Austria and the Netherlands combine membership in the 'World of Domestic Politics' with a more Bismarckian welfare state and high levels of trust in the ECJ with a lack of judicial empowerment. Austria also has another pathway, along with Belgium, through membership in the 'World of Domestic Politics,' a higher Bismarckian level, higher union density and higher levels of trust in the ECJ. Italy's pathway is a large population, a Bismarckian welfare state and high union

density. These four solutions are 100% consistent and explain 100% of the cases that display high social policy preliminary references.

6.7 Analysis for the Low Social Policy Preliminary References Outcome

An fsQCA analysis was also performed with the outcome as a low rate of social policy preliminary references. Again, complex, parsimonious and intermediate solutions were derived.

The complex situation was more informative for the low preliminary references outcome. Four pathways were identified, two of which accounted for six Member States.

Table 11: Complex Solution for Low Rate of Preliminary References Outcome

Causal Pathway	Raw Coverage	Unique Coverage	Number of Member States
TRUST x bismarck x dompol x lawobsv x judemp x pop	37.5%	37.5%	3
TRUST x bismarck x UNION x dompol x LAWOBSV x pop	37.5%	37.5%	3
TRUST x BISMARCK x union x dompol x lawobsv x JUDEMP x pop	12.5%	12.5%	1
trust x BISMARCK x union x dompol x lawobsv x JUDEMP	12.5%	12.5%	1

In the complex solution, two causal combinations explained 75% of the cases. The first, high trust, low Bismarckian levels, membership in neither the 'World of Domestic Politics' nor the 'World of Law Observance,' a lack of judicial empowerment and a smaller population, is the pathway for Ireland, Luxembourg and Portugal. The second is the Scandinavian pathway, and explains Denmark, Finland and Sweden. The third pathway accounts for Greece, and the fourth for France. These four pathways are 100% consistent and explain 100% of cases.

The parsimonious solution identified two potential causal pathways, which together provided 100% coverage for cases with the outcome of low social policy preliminary references and were 100% consistent.

Table 12: Parsimonious Solution for Low Rates of Preliminary References

Causal Pathway	Raw Coverage	Unique Coverage	Number of Member States
bismarck x dompol	75%	62.5%	5
union x dompol	37.5%	25%	3

The first parsimonious pathway is not having a Bismarckian welfare state and not being a member of the 'World of Domestic Politics.' This is the pathway for Denmark, Finland, Ireland, Luxembourg and Sweden. The second pathway is a lack of union density and a lack of membership in the 'World of Domestic Politics.' This is the pathway for France and Greece. Portugal follows both pathways.

The intermediate solution provides three pathways that explain 100% of the cases with 100% consistency. The first pathway accounts for six of the Member States with low rates of preliminary references. The remaining two pathways each explain one Member State.

Table 13: Intermediate Solution for Low Rate of Preliminary References Outcome

Causal Pathway	Raw Coverage	Unique Coverage	Number of Member States
pop x dompol x bismarck	75%	75%	6
JUDEMP x dompol x union x trust	12.5%	12.5%	1
pop x JUDEMP x dompol x union	12.5%	12.5%	1

As a lack of membership in the 'World of Domestic Politics' is a necessary condition for a low rate of preliminary references, all three intermediate pathways include it. The first intermediate pathway, a smaller population, and a lack of a Bismarckian welfare, accounts for Denmark, Finland, Ireland, Luxembourg, Portugal and Sweden. France has a high degree of judicial empowerment, low union density and low levels of trust in the ECJ. Greece has a small population, judicial empowerment, and low union density.

6.8 Discussion

In order for a Member State to have a high rate of social policy preliminary references, it is a necessary condition that the Member State not be a Member of the 'World of Law Observance.' The Falkner, *et al.* (2005, 2008) typologies seem to be robust in this regard. These more compliant Member States do not have high rates of social policy preliminary references.

The parsimonious analysis reaches maximum simplification by using any counterfactuals that help to simplify the results. In the parsimonious solution, the QCA analysis identified two pathways to high rates of social policy

preliminary references in a Member State. First, a Member State can be a member of the 'World of Domestic Politics.' Six of the seven Member States with high rates of social policy preliminary references are members of the 'World of Domestic Politics.' Only Italy is not. Again, this bears out the Falkner, *et al.* (2005, 2008) typologies. The combination of lower rates of compliance when directives present conflicts with domestic politics and efficient administrative and legal systems does seem to contribute to higher rates of references. In the second pathway, a Member State can have a more Bismarckian welfare state and high union density. Six of the seven Member States with higher rates of preliminary references have a more Bismarckian welfare state, with only the United Kingdom as the exception. This supports the TSCS finding that a Bismarckian welfare state is an important predictor of rates of social policy preliminary references. One of these sets of conditions was present in every potential solution to reach the outcome of high numbers of social policy preliminary references. Together they explain 100% of the instances of high social policy preliminary references, with perfect consistency.

Although there were various combinations of other conditions included in the intermediate solution, the results also emphasise membership in the 'World of Domestic Politics' or a highly Bismarckian welfare state and a high degree of union density among the Member State population. Based upon the parsimonious solution, the intermediate analysis was designed to minimize for a Bismarckian welfare state. The intermediate analysis adds in the interaction of population, citizen trust of the ECJ and the judicial empowerment variable. The most common pathway is to have a large population and to be a member of the

'World of Domestic Politics.' This is the pathway for Germany, Spain and the United Kingdom. Although four of the five Member States with higher populations also have high rates of social policy preliminary references, three Member States with small populations also have high rates. The next two pathways are variations of a causal recipe for those smaller Member States and include membership in the 'World of Domestic Politics,' a more Bismarckian welfare state and higher levels of trust in the ECJ. In one pathway, these combine with a lack of the judicial empowerment variable, suggesting a legal system without resistance to preliminary references from the higher courts. This pathway includes Austria and the Netherlands. The other potential variation on this recipe includes high union density rather than a lack of judicial empowerment. This supports the idea that unions can help to mediate on behalf of their members to bring about higher preliminary references, even if there is resistance in the legal system. This recipe also fits Austria, along with Belgium. The results suggest that unions remain important for aiding workers to enforce their social rights, even though they are often perceived to be of declining importance in Europe. The final pathway is the Italian pathway of a big population, a more Bismarckian welfare state and high union density.

The Falkner *et al.* typologies (2005, 2008) also seem to be robust in the QCA analysis for the outcome of low social policy preliminary references. Not being a member of the 'World of Domestic Politics' was a necessary condition for having a low rate of preliminary references. Therefore, it is included in every causal combination.

The other novel factors proposed in this study also seem to be robust. In the parsimonious analysis, there are two potential causal pathways. The first is a less Bismarckian welfare state and not being a member of the 'World of Domestic Politics,' which accounts for Denmark, Finland, Ireland, Luxembourg and Sweden. The other potential pathway is lack of membership in the 'World of Domestic Politics' and low union density, which applies to France and Greece. Portugal follows both pathways.

In the complex solution, two pathways to low rates of social policy references accounted for six of the eight Member States. Again, the analysis that generates the complex solution does not allow counterfactuals to minimize the equations. The first of these common pathways combines a high level of trust in the ECJ with low Bismarckian levels, a lack of judicial empowerment and a small population with a lack of membership in either the 'World of Law Observance' or the 'World of Domestic Politics.' This seems to essentially be a catch-all for the smaller non-Nordic Member States, and explains Ireland, Luxembourg and Portugal. Second, a high degree of trust in the ECJ, high union density and membership in the 'World of Law Observance' combined with a low degree of Bismarckian welfare state and a smaller population size leads to lower social policy preliminary references. This set of conditions is describing the Social Democratic Nordic countries, and it explains Denmark, Finland and Sweden.

For the intermediate solution, because the lack of membership in the 'World of Domestic Politics' was a necessary condition, the solutions are minimized for that result. One intermediate pathway explains six of the eight Member States

with lower rates of social policy preliminary references. A smaller population, a less Bismarckian welfare state and a lack of membership in the 'World of Domestic Politics' is the causal recipe for Denmark, Finland, Ireland, Luxembourg, Portugal and Sweden. Again, Ragin has stated that the intermediate solution is generally preferable (2011). The remaining two pathways are variations of a recipe that includes judicial empowerment, suggesting resistance to preliminary references in the legal system and a lack of union density, which may foreclose a potential aid to overcoming that resistance. In France, these combine with a low level of trust in the ECJ. In Greece, they combine with a small population to explain low rates of preliminary references.

6.9 Conclusion

The QCA method is well suited to this study, and provides a bridge between the quantitative, variable-based analysis of Chapter 5 and the qualitative case studies of Chapter 7. The Time Series Cross-Section analysis identified variables that were significant and affected rates of social policy preliminary references from the Member States. This QCA analysis determined how those variables fit together in the cases, combining into causal recipes that result in the outcomes studied. The causal conditions identified by this study interact together to create pathways to the two studied outcomes: high and low rates of social policy preliminary references.

As is emphasized in the literature, a Member State's compliance with the EU is an important predictor of the rate at which it will send social policy preliminary references to the ECJ. The Falkner, *et al*. (2005, 2008) typologies seem robust. The member states of the 'World of Domestic Politics,' with their efficient legal and political systems, but lower rates of successful transposition of EU Directives attributable to domestic political interference, have higher rates of social policy preliminary references. These member states will often be out of compliance, and their legal systems will allow their citizens to use the judicial processes to more successfully enforce compliance. Every Member State in the 'World of Domestic Politics' has a high rate of social policy preliminary references. Only Italy has a high rate of references and is not a member. On the other hand, the member states of the 'World of Law Observance' are expected to create less of a need for preliminary references, as they will not be as necessary to enforce compliance with EU law. Directives are transposed quickly and correctly, even if there is a conflict with domestic law. Despite these Member States' efficient legal systems, their circumstances will lead to fewer preliminary references. This was also borne out by the QCA analysis. Every Member State in the 'World of Law Observance' was in the set of lower rates of preliminary references.

The degree to which a Member State's welfare state is funded in a Bismarckian manner is also an important predictor of the rate of social policy preliminary references. The Member States with a high Bismarckian element were more likely to send a high number of preliminary references. A low Bismarckian level combined with a small population and a lack of membership in the 'World of Law Observance' to form the causal pathway that explained six of the eight Member

States with a low rate of social policy preliminary references, in the preferred intermediate analysis. This supports the idea that the Bismarckian, social insurance-based, model for welfare states will create interests for citizens that are more clearly akin to property rights (Hinrichs 2003, Titmuss 1976) and are therefore more readily enforceable in courts. This creates the expectation that some citizens of the EU will have better access to legal means to enforce their European rights. It also has implications for the rates at which the newer accession states will send references to the ECJ.

Union density was also related to the outcomes. A high union density combined with a more Bismarckian welfare state as one of two parsimonious pathways to higher rates of preliminary references, for Austria, Belgium and Italy. A lower union density combined with a lack of membership in the 'World of Law Observance' was one of two pathways to lower rates of preliminary references, and can be seen in France and Greece. This supports the idea that assistance is required to enforce European rights effectively through a litigation strategy. Again, this raises issues about differing abilities for citizens of the various Member States of the European Union to enforce what are intended to be equal rights across the Member States. Some citizens will have better support to pursue their rights through a legal strategy.

Population does seem to be an important factor. However, although four of the five Member States with larger populations are included in the high preliminary references set, there are also three Member States with lower populations. A smaller population can be overcome through variations on a recipe that includes

a more Bismarckian welfare state, high levels of trust in the ECJ, and membership in the 'World of Domestic Politics.' In one variation, these combine with a lack of the judicial empowerment variable, suggesting a legal system without resistance to preliminary references from the higher courts. This pathway includes Austria and the Netherlands. The other potential variation on this recipe includes high union density rather than a lack of judicial empowerment. This may support the idea that unions can help to mediate on behalf of their members to bring about higher preliminary references, even if there is resistance in the legal system. This recipe also fits Austria, along with Belgium. France is the only large Member State to have a low rate of social policy preliminary references.

These pathways, and the consideration of the Member States more holistically as sets of conditions, rather than by isolating variables, help to set up the case studies of Chapter 7. The United Kingdom and France will be studied more in-depth. The QCA analysis helped to explain why the mixed factors present in these two Member States result in their particular outcome. The qualitative case studies in the next chapter will further inform our understanding of these complex structures and interactions.

7 Case Studies of France and the United Kingdom

This chapter contains in-depth case studies of France and the United Kingdom. This case analysis will inform the statistical analysis and the qualitative comparative analysis in the previous section. As was discussed in Chapter 4, the UK and France were chosen because they are disparate cases, and can provide insight into the quantitative and QCA results. Extensive documentary analysis and 25 expert interviews were employed to answer the research questions.

7.1 Approach to the Qualitative Case Studies

Qualitative methods are suited to 'research questions that require explanation or understanding of social phenomena and their contexts. They are particularly well suited to exploring issues that hold some complexity and to studying processes that occur over time' (Ritchie and Lewis, 2003). In a sequential explanatory design for a mixed methods study, the qualitative information can explain why differences were found with the quantitative analysis, and explore the characteristics of outlier or residual cases (Creswell, et al. 2003, p. 225, Caracelli and Greene 1993). The qualitative section is intended to provide meaning and context, as well as shedding light on the process (Maxwell and Loomis 2003).

Here, the United Kingdom and France are examined in more detail. Case studies provide an empirical investigation of a complex phenomenon in context (Yin 2009, p. 18). Because of the complexity of the case that is being studied, i.e. a nation state, it is difficult to isolate and test sufficient variables to explain fully the interactions. Therefore, more sources of data are needed (Yin 2009, p. 2).

As discussed in the introductory and methodological chapters, by using a theoretical proposition developed beforehand, it is possible to guide the collection of data (Yin 2009, p. 18). The theoretical perspective of this study is that the different usage of the preliminary reference procedure arises from the institutional structures of the national legal system and of the welfare state, as well as because of agency of actors within the national system. This perspective leads to the development of questions to be investigated during the qualitative analysis. How do the welfare state and policy structures of the Member State affect usage of the preliminary reference system in the area of social policy? How do the institutional structures of a Member State legal system affect usage of the preliminary reference system? How do actors within a system, such as lawyers, equality agencies or unions, affect rates of preliminary references?

Within each of the Member States, a case study was conducted. It contains a 'context analysis' and a 'conduct analysis' (Stones 1991). The context analysis looks at the historical, political and socio-economic conditions that contributed to the institutional development of the preliminary references process in the Member State. The conduct analysis addresses how the various actors involved in the process draw upon this context in their interactions in the preliminary references process. Evidence for both of these analyses was collected via analysis of documentary evidence and 25 expert interviews. Chapter 4 contains a detailed discussion of the specific methods used.

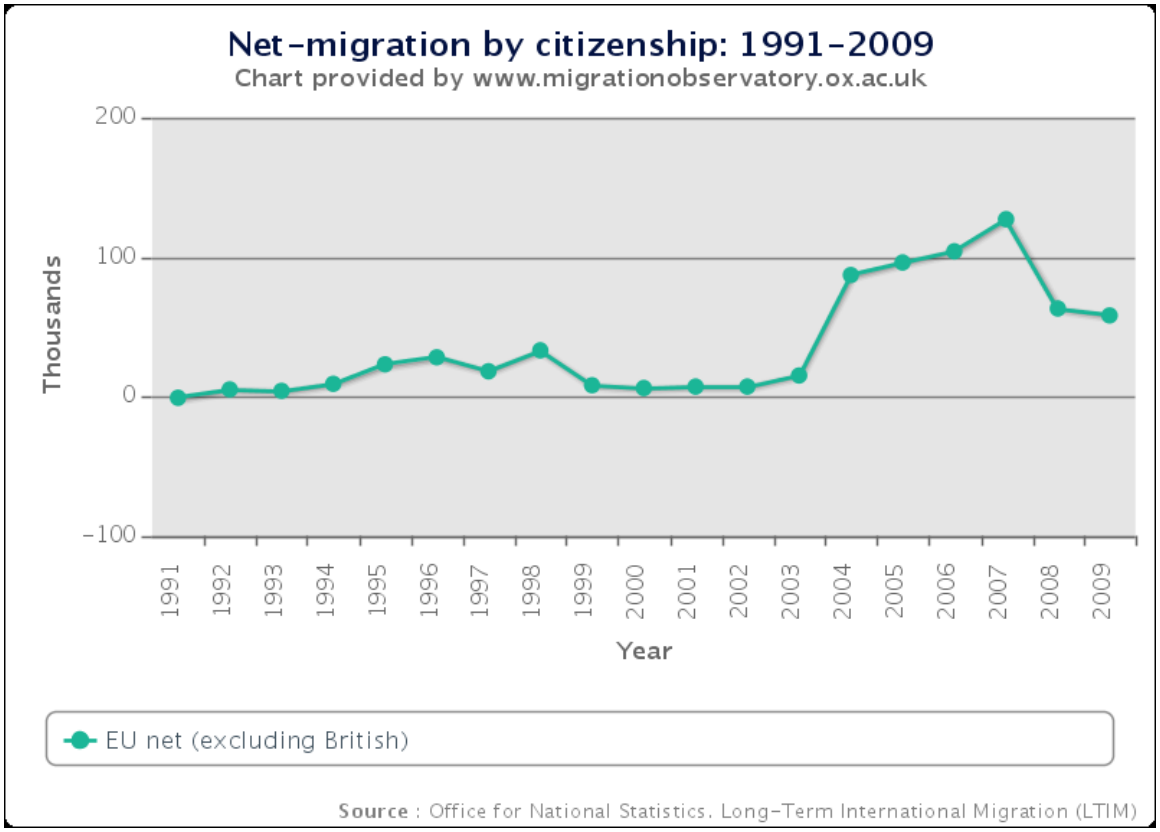
The resulting data were analysed and themes and sub-themes emerged. The themes broadly fall into the three types of explanatory factors that have been used throughout this study, although France and the United Kingdom have differing themes within that framework. First, there are themes related to the underlying policy structure of the Member State. These include the type of welfare state or legislation related to social policy. These help to explain the types of social policy preliminary references that are being sent from the Member State. Second, there are themes related to structural factors in the state. This includes how the Member States comply with the EU, such as the Falkner, *et al.* typologies (2005, 2008). These also include the types of causes that Alter called the 'friendliness' of the legal system to litigation (2000). They might include the right to class actions or legal aid. These structural factors create barriers to or help to benefit social policy preliminary references. Both the policy themes and the structural themes are broadly related to the context analysis. Third, there are themes related to the actions of individuals and groups. These actors, whether they are plaintiffs, supporting groups or judges in the national system, affect rates of preliminary references. These actors can help to overcome any barriers set up by the structural factors and can be aided by any beneficial structural factors. These themes are related to the conduct analysis.

7.2 Results for the United Kingdom

Policy Structure

There were several themes that reflect the nature of the UK policy structure. The UK was the original Beveridgean welfare state, and has as a goal the prevention of Beveridge's five 'giants:' want, disease, ignorance, squalor and idleness (1942, p. 6). 'Beveridgean social policy, defined as aimed at the prevention of poverty, is obviously directed at the whole population of a country, rather than limited to a section of it, the eradication of poverty being otherwise impossible' (Bonoli 1997, p. 358). The UK is classified as a low-spending Beveridgean welfare state (Bonoli 1997). It provides low-level, often means-tested, support. Apart from meeting any means test requirements, eligibility to receive benefits is based upon residence in the UK. Struggles over who is resident for benefits purposes lead to the first theme, free movement of persons and European citizenship. The importance of this theme is also linked to another element of the UK policy structure. The UK was one of only three (the others being Ireland and Sweden) established EU Member States that permitted nationals of the new accession states to move to the UK for work after 2004. According to the Migration Observatory at the University of Oxford, it was at that point that the net inflows and outflows of EU migrants into the UK made a large shift well into a positive balance, after years of being at or near stasis (2011). Recently, there has been a decline back toward closer to stasis after the economic downturn. Figure 8, below, illustrates the net migration from the EU.

