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CORE ANALYSIS

Social policy and the judicial making of Europe: capital, social mobilisation and minority social influence

Konstantinos Alexandris Polomarkakis

Lecturer in Law, University of Exeter, Exeter, United Kingdom
Corresponding author. E-mail: k.alexandris-polomarkakis@exeter.ac.uk

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Abstract

This article puts forward a cohesive narrative to explain the contribution of European social policy to the judicial making of Europe. By making a case for the inclusion of social policy as part of the discourse on the constitutional practice of the Court of Justice of the European Union, together with focusing on a socio-legal deconstruction of four seminal social policy judgments of the Court (*Defrenne II*, *Von Colson*, *Harz* and *Francovich*), the article undertakes a systematic approach to tracing the contribution of the field, and more specifically of its labour and non-discrimination law strands. To formulate its socio-legal analysis, the article adopts an explanatory framework, which draws on Bourdieu's concepts of capital and field, the theory of legal mobilisation and Moscovici's minority social influence, and which is applied to the selected judgments as a case-study. The framework enables the analysis to shed light on the dynamics between stakeholders in the social dimension of the European legal field and to persuasively showcase how social policy case-law, despite its *sui generis* dynamics, merits to have a place in the conversations surrounding the transformation of Europe.

Keywords: European Union Law; Court of Justice of the European Union; Bourdieu; legal mobilisation; minority social influence

1. Introduction

The Court of Justice of the European Union (CJEU/Court) has played an important role in advancing European integration, by taking centre-stage in the efforts to transform the Treaties into a proto-federal constitution.[1] Although scholars harbour different views on whether and if the CJEU single-handedly managed to constitutionalise European integration, they all agree that its contribution to furthering the latter has been notable. Yet, a systematic analysis of the contribution of social policy case-law in this endeavour is lacking, despite the area giving rise to seminal judgments such as *Defrenne II*,[2] *Von Colson*,[3] *Harz*[4] and *Francovich*.[5] This article sets out to explain how it is possible that the case-law on social policy, broadly understood and

[1]Whether this was achieved is equivocal. M Rasmussen and D Sindbjerg Martinsen, 'EU Constitutionalisation Revisited: Redressing a Central Assumption in European studies' 25 (3) (2019) European Law Journal 251.

[2]C-43/75 *Defrenne II* [1976] ECLI:EU:C:1976:56.

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

[4]C-79/83 *Harz v Deutsche Tradax* [1984] ECLI:EU:C:1984.

[5]Joined cases C-6/90 and C-9/90 *Francovich and Bonifaci v Italy* [1991] ECLI:EU:C:1991:428.

with particular emphasis on its labour and non-discrimination law components, proved decisive in the forging of the structural principles of European Union (EU) law by the CJEU,[6] despite the fact that social policy was a relative laggard in the process of integration.[7] In other words, how could social policy help drive European integration through doctrines while otherwise being side-lined in EU policy-making?

The meagre EU social laws at the time, together with the very first judgments of the Court's proto-federal jurisprudence, facilitated litigation that gave the Court the chance to further develop its constitutional practice. Through supremacy and direct effect, the foundational doctrines of that constitutional practice, national courts and individuals (as litigants, lawyers or other actors) were empowered to take part in the 'promulgation and implementation of [EU] law'.[8] Accordingly, as a litigation tool, European social policy norms tended to be invoked by claimants who wished to challenge the compatibility of Member States' provisions, or employment practices more broadly, which ostensibly fell below the EU-wide standards of protection.[9] EU social laws, thus, became a safety net, a last chance saloon for traditionally disadvantaged litigants.[10] The relatively good chances of such claims succeeding, resulting in national courts putting pressure on national legislators for positive change, rendered the reliance on European social policy norms an appealing route, despite the fact that litigants in this context tended to possess few resources and little capital.[11]

The development of European integration meant that more and more areas, even those traditionally portrayed as part of the Member States' competences, such as social policy, could not evade their adjudication before the CJEU.[12] Due to the nature of the claims put forward before national courts, the Court's engagement, at least during the proto-federal era had been constructive. Especially in relation to non-discrimination law, the Court achieved a double aim through its case-law. First, to challenge discriminatory practices and, second, to undertake a broad interpretation of EU social laws.[13] The foregoing created the right conditions and opportunity structures for litigants, especially in the context of public interest litigation, to try and make use of the preliminary reference procedure.[14] The rise of strategic litigation counterbalanced the litigants' low capital. At the same time, the content of those rulings, which apart from interpreting the EU social law in question, often asserted the authority of EU law more broadly, saw the Court willing to adjudicate such disputes, if anything, to advance its constitutional practice.[15]

For the Court to advance its constitutional practice, cases needed to reach its docket. In the social policy realm, these cases often saw disadvantaged litigants who were discriminated against or denied employment protection being supported by activist – and often pro-EU – lawyers and

[6]Note that the term CJEU is used throughout the article to ensure consistency, even though it was only formally introduced with the Treaty of Lisbon. A similar approach was taken with the regard to the notions of EU law and EU level, to include references to the pre-Maastricht era.

[7]F Scharpf, 'The Asymmetry of European Integration, or Why the EU Cannot be a "Social Market Economy"' 8 (2) (2010) Socio-Economic Review 211, 212.

[8]A-M Burley and W Mattli, 'Europe before the Court: A Political Theory of Legal Integration' 47 (1) (1993) International Organization 41, 60.

[9]AS Sweet and TL Brunell, 'Constructing a Supranational Constitution: Dispute Resolution and Governance in the European Community' 92 (1) (1998) American Political Science Review 63, 74.

[10]For example, the well-known reluctance of the UK government to greenlight further social policy-making at EU level led to an influx of preliminary references originating in UK courts that challenged the compatibility of national provisions with EU labour and non-discrimination law. Ibid 76.

[11]Ibid.

[12]L Azoulai and R Dehousse, 'The European Court of Justice and the Legal Dynamics of Integration' in E Jones, A Menon and S Weatherill (eds), *The Oxford Handbook of the European Union* (Oxford University Press 2012) 360.

[13]RA Cichowski, 'Women's Rights, the European Court, and Supranational Constitutionalism' 38 (3) (2004) Law and Society Review 489, 503.

[14]Ibid.

[15]Burley and Mattli (n 8).

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organisations, or even, indirectly, by national courts that were willing to make use of the preliminary reference procedure. Litigants' insufficient resources, manifested in low levels of economic, cultural and symbolic capital, were, thus, boosted due to the support they received by such actors, who, by reason of their background, status or role, tended to enjoy higher levels of capital. This legal mobilisation, whatever its source or form, helped amplify the social policy claim at issue. It also ensured that the case got noticed by the CJEU.

The preceding discussion explains how a social policy case, despite the onerous position of its claimant, could reach the docket of the Court. It, nonetheless, does not necessarily account for such a case being used by the CJEU as an important addition to its constitutional practice. Looking for concepts beyond legal and political science, in fields like social psychology can prove useful. Conceptualising litigants and their allies as a minority takes stock of their ever-marginalised position in terms of resources and capital in the wider context of EU litigation, especially when compared to cases of business or commercial nature. Yet, social psychology professes that certain minorities can be influential. Minority social influence shows that 'active' minorities, minorities that are pragmatic, committed and unwilling to compromise, are drivers of innovation.[16] Under these circumstances, the minority's innovative views stand a good chance of being embraced by the majority. Accordingly, the innovative use of EU law these minorities employed to advance their social policy claims during the proto-federal era, laid the groundwork for the Court to further develop its constitutional practice.

Stemming from the above, social policy can *mutatis mutandis* be responsible for some of the key judgments contributing to the Court's constitutional practice. Despite the lack of a clear vision for the area at policy level, it appeared that the labour and non-discrimination provisions in place were relied on in litigation that eventually added to the proto-federal jurisprudence of the Court. The existence of some social laws at EU level, combined with retained powers by the Member States, prompted litigants to bring cases before the Court for the reasons mentioned above. In addition, the relatively limited scope of positive integration meant that there could be clashes with various aspects of the more detailed national legislation that was applicable, which presented opportunities for adjudication. Besides, it was relatively straightforward for litigants and other actors to take stock of the relevant EU rules in place and, consequently, to try and frame cases in a way that fell within their remit.

Against this background, this article adds to the literature by focusing on the contribution of European social policy to the proto-federal jurisprudence of the Court. It does so by undertaking an interdisciplinary socio-legal analysis, drawing on Bourdieu's concepts of capital and field, and Moscovici's minority social influence, alongside accounts of legal mobilisation and historical insights, assessing these in connection with the CJEU's four seminal judgments in *Defrenne II*, *Von Colson*, *Harz* and *Francovich*. Conceptualising the Court's constitutional practice as a field highlights the power relations between the different stakeholders involved in the examined judgments. These power relations are often determined by the amounts of capital possessed by each actor. Legal mobilisation provides insights on how the stakeholders with low levels of capital could be empowered in this context, by getting support to pursue their claims through the opportunity structures present in EU litigation. Finally, minority social influence offers an explanation of the prima facie disjunction between disadvantaged claimants and the transformative impact of their case on the judicial making of Europe.

To effectively address these matters, the article first sets out the literature drawing attention to the important role various actors played in the constitutionalisation of Europe, and whose involvement is sometimes overlooked in light of the more prominent role taken on by the CJEU. At the same time, it locates its contribution to that literature by conceptualising EU law and the Court's constitutional practice as a distinct legal field, laying down the foundations for the analytical

[16]S Moscovici and B Personnaz, 'Studies in Social Influence. V. Influence and Conversion Behavior in a Perceptual Task' (1980) Journal of Experimental Social Psychology 270–2.

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framework of the article. The discussion then moves on to explain why and how social policy, and in particular its labour law and non-discrimination strands, can offer new insights by providing a fresh perspective on the Court's constitutional practice. Thereafter, the explanatory framework, which draws on the concepts of capital and field, legal mobilisation and minority social influence, is set out. Then comes the main analysis which dissects the judgments in *Defrenne II*, *Von Colson*, *Harz and Francovich* in order to trace the reasons behind European social policy's somewhat paradoxical role in providing the Court with the right conditions to move its proto-federal jurisprudence forward. Finally, the conclusion reflects on the contribution of European social policy and its place in the course of the Court's judicial making of Europe.

2. The Court and the unseen contributors to the judicial making of Europe

Lawyers and political scientists alike have painstakingly recounted how seminal judgments of the Court shaped the trajectory of European integration.[17] The mainstream narrative in the literature perceives the CJEU as the core institution responsible for bestowing a proto-federal character on the European project. The key component in carving the EU's proto-federal character was the so-called constitutionalisation of the Treaties and the EU legal order more generally. The traditional view pins this process down to a reading of the Treaties by the CJEU as if they were a constitution, departing from an interpretation similar to that of public international law.[18] This departure was achieved by the creation of doctrines 'that fixed the relationship between Community law and Member State law and rendered that relationship indistinguishable from analogous legal relationships in constitutional federal states'.[19]

The framing of the legal relationships as akin to those found in federal states prompted the observation that the CJEU was creating a proto-federal order. Supremacy and direct effect, conceived by the CJEU in *Costa v ENEL* and *Van Gend en Loos* respectively,[20] became the doctrines that monopolised the discussions around the constitutionalisation of the EU by the CJEU.[21] *Costa v ENEL* and *Van Gend en Loos* gave effect to a system of judicial remedies and enforcement that differentiated EU law from public international law.[22] Nevertheless, for such a system to become optimal, further steps were required for EU law's decoupling from international law,[23] taken by the Court in the form of follow-up judgments.[24] Although not all these follow-up judgments featured prominently in the accounts of the Court's constitutional practice, their significance in this context is uncontested.[25]

The mainstream narrative in the literature focuses on the centrality of the CJEU as the instigator of the EU's constitutional moment. This thesis is not surprising, given that seminal pieces on the matter were authored by judges and other actors within the Court.[26] Yet, it has been

[17]To name a few: E Stein, 'Lawyers, Judges, and the Making of a Transnational Constitutional' 75 (1) (1981) American Journal of International Law 1; JHH Weiler, 'The Transformation of Europe' 100 (8) (1991) Yale Law Journal 2403; Burley and Mattli (n 8); KJ Alter, 'The European Court's Political Power' 19 (3) (1996) West European Politics 458; A Stone Sweet, *The Judicial Construction of Europe* (Oxford University Press 2004).

[18]Stein (n 17).

[19]Weiler (n 17) 2413.

[20]Cases C-6/64 *Costa v ENEL* [1964] ECLI:EU:C:1964:66; C-26/62 *Van Gend en Loos* [1963] ECLI:EU:C:1963:1.

[21]A Vauchez, 'The Transnational Politics of Judicialization. Van Gend en Loos and the Making of EU Polity' 16 (1) (2010) European Law Journal 1.

