

Gendering the Court of Justice of the European Union

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Abstract

While there is an emerging body of work which considers the European Institutions, European Integration and specific policy areas from a feminist or gendered perspective (For recent examples of books see Abels and Mushaben 2012, Beveridge and Velutti 2008, Kantola 2010, Lobardo and Forest 2012, Van der Vleuten 2007, Caracciolo di Torella and Masselot 2010) , little work has to date been done which examines the Court of Justice of the European Union (CJEU) in this way. This paper seeks to stimulate discussion and debate on the CJEU as seen through a gender lens and asks to what extent CJEU key principles and processes are gendered and what the implications of that might be. While this paper is a theoretical piece it seeks to highlight areas for empirical research by seeking to understand what questions might be asked of the CJEU and the way it operates as well as by highlighting questions which arise out of a feminist or gendered examination of the Court.

Introduction

The Court of Justice of the European Union (CJEU) has been subject to relatively little scrutiny from a gender perspective. Lawyers have tended to focus their examination of the court and its work on specific decisions or opinions or on the workings of the preliminary reference procedure and the relationship between it and national courts and legal systems. Political scientists have paid comparatively little attention to the CJEU as an institution of political relevance initially focusing on it as an agent of the most powerful states (See Garret 1992, Garrett and Weingast 1993, Burley and Mattli 1993) and later acknowledging though perhaps not unpicking, the Court's independence and possible activism (See for example Weiler 1994, Mattli and Slaughter 1995, 1998, Alter 2009...). So while there is a growing body of work considering the EU generally as well as EU institutions, actors, policies and processes more specifically from a gendered perspective (For recent examples of books see Abels and Mushaben 2012, Beveridge and Velutti 2008, Kantola 2010, Lobardo and Forest 2012, Van der Vleuten 2007, Caracciolo di Torella and Masselot 2010) and there is also a growing body of work which examines the CJEU and its work, there is very little which brings those two areas together. As Kenney (2013: 108) notes '*Political scientists and feminists alike often fail to recognize courts as political institutions and judgeships as decision-making positions that require a gender balance*' and as a result, when considered from a gendered or feminist perspective, we know almost nothing about the CJEU. This paper seeks to address that gap in our understanding by highlighting some of the issues relating to gender and setting out a research agenda for the future.

One obvious place to begin an examination of the CJEU from a gendered perspective is to look at the Court itself and simply count the women. Understanding the gender balance within an institution is an important starting point and yet the composition of the CJEU has received only limited academic attention (See for example Kenney 2002 and 2013). The

Treaties now dictate that there must be one judge from each of the Member States to ensure representativeness and fairness. Why this argument holds true for nationality but not for other characteristics such as race or ethnic background, sexual orientation or of course gender is however not clear and has not been fully explored. There is a linked issue here which is the more general theoretical question as to why a diverse judiciary might be important. This is explored in part 2.

Following on from questions of composition are questions around how the institution carries out its work and thus in the case of a court, how cases are brought to it and how it hears cases and how its decisions are arrived at. There is scope for significant gendered approaches here and it is in this area where the case of a diverse judiciary can be made. However, assessing the impact of diversity generally and gender specifically in the case of the CJEU is difficult. This is because judgments are given by the court not by individual judges and individual voices are thus difficult to isolate and examine. Even more difficult is an assessment of the implications of the processes and procedures which lead to cases being heard at the CJEU. There are questions here generally about whether access to justice is gendered which in itself has implications for the type of cases and claimants which come to the CJEU – particularly to the ECJ through the preliminary reference procedure. However, there are also other gender issues inherent in the way cases are brought, processed, presented and eventually decided upon. At this point we can only speculate on exactly how these factors play out in reality because knowing how decisions are arrived at, what negotiations take place and the extent to which these are gendered is only possible with detailed empirical work which has access to the judges as they go about their work. These issues are dealt with in part 3.

The next obvious issue to consider after looking at the process of work is the outcome of that work. It is often assumed that the CJEU is an institution or actor which has done a lot for gender equality and which is at worst gender neutral but probably very gender aware with a focus on achieving equality. That assumption is based on a handful of key cases decided by the Court which advanced women's rights. However, making decisions which benefit women is not the same as being gender aware and genuinely promoting equality. The claims about the CJEU being women's friend requires a far more detailed examination which is based on evidence and careful analysis of decisions rather than being based on assumptions. If we are claiming that the CJEU is in fact consistently making decisions which are gender aware then we need to examine those decisions which have an obvious and direct impact on gender but we also need to consider cases where gender is not an obvious or blatant issue and understand how the Court deals with them. A gendered look at CJEU jurisprudence will lead to a fuller understanding of that jurisprudence and a more holistic understanding of Court decisions and the Court's approach generally. This theme is explored in part 4 below.