Figure 9: Net Migration from the EU, 1991- 2009



Source: Oxford Migration Observatory 2011

Free Movement of Persons/ European Citizenship

The first theme that reflects the UK policy structure is free movement of persons and, later, European citizenship. There are two sub-themes: the right to reside test and the rights of family members of UK or EU nationals. As the right to most UK benefits is contingent upon being both habitually resident and having the right to reside in the UK, it is a major policy area for UK preliminary references. Twenty-one of the 69 cases from the UK included in this dataset were either in the area of free movement of persons, European citizenship or both. Paul Eden, who co-represented the plaintiff in the *Collins* case about access to Job Seekers Allowance (JSA) for EU nationals said, 'I was as aware everyone was aware of the

potential financial dimensions to this case. The courts did not want to put the financial burden on the state. If everyone coming to the country for the first time had the right to seek JSA that has obviously a huge potential cost. There were Home Office lawyers sitting there in the phalanx of government lawyers, monitoring the implications for asylum and immigration' (Interview, 15/09/11). Sarah Clarke, solicitor at the Child Poverty Action Group (CPAG), commented that, 'European law can be useful in attempts to claim benefit in the UK, but it tends to be linked to migration – European migrants to the UK and also British migrants to the EU. To get entitlement to, I think, all means-tested benefits in the UK you have to have a right of residence in the UK, and that comes from European law, and that's part of a wider habitual residence test that you have to pass' (Interview, 02/09/11). CPAG has also been involved in cases about the right for UK nationals to export their benefits from the UK when they move within the EU. Clarke said, 'That's become quite a big issue since the European Court of Justice made a decision that one of the UK's major disability benefits and the carer's allowance … are sickness benefits, not special non-contributory benefits. There are different categories of benefits that are basically treated differently in European law and special non-contributory benefits, if you move within the EU you can't take them with you, but sickness benefits you can take with you' (Interview, 02/09/11).

Because of the strong nexus between the right to residency and economic self-sufficiency, Clarke noted that, 'I think it's striking that the people who tend to lose out under European law, the people who don't get their rights recognised, tend to be women, and often women with children, because they fall out of the

movement of workers, which is all based upon worker status. And women who are looking after children, or having children, women who separate from their partners, they tend to be the people who lose their protections under European law' (Interview, 02/09/11).

Right to Reside

The first sub-theme is about the right to reside test. It was created through the amendment of UK social security legislation in May 2004, in response to concerns about the EU enlargement (House of Commons Library 2011). It applies to applicants for most benefits, including:

- Income Support
- Income-based Jobseeker's Allowance
- Income-related Employment and Support Allowance
- Pension Credit
- Housing Benefit
- Council Tax Benefit
- Child Benefit
- Child Tax Credit
- Housing assistance from local authorities

Under the right to reside test, other EU nationals have the right to reside so long as they remain 'qualified' persons or are the family member of a qualified person. According to Immigration Regulation 6(1)(a)-(e), a 'qualified person' is an European Economic Area (EEA) national who is in the UK and is: a jobseeker, a worker, a self-employed person, a self-sufficient person, or a student. Which individuals qualify for the various sub-categories has been the subject of much litigation. On 29th September 2011, the European Commission issued a reasoned opinion warning the UK that the right to reside test is in contravention of EU law,

and that the UK has two months to inform the Commission of how it intends to comply with EU coordination of social security legislation. If it does not, the Commission may refer the UK to the Court of Justice for enforcement proceedings (European Commission 2011). By requiring non-UK citizens who are EEA nationals to pass the right to reside test, the UK indirectly discriminates against those EU citizens, in contravention of Article 4 of Regulation EC 884/2004. The EU already has a definition of who is habitually resident in a member state for purposes of social security coordination, 'the place where the habitual centre of interests of the person is located.' By requiring the test of non-UK EEA nationals, but not of UK citizens, the UK is discriminating against other EU nationals.

CPAG run a welfare rights advice hotline that mainly provides advice to welfare rights advisers, and two-thirds of all calls to the hotline are for assistance with the right to reside test. It is a convoluted area and many potential recipients and staff are ill informed. One welfare rights adviser said that, 'Most clients only know as much as the DWP/HMRC/Local Authority tells them. This information is usually dispensed by frontline staff who only have a cursory understanding of EEA nationals' rights … In particular, we find that clients are often advised to claim income support … and are refused because, by doing so, they become economically inactive … and lose their 'right to reside'' (Interview, 07/09/11). Another welfare rights adviser reported that quite a high proportion of his caseload were people who had come from elsewhere in the EU. However, in his opinion this was because nationals of other EU Member States were 'disproportionately denied benefit,' not because they were frequent seekers of

benefit (Interview, 21/09/11). Sarah Clarke described a case that CPAG is supporting at the moment, *JS*, about whether a worker who becomes unable to work because of pregnancy and childbirth retains the status of worker (Interview, 02/02/11).

A further complication of the right to reside is that the Member States may discriminate against newer Member State nationals for up to seven years after the date of accession to the EU. Although the UK allowed nationals from the newer Member States to relocate to the UK for work, there were some restrictions. The UK instituted the Workers Registration Scheme (WRS) for A8[137] and A2[138] nationals, requiring them to be in registered paid employment for 12 months before they were eligible for benefits. The WRS ended in May 2011 for A8 nationals, with an arrangement in place for A2 nationals until December 2011, which may be extended until 2013 (House of Commons Library 2011). CPAG has just been granted a preliminary reference in the *Punakova*[139] case, about whether previously self-employed A8 nationals have *Baumbast*-type rights of residence. In *Baumbast*, the previously employed German father of children in education in the UK was entitled to remain based upon his citizenship of the EU, even though he had ceased to be economically active, because his children were in education.

[137] Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia and Slovenia.
[138] Bulgaria and Romania.
[139] Case C-148/11, *Secretary of State for Work and Pensions v Margita Punakova*.

Rights of family members of UK or EU nationals

The next sub-theme of the free movement of workers/ European citizenship theme is the rights of family members. Some of the most important European citizenship cases have recently arisen from the UK in this sub-theme. The *Baumbast* case, mentioned above, was a preliminary reference from the UK. More recently, in the *Teixeira* and *Ibrahim*[140] cases the plaintiffs, a Portuguese national and a non-EU national spouse of an EU national, respectively, who are the primary carers of a child in education in the UK sought to claim housing benefit when they were economically inactive. The benefit was denied to each on grounds that because they were economically inactive they did not have the right to reside. The Court found that non-nationals may claim a right of residence as the primary carer of an EU child in education in the Member State even though they are not economically active. Their right of residence is not conditional on having sufficient resources not to become a burden on the social assistance system or on having comprehensive sickness insurance cover. The right of residence in the host Member State of the parent who is the primary carer for a child of a migrant worker is not conditional on one of the child's parents having worked as a migrant worker in that Member State on the date on which the child started in education.

There is also confusion about who qualifies as a family member. A welfare benefits adviser described a case where the client, 'a Dutch national, who was

[140] Case C-480/08, *Teixeira v Lambeth LBC and Secretary of State* and Case C-310/08, *Harrow LBC v Ibrahim and Secretary of State*. These cases are also discussed in more depth in Chapter 3.

living with her daughter (also a Dutch national, working in the UK part-time and caring for her mother), was refused Pension Credit despite having a right to reside as an 'extended family member' of her daughter who was a worker'(Interview, 07/09/11). Liz Barratt, a solicitor said that judges used to hearing asylum cases can get 'a bit edgy' when EU law comes up if they're not an EU practitioner. EU law 'usually crops up in the case of a third Member State family member wanting to join' (Interview, 15/09/11).

Anti-discrimination

The second major theme of the Member State policy structure category is anti-discrimination cases. This reflects the fact that there was a misfit between the UK's policies and situation in this area and Europe in some ways. Most of the cases address matters at the edges of rights and protections. Although later than in some other Member States, notably France, anti-discrimination had been extensively legislated in the UK. The Equal Pay Act of 1970 covered equal pay for men and women in pay and non-discrimination in working conditions. Discrimination based upon sex or marital status was banned by the 1975 Sex Discrimination Act (SDA). However, women still lag behind their male counterparts in pay and promotion. Some of the areas not initially covered by the SDA were addressed through EU law. For example, the Social Security Directive (79/7) required equal treatment of men and women in the statutory provision of social security benefits. The Race Relations Act of 1976 (RRA) banned discrimination based upon race in employment, education, transport and the provision of goods and services. The Disability Discrimination Act 1995 banned

discrimination based upon disability. It abandoned the approach of the SDA and the RRA, which banned direct and indirect discrimination. Instead, it prohibited less favourable treatment based upon a person's disability and required reasonable adjustments to remove barriers. At the end of 2003 the UK introduced laws implementing European regulations that protected individuals from discrimination based upon sexual orientation or religion or beliefs. This earlier UK anti-discrimination was consolidated into the Equality Act of 2010, which closely follows the EU Equal Treatment Directives.

There were 19 cases in the UK that dealt with discrimination. Seventeen of those concerned equal treatment of men and women. The overwhelming majority of these equal treatment cases were brought on behalf of women. Two were brought on behalf of both men and women, and two were on behalf of transsexuals. Despite the protections afforded in UK law, examples of discriminatory treatment are still found. Christine Boch, who was involved with the *Brown*[141] case on pregnancy discrimination, said that at the Citizens' Advice Bureau, 'We do still have loads of people who are the victims of the most blatant form of, for example, pregnancy discrimination. It is incredibly startling to see the amount and the kinds of violations' (Interview, 23/09/11). In her experience, it happens primarily in two sectors – catering and cleaning. However, it is not restricted to those fields. As to why there should be so many clients in those fields, 'There can be any sort of explanation … A lot of people who work in these sectors are Polish, and Polish people are very good at networking and they like to enforce their rights. Their churches, their delicatessens, these are forums and

[141] Case C-394/96, *Mary Brown v Rentokil Ltd* [1998] ECR I-4185.

places where they exchange information, so it might simply be that they know better to come to CAB' (Interview 23/09/11).

There was also an age discrimination case from the UK, the *Age Concern* case. That case challenged the UK's default retirement age of 65 as being inconsistent with the EU's Equal Treatment Framework Directive. The ECJ found that a default retirement age could be justified if it was a proportionate means of achieving a legitimate aim. The UK's transposition was not incorrect for having failed to set out what constituted a legitimate aim. However, the aims of the strategic litigation went beyond the immediate headline result. Andrew Harrop, formerly of Age Concern, said that, 'We wanted to get a tight interpretation of 'objective justification,' in order to show that the prohibition of age discrimination could only be disregarded in special circumstances' (Interview, 07/09/11). Moreover, although the initial result was a setback, the legal challenge worked in the long run:

> It was an interesting example of the usefulness of litigation in a political lobbying context. The ECJ opinion was somewhat helpful in that it left some room for favourable interpretation, but it guided the High Court to dismiss the case. However, over the course of the case the issue had garnered huge interest and entered the public debate. It turned around stakeholder views … We lost the case in the High Court in the autumn of 2009, but going into the 2010 General Election we had all three parties committed to ending the practice, against what remained pretty robust lobbying from the CBI (Interview, 07/09/11).

Finally, the *Coleman*[142] case was brought by Mrs Coleman, who alleged that her employer discriminated against her because she was the carer for a disabled child. The Court agreed that discrimination against an employee because she is

[142] Case C-303/06, *Coleman v Attridge Law and Steve Law* [2008] ECR I-5603.

the carer for a disabled person is in violation of the Equal Treatment Framework Directive. Therefore, associative disability is also protected against under EU law.

Structural Elements

The next set of themes relates to the elements of the UK systems that make it friendly or unfriendly to litigation to enforce rights. As discussed previously in Chapter 2, the literature predicts that practical limits on litigation, such as a lack of class actions, limited standing to sue by public interest groups and limited availability of organizational support can be expected to reduce litigation (Conant 2007, p. 58, Alter 2000). Galanter pointed to the lower success rate for one-time litigants as compared to 'repeat players,' which are groups that pursue many cases, in what are often coordinated litigation strategies (1974). 'Commercial enterprises, societal interest organizations and public enforcement agencies are most likely to gain access to court to enforce EU legal norms because they are most likely to possess the knowledge and financing necessary for litigation' (Conant 2007, p. 59). EC rules on gender equality and social security were advanced through public support of the Equal Opportunities Commission, Social Security Tribunals and Citizens' Advice Bureaux (Alter and Vargas 2000, Harlow and Rawlings 1992, Conant 2001, 2007). Moreover, among the factors that make the UK belong to the 'World of Domestic Politics' in the Falkner, *et al.* (2005, 2008) typologies are an efficient administration and judicial system. As was discovered in the QCA analysis of Chapter 6, the UK's pathway to a higher rate of social policy preliminary references is through having a large

population and its membership in the 'World of Domestic Politics.' The relatively smooth functioning of the judicial system for administering EU law related to social policy was affirmed in this case study.

Acceptance of courts

The first theme is that UK courts are generally accepting of EU rights and that this acceptance has increased over time. Roger Smith, Director of JUSTICE, identified four developments in UK law that had increased the role of the courts. First, courts had become 'adjusted to playing a more active role in the monitoring of government.' Second, EU law provides for 'interpretations binding on national government.' Third, a decision of the European Court of Human Rights is the ultimate authority on the European Convention on Human Rights. Finally, the Human Rights Act 1998 gave powers to courts to make a declaration of incompatibility if legislation did not conform (2003, p. 2). Several lawyers interviewed reported that courts were open to preliminary references. Liz Barratt said that, 'UK courts are very receptive to preliminary references. On immigration issues, the courts are very prepared to sort of knock it off to Europe' (Interview, 15/09/11). This is in contrast to a retired barrister's experience before 2006, 'when I was in practice, resisting a reference on behalf of the government was relatively easy for experienced counsel' (Interview, 08/09/11). There are differences by courts. Sarah Clarke reported that, 'The Upper Tribunal [Social Security] has become quite good about referring … the Court of Appeal is probably a bit more hostile' (Interview, 02/09/11). Liz Barratt said, 'Once you get to the higher courts then the judges and barristers are more familiar with EU

law. Lower courts may be nervous about sending a reference off, compared to the Supreme Court. I know people who have asked at the tribunal and been bounced up and only got their reference higher up' (Interview, 15/09/11). Victoria Phillips, counsel for the *Stringer*[143] and *British Airways v. Williams*[144] cases said that in her experience it was easier to get a reference from a higher court. She did note a few cases that had gone directly to the Court from the tribunal stage, '*Coleman v Attridge*[145] … That was referred straight from the employment tribunal by Mary Stacey, who trained me. She was the judge at first instance in the *Williams* case, too. And the *Robinson Steel*[146] reference, which was about holiday pay working time, that was a reference straight from the tribunal in Leeds. But I think it's a bold employment judge who's prepared to go for a reference' (Interview, 16/09/11).

There used to be more resistance to EU law in UK courts. A retired barrister said that, 'It used to be almost a dirty word in English, you know, if you've got nothing else you run the Euro Defence. And it was almost a dirty term. Obviously, if you were running an EU law point then it was because you had nothing better to say. In effect of course, that was a real caricature' (Interview, 08/09/11). The barrister pointed to differences in approach to judicial training between the Human Rights Act and EU law. Before the Human Rights Act went into effect there was an extensive training campaign, and:

[143] Case C-520/06, *Stringer and others v HMRC* [2009] ECR I-179.
[144] Case C-155/10, *British Airways v Williams* [2011].
[145] Case C-303/06, *Coleman v Attridge Law and Steve Law* [2008] ECR I-5603.
[146] Case C-131/04, *Robinson-Steele v R. D. Retail Services Ltd* [2006] ECR I-2531.

> One of the curious consequences of that was that immediately after the Act came into force you could appear in an English court with a human rights argument, and find that you had a very well informed judge, and you could have a very, as it were, high level discussion with the judge about the case law because he absolutely got the issue, understood what the case law said, what the principles were, what the principles of interpretation are, and so on. And you could go before the same judge, or one of his brethren, the next day with an EU law point, and notwithstanding the fact that the UK joined the EEC, as it then was, in 1973, you would find that the judge was much less well informed about EU law than he was about the Convention. And that is a matter of training (Interview, 08/09/11).

The barrister didn't know if the lack of training persisted, but:

> I think, I hope, that it must necessarily be less true now than it was then. I would hope that most members of the judiciary had a basic toolkit, and some of them will have had considerable experience by now, in particular areas dealing with EU law. For example, employment law. For example, social security. I would expect, because it's actually quite difficult to do either of those without some exposure to EU law. As it were, you keep on tripping all over it, so you're going to find out that it's there. I would expect that most of them had an understanding. Whether they have the same understanding of the Directive on Part-time Work, or whatever, as the Court would have, is a different question (Interview, 08/09/11).

Christine Boch agreed that while there was no resistance from tribunals to enforcing EU law, 'In general, nowadays they are enforced, yes, but the trouble with trying to enforce these cases is that it's very difficult to force employers to do anything. The law is not geared to give people the type of remedies that people want, such as a change of their shift, you know, very simple matters. And when it goes to tribunal it drags on and maybe you get compensation, but most of the time you need to have another hearing to force the employer to pay. It does happen, but people have to be very, very resilient' (Interview, 23/09/11). This lack of practical remedies limits the effectiveness. 'Mrs Brown, when she eventually got her rights established, her child was 8 years old or something like

that. She'd moved on' (Interview, 23/09/11). It is hoped that the changes of the Equality Act of 2010 will introduce more practical remedies in discrimination cases.

Structural Barriers

Several structural barriers in the system to social policy preliminary references were identified. The two most common were restrictions on standing to sue in Scotland and money issues.

Standing to sue

The UK case study bears out the idea that restrictions on standing to sue for class action suits will be a barrier to preliminary references to some extent. There is a difference between the legal systems that comprise the UK. In Scotland, groups cannot get standing for judicial reviews. This means that groups are unable to challenge legislation. Nicola Smith, a solicitor who collaborated on a handbook for disability advocates wishing to bring test cases, identified the lack of class actions as a barrier. 'In Scotland there wasn't much anyone could do to facilitate cases, unless they'd specifically been given the right by statute. … In Scotland the only option would be to apply to be someone's legal guardian and to bring a case on their behalf. But there are some potential philosophical problems with that for some disability rights groups' (Interview, 14/09/11). Christine Boch said that this was not a barrier to other types of action, 'I think that the only issue on standing arises in relation to judicial review. … So in relation to employment

cases, the issue of standing should not … crop up in front of an employment tribunal' (Interview, 23/09/11).

Several others mentioned that there were difficulties in intervening in litigation. It is impossible to do this at the level of the Court of Justice. Third parties wishing to present a public interest argument must have intervened in the national court proceedings. Advocate General Sharpston confirmed, 'if you wish to intervene in a reference, you *have* to have got involved in the domestic proceedings, and you have to have got involved before the judge decided to make the reference' (Interview 08/09/11). Advocate General Sharpston described a case earlier that day that had an intervener, 'I would certainly say that the Court was enlightened, in terms of understanding more about the case, by the fact that the intervener was there. But I can only repeat that, the way that the system is, the intervener must be involved in the national proceedings' (Interview 08/09/11). It can be difficult for NGOs to intervene at the national level in ECJ-bound cases. Jodie Blackstock[147], barrister at JUSTICE, said, 'It is harder to intervene because you have to support the order that one of the parties is making rather than simply set out the law in the public interest which may not support one or the other approach (art 40 of the Statute).'