[22]Weiler (n 17) 2419.

[23]Indeed, the Court relied heavily on the principle of effectiveness in its reasoning, under the double meaning of ensuring effective operation of areas of activity on the one hand and effective adherence to these areas of activity by the Member States on the other. D Chalmers and L Barroso, 'What Van Gend en Loos Stands for' 12 (1) (2014) International Journal of Constitutional Law 105, 118–19.

[24]Azoulai and Dehousse (n 12) 353.

[25]Burley and Mattli (n 8) 61–2.

[26]See the writings of Lecourt, Mancini and Pescatore to name a few.

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persuasively shown that the Court did not act alone in this process, for otherwise the backlash would have been immense. Member States, as the main players of the EU's political process, needed to be on board with, or at least not systematically against, the pertinent CJEU case-law.[27] Although presented with opportunities to openly alter their relationship with the CJEU, Member States chose not to, tacitly accepting the Court's conceptualisation of a proto-federal order.[28]

Supporting the idea that the constitutionalisation of the EU did not solely originate in Luxembourg, historical analysis has shown the influence of the negotiations of the Treaties of Paris and Rome, and the remnants incorporated therein of the federalist and constitutional aspirations from the failed Treaty establishing the European Defence Community.[29] The federalist and constitutional aspirations carried over in the framing of the EU legal order by a series of stakeholders, whose interaction and positioning close to – and at times even within – the Court, was crucial for the proto-federal order to be cemented.[30] Consequently, it is difficult to attribute the creation of the proto-federal order to the Court's constitutional practice alone. Instead, the proto-federal order appears to emanate from a synergistic interaction of various actors, including the CJEU.

The CJEU had been for the most part in alliance with the Commission's integrationist position in the context of its seminal constitutional judgments.[31] Moreover, Member States' national courts also adopted a mostly accepting position towards the CJEU's jurisprudence,[32] engaging constructively through the preliminary reference procedure, which is in itself what enabled the Court to hand down its judgments.[33] In turn, this would not have materialised had it not been for the lawyers that were made aware and sought to make use of the litigation opportunities that the EU legal order created, pushing novel claims and test cases through to the CJEU.[34] Associations, such as FIDE were also influential in the development of seminal EU law doctrines, their recommendations taken up by the CJEU.[35] Finally, the academic community of European scholars of that era, with its close ties to the Court's officials and generally pro-European attitudes, lent its support to the endeavour.[36]

Following from the above is the view of the Court not as the sole instigator of the constitutional transformation of the EU, but as the most obvious one among many. Due to its institutional position, the Court can be considered as the mouthpiece of such shared understandings of European integration. It has been receptive to both internal and external influences, aware of the surrounding context, and reactive to signals by the Member States, adapting the direction of its jurisprudence for the most part.[37] To better reflect the foregoing, more recent accounts set aside the concept of constitutionalisation in favour of the notion of constitutional practice.[38]

[27]Weiler (n 17) 2407.

[28]AS Sweet, 'The European Court of Justice and the Judicialization of EU Governance' 5 (2) (2010) Living Reviews in European Governance 15.

[29]M Rasmussen, 'The Origins of a Legal Revolution: The Early History of the European Court of Justice' 14 (2) (2008) Journal of European Integration History 77, 97.

[30]Weiler (n 17).

[31]With few exceptions, such as C-36/74 *Walrave and Koch v Association Union Cycliste Internationale and Others* [1974] ECLI:EU:C:1974:140 and *Defrenne II* (n 2). Stein (n 17) 25.

[32]With some reservations by supreme courts of the Member States as to the outer limits of supremacy. Alter (n 17) 464–65.

[33]Weiler (n 17) 2425–6.

[34]Burley and Mattli (n 8) 59.

[35]M Rasmussen and B Davies, 'From International Law to a European Rechtsgemeinschaft: Towards a New History of European Law, 1950–1979' in J Laursen (ed), *Institutions and Dynamics of the European Community, 1973–83* (Nomos 2014).

[36]J Shaw, 'European Union Legal Studies in Crisis? Towards a New Dynamic' 16 (2) (1996) Oxford Journal of Legal Studies 231, 246. Although, for a notable critic of the Court, see: H Rasmussen, *On Law and Policy in the European Court of Justice: A Comparative Study in Judicial Policymaking* (Martinus Nijhoff 1986).

[37]D Chalmers, 'Judicial Preferences and the Community Legal Order' 60 (2) (1997) Modern Law Review 164.

[38]B Davies and M Rasmussen, 'Towards a New History of European Law' 21 (3) (2012) Contemporary European History, 305–18, 315–16; B Davies, *Resisting the European Court of Justice: West Germany's Confrontation with European Law, 1949–1979* (Cambridge University Press 2012) 4.

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This article acknowledges the advances and insights offered by the interdisciplinary and often empirical accounts of the Court. Not only that, but it purports to add to these accounts by looking at other analytical frameworks that can be used to explain what underpinned the creation of core EU law doctrines in policy areas less studied in that regard. Drawing on socio-legal approaches, the constitutional practice of European law is considered as a distinct legal field. The concept of field has been defined by French Sociologist Pierre Bourdieu as a self-governing social space, where 'actors and institutions [are] in competition with each other for control of the right to determine the law'.[39] The field, thus, constitutes an area of power struggles among the actors involved therein. The concept of field is not unknown to the study of the EU. It has been applied to the institutional, political and governance elements of the project.[40]

Vauchez introduced the notion of the European legal field in order to locate the position of law in a broadly construed understanding of EU government, focusing on the structure of EU institutions, the relations among them and the influence they exert on European integration.[41] By focusing on the role of lawyers, he contends that they, together with the idea of law as the object of power struggles within the European legal field, were instrumental in building and shaping the so-called transformation of Europe before the Court.[42] He continues:

> The knowledge and beliefs that are being produced, however, are not just some sort of esoteric or technical message, but form a set of representations of the European Union, its history and its government. In other words, what is usually considered as the mere surface of the social processes that shape European integration could well be one of the essential spaces where the government of Europe is being shaped.[43]

The different actors within the European legal field, their power relations, worldviews and characteristics ought to be studied in greater depth, for they play a central role in determining the understanding of the law, which then prevails within the EU legal order. The CJEU is, thus, one among the many actors involved in the determination process. Its prominence in the pertinent discourse rests on the fact that it is tasked with handing down judgments, which provide a resolution to questions of interpretation and validity of EU law, using an 'authoritative tone' that supports a 'magisterially institutional voice'.[44] Behind the façade of a judgment lie the power struggles between the views of the judges, the Court's bureaucracy, any EU institutions and Member States involved, national courts, lawyers, litigants and collective actors, to name the parties often implicated in a case.

The influence of each actor features in varying extents in the literature, with litigants getting the least attention, at least in terms of their influence and contribution from a legal field perspective.[45]

[39]P Bourdieu, 'The Force of Law: Toward a Sociology of the Juridical Field' 38 (5) (1987) Hastings Law Journal 805, 816.

[40]A Cohen, 'Bourdieu Hits Brussels: The Genesis and Structure of the European Field of Power' 5 (3) (2011) International Political Sociology 335; N Kauppi, 'Bourdieu's political Sociology and the Politics of European Integration' 32 (5/6) (2003) Theory and Society 775.

[41]A Vauchez, 'The Force of a Weak Field: Law and Lawyers in the Government of the European Union (For a Renewed Research Agenda)' 2 (2) (2008) International Political Sociology 128, 130.

[42]Ibid., 129.

[43]Ibid.

[44]M De S-O-L'E Lasser, *Judicial Deliberations: A Comparative Analysis of Transparency and Legitimacy* (Oxford University Press 2009) 107.

[45]There have been studies on some characteristics, but these do not focus on bringing forward socio-legal analytical frameworks that can explain the influence of litigants in the field and their interaction with other actors. See the slight critique provided in: Vauchez (n 41). On the contrary, the latter offers a thoughtful engagement with Bourdieu's sociology of law in the context of European integration, by highlighting the contribution of lawyers to the European legal field. Similarly in relation to the role and capital of CJEU judges and Advocates General, see: A Cohen, '"Ten Majestic Figures in Long Amaranth Robes": The Formation of the Court of Justice of the European Communities' in A Vauchez and B de Witte (eds), *Lawyering Europe: European Law as a Transnational Social Field* (Hart 2013).

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Despite that, litigants are important in that it is them that trigger the preliminary reference procedure, which had enabled the CJEU to hand down its seminal judgments in *Van Gend en Loos* and *Costa v ENEL* that propounded the proto-federal character of the EU. Especially since the creation of supremacy and direct effect, which introduced the idea of enforcement through private actors litigating on the basis of EU law, thus empowering the preliminary reference procedure, litigants, alongside their lawyers, as well as lower national courts sought to take advantage of the new legal landscape.[46] To this matrix, civil society organisations and collective actors can be added. They were of particular assistance to worse-off or otherwise disadvantaged litigants.[47] The afore-mentioned group of actors, often portrayed as close allies, was present in power struggles taking place within the field of the constitutional practice of European law, according to which the transformation of Europe was a social construct, an osmosis of different views, whose final outcome was depicted in the text of the Court's constitutional judgments.[48]

Perhaps the lack of attention towards litigants is to be attributed to their relatively weak position, compared to other actors in the examined field. To rely on another Bourdieusian concept, litigants tend to enjoy lower amounts of capital, be it economic, cultural, symbolic or social, compared to other actors.[49] Their influence in the final determination of EU law, is likely to be meagre, particularly if they belong to the so-called 'have-nots' or 'one-shotters', litigants with few resources and, consequently, low levels of capital which only rarely make use of transnational litigation, such as the one provided under the preliminary reference procedure.[50]

If the constitutional practice of European law is the outcome of power struggles that denotes collective action,[51] then what – if any – is the role of litigants and their allies? The legal mobilisation literature ascertains that a 'one-shotter' is likely to succeed in the pursuit of their claim, and might in turn have higher chances of influencing the constitutional acquis communautaire, if they are supported by a 'repeat player': a collective actor, association, trade union or activist lawyer.[52] Naturally, there are cases where these repeat players do not exist. Yet, sometimes, litigants and their allies manage to exert considerable influence in the adjudicative process of the Court, appearing to constitute a paradoxically prominent minority in the power struggles of the legal field in question. It is here that the concept of minority social influence, which has its roots in social psychology, can generate new insights.[53] Capital, legal mobilisation and minority social influence form the basis of this article's analytical framework, cementing its contribution to the literature that sees the Court's constitutional practice of European law as a legal field, a social arena where actors interact with and influence each other. As such, these concepts are touched on in more detail in Section 4.

3. Social policy as the analytical context

Before presenting the analytical framework in more detail and test its potential by applying it to a number of seminal judgments that advanced the constitutional practice of European law, it is important to specify the policy area under examination in this article. The discussion of concepts

[46]Burley and Mattli (n 8) 58.

[47]RA Cichowski, *The European Court and Civil Society: Litigation, Mobilization and Governance* (Cambridge University Press 2007).

[48]Cohen (n 45) 70.

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

[50]M Galanter, 'Why the "Haves" Come out Ahead: Speculations on the Limits of Legal Change' 9 (1) (1974) Law and Society Review 95.

[51]Cohen (n 45) 36.

[52]L Conant, *Justice Contained: Law and Politics in the European Union* (Cornell University Press 2002) 18.

[53]S Moscovici, *Social Influence and Social Change* (Conformity 1976).

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like capital, legal mobilisation and minority social influence will gain further credibility if it is done in a clearly delineated and specialised context.[54] The article seeks to put forward a new framework according to which the contribution of prima facie weak actors within the legal field of the Court's constitutional practice can be explained. To do so, the field ought to be narrowed down further, by looking at a particular subject matter of case-law, where the majority of litigants are unlikely to be considered as 'haves', lacking resources and high levels of capital. At the same time, that subject matter needs to be a policy area of European integration that has yielded a number of CJEU judgments of constitutional significance. Moreover, it would be interesting to look at a relatively under-researched area in that regard. The re-evaluations of the Court's constitutional practice mainly focus on *Van Gend en Loos* and *Costa v ENEL*, or other judgments closely linked to free movement with little systematic attention paid to the social dimension of European integration.[55]

A notable component of the social dimension is social policy. At first glance, the polysemy of the term makes social policy hard to define.[56] Free movement of workers and, later on, EU citizenship, social security, labour and non-discrimination law, can all potentially fall under its remit, especially if a broad definition is adopted. Trying to trace the contribution of all these strands of case-law in the confines of an article would have been unmanageable. Not only that, but each strand has had its own distinct development and underpinning rationale, rooted in different legal bases and tied to particular adjudicative approaches by the CJEU, which makes their holistic examination difficult.[57]

Instead, this article chooses to examine the strand of case-law that deals with labour law and discrimination in the workplace. This is not a random choice, given the content of the preceding paragraph. Labour and non-discrimination law are the strands of social policy most closely associated with the term from a formal perspective, especially during the proto-federal era.[58] The provisions found in the social policy chapter of the Treaties for the most part refer to EU action in labour and non-discrimination law. Furthermore, searching InfoCuria, the Court's online database, using social policy as the subject matter would yield results that almost exclusively refer to these two strands.