This paper highlights areas where further research, mostly empirical in nature, is required to give us a fuller picture of how the court works. Key to successfully increasing gender equality within the CJEU and importantly also increasing gender awareness thus leading to better overall decisions is making the case for a diverse judiciary not just on the basis of representativeness and legitimacy but on the basis that a more diverse judiciary is likely to be

a better judiciary. In order to do so, we need to fully understand the CJEU, how it works, how it thinks and what its role is in an increasingly complex European Union (EU).

The Composition of the CJEU

According to its own website the CJEU employs over 2000 civil servants and temporary agents and 60% of them are female (CJEU 2014). Taking a look at the composition of the judges, the picture looks rather different. The CJEU itself is made up of 3 separate courts with separate jurisdictions. The Court of Justice is made up of 28 judges, 5 of whom are women, and nine Advocate Generals, 3 of whom are women. In the General court 6 out of the 28 judges are women and in the Civil service Tribunal, 2 out of the 7 and one of the three temporary judges are female. Women are therefore clearly in the minority and looking historically the picture looks bleaker still. Out of the 130+ former members of the CJEU listed, only 9 are women.

However counting the women and bemoaning the fact that there are so few does not help us to establish why having more women members of the CJEU is important. We must look beyond just looking at numbers because this can lead to tokenism and just evening up the scales for the sake of it. The important point is not that there should be a more equal gender balance, the important point is the benefits a more equal gender balance can bring. The first and perhaps most obvious reason is that a more equal gender balance simply looks fairer. It gives women who bring cases before the CJEU confidence that the judges hearing their case have an understanding of the issues they may be bringing; that the judges are not ‘other’ to them and that they can relate to them. There are of course all sorts of other reasons why litigants may still feel that the judges cannot relate or fully appreciate the context in which they are bringing the case and a more gender balanced judiciary does not tackle problems of race, sexual orientation, class or age imbalances but it is a start. As far back as 1996 the European Commission noted the importance of gender balance across institutions:

‘The balanced participation of women and men in decision-making is considered crucial to the legitimacy of representative and advisory bodies and therefore also our European democracies... The judiciary influences society at all levels and it is therefore crucial that women form a significant presence within it’ (European Commission 1996)

What is not explored in detail is why a more gender balanced or indeed more diverse judiciary might add to the legitimacy or indeed why representativeness and legitimacy go hand in hand. In the context of national representativeness this seems uncontroversial in the literature and this is discussed further below. In addition and perhaps more importantly, the question of why a more diverse judiciary might make a better judiciary needs exploring. Rackley (2013) has explored this questions in some detail and she argues convincingly that ‘*who the judge is matters, since it will determine both the way the judge sets about deciding cases and the substantive conclusions they reach*’ (Rackley2013, 165, emphasis original) and one of the reasons that who the judge is matters is because ‘*personal experiences affect what facts judges choose to see*’ (Sotomayor 2002; 92). Furthermore the mere presence of a female judge can influence the arguments put forward and submissions made. Advocates may feel

confident to address issues to a woman judge that they may have couched in different terms or side-lined altogether with a male judge or panel of all male judges. Rackley notes, in the context of discussion of Justice Ginsburg's role and influence in the US supreme Court case *AT&T Corp v Hulteen et al* (2009) about the impact of maternity leave on pension rights that '*her presence ensured that arguments about workplace equality were aired and addressed*' (Rackley 2013; 170). A more diverse judiciary is therefore important because it allows claimants to feel like they have had their day in court, that they were listened to and that the issues which are important to them got a fair hearing even if they are not ultimately successful in their claims. Where, staying with the example of workplace equality, arguments are not made or clearly not accepted as important or relevant by an all-male judiciary, female claimants are likely to feel silenced and that their concerns have not been fully addressed because they have not been understood. Representativeness and legitimacy therefore do often go hand in hand.