Intervening is often an unattractive option for legal NGOs anyway. Sarah Clarke said that, 'That's probably our least-preferred action, because that's probably where you have the least control over things. And the degree of your

[147] I did not interview Ms Blackstock, but she kindly responded to an several questions via email.

involvement as an intervener can vary quite a lot. So in *Lassal*[148] we were virtually treated as if we were acting for the claimant, the party, really. But in other cases you might only be given leave to put in written submissions, or you might make oral submissions at the hearing. But if you just put in written submissions, a court can completely ignore them. Nobody necessarily listens to what you have to say' (Interview, 02/09/11).

Money

Funding was often discussed as a barrier to preliminary references, but there were two different issues. First, it is expensive to bring a test case. Victoria Phillips identified this as crucial. 'You'd have to have some big funding. It's interesting to look at those cases that have been referred. My colleague, Richard Arthur was involved in the *Preston*[149] litigation. That was … all trade union-funded. We had another colleague who had the UK *BECTU*[150] reference. Now that went straight from the High Court to the ECJ, and again that was trade union funded. … EHRC or the EOC have funded a few cases, but I can't think of anything in the employment or industrial relations world that has gone without funding. *Coleman*[151] was EOC-funded' (Interview, 16/09/11). However, she pointed out that it would be considerably less expensive if the reference were made by the lower courts to the ECJ without having to appeal a case up to the House of Lords

[148] Case 162/09, *Secretary of State for Work and Pensions v Taous Lassal* [2010]
[149] Case 78/98, *Shirley Preston and Others v Wolverhampton Healthcare NHS Trust and Others* [2000] ECR I-3201.
[150] Case 173/99, *The Queen v Secretary of State for Trade and Industry, ex parte Broadcasting, Entertainment, Cinematographic and Theatre Union (BECTU)* [2001] ECR I-4881.
[151] Case C-303/06, *Coleman v Attridge Law and Steve Law* [2008] ECR I-5603.

or now the Supreme Court, 'it's not costly - other than the costs of travel - it's not costly to make an application to the ECJ. It's not so costly. There's less documentation, there's less fuss. So it seems very sensible in the way the court operates' (Interview, 16/09/11). Nicola Smith said, 'Money is another big barrier. You're always relying on someone to do it pro bono' (Interview, 16/09/11). Another barrister said, 'One of the things that's foremost in the judge's mind is does this case merit it, does it merit the delay, and the higher costs, all in order to get a reference sent up to the Court of Justice' (Interview, 09/09/11).

The second potential barrier to do with funding is the possibility of a large award of costs against the losing party. In a few cases lawyers have managed to get the court to agree to a protective costs order, essentially agreeing that the litigation is in the public interest and therefore the costs will not be passed along to the losing party. However, barring that unlikely event, the prospect of bearing all of the costs for an expensive action is a deterrent. Andrew Harrop, formerly of Age Concern, said:

> The main challenge for us as a litigant was that the government refused to agree to a protective costs agreement. All along we were more afraid of an award of costs against us than we were of our legal fees, because costs would be so unpredictable. At one point we had two QCs against us. In the end the government didn't seek costs against us because they recognised that it was a public interest case. But they would not agree to the protective costs order in advance. We were too big an NGO. If we'd been a smaller organisation, then maybe it would have been different (Interview, 07/09/11).

Nicola Smith also identified potential costs as a barrier, particularly in light of the sorts of cases that result in preliminary references. 'And there's the issue of

potential costs. There's always a substantial risk of losing and getting stuck with all the costs. In these cases there's always a genuine disagreement as to the area of law. It could go either way, usually' (Interview, 14/09/11). Roger Smith has identified this as a benefit to strategic litigation arising out of the employment tribunal systems, where costs are not awarded (2003).

Structural Benefits

There were two major structural elements that benefited rates of social policy preliminary references: the tribunal system and the availability of legal aid.

Employment and Social Security Tribunals

The first structural benefit in the UK is the tribunal system of first instance courts that litigants can access with few barriers and often without a lawyer. The tribunals for employment and social security cases were cited as important to promote social policy cases. These systems handle an incredible volume of cases. Sarah Clarke stated that there were half a million social security cases a year in the tribunal (Interview, 02/09/11). In the *Preston*[152] case, the Court noted that after earlier ECJ judgments about the rights of part time employees to join pensions systems, 'some 60,000 part-time workers in the United Kingdom in both the public and the private sector commenced proceedings before industrial

[152] Case 78/98, *Shirley Preston and Others v Wolverhampton Healthcare NHS Trust and Others* [2000] ECR I-3201.

tribunals' (para. 17).[153] The cases dealt with the claims of some 22 women that were being used by the UK courts as test cases for all those other cases in order to dispose of some 'preliminary issues of law before the facts are considered' (para. 20). Sarah Clarke said that CPAG's most recent preliminary reference, in *Punakova*[154], was a 'leading case' with lots of other cases behind it on the same topic (Interview, 02/09/11).

Although plaintiffs do not need a lawyer to access the tribunals, the tribunals will also sometimes act to ensure that plaintiffs have better representation as the cases move up through the system on appeal. Sarah Clarke said that, 'Sometimes the Upper Tribunal refers cases to us, if the claimant isn't represented and it's a complicated issue' (Interview, 02/09/11). Paul Eden, the co-counsel in *Collins*, which rose up through the social security tribunal system, discussed how he suddenly found himself out of his depth when the Commissioner decided to send a preliminary reference. 'Neither the government nor our side said 'wouldn't it be a good idea to go to the ECJ.' We weren't lawyers at that level … It was an entirely different matter to go off to the ECJ, rather than the Commissioner in London. I actually looked at bus timetables to Luxembourg. I thought I was going to have to do the written and oral submissions myself. I showed the European law professors here that I had this preliminary reference, and they laughed a lot' (Interview, 15/09/11). However, help came from the tribunal. 'I got a letter not in the record from the Commissioner saying 'I understand your problem. I had a chat with Stewart Wright at CPAG, not mentioning any names, of course, and you

[153] The industrial tribunals were the predecessors to the employment tribunals.
[154] Case C-148/11, *Secretary of State for Work and Pensions v Margita Punakova*.

might want to get in touch.' And Stewart said that CPAG was happy to help' (Interview, 15/09/11).

Legal Aid

A Judge at the ECJ stated that 'Of course you need finance,' in order for cases to be brought (Interview, 08/09/11). Legal aid was frequently mentioned as a benefit to preliminary references. But legal aid is also important in the area of advice that doesn't even reach the level of the tribunal. The UK has a system of welfare benefits advisers that help their clients understand and access rights to which they are entitled. These systems encourage settlement of matters before they even reach the tribunal system.

Legal aid only applies in some types of cases. There's no legal aid in the employment tribunals. Also, there's no legal aid for third party interventions. Nicola Smith noted that legal aid was 'only available to persons, so you'd have to fund the case yourself as an organisation' (Interview, 15/09/11). There is some limited legal aid available at the ECJ for indigent litigants. Paul Eden said that, 'I should say that the Court was tremendously helpful. I got a series of nice calls from the Registry to check on things, particularly with the legal aid process. They were very good about the legal aid process. The Registry were very empathetic to so-called indigent plaintiffs' (Interview, 15/09/11).

Threats to legal aid were frequently mentioned as a potential problem. Sarah Clarke said, 'There's a network of advice workers and advice agencies in the UK,

so there are Citizens' Advice Bureaux, Law Centres, local authorities might have welfare rights units, and there are independent advice agencies as well, all of whom might refer cases to us. … But we don't know quite what will happen about that, because the government is proposing to take legal aid away for social welfare cases, which would devastate the advice sector. I would think it would be catastrophic. I think legal aid is quite an important part of how the entitlement system works in the UK' (Interview, 02/09/11).

Actors

The UK case study revealed that NGOs, the EHRC/EOC and unions are crucial actors to advance preliminary references. They help to overcome the barriers to social policy preliminary references. These groups are acting in organised test case strategies.

Test case strategy

For these actors, support for strategic litigation, or test cases, is part of an organised plan. CPAG's strategy is well-developed and they openly solicit on their website for the fact patterns for test cases that they're seeking. For example, the current right to reside test cases they're looking for are:

1. EU nationals divorced from other EU nationals who claim IS as LPs or because they can't work for some other reason. Either 'old' EU nationals or A8 nationals where either the claimant or their partner has done registered work for a year, or is self employed.

2. EU nationals married to UK nationals and supported by them for over 5 years, then divorced and unable to work. 'Old' EU nationals or A8 nationals after April 2009.
3. Pregnancy cases – we are still looking for cases where claimant has to stop work because of pregnancy and claim IS in pregnancy period either because they have been dismissed or because they are doing heavy work, and has no continuing employment rights. Either 'old' EU nationals or A8 nationals where claimant has done registered work for 12 months or is self employed.
4. A8 nationals who are divorced or separated from UK nationals and have been refused jobseekers allowance on the basis that they do not have a right to reside in the UK.[155]

Sarah Clarke said that the test case strategy was part of the organisation's broader efforts to lobby for an end to child poverty in the UK. They have many different tacks to achieving that goal. 'And then part of that whole strategy is that we also do test cases, which are basically cases that we do with the aim of getting better interpretations of the law on social security for benefit claimants and so we're looking … for cases that will affect more than just that one claimant, so they'll have a public interest effect, and that'll help to achieve the organisation's aims' (Interview, 02/09/11). Roger Smith noted that test case litigation was often viewed as an American import, but actually 'both England and Scotland have a long history going back at least to the 18th century of litigation by pressure groups for a political goal. Slavery was successfully challenged in both jurisdictions by cases taken as part of the anti-slavery movement' (2003, p. 1).

Assistance is provided to help with European rights and with test cases. Many legal NGOs run training sessions or advice lines for client advisers on European rights. Nicola Smith collaborated with other disability rights NGOs in other Member States to write *Legal Strategy: A Good Practice Guide for Lawyers*. 'We

[155] http://www.cpag.org.uk/cro/test.htm#needed. Accessed 13/10/11.

had identified that here were very few cases on people with learning disabilities in the Member States involved and none at the European Court. We looked at the types of cases that it would be useful to have in the employment field. We also considered how NGOs could help with access to justice because it is difficult for this particular group to access courts, more so than for other groups. Some people completely lack capacity to ever instruct a solicitor. Others have some capacity if you can explain things and help them' (Interview 14/09/11). Although there proved to be too many barriers in Scotland, the strategy was more successful in other Member States.

Some interventions are more strategic than others. Sarah Clarke of CPAG noted that there were some bad precedents in the field because of cases that had been brought prematurely, or on bad facts. 'You can't control where test cases go, really, because people have to do the best that they can for their clients. So often immigration cases, in particular, are brought on weak facts, and they don't make good case law, but that's just because representatives are trying to do their best for their clients. So they have to kind of cling to arguments' (Interview, 02/09/11). Paul Eden said that both sides in test case litigation are looking for favourable cases. 'The government is looking for their test cases and CPAG is actively seeking their test cases. Both sides are looking for the best facts they can.' He noted that the government will settle cases strategically to avoid sending cases with really sympathetic facts (Interview, 15/09/11).

Organisations often have larger purposes behind test cases. Cases are part of larger campaigns. In addition to the legal result desired, they can seek publicity

for a cause or to exert political pressure. One participant said of the *Age Concern* case, 'from a bit of a distance, that it was seen as a promotional tool for Heyday. It was primarily there to change the world, and to change the situation with regard to retirement, but actually it had another very powerful benefit, to show Age Concern and Heyday as champions of older people, particularly of the baby boomers, who were coming up to an age where they could be booted out just because of their age' (Interview, 02/09/11).

Several types of groups emerged as themes in the actors category. NGOs, unions and the Equality and Human Rights Commission (previously the Equal Opportunities Commission, which merged with two other equality commissions to form the EHRC) all featured as important actors to promote preliminary references. NGO support for litigation can come from either specialist legal NGOs that regularly take on strategic litigation or from general NGOs that provide support for an occasional strategic case. Within the legal NGOs category there are also community law centres, which occasionally take test case strategies. However, they are often more limited in their remit, geographically speaking, and may not have the funding or the opportunities to have an organised test case strategy (Roger Smith 2003). Unions also provide support for test cases. Victoria Phillips, who has had two union-funded preliminary references, said 'This is all entirely strategic litigation' (Interview, 16/09/11). Finally, the EHRC and its predecessor the EOC have provided support for many cases. The impact of these actors who have experience with the system is very important for preliminary references, especially considering the inequity between the experience levels of the government and plaintiffs. Having the support of a pressure group can level

the playing field. Paul Eden noted that, 'There's the socio-legal theory about one shot versus repeat players. Brian [Collins] was a classic one-shot player. CPAG and the Government were repeat players' (Interview, 15/09/11).[156]

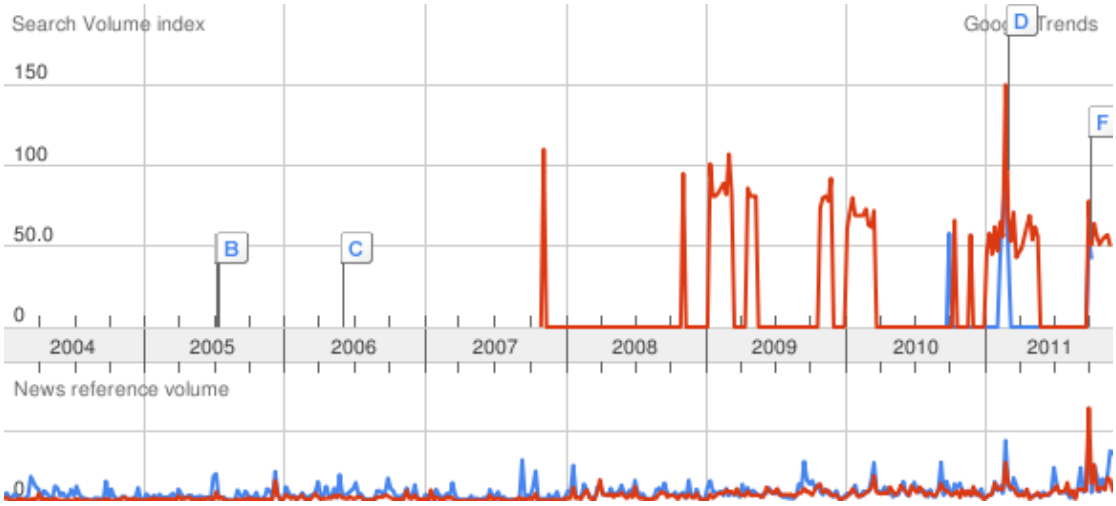
There can be a tension between the interests of the party to the case and the pressure group that is supporting the action or that intervenes. Sometimes the broader principle sought by the pressure group is not the overriding concern of the individual plaintiff. Christine Boch has observed that sometimes, 'The interests of academia, NGOs are not the same [as those of the plaintiff]. There is a tension' (Interview, 23/09/11). Paul Eden, while noting that he is very supportive of CPAG and often sends his students their way, also felt a tension between interests. 'The problem with having an NGO involved is that they're not client focused, they're issue focused. Not that they weren't on our side, or anything, but they're trying to push a line that is useful for their agenda. Whereas for me, if Brian [Collins] gets his money, then I walk away a winner. They were always trying to push that another EU national does not need to meet the habitual residence test' (Interview, 15/09/11).

Trends over time

A search using Google Trends tool [157]showed that there has been an increase in searches for information about the Court using the Google search tool. The Google Trends tool created the following illustration:

[156] *See* Galanter 1974.

Figure 10: Google Trends Image for UK



Source: Google trends

The trend lines above the timeline reflect the relative volume of searches for 'European Court of Justice' (in red) and 'ECJ' (in blue). The data were collected since 2004, so there does seem to be a growth over time in the volume of searches. There were periodic spikes of interest. The letters in boxes identify news stories that Google can associate with a particular spike. Here, 'D' was an article entitled on the Court in the *The Economist*.[158] 'F' was an article in the Telegraph about a case where the Premier League unsuccessfully tried to restrict live broadcasts of games from foreign television feeds.[159] The trend lines below the timeline are news stories in Google News. Again, the red line is 'European

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[157] Google cautions against relying on the numbers, but the trends themselves should be reliable. The data are scaled based upon average traffic for the search term, represented as 1.0. A spike to 4.0, for example, means that there was 4 times the average search volume at that point.
http://www.google.com/intl/en/trends/about.html#7

[158] 'The European Court of Justice,' *The Economist*, 1st March, 2011.

[159] 'Premier League lose case on selling of lucrative television rights at European Court of Justice', *The Telegraph*, 4th October 2011

Court of Justice' and the blue is 'ECJ' There has been a definite increase in news stories over the past two years, but there isn't much of a trend in the data before that.

7.3 Results for France

As previously discussed in Chapter 4, France was chosen as a case study in part because it has quite a low rate of preliminary references in the area of social policy but a high rate in the overall data set. France has the lowest number of social policy references of the original six member states. Moreover, it has mixed results for the variables that would predict a higher rate of social policy preliminary references. France has a high score for Bismarckian welfare state structure, which should predict a higher rate of social policy references. However, it has strikingly low union density, the lowest of the EU-15, low levels of reported population trust in the ECJ, a higher judicial empowerment score and in the Falkner, *et al.* typology (2005, 2008) is in the World of Transposition Neglect, which should predict lower rates of preliminary references. France also has judicial review and a monist legal tradition.

As was shown in Chapter 4, there were 27 relevant preliminary references from France over the period from 1996 to 2009. Four of those were removed from the register or de-published, so further information from the ECJ was not available. Twenty-three cases remained. Generally speaking, there was much less data available in France. Although media and academic coverage of the Court grew in

France over the period studied, it was still much lower than in the United Kingdom. There were many fewer potential interviewees, and they were harder to contact due to a lesser presence on the Internet for French lawyers. Those who were reachable tended to have had isolated experiences with the Court. There were no equivalent legal NGOs with test cases strategies in the cases in the time period studied. The analysis will begin with a discussion of the French social policy system and other national elements that might account for some of this lower rate of references. Then the themes that emerged from the interviews will be discussed. Analysis revealed five key themes from the French interview data. Two of the themes are in the policy structure category and explain how the French policy structure affects the types of preliminary references that are sent in the area of social policy. Two belong to the category of structural factors in the Member State. One presents a major barrier to accessing the Court through preliminary references. The final key theme is in the category of actors. The almost complete lack of comparable actors to those seen in the UK helps to explain why so few French litigants are able to overcome the structural barriers in the system.

Social Policy Structure of France

France has a 'dual social protection system.' Its primary component, the *Sécurité sociale*, is a social insurance system financed through employment-related contributions and providing benefits linked to contributions. Generally, entitlement to pensions and unemployment benefits is earnings-related and contributory. A secondary component, the *Solidarité nationale*, is a non-

contributory scheme 'generally designed to cater for those who have been unable to build up an adequate contribution record (Bonoli 2000, p. 123- 124). Although these non-contributory elements are becoming more important, the social insurance system has traditionally dominated the French welfare state. Bonoli defined the objective of Bismarckian welfare states as 'income maintenance for employees' (1997, p. 359). However, the French social security system was conceived of with the objective of achieving a Beveridgean universality through a Bismarckian means (Palier 2010, p. 97). It is aimed at a Keynesian full employment rationale. Thus, the French welfare system is generous. Peter Hall notes that, 'at 53 percent of GDP, France's public expenditure has reached Scandinavian levels, although the redistributive impact of its tax and transfer systems is more meagre' (2008, p. 8). The system is regressive, and most social benefits go to the richest half of society (T. Smith 2004).