Indeed, labour and non-discrimination law are key pillars of European social policy and have contributed to European integration.[59] They also constitute the perfect testing ground of the article's analytical framework, which purports to explain the contribution of such case-law to the Court's constitutional practice. Unlike some more solidaristic areas of social policy, there are some EU-level rules that can be invoked by litigants in national courts. Litigants that seek to benefit from the minimum harmonisation approach of EU labour and non-discrimination law, which often lays down a lowest common denominator among the Member States, de

[54]Y Dezalay and MR Madsen, 'The Force of Law and Lawyers: Pierre Bourdieu and the Reflexive Sociology of Law' 8 (2012) Annual Review of Law and Social Science 433, 441.

[55]eg, although Phelan dedicates a whole chapter to Van Duyn, there is very little mention of the social dimension of the free movement of workers, and only in relation to Lecourt's writings. William Phelan, *Great Judgments of the European Court of Justice Rethinking the Landmark Decisions of the Foundational Period* (Cambridge University Press 2019) 169.

[56]RR Geyer, *Exploring European Social Policy* (Polity Press 2013) 4–6.

[57]For example, free movement of workers is a fundamental freedom, a fact alone that would help explain its contribution to the judicial making of Europe, but which simultaneously distinguishes it from other European social policy strands. The requirement for having exercised free movement rights also leads to the exclusion of social security case-law, as it poses limitations to the number and type of claimants. Moreover, other strands like EU citizenship only gained prominence after the end of the Court's proto-federal jurisprudence with the entry into force of the Treaty of Maastricht. The latter also marked a more expansive framing of European social policy, going beyond work-related aspects of welfare. For more on the latter, see: C Kilpatrick, 'The displacement of Social Europe: a productive lens of inquiry' (2018) European Constitutional Law Review 62, 64.

[58]D Ashiagbor, 'EMU and the Shift in the European Labour Law Agenda: From "Social Policy" to "Employment Policy"' 7 (3) (2001) European Law Journal 311, 317.

[59]G Abels, 'Gender Equality Policy' in H Heinelt and M Knodt (eds), *Policies within the EU Multi-Level System. Instruments and Strategies of European Governance* (Nomos 2011) 344.

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facto tend not to be privileged. Their circumstances would make it difficult for them to instigate change. To begin with, their lack of resources, especially of financial nature, constituted an obstacle to engaging in litigation.[60] Social policy's more peripheral role vis-à-vis the single market compared to the fundamental freedoms was another reason why litigants faced additional hurdles when bringing their claims forward.[61] These factors therefore make it all the more interesting to offer an explanation of the circumstances in which these litigants, and their allies, managed to gain an influential position in the labour and non-discrimination strands of case-law. Finally, although judgments such as *Defrenne II* and *Francovich* have seen the spotlight of academic commentary, there is no cohesive narrative that links these judgments together while assessing their contribution to the Court's proto-federal jurisprudence.

4. Capital, legal mobilisation and minority social influence

This article contends that there are three concepts, which, together, can act as a framework to explain the contribution of European social policy to the proto-federal order through the Court's constitutional practice of European law: first, the Bourdieusian concept of capital, with its many manifestations, within the EU legal field more broadly, and that of the Court's constitutional practice more specifically; second, the framework of legal mobilisation, which has prompted scholarly interest by political scientists and legal academics alike; third, the, relatively unknown to EU studies, idea of minority social influence, rooted in the work of social psychologist Serge Moscovici. This section sets out these concepts, which provide a persuasive analytical framework to showcase how the social policy case-law of the Court took the role of a constitutional facilitator for the realisation of the proto-federal order.

The selected concepts are interlinked and interdependent. Taken together, capital, legal mobilisation and minority social influence offer novel insights into the study of this strand of the Court's proto-federal jurisprudence. Although the concepts are self-standing, as manifested in studies that have focused independently on the role of capital, or, more often in EU scholarship, on that of legal mobilisation, the article is based on a conscious choice to bring them together in order to offer a more compelling explanation of the social policy's contribution to the judicial making of Europe. Inadequate resources or an inferior position de facto make litigants and the individuals associated with them a minority in the EU legal field, while legal mobilisation is a distinguishable pattern employed by such actors to compensate for their otherwise low levels of capital. Minority social influence, drawing on social psychology, offers an additional layer of speculation behind the seemingly paradoxical success of the – often disadvantaged – minorities under examination.

A. Capital in the EU legal field

It was mentioned in the second section of this article that the EU litigation landscape, including that giving rise to the Court's constitutional practice, can be characterised as a distinct legal field of transnational magnitude[62] due to it drawing on national judicial or otherwise rules of procedural and substantive character, alongside the available litigation avenues in the Treaties.[63] It is also part

[60]M Gilles, 'Class Warfare: The Disappearance of Low-Income Litigants from the Civil Docket' 65 (6) (2016) Emory Law Journal 1530.

[61]L Vanhala, 'Anti-discrimination Policy Actors and Their Use of Litigation Strategies: The Influence of Identity Politics' 16 (5) (2009) Journal of European Public Policy 738, 742.

[62]JL Gibson and GA Caldeira, 'The Legitimacy of Transnational Institutions: Compliance, Support, and the European Court of Justice' 39 (2) (1995) American Journal of Political Science 459, 461.

[63]eg direct litigation route under Art 263 of the Treaty on the Functioning of the European Union (TFEU), or indirect under Art 267 TFEU.

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of the wider European field of power, which in sociological terms represents the overarching 'locus of the struggle for power between different types of power holders'.[64] As a field, the EU legal field more broadly, as well as that of the Court's constitutional practice more specifically, comprise a number of stakeholders: the CJEU and its bureaucracy, its national counterparts, litigants and their lawyers, and collective actors and similar organisations.[65] These stakeholders inevitably interacted with each other in the course of the CJEU's proto-federal jurisprudence.[66] The power dynamics within the afore-mentioned field are – at least partly –determined by the levels of capital each stakeholder possesses.[67]

'Field' and 'capital' are concepts coined by French sociologist Pierre Bourdieu, who acknowledged the existence of a distinct legal field.[68] As mentioned above, capital is a determinant of power within a field. Capital also comes in different forms. However, before setting those out, it is important to first define it. Capital is a twofold concept manifested as the innate force behind social interactions, but also as an underlying principle of society more broadly, acting as a behavioural code instilled in each person through their upbringing, and which pre-determines their disposition.[69] Whomever possesses capital is likely to win the afore-mentioned struggle for power, while it is society and its structures that apportion capital to the stakeholders within a field. In turn, this means that, focusing on the EU legal field, including that of the Court's constitutional practice, there are some conclusions that can be drawn for the actors involved therein. For example, judges, especially those of the CJEU, due to its position as the final arbiter for EU law matters, are likely to enjoy *a*, if not *the*, decisive role in the context of the EU legal field. Likewise, they are likely to hold larger amounts of capital, since they are traditionally perceived as belonging to the dominant class.[70]

Despite their interpretative monopoly, decisive role and seemingly abundant capital, judges alone do not determine the outcome of a case before them. Other stakeholders of the legal field exert influence in the judicial process. Bourdieu poignantly observed the following:

> The practical content of the law which emerges in the judgment is the product of a symbolic struggle between professionals possessing unequal technical skills and social influence. They thus have unequal ability to marshal the available juridical resources through the exploration and exploitation of 'possible rules,' and to use them effectively, as symbolic weapons, to win their case. The juridical effect of the rule—its real meaning—can be discovered in the specific power relation between professionals. Assuming that the abstract equity of the contrary positions they represent is the same, this power relation might be thought of as corresponding to the power relations between the parties in the case.[71]

Lawyers, therefore, play an important role in the process, as does any other support litigants receive. The litigants' socio-economic background also influences their access to justice and, *mutatis mutandis*, the outcome of the judicial process in the EU legal field. The interdependence of these actors is the reason why the capital of each and every one of them matters. Their levels of

[64]A Cohen, 'Bourdieu Hits Brussels: The Genesis and Structure of the European Field of Power' 5 (3) (2011) International Political Sociology 335.

[65]Drawing parallels with Schepel's and Wesseling's Legal Community. H Schepel and R Wesseling, 'The Legal Community: Judges, Lawyers, Officials and Clerks in the Writing of Europe' 3 (2) (1997) European Law Journal 165.

[66]A Cohen, 'Constitutionalism without Constitution: Transnational Elites between Political Mobilization and Legal Expertise in the Making of a Constitution for Europe (1940s–1960s)' 32 (1) (2007) Law and Social Inquiry 109, 111.

[67]P Bourdieu and LJD Wacquant, *An Invitation to Reflexive Sociology* (University of Chicago Press 1992) 97.

[68]Bourdieu (n 39).

[69]Bourdieu (n 49) 241. P Bourdieu, 'Outline of the Theory of Practice: Structures and the Habitus' in GM Spiegel (ed), *Practicing History* (Routledge 2005) 184.

[70]Bourdieu (n 39) 842.

[71]Ibid., 827.

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capital assign their position within the judicial process and the EU legal field more broadly. Capital extends beyond an economic understanding to other forms, such as social and cultural.[72] All forms of capital are interrelated. Economic capital refers to anything that can be translated into monetary value, including property rights. Social capital captures people's connections, including club or other powerful group affiliations. Finally, cultural capital is threefold and includes mental and bodily dispositions (embodied state), cultural goods (objectified state), and education, qualifications and other skills (institutionalised state).[73] When a specie of capital is recognised as legitimate, then it constitutes symbolic capital.[74]

The three forms of capital might be interdependent, but the salience each bears depends on the field where the stakeholders interact. This is so because 'a field constructs its own particular symbolic economy in terms of the valorization of specific combinations and forms of capital'.[75] In the EU legal field, this goes beyond a simplified exchange between judges and lawyers to a complicated amalgam of stakeholders in the form of the CJEU, national courts and their bureaucracies, lawyers, supporting actors and litigants. Since the EU legal field consists of actors that fulfil often mutual needs, determining and upholding EU law in the wider sense, then forms of capital beyond its merely economic manifestation might take the lead in influencing the judicial processes and power struggles among them.

Even though economic capital is important for litigants to afford legal representation and contemplate commencement of such proceedings, possessing social capital is equally important for gaining support from collective actors, or liaising with contacts with appropriate expertise. Likewise, symbolic capital in the form of similar – or even better, identical – qualifications or education could help improve the degree of interaction between lawyers and judges. The foregoing is common for all legal settings or fields. In addition to its distinct legalese, the EU legal field presents an additional challenge: the double hurdle of its transnational context, where actors often tend to interact first at a national and then at a supranational level.[76] The accumulation of various forms of capital could result in different degrees of power at each level.

Given that non-discrimination law has been a notable component of European social policy, and considering that during the proto-federal era gender was the main ground of discrimination, apart from nationality, clearly protected under EU law, it would be useful to briefly discuss the gendered dimension of capital. Gender and its dispositions have been considered as always underpinning the various forms of capital, and at the same time constituting a hidden, 'universal and natural', form of capital on its own.[77] This duality in the representation of gender in the capital discourse emanates from the societal valorisation of gender per se as a determinant of power in a field on the one hand, and the impact it has on the formation of the traditional forms of capital on the other. In turn, cases of discrimination on grounds of gender tend to involve women, which are traditionally more disadvantaged.[78] To achieve a breakthrough in the field, they need to possess or accumulate adequate levels of one or more forms of capital, which, based on the foregoing, is harder compared to their male counterparts.

[72]Bourdieu (n 49) 242.

[73]Ibid.

[74]P Bourdieu, 'Social Space and Symbolic Power' 7 (1) (1989) Sociological Theory 14, 17.

[75]Dezalay and Madsen (n 54) 441.

[76]eg in the context of the preliminary reference procedure, a case needs to first be raised and be admissible in national courts, for the pertinent questions of EU law to be raised before the CJEU.

[77]L McCall, 'Does Gender Fit? Bourdieu, Feminism, and Conceptions of Social Order' 21 (6) (1992) Theory and Society 837, 842–4. For more on gendered capital in the EU legal field, see: KA Polomarkakis, 'Gendered Capital and Litigants in EU Equality Case-Law' (2022) Modern Law Review Early View <https://doi.org/10.1111/1468-2230.12745> accessed 25 May 2022.