It also seems obvious that '*a judiciary with a diversity of experience ... is more likely to achieve the most just decision and the best outcome for society*' (Etherton 2010; 728). Maybe this is not that obvious though and it is certainly worthy of further exploration. A key legal principle is that similar cases must be treated in a similar way and legal certainty can only be upheld if this is the case. However if we accept that who the judge is matters because it influences not only what arguments, and therefore whose voices, are heard but also which facts are considered relevant and how the decision making is approached and ultimately what the final decision might be, then must we also accept that a diverse judiciary is likely to lead to diversity in outcomes? While this is a concern, Rackley convincingly argues that

'the promise of a diverse judiciary is not the promise of a multiplicity of approaches and values fighting for recognition. But of a judiciary enriched by its openness to viewpoints previously marginalised and of decision-making which is better for being better informed' (2013; 177).

A diverse judiciary therefore brings a multitude of experiences, backgrounds, viewpoints and opinions and adds them to one big melting pot which is stirred through discussion and debates both formally and informally, both in relation to specific cases and more generally. As Rackley notes, '*Judging is a collective enterprise*' (2013; 169).

However at EU level this collective enterprise is difficult to unpick and it is almost impossible to study the impact of diversity including gender because judgments are given by the Court as a whole without dissenting judgments or separate judgments. We simply do not know who thought what and why. This is in contrast to the UK Supreme Court for example, where some suggestions about the influence of Brenda Hale, the only female judge at that level, can be made based on analysis of her dissenting judgements as well as by reading her judgments together with those of her colleagues in the same cases. This is not possible in the CJEU. To make matters more impenetrable in research terms, we must also acknowledge that judges at the CJEU swear an oath which includes the obligation to uphold the secrecy of the Court's deliberations (Article 2).

What we do have is the possibility of looking at the opinions of Advocate Generals. However, here we have only have one opinion per case so we cannot compare different approaches and the influence gender may have here. We could compare the Advocate General's (AG) opinion with the final ECJ judgment in specific cases which may give us some, albeit limited, insights or we could compare the approaches of male and female advocate general across a series of cases and consider any differences in approach. However, all of these approaches are potentially more limited and more problematic in the case of the CJEU than in a national court because there are several more factors which may account for difference. The judges and AGs all come from different national contexts with different legal traditions, processes and norms. Their cultural backgrounds are different, their training to become a lawyer and judge has been different, their approach to law may be very different and indeed the role and visibility of women in law or more generally may also vary dramatically between Member States. All of this means that without carefully constructed and detailed empirical work with the judges of the CJEU and those who work with them, isolating gender as a factor and exploring its importance and impact is almost impossible.

The EU has recognised the need for the CJEU to be representative. In Article 19 TEU the composition of the Courts is set out. It notes that

The Court of Justice shall consist of one judge from each Member State. It shall be assisted by Advocates-General.

The General Court shall include at least one judge per Member State.

If the EU recognises that representativeness is important in terms of Member States then it has already recognised that representativeness enhances the legitimacy and acceptance of court decisions because Member States are more likely to agree with and enforce decisions which they have – at least at institutional level even if not directly, been involved in. Kenney highlights this by questioning ‘*whether Ireland would accept a decision by the court that it had to allow the advertisement of abortion services available in London if no Irish judge had sat on that case?*’ (Kenney 2002: 266). This argument is somewhat diluted when judges sit in panels where of course judges from other Member States may decide a case relating to a particular Member State. However, while the panels might make decisions relating to Member States other than their own, the legitimacy of the overall institution remains intact. The importance of retaining one judge per Member State even in the enlarged EU of 28 is clear: politically nothing else would be acceptable and the legitimacy of the Court in the eyes of those Member States without judicial representation is likely to be reduced significantly. Having said that, there is little systematic research which explores these questions empirically in the Member States.

So if there is an acceptance that diversity helps legitimacy, it is even more worrying that there is little diversity in terms of gender as well as other characteristics (such as for example race). If decisions are mostly made by white middle class men, it is perhaps more difficult for the women of the EU to fully embrace those decisions particularly where those decisions are about issues where gender plays an obvious role. However the argument is more complex

than that, there are a number of decisions made by all male judges which can be seen to significantly advance women's rights. This is however not fatal to the argument that visibility of women or rather a visibly diverse judicial body is important for legitimacy. Exactly how important it is in the context of the CJEU is something we do not really know and something we cannot know without detailed empirical work with citizens across the EU. Qualitative work which explores what citizens want from their CJEU personnel and how and why that might differ from what they want from their national judiciary would help us to a fuller understanding of how and why (gender) diversity at CJEU is important.