The degree to which a welfare system is financed through contributions, as opposed to taxation, is the 'best approximation' of how Bismarckian the system is (Bonoli 1997, p. 360). France's social insurance system had the largest proportion of financing from employer and employee contributions in Europe (Bonoli and Palier 2001). Employer and employee contributions are still by far the largest source of funding for the system, although taxes are becoming more important. Social contributions comprised two-thirds of social protection funding in 2000, down from a high of 80 per cent (Caune, *et al.* 2011). This insurance contribution is considered as a 'deferred wage' (Palier 2010, p. 77). 'French trade unions … tend to regard the social insurance system as an

insurance plan covering all salaried employees. Its use as a social policy instrument is bound to be resisted' (Bonoli 2000, p. 125).

The social insurance funds that manage these contributions are relatively independent from the state. Through the principle of 'management by interested parties,' unions, employers and mutualist representatives were granted joint management (Lallement 2008, p. 54). Unions are involved in managing these funds and as such have 'a *de facto* veto power against welfare state reforms' (Bonoli and Palier 2001, p. 339.) Trade unions have control over the staff and administration of the funds (Palier 2008). There have been attempts to increase government control over social insurance, especially as this is seen as necessary to successfully contain costs. These attempts have been 'strenuously resisted by the trade unions,' which would lose a great deal of influence along with the management of the systems (Bonoli 2000, p. 125). 'The trade unions act as the representatives and defenders of the systems. They defend both the interests of the salaried population and their own interests (Palier 2008, p. 111). In part because of union's strong connections to these joint management associations, a distance has opened up between the interests of the union and the interests of the line worker (Lallement 2008). Employers' groups and unions are geared up for lobbying and 'poorly equipped to assist their local members' (Culpepper 2008, p. 38). The unions have become integrated into institutions that have a 'broader constituency' than just union members, and the unions increasingly must intermediate between the short-term interests of their membership and the broader general interests (Lallement 2008, p. 61).

Unions are loath to lose this source of power, in part because their power base is limited. France has 'one of the lowest unionisation rates in the western world' (Bonoli 2000, p. 119). The French labour movement is also divided into five major federations along ideological lines (Bonoli 2000). Thus, the labour interest group is highly fragmented. However, despite their lack of penetration into society as a whole, French unions are able to mobilise for strikes extremely effectively, particularly around threats to social insurance (Bonoli 2000). Mass labour mobilisations through strikes can be very effective at arousing popular sentiments, leading governments to negotiate most social policy changes with unions and employer groups (Hall 2008). Through these mass mobilisations, industrial disputes were 'represented as manifestations of class conflicts' (Lallement 2008, p. 53).

In addition to the traditional Bismarckian system of social insurance, France has a newer system of basic social protection, which is increasingly leading to welfare 'dualization' and 'two distinct worlds of welfare' (Palier 2010, p. 96). This social protection system is referred to as 'national solidarity,' and consists of healthcare, family benefits, and policies against social exclusion (Palier 2010, p. 96). Eligibility is based upon citizenship, benefits are either universal or means-tested, and the funding is through taxation (Palier 2010). About one-third of the French population does not participate in the 'normal' labour market and social insurance arrangements, and therefore is covered by this second world. (Palier 2010).

The first major change was the introduction in 1990 of the *Contribution Sociale Généralisée* (CSG), a tax on all income, as opposed to earned income, that funds social expenditure (Palier 2010). It was initially set at a rate of 1.1 per cent, but has since been raised considerably higher, to 7.5 per cent of income as of 1998 (Caune, *et al.* 2011). Activation measures, initially targeted at young people and the long-term unemployed were expanded with the *Revenu Minimum d'Insertio*n (RMI), a means-tested benefit guaranteeing a minimal level of income to all over age 25 (Palier 2008). All recipients must agree to participate in activation programmes, such as vocational training. Although it was believed that he programme would support 300,000 to 400,000 individuals, as of 2005 nearly 1.3 million were receiving RMI (Palier 2008). More minimum protection programmes followed. More than ten per cent of the French population now benefits from one of these programmes (Palier 2008, p. 120). Although social insurance is still 'central' it is no longer 'hegemonic' (Palier 2010, p. 97).

French social protection programmes have become even more oriented toward activation. By the late 1990s work disincentives had developed for people receiving RMI in particular, who would lose money if they took part time, low paid work. In 2001, the *Prime pour l'emploi*, a negative income tax for low-income workers, was introduced (Palier 2008). This 'employment bonus' is designed to 'make work pay' (Caune, *et al.* 2011, p. 56). Palier notes that, thus both 'a totally new rhetoric (unemployment trap, work disincentive) and a totally new type of social policy instrument (working family tax credit) have been introduced by the development of the world of poverty alleviation in

France' (2008, p. 121). In 2003 the RMI was transitioned into the *Revenue Minimum d'Activité* (RMA) for those who had been in receipt for two years or more, increasing the activation prerequisite for receipt of benefits (Palier 2008). The *Revenu de solidarité active* (RSA) was created in 2008, and provides every low-income worker with a supplementary payment to guarantee that work pays more than RMI (Caune, *et al.* 2011). Recently, activation has spread even into social insurance, with some social partners incorporating plans to help the unemployed return to work and shifting the scheme from an unemployment benefit to a jobseeker's allowance (Caune, *et al.* 2011). This is a shift in the policy objectives of the system, to include aiding people to return to work alongside compensating for lost income (Palier 2008).

In 2001 Bruno Palier noted the increasing distance between the social insurance schemes, which were becoming less and less solidaristic, and the emerging state-financed health care, family policy and social minima policies, which were becoming more and more run by means tests and activation principles. Smith, in considering why it has been so difficult to reform the French welfare state, answered that, 'a key reason is that so many comfortable people resist change' (2004, p. 2). This may perhaps also be revealing of why France has so few social policy preliminary references.

Europeanisation

The relationship between the French state and the European Union has sometimes been fraught. France has had a long relationship with what is now the European Union, and the relationship between French policy change and European policy demands differs by issue area. In the area of social policy, Caune, *et al.* have identified two different reactions by French policymakers to European influence (2011). First, in unemployment and pensions, French policymakers have denied European influence. Policymakers have become sensitised to any perceived threats to traditional employment and social protections (Palier and Petrescu 2007, p. 62). When French officials present the EU as a constraint on French policymaking, they undermine the legitimacy of the French state to meet its obligations for republican governance – to protect citizens and implement the general will (Hall 2008). 'A disjunction has opened up between the rhetoric of national grandeur, still frequently called upon to justify the policies of the Republic, and the perception that France must bow to the edicts of the EU' (Hall 2008, p. 18). This explains the prevalence of what Caune, *et al.* term 'boasting the national model,' where, in traditional welfare areas, 'the only references to Europe were made in order to underline the intrinsic quality of the French model' (2011, p. 49). However, in newer policy areas, such as discrimination and disability, new actors have made use of European resources to implement change. Here, European demands have been used to legitimise policy changes and to put the issues on the political agenda' (Caune, *et al.* 2011). The impetus from Europe was not presented 'as a stick,' but

rather as a mechanism 'to strengthen the French universalist model' (Caune, *et al.* 2011, p. 64).

Caune, *et al.* cite three factors that predict France will be reluctant to comply with European demands (2011). First, France has a conservative- corporatist welfare system (Esping-Andersen 1990, Palier, 2010) with a high degree of misfit with European policy. The degree of misfit between French and European policies has increased over time. Second, France is an original member of the EU, and Caune, *et al.* hypothesise that older members of the EU receive less scrutiny and therefore have less pressure to comply. Moreover, French policy elites conceive of themselves as driving European policy. Therefore, a common French view is that policy models flow from France to the EU, rather than the other way around. France is 'keen to comply with Europe so long as the EU is built following its image and it reflects its model' (Caune, *et al.* 2011, p. 51). However, when the opposite is true then the French are slow and reluctant to comply. Third, France is in Falkner, *et al.*'s world of transposition neglect, which leads to the expectation that it will not be compliant with European requirements. Based upon these three French characteristics, Caune, *et al.* 'predict that usages of Europe will be poor or denied' (2011, p. 51). In addition, popular support for the EU within France has been declining. It reached 'a low ebb' in 2003, when only 44 per cent of the population supported membership in the EU (Hall 2008, p. 18).

Potential Pathways to a High Rate of References

As discussed in Chapter 6, there are four potential causal pathways for higher rates of preliminary references. Three of the four involve membership in the 'World of Domestic Politics.' France is instead a member of the 'World of Transposition Neglect' (Falkner, *et al.* 2005, 2008). As characterised in the typologies, in this ideal type of Member State, compliance with the EU is not a goal at all. The intervention of powerful supranational actors is often required for transposition. Problems in enforcement and application are common. The most characteristic reaction to EU actions is inactivity. As Caune, *et al.* (2011) also predict, the French response to European directives will be reluctant and slow. Because France is not motivated to be compliant with Europe, there is a substantial barrier to a higher rate of preliminary references.

Without the efficient administration and judicial system enforcement of EU social policy directives seen in the 'World of Domestic Politics,' only one potential pathway to a higher rate of preliminary references remains: to have a large population, a Bismarckian welfare state and high union density. France is the second-largest Member State by population. As is discussed above, although there is a dualisation within the French welfare state and a growing importance of social policy measures that are not social insurance, France remains a Bismarckian welfare state. The 'best measure' of whether a welfare state is Bismarckian is the degree to which social expenditures are financed by employer and employee contributions (Bonoli 2000). France has the highest percentage of social protections funded through contributions in the EU-15 (See Chapter 4).

However, despite having a large population and a Bismarckian structure, France cannot take the remaining pathway to high references because of its low rate of union density. As is discussed above, France's rate of union density is the lowest in Europe. Moreover, the union density in the model is serving as a proxy for having interest groups willing to intervene to enable cases to get to the Court to enforce rights. In the case of France the unions might serve in the opposite capacity. Because French unions are so heavily interlinked with the management of French social insurance funds, unions are an unlikely source of support to challenge the system. French unions have to consider more general interests in the administration of the system, and balance these against the needs of their members (Lallement 2008). Most of the French cases challenging social insurance provisions were brought against the social insurance funds, meaning that the interests of the unions were likely to be on the opposing side to the plaintiffs. French unions are also increasingly distant from the needs of rank and file members (Culpepper 2008). When coupled with the lack of legal NGOs and other civil society actors, there is very limited assistance available to individuals wishing to access the French legal system. The substantial barriers in the French system created by a lack of compliance and a high degree of inactivity in the face of European demands cannot be overcome.

Even in the newer social policy areas, where Caune, *et al.*, identify a greater impact of Europe, and the importance of newer, non-traditional actors, there haven't been many cases. Again, this may be related to difficulties in overcoming the barriers in the system. The lack of legal NGOs and other civil society actors seen in the UK also takes a toll here. There was briefly an agency that could

intervene on behalf of individuals in anti-discrimination matters. In May 2005 the French equality agency, the *Haute autorité de lutte contre les discriminations et pour l'égalité* (HALDE) came into being. However, its staff was 'ridiculously small' and by aggregating all types of discrimination it 'dilutes each issue' (Guirandon 2008, p. 146). In 2006 its powers were expanded and it gained a statutory ability to be a party to cases. Louis Schweitzer, President of the HALDE, said that the number of complaints received by the agency had grown from 1,400 in 2005 to 10,549 in 2009.[160] The largest group of these complaints was in the area of discrimination based upon origin. However, 70% of the claims processed by HALDE in 2009 proved to be outside of its areas of competence. In the interview, Mr. Schweitzer discusses a problem of interest:

> The HALDE considered that the fact that children's access to family benefits was attached to the regularity of their right of residence was discriminatory. The HALDE considered it was contrary to articles 8 and 14 of the European Convention on Human Rights as well as article 3 of the International Convention on Children's Rights. Many courts echo the HALDE's analysis and cancel the payment refusals. However, despite the repeated recommendations of the HALDE, at this very stage, the government will not amend the law on this issue despite it being clearly contrary to the international commitments of our country. This illustrates the limits of our powers.[161]

It is striking that the HALDE was so powerless to effect change in one of the major issue areas that has generated most of the UK case law – being legally resident for benefits purposes. This is especially true because this issue would be in the 'new' social policy areas that Caune, *et al.* identify as being where new

[160] Interview with Equinet Europe, accessed at: http://www.equineteurope.org/215186.html#question2, 18 October 2011.
[161] Interview with Equinet Europe, accessed at: http://www.equineteurope.org/215186.html#question2, 18 October 2011.

actors have used the European influence to legitimate policy change and get issues onto the public agenda (2011).

Over time, HALDE might have proved to be an important voice for individuals, within limits. However, on 1st May 2011 the HALDE was dissolved and its functions were incorporated into another, more general, organisation, the *Défenseur des droits* (DDD). How the DDD will function was as yet unspecified at the time of this writing.

In the social protection programme areas, where the right to receive benefits for EU migrants will be conditional upon reside, the UK saw many cases related to the right to reside. However, France has no cases in this area. This may be related to the fact that France has not had the same volume of EU migrants as in the UK. In particular, as was true in most of the EU-15, France did not permit A8 and A2 nationals to migrate and work after the accession of the newer Member States to the EU. Most French migrants are not from the EU. With a total population of approximately 61,876,000 in 2007, France had an immigrant population of 5,252,696. Of these, 1,802,532 were from the EU-27. The largest group of EU migrants in France was from Portugal. As Portugal itself has the lowest rate of social policy preliminary references in the EU-15, this immigrant group may not be as informed or motivated to enforce their EU rights through courts.

The largest group of migrants in France was from Africa, at 2,223,617.[162] Although some will have rights based upon marriage to French citizens or other EU citizens, most of these non-EU migrants will probably not be eligible for EU rights. The resulting increase in ethnic and religious diversity in France presents severe challenges to the Republican model, which stresses assimilation to the dominant French culture (Hall 2008). However, assimilation is difficult, as discrimination against these non-EU migrants remains legal, with about seven million jobs, including those in the civil service and in publicly owned firms, being closed to these migrants (Guiraudon 2008). These inequities cannot be redressed through EU law and rights.

French Themes from the Interview Data

Policy Structure Themes

There were two policy structure-related themes in the French analysis. Both of the issue areas in which the French have sent social policy preliminary references relate to protective French policies. The first theme is that of reverse discrimination claims. Most of the challenges to discriminatory policies brought from France were by men challenging protective policies for women. The second theme is about opening up the protective French civil service and other protected professions. They reflect the advanced French protective policy structures in these areas.

[162] Institute national de la statistique et des etudes économiques (INSEE), 'Répartition des immigrés par pays de naissance,' Accessed at: http://www.insee.fr/fr/themes/tableau.asp?reg_id=0&ref_id=immigrespaysnais

Reverse Discrimination

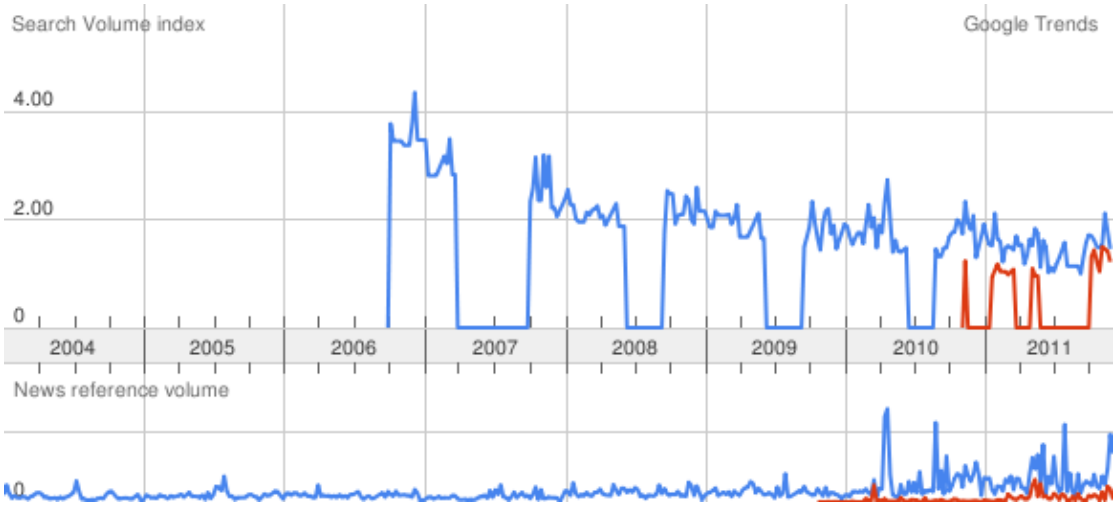
France already had laws proving for gender equality, at least at the level of grand principles, before the European legal order began. It was at the insistence of France that Article 119 on Equal Pay was inserted into the Treaty of Rome (Cichowski 2002). The first theme identified related to the structure of the French welfare state and laws is the importance of reverse discrimination cases. None of the five cases in the area of equal treatment of men and women in France was brought on behalf of female plaintiffs. Every case involved men challenging more protective treatment for women. One interviewee noted that in France many of the protections in employment law existed before the EU, so it was a difference in standards or degree. However, the EU had been important in bringing about a more strict application of rights, rather than relying on broad general principles, in France. Because rights already existed for women, the areas where challenges were possible were on behalf of men. In an interview, the President of the HALDE said that they had quickly noted that, 'There were not enough complaints from women on the grounds of gender and pregnancy.'[163] The two most important cases were the *Griesmar*[164] and *Mouflin*[165] cases, with judgements released in close succession at the end of 2001. In *Griesmar*, a male magistrate challenged provisions in the scheme that granted service credits to

[163] Interview with Equinet Europe, accessed at: http://www.equineteurope.org/215186.html#question2, 18 October 2011.
[164] Case C-366/99, *Joseph Griesmar v Ministre de l'Economie, des Finances et de l'Industrie et Ministre de la Fonction publique, de la Réforme de l'Etat et de la Décentralisation* [2001] ECR I-9383.
[165] Case 206/00, *Henri Mouflin v Recteur de l'académie de Reims* [2001] ECR I-10201.

female civil servants for each child but not to male civil servants. In *Mouflin*, Mr Mouflin wished to retire and claim his pension early in order to care for his wife, who had a terminal illness. However, the pensions scheme only allowed female civil servants to retire to care for an invalid spouse. In these cases the Court confirmed that pensions provided under the French civil service retirement scheme fell under the scope of article 119.

Two respondents noted that after *Griesmar* there was much more public awareness of the Court of Justice and EU rights in France (Interviews, 22/08/11 and 24/08/11). A search using the Google Trends tool provided the following illustration:

Figure 11: Google Trends Image for France



Source: Google Trends.

The trend lines above the timeline reflect the relative volume of searches for '*Cour de Justice*' (in blue) and 'CJUE' (in red). The data were collected since 2004, so there does seem to be a growth over time. The trend lines below the timeline

are news stories in Google News. Again, blue is 'Cour de Justice' and red is 'CJUE' There has been a definite increase in news stories over the past two years, but there isn't much of a trend in the data before that. Unfortunately, the feature attributing particular spikes to news articles is not available in French.

Searches of media databases revealed numerous articles about *Griesmar*, in particular, and the responses within France to the Court of Justice decision. They triggered a series of online commentaries, with participants in the discussions discussing potential strategies to enforce their rights or to challenge discriminatory policies. One such declared that he was going to challenge a discriminatory policy in the Tribunal Administratif, and 'if I do not succeed in the TA I plan to bring it to the ECJ FOR DISCRIMINATION and also to the ECtHR to challenge the retroactivity of the law.'[166]

Opening up the French Civil Service/ Protected Occupations

The second theme related to the underlying structure of the French system is about cases challenging the closed French systems for the civil service and French protectionism for certain occupations. The state-led market economy in the post-war era featured a rigorously segmented education and training system that selected and trained a meritocratic elite to run the civil service (Culpepper 2008). 'As long as the prestige and the perquisites of the civil service of the civil

[166] 'Si je n'obtiens pas gain de cause au TA j'envisage de saisir la CJCE POUR DISCRIMINATION et aussi la CJDH pour contester la rétroactivité de la loi.' Translation by author. NB: I assume that 'CJDH' is a misnomer for the CEDH, or the European Court of Human Rights.

service were able to attract the brightest young elites into bureaucratic careers, the state-controlled system was able to set the criteria of elite recruitment' (Culpepper, 2008, p. 42). As a result, access to the French civil service was tightly controlled and regimented through national examinations and the elite of the French universities.