[78]Indeed, gender alone 'highlights the unequal social relations between women and men'. H-J Bieling and T Diez, 'Linking Gender Perspectives to Integration Theory: The Need for Dialogue' in G Abels and H MacRae (eds), *Gendering European Integration Theory: Engaging new Dialogues* (Verlag Barbara Budrich 2016) 280.

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More broadly, the stakeholders involved in bringing forward social policy cases before the CJEU were faced with a series of innate obstacles in terms of capital formation and accumulation. The uneven policy trajectory and relatively narrow ambit of the subject matter negatively affected the starting point of anyone wishing to rely on the social acquis to precipitate positive change. Along the same lines, litigants in social policy case-law are traditionally worse off, not only from an economic, but also from a cultural or social capital perspective, than those in internal market cases, not least because they are not backed by financial interests.[79] These factors undoubtedly dampen the breadth of the cases that can be brought before the CJEU, as well as their successful litigation and transformative potential. Yet, in some instances, the afore-mentioned obstacles were overcome, and European social policy case-law managed to shape the proto-federal order of the EU. This could be explained by making recourse to legal mobilisation and minority social influence.

B. Legal mobilisation

Legal mobilisation addresses some of the problems facing individuals or groups wishing to instigate positive change. They might not be able to instigate that change through the policy process because they lack the required combination of capital, but they can litigate their case through the courts. Accordingly, legal mobilisation at EU level could help overcome obstacles or disadvantages at the national level.[80] This is in line with a broad definition of legal mobilisation, which departs from the traditional socio-legal view of the concept to acknowledge its use by a wider range of actors extending beyond social movements.[81] Such a broad understanding of legal mobilisation covers instances of strategic litigation initiated by holders of capital, not supporting a social movement per se, but other interests. Giangaleazzo Stendardi and Flaminio Costa, the individuals behind *Costa v ENEL*, for example, were motivated by favourable views of an expansive understanding of economic freedoms and an activist belief in the European rule of law.[82]

As a bottom-up mechanism of instigating change, legal mobilisation is not immune to the implications of capital. Litigants like Costa, other Euro-lawyers, or some of the companies engaging in internal market litigation are at a better starting point than Gabrielle Defrenne, due to the attributes of capital they possess. The former, enjoying higher overall levels of capital due to their know-how, standing, connections or money, have an advantage over the latter, enjoying some of the benefits that Galanter identified as going hand-in-hand with the so-called 'haves' or 'repeat players'.[83] These advantages include past experience, resources, lobbying and informal institutional relations, increased credibility and not being risk averse more generally.[84] On the other hand, the so-called 'have-nots' or 'one-shotters', individual litigants at the bottom end of the capital continuum, need to push hard and mobilise strategically to increase their levels of capital, and, consequently their chances of success.

The social policy case-law is an area where 'one-shotters' abound. The litigants themselves are often marginalised and disadvantaged, with the exception of the odd trade union or other institutional or collective actor. For these litigants, supported legal mobilisation through strategic litigation is key. Support by what would have otherwise been repeat players, such as interest groups, activist lawyers, trade unions or other institutional and organisational actors 'can give individuals

[79]On Euro-law firms as business professionals, see: Schepel and Wesseling (n 65) 182.

[80]Cichowski (n 47) 6.

[81]E Lehoucq and WK Taylor, 'Conceptualizing Legal Mobilization: How Should We Understand the Deployment of Legal Strategies?' 45 (1) (2020) Law and Social Inquiry 166, 168.

[82]Vauchez (n 21) 17–19; A Arena, 'From an Unpaid Electricity Bill to the Primacy of EU Law: Gian Galeazzo Stendardi and the Making of Costa v. ENEL' 30 (3) (2019) European Journal of International Law 1017.

[83]Galanter (n 50).

[84]Ibid., 98–101.

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who would normally pursue just "one shot" in court the advantages of repeat players'.[85] This form of supported legal mobilisation, akin to that undertaken by social movements, has provided disadvantaged actors within the EU legal field with avenues for effective legal representation, resources, specialisation and networks, which effectively increases their capital, in particular its social and cultural forms.

Non-discrimination law, in particular, is a poster child for legal mobilisation. Ever since the emergence of second-wave feminism in the late 1960s and 1970s, European feminists, acting as an advocacy coalition, pushed for policy change at EU level to tackle, among other issues, discrimination in the workplace.[86] These feminists saw the CJEU as the institution capable of enforcing working women's rights derived from EU law in their respective Member States.[87] To achieve that, they sought test cases, with the most famous among them being that of Gabrielle Defrenne.[88] The next section of this article examines the Court's seminal judgment in *Defrenne II* in detail. Feminist lawyers, public interest groups or equality bodies brought additional capital to disadvantaged women litigants, enabling them not only to bring their cases forward, but to have a viable chance of success.[89] Success in that context even resulted in changes to national legislation.[90]

A form of transnational activism, legal mobilisation in European social policy case-law has enabled ostensibly weak actors to push their claims through and instigate positive change for themselves and the proto-federal legal order of the EU.[91] Legislative change at the national level as a result of successful mobilisation leading to and following up on a CJEU judgment, for example, buttresses the enforcement of EU law, developing the Court's constitutional practice. Indeed, Schmidt sees constitutional change throughout the EU as 'the significant prize of successful litigation'.[92] The constitutional change was achieved indirectly. The claims that social policy litigants raised in this supported mobilisation landscape, in turn, permitted the Court to enrich its constitutional practice of European law.[93]

At this point, one may ponder on the motivations behind lending support to social policy litigation. Why did support emerge for this strand of legal mobilisation that resulted in such profound constitutional ramifications? Although better perceived as a continuum rather than binary, actors supporting such mobilisation harboured both internal and external motives vis-à-vis the subject matter. Social policy cases represent a good example of altruistic mobilisation, a fertile ground of cause-lawyering to improve conditions in the labour market, social protection and welfare across the EU.[94] Identity politics is another selfless reason why certain collective actors, trade unions, equality bodies or other similar organisations, intervene and support litigation in the field. On the other hand, advancing European integration more broadly is a distinct external motive, deeply associated with Euro-lawyers. The latter example of mobilisation is less about the substance of the case from a social policy perspective, and more about its potential for constitutional change, developing the proto-federal order of the EU.

[85]Conant (n 52) 18.

[86]S Mazey, 'Europeanization of national agendas to the nationalization of a European agenda?' 5 (1) (1998) Journal of European Public Policy 131.

[87]Ibid.

[88]C Hoskyns, *Integrating Gender: Women, Law and Politics in the European Union* (Verso 1996) 77.

[89]KJ Alter and J Vargas, 'Explaining Variation in the Use of European Litigation Strategies: European Community Law and British Gender Equality Policy' 33 (4) (2000) Comparative Political Studies 452, 466.

[90]RA Cichowski, 'Legal Mobilization, Transnational Activism, and Gender Equality in the EU' 28 (2) (2013) Canadian Journal of Law and Society / Revue Canadienne Droit et Société 209, 221–2.

[91]SG Tarrow, *Power in Movement: Social Movements and Contentious Politics* (3rd edn, Cambridge University Press 2011) 254–5.

[92]SK Schmidt, *The European Court of Justice and the Policy Process: The Shadow of Case Law* (Oxford University Press 2018) 36.

[93]Cichowski (n 47) 7.

[94]On altruistic mobilisation, see: V Passalacqua, 'Legal Mobilization via Preliminary Reference: Insights from the Case of Migrant Rights' 58 (3) (2021) Common Market Law Review 751, 764–6.

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The combined capital of those litigating social policy case-law is undoubtedly increased through legal mobilisation, no matter its motives. Although it is difficult to decipher the variations of legal mobilisation in detail,[95] this article offers an understanding of its effectiveness in the specific context examined herein through the concept of minority social influence. Despite their prima facie lower levels of capital, actors involved in social policy litigation at EU level are empowered by legal mobilisation to successfully pursue their claims and, at the same time, they end up influencing the Court's constitutional practice of European law as a result. In this context, minority social influence offers an explanation of the transformative – in constitutional terms – impact of social policy case-law, despite it being a resource-lite – at least in terms of material resources and economic capital – area of mobilisation.

C. Minority social influence

Minority social influence, a concept coined by French social psychologist Serge Moscovici,[96] is 'a form of social influence in which the deviant subgroup rejects the established group norm and persuades the majority to the minority attitude, opinion, belief, or behaviour pattern, thereby changing the norm'.[97] To contextualise this definition, in social policy case-law the deviant subgroup is comprised of the claimants and any other stakeholders that support them (lawyers, activists, national courts, organisations, etc). The term 'deviant' should not be perceived as having a negative connotation, but purely as denoting marginalised social groups with limited resources and capital, termed active minorities, a broad group including – but not limited to – social and scientific movements, whose common thread 'is the tendency to seek visibility, to forge an identity, to convert the majority to their ideas and beliefs, in short, to change the groups or societies to which they belong'.[98] Similarly, the established group norm in the examined context is the traditionally held view, especially until the Treaty of Maastricht, that social policy-making sits at the margins of European integration compared to other areas, being primarily located within the realm of the Member States' competence. As such, social policy was prima facie unlikely to contribute to the Court's constitutional practice. Indicatively, until the end of 1975 only two cases had been lodged before the CJEU falling under the social policy subject matter, *Defrenne I* and *II*.

The preceding analysis constitutes an abstract construction of the mainstream view. More specific manifestations of it arise in each dispute adjudicated before the CJEU. To give some examples, the majoritarian view prior to *Defrenne II* was that it was debatable that the wording of Article 119 of the Treaty establishing the European Economic Community (EEC), one of the then few social policy provisions, could be enforced in horizontal situations to benefit disadvantaged women claimants.[99] Likewise, workarounds to the lack of horizontal direct effect of Directives, the core legislative instrument of EU policy-making in labour and non-discrimination law were not systematically developed prior to *Von Colson* and *Harz*. Finally, before *Francovich* it was unlikely that non-compliance with a Directive on the insolvency of the employer would give rise to state liability, and avail a precise remedy for litigants, eroding the principle of national procedural autonomy.

Minority social influence offers fresh insights for the EU legal field, by plausibly establishing a link between the emergence of social policy case-law, which was supported by legal mobilisation, and the impact that this had on the development of the proto-federal order of the EU. This is because the European social policy case-law stakeholders, representing the minority in the

[95]L Conant et al, 'Mobilizing European Law' 25 (9) (2018) Journal of European Public Policy 1376.

[96]Moscovici (n 53).

[97]AM Colman, *A Dictionary of Psychology* (3rd edn, Oxford University Press 2008).

[98]S Moscovici and G Mugny, 'Minority Influence' in PB Paulus (ed), *Basic Group Processes* (Springer 1983) 42.

[99]Alluding to the Commission's view in distinguishing between public and private employers in the case. S Tas, 'The Court of Justice in the Archives Project: Analysis of the Defrenne II Case (43/75)' (2021) Academy of European Law Working Paper AEL 2021/09 16–17.

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popularity of their views and accumulation of capital, managed to influence the majority, the capital holders that represent the institutionalised majority. In the EU legal field, the majority would include the Court and other EU institutions, as well as stakeholders that uncritically side with the dominant views, such as (some of) the Member States.

Against this backdrop, a pressing question lingers. How does the minority manage to persuade the majority of its views? A minority will be successful if it 'has a clear view of reality, is committed to its view, and is unwilling to yield or compromise with respect to its position'.[100] If these qualities exist, then the minority is likely to exert influence on the majority through the validation process, wherein the majority is keen to understand and ascertain the minority's arguments, becoming more receptive to the latter.[101] This is possible because active minorities are the key drivers of innovation, which, together with the majority's erring on conformity, underpin decision-making processes.[102] The innovation in the examined field rests on the efforts to rely on the fragments of the European social policy acquis, centred on labour and non-discrimination law, to induce change. Although the end-goal of the minority is not always to induce a constitutional change, their innovative approach might entail new readings of EU law that *mutatis mutandis* helped propound the Court's proto-federal jurisprudence.

A problem that these active minorities, such as the actors involved in litigating European social policy, are faced with is lack of – mainly economic – capital or resources. Although having economic capital in abundance would undoubtedly help such minorities, they have successfully devised alternative strategies to succeed through innovation.[103] Indeed, such a pattern has been observed in the field of legal mobilisation. Actors with low levels of capital associated with material resources resorted to strategies that drew on non-material resources and non-economic forms of capital for their claims to succeed.[104] Active minorities' constant struggle for innovation as telos, framed as a committed and uncompromised endeavour, is the main route for them to have their voice heard and achieve policy and societal change. The concept of minority social influence does not involve a forced compliance mechanism.[105] Instead, it seeks to influence the majority's behaviour, hoping to achieve attitude change, reflected in policy and judicial decision-making outcomes. The risk remains, though, that the intended outcome may never materialise.