However an argument often brought against measures which increase the number of women judges is the fact that this would interfere with the idea of merit and appointing the best person for the job. However, the question of merit in the case of the CJEU is already highly skewed:

‘Choosing the best woman judge is no more antithetical to applying merit standards than choosing the best Cypriot judge. The difference is that requiring diversity of nationality or geography has been accepted as a representative restriction, whereas gender diversity has not.’ (Kenney 2013; 128 see also Greaves 2011).

In addition, factors and characteristics taken into account for objectively assessing merit are often highly gendered. It seems that when we consider what it is we want from our judiciaries we often think about what we already know rather than what it should be and that we associate characteristics which are seen as male such as logic, rationality, ability to apply legal rules to facts without distraction, detachment etc as characteristics we should value in judges whereas more female traits such as empathy and emotional intelligence are side-lined. Thus

‘one of the greatest obstacles to a diverse judiciary has been and remains the image of the default judge and our unwillingness to embrace fully the reality that who the judge is matters.’ (Rackley 2013; 196)

In order to overcome some of the barriers to bringing more women into the CJEU, a fuller understanding of the way lawyers reach the required level for appointment in their home states is necessary. If the path to the level required for appointment to the CJEU in a member state is highly gendered, the chances of a woman being in a positions where she might be considered for the CJEU are limited indeed. Even where women do reach those positions, careful consideration then needs to be given to how they are then appointed to the CJEU (see Kenney 2013).

Composition of the Court is, as outlined above, important for a variety of reasons. A more diverse judiciary simply looks better and appears more legitimate because it is more representative. More importantly thought a more diverse judiciary is, at least theoretically a better judiciary because it benefits from a wider variety of experiences and views. Exactly how this plays out in the CJEU needs detailed examination which would also include an exploration of how the court works which is what this paper turns to next.

How the CJEU works – gender implications

As noted above, deliberations in the courts making up the CJEU are secret. We are not privy to the discussions, debates, considerations, arguments and possibly rows which ultimately form the final decision. So although, without detailed empirical work and unprecedented access to the Courts, we cannot know the impact gender has in the forming of judgements, we can consider the gender implications of the way the Courts work more generally. That is the focus of this section which first considers how cases are brought to the Court and second consider the actual process of decision making which takes place in the court.

Bringing a case to the CJEU

As mentioned above the CJEU is made up of three separate courts with separate jurisdictions. The three courts have slightly different jurisdictions and do not form an appeal structure as we might know it from national legal systems. The Civil Service tribunal has jurisdiction over cases which concern the EU institutions and their personnel pursuant to Article 270 TFEU. The General Court deals with direct actions brought against the institutions of the EU by natural or legal persons and with cases brought against the European Commission by Member States. It also has jurisdiction in cases relating to Competition and State Aid measures and trademarks. The Court of Justice on the other hand deals with cases which are referred to the CJEU by national courts via the preliminary reference procedure as well as with actions concerned with whether or not Member States have fulfilled their Treaty obligations. It also has jurisdiction to hear actions for annulment of EU law measures and actions for failure to act on the part of an EU institution, body, office or agency.

As the jurisdiction and type of case and therefore complainant/claimant are different in each of the three courts it stands to reason that the issues arising from a gender perspective are also different. Dealing with all of them is beyond the scope of a single paper. This paper therefore focuses on the preliminary reference procedure by which national cases which concern or involve a question of EU law can be referred to the Court of Justice for an interpretation of the relevant EU law provisions. It does so because from an EU citizen's perspective this is probably the most important and significant way to bring EU law concerns before the court and because, preliminary references are likely to have the most obvious and direct impact on EU citizens.

The preliminary rulings procedure is a mechanism that allows any national court to refer a question of EU law to the ECJ and ask them for interpretative guidance. The ECJ does not rule for or against the parties, in other words it does not apply the law to the facts, it simply interprets the law and answers the questions referred. The national courts must then apply the law and the ECJ's guidance to the factual situation before them. There are a number of issues arising out of the procedure which have gender implications. The rules concerned with when and what sort of questions are to be referred may have significant impact on the type of cases which reach the ECJ and therefore the type of cases the ECJ has the opportunity to rule on. Case law has clearly established that there must be a genuine dispute (Foglia 1991) to which the interpretation of EU law is relevant and important (Meilicke 2007; Dzodzi 1990) and that the national court must put a precise and clearly phrased question to the court

(Telemarsicbruzzo 1993). Under Article 276 TFEU any court may refer a question on the interpretation of EU law and court is fairly widely defined to include tribunals and bodies with judicial decision making powers (see Dorsch 1997). An obligation to refer arises where a case reaches the highest national court for that particular action¹ or where a question of the validity of EU law arises.