Five of the cases were related to efforts to open up the French civil service, or other protected occupations, to nationals of other Member States who have credentials from their home Member State. One such case was that of Isabel Burbaud, a Portuguese national, who wished to be included as a public hospital administrator in France based upon her qualifications in Portugal. Ms Burbaud challenged, stating, 'I could not accept sitting for this competition, it was a matter of principle.'[167] The court held that she could not be required to pass the public competitive examination for this position in the French civil service. In another case, Josep Peñarroja Fa challenged a decision denying him enrolment in the court registries of translators. He believes that the restriction is to do with nationality. He successfully brought a test action, although he is still awaiting the response of the French authorities to the Court of Justice's decision in his favour. He noted that one likely response was for the French authorities to now say that the register is full (Interview, 25/09/ 11).

[167] 'Je ne pouvais accepter de passer ce concours, c'était une question de principe.' *Actualité Juridique. Edition droit administrtif*, No. 36, 2003, p. 1916. Translation of author.

Structural Elements

In terms of the structure of the French legal system, two themes emerged. The first is a substantial barrier that explains some of the low rate of preliminary references from France. French judges and courts were reported to be extremely resistant to the idea of European law and European rights. The second theme was reported improvement over time. However, this has not been reflected in the trend of rates of preliminary references.

Resistance of Judges and Courts

Resistance of French judges and courts to preliminary references specifically, or European rights and law generally was the first structural theme. Every French lawyer reported resistance to preliminary references by French courts as a barrier. A Court of Justice official said that, 'I think what you need at the national level is of course judges who are willing to start a preliminary reference procedure. What is generally well known is that if they can avoid it, they often prefer to avoid it' (Interview, 08/09/11). Another respondent said that it was 'absolutely not' his experience that French courts were open to the idea of European law or European rights (Interview, 25/09/11). Jean-Edouard Robiou de Pont, the counsel in the *Wood*[168] case, said that in his experience it was 'very rare' for a French court to agree to send a preliminary reference that had been requested of it: 'I think that French judges think that a lawyer only uses the

[168] Case C-164/07, *James Wood v Fonds de garantie des victimes des actes de terrorisme et d'autres infractions* [2008] ECR I-4143.

European rights if he has nothing serious to say' (Interview, 23/08/11). Another said, 'The judges they do not like European law' (Interview, 24/08/11). A common response was, 'They wish to keep cases in France' (Interview, 23/08/11). Philippe Derouin, a lawyer who has brought three preliminary references to the Court, including one in which he was the named party,[169] noted that, 'I think that the Paris administrative court, at the lower level and the court of appeals, pride themselves on never having referred a case to the ECJ' Interview, 24/08/11). One lawyer remembered that this was not a new trend, 'even in the old days the Conseil d'État refused to acknowledge that there were EU competencies for a long time' (Interview, 22/08/11). Mr Derouin noted that there are two routes to the Court of Justice for those who have been discriminated against. They can file a case themselves and hope for a referral, or they can make a complaint to the Commission, and if the Commission takes it seriously enough they will start an infringement procedure. However, 'in France, in the areas that I know better, there are almost as many infringement procedures as there are referrals. Whereas in countries like the UK, Germany or the Netherlands, there are three times as many referrals as there are infringement procedures' (Interview, 24/08/11).

Philippe Derouin also described a lengthy legal process for his eponymous preliminary reference, at the end of which, 'because this had been lasting for ten years, we could convince the tribunal de sociale sécurité that there really was an issue' (Interview, 24/08/11). However, the tribunal did not make a referral

[169] Case C-133/06, *Philippe Derouin v Urssaf de Paris - Région parisienne* [2008] ECR I-1853.

directly to the ECJ. It instead referred the case to the Cour de Cassation, which also did not refer the case, although it noted that there was an EU question. The Cour de Cassation referred the case back to the tribunal, which finally sent the preliminary reference to the ECJ (Interview, 24/08/11).

Particular issue areas

One sub-theme is that the resistance to European law or European references can also be focused in particular legal areas. Speaking of gender discrimination, one European official said, 'Particularly in France, it was very difficult to make French judges understand what indirect discrimination is. Because they have a very formal understanding of equality in France, and indirect discrimination is a much more substantive concept. So it really took years to make them understand and to get the concept into the writings' (Interview, 08/09/11).

Wilful misinterpretation by courts

A second sub-theme was instances of French courts interpreting EU directives in opposition to ECJ precedent. Mr Derouin observed that, 'One of the ways of the French court to resist is to disobey themselves, and the administrative courts tend to decided in favour of the administration. They tend to give a neutralising interpretation to European law or the European legislation or to the Treaties' (Interview, 24/08/11). Another interviewee said that, 'the French judges do what they want with the text. There are famous cases of the French courts, where the judges say that it is obvious what we must do based upon European

law. But if you look at what they have said, it is nothing like the law. It is very different' (Interview, 23/08/11).

Growth

In the second major structural theme, the interviewees indicated that the situation is improving. Several respondents said that the French legal system had become more open to European law and rights over the past decade. Mr Derouin attributed this change to the leadership of the Conseil d'État, stating that it 'showed [lower courts] the way' (Interview, 24/08/11). Seven of the 23 cases in this sample were referred by the Conseil d'État. Another participant said that, 'Certainly the *Griesmar* case has triggered some changes in the litigation in France. And I feel like there is a lot more understanding of French law and EU law in France … I would say that in the last ten years it has changed a lot' (Interview, 22/08/11). However, there is no trend in the data to indicate increasing numbers of social policy preliminary references over time.

Actors

Again, actors in the system can help to overcome barriers created by the policy or structural elements of the welfare system or legal system. They may also be aided by beneficial elements within those systems. In France there were very few of the actors that were identified in the UK case study. Without legal NGOs or unions or an equality agency (apart from during a six-year window) to intervene as 'repeat players' (Galanter 1974) to help overcome the structural barriers on

plaintiffs' behalf, individuals become crucial to the success of claims. The actions of several lawyers were singled out as being key points to help cases get to the Court. Also, a notable theme was that many of the individual plaintiffs were elites. Elites seem to be able to access the Court to enforce their rights without requiring these other interventions. However, without the benefit of being an elite or a very determined lawyer, individual plaintiffs do not seem to be able to access the system.

Importance of individuals or elites

Lawyers

A key theme in the category of actors is the necessity of having individuals who will push for change through litigation. Without these protagonists it is unlikely that preliminary references will happen. This was highlighted by a Judge at the Court of Justice, who said, 'For certain important changes, you need people who pursue that aim with much litigation and force. If those people are not there you can forget about it, I think' (Interview, 08/09/11). One French lawyer said that most people would not consider taking a test case, as 'That requires really serious people' (Interview, 22/09/11). As an example of the determination required, Philippe Derouin had tried at least once or twice a year for ten years to obtain a preliminary reference in a particular area of EU law before he was successful (Interview, 24/08/11). Jean-Edouard Robiou de Pont, the counsel in

the *Wood*[170] case, described how 'both courts in town refused to pose the question to the CJE,' but he persisted until 'one very brave judge' sent the preliminary reference (Interview, 23/08/11).

Several interviewees also highlighted the specialist knowledge required to be able to bring a preliminary reference to the ECJ. 'For a long time there were two different types of lawyers, there were the national lawyers and there were the European lawyers … It takes a certain type of lawyer to have the ambition to take a European case … to bring a test case, and also to have the two types of knowledge together – European and national law – it is quite rare, this type of person. So in France it is not unusual that there were not these types of cases, these types of people' (Interview, 22/08/11). Another interviewee said, 'I think a lot depends on the involvement of the lawyers and how far they are familiar with EU law' (Interview, 22/08/11). As an example of a protagonist, three interviewees mentioned Hélène Masse-Dessin[171], an attorney in a number of gender equity preliminary references. One interviewee described her as, 'Daily involved in gender equality cases … very familiar with EU law, and certainly looking at legal strategies that might be useful to generate preliminary questions' (Interview, 15/09/11). Analysis of the documents showed that Maitrise Masse-Dessin had appeared for the party requesting the reference in 3 of the 23 matters, or 13 per cent of the cases over the 14 year period.

[170] Case C-164/07, *James Wood v Fonds de garantie des victimes des actes de terrorisme et d'autres infractions* [2008] ECR I-4143.
[171] Unfortunately, Ms Masse-Dessin's caseload did not permit her to be interviewed at the time that she was approached.

Parties

The key individual can be a lawyer, but it can also be the party bringing the suit, who is determined to push the action. In 6 of the 23 cases the party requesting the preliminary reference represented him or herself in written or oral proceedings before the Court of Justice. When the stature of the Court of Justice in the EU court hierarchy, as well as its status as a quasi-constitutional court, is considered, it seems extraordinary that over one quarter of French social policy preliminary references brought before it should have been argued by the parties themselves. A related sub-theme is the importance of elites. Many of the parties to the actions that generated the preliminary references were elites, who presumably had better access to resources or knowledge. Josep Peñarroja Fa, who was the plaintiff in a matter that resulted in a preliminary reference, is the President of the Association of Sworn Translators. He is a lawyer and a translator from French to Spanish who passed a competitive examination in his home Member State, Spain. Having heard of difficulties for his colleagues with 'free circulation in France,' he applied to be admitted to the register of court translators in France for both the Cour d'Appel de Paris and the Cour de Cassation, both of which applications were rejected. Subsequently he brought a case to challenge policies of the French courts as restricting free movement of services. As there weren't sufficient funds for a lawyer, he brought the cases himself and represented himself at the Court of Justice. He said of the cases, 'legally speaking it was me against France, but really it was all the Spanish sworn translators represented by my association against the French authorities' (Interview, 24/09/11). Another named plaintiff in a case, Philippe Derouin, is a

partner at major multi-national law firm in Paris. He was the party to a case about the proper social security contributions when an individual has income in more than one Member State of the EU. This was primarily a problem affecting elites, although he noted that 'This applies not only to partners in law firms, but partners in other firms, and employees who have a split salary from a French company, and also from a UK subsidiary' (Interview, 24/08/11). The *Griesmar* case had a French magistrate as the plaintiff. Another case, *Olympique Lyonnais SASP v Olivier Bernard and Newcastle UFC*[172], was brought on behalf of a professional football player, with support of his Premier League club, over the breach of a training contract with his previous club. Clearly there were resources available to him that would not be available to the average citizen with an employment dispute.

7.4 Cross-Case Results

There were also three themes that emerged in the case studies that were not specific to either France or the UK.

Court of Justice and Individual Rights

Several participants pointed to a lack of concern for individual rights on the part of European judges. One French lawyer said, 'The judges of the European court, in my opinion, don't care totally about the importance of the case to the person

[172] Case C-325/08, *Olympique Lyonnais SASP v Olivier Bernard and Newcastle UFC* [2010] ECR I-2177.

trying to enforce his European rights. The European judge doesn't care about the problem of the one who needs European justice. They only respond simply and ask if the present case is necessary or not to build European rights. There is a great distance between what the French people understand about European justice and what the European judges understand about the French question' (Interview, 23/08/11). Sometimes the response of the Court is not very enlightening. One commentator on a discussion board to assist welfare rights practitioners commented, 'The ECJ reminds me of my late lamented brother in law. He was the sort of person who answered questions put to him very literally. Thus if you asked him 'Going on holiday this year, John' he would answer 'yes.' No details were volunteered.'[173]

A Judge at the Court commented on this view that the Court is not concerned about individual justice:

> I think you cannot say that about the Court as such in the first case. Because there were in the past judges, and there are judges now as well, who are very interested in individual justice. But there is another dimension to this and this is that some of my colleagues here, and also a lot of people outside, see this Court as a kind of constitutional court. And the role of a constitutional court is to lay down clear principles. So in a way, if we should focus only on individual justice, it wouldn't be right either. There is a risk in that, which is the bleeding heart case law, where people are so concerned with helping an individual that you just get lousy jurisprudence. … So I think it's always about finding something in the middle and laying down principles and providing guidance to those judges who are in fact dealing with the individuals. That might be more helpful for individual justice than being here concerned with every single individual that has a case here. But I think of course, at the same time, that we should never forget that we are dealing often with cases about individuals (Interview, 08/09/11).

[173] Accessed at: http://www.rightsnet.org.uk/forum-archive/index2fc5.html, 13/10/11.

Advocate General Sharpston also commented on this, and defended the Court's concern for individual justice:

> I think that in every court … there are two separate things going on. You see the individual case, and you do understand that there are real people out there, and there are issues about justice in the particular case. You also know that a decision of the court, whether or not you have a formal precedent system – we don't have exactly the same precedent system as in English law, but we do have a precedent system nevertheless – a decision of the court is laying down a precedent and a contribution, to the overall mosaic of law. And we do all know the quote that hard cases make bad law. Therefore, when you look at a case, there is sometimes a tension. Of course, there's not always a tension. Sometimes it is perfectly clear that doing justice in the individual case is absolutely going to match giving the answer that is the correct answer as a matter of law. Sometimes, however, you see the individual case, you can see the person has been hard done by, but you can also see that as a strict matter of law you cannot give an answer which is the answer they want. I'd be tempted to turn the question around. In such a case, are you not doing justice if you give the legally correct answer? I feel you are doing justice, you're just, unfortunately, not giving the answer that your heart would like you to give (Interview, 08/09/11).

In Advocate General's experience, the Court does sometimes advance individual justice beyond where might perhaps be strictly interpreted. 'And I know that there are occasions on which I have given an opinion where I have tried to push the boat out, to try to help in a particular instance, and the Court has said no, actually, we don't buy that. There are other instances where I have given an answer that I felt was legally correct and the Court has pushed the boat out' (Interview, 08/09/11).

Compromise Legislation

Another cross-cutting theme was that European legislation that is either badly drafted, or that is vague, usually as a result of compromises between Member States, leads to more references. An ECJ Judge said, 'It is also of course, very much dependent on the clarity of the law. If there is a badly drafted, vague, European regulation, of course it generates cases for the court, because nobody understands it' (Interview, 08/09/11). Advocate General Sharpston said that one possible explanation for rates of preliminary references in particular areas is that, 'And possibly also there are references in part because the way in which the legislation is drafted is often a bit of a compromise between the Member States and if the compromises are big enough, then sometimes the consequence for the drafting is that the drafting is ambiguous. And that is the way that the agreement was attained, but that does mean that the resulting text may get litigated' (Interview, 08/09/11). Sarah Clarke at CPAG also identified problems with drafting and translation leading to more litigation. 'Some of the directives are quite badly drafted, and then it's interpreted. So then you've got problems. There's quite a fundamental difference, in UK law you're taking a literal approach, looking at the wording, seeing what the wording means. In European law you're taking a purposive approach, looking at what the intention is. And you have to do that, because all of those directives have been interpreted and translated, so they don't have the same literal meaning in every translation. But also they can be quite vague and have lots of holes in them' (Interview, 02/09/11).

Influence of New Member States

The final cross cutting theme was about the importance of the new accession states in the Court and EU law. Victoria Phillips said that, 'As a practitioner, there is a worry, particularly on some of this social law, that the newer Member State are going to be a conservative influence on the Court. Certainly the submissions in *Stringer*[174] from the Czech Republic and Slovakia, I think it was, were of the 'we don't need all these rights' ilk.' After the *Laval*[175] and *Viking*[176] cases, 'There is quite a lot of concern. It's been – I think the feeling is that if you get an industrial dispute in the ECJ, the commercial interests will prevail. … People are talking about it less, but people are steering well clear of the court' (Interview, 16/09/11). 'You just have to look at Poland, really. After solidarity there's no real record of trade unionism. And actually there's hostility to trade unionism. And in East Germany as well, because of the close link of trade unions and the states. I think it'll take a while for that to settle down and in the meantime they'll be hostile' (Interview, 16/09/11).

Christine Boch, the lawyer who was involved in the *Brown*[177] case, said that she hasn't observed a tendency toward more conservative judgements on social issues in the area of gender equality. Instead, 'In terms of composition of the Court, what I have observed post-accession is that suddenly we have females at

[174] Case C-520/06, *Stringer and others v HMRC* [2009] ECR I-179.
[175] Case C-341/05, *Laval un Partneri Ltd v Svenska Byggnadsarbetarforbundet*, [2007] ECR I-11767.
[176] Case C-438/05, *International Transport Workers' Federation . Viking Line ABP* [2008] ECR I-10779.
[177] Case C-394/96, *Mary Brown v Rentokil Ltd* [1998] ECR I-4185.

the Court, and not just the female secretaries. We have Advocates General and Judges, and that is what I have observed' (Interview, 23/09/11). However, it is important to bear in mind that 'Sex equality in the west is not the same as sex equality in the east.' She has seen before that 'for females from central European states, work was not at all a liberating issue. In countries with the communist regime, women were forced to work. So work was never seen as an equality issue. Quite the reverse.' She goes on to say that females at the Court from these newer accession states 'must have brought that type of cultural baggage' (Interview, 23/09/11).

A Judge at the Court noted that there are differences in the types of cases that are coming to the Court from accession states. 'When we are seeing what comes to this Court from the 12 new Member States, it's very different from what is coming to this court from the Netherlands, from Germany. They still need to get familiar with European law in these states' (Interview, 08/09/11). The cases are 'very much things like VAT, other taxation issues, costing duties, problems with transition periods under treaties. They are not so terribly much social policy cases, for instance. Some competition, telecom, these types of things' (Interview, 08/09/11). When asked whether this was a similar pattern to what was observed at the very beginning of the European Community, with market-making cases at first that later transitioned into subjects such as social policy, the Judge agreed. 'My impression is that the pattern is comparable to what happened at the beginning, when we started with six Member States' (Interview, 08/09/11).

7.5 Discussion and Conclusion

This chapter identified themes about social policy preliminary references in France and the United Kingdom. Many of these themes are consistent with the results of the quantitative and QCA analyses of the earlier chapters. The themes fall into three categories of explanatory factors similar to those that have been used throughout this study.

First, there are themes related to the underlying policy structure of the Member State. These include the type of welfare state or legislation related to social policy. This is a contribution of this study. Because previous studies (except for Stone Sweet and Brunell 1998) did not analyse preliminary references by issue area, it was impossible to consider how the underlying Member State policy structure might affect rates of social policy preliminary references as well as the areas in which preliminary references are sent. The results from France and the United Kingdom expand and clarify how policy structures can influence the rates of preliminary references and the areas in which they arise.

In the United Kingdom, one of the points that wanted clarification from the earlier analyses was why, if a Bismarckian system was important for increasing rates of preliminary references, did the UK send so many references? The themes from the policy structure category in the UK case study offer some insight. The efficient political and legal systems of the 'World of Domestic Politics' (Falkner, *et al.* 2005, 2008), coupled with domestic politics trumping compliance where a national policy conflicts with European policy, greatly help

rates of preliminary references. This is reinforced by the fact that three of the four pathways to higher rates of references identified in Chapter 6 involved being a member of the 'World of Domestic Politics.' However, Beveridgean welfare states can offer other points for cases to arise. As eligibility for benefits in Beveridgean systems is primarily based upon residence establishing a nexus to the state, who is 'resident' for the purposes of benefits becomes a crucial and, in the UK, highly litigated issue. Also, the fact that the UK became a destination state for migration for many nationals of new accession Member States after 2004 contributed to the rise in these cases. Because the UK's equal protection legislation lagged that of Europe, there also were potential points to challenge the policy structure in these areas. This policy misfit created opportunities for challenges via preliminary references. The UK cases mostly arose through female plaintiffs, or in two instances, trans-gendered persons. Because protections were not in place, it was the more traditionally disadvantaged groups that used the policy misfit between the UK and the EU to challenge national policies.

