Law as the Object and Agent of Integration:
Gendering the Court of Justice of the European Union, its decisions and their impact

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1. Introduction

In 1998 Armstrong wrote 'Politics has discovered the European Court of Justice (ECJ). But has it discovered Law?' (Armstrong 1998: 155) The answer to this question, I would argue, continues to be no. Though there has been some interest in the ECJ from a political science perspective (for example Garrett 1992, 1995; Mattli and Slaughter 1995, 1998, Stone Sweet 2002, Stone Sweet and Caporaso 1998, Conant 2007, Alter 1998, 2001, Haltern 2005, 2007), political science has not yet fully engaged with law as a discipline which can add to our understanding of EU integration and remains rather uncritical of law as a tool for integration (Armstrong 1998). Conversely, law has also shied away from analyses of EU integration which go beyond traditional legal doctrine. As a result genuine interdisciplinary analysis of legal integration is rare. As Alter and colleagues observed:

> 'Through a political science lens, legal scholarship seems anecdotal, lost in details, fatally flawed because the influences of extra-legal factors are not seriously explored, or unpersuasive because of a tendency to say that everything matters. Through a legal lens, political science work seems woefully misinformed about law and the legal process, simplistic if not crude, stating the obvious as if it were newly discovered, and ignorant or in denial of important cases that seem to disprove the argument made.' (Alter et al. 2002: 114)

Legal integration as a theory of integration which captures both the legal *and* the political is therefore underdeveloped and many of the questions asked of more traditional theories have not yet been asked of it. Its complexities are yet to be fully discovered, its problematics yet to be fully acknowledged and its gendered nature is yet to be fully appreciated. This chapter focuses on the latter point and seeks to address two key issues. Firstly, it seeks to outline why legal integration theory may be problematic when viewed from a gender perspective and secondly it seeks to show how a more nuanced and gender aware reading of legal integration can help us develop a fuller and more holistic picture of how EU (legal) integration works and how it allows us to uncover the hidden assumptions and biases inherent in the case law of

the ECJ. This chapter begins by sketching out what we mean by legal integration as it has been traditionally understood and it does so trying to take into account both legal and political science approaches and positions. The next part of the chapter then considers examples of gendered analysis of legal integration whereas the final part of this chapter offers a general critical assessment of legal integration from a gendered perspective.

2. What is Legal Integration?

Throughout this volume we have already explored a variety of integration theories and each of the accounts can be applied to integration using law/legal integration (for an example of how the theories might apply to the legal see Burley and Mattli 2006). For it to be theorised in its own right we first need to clarify and define at which level we are interested in the legal. We might seek to understand how the Treaties, as overarching legal frameworks, encourage, shape and seek to advance integration. We may therefore be interested in aspects of EU constitutional law and the role of constitutional law in integration. This approach has already received some attention in this volume in the sense that different approaches to understanding how treaties are negotiated have been explored (see, for example, van der Vleuten in this volume). Alternatively we might be interested in how the provisions of the Treaties are implemented through secondary legal provisions such as Directives and Regulations as well as through soft law measures such as communications and other policy documents. Again this approach is not unfamiliar in political science circles although it is perhaps less well developed than the constitutional approach. A third area of interest might be the interpretation of the legal provisions through the Court of Justice of the European Union (CJEU) and the national courts of the member states. While the CJEU has received some attention as a political institution (see section 3) and the relationship between the European Court and national courts has been explored to a lesser extent, the case law of the CJEU and the reaction of national courts to that case law has not been examined or unpicked systematically in the context of EU integration. Finally, there is a further level of analysis which focuses on the socio-legal and in particular the impact of the legal provisions on the lived experience of citizens across the EU. Which focus we take or prioritise has implications for our understanding of EU integration from a legal perspective. This chapter focuses on the implementation and enforcement of EU law through the CJEU and the ECJ in particular for a number of reasons. First, the constitutional level as well as the implementation of law in secondary legislation and policy documents have already received some attention and are the most obvious areas where critiques already explored in this book can be applied to the legal.

Second, those levels involve the institutions and actors which have been recognised as political institutions and have been subjected to scrutiny as such; the CJEU has not received the same level of scrutiny and is treated (usually at least) as a legal and not a political institution.

Joseph Weiler noted that law is both the object and the agent or instrument of integration: while law is a product of the polity, the polity is also to some extent the creature of the law (Cappelletti et al. 1986: 4; Augenstein and Dawson 2012: 1). This captures well the nature of legal integration. Law and legal decisions are the result of legal integration as well as shaping it. It is therefore striking that political science textbooks rarely include separate sections, never mind chapters on legal integration even though most do include sections on the CJEU (notable exceptions include Bieling and Lerch 2012; Eilstrup-Sangiovanni 2006; Wiener and Diez 2009) and equally, legal textbooks rarely include detailed analysis of integration theories. Where legal integration issues are covered, they often focus on questions around judicial politics. Initial research drew heavily on principal-agent theory and conceptualised the Court as an agent of the Member States doing the bidding of the most powerful States (see Garret 1992; Garrett and Weingast 1993, Burley and Mattli 1993). This however underestimates the level of independence the CJEU has exhibited and overestimates the control even the most powerful Member States exert over it (See for example Weiler 1994; Mattli and Slaughter 1995, 1998; Alter 2001). This might seem obvious to lawyers who are trained in the traditions of judicial independence and the rule of law but it is worthy of further discussion. The role of the ECJ in shaping the EU as we know it today and in pushing forward EU integration cannot be underestimated. Beginning with the decision in *Van Gend en Loos* in 1963, the ECJ turned what was for all intents and purposes an international legal framework into a new legal order which applied not only at international level between Member States but also to citizens of those Member States. The ECJ said:

