

## Interpreting strategic litigation: human rights entrepreneurship in the European Union

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### Abstract

Policy entrepreneurs are political actors who seek to effect policy change. Though their modus operandi is traditionally limited to influencing the *legislative* policy agenda, the *judiciary* may present an alternative opportunity for domestic policy change in political systems which possess a codified set of laws with established legal supremacy over statutory law. Whether policy change achieved by litigious, rather than legislative, means represents a new manifestation of policy entrepreneurship, was of primary concern to this study. The effectiveness of 'strategic litigation' was concurrently evaluated by examining three legal cases which appeared before the Court of Justice of the European Union (CJEU). It was ultimately found that strategic litigation shares several significant commonalities with the current academic conceptualisation of policy entrepreneurship. Differences between the legal outcomes of the cases examined further suggest that litigious success is subject to evolving external and internal perceptions regarding the CJEU's institutional legitimacy.

**Keywords:** policy entrepreneurship, strategic litigation, policy streams, policy windows, European Union

## Introduction

In liberal democracies, it is axiomatic that a policy proposal will not receive legislative endorsement if its corresponding policy ‘ideal’ is unpopular (Cohen et al. as cited in [Kingdon, 2003](#); [Mintrom, 1997](#)). Building ‘ideal’ popularity is not a straightforward process; the likelihood of legislative endorsement positively corresponds to the inherent marketability of a policy issue. In the absence of such qualities, substantial shifts in the dominant legislative paradigm – often the result of an unplanned public event or disaster – may draw attention to the issue and garner political support for a proposal which promises to adequately address it (Cohen et al. as cited in Kingdon, 2003; Mintrom, 1997). Though academic debate persists regarding the nature of such shifts, often termed ‘policy windows’, Kingdon (2003)’s ‘Multiple Streams Model’ is widely considered the traditional standard for interpreting legislative policy development ([Ackrill & Kay, 2010](#); [Bakir, 2009](#); [Hoeijmakers, De Leeuw, Kenis, & De Vries, 2007](#); Kingdon, 2003).

Kingdon (2003) highlights the enduring presence of what he terms ‘problem’, ‘policy’ and ‘politics’ streams, noting that: “None of the streams are sufficient by themselves to place an item firmly on the decision agenda” (p. 178). The ‘problem’ stream refers to issues which are significant enough to both attract the attention of policy-makers and justify their participation in devising a solution (Bakir, 2009; [Anggoro, 2012](#)). The ‘policy’ stream represents the availability of pre-formed solutions to that problem, while the ‘politics’ stream accounts for factors which influence the political traction of available solutions, such as: “the national mood, pressure group campaign, and administrative or legislative turnover” (Anggoro, 2012). Kingdon (2003)’s model suggests that only through a change in

one of the streams, leading to multi-stream convergence, is subsequent legislative endorsement a likely outcome (Bakir, 2009).

Specific political actors can play a substantial role in facilitating policy streams convergence. Broadly conceptualised in terms of their intention and practice, Mintrom (1997) identifies *policy entrepreneurs* as agents of “dynamic policy change” (p. 766). In practice, policy entrepreneurs develop, disseminate and advocate the adoption of policy proposals through problem framing and interest brokering ([Oborn, Barrett & Exworthy, 2011](#)). Briefly, problem framing is a process by which individuals are able to imply a particular cause and emphasise the merits of a specific solution by the way that problem is defined ([Rochefort & Cobb, 1994](#)). Interest brokering is the other conventional role of a policy entrepreneur, referring to his or her ability to emphasise the common ground between competing interests and secure mutual benefits for all participants (Oborn, Barrett & Exworthy, 2011).

Strategic litigation is distinguished from policy entrepreneurship by its methodology. While both share a fundamental purpose – to effect social change within a specific political arena – each employs different means of achieving that purpose ([Barber, 2011](#); [Fuchs, 2013](#); Kingdon, 2003). Hoeijmakers et al. (2007) argue that a critical mass of interest may accrue around an issue when the problem stream combines with the politics stream (p. 114); in this scenario, the political elite considers an issue to be of sufficient urgency, or to be associated with sufficient political capital, to warrant the development of legislation to address it. However, policy streams convergence may also arise from the efforts of policy entrepreneurs operating within the *judicial branch* of a political arena. Through strategic

legal action, judicial courts may link problem, policy and politics streams when granted the legitimacy and authoritative mandate to do so.