Each of these procedural rules have implications when examined from a gender perspective. The first thing to note is that any court, even the lowest, can refer a question of EU law. This arguably is a positive for gender equality and the chances of gendered questions being referred. If it is accepted that women judges are more likely to acknowledge that questions arising are gendered or put the other way round that gender is relevant to the questions being addressed, she might also be more willing to recognise the need to refer questions where other (male) judges may not see a gender issue which needs to be addressed and be less willing to engage with EU law to address the question. However, how effective this process is will depend very much on the extent to which judges in national courts are willing to engage with the EU system and the extent to which that is accepted within the Member State. As far back as 1999 Tesoka noted in the context of discussion judicial politics and their impact on national equality structures that

‘Despite the presence of equality litigation procedures in all EU member states, it seems that certain national systems are more ‘open’ than others and better equipped to provide effective and easy access to justice’ (Tesoka p14).

The extent to which gender questions are seen as relevant and in addition the extent to which EU law is seen as a way to help address gender questions will also vary from Member State to Member State. MacRae in two papers published in 2008 and 2010 explores the disjuncture between the gender equality rhetoric and myth at EU level and its translation or implementation into national contexts. She highlights that

‘where, however, the Member State’s gender narrative differs dramatically from the liberal frame advanced by the EU, it is unlikely that the full policy gains will be transposed into national legislation’. (MacRae 2010; 171)

On the one hand this might be expected to lead to increased litigation questioning whether or not EU law has been correctly implemented but that presumes that the EU policy has in fact taken the form of legislation. In addition, even where a legal challenge might be possible, the differing gender narrative might well act as a deterrent to bringing an action because gender roles, what constitutes acceptable or unacceptable behaviour or action and expectations might differ considerably. While there is research which considers the impact of EU gender policies (in terms of legislation, soft law and mainstreaming) on gender equality regimes in Member States, there is no systematic examination on the impact the culture, history, legal tradition,

¹ This is often the highest court in a Member State such as the Supreme Court in the UK but it does not have to be as for example in cases where permission to appeal to the highest court is not given.

position of women within society and other factors have on the number and type of preliminary references on gender issues. There is less work still on whether or not these factors impact on referral of cases which may have unintended consequences which are gendered.²

The preliminary rulings procedure has been defined as an organic connection between the national courts and the European Court of Justice (Shaw 2000) and has been said to be essential for the preservation of the Community character of the law and has the object of ensuring that in all circumstances the law is the same in all States (Rheinmühlen-Düsseldorf 1974). While this does mean that if the ECJ is indeed women friendly and gender aware this gender awareness will filter through to national courts in preliminary rulings and may therefore have an impact on the experience of claimants. It also means though that where individual judges or panels in national courts are not gender aware they may not realise the importance or relevance of particular provisions and may therefore not refer a question. As Tesoka noted in 1999

The judicial transformation of gender equality politics in a supranational direction is uneven, incremental and patchy. It is the locus of an ongoing interplay between favourable conditions and incentives for the expansion of judicial politics in the field of gender equality, on the one hand, and adverse impulses and conflicting structures, on the other. (Tesoka 1999; 26).

This has not changed in the 15 years since then and is perhaps even more so the case in areas where the gender implications are less obvious and gendered consequences are unintended. While the gender implications of the preliminary reference procedure are not at all clear, what is clear is that the issues are complex and would benefit from a systematic and detailed examination. In depth work which looks at the use of preliminary references in Member States as well as the Member States' reactions to CJEU rulings through a gender lens would help us better understand the potentially different impact of the processes on men and women as well as the impact gender may have on the processes (and therefore help make the case for a more diverse judiciary at all levels).