France has a Bismarckian welfare state, but without the efficient administrative and judicial systems of the 'World of Domestic Politics' (Falkner, *et al.* 2005, 2008), a high rate of union density is also required to have a high rate of social policy preliminary references. Not only does France have strikingly low union density, in France the unions might serve in the opposite capacity. French social insurance funds are jointly administered by unions, making unions an unlikely source of support to challenge the system. Moreover, France's welfare state is very generous to insiders, who are seldom motivated to challenge the system. They will not mount many challenges via preliminary references. Without help,

outsiders will have difficulty accessing legal systems to enforce their rights. In France there are very few such helps to outsiders.

Even in the newer areas of French social policy, such as social protection, anti-discrimination and disability, there are few cases. Caune, *et al.* (2011) identify these as areas where non-traditional French policy actors have been able to use European policy to help bring about policy change. Therefore, these areas seem more likely to generate social policy preliminary references than the more traditional social insurance areas. However, this has not as yet translated into many preliminary references in these areas, though there are a few. France does have cases in the area of reverse discrimination and opening up the civil service and protected professions. France had policies about equal pay before the EC even began. Although Annick Masselot noted that France was better at broad principles, rather than specific policies, the areas in which French law was out of sync with EU law were to do with the disadvantage that French policies benefitting women caused to men (Interview, 22/08/11). Anti-discrimination cases were a major category of cases from France, and all of the cases during the period studied were brought by or on behalf of men.

The fact that France has relatively few immigrants from the EU may also help to explain why it has few social policy preliminary references. Most French immigrants are from outside the EU, with the largest group coming from North Africa. They have become an underclass and create problems with the Republican concept of solidarity. Some discrimination against these immigrants is legal in France, and approximately seven million French jobs are closed to

them based upon their nationality (Guiraudon 2008). Most of these jobs are in the French civil service or in publicly owned companies. The French system is characterised by being very closed for its civil service and regulated professions. These restrictions put France in conflict with EU law on free movement of persons and the right to establishment. Therefore, cases related to opening up the civil service and the regulated professions fall into the second important theme to the French policy structure category. However, many of these non-EU migrants discussed above will not have EU citizenship or a family link to an EU citizen, and so will not be able to use European legal precedents to challenge this discrimination.

In the second category, there are themes related to structural factors in the Member State. These factors, and how they account for differing rates of preliminary references, have been discussed in the literature. They can present barriers to social policy preliminary references or they can benefit them. They include how the Member States comply with the EU, as the Falkner, *et al.* typology (2005, 2008) tries to address. They also include the types of causes that Alter called the 'friendliness' of the legal system to litigation, such as the right to class actions or legal aid (2000). Factors might include the interaction between layers of the national legal system, such as the judicial empowerment that Leibfried and Pierson (2000) found enabled lower German courts to circumvent more conservative precedents from higher courts. They might also include aspects of national legal culture, which has been used by some commentators to dismiss the idea of being able to determine what national factors affect rates of preliminary references.

In the UK, although some structural themes were barriers, there were beneficial structural factors that helped to offset those barriers. The acceptance of courts was a broad theme. Courts had become accustomed to greater oversight over the policy process. Although some courts were more resistant than others, generally the participants reported positive experiences. And even where preliminary references weren't being made, participants reported that courts enforced EU rights in accordance with the UK policy framework. There were barriers reported. In Scotland, a lack of standing for NGOs to bring judicial review challenges is a barrier. The costs of litigation were also a barrier, both for the fees to bring legislation, but also because of the cost shifting onto the losing party that happens in UK courts. In the sorts of cases that lead to preliminary references, it is impossible to predict the outcome with confidence. They are by their nature in untested areas of law. Finally, the employment and social security tribunal systems and legal aid were benefits to preliminary references, and helped to overcome some of the barriers. However, current policy proposals threaten this availability of legal aid, and may upset the balance between structural barriers and benefits.

In contrast, in France, although there was reported perceived improvement over time, the other major structural theme presents a major barrier to preliminary references. The extreme resistance of courts and judges to European law and European rights is very difficult to overcome. Some courts were more resistant than others, with one report that the Conseil d'État was showing leadership on references. This is encouraging for social policy preliminary references, as most

of these cases will arise in the administrative courts system in France. There were sub-themes of resistance to a particular policy area, and wilful misinterpretation of EU law by French courts.

The third category of themes is those related to the actions of individuals and groups. These actors, whether they are plaintiffs, supporting groups or judges in the national system, affect rates of preliminary references. They can act to overcome structural barriers in the system. Again, there were differences between France and the UK as to the themes that emerged within the category.

In the UK, organised test case strategies were seen, backed by different types of organisations. These organised actions can be more strategic and advance the case law by soliciting particular cases needed to clarify points of law. The efforts are backed by NGOs, unions and the Equality and Human Rights Commission and its predecessor the Equal Opportunities Commission. These actors have employed strategic litigation to advance their policy interests. They benefit from legal aid and provide advice through benefits advisers and assist plaintiffs to access the tribunal systems and courts.

In France, the major theme in the category of actors was the importance of individuals. Without unions, legal NGOs, equality agencies (apart from a six-year period) or other advocacy groups to help with access to the Court, it is difficult for individuals to gain access. A few determined lawyers have accounted for many of the French preliminary references. One lawyer, Hélène Masse-Dessin,

was named by several interviewees as a crucial actor to advance preliminary references in France. Philippe Derouin reported trying several times a year for over decade before his attempts to secure a preliminary reference were successful. Individuals were also important as plaintiffs in the actions. These individual plaintiffs were often elites themselves, who presumably had better access to information and resources to overcome the substantial barriers in the system.

Based upon the classifications of Caune, *et al.* (2011), we might expect that the types of actors that have been able to use the preliminary references process successfully will influence in what areas of social policy preliminary references are seen. They identified the more traditional social insurance areas of French social policy, such as pensions and unemployment compensation, as areas where the French policy elite deny the influence of Europe, instead 'boasting' the French model. The social insurance system is very generous to insiders in these traditional areas, and as Smith points out, 'so many comfortable people resist change' (2004, p. 2). Although elites have been able to overcome barriers to access the system on their own account, presumably fewer elite individuals are sufficiently motivated to bring cases to challenge the generous system for insiders. Indeed there are few cases in these areas.

In the 'newer' areas of social policy, such as social protection, anti-discrimination and disability, Caune, *et al.* say that new actors have used European policy to help effect changes to French policy. We might expect to see more cases in these areas. However, although there are more cases in the area of anti-discrimination,

they were brought on behalf of male plaintiffs, most of whom were elites themselves. Without access to agencies, or a very few individual lawyers, to intervene on their behalf, outsiders will have grave difficulties overcoming the barriers to access the Court. Unions remain important for workers in Europe to be able to enforce their European rights, although in France unions mostly benefit the insiders of the social welfare system and are therefore less of a force for change. The HALDE, the entity created in response to European anti-discrimination policy pressure, might have helped non-elites gain access in these new areas, but there were no preliminary references with overt HALDE support in its six-year history. The HALDE might have matured into a body that helped to overcome barriers to the system on behalf of outsiders, but it has been dismantled. However, the HALDE had always had very limited authority. It tried to raise the same issue about requiring a right of legal residence for children to receive benefits that has been raised so often in the UK. But the HALDE was unsuccessful in both the courts and the government. Without other actors to assist them to access the legal system to bring a preliminary reference, non-elites appear to be unable to overcome the substantial barriers in the system discussed above.

In both France and the United Kingdom, the themes related to policy structures affect the types of cases that arise. These are the opportunities in the systems for strategic actions. The structural factors present either benefits or barriers to these preliminary references actually coming to be. In France, the structural factors presented one major barrier. In the UK they were mixed, but more beneficial than barriers as a whole. Then the themes related to actors help to

explain how and to what extent the barriers are overcome through individual action in a complex system. The actors in both Member States helped to overcome barriers, but in the UK the groups were much more organised and the strategy more far-reaching. It was therefore much more effective than that in France, which primarily benefited a few privileged elites.

Chapter 8, the concluding chapter, will discuss further how this qualitative data informs the earlier quantitative and QCA analyses. The chapter will recap the findings from the empirical chapters and relate them to the literature. It will discuss the types of enquiry and how they relate to one another to explain the phenomenon of rates of preliminary references.

8. Conclusion

This concluding chapter summarises the theoretical background to the thesis and research questions. It reiterates the rationale for the research design and the methods employed. It sets out the findings from the four methods brought to bear on the research questions. It discusses how the different methods inform one another. The contributions and the limitations of the study are considered. Finally, areas of future enquiry are presented.

This thesis set out to determine how we account for the different usage of the preliminary reference process across the member states of the European Union. It is specifically focused in the area of social policy preliminary references. The theoretical perspective of this study is that the different usage of the preliminary reference procedure arises from the policies of the national welfare state, the institutional structures of the legal system, and because of the agency of actors within the national system. By limiting the study to one policy area, this study was able consider the effects of Member State welfare state structures. Most previous studies reviewed in Chapter 2 looked at general rates of preliminary references across the Member States. Because their focus was broad, they could consider factors related to the institutional legal structures of the Member States, but not factors related to policy, such as welfare state structure or policy fit or misfit. This study repeated their general analyses but primarily focused on social policy preliminary references, allowing for a comparison of the effects of various aspects of the national welfare state on rates of preliminary references. This is a contribution of this study.

Theoretical Background

This thesis investigates the role of the Court of Justice for the European Communities in European social policy. The Court of Justice was an agent of integration (Haas 1968) that helped to integrate the Euro-polity and drive the deeper penetration of the European Union into social policy. The early literature related to the Court followed the classical integration theory debate between the neofunctionalists and the intergovernmentalists, and focused on who was driving that process. Was it the Court, acting independently (Lenaerts 1990, Mancini 1989, Pierson 1996, Stone Sweet 2003), or did the Member States retain control (Carrubba, *et al.* 2008, Garrett 1992, 1995, Garrett and Weingast 1993)? Rather than joining this debate, this thesis is situated in the institutionalist or governance literature (Conant 2007). The policy process involves actors at institutions at different levels, and their interrelationship will be important for determining policy outcomes. Studies of a political system 'need not declare the permanent supremacy of any layer of government' (Conant 2007, p.62). This study is concerned with how the Court of Justice functions within the European legal system, specifically its interaction with national courts through the preliminary references process.

The role of the Court is essential to a governance-based account of the development of the European Union social dimension, especially in terms of regulatory policy-making. Institutions shape political systems and policy outcomes (Thelen and Steinmo 1992). This has been true in the Euro-polity (Cram 1997). The Court of Justice is shaping social Europe through its

jurisprudence. Social Europe will not be a supranational welfare state, but rather 'an increasingly rich space of social-regulatory policies and institutions' (Majone 1993, p. 168). The process that Keleman calls 'juridical re-regulation' is replacing national-level regulation with regulation at the EU level, with the Court of Justice as a prime actor (2010). Therefore, scholars of governance and European social policy should be interested in the Court as an institution.

This study focuses on the most important aspect of the Court's functioning as an institution: the Article 267 TFEU (ex 234 EC and 177 EC)[178] preliminary references process. The institution in question is really the Court of Justice at the centre of a web of national courts and tribunals in the Member States, all functioning as European courts (Broberg and Fenger 2010). The incentives of the Court of Justice and the Member State courts are intertwined and tend to advance legal integration (Stein 1981, Weiler 1981, 1990, 1994). What Stone Sweet and Brunell termed a 'virtuous circle' enlisted Member State judges as 'agents of the Community order' (1998, p. 65-66). The Court has sought to further integrate Member State legal systems and the EU legal order (Wincott 1995). The campaign has been successful, as is evidenced by the increasing number of preliminary references over time. These preliminary references have become important for European policy. Almost all of the Court's significant

[178] As discussed in Chapter 3, the Treaty of Lisbon replaced the existing EU treaty structure with two treaties. One of these is the Treaty on the Functioning of the European Union (TFEU), which replaced the previous TEC, the source of most EU law. It details the competencies of the Union and the procedures to be followed. The other, the Treaty on European Union (TEU) is more expansive, and covers the values and principles of the Union, the institutions, external relationships and more.

rulings on matter of EU law have come in decisions in cases that reached the court through the preliminary references process (Chalmers, *et al.* 2010). The Court's position within the EU legal order means that its caseload focuses on challenges to the validity of national measures under European law. Litigation seeks to overturn national measures, often as a last ditch effort after the failure of attempts to influence policy domestically (Alter 2000). The Court has thus become an important force challenging Member State *status quo* (Chalmers, *et al.* 2010).

However, the Court does not have docket control over the matters that reach it. It takes all cases that are referred, unless it does not have jurisdiction or there is some other technical problem. Therefore, which Member States send preliminary references, and in what areas, will limit the reach of the Court's power. Member States' usage of the preliminary reference process is very uneven, with some Member States sending many cases, and some sending few, if any. As was illustrated with the descriptive statistics at the beginning of Chapter 5, the distribution of cases by subject matter is also quite uneven. This could have important implications for the direction of EU policy. Case law advances via chains of built-up precedent, with one decision following after another in a process of 'gap-filling' (Hartley 1998). Despite the fact that the court is not a common law court, it still has a precedent system (Interview with Advocate General Sharpston, 08/09/11). A skewed distribution can affect the direction of EU legal precedent and, as a result, policy.

The introductory chapter illustrates this theory with an example of how preliminary references in the area of cross-border provision of health services established 'a European healthcare dimension,' beginning in the mid-1990s (Martinsen 2006, p. 1035). The cases are set out in more detail in Chapter 3. The first cases in the *Decker/Kohll*[179] series arose in a social security-based health system with cash reimbursement, Luxembourg. Additionally, one of the cases implicated the free movement of goods, a fundamental freedom in the EU. The cases therefore had a reasonably strong nexus with the common market, the strongest justification for EU law. Over a period of years a series of cases arose, all of them in social security-based systems, in which the Court expanded and refined this right to cross-border care. By the time in 2004 when the *Watts*[180] case reached the Court from a national health system, the UK, a clear line of precedent had been established. The Court followed this path and held that there was also a right to cross border care in national health systems, even though they have a much weaker link to the market. This was true even if the same care would not be reimbursable if sought through private provision in the UK. Thus, where preliminary references originate can have real implications for the direction of European social policy.

[179] Case C-158/96, *Kohll v. Union de Caisses de Maladie* [1998]; Case C-120/95, *Decker v. Caisse de Maladie de Employés Privés* [1998].
[180] Case C-372/04, *The Queen on the application of Yvonne Watts v. Bedford Primary Care Trust and Secretary of State for Heath* [2006] ECR I-4325.

Methods Used

This analysis uses mixed methods to answer the research question.

- The legal analysis in Chapter 3 tracks Court of Justice cases in the areas of gender equality, free movement of workers/ European citizenship and free movement of services to answer the threshold question of: 'Why should scholars of European social policy care about the Court of Justice?

- Chapter 5's The Time Series Cross Section (TSCS) analysis tested the significance of potential explanatory factors.

    - Five general hypotheses about what factors explain rates of preliminary references were tested using a dataset constructed using all preliminary references from the EU-15 from 1996-2009.

    - Three novel hypotheses related to social policy were tested using a dataset constructed using only the social policy preliminary references the EU-15 from 1996-2009. This was defined as:

        - Free movement of persons
        - European citizenship
        - Social provisions
        - Social security for migrant workers, and
        - Free movement of services, but only those services that are social policy-related, including health and education.[181]

- The Qualitative Comparative Analysis (QCA) of Chapter 6 used set theory to look for combinations of those significant factors that lead to higher and lower rates of preliminary references. These 'causal pathways' explain how the explanatory factors work together within a case.

- Chapter 7 contains in-depth case studies of the United Kingdom and France. Analysis of documentary evidence and 25 expert interviews illuminate how the social policy preliminary reference process is working in these two Member States.

[181] To make this determination, all free movement of services cases in the original dataset were read and classified.

Legal Analysis

The Court of Justice has been an important actor in the development of social policy in Europe. Court decisions have linked citizens directly to the EU, in a way that they had previously only been linked to their Member State. Decisions establishing direct effect and supremacy began the Court's evolving jurisprudence in the area of European citizenship, and were the crucial step in expanding rights to citizens. These court-created doctrines have granted *European* rights to citizens. These European rights can be enforced against the Member States and sometimes against other private parties. European law flows from an opening principle and the four freedoms present challenges to the traditional structures and functioning of the welfare states. Ferrera calls the welfare state and the European Union 'probably the most salient and distinctive legacies that the 20th century has bequeathed to Europe' (2009, p. 231). Evidence presented in Section 3.5 suggests that these two legacies are on a collision course.

The case law of the Court of Justice has compromised the ability of Member States to control access to their territories and to their welfare states (Leibfried and Pierson 1995). Important Court decisions in the areas of gender equality, free movement of workers/ European citizenship, and free movement of services were detailed in Chapter 3. Through these and other decisions, the Court has addressed who may settle in Member States and who is entitled to receive benefits. As Leibfried (2005) notes, the ability to define the outsider and the

citizen had important state-building features, especially in continental Europe. By eroding these boundaries, the ECJ is furthering the idea of a European community that has European citizenship. The concepts of who are insiders and outsiders in the societies of the Member States have been changed radically. Other European citizens must be treated as insiders, despite linguistic boundaries and sometimes deep cultural differences. No tests of language or cultural integration can be required of them as a condition of settlement. To a large extent, Member States cannot even condition the right to reside for nationals of other EU states upon engagement with the market.

The Court's decisions have also eroded Member State control over what benefits must be offered, who may provide welfare state services, and where those services may be consumed (Leibfried and Pierson 1995). The presumption is in favour of exportability of services (Leibfried 2005). This logic of opening creates tensions with the welfare state structure. Recent decisions have limited the rights of Member States to implement national labour laws. European legislation that was considered to guarantee a minimum benefit has instead been interpreted by the Court as creating a cap on the protections that Member States can provide to workers in their territory. With the new accession states opening up vast markets with lower wage costs, perhaps the race to the bottom will become more of a reality. Moreover, politically these newer states have been a voice for market liberalization. One labour lawyer said that with the new judges from the post-accession states on the ECJ the Court had become much more hostile to the interests of workers (Interview, 16/09/11). Through ECJ

precedents, the territoriality of the welfare state has been thoroughly compromised (Leibfried and Pierson 1995). However, the result has not always been that European citizens were empowered.

Quantitative Analysis

The quantitative chapter first used descriptive statistics to describe the social policy caseload of the Court of Justice. The social policy preliminary references to the European Court of Justice are unevenly distributed across the Member States and across issue areas. Germany, the United Kingdom, Belgium, Italy and Austria are the countries that send the most social policy preliminary references. Ireland and Portugal send the fewest references. The Member States with the highest numbers of social policy preliminary references tend to dominate the subcategories, as well, but the distribution of preliminary references by subcategory is also suggestive. Germany and the United Kingdom have by far the highest numbers of European citizenship references. However, the free movement of services references are dominated by Germany, Italy and Belgium. The United Kingdom has sent very few free movement of services references. Germany, Belgium and Austria also send the most references in the area of social provisions for migrant workers. Germany and the United Kingdom have sent the most references in the area of social provisions. The second part of the chapter's analysis suggested some potential explanations.

The Time Series Cross-Section analysis tested eight hypotheses about what Member State factors affect rates of preliminary references to the Court. Five

were derived from previous analyses and related to rates of overall preliminary references. Three of the hypotheses were original and specific to the area of social policy preliminary references. The hypotheses and the results are recapped below.