### **New Policy Windows in the European Union**

Specific interpretations by the Court of Justice of the European Union (CJEU), the EU's pre-eminent judicial institution, have identified implied social rights within the foundational economic objectives of the EU ([Court of Justice of the European Union, 2006](#); [Flynn, 1999](#), p. 1139). These interpretations have formally affixed a social dimension to the 1957 Treaty establishing the European Economic Community (TEEC), broadening the criteria used by the CJEU to invalidate EU member state law ([Brown, 2013](#); [Conway, 2012](#); Fuchs, 2013). The growing interpretive power of the CJEU thus marks an unprecedented opportunity for European policy advocacy networks to challenge domestic legislation on the basis that it contravenes the social dimension of EU treaty law: "The European Union's (EU) legal system has transformed previously weak organisations with little leverage into political players capable of directly influencing national policy" ([Alter & Vargas, 2000](#), p. 453). Put another way, substantial change within the politics stream, equipping a supranational judiciary with the power to directly evaluate and invalidate domestic legislation, has caused a new policy window to open in the EU.

This study firstly aims to supplement the current scholarly understanding of policy entrepreneurship through a conceptual synthesis with strategic litigation. Examination of three legal cases involving strategic litigation in the EU will secondly form the basis of an evaluation regarding the *effectiveness* of strategic litigation as a tool for instigating domestic policy change. The following section will rationalise the choice of cases analysed by this

study, disclosing conceivable sources of research bias. Methodology will then lead to an empirical discussion of the subject matter. Lastly, final conclusions will reconsider the central research questions raised at the beginning of this study and suggest possible avenues for further inquiry.

### **Methodology: Case Selection**

This analysis has been limited to a study of three legal cases which were brought before the CJEU: Gabrielle Defrenne v. Société anonyme belge de navigation aérienne Sabena (1976) (hereafter 'Defrenne v. Sabena'), Lisa Jacqueline Grant v. South-West Trains Ltd. (1998) and P. v. S. and Cornwall County Council (1996) (hereafter 'P. v. S.'). The selectivity with which these three cases were chosen, based on subjective estimates of relevancy, must therefore be considered a source of research bias. Further research, conducted to evaluate the veracity of this paper's conclusions through a thorough examination of other notable CJEU cases, is therefore encouraged.

The CJEU's watershed interpretation of EU treaty law in *Defrenne v. Sabena* (1976), "...gave fresh impetus to women's rights campaigners throughout the Community and brought the issues of equal pay and equal treatment firmly to the forefront of the EC's political agenda." ([Mazey, 1998](#), p. 139-140). As this quotation demonstrates, *Defrenne v. Sabena* (1976) represents an ideal opportunity to evaluate the applicability of several key concepts associated with Kingdon (2003)'s 'Multiple Streams Model'. The activism of lawyer Elaine Vogel-Polsky, a notable feature of the case, serves to further illustrate the impact that individual entrepreneurs may have on the legitimisation of social change.

*Grant v. South-West Trains Ltd.* (1998) represents an instance of failed strategic litigation ([Stychin, 2000](#)). The inability of the legal advocacy group 'Stonewall' to persuade the CJEU to widen its interpretation of an EU equal pay provision to include discrimination on the basis of sexual orientation reflects an important lack of convergence between the problem, policy and politics streams (Stychin, 2000). This ruling contrasts the positive outcome of *P. v. S.* (1996), in which litigators were able to successfully defend the employment rights of a transsexual person against the Cornwall Council in the United Kingdom (UK) (Stychin, 2000). The differences between the outcomes of these cases, specifically regarding the grounds for discrimination developed by the CJEU in both, may serve to illustrate the way in which institutional legitimacy represents a significant influence on the outcome of litigious action in the EU. The following examination, using Kingdon (2003)'s policy entrepreneurship framework as a guiding model for analysis, has sought to elucidate the extent to which the aims and practices of strategic litigation correspond to those of policy entrepreneurship while concurrently addressing the effectiveness of strategic litigation in delivering consistent outcomes for human rights advocacy.