Judicial Decision Making in the CJEU

Once a case has come before the ECJ (and indeed the other two courts which make up the CJEU) and has been heard, deliberations are secret and, as noted above, judges swear an oath to uphold that secrecy. As well as making research into the impact of gender on judging the CJEU level difficult, the process itself has gender implications. If there are significant diverging opinions, there is no way to express these through a dissenting judgement and there is no way for the parties in the case or the wider legal community to know that there was disagreement. There is no way, from the outside to appreciate and understand the

² In her 2008 paper MacRae uses the example of the liberalisation of the airline industry to illustrate policy which has significant but unintended and perhaps unforeseen gendered implications. Similar examples can be found in ECJ case law

negotiations that went on to arrive at the final decision and we therefore do not know very much about the power relationships within the Court. Collins et al rightly note that ‘*although some studies have identified gender differences in judicial decision making, others have failed to uncover systematic differences between male and female judges*’. This seems obvious given the discussion in part 2 of this paper which argued that it is the diversity in experience that might make for an overall better judiciary rather than the fact that men and women will always and inherently make different decisions. However Collins et al raise an interesting question about women judges which might be important in the CJEU context: Does critical mass make a difference? If the number of women on a judiciary exceeds a certain number/proportion, do women then decide cases differently or reason differently? Collins et al found that when women serve with other women they do decide cases differently. They note

‘While it is clear that the influence of gender varies across policy areas, it is also evident that the impact of gender may be in part, contingent upon the presence of other women in the decision-making environment’ (Collins et al; 275).

The question therefore arises whether, if there were more women on the CJEU, would they bring a more gender aware voice to the CJEU and would that be reflected in the final decisions which are made? Until there are more women on the CJEU this is impossible to assess but empirical work in other courts can further develop the work done by Collins and detailed qualitative work with judges can shed further light on the factors that influence decision making

The Outcomes – gendering CJEU decisions

An important area of analysis and one where we do have significant amounts of academic material is the outcome of the work of the CJEU. The decisions can of course be analysed from a gender perspective. Firstly differing impact of the decisions on men and women can be (and in some cases has been) explored. Secondly the way in which the court deals with gender issues can be highlighted and finally the court’s gender awareness in cases which do not deal with women’s issues can be examined. Individual decisions or clusters of decisions have been the subject of this kind of scrutiny in the past but there is no systematic investigation of case law of any of the courts from this perspective.

EU rhetoric suggests that gender equality is one of the founding principles of the EU and that the CJEU has driven gender equality forward through its decisions. While most academics writing in this area are a little more sceptical, there is recognition that the EU has helped to drive progress in Member States. In 1999 Tesoka noted that

‘In spite of obvious limits related to the pre- dominance of an economic rationale and a certain integrationism, the jurisprudence of the quasi-

supreme Court of the European Union undoubtedly questions the accommodation of gender inequalities that generally characterises most European welfare states . (Tesoka 1999; p5)

More recently MacRae has expressed a similar point in the context of EU policy making more generally:

‘Many of the measures in the area of gender equality developed not out of a concern for women’s rights, but through competition policy and the need to harmonize social provisions in the face of free movement of goods, services and people. In fact, it is not a stretch to say that gender equality has often been a side effect of other European policy initiatives’. (McRae 2010: 158)

The case law which has driven gender equality forward is well known and there is no need to rehearse it in detail here (Brzezińska 2009 as well as European Commission 2009 provide a useful analysis and list of relevant case law). Perhaps the key case was Defrenne which concluded that the provisions relating to gender equality were directly effective and therefore that citizens could rely on those provisions in their national courts. Other important decisions related to equal pay cases (Barber v Guardian Royal, Braunhoffer), decisions about part time workers (Hill, Bilka) and cases about access to certain jobs in the military (Kreil, Commission v Austria). However there are also decisions which question the gender awareness of the Court. In Kalanke and Abrahamsson it decided that positive action was unlawful because it goes beyond the promotion fo equal treatment. Although the court has also recognised that where women are underrepresented an equally qualified women can be hired over a man (Marhsall), it seems clear that this does not acknowledge the historic disadvantage women still face. Brzezińska (2009:17) argues

‘So if only the ECJ relaxed its case law, the Member States could start introducing measures such as quotas in employment. It is for the ECJ to adapt its reasoning to social needs and to fully follow the substantive model of equality. The Advocates- General have already recognised in several opinions that otherwise equality between men and women in the procedure of selecting employees remains a fiction’