Studies have shown that innovation exerted through minority social influence tends to produce change, which is mostly covert or private, leaving additional hurdles for the active minorities to overcome in order to ensure that change eventually materialises in the public sphere too.[106] Nevertheless, in the legal field, their influence already seems to extend to the public sphere because judges can become allies to active minorities. Bourdieu noted that 'through the more or less extensive freedom of interpretation granted to them in the application of rules, judges introduce the changes and innovations which are indispensable for the survival of the system'.[107] Even though the motivation behind the commitment to change may differ, judges' attitudes may still support an active minority's innovative agenda, especially if it helps serve their own. Likewise, through legal mobilisation, a small minority, as in the single unit of the European social policy claimant,

[100]Moscovici and Personnaz (n 16) 271.

[101]Ibid., 272.

[102]Moscovici and Mugny (n 98) 43.

[103]Ibid., 44–5.

[104]M Aspinwall, 'Legal Mobilisation without Resources? How Civil Society Organizations Generate and Share Alternative Resources in Vulnerable Communities' 48 (2) (2021) Journal of Law and Society 202.

[105]U Liebert, 'Gendering Europeanisation: Making Equality Work in Theory and Practice' in G Abels and H MacRae (eds), *Gendering European Integration Theory: Engaging new Dialogues* (Verlag Barbara Budrich 2016) 157.

[106]Moscovici and Personnaz (n 16) 281. Cf W Wood, 'Attitude Change: Persuasion and Social Influence' (2000) 51 Annual Review of Psychology 539, 543.

[107]Bourdieu (n 39) 824.

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is supported to become an active one,[108] with its voice being amplified as a result, subsequently increasing that minority's accumulation of various forms of capital.

In the context of the article's case-study, it is important to underline that minority social influence remains relevant and can continue to act as part of the explanatory framework even if the minorities teaming up to pursue a case do not share the same objectives or motivations. The same applies in regard to the objectives and motivations of the majority. They do not have to allign with those of the active minority. By way of illustration, there might be different underlying motivations from the part of the CJEU for accepting the minority's position. Such motivations could be self-serving like the aggrandisement of its role, for example, as opposed to a desire to advance and enforce gender equality per se, which could be the objective sought by the minority. This does not render minority social influence irrelevant, but it rather means that the innovation brought forward by the minority should also act as a tool to serve the motivations of the actors representing the majority. What is, thus, required is some behavioural alignment between the two sides for the minority position to be eventually satisfied by being relied on, and by simultaneously acting as an acceptable vehicle serving (part of) the majority's own motivations to innovate.[109]

Drawing parallels to the prerequisites for litigation to precipitate policy change,[110] what is required for the framework to work in the field of the Court's constitutional practice is: a) a network of actors constituting a powerful minority, b) the latter's desire to innovate by relying on European social policy for whatsoever motive, c) national courts' use of the preliminary reference procedure, and d) eventual alignment between the innovation proposed by the minority and the Court's receptiveness to it. It does not mean that whenever these conditions are met, minority social influence would have played a role, but that in these circumstances, and upon further engaging with the particulars of each case, minority social influence might be a persuasive tool to add to the narrative used to examine the Court's proto-federal judgments.

5. The framework in action: *Defrenne II*, *Von Colson*, *Harz*, *Francovich* and their judicial making of Europe

After setting out capital, legal mobilisation and minority social influence as the three main components of the explanatory framework, this section applies these concepts to four seminal social policy cases. Before doing so, the peculiarities of social policy compared to other strands of the Court's case-law are worth considering. Especially, insofar as the examined labour and non-discrimination litigation is concerned, the following can be observed: there was an insignificant or non-existent free movement element; apart from Article 119 EEC, the majority of the provisions were of secondary EU law, namely Directives; most of the situations arose horizontally between private parties, the employee and the employer. These elements presented opportunities for the Court to develop aspects of the constitutional practice of European law, considering that at that time not all characteristics of the proto-federal order were fully fleshed out. Preliminary references with social policy as their subject matter raised several issues of constitutional significance necessary for the realisation of a comprehensive proto-federal legal order, such as further particulars surrounding the enforcement of EU law, the extent of legal integration's interpretative authority and influence, and even alternative remedies for disadvantaged claimants whose EU rights were undermined by their Member States.

[108]The stakeholders involved in legal mobilisation can be perceived as an ingroup minority within the EU legal field, which according to studies has higher chances of exerting its influence over the majority. B David and JC Turner, 'Studies in Self-categorization and Minority Conversion: Is Being a Member of the Out-group an Advantage? 35 (1) (1996) British Journal of Social Psychology 179; Wood (n 106) 560.

[109]In that regard it is important to note how the minority source is perceived. W Wood, et al, 'Minority influence: A Meta-analytic Review of Social Influence Processes' 115 (3) (1994) Psychological Bulletin 323, 335–6.

[110]Alter and Vargas (n 89) 453.

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When adjudicating cases with constitutional ramifications, the Court, despite its strong relationship with a variety of stakeholders, must act cautiously. Otherwise, ostensibly over-reaching judgments may lead to non-compliance or, worse, outright rejection by national courts, and could even culminate in Member States' governments trying to change the Court's composition, given their central role in the appointment process of its members.[111] This is likely the reason why the Court chose to lay down direct effect and supremacy in separate judgments, for example, and that it was in the lookout for further opportunities to develop these doctrines further through the preliminary references that reached its docket. Moreover, the outcome of the CJEU's judicial decision-making is not immune from intervention to weaken its scope, be it at national or EU level.[112]

The afore-mentioned limitations can also apply to cases of influential minorities, empowered through legal mobilisation or increased levels of capital. However, in relation to the Court's proto-federal judgments, which set out the most cherished EU law doctrines, attempts to dilute them had been largely unsuccessful.[113] Overriding constitutional doctrines necessitate constitutional amendments, which are translated into Treaty change in EU law, something hard to materialise given the requirement for unanimity and difficulties in reaching consensus among Member States with diverse interests.[114] Consequently, the inherent difficulties in overturning constitutional judgments helped the proto-federal jurisprudence of the Court to establish itself as such, standing the test of time, with most critiques touching on the exact degree of the Court's contribution therein.[115]

How did European social policy feature in this endeavour? Through its contribution to the conceptualisation of certain aspects of the Court's proto-federal jurisprudence. Simply put, some of the relevant cases arose within the labour and non-discrimination context of European social policy, with the preliminary references seeking guidance as to the interpretation of EU social laws, be it in the form of Treaty Articles or other secondary legislation. Regarding the cases under consideration for the purposes of this article, *Defrenne II* revolved around what was then Article 119 EEC on equal pay for equal work; *Von Colson* and *Harz* concerned the Equal Treatment Directive 76/207/EEC; whereas *Francovich* involved the Employer's Insolvency Directive 80/987/EEC. In fact, social policy is the sole subject matter coming up for all four cases when searching the CJEU's InfoCuria database. The conceptualisation of the doctrines that arose therein could, thus, partly be attributed to the circumstances that prompted the actors involved in those cases, be it the litigants, their lawyers or the national court, to approach the CJEU through the preliminary reference procedure.

In turn, these circumstances prompted the ever-expanding jurisprudence of the Court, which not only substituted formal policy-making, but also pushed the proto-federal order forward.[116] The constitutional impact of equality case-law has already been singled out,[117] but, as *Francovich* demonstrates, such assertions could be transplanted to other areas of European social policy, such as labour law. The synergies between judicial social policy-making and constitutional law-making by the Court have been acknowledged elsewhere.[118] Granted, one could argue that the

[111]LR Helfer and A-M Slaughter, 'Toward a Theory of Effective Supranational Adjudication' 107 (2) (1997) Yale Law Journal 273, 315.

[112]Rasmussen and Sindbjerg Martinsen (n 1).

[113]Alter (n 17) 477. Although following Weiss, attempts to dilute the effect of CJEU judgments are currently on the rise if the recent judgments by the Polish Constitutional Tribunal and the Romanian Constitutional Court are to be considered.

[114]Ibid.

[115]See Section 2.

[116]Cichowski (n 47) 91; D Curtin, 'Scalping the Community Legislator: Occupational Pensions and "Barber"' 27 (3) (1990) Common Market Law Review 454.

[117]T Hervey, 'Thirty Years of EU Sex Equality: Looking Backwards, Looking Forwards' 12 (4) (2005) Maastricht Journal of European and Comparative Law 307, 319–20.

[118]Ibid.

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CJEU conceiving or elaborating doctrines through its social policy case-law might be clearly accidental.[119] Nevertheless, such an approach disregards the collective character of the constitutionalisation process[120] reflected in the conceptualisation of the Court's constitutional practice as a legal field wherein its various actors interact with each other in a power struggle aiming towards the determination of the law.

At this stage, it is worth briefly touching on the selection of these cases. Since the ambit of this article's research question centres on the CJEU-derived doctrines that constitutionalised the EU legal order in the context of social policy case-law, it is essential that the judgments chosen for analysis possess three characteristics: a) they are filed under the social policy subject matter in InfoCuria; b) they introduced and/or manifestly enriched a well-established doctrine of EU law; and c) they were decided during and contributed to the proto-federal era of the EU legal order. These are the parameters that defined what a seminal case is for present purposes.[121]

On that basis, four judgments were chosen: *Defrenne II*, in which the Court clearly spelled out the horizontality of direct effect; *Von Colson* and *Harz*, associated with the principle of harmonious interpretation or indirect effect; and *Francovich*, where state liability was affirmed as a means to ensure the effectiveness of Community law. Arguably, this is a small sample of social policy case-law, especially if a broad definition of social policy is adopted. Yet, it is important to note that the article focuses on the labour and non-discrimination strands of European social policy for reasons mentioned earlier, which considerably decreases the number of eligible cases. Indicatively, a search on InfoCuria yields only eight results of judgments delivered until the end of 1979 with social policy as their subject matter.[122] Moreover, the key objective of the article is to showcase the potential of the analytical framework in constructing a cohesive narrative to trace the contribution of social policy case-law to the Court's constitutional practice. Accordingly, and similar to how other strands of case-law have been discussed and grouped in the literature on the transformation of Europe, these four cases are good illustrations of well-known textbook examples of the Court's constitutional practice, and satisfy the criteria of the preceding paragraph to apply the analytical framework thereon. Follow-up studies could explore a higher number of cases from a macro-level perspective, also going beyond the InfoCuria's – at times – rigid classification.

Applying the explanatory framework to these cases achieves two overarching aims. First, it showcases the framework's relevance. Second, it helps to better elucidate the dynamics behind the contribution of social policy case-law to the constitutionalisation of the EU. In other words, it helps construct a cohesive narrative. The foregoing renders this section a case-study for the plausibility of the framework and the increased contextualisation of the Court's jurisprudence following socio-legal and interdisciplinary traditions.[123] As such, the section does not intend to offer a doctrinal account or an exhaustive analysis of the legal significance of the four cases,

[119]Drawing parallels with what has been argued in relation to the legal revolution prompted by the Court's proto-federal jurisprudence. Rasmussen (n 29) 98.

[120]Cohen (n 45) 36.

[121]On the polysemy of the term 'landmark cases', see: A Vauchez, 'EU Law Classics in the Making: Methodological Notes on Grands arrêts at the European Court of Justice' in F Nicola and B Davies (eds), *EU Law Stories: Contextual and Critical Histories of European Jurisprudence* (Cambridge University Press 2017) 22–6.

[122]The number rises significantly thereafter, once secondary legislation in the form of Directives entered into force. Note though, that it does not mean that their contribution to the Court's constitutional practice rose exponentially. Naturally, there would be cases that either did not contribute, but might have also constrained the constitutional practice, eg Case C-152/84 *Marshall v Southampton and South-West Hampshire Area Health Authority* [1986] ECLI:EU:C:1986:84. Further research is needed in the area.

[123]B Davies and F Nicola, 'Introduction to EU Law Stories' in F Nicola and B Davies (eds), *EU Law Stories: Contextual and Critical Histories of European Jurisprudence* (Cambridge University Press 2017) 9–12.

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not least because these abound in the academic literature. Instead, the analysis adopts a socio-legal, interdisciplinary approach, rooted in the chosen explanatory framework, to offer fresh insights into the judicial constitutionalisation of the EU's proto-federal order through the Court's social policy case-law, focusing on its labour and non-discrimination components.