## **Discussion**

*Defrenne v. Sabena* (1976) concerns the discriminatory employment practices of the Belgian airline, Sabena ([Cichowski, 2004](#)). Despite a lack of differentiation between male and female steward responsibilities, "Sabena's male flight stewards earned higher wages, were allowed to retire 15 years later, and were entitled to a special pension plan, all benefits that their female counterparts failed to receive" (Cichowski, 2004, p. 502). The case was referred to the CJEU to determine whether the TEEC's equal pay provision enabled disadvantaged

employees to refer cases of pay discrimination to the national courts of all EU member states (Cichowski, 2004). The CJEU's interpretation of the TEEC in *Defrenne v. Sabena* (1976) had a two-fold effect on the EU's legal environment: it not only provided and empowered individual workers with the right to demand their economic and social rights under EU law, it demonstrated the power of the 'test case' to highlight shortcomings associated with the existing legal framework (Fuchs, 2013).

The CJEU's growing institutional legitimacy, reflecting a significant shift in the politics stream of the EU, enabled it to override the traditional immutability of individual state sovereignty and created a new opportunity for workers possessing EU citizenship to seek compensation for employment discrimination (Alter & Vargas, 2000). Importantly, *Defrenne v. Sabena* (1976) clarified the essential objectives of the TEEC (Flynn, 1999). In addition to the universalisation of economic rights among signatory member states, the CJEU emphasised the TEEC's commitment to "fundamental human rights" (Flynn, 1999, p. 1139). The consequence of this expansion has been to empower other social and consumer advocacy groups to bring cases of discrimination before national courts and strategically invoke the CJEU's interpretation of EU treaty law in order to have a direct impact on public policy ([Afilalo, 1999](#); [Vanhala, 2009](#)): "The ruling came as a shock to governments throughout the EC who realized that they could no longer ignore Article 119 [of the TEEC]." (Mazey, 1998, p. 139-140).

Returning to Kingdon (2003)'s 'Multiple Streams Model', Article 119 of the TEEC may be considered the 'policy' element in *Defrenne v. Sabena* (1976). Essential to the convergence of policy and problem streams is the authoritative recognition of a *pre-existing*

policy proposal. Recognition of the TEEC's implicit commitment to social rights protection was absent until the decision in *Defrenne v. Sabena* (1976):

“...how did individuals come to utilize a treaty provision for their own protection against discriminatory national practices? This treaty provision was meant to place duties on member state governments, not to provide directly enforceable rights for individuals. Thus, the second necessary condition for this activism and litigation was [a CJEU] decision that transformed this treaty provision into an enforceable rights provision.” (Cichowski, 2004, p. 501).

The policy stream was able to gain such recognition through the advocacy efforts of litigator Elaine Vogel-Polsky ([Amado, Peetermans & Ripani, n.d.](#); Cichowski, 2004). Vogel-Polsky's involvement with *Defrenne v. Sabena* (1976) typifies the impact that individual policy entrepreneurs may have in facilitating policy streams convergence. Vogel-Polsky *proactively* litigated, searching five years for an opportunity to test whether the TEEC's economic rights had an enforceable social dimension, before she was able to involve herself with the *Defrenne* case (Alter & Vargas, 2000; Vanhala, 2009). By linking Article 119 of the TEEC to Sabena's discriminatory employment practices, Vogel-Polsky was able to join the problem and policy streams and transform the dominant conceptualisation of the TEEC. Her persistence and successful facilitation of policy streams convergence are a clear indication of her capacity to act as a policy entrepreneur by strategically litigating to influence public policy.

### **P. v. S. (1996)**

Kingdon (2003) emphasises the significance of policy window creation, noting that open windows can establish principles which “...guide future decisions within a policy arena.” (p. 190). With regards to the CJEU, the outcome of *Defrenne v. Sabena* (1976) enabled EU

citizens to invoke their social rights under the TEEC before national and European courts (Afilalo, 1999; [“The direct effect of European law”, 2010](#)). Ackrill and Kay (2010) and Kingdon (2003) further postulate that a policy decision in one area has the potential to affect the outcome of a subsequent decision in an ‘adjacent’ area. Accordingly, the outcome of *Defrenne v. Sabena* (1976) significantly influenced the development of later human rights cases.