She perhaps overstates the view of the Advocates-General here citing only Opinion of Advocate General Saggio, in Abrahamsson, (Case C-407/98) but the point is still well made. Comparing women with men without taking cultural and societal context into account is not a fair comparison. Decisions which compare women and men on a like for like basis miss the point because men and women are not in the same position. This like for like comparison may be at least in part based on the underlying economic rationale of all EU provisions which also presumes equal labour market participation. Barnard (2006:299) has noted that ‘*equal opportunities were acceptable so long as they did not interfere significantly with the operation of the Single Market*’ and that is sometimes still how the court seems to be deciding

cases which are not specifically about gender. Although the Court acknowledged in *Deutsche Post* (Cases C270/97 and C271/97) that

‘the economic aim pursued by Article 141 of the treaty, namely the elimination of distortion of competition between undertakings established in different Member States is secondary to the social aim pursued by the same provision, which constitutes the expression of a fundamental human right’ (at paragraph 57)

it seems that the economic objectives often still take priority.

Considering all policy areas if obviously beyond the scope of this paper but it is worth looking at one area to illustrate the argument as well as the point that CJEU jurisprudence would benefit from a detailed gender analysis. Recent Free Movement of Persons and Citizenship case law is worthy of a closer examination through a gender lens. In 2011 the ECJ handed down its judgement in the case of Ruiz Zambrano. The case was quickly followed by the Court’s decision in McCarthy. In some ways the facts are quite similar. In Ruiz Zambrano a residence and work permit was granted to a third country national man on the basis of his children’s EU citizenship status (for detailed analysis see Guth and Mowlam 2012). In McCarthy a residence permit was refused to a Jamaican man married to a dual British-Irish citizen. In both cases the legal issue is whether a right to reside in the EU can be derived by a third country national from an EU national who has always resided in their home state. In Zambrano the answer was yes, in McCarthy the answer was no. The difference appears to be that holding otherwise would oblige Zambrano and his family to leave the territory of the EU and this deprive the children of their EU rights. In McCarthy the refusal did not mean that Mrs McCarthy was deprived of her Treaty rights. However, there are other differences which when considered from a gender perspective have significant consequences. Zambrano had been working and supporting himself and was able to do so again if allowed to legally work in Belgium. Economically it made sense – the family was settled, the family could support itself, the family was not likely to be a burden on the state. In McCarthy however, Mrs McCarthy had never worked and was dependent on state assistance, she was the sort of EU citizen to whom very few EU rights applied because she was not economically active and had no intention and no means of leaving her home state. Economically, allowing residence to her Jamaican husband makes no sense at all as it is not clear whether he would be able to work and support the family. In other words, Zambrano was perhaps a more worthy recipient of rights derived from EU Law? This is hugely problematic from a gender perspective. For example, caring responsibilities still predominantly fall on Europe’s women who are then do not work or work limited hours and therefore rely on state benefits or other assistance. To claim that they are not prevented from enjoying their EU law rights by a ruling such as the one in McCarthy is absurd. They are simply not in a position to move to another Member State where they then can exercise the right to bring their third country national spouse with them – in the same way that the Zambrano children were not in a position to move to another EU member State. If the Court was prepared to grant rights in a case with no cross-border element in Zambrano, then why not allow it in cases such as McCarthy? Can it really be said that McCarthy was less about ‘*the very enjoyment of the substance of rights*

conferred by the status of EU citizenship’? If the main Citizenship rights are just about free movement and particularly free movement linked to economic activity then the answer is perhaps yes but the issue was not economic free movement rights in *Zambrano* either. Furthermore the two cases read together suggest that there has to be a relationship of carer for the derived residence rights to apply. This is not something made explicit in the judgment but it is something seen in previous cases (*Chen*, *Ibrahim*, *Teixera*) – where there is a carer of an EU national child, residence and associated rights are granted. The CJEU seems rather more sceptical of partners and spouses in general and even more so where as in *McCarthy* the citizen claiming the right was not economically active (see also *Akrich* and *Metock*). Or differently put:

‘Thus, whereas in *Zambrano* the company (and indeed authorisation to work) of a carer-parent was considered essential for the continued residence of the citizen on the territory of the Union, in *McCarthy* the same logic did not apply to the company of a spouse’ (Coutts 2011).