A. Defrenne II: *the textbook case*

Defrenne II is arguably the pre-eminent case of European social policy and its non-discrimination strand more specifically. It enshrined in EU law the principle of equal pay for equal work between men and women, laid down in what was then Article 119 EEC. At the same time, the case contributed to the proto-federal legal order of the EU. The Court explicitly spelled out the existence of horizontal direct effect: the ability of individuals to rely directly on a provision of EU law, even against another private party.[124] The constitutional implications of the judgment were immense. The CJEU, by fleshing out the specifics of direct effect further, accepting its horizontal application, contributed the final piece of the puzzle regarding the enforcement of EU law, broadening significantly the pool of situations where individuals could make use of the preliminary reference procedure.[125] Although previous judgments paved the way and hinted at the existence of horizontal direct effect,[126] it was in *Defrenne II* that the Court handed down a fully realised conceptualisation of it, framing it as a positive right in the face of a narrowly worded provision seemingly addressed to the Member States.[127]

The foregoing shows what propelled *Defrenne II* to be a textbook case for horizontal direct effect and the affirmation of a cornerstone principle of EU law alike. Yet, it is also the textbook case of strategic litigation through legal mobilisation with a litigant successfully relying on EU law to pursue their claims.[128] But how did Gabrielle Defrenne, a flight attendant for the then Belgian flag carrier SABENA, manage to precipitate a change of such magnitude? On the face of it, a woman in a precarious job, fired at the age of 40, as opposed to 55 for her male counterparts, must have been situated at the lower end in terms of capital accumulation, no matter which form. The most obvious route of support, and mobilisation, the trade unions, was not an option for her, or her women co-workers.[129] For them, a professional organisation was in place, 'for some time unrecognised as a social partner by management and other unions', which later became formally known as the Belgian Corporation of Flying Hostesses (BCFH).[130] Amongst their series of actions, they sought a test case to reach the courts. Defrenne, willing to fight her dismissal,[131] but not to take an active role publicly, stepped forward.[132]

[124]*Defrenne II* (n 2) para 40.

[125]KJ Alter, 'Who Are the "Masters of the Treaty"?: European Governments and the European Court of Justice' 52 (1) (1998) International Organization 121.

[126]See cases C-78/70 *Deutsche Grammophon v Metro SB* [1971] ECLI:EU:C:1971:59, C-15/74 *Centrafarm BV and Others v Sterling Drug* [1974] ECLI:EU:C:1974:114, and *Walrave* (n 31).

[127]G Bebr, *Development of Judicial Control of the European Communities* (Springer 1981) 600; S O'Leary, 'Defrenne II Revisited' in MP Maduro and L Azoulai (eds), *The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Hart 2010) 274–5.

[128]Schmidt (n 92) 36.

[129]A van der Vleuten, *The Price of Gender Equality: Member States and Governance in the European Union* (Ashgate 2016) 78. On the general lack of support for women by trade unions of that era, see: É Gubin, *Éliane Vogel-Polsky: A Woman of Conviction* (Institute for the Equality of Women and Men 2008) 81.

[130]V D'Hooghe, 'Article 119: A Practical Tool for Stewardesses to Obtain Equal Pay in the European Community (Belgium, 1968–1980)' in Y Gradskova and S Sanders (eds), *Institutionalizing Gender Equality: Historical and Global Perspectives* (Lexington Books 2015) 56.

[131]Hoskyns (n 88) 77.

[132]D'Hooghe (n 130) 46.

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Defrenne, herself a minority due to her low levels of capital, paired up with an active minority, BCFH, to gain adequate representation and support, and to improve the chances of her claim succeeding in court. Nevertheless, due to its non-recognition as a trade union, the position of BCFH was relatively weak. It was still an outsider in industrial relations and the EU legal field more broadly. Nevertheless, BCFH's standing as a feminist organisation, provided it with cultural and social capital, and helped it find the right lawyers for the claim, Éliane Vogel-Polsky and Marie-Thérèse Cuvelliez, active in the feminist movement, cause-lawyering and academic community, and long known to each other since university.[133] Inspired by the women's strike at the Belgian weapons factory Herstal, Vogel-Polsky saw the opportunities that a horizontally directly effective Article 119 EEC would create and teamed up with Cuvelliez to look for a test case, which they found in Defrenne.[134]

Vogel-Polsky and Cuvelliez boosted Defrenne's chances considerably.[135] They were insiders of the (EU) legal field and, in advocating for women's protection and empowerment, sided with the agenda of BCFH, together constituting a potentially powerful active minority, with increased levels of all forms of capital, and mobilised to make use of the EU legal arena. Moreover, according to social psychology, a minority will succeed in exerting influence if it is aware of the reality, committed to its view and unwilling to compromise.[136] At an interview, Vogel-Polsky noted that, even before the case was brought, she was convinced that Article 119 EEC was capable of direct effect, but was repeatedly dismissed as a professional feminist by Euro-lawyer colleagues.[137] She alone could not push for change. She needed a case, and further support, which she found in her feminist comrades, women workers and their associations, such as the BCFH, and finally Defrenne as the ideal test case. Precipitating change turns, therefore, into a collective endeavour for someone who wants to innovate.

Here, the innovation propounded by the team behind *Defrenne II* was simple: to rely on EU law for the protection and promotion of the rights of women workers, being disregarded at the national level. Vogel-Polsky and Cuvelliez sought to achieve this by taking advantage of the emerging constitutionalisation of the EU by the Court. Indeed, Vogel-Polsky admitted that she was convinced of the CJEU's fundamental role because, in her view, the supranational mechanisms (direct effect and supremacy) that supported the creation of the proto-federal order and which were coined by the Court, signalled an institution that was willing not simply to reiterate the law, but to create it.[138] This, together with the overall attitude of the Court's stakeholders, who strived through their interpretation of the law to create a European consciousness, inspired her to pursue strategic litigation and cause-lawyering.[139] There were signals that this group might be receptive towards innovation, recalling Bourdieu's observations about judges and their desire to innovate.[140] In fact, it has been noted that the Court in *Defrenne II* engaged 'in an absolutely original approach'.[141]

At this stage, it seems that the requirements for this famous social policy case to contribute to the judicial constitutionalisation of Europe were met. There was an active minority of various actors (claimant, professional organisation, lawyers) that wanted to innovate, which, allied together,

[133]Gubin (n 129) 26–7.

[134]Van der Vleuten (n 129) 78.

[135]Note that Vogel-Polsky was not mentioned in the dossier of the case. Instead Cuvelliez was shown as Defrenne's lawyer in the proceedings, with Vogel-Polsky taking the role of consultant. Tas (n 99) 24

[136]Moscovici and Personnaz (n 16) 271.

[137]É Vogel-Polsky, 'Agir pour les droits des femmes' 2003 (2) (2003) Raisons Politiques 139, 142.

[138]Ibid., 140.

[139]Ibid., 140.

[140]Bourdieu (n 39) 824.

[141]O Pollicino, 'Legal Reasoning of the Court of Justice in the Context of the Principle of Equality between Judicial Activism and Self-restraint' 5 (3) (2004) German Law Journal 283, 293.

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increased their levels of capital. In addition, *Defrenne II* was a clear example of mobilisation, where altruism and identity politics on behalf of BCFH, Vogel-Polsky and Cuvelliez were instrumental in bringing the case forward.[142] However, the process of persuading the majority to side with their view took time. *Defrenne* was more of a saga, resulting in three judgments by the Court. The first,[143] in 1971 against Belgium,[144] was a failure.[145] The Court found that statutory pensions did not fall within the definition of pay under Article 119 EEC, despite the sympathy expressed by the Advocate General assigned to the case.[146]

As an active minority exhibiting the prerequisites for successful minority social influence, they persevered. The fact that preliminary references were sent to the CJEU by the Belgian courts was an early sign of success, at least in terms of their mobilisation effort. The second was the sympathy of Advocate General Dutheillet de Lamothe, assigned to the first Defrenne case, and his hinting that Article 119 EEC was directly effective, something that was used by the claimant's lawyers in *Defrenne II*.[147] The intervening years between the two CJEU judgments (1971–1976), during which Europe witnessed the rise of second-wave feminism, widespread industrial action in the form of strikes and the institutional commitment to social policy at the EU level, constitute the third.[148] These show how actors within the legal field could interact and influence each other. Cuvelliez herself noted that *Defrenne II* was ostensibly taken much more seriously from the outset.[149]

The Court was likely persuaded due to the increased capital of everyone involved in supporting Defrenne's case, their mobilisation and conformity to the requirements for successful minority social influence. Their commitment to innovate succeeded in precipitating change, but this took time. The Court was also influenced by the social reality, which in turn helped the latter to better understand the claimant's position.[150] In addition, the Court's prior engagement in the constitutionalisation of the EU might have made it easier for it to eventually find that Article 119 EEC was capable of horizontal direct effect. Research in the archives of the case has shown that the Court ruled out the Commission's argument about a distinction between private and public sector employees, disregarding the views of this powerful player in the EU legal field.[151]

The judgment represented an important breakthrough on behalf of everyone involved in the case, and its significance for both European social policy and the proto-federal legal order is undeniable.[152] In relation to the more tangible aspects of the case, though, the Court yielded to the economic arguments by the intervening Member States, mainly the UK, rejecting the retroactive application of the principle, which meant that Defrenne still suffered a material loss.[153] Even though the explanatory framework and its components showed how this landmark social policy ruling contributed to an overall positive outcome alongside the further elucidation of the Court's constitutional practice, this was restricted in practical terms to future cases. This outcome confirmed the role capital plays, by showing that being a minority, no matter how active and mobilised, still amounts to being disadvantaged compared to the ever-so powerful Member States.

[142]In addition to limited support by trade unions, support by the European Commission was absent too. Hoskyns (n 88) 69.

[143]Interestingly, the case which gave rise to the preliminary reference that resulted in the *Defrenne I* judgment by the Court was lodged in Belgian courts after the one that gave rise to *Defrenne II*.

[144]C-80/70 *Defrenne v Belgian State* [1971] ECLI:EU:C:1971:55.

[145]Vogel-Polsky (n 137) 142.

[146]van der Vleuten (n 129) 78–9.

[147]Tas (n 99) 14.

[148]Vogel-Polsky (n 137) 142.

[149]Hoskyns (n 88) 90.

[150]Ibid., 92.

[151]Tas (n 99) 16–7.

[152]Cichowski (n 47) 98; W van Gerven, 'Contribution de l'arrêt Defrenne au développement du droit communautaire' (1977) 13 Cahiers de Droit Européen 131.

[153]F Nicola, 'Waiting for the Barbarians: Inside the Archives of the European Court of Justice' in C Kilpatrick and J Scott (eds), *New Legal Approaches to Studying the Court of Justice: Revisiting Law in Context* (Oxford University Press 2020) 84–5.

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B. Von Colson *and* Harz*: the underdogs*

In contrast to *Defrenne II*, the *Von Colson* and *Harz* judgments are rather subdued, with less academic commentary surrounding them. Nevertheless, they left their mark as seminal judgments of the so-called second wave of constitutionalisation.[154] The latter revolves around the creation of doctrines, such as indirect effect and state liability, which further empowered national courts by providing them with 'enhanced means of guaranteeing the effectiveness of [EU] law'.[155] Furthermore, the judgments showcase the dynamic application of the analytical framework depending on the type of social policy case in question. Here, key actors that played an instrumental role in the trajectory of the case were not the claimants' activist lawyers or a civil society organisation, but, instead, national first instance courts. It was a different kind of mobilisation, with seemingly more powerful allies, in terms of the afore-mentioned actors' standing and accumulation of capital in the legal field.

The Court in *Von Colson* introduced the doctrine of indirect effect, also known as the principle of harmonious interpretation. The doctrine crystallised a duty falling on the Member States, including national courts, to interpret relevant domestic law in light of EU law, insofar as possible.[156] It helped overcome issues of enforcement of provisions of EU law that did not fulfil the direct effect conditions and has been widely used as a workaround to the lack of horizontal direct effect of Directives. Additionally, indirect effect reinforced the perception of national courts as EU courts.[157] *Harz* was an almost identical judgment that was handed down on the same day.[158]

Sabine Von Colson and Elisabeth Kamann were female social workers who applied for positions at the Werl prison in the German state of North Rhine-Westphalia. Despite them being qualified, their applications were rejected on grounds of their sex, officials claiming that it would be risky to appoint women to work in a men's prison.[159] In Hamburg, Dorit Harz found herself in a similar position. A business graduate, she applied for a position at the private company Deutsche Tradax, but was informed by the manager that they would only consider men, due to the market in agricultural raw materials being male-dominated, coupled with the company's strong presence in Saudi Arabia.[160] The weak societal position of the claimants in terms of capital is obvious.[161] As women looking for employment, their economic capital was likely low. Despite being qualified, their gender put them at an undue disadvantage in the job market, recalling the gendered dimension of capital, including in its cultural and social forms.

The problem that led to the preliminary references before the CJEU was not the finding of discrimination on grounds of sex, which the national courts in Hamm and Hamburg established had taken place. Instead, it was that the national legislation setting out the available sanctions for victims of discrimination in recruitment under §611a II BGB (German Civil Code) provided only minimal compensation in connection with the application stage.[162] Apart from its inability to act as an incentive to eliminate discrimination on grounds of sex in recruitment, the national courts were wary of the paragraph's compliance with EU law, namely Directive 76/207/EEC, for whose transposition it had been enacted. This is what prompted the almost identical references, which gave rise to this cornerstone principle. Created by the CJEU as a way to compensate for the lack of direct effect of the Directive's

[154]Stone Sweet (n 17) 69. *Von Colson* in particular, having been handed down right before *Harz*.