The first hypothesis, that Member States with larger populations will have higher rates of preliminary references (Stone Sweet and Brunell 1998, Vink, *et al.* 2009), was confirmed. Population was highly significant and positively correlated with higher rates in the Member States in both the general preliminary references and the social policy preliminary references models. This corresponds with the finding in the descriptive analysis that Germany sends the most references to the ECJ. However, it is interesting that France, the second largest EU member state, is such a low referrer in the areas of social policy. Moreover, three smaller Member States, Austria, Belgium and the Netherlands, had high rates of preliminary references. Therefore, population, while important, is not the whole story. Other factors also account for a large percentage of the variation in rate of preliminary references from the Member States.

The literature identifies the importance of national legal culture for the usage of courts. Studies in the US legal system determined that if citizens lack confidence in their courts, then they are likely to seek redress elsewhere (Scherer, *et al.* 2010, Dougherty, *et al.* 2006). A previous study of the Court had found that it had little perceived institutional legitimacy (Gibson and Caldeira 1998). If a Member State's citizens have a poor perception of the Court, then that may result in a low usage of preliminary references in that Member State. This study's second

hypothesis was that higher reported levels of trust of the Court by the population of a Member State will predict higher rates of preliminary references. Opinion data from the EuroBarometer surveys was used to assess Member state citizens' perceptions. Reported trust of the Court was highly significant and positively correlated with higher rates of preliminary references across both the general references and the social policy preliminary references models. It was the most important factor, relatively speaking, in the general references model, and the second most important in the social policy model. Thus, the court's perceived legitimacy does seem to be an important factor in determining usage of the preliminary reference process. Overall reported rates of trust in the Court were not especially high, with a median of 55.8% for the EU-15. The UK was a notable outlier, with only 36.2% of the population reporting trust in the Court. The citizens of Denmark are especially trusting of the Court, with 71.9% reporting high levels of trust. Interestingly, the UK has a high rate of preliminary references, and Denmark has a low rate of preliminary references.

The third hypothesis tested the proposition that a Member State's legal system's relationship to international law would be predictive of rates of preliminary references. Previous analyses had theorised that countries with monist legal traditions, where domestic and international law make up a universal legal order (Hillier 1998), would have higher rates of references than dualist legal systems, where domestic and international law occupy separate spheres (Alter 1996, Mattli and Slaughter 1998, Carrubba and Murrah 2005). Vink, *et al.* (2009) expected the opposite relationship. This study tested the hypothesis that Member States with monist legal traditions would have higher rates of

preliminary references. However, the monist independent variable was not significant.

The fourth hypothesis relates to traditions of judicial review and the interaction of levels of courts in the Member States. The presence or absence of a right of judicial review in a Member State is widely expected to be an important factor in that Member State's use of the preliminary reference process. Scharpf called the new ability of ordinary national courts to review national legislation, 'which may have been particularly attractive for lower court judges', 'the most convincing explanation' for the interaction of judicial review with rates of preliminary references (2010, p. 216). This complements Leibfried and Pierson's theory that lower courts in a judicial system will take advantage of a new ability to review legislation to circumvent resistance in higher-level courts (2000).

As there is insufficient variation to adequately test the presence or absence of judicial review quantitatively, instead the judicial empowerment that is presumed to result was tested in this study. A judicial empowerment variable was constructed using data from the Curia website. Lower courts were defined as courts from which there is an appeal to another higher member state court. Under Article 267 TFEU, lower courts may send a preliminary reference if a question of European law arises, but courts from which there is no right of appeal must send preliminary references. If ordinary judges in a system are empowered by the European judicial review granted through preliminary references, then we might expect that those Member States with higher percentages of references from lower courts will have lower levels of

preliminary references.[182] The judicial empowerment variable was significant and negatively correlated with higher rates of preliminary references in both the general and the social policy models.

The fifth hypothesis relates to how differing levels of compliance with the European Union policies and the efficiency of the national legal system interact to affect rates of preliminary references. The Falkner, *et al.* (2005) and Falkner and Treib (2008) typologies were used as proxies. These typologies seem to be robust. Member States from the 'World of Law Observance' were significantly less likely to have high rates of preliminary references than Member States in the 'World of Transposition Neglect.' Member States from the 'World of Domestic Politics' were significantly more likely to send preliminary references than Member States in the 'World of Transposition Neglect.'

In terms of social policy preliminary references and the novel hypotheses tested in this study, the hypotheses were largely confirmed. The sixth hypothesis was that Member States with more Bismarckian welfare states will have higher rates of preliminary references. The Bismarckian variable was significant and positively correlated, meaning that the greater the percentage of social expenditure that is contributed by insured individuals and their employers, the

[182] This cannot fully account for systems such as that of the UK, where a lower court must approve an appeal to the next level. In this situation, a lower court that was refusing to grant leave to appeal would be functioning as the court of last resort and would be obliged to grant a preliminary reference. However, there is no practical way to include this nuance in the measurement of the variable. It is a limitation.

higher the number of social policy preliminary references. This supports the theory that more Bismarckian welfare states create interests for participants that are more closely akin to property rights (Titmuss 1976, Hinrichs 2003) and are therefore more readily enforceable in court.

The importance of the Bismarckian variable may account for the fact that the UK, although a high overall sender of social policy preliminary references, sends relatively few in the areas of free movement of services and social security for migrant workers. Germany, Belgium and Austria, which have higher degrees of Bismarckian social benefits, have high rates of references in the subcategories of free movement of services and social security. France, which has a low rate of social policy preliminary references, has higher rates of references than the UK in free movement of services and social security for migrant workers, and a higher Bismarckian score for social spending.

The seventh hypothesis was that a higher density of union membership in a Member State will explain a higher rate of preliminary references. It is based upon the theory that the availability of organisational support will affect access to the Court of Justice (Alter 2000, Conant 2007). Unions are 'repeat players' (Galanter 1974), and are more successful at pursuing litigation strategies. Other organisations, such as legal NGOs or an equal opportunities commission, could also help, but it is more difficult to analyse their importance cross-nationally. Union rates are tracked cross-nationally and were used here as a proxy. The variable for union density was significant and positively correlated with higher rates of preliminary references. This supports the theory that support is

required for litigants to pursue a European litigation strategy. In the area of social provisions, a union is an obvious potential source of support. However, as was seen in the qualitative case study results for France, there is a great deal of variation between Member States in terms of what unions do on behalf of their membership and where the interests of the union lie.

The eighth hypothesis was that more intra-EU migrants in a Member State will lead to a higher number of preliminary references. Many European protections arise out of the free movement of workers and persons, so a higher number of intra-EU migrants in a Member State might lead to more preliminary references to enforce rights for those workers. However, the number of intra-EU migrants in a Member State was not significant.

Discussion

These potential explanations are important for several reasons. First, they indicate that some sorts of benefits or entitlements will be easier to enforce legally in some EU Member States than they are in others. Citizens of different Member States will have different access to justice at the European level if they wish to enforce social rights. Second, as the new accession states begin to interact with the ECJ more frequently, their patterns of preliminary references may follow similar paths (Interview with Court of Justice Judge, 08/09/11). Finally, although the legal system is modelled on European civil law systems, the trend of the development of precedent at the ECJ has followed a more common law trajectory of building up lines of cases, each of which relies upon earlier

cases. This means that the sorts of cases that are sent to the Court will influence the development of the jurisprudence. If more Bismarckian welfare systems are more conducive to European litigation, then the case law of the Court will develop in line with the disputes that are triggered by those sorts of systems. The Court will have many more opportunities to rule in disputes from Bismarckian welfare states. Because the EU legal system has so closely linked the legal systems of the Member States, the cases will have equal effect in other Member States. Therefore, the accumulated precedents of the Court will establish a more Bismarckian path that affects all Member States.

These results are also important because they indicate that perceptions of the Court of Justice in the population are important. Trust was the second largest predictor in the model. In light of the Eurozone[183] crisis that has engulfed the EU, the population's perceptions of the EU and its institutions may well have been shaken. This could affect future rates of preliminary references.

There are limitations to the TSCS analysis. Because the sample size was small the potential relevance might be limited. Although the independent variables were tested for statistical significance to the 95 per cent confidence level, the limitations in the sample size lead to cautiousness about the results. However, attempts were made to address this issue. As set out in Chapters 4 and 5, the preferred model was chosen to best address the challenges presented by the data, and the TSCS was re-estimated with two different models to ensure robust

[183] The Eurozone, or Euro area, is an economic and monetary union of 17 EU Member States that have adopted the Euro.

results. The TSCS was also only one of several methods brought to bear on the research puzzle. However, there are limitations to how much can be explained of such a complex phenomenon through quantitative analysis alone.

Qualitative Comparative Analysis

As discussed above and in Chapter 5, the TSCS analysis assessed the relative explanatory power of the independent variables. Population size, membership in the 'World of Law Observance,' membership in the 'World of Domestic Politics,' a more Bismarckian welfare state, the 'judicial empowerment variable' and the degree of union density were all found to be significant predictors that help to explain much of the variance in the rate of preliminary references to the Court of Justice. The Qualitative Comparative Analysis (QCA) of Chapter 6 considered the Member States in-depth as whole cases, and determined how these different causal conditions interact to affect rates of social policy preliminary references. The QCA determined the different sets of conditions, or 'causal pathways', which lead to the outcome in question (Seeleib-Kaiser and Fleckenstein 2007, p.48).

The Qualitative Comparative Analysis (QCA) technique is well suited to a study of a set of countries such as the EU-15 (Haverland 2007, p. 69). This is simultaneously few enough cases that statistical techniques are limited, and require specification of a model that can overcome this smaller N, as was explained in Chapters 4 and 5, and too many cases to cover practicably through case studies. The QCA analysis allows for the advantages of both the qualitative and the quantitative analysis worlds. It requires 'familiarity with cases' and 'in-

depth knowledge,' while still allowing for examination of cross-case patterns across the EU-15 (Ragin 2011, p. 2). By looking at a case as a configuration of causally relevant conditions, QCA can address the complex systems that are of interest in much social science research. QCA allows the researcher 'to examine causal complexities under the rubric of multiple conjectural causation' (Ragin 2000). Therefore, QCA can identify multiple, not mutually exclusive, potential 'recipes' of conditions that result in the outcome in question.

As such, in this research design the QCA method provides a bridge between the quantitative, variable-based analysis and the qualitative case studies. The Time Series Cross-Section analysis identified variables that were significant and affected rates of social policy preliminary references from the Member States. This QCA analysis determined how those variables fit together in the cases, combining into recipes of conditions that result in the outcomes studied. These recipes are pathways to the two studied outcomes: high and low rates of social policy preliminary references.

The QCA analysis was performed for both a high rate of social policy preliminary references and a low rate of social policy preliminary references. There was a necessary condition for each. In order for a Member State to have a high rate of social policy preliminary references, it is a necessary condition that the Member State not be a Member of the 'World of Law Observance' in the Falkner, *et al.* typologies (2005, 2008). These more compliant Member States do not have high rates of social policy preliminary references. Not being a member of the 'World of Domestic Politics' was a necessary condition for having a low rate of

preliminary references. Domestic politics will often trump compliance where there is a policy misfit with Europe, but these Member States' efficient legal and administrative systems will ensure that the preliminary reference process can be used to challenge that lack of compliance. Therefore, they will have a high rate of preliminary references. Thus, the Falkner, *et al.* (2005, 2008) typologies again seem to be robust.

Causal pathways – High rate of social policy preliminary references

The QCA yields three potential solutions to the model. In the parsimonious solution[184], the QCA analysis identified two pathways to high rates of social policy preliminary references in a Member State. First, a Member State can be a member of the 'World of Domestic Politics.' Six of the seven Member States with high rates of social policy preliminary references are members of the 'World of Domestic Politics.' Only Italy is not. Again, this supports the Falkner, *et al.* (2005, 2008) typologies. In the second pathway, a Member State can have a more Bismarckian welfare state and high union density. Six of the seven Member States with higher rates of preliminary references have a more Bismarckian welfare state, with only the United Kingdom as the exception. This supports the TSCS finding that a Bismarckian welfare state is an important predictor of rates

[184] As was described in Chapter 6, the QCA analysis yields three potential solutions:

- The Complex Solution avoids using any counterfactual cases.
- The Parsimonious Solution uses any remainders that will lead to fewer recipes for causal conditions.
- The Intermediate Solution uses only those counterfactual cases that the researcher allows, based upon his or her knowledge of the cases.

Charles Ragin considers the intermediate solution to be the preferred solution in many cases (2011).

of social policy preliminary references. One of these sets of conditions was present in every potential solution to reach the outcome of high numbers of social policy preliminary references. According to the fsQCA analysis, together they explain 100% of the instances of high social policy preliminary references in the model, with perfect consistency.[185]

Although there were various combinations of other conditions included in the intermediate solution, the results also emphasise membership in the 'World of Domestic Politics' or a highly Bismarckian welfare state and a high degree of union density among the Member State population. Based upon the parsimonious solution, the intermediate analysis was designed to minimize for a Bismarckian welfare state. The intermediate analysis adds in the interaction of population, citizen trust of the ECJ and the judicial empowerment variable. The most common pathway is to have a large population and to be a member of the 'World of Domestic Politics.' This is the pathway for Germany, Spain and the United Kingdom. The other pathway for larger Member States is the Italian pathway of a large population, a more Bismarckian welfare state and high union density.

Although four of the five Member States with higher populations also have high rates of social policy preliminary references, three Member States with smaller populations also have high rates. The next two pathways are variations of a causal recipe for those smaller Member States and include membership in the

[185] Of course, social science research is unlikely to explain 100% of a complex phenomenon. This only means that as the model was formulated, it explained 100% of the cases through some pathway.

'World of Domestic Politics,' a more Bismarckian welfare state and higher levels of trust in the ECJ. In one pathway, these combine with a low level of judicial empowerment, suggesting a legal system without resistance to preliminary references from the higher courts. This pathway includes Austria and the Netherlands. The other potential variation on this recipe includes high union density rather than a lack of judicial empowerment. This supports the idea that unions can help to mediate on behalf of their members to bring about higher preliminary references, even if there is resistance in the legal system. This recipe also fits Austria, along with Belgium. These pathways suggest that while population is important, the barrier of having a smaller population can be overcome. Member States with more Bismarckian welfare states, domestic resistance to compliance coupled with efficient legal systems and high levels of trust in the Court can lead to higher rates of references, despite the smaller population.

Causal pathways – Low rate of social policy preliminary references

As discussed above, the Falkner *et al.* typologies (2005, 2008) also seem to be sound in the QCA analysis for the outcome of low social policy preliminary references. Not being a member of the 'World of Domestic Politics' was a necessary factor for a low rate of preliminary references. It is therefore present in every causal combination.

The other novel factors proposed in this study also seem to be robust. In the parsimonious analysis, there are two potential causal pathways to a low rate of

social policy preliminary references. The first is a less Bismarckian welfare state and not being a member of the 'World of Domestic Politics,' which accounts for Denmark, Finland, Ireland, Luxembourg and Sweden. The other potential pathway is lack of membership in the 'World of Domestic Politics' and low union density, which applies to France and Greece. Portugal follows both pathways.[186]

In the complex solution, two pathways to low rates of social policy references accounted for six of the eight Member States. The first of these common pathways combines a high level of trust in the ECJ with low Bismarckian levels, a lack of judicial empowerment and a small population with a lack of membership in either the 'World of Law Observance' or the 'World of Domestic Politics.' This seems to essentially be a catch all for the smaller non-Nordic Member States, and explains Ireland, Luxembourg and Portugal. Second, a high degree of trust in the ECJ, high union density and membership in the 'World of Law Observance' combined with a low degree of Bismarckian welfare state and a smaller population size leads to lower social policy preliminary references. This set of conditions describes the Social Democratic Nordic countries, and it explains Denmark, Finland and Sweden.

For the intermediate solution, because the lack of membership in the 'World of Domestic Politics' was a necessary condition, the solutions were minimized for that result. One intermediate pathway explains six of the eight Member States with lower rates of social policy preliminary references. A smaller population, a

[186] As the pathways are not mutually exclusive, it is possible to be a member of more than one set.

less Bismarckian welfare state and not being a member of the 'World of Domestic Politics' is the causal recipe for Denmark, Finland, Ireland, Luxembourg, Portugal and Sweden. The remaining two pathways are variations of a recipe that includes judicial empowerment, suggesting resistance to preliminary references in the legal system and a lack of union density, which may foreclose a potential aid to overcoming that resistance. In France, these combine with a low level of trust in the ECJ. In Greece, they combine with a small population to explain low rates of preliminary references.

Causal Factors

Although the primary purpose of QCA was to determine the sets of conditions or causal pathways in the Member States, it also offers some confirmation of the importance of the causal factors identified as significant in the TSCS analysis. As is emphasized in the literature, a Member State's compliance with the EU is an important predictor of the rate at which it will send social policy preliminary references to the ECJ. The Falkner, *et al*. (2005, 2008) typologies have been supported by these results. The member states of the 'World of Domestic Politics' with their efficient legal and political systems, but lower rates of successful transposition of EU Directives attributable to domestic political interference, have higher rates of social policy preliminary references. These member states will often be out of compliance, and their legal systems will allow their citizens to use the judicial processes to more successfully enforce compliance. Every Member State in the 'World of Domestic Politics' has a high rate of social policy preliminary references. Only Italy has a high rate of references and is not a

member. On the other hand, the member states of the 'World of Law Observance' are expected to create less of a need for preliminary references, as they will not be as necessary to enforce compliance with EU law. Directives are transposed quickly and correctly, even if there is a conflict with domestic law. Despite these Member States' efficient legal systems, their circumstances will lead to fewer preliminary references. This analysis was also borne out by the QCA analysis. Every Member State in the 'World of Law Observance' was in the set of lower rates of preliminary references.

The degree to which a Member State's welfare state is funded in a Bismarckian manner is also an important predictor of the rate of social policy preliminary references. The Member States with a high Bismarckian element were more likely to send a high number of preliminary references. A low Bismarckian level combined with a small population and a lack of membership in the 'World of Law Observance' to form the causal pathway that explained six of the eight Member States with a low rate of social policy preliminary references, in the preferred intermediate analysis. This supports the idea that the Bismarckian, social insurance-based, model for welfare states will create interests for citizens that are more clearly akin to property rights (Hinrichs 2003, Titmuss 1976) and are therefore more readily enforceable in courts. This creates the expectation that some citizens of the EU will have better access to legal means to enforce their European rights. It also has implications for the rates at which the newer accession states will send references to the Court.

Union density was also related to the outcomes. A high union density combined with a more Bismarckian welfare state as one of two parsimonious pathways to higher rates of preliminary references, and accounted for Austria, Belgium and Italy. A lower union density combined with a lack of membership in the 'World of Law Observance' was one of two pathways to lower rates of preliminary references, and can be seen in France and Greece. This supports the idea that assistance is required to enforce European rights effectively through a litigation strategy. Again, this raises issues about differing abilities for citizens of the various Member States of the European Union to enforce what are intended to be equal rights across the Member States. Some citizens will have better support to pursue their rights through a legal strategy.

Population does seem to be an important factor. However, although four of the five Member States with larger populations are included in the high preliminary references set, there are also three Member States with lower populations. A smaller population can be overcome through variations on a recipe that includes a more Bismarckian welfare state, high levels of trust in the ECJ, and membership in the 'World of Domestic Politics.' In one variation, these combine with a lack of the judicial empowerment variable, suggesting a legal system without resistance to preliminary references from the higher courts. This pathway includes Austria and the Netherlands. The other potential variation on this recipe includes high union density rather than a lack of judicial empowerment. This may support the idea that unions can help to mediate on behalf of their members to bring about higher preliminary references, even if there is resistance in the legal system. This

recipe also fits Austria, along with Belgium. France is the only large Member State to have a low rate of social policy preliminary references.