While the acknowledgement of the importance of carers’ rights is important and enhances women’s rights it is not something which the Court has done in order to enhance equality. It has also not considered the issues from a gendered or even gender aware perspective. In fact, the cases seem to require women to do it all: They need to be able to work and ideally work in a Member State other than their own in order to benefit from the right to have their third country family member join them and if there is a relationship of caring present chances of rights being granted seem to increase dramatically. What then if in the *Zambrano* case, Mr *Zambrano* had not featured? What if it was Mrs *Zambrano* who had claimed the right of residence? What if she had not worked because she had been looking after the (EU national) children? Would the reasoning have been the same? What then if Mr *Zambrano* had still been in Colombia and had asked to join his family in Belgium? Would he have been granted residence in the way that *McCarthy*’s Jamaican husband was not? From a gender perspective all these questions matter. Why Mrs *McCarthy* did not work matters from a gender perspective, who looked after the *Zambrano* children may also matter.

Taking a gendered approach to both cases may not have resulted in different outcomes but it may have done and it is likely to have resulted in better reasoning which showed more clearly if and why the cases were different. Gender and questions of traditional family models cannot be de-coupled from free movement and citizenship questions in situations where families are involved. Being aware of gender roles and the implications decisions may have on those or because of those should be the norm not the exception in CJEU decisions. However, citizenship case law and free movement case law are not usually subjected to a gender analysis. Where equality is considered it is equality based on nationality, not on other grounds which take gender into consideration (see for example *Guth* 2011 on the EU’s definition of family in free movement cases).

A slightly different approach to discrimination cases which could be applied to all cases involving individual citizens in one which puts human dignity at the heart of the consideration. Advocate-General Maduro in his opinion in the *Coleman* case attempts to

establish a foundation to equality jurisprudence which will govern the interpretation of the framework Directive and which sees ‘human dignity’ as fundamental to equality. His approach has been welcomed by some and criticized by others (See for example Mendes 2000) and it was ultimately not taken up by the ECJ. However it is an approach which would facilitate the consideration of gender alongside other factors and which might be more sensitive to gender implications and one which could be employed in a variety of policy areas.

Even using just two recent cases, we can see that cases which do not explicitly raise gender issues have gendered consequences and also that applying a gender lens to the cases might lead to a different understanding of the issues and this different outcomes. A systematic analysis of Court decisions in a variety of policy areas which considers both the gendered consequences of those decisions in detail as well as what a gendered reading of the cases might add to or change about a decision is required to better understand the jurisprudence in those areas and the CJEU as a legal and political institution.

Conclusions

This paper has suggested that the CJEU needs to be subjected to a full analysis which not only considers gender implications but also considers what a more gender aware consideration of the CJEU as a political institution could add to our understanding of how the EU works. The paper has argued that the composition of the CJEU matters not only because the composition impacts on representativeness and legitimacy because a more diverse judiciary will ultimately be a better judiciary. However, the impact of gender on judging at CJEU level needs to be investigated in much more detail through carefully designed empirical work which captures the complexity of judicial appointments in Member States and to the CJEU, the ways of working at CJEU level and the negotiations leading to final decisions. Further this paper argues that the way cases are brought to the Court, particularly through the preliminary reference procedure also has gendered consequences. Much is dependent on the judiciary in the home state as to the extent to which preliminary references are made and indeed the extent to which gender questions are seen as important and worthy of referral. More work is needed to fully understand the preliminary reference procedure from a gendered standpoint. It seems clear that it might have different implications and impacts on men and women but exactly how they play out at Member State level as well as at EU level is not fully understood and needs exploration. Finally this paper argued that although there have been a number of decisions which advance the rights of women and have done much for gender equality in the EU, the gender awareness and pro-equality stance of the CJEU (and perhaps the EU generally) has often been overstated. Many of these decisions were economically motivated and just as when gender often loses out when it has to compete with other factors in general policy making (MacRae 2010), so it loses out when competing with other considerations in judicial decision making. That is to say, when presented with a gender question, the CJEU has a relatively good record of making gender aware decisions which try and promote equality in most cases; however, where gender is not an obvious factor or not directly at issue, it seems the CJEU is not better at showing gender awareness or at mainstreaming gender than any of the other EU institutions. Having said that, this paper also

acknowledged that there is a lack of systematic research to confirm this claim and more works needs to be done to examine a variety of legal and policy areas in which the CJEU has ruled to fully appreciate the extent to which it has shown a true commitment to gender equality. The paper has therefore thrown up far more questions than it answers and it is hoped that others will take up the opportunities and take on the challenges to conduct some of the suggested research and lead us to a fuller understanding of the CJEU.

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