[155]Ibid., 69–70.

[156]*Von Colson* (n 3) para 26.

[157]Stone Sweet (n 17) 70.

[158]*Harz* (n 4).

[159]D Curtin, 'Effective Sanctions and the Equal Treatment Directive: The Von Colson and Harz Cases' 22 (3) (1985) Common Market Law Review 505, 507.

[160]Ibid.

[161]Especially if one considers some of the candid justifications put forward by Deutsche Tradax. V Slupik, 'Verrechtlichung der Frauenfrage – Befriedungspolitik oder Emanzipationschance? Die aktuelle Diskussion eines Anti-Diskriminierungsgesetzes' 15 (4) (1982) Kritische Justiz 348, 357.

[162]Curtin (n 159) 508.

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provision at issue,[163] the conceptualisation of indirect effect was, moreover, accompanied by a constitutional reasoning relying on the principle of sincere co-operation,[164] which in turn enriched the Court's jurisprudence shaping up the proto-federal order of the EU.

Similar to what was the case when analysing *Defrenne II*, the aim of this section is not to offer a detailed account of the cases, which already exists, but to apply the explanatory framework so as to decipher what was so special about them that led the Court to hand down a judgment with constitutional implications. This becomes an even more interesting question if one considers the litigants' low levels of capital as women who suffered discrimination. Unlike *Defrenne II*, where a lot has been written about the actors who supported the claimant, there is not as much information available in relation to Von Colson and Kamann, or Harz. The *Harz* judgment mentions that the regional department promoting equality for women (*Leitstelle Gleichstellung der Frau*) requested an explanation from the company, but at the 'instigation of the plaintiff'.[165] Consequently, it appears that there was no well-orchestrated effort to support the claimants – at least not overtly. In Germany, campaigns by organisations such as the afore-mentioned regional department were generally disregarded at that time, highlighting weak levels of capital and mobilisation more broadly.[166]

However, the question remains: how were Von Colson, Kamann and Harz able to precipitate paradigmatic change through their cases? It seems they acquired a different ally: the national courts adjudicating their claims. German courts had been especially active in bringing references on matters of EU equality case-law. Unlike other jurisdictions, such as the UK, first instance labour courts played an active role in taking advantage of the preliminary reference procedure, representing the majority of German references on gender equality in the 1980s and 1990s.[167] *Von Colson* and *Harz* originated in two of these courts: the first instance labour courts of Hamm and Hamburg respectively. Apparently, there was some court-based mobilisation in place.

This court-based mobilisation stemmed from a form of inter-court competition characteristic of Germany, which allowed the lower courts there to pit the CJEU's approach to gender quality against that of the Federal Constitutional Court, or other higher courts for that matter, and, contrary to other jurisdictions such as Italy and Spain, to choose the CJEU approach as the way forward.[168] The inter-court competition could open up avenues for litigants and their lawyers, by making non-economic forms of capital more influential in the judicial decision-making process. Lower courts in Germany have been seen as occasional rebels to higher courts' judgments,[169] which, in turn, could render them more receptive to novel claims by minorities and, consequently, the perfect arena for legal mobilisation. Indeed, when comparing lower labour courts 'with active judges and lawyers' in Germany to their UK counterparts, Kilpatrick characterises them as 'innovative protagonists in preliminary reference dialogue and interaction with EC sources'.[170] Their receptiveness to innovation denotes how minority social influence can explain the outcome in *Von*

[163]The provision at issue was Art 6 on effective remedies.

[164]Based on what was then Art 5 EC, a provision that the Court also relied on in *Francovich*. I Maher, 'National Courts as European Community Courts' 14 (2) (1994) Legal Studies 226, 231.

[165]*Harz* (n 4).

[166]Slupik (n 161) 364–5.

[167]According to a study by Kilpatrick, 60 per cent (24 out of 40) of the preliminary references on gender equality in Germany originated in first instance courts, and in particular first instance labour courts (19 out of 40). Especially in the 1980s, four out of the six preliminary references made, originated in three first instance labour courts. C Kilpatrick, 'Gender Equality: A Fundamental Dialogue' in S Sciarra (ed), *Labour Law in the Courts: National Judges and the ECJ* (Hart 2001) 45. This trend seems to have been maintained with German lower courts continuing to send references to the CJEU. R Kelemen and T Pavone, 'The Political Geography of Legal Integration: Visualizing Institutional Change in the European Union' 70 (3) (2018) World Politics 358, 382.

[168]Kilpatrick (n 167) 39.

[169]Ibid., 54.

[170]Ibid., 53–4.

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Colson and *Harz*. Judicial support, no matter its underlying motives, also increased the minority's levels of non-economic forms of capital in the legal field.

The court-based mobilisation was undoubtedly beneficial to the claimants. National courts were key in ensuring that their cases reached the EU legal field. At the same time, they constituted an actor within that field, according to earlier developments in the CJEU's constitutional practice. The motives behind this mobilisation were likely mostly external. National courts must have wanted to ensure effective remedies for victims of discrimination. Indeed, the first instance labour court in *Von Colson* appeared to have inserted a pre-emptive statement of its position regarding the type of compensation that would be appropriate.[171] The court in *Harz* also discussed leaving out §611a II BGB in favour of a remedy found elsewhere in German civil law.[172] This approach can be perceived as a methodological tool on behalf of the national courts in their attempt to influence 'the ensuing supranational legal debate and interpretation'.[173] The CJEU, especially in the first decades of its jurisdiction, was receptive to such tactics, to encourage the use of the preliminary reference procedure.

The Hamm and Hamburg first instance labour courts, therefore, not only mobilised but made themselves part of the minority, 'attempting to circumvent a national provision clearly at odds with [EU] obligation in circumstances where the legislature has so far failed to amend the law'.[174] Given their depiction as rebels and their position in the judicial hierarchy, they were in a way a minority, with aligned interests, but perhaps different motives, with the minority formed by the litigants and their lawyers in instigating change. The two labour courts also employed a pattern characterised by Kilpatrick as same-issue repetition.[175] Indeed, the same issue was referred only months apart by labour courts located in different cities, in different *Länder*. Finally, when the judgments by the CJEU were handed down, German labour courts entered into a dialogue with each other 'on the possibilities for judicial action within the terms of the German Civil Code',[176] as a result of the newly minted interpretative obligation that formed the basis of indirect effect.

This sequence of events frames a concerted effort by the national courts which is not limited to isolated examples. The combination of the pre-emptive framing of references in *Von Colson* and *Harz* and the same-issue repetition pattern both point to tactics falling within the minority social influence paradigm:[177] namely, belief in a cause, perseverance and attempts at innovation by hinting at the desired end result, prompting the CJEU to find a way to achieve it. The Court responded positively to this call for innovation by adopting a new approach, manifested in the creation of another doctrine of constitutional magnitude.[178]

The first instance labour courts were instrumental in enabling the claims of Von Colson, Kamann and Harz to precipitate change. Alongside them, there was a wave of legal mobilisation that dominated the CJEU at that time, and which boosted the non-economic forms of the litigants' capital. Inspired by its judgment in *Defrenne II*, whose significance activists made sure to spread across Member States, 'individuals and legal activists created the subsequent opportunity for the [CJEU] to further expand and elaborate these rights'.[179] National courts, at least in cases such as

[171] *Von Colson* (n 3) para 9.

[172] J Shaw, 'European Community Judicial Method: Its Application to Sex Discrimination Law' 19 (4) (1990) Industrial Law Journal 228, 235.

[173] S A Nyikos, 'Strategic Interaction among Courts within the Preliminary Reference Process—Stage 1: National Court Preemptive Opinions' 45 (4) (2006) European Journal of Political Research 527, 530–1.

[174] Shaw (n 172) 231.

[175] Kilpatrick (n 167) 47.

[176] Ibid., 58.

[177] On the repetition effect, see: Moscovici and Mugny (n 98) 47–8.

[178] J Steiner, 'EEC Directives: A New Route to Enforcement?' 101 (4) (1985) Law Quarterly Review 491.

[179] Cichowski (n 90) 217.

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Von Colson and *Harz*, were taking part as active stakeholders in this arena of women's transnational activism.[180] The result was yet another powerful judgment.

As ever, when first bringing a constitutional principle to light, the CJEU was somewhat Delphic, but the seeds for further elaboration were sown.[181] The fact that *Harz*, a case involving a private employer, was not distinguished also paved the way forward for the use of the doctrine as a workaround to the lack of horizontal direct effect of Directives, hinting at the limitations of active minorities in fully controlling the outcome of their case. Both judgments were a victory for the litigants, who received appropriate compensation. They also represented an important moment for EU law, by allowing the Court to further elucidate crucial elements of the proto-federal order. Lastly, *Von Colson* and *Harz* showed how, even without substantial capital or well-orchestrated support at the pre-litigation stage, mobilisation can still occur through other stakeholders in the EU legal field, the national courts and minority social influence coming to play in such a context.

C. Francovich: *the Last Supper*

The final judgment that rounds off the analysis, *Francovich*, is more widely accepted as a landmark one, at least in comparison to *Von Colson* and *Harz*. *Francovich* prompted the Court to conceive yet another constitutional doctrine, that of state liability for breaches of EU law. The doctrine further empowers the private enforcement of EU law, by creating a remedy that until that point was not explicitly spelled out in the Treaties.[182] In doing so, the Court followed its teleological interpretation of the Treaties, similar to *Costa v ENEL* and *Van Gend en Loos*, on which its reasoning in *Francovich* elaborated, rendering the latter their 'ultimate consequence'.[183] It is characterised as the 'Last Supper' case of the case-study since it is widely perceived as the final judgment of the Court during the heyday of its proto-federal jurisprudence. Moreover, in English language textbooks of EU law, it also seems to have been superseded by *Brasserie du Pêcheur*.[184]

Similar to *Brasserie*, *Francovich* also consisted of joined cases. On the one hand, there was Andrea Francovich, who was owed part of his wages by his former employer, CDN Elettronica, and was unable to enforce a prior judgment against the company since the bailiff assigned by the national court to collect the money was forced to submit a negative return.[185] On the other hand, there was Danila Bonifaci, with 33 co-workers. They had worked for another insolvent company, Gaia Confezioni, and discovered that, despite their wages owed having been proved as debt in the insolvency process, it was unlikely they would receive any of them.[186]

The cases were lodged in neighbouring tribunals in the province of Vicenza. Not only that but the questions put forward before the CJEU were identical. The subject matter, although located within the realm of European social policy is also different from *Defrenne II*, *Von Colson* and *Harz*, in that it moves away from non-discrimination to *stricto sensu* employment law, namely Directive 80/987/EEC and the protection of employees in the event of the insolvency of the employer, which Italy had failed to implement.[187] The claimants here, workers whose wages were

[180]Cichowski (n 47) 186.

[181]Shaw (n 172). For a different view, see: L Niglia, 'Form and Substance in European Constitutional Law: The "Social" Character of Indirect Effect' 16 (4) (2010) European Law Journal 439.

[182]M Ross, 'Beyond Francovich' 56 (1) (1993) Modern Law Review 55.

[183]G Bebr, 'Joined Cases C-6/90 and 9/90, Francovich v Italy, Bonifaci v Italy Judgment of the Court of Justice of 19 November 1991' 29 (3) (1992) Common Market Law Review 557, 583.

[184]Joined Cases C-46/93 and C-48/93 *Brasserie du pêcheur v Bundesrepublik Deutschland and The Queen v Secretary of State for Transport, ex parte Factortame and Others* [1996] ECLI:EU:C:1996:79.

[185]*Francovich* (n 5) para 5.

[186]Ibid para 6.

[187]This breach was also confirmed by the Court following enforcement proceedings initiated by the Commission in Case C-22/87 *Commission v Italy* [1989] ECLI:EU:C:1989:45. Nevertheless, Italy continued its non-compliance.

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at least partly unpaid, continue the pattern of underprivileged litigants with limited amounts of mainly economic, but also likely other forms of, capital. Contrary to the preceding cases though, there is a male worker in the case of *Francovich* and a sizeable group of workers in *Bonifaci*, which was likely to put them at a better starting point, compared to Defrenne, Von Colson, Kamman and Harz. If nothing else, they had more power in numbers.