Qualitative Results

The two previous methods employed in this study helped to set up the qualitative case studies of the United Kingdom and France. These two Member States were chosen using a purposive sampling technique because they are the most likely to provide information valuable to the analysis (Kemper, *et al.* 2003). Although both have high numbers of overall preliminary references, France has a low rate of social policy references, whereas the UK has a high rate of social policy preliminary references. Both have mixed results for the predictor variables. The TSCS results indicate that having a more Bismarckian welfare state, higher union density, higher reported trust of the ECJ as an institution, a larger population, a lack of the judicial empowerment variable and membership in the 'World of Domestic Politics' in the Falkner *et al.* typologies (2005, 2008) should predict higher rates of references. France is alone in the more Bismarckian welfare states for having low rates of preliminary references. The UK is alone in the Beveridgean welfare states for having higher rates of social policy preliminary references. The UK is a member of the 'World of Domestic Politics,' and France is a member of the 'World of Transposition Neglect.' The two Member States have similar results for population, union density, trust of the ECJ and judicial empowerment, but have different results. The different outcomes for France and the UK raise questions about how these predictors interrelate in the complex phenomena that are Member States.

The QCA helped to understand these divergent results, by determining how these causal factors combine in Member States into sets of conditions. The resulting recipes, or causal pathways, showed how sets of conditions lead to higher and lower rates of preliminary references. The QCA identified four intermediate pathways to a high rate of preliminary references. Three pathways include being a member of the 'World of Domestic Politics' (Falkner, *et al.* 2005, 2008). The UK follows the pathway that is defined by a large population, membership in the 'World of Domestic Politics' and not being a member of the 'World of Law Observance.' The remaining pathway was to have a highly Bismarckian welfare state, a large population and high union density. Although France has the most Bismarckian welfare state in Europe, it cannot take this path because of its lower union density. Thus, the QCA analysis helped to explain why the mixed factors present in these two Member States resulted in their particular outcome. The qualitative case studies will add further detail and understanding.

The qualitative case studies used documentary analysis and 25 expert interviews to study social policy preliminary references in France and the United Kingdom. They identified themes in the analysis. Many of these themes are consistent with the results of the earlier quantitative and QCA analyses. The themes fall into three categories of explanatory factors similar to those that have been used throughout this study.

First, there are themes related to the underlying policy structure of the Member State. These include the type of welfare state or legislation related to social policy. This is a contribution of this study. Because previous studies (except for Stone Sweet and Brunell 1998) did not analyse preliminary references by issue area, it was impossible to consider how the underlying Member State policy structure might affect rates of social policy preliminary references as well as the areas in which preliminary references are sent. The results from France and the United Kingdom expand and clarify how policy structures can influence the rates of preliminary references and the areas in which they arise.

One question raised by the TSCS was why, if a Bismarckian system, high union density and trust in the Court of Justice were important for increasing rates of preliminary references, did the UK send so many social policy references? The QCA identified that being a member of the 'World of Domestic Politics' (Falkner, *et al.* 2005, 2008), together with a larger population will lead to higher rates of preliminary references. The qualitative themes from the policy structure category in the UK case study offer some additional insight. Although Bismarckian welfare states may create rights more closely akin to property rights (Titmuss 1976, Hinrichs 2003), Beveridgean welfare states have other points where cases may arise. As eligibility for benefits in Beveridgean systems is primarily based upon residence establishing a nexus to the state, who is 'resident' for the purposes of benefits becomes a crucial and, in the UK, highly litigated issue. Also, the fact that the UK became a destination state for migration for many nationals of new accession Member States after 2004 contributed to the rise in these cases. Because the UK's equal protection legislation lagged

behind that of Europe, there also were potential points to challenge the policy structure in these areas. This policy misfit created opportunities for challenges via preliminary references. The UK cases were mostly brought on behalf of female plaintiffs, or in two instances, trans-gendered persons. Because protections were not in place, it was the more traditionally disadvantaged groups that used the policy misfit between the UK and the EU to challenge national policies.

France has a Bismarckian welfare state, but without the efficient administrative and judicial systems of the 'World of Domestic Politics' (Falkner, *et al.* 2005, 2008), a high rate of union density is also required to have a high rate of social policy preliminary references. Not only does France have strikingly low union density, in France the unions might serve in the opposite capacity. French social insurance funds are jointly administered by unions, making unions an unlikely source of support to challenge the system. Moreover, France's welfare state is very generous to insiders, who are seldom motivated to challenge the system (T. Smith 2004). They will not mount many challenges via preliminary references. Without help, outsiders will have difficulty accessing legal systems to enforce their rights. In France there are very few such helps to outsiders.

Even in the newer areas of French social policy, such as social protection, anti-discrimination and disability, there are few cases. Caune, *et al.* (2011) identify these as areas where non-traditional French policy actors have been able to use European policy to help bring about policy change. Therefore, these areas seem more likely to generate social policy preliminary references than the more

traditional social insurance areas. However, this has not as yet translated into many preliminary references in these areas, though there are a few. France does have cases in the area of reverse discrimination and opening up the civil service and protected professions. France had policies about equal pay before the EC even began. Although Annick Masselot noted that France was better at broad principles, rather than specific policies (Interview, 22/08/11), the areas in which French law was out of synch with EU law were to do with the disadvantage that French policies benefitting women caused to men. Anti-discrimination cases were a major category of cases from France, and all of the cases during the period studied were brought by or on behalf of men.

The fact that France has relatively few immigrants from the EU may also help to explain why it has few social policy preliminary references. Most French immigrants are from outside the EU, with the largest group coming from North Africa. Some discrimination against these immigrants is legal in France, and approximately seven million French jobs are closed to them based upon their nationality (Guiraudon 2008). Most of these jobs are in the French civil service or in publicly owned companies. The closed French system for its civil service and regulated professions placed France in conflict with EU law on free movement of persons and the right to establishment. Therefore, cases related to opening up the civil service and the regulated professions fall into the second important theme to the French policy structure category. However, many of these non-EU migrants discussed above will not have EU citizenship or a family link to an EU citizen, and so will not be able to use European legal precedents to challenge this discrimination. Therefore, despite this policy misfit, there are relatively few

people in France positioned to challenge the closed French civil service and professions via European law.

Structural factors in the Member State comprise the second thematic category. As discussed in the literature, structural factors can be either a barrier or a benefit to social policy preliminary references. One structural factor is Member State compliance with the EU, put into operation using the Falkner, *et al.* typologies (2005, 2008). Structural factors also include what Alter (2000) called the 'friendliness' of the legal system to litigation, such as the right to class actions or legal aid. Another potential structural factor is the interaction between layers of the national legal system, such as the judicial empowerment that Leibfried and Pierson (2000) said enabled lower German courts to circumvent more conservative precedents from higher courts. National legal culture may also play a part.

The UK case study identified some structural barriers, but also structural benefits to help overcome those barriers. One benefit was that courts were accepting of preliminary references, having become accustomed to greater oversight over the policy process. Although some courts were more resistant than others, generally the participants reported positive experiences. Even where preliminary references weren't being made, participants reported that courts enforced EU rights. There were still barriers reported. In Scotland, NGOs do not have standing to bring judicial review challenges. The costs of litigation present a barrier in two ways. There are the costs and fees necessary to bring legislation, but also costs are shifted onto the losing party in UK courts, meaning

that an unsuccessful plaintiff would bear the fees for the other party, as well. In the sorts of cases that lead to preliminary references, it is impossible to predict the outcome with confidence. They are by their nature in untested areas of law. Therefore, the risk of being unsuccessful, yet liable for a very large award of costs is a real one. Finally, the employment and social security tribunal systems and legal aid were benefits to preliminary references, and helped to overcome some of these barriers. However, current policy proposals threaten this availability of legal aid, and may upset the balance between structural barriers and benefits.

In France, the structural theme presented a major barrier to preliminary references. The extreme resistance of courts and judges to European law and European rights is very difficult to overcome. Some courts were more resistant than others, with one report that the Conseil d'État was showing leadership on references. This may lead to a higher rate of social policy preliminary references, as most of these cases will arise in the administrative courts system in France. There were sub-themes of resistance to a particular policy area, and wilful misinterpretation of EU law by French courts. All of these combine to help account for the low rate of social policy preliminary references in France.

The third thematic category relates to the actions of individuals and groups. These actors, whether they are plaintiffs, supporting groups or judges in the national system, affect rates of preliminary references. Their actions can act to overcome structural barriers in the system. Although the two previous methods of analysis included union density as a proxy to account for the impact of interest

group actors on rates of social policy references, it is difficult to draw very informed conclusions about the agency of these actors from those analyses. The qualitative case studies contributed interviews and documentary analysis and can evaluate the agency of these actors. Again, there were differences between France and the UK as to the themes that emerged within the category.

In the UK, different types of organisations backed deliberate test case strategies. These organised actors can be more strategic and advance the case law by soliciting particular cases needed to clarify points of law. The NGOs, unions and the Equality and Human Rights Commission (and its predecessor the Equal Opportunities Commission) backed these strategies. These actors employ strategic litigation to advance their policy interests. They benefit from legal aid and provide advice through benefits advisers and assist plaintiffs to access the tribunal systems and courts.

The major French theme in the category of actors was the importance of individuals. Without unions, legal NGOs, equality agencies (apart from a six-year period, 2005-2011) or other advocacy groups to help with access to the Court, it is difficult for individuals to gain access. A few determined lawyers have accounted for many of the French preliminary references. One lawyer, Hélène Masse-Dessin, was named by several interviewees as a crucial actor to advance preliminary references in France. Philippe Derouin reported trying to secure a preliminary references several times per year for over a decade before his attempts were successful (Interview, 24/08/11). Individuals were also important as plaintiffs in the actions. These individual plaintiffs were often elites

themselves, who presumably had better access to information and resources to overcome the substantial barriers in the system.

Based upon the classifications of Caune, *et al.* (2011), we might expect the types of actors that have been able to use the system successfully to influence in what areas of social policy preliminary references are seen. They identified the more traditional social insurance areas of French social policy, such as pensions and unemployment compensation, as areas where the French policy elite deny the influence of Europe, instead 'boasting' the French model. The social insurance system is very generous to insiders in these traditional areas, and as Smith points out, 'so many comfortable people resist change' (2004, p. 2). Although elites have been able to overcome barriers to access the system on their own account, it seems likely that fewer elite individuals are sufficiently motivated to bring cases to challenge the generous system for insiders.

As discussed above, Caune, *et al.* (2011) lead us to expect to see more cases in the 'newer' French social policy areas. However, although there are more cases in the area of anti-discrimination, they were brought on behalf of male plaintiffs, many of whom were elites themselves. Without access to agencies, or a very few individual lawyers, to intervene on their behalf, outsiders will have grave difficulties overcoming the barriers to access the Court. In the two previous methods, rates of union density were used to estimate the levels of support available to support litigation. The qualitative results in France indicate that French unions mostly benefit the insiders of the social welfare system and are therefore less of a force for change. The HALDE, the entity created in response to

European anti-discrimination policy pressure, could have helped non-elites gain access in these new areas, but there were no preliminary references with overt HALDE support in its six-year history. The HALDE might have matured into a body that helped to overcome barriers to the system on behalf of outsiders, but it has been dismantled.

In both France and the United Kingdom, the themes related to policy structures affect the types of cases that arise. These are the opportunities in the systems for strategic actions. The structural factors present either benefits or barriers to these preliminary references actually coming to fruition. In France, the structural factors presented one major barrier. In the UK they were mixed, but more beneficial than barriers as a whole. Then the themes related to actors help to explain how and to what extent the barriers are overcome through individual action in a complex system. The actors in both Member States helped to overcome barriers, but in the UK the groups were much more organised and the strategy more far-reaching. It was therefore much more effective than in France, in which a few privileged elites primarily benefitted.

Discussion

The research design used mixed methods to allow for maximum leverage on the research question (King, Keohane and Verba 1994). Using these three methods the inquiry makes a transition from a variable-oriented approach across the EU-15, which allows for more generalisability, to a case-oriented approach to allow for a more nuanced understanding of the complex systems. This research design

leads to some 'triangulation' of the research findings, however, the primary purpose is explanatory (Creswell and Plano Clark 2007). The objective of the research design is to further develop and understand the quantitative findings through the QCA and qualitative techniques.

As is evident from the literature review in Chapter 2, this puzzle of why some Member States send many preliminary references, while some send very few, has been much theorised. Although there were fewer empirical studies, the number of potential explanatory factors was large, especially considering the smaller sample size. By concentrating on the social policy preliminary references, this study was able to consider factors related to the underlying policy structures and welfare state. This is a contribution of this study, but it also led to still further potential explanatory factors to include in the model. The quantitative TSCS analysis in Chapter 5 reduced this large number of potential factors to a smaller number that were statistically significant. This winnowing benefitted the following QCA analysis by making it more parsimonious.

As is discussed above, the TSCS analysis indicated that having a more Bismarckian welfare state, higher union density, higher reported trust of the ECJ as an institution, a larger population, not being in the set for the judicial empowerment variable and membership in the 'World of Domestic Politics' in the Falkner *et al.* typologies (2005, 2008) should predict higher rates of references. However, those findings also raised questions.

Although population was highly significant and provided a great deal of explanatory power in the model, there were three smaller Member States (Austria, Belgium and the Netherlands) with higher rates of social policy preliminary references, and France, the second-largest Member State in the EU, had a low rate of preliminary references. Moreover, a more Bismarckian welfare state was important, but then how does that explain the rates of preliminary references of the UK and France? The UK was the only Beveridgean welfare state with a higher rate of preliminary references, whereas France, the most Bismarckian welfare state in the EU-15, had a lower rate. If union density and trust in the UK were important, what about the UK, with a low rate of union density and a strikingly low rate of reported trust in the Court? Compliance with the EU was significant, but what about Italy, which has a high rate of preliminary references, despite languishing in the 'World of Dead Letters?' (Falkner, *et al.* (2005, 2008).

The QCA helped to resolve these conflicts by identifying the pathways whereby these conditions combine together to result in higher or lower rates of social policy references. Although the QCA does confirm the importance of the factors seen to be statistically significant in the TSCS, it was included in the research design primarily to inform the TSCS, rather than to test it. The causal pathways identified by the QCA answer the 'so what?' question. They explain how these variables, identified as significant in isolation, interact in the real world of the Member States to impact upon rates of preliminary references. The QCA transitioned from the variable-oriented analysis of the TSCS to the case-oriented analysis of the qualitative case studies.

The qualitative analysis then added more detail and context. Even with the ability to group the causal conditions together into sets of conditions that lead to an outcome, there was still more nuance to grasp. The interviews with the experts working in the systems in the UK and France provided insight into what those causal factors actually mean. They highlighted the importance of actors within the system, which is more difficult to see in the earlier two analyses, even though union density was statistically significant and formed part of the primary causal pathways. As an example of the value case studies can add, in France unions might be playing a different role around preliminary references than they would elsewhere. As is discussed in depth in Chapter 7, French unions are involved in the joint administration of the traditional social security systems. These generous systems primarily benefit insiders in the French system. In part because of unions' strong connections to these joint management associations, a distance has opened up between the interests of the union and the interests of the line worker (Lallement 2008). Employers' groups and unions are geared up for lobbying and 'poorly equipped to assist their local members' (Culpepper 2008, p. 38). The unions have become integrated into institutions that have a 'broader constituency' than just union members, and the unions increasingly must intermediate between the short-term interests of their membership and the broader general interests (Lallement 2008, p. 61).'The trade unions act as the representatives and defenders of the systems. They defend both the interests of the salaried population and their own interests (Palier 2008, p. 111). Therefore, French unions have not been a voice for change or to assist the process of

bringing preliminary references to challenge the systems in which they are so intertwined.

The findings from the case studies highlight a difficulty of cross-national comparative research. Union density was included in the TSCS and QCA models as a proxy for having interest groups willing to intermediate to help bring references on behalf of outsider plaintiffs. It was chosen because rates were collected cross-nationally, but also because it was believed that the role unions played would be more comparable cross-nationally. Unfortunately, the density of union membership can't account for union agency.

The research design was chosen pragmatically to suit the research question. Although it was a sequential design, data analysis at various stages involved moving back and forth between deductive and inductive reasoning in an abductive approach (Morgan 2007). The progression from quantitative, transitioning through the QCA to qualitative case studies seemed a natural fit. However, I could find no other study integrating these methods in a mixed methods design.

There were difficulties involved in integrating these methods. First, the time involved in mastering and implementing three such diverse methods was not inconsiderable. The TSCS allowed for some generalisability across the EU-15, but presented challenges in adequately quantifying complex concepts that had been advanced as explanations for differing rates of preliminary references. The research design planned for the TSCS results to be used to reduce the number of

causal factors included in the QCA, in the interest of parsimony. However, by necessity that meant that some factors that were considered to be important in the literature could not be included. This led to concerns that perhaps an inability to adequately quantify a concept might have knock-on effects into the later, more qualitative stages. Attempts were made to address this in the case studies by opening the analysis back up and considering the problem afresh in the broadest possible light. However, it certainly had implications for what was included in the QCA analysis.

Implications

Though case studies can, as here, add understanding, they are not very generalisable. They cannot add a great deal of insight to where the EU and the Court of Justice might go now that the EU has nearly doubled in size since 2004. The newer accession states are very different politically. Many have a history of communism. They are, in many cases, more like one another than they are like the older western European Member States. More conservative precedents on labour law matters have already been identified (Davies 2008), and perhaps are attributable to the influence of judges from these newer Member States on the Court (Interview with Victoria Phillips, 16/9/11). What will happen with rates of preliminary references in these newer Member States? What will that mean for Court precedent and EU social policy? The impact of these new judges on the Court could mean that future Court decisions on social policy have a more market liberal bent. The logic of opening and integration will continue to drive precedent, and the newer accession states present pools of lower wage costs and

lower social benefits that could well lead to a race to the bottom fuelled by the four freedoms.

More generally, the continuing Eurozone crisis raises huge questions about the future shape of the European Union. At the time of this writing, in fourth quarter 2011, a major revision to the Treaty of Lisbon was being discussed as imminent. The Eurozone crisis also raises questions about the use of the preliminary reference process in the future. Financial retrenchment may lead to benefits cutbacks. Cuts to legal aid are threatened in the UK, jeopardising what was identified as a major benefit to rates of preliminary references (Interview with Sarah Clarke, 02/09/11). In France, the HALDE has been dismantled and it's not clear yet what the remit of its successor organisation might be. The crisis has shaken citizens' confidence in the EU and trust in the system. It is likely that this will lead to lower levels of trust in the Court of Justice. Will this result in lower rates of preliminary references overall?

There are as yet few references from the newer Member States. However, the early patterns indicate that there will be a wide variation in rates of references among these Member States, as well. These states received a more coordinated entry to the EU. They were required to be in compliance with the *acquis communautaire* before the date of accession. The Court of Justice provided training to national court officials in all the new Member States on the preliminary references process (Interview with Advocate General Sharpston, 08/09/11). Despite this, use of the preliminary reference process is unequal. One potential area of future research is to try to explain the variation in the rates of

preliminary references in these Member States. In light of the significant cultural and historical differences between the newer Member States and the EU-15, will the results of this study provide any inference about what might happen in the larger EU?

A Judge interviewed at the Court for this study had the impression that the cases coming from these newer Member States are following a similar pattern to the cases from the original six Member States at the beginning of the EC. They are market-making cases, and cases in the area of agricultural policy, although there were some cases starting to be seen in the area of free movement of persons. There might be a greater policy mismatch with European regulations in these Member States. Future research could explore what that might mean for preliminary references. Will there be a similar trajectory to that seen before, with a growth of preliminary references sent to the Court with a social policy dimension?

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