*P. v. S.* (1996) compelled the CJEU to examine the scope of EU social rights and determine whether anti-discrimination provisions extended to the treatment of transgendered individuals (Flynn, 1999). Cornwall County Council dismissed ‘P.’ from employment due to her intention to undergo gender reassignment ([“Transgender case decisions”, n.d.](#)). The case was referred to the CJEU to determine whether the TEEC recognised a wider scope for individual rights than the UK’s Sex Discrimination Act of 1975 ([“Transgender case decisions”, n.d.](#)). The CJEU complied, declining to respect “national variation in the treatment of transsexuals” and setting a precedent which established “a form of ‘normalizing harmonization’” (Backer as cited in Stychin, 2000, p. 289). The policy entrepreneur at the centre of this successful litigation campaign was the UK transgender legal advocacy group ‘Press for Change’ ([Burns, n.d.](#)).

[Bell \(1999\)](#) has argued that the ability of the participating litigants to persuade the CJEU of the “injustice” of an outright dismissal of employment based on trans-sexuality was essential to the success of *P. v. S.* (1996) (Bell as cited in Stychin, 2000, p. 290). *P. v. S.* (1996) thus represents a second instance of policy streams convergence facilitated by policy entrepreneurs who have adopted a litigious approach to policy avocation. In this case, an advocacy group, rather than a sole, persistent individual, performed the role of policy

entrepreneur. One significant consequence of *P. v. S.* (1996) was the development of the UK's Sex Discrimination (Gender Reassignment) Regulations of 1999, notably engaging the transgendered community in drafting the legislation (["Transgender: what the law says", n.d.; Whittle, Turner & Al-Alami, 2007](#)). The occurrence of interest brokering in this instance, conducted between institutions and advocacy groups, reinforces the conceptual parallelism between policy entrepreneurship and strategic litigation.

### **Grant v. South-West Trains Ltd. (1998)**

The final case this study will consider is that of *Grant v. South-West Trains Ltd.* (1998). This case contributes to the study of strategic litigation by illustrating a set of conditions which may impede the appearance of a successful judicial outcome. Crucially, the inability of the advocacy group, 'Stonewall', to further the scope of social rights protection under the TEEC reflects a lack of convergence between the problem, policy and politics streams. Despite the occurrence of "an intense media campaign" (Stychin, 2000, p. 283), many commentators have argued that the institutional legitimacy of the CJEU in this case was not sufficient enough to justify a substantial intervention into "personal or domestic matters" (p., 289). The consequences of such litigious failure bear significant implications for the conceptualisation of policy entrepreneurship and the future of strategic litigation.

In *Grant v. South-West Trains Ltd.* (1998), Grant was denied free travel concessions for her same-sex partner, despite her employment contract specifying such a benefit for her "spouse and dependents" (Stychin, 2000, p. 282). The case was referred to the CJEU, which ruled that the current state of law in the European Community (later the EU) did not consider stable, same-sex relationships to be equivalent to marriages or stable relationships

between heterosexual couples (Stychin, 2000, p. 283). In rejecting an expansion of the TEEC to include same-sex relationships among the beneficiaries of fundamental rights protection, the CJEU emphasised the domestic jurisdiction of sexual orientation (Stychin, 2000, p. 290). Stonewall's inability to persuasively relate the refusal of "employment perks" to fundamentally dehumanising discrimination was a key factor which influenced the failure of the case (Stychin, 2000, p. 290). This decision notably stands in contrast to *Defrenne vs. Sabena* (1976), in which the facts of the case comparably dealt with employment benefits, but were more persuasively linked to long-term injustice and poorer quality of life as a result of discriminatory practices. The profound lack of consensus among member states regarding homosexuality similarly inhibited the likelihood of a successful outcome in *Grant v. South-West Trains Ltd.* (1998).