The proximity of tribunals and the fact that the questions referred were identical hint at an underlying mobilisation effort, which was instrumental in increasing the litigants' social and cultural capital. Looking at the text of the judgment, one observes that the parties in both cases were represented by the same lawyers: Claudio Mondin, Aldo Campesan and Alberto dal Ferro of the Vicenza Bar. This is certainly not a coincidence. Indeed, Bartolini and Guerrieri note that *Francovich* was akin to a *fictio litis*, a case framed in such a way to prompt the national courts to make a preliminary reference to the CJEU.[188] The Italian lawyers actively sought the involvement of the CJEU in that case. In an interview, Campesan and Dal Ferro were candid about their intentions when putting the case together: 'there are times when European judges limit themselves to being "notaries", and take note of certain events; yet there are also others, in which they feel a deep urge towards the development of new principles: we were well aware that the latter was the case at that juncture, and that it could be turned to our favour.'[189] They saw litigation before the CJEU as an opportunity, hinting at how an active minority could influence the latter. Although not supported by a civil society organisation, such as Defrenne, it was still a form of legal mobilisation, despite the fact that ostensibly it is not a stereotypical case of cause-lawyering, which is usually deployed on the basis of altruistic motives to aid disadvantaged litigants.

From the information available, at least two of the lawyers, Campesan and Dal Ferro, graduated in law from the University of Padua in the mid-1980s. The university was one of the few in Italy at that time where a specialised course in EU Law was offered. Campesan and Dal Ferro not only attended this course but also wrote their dissertations in that area.[190] It seems that their belief in the transformative potential of EU law was ingrained in them by their professor, Paolo Gori, who had been a référendaire at the CJEU for 20 years (1958–1978), assigned to the three Italian judges.[191] One of them, Alberto Trabucchi, was also a former law professor at the University of Padua.[192] Trabucchi was one of the judges in *Van Gend en Loos*, one of the pre-eminent judgments that propelled the judicial constitutionalisation discourse to fame, as well as the Advocate General in *Defrenne II*. As a référendaire involved in the making of *Van Gend en Loos*, Gori played the role of activist by proxy[193] and was part of the Court's legal revolution.[194] This context must have certainly been instrumental in forging Francovich and Bonifaci's lawyers' pro-European views.

Having a good understanding of EU law, a commitment to European integration and strong views on the opportunities they presented for litigation certainly equalled increased levels of cultural capital, of the kind that would prove useful in navigating the EU legal field, in light of the reluctance by the national courts hearing the cases to submit the preliminary references to the CJEU.[195] In framing their arguments, they used their specialist knowledge to focus on

[188]A Bartolini and A Guerrieri, 'The Pyrrhic Victory of Mr Francovich and the Principle of State Liability in the Italian Context' in F Nicola and B Davies (eds), *EU Law Stories: Contextual and Critical Histories of European Jurisprudence* (Cambridge University Press 2017) 340.

[189]Ibid., 339–40.

[190]Ibid., 346–7.

[191]A Vauchez, 'À quoi « tient » la cour de justice des communautés européennes? Stratégies commémoratives et esprit de corps transnational' 2010 (2) (2010) Revue Française de Science Politique 247, 252.

[192]Bartolini and Guerrieri (n 188) 346.

[193]A Vauchez, *Brokering Europe Euro-Lawyers and the Making of a Transnational Polity* (Cambridge University Press 2015) 126.

[194]Ibid., 185.

[195]Bartolini and Guerrieri (n 188) 340–1.

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ensuring compliance with EU law and, more specifically, Directives, whose non-implementation was a pressing issue.[196] This EU-centred motivation in bringing the case forward denotes a strand of legal mobilisation based on external factors, which proved to be beneficial to the outcome of the case. Anecdotally, Campesan and Dal Ferro assert that their accumulated capital helped them mobilise and find an ally in Giuseppe Federico Mancini, the then Italian judge at the CJEU, a prominent labour law scholar with pro-European attitudes, whose views *Francovich* ostensibly echoed.[197]

The foregoing passages paint a picture of an emerging form of mobilisation that transcended national boundaries. Moreover, the same-issue repetition found in the identical framing of the references is a sign of commitment to their goal. The latter is characteristic of active minorities, according to social psychology. Likewise, the lawyers representing this active minority wanted to innovate. They must have sensed that the claimants' circumstances, constituting a clear example of injustice suffered because of non-compliance by a Member State with EU law, could be utilised as a powerful mechanism to gain the sympathy of the Court.[198] In other words, they had a clear view of the (legal) reality, they were committed to relying on state liability, and finally, unwilling to compromise by not pushing for the cases to reach the CJEU, or by looking at conventional and well-established remedies, all quintessential ingredients for a minority to exert influence on the majority.

Moving on to the legal front, although the lawyers' first question began by inquiring about the possibility of relying on the direct effect of the Directive against the Member State that had failed to implement it, perhaps trying their luck but deep down knowing it was likely to fail, they put forward an alternative, making an open plea to the CJEU to continue building its role as guarantor of the effectiveness of EU law, by instituting an additional enforcement route for individuals.[199] Their closing statement is telling:

> Is there a limit within which the arbitrariness of a Member State, which in any case is not permissible, can be contained? Can [the] [C]ommunity legal order remain indifferent when faced with actions brought by those who, without proper reason, have suffered prejudice because of the default of [a] [M]ember State?. .. Can the [C]ommunity legal order allow and justify a situation, an unlawful situation, to crystalize in time, forbearing to restore legality, without by so doing placing in doubt the very binding nature of the [D]irective?[200]

In putting forward their plea for innovation to the Court, they made sure it reverberated with the Court's objectives and agenda for moving European integration forward.[201] This proved a successful strategy for their claimants, as well as the proto-federal order, resulting in the doctrine of state liability and, consequently, demonstrating a good example in successful minority social influence. As Ross observed, beyond granting individuals across the EU a right to reparation, in *Francovich*, 'the Court has taken a significant step towards giving individuals the right to have the [EU] run in accordance with its constitution as developed by the Treaty and judicially-defined fundamental principles'.[202] *Francovich* kicked off as a *fictio litis*, which ended up becoming a social

[196]Ibid., 342–3.

[197]Mancini was one of the judges that decided the case, albeit his contribution is unclear: Ibid., 344–5.

[198]Something that they achieved, at least according to the Advocate General. Opinion of Advocate General Mischo in Joined Cases C-6/90 and C-9/90 *Francovich and Bonifaci v Italy* [1991] ECLI:EU:C:1991:221 para 1.

[199]Bartolini and Guerrieri (n 188) 342–3. A route that perhaps the Court had already hinted at in Case C-60/75 *Russo v AIMA* [1976] ECLI:EU:C:1976:9.

[200]Based on a draft of the lawyers' closing statement: Ibid., 343.

[201]In *Francovich*, the self-referential approach of the CJEU, which could be perceived as challenging the Member States' position as constituent authority of the EU, has been noted. T Horsley, *The Court of Justice of the European Union as an Institutional Actor: Judicial Lawmaking and its Limits* (Cambridge University Press 2018) 140–1.

[202]Ross (n 182) 55.

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policy case of constitutional magnitude, perhaps the last big bang judgment completing the proto-federal order of the EU.[203] Looking back, *Francovich*'s potential may have actually been too powerful, with the Court having to limit its scope later, coinciding with the end of the heyday of its proto-federal jurisprudence.[204]

6. Conclusion

The analysis in this article has offered fresh insights into the dynamics behind the Court's constitutional jurisprudence by attempting to explain the influence social policy case-law exerted on the latter. It focused on four important judgments that showed the Court further developing its constitutional practice of European law, or, in other words, the proto-federal legal order of the EU.[205] At the same time, the judgments also contributed positively to the development of European social policy. From solidifying and giving teeth to the principle of non-discrimination, to extensive obligations for compliance with EU social laws and the right to reparations for breaches by Member States, the effectiveness of European social policy improved. All this was achieved despite the traditionally low levels of capital held by the actors involved and the labour and non-discrimination strands of European social policy not traditionally being considered as an area of case-law conducive to the Court's constitutional practice. The foregoing adds to the discussions that reject the narrative of the Court being single-handedly responsible for the transformation of Europe, approaching the latter as a collective process instead.[206]

To connect the dots, the article propounded an interdisciplinary explanatory framework, drawing on Bourdieu's concepts of capital and field, the theory of legal mobilisation and Moscovici's minority social influence. The framework was applied to the seminal judgments in *Defrenne II*, *Von Colson*, *Harz* and *Francovich*. These cases originated in national courts that were not the usual suspects, at least not in social policy matters, in sending preliminary references to the Court.[207] Observing the interaction between the distinct actors in the EU legal field corroborated the plausibility of the propounded framework as offering a compelling explanation of the cases' transformative impact on the constitutional jurisprudence of the Court and social policy more broadly. Mobilisation efforts supported by activist lawyers, with altruistic or EU-related motives, as well as national courts, helped frame the stakeholders lending their support to the examined cases, together with the latter's litigants, as active minorities, which, through their commitment to innovation, could influence the Court's judicial decision-making. They also created opportunities for the Court to show a more social face.[208]

The foregoing discussion does not mean that every minority, which encompasses most – if not all – social policy litigants, is bound to become influential. The inherently low levels of

[203]A Arnull, 'The Court of Justice Then, Now and Tomorrow' in M Derlén and J Lindholm (eds), *The Court of Justice of the European Union: Multidisciplinary Perspectives* (Hart 2018) 4.

[204]D Ruiz-Jarabo Colomer, 'Once Upon a Time—Francovich: From Fairy Tale to Cruel Reality?' in M Poiares Maduro and L Azoulai (eds), *The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Hart 2010) 405–12.

[205]Stone Sweet (n 17) 70.

[206]Cohen (n 45) 36.

[207]Kelemen and Pavone (n 167) 390. Although the cases could fit with accounts about court politics and pro-European lawyers that drove EU litigation – and as a result integration – forward, despite the stakeholders not being consistently involved in a sustained effort to keep putting preliminary references forward: M Rasmussen, 'From International Law to a Constitutionalist Dream? The History of European Law and the European Court of Justice (1950–1993) in I de la Rasilla and JE Viñuales (eds), *Experiments in International Adjudication: Historical Accounts* (Cambridge University Press 2019) 300.

[208]K Lenaerts and JA Gutiérrez-Fons, 'The European Court of Justice as the Guardian of the Rule of EU Social Law' in F Vandenbroucke et al (eds), *A European Social Union after the Crisis* (Cambridge University Press 2017).

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capital are problematic and point to the persistence of structural injustices. Moreover, mobilisation processes cannot compensate for low levels of capital in all cases. Simply put, not all litigants can enjoy the same level of support.[209] Even if support was there, these supporting actors, be it lawyers, civil society organisations or courts would need to find an EU social norm whose interpretation is open to be challenged, so as to enable a potential preliminary reference to reach the CJEU. Given the relatively meagre positive integration in the area, this is not an easy task. Not only that, but importantly, the majority, which is the CJEU in this case, needs to be receptive to the minority view.

It is worth reminding that the examined cases were decided at a time where the CJEU's contribution to the proto-federal order of the EU was at its heyday. Post-Maastricht, disintegrationist circles became more dominant, creating a new dynamic.[210] That dynamic, to some, signalled a new socio-political reality that hindered the furthering of the Court's constitutional practice.[211] Nevertheless, the judgments had a long-lasting effect. Following the *Van Gend en Loos* tradition, they '[took] European law out of the hands of politicians and bureaucrats and [gave] it to the people'.[212] Indeed, the Court's process to lay down the foundational elements of the proto-federal legal order of the EU had an impact in practice. Mobilisation leading to and following up on the Court's judgments, coupled with fear that the latter's powerful potential could be unleashed *en masse*, prompted Member States to comply.[213] This saved prospective social policy litigants from a myriad of hurdles to overcome, some of which, such as their traditionally low levels of capital, have been discussed above. The social policy judgments examined here, and the active minorities that were implicated therein, contributed to the Court's constitutional practice and emancipated – at least partly – European social policy from the shackles of piecemeal policy-making during the proto-federal era.[214] For these reasons, the judgments, as well as the actors constituting these active minorities therein, should be celebrated as pioneers.

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[209]Relatedly, it is important to consider the cases that never were: potentially paradigm-shifting situations and circumstances, which, due to the litigants' disadvantaged position could not be brought before national courts to begin with.

[210]Shaw (n 36).

[211]Although, despite its importance, its impact in practice might have been more subdued in the end: J Baquero Cruz, 'Francovich and Imperfect Law' in M Poiares Maduro and L Azoulai (eds), *The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Hart 2010) 419–20.

[212]GF Mancini and DT Keeling, 'Democracy and the European Court of Justice' 57 (2) (1994) Modern Law Review 175, 183.

[213]Alter and Vargas (n 89) 463–4; Cichowski (n 13).

[214]Note that post-Maastricht, and certainly post-*Laval Quartet*, the Court's contribution to European and national social policies took a different turn: S Giubboni, 'The Rise and Fall of EU Labour Law' 24 (1) (2018) European Law Journal 7.

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