The decision in *Grant v. South-West Trains Ltd.* (1998) suggests that successful policy entrepreneurship may still be vulnerable to multi-stream fluctuation once the policy window has been opened. In the case of *Grant v. South-West Trains Ltd.* (1998), the CJEU retained the legal authority to make a binding decision on same-sex relationships yet deferred to "the local", differentiating between Grant's complaint and the occurrence of public discrimination (Stychin, 2000, p. 290). This case demonstrates the importance of issue presentation and promotion to litigious success; in contrast to Kingdon (2003)'s model, its failure did not result from any lack of available policy alternatives or political momentum. Stonewall's litigious efforts were instead frustrated by the CJEU's incapacity to credibly assert its institutional legitimacy *against* the legitimacy of Europe's popularly-elected, domestic legislatures on matters which were not defensibly proven to deal with fundamental discrimination.

## Conclusion

The outcome of *Grant v. South-West Trains Ltd.* (1998), the most recent case of strategic litigation examined in this study, indicates the perpetuity of domestic sovereignty and the limitations of litigious policy entrepreneurship in the EU. Despite previous success, the extent to which this policy window has remained open has depended upon the dominant conceptualisation of the TEEC. Importantly, the CJEU's desire to safeguard its institutional legitimacy has significantly impacted the outcome of human rights cases: "...the Court cannot indefinitely act as a substitute legislator, still less as a constitutional legislator, without undermining its own credibility and authority, in fact, without ultimately destroying them." (Simitis as cited in Bell, 1999, p. 80). Bell (1999) associates this enduring structural limitation placed upon strategic litigation in the EU with a subsequent renaissance in the perceived ability of domestic legislatures to produce socially progressive legislation: "Interestingly, [*Grant v. South-West Trains Ltd.* (1998)] seems to have generated more interest in law reform through national legislatures than through the EU institutions" (p. 80). The effect of this shift in public perception, specifically in terms of its long-term impact on the EU politics stream, will be an important development for the future of strategic litigation.

To provide some final conclusions regarding the central questions raised at the beginning of this study, strategic litigation bears several significant commonalities with the current academic conceptualisation of policy entrepreneurship. The applicability of 'policy windows' to strategic litigation, as well as the ability of specific entrepreneurs to deliberately facilitate policy streams convergence through strategic legal action, has been

confirmed by this case study analysis. Though Kingdon (2003)'s model provides a useful guide for interpreting the interrelated, yet autonomously operating factors which determine the success or failure of such strategically-minded litigious campaigns, the extent to which policy windows remain open or closed may not consistently display an absolute value.

Next considering the *effectiveness* of strategic litigation from a European standpoint, the stark divergence in outcomes between the three cases examined illustrates an implicit evolution in the CJEU's formal powers of legislative review. Despite the existence of legal precedent emphasising the Court's willingness to expand the traditional scope of TEEC rights provisions, the precarious institutional legitimacy of the CJEU may prove an enduring barrier to the successful harmonisation of human rights legislation in the EU. Though the CJEU retains and has utilised its ability to invalidate domestic legislation, traditional lobbying efforts remain an important strategy used by advocacy groups to effect policy change in the EU ([Dür & Mateo, 2012](#)).

Nevertheless, such instances of domestic subordination to a supranational legal system mark an interesting development in European regionalism. The recent incorporation of the Charter of Fundamental Rights of the European Union into the Treaty of Lisbon in 2009 seems to indicate an emerging political consensus in support of the further subversion of domestic policy-making autonomy in order to formalise and standardise human rights across the EU. Whether this newly minted Charter will decisively entrench the legal ascendancy of the CJEU remains a question for future studies. The potential for this system to inspire a similar, *inter-continental* pooling of sovereignty also represents a future possibility. In the event of this outcome, cases such as the ones examined by this study will

doubtlessly inform the efforts of global advocacy networks to achieve substantial and dynamic policy change.

A final note of consideration regards the ability of strategic litigators to successfully function as policy entrepreneurs in adverse legal environments. This study focused exclusively on the CJEU's developing interpretation of the TEEC and the resulting implications for policy avocation, only briefly addressing the boundaries to successful legal action in *Grant v. South-West Trains Ltd.* (1998). Further studies, specifically considering examples of unsuccessful strategic legal action in the EU, may identify more significant and enduring barriers to litigious policy entrepreneurship and present a more accurate reflection of the process's rate of success.

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