> 'the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals'

Not only is *Van Gend en Loos* a 'famous stepping stone of legal doctrine, but [also] a breakthrough in the political relationship between member states and the club' (Middelaar 2013:49). Subsequent case law built on this stepping stone by firmly establishing the direct

applicability and supremacy of EU Law (*Costa v ENEL* (1964); *Simmethal II* (1978), *Internationale Handelsgesellschaft* (1970)) which then allowed the development of the principles of direct and indirect effect and finally that of State Liability (*Francovich and Bonafaci v Italy* (1990)). The series of cases therefore 'represented, not just in their time but permanently, a giant leap on the road to European integration' (Fennelly 2010: 44) because they resulted in the Member States having been 'judicially tamed' (Middelaar 2013: 80) and the ECJ having completed the transformation of the treaties

> 'from a set of horizontal legal arrangements between sovereign states into a vertically integrated legal regime conferring judicially enforceable rights and obligations on all legal persons and entities, public and private, within the EC territory' (Stone Sweet 1998: 306).

This vertically integrated legal regime allowed integration to occur at a much faster pace than it would otherwise have done because it allowed citizens, you and me, to enforce our EU law rights like we would enforce any other rights in our own national courts. And our own national courts were, for the most part happy to help us enforce our EU Law rights:

> 'For more than 40 years, this system has successfully managed the myriad complexities of legal integration. It has also heavily conditioned legislative outcomes in a wide range of policy domains, and it has helped to determine the course of European integration more generally. But the system has never been "perfected". It has evolved continuously, often unpredictably, in response to a steady stream of challenges to supremacy arising from litigation of EC law in national courts' (Stone Sweet 2010: 201)

'One of the most important aspects of the Court's contribution has been its characterization of the relationship between the EU and national law' (Shaw 2000b: 27) and the Preliminary Reference Procedure which, under what is now Article 267 TFEU, allows national courts to refer questions of EU law to the ECJ is a good example of how that relationship works between EU and national courts. Case law has clearly established that there must be a genuine dispute which is being heard in a national court or tribunal (*Foglia* (1991)) to which the interpretation of EU law is relevant and important (*Dzodzi* (1990)) and that the national court must put a precise and clearly phrased question to the ECJ (*Telemarsicbruzzo* (1993)).

The ECJ's job is then to answer the question put to it, not to decide which party to the original case wins. One reason the ECJ has been so successful in driving EU integration forward and developing policy areas is the relatively high number of cases brought by citizens which raise EU law questions and which have therefore allowed the ECJ to interpret areas expansively. Gender equality is an example of a policy area where this can be seen clearly.

A key case in terms of both the development of the doctrine of direct effect as a key legal principle and in terms of gender equality was *Defrenne II*. In this case an air hostess made a claim for equal pay with that of her male colleagues and the ECJ concluded that the EU Law in this area (what was then Article 119EEC) had direct effect and therefore allowed Ms Defrenne to bring her claim directly to the national court and rely on her EU law rights to do so. This is the first example of direct effect of a Treaty provision being applied in this way between an individual and a private organisation (the airline) leading Prechal to comment:

> 'Gender equality law has played a pivotal – in many respects pioneer – role in the field of enforcement of Community law in general and in particular for the protection of rights, which individuals derive from that law' (Prechal 2005: 35)

As a result of the decision in *Defrenne II* women all over Europe are able to ensure the consistent enforcement of EU Law in their own Member State and a series of cases confirms that the mechanism is effective in bringing about implementation of the provisions and the expansion of equality law. *MacCarthys Ltd v Smith* (1980), which concerned a claim for equal pay with an employee's predecessor in the same job, is an example of an ECJ case which forced change in national legislation (this time the British Equal Pay Act 1970) but which is also forced other Member States to examine their equal pay laws. In *Bilka Kaufhaus GmbH* (1986) for example the ECJ concluded that it was unlawful to withhold pension contributions to part time workers because it breached the provisions on equal pay. The cases of *Kalanke* (1995) and *Marschall* (1997) show the balancing act which the ECJ has sometimes engaged in, in order to clarify the law. Both cases concern a complaint of sex discrimination brought by a man because of rules which require the appointment of women over men where they are otherwise underrepresented. In *Kalanke* the relevant rule was held to be discriminatory because it required the woman to be hired in all circumstances where the candidates were similarly qualified whereas in *Marschall* the women was to be hired unless there were factors which tipped the balance in the man's favour. While *Kalanke* was seen as a

major setback for equality across the EU, *Marschall* restored some of the balance. What the cases did do however, was show clearly that across the EU a distinction must be drawn between positive action and positive discrimination with the former being lawful and the latter not.

Research from individual Member States as well as research taking an overview (for example Alter and Vargas 2000; Anderson 2006; Schiek and Chege 2009) indicate that the ripple effect of decisions made at EU level is significant in shaping the development of the law at national level. Individual ECJ decisions impact not only on the Member State concerned but on all others too resulting in increasing integration, the potential for further litigation which in turn leads to further integration.

Although there continues to be significant resistance against laws 'imposed by Brussels', EU citizens are also quick to enforce their rights, including EU law rights through the court system in their respective countries and in some instances civil society organisations have significant litigation strategies which support recourse to law (Cichowski 2007; Vanhalla 2011). Member States' courts, particularly lower courts have been co-opted into the system of EU law enforcement because of EU law principles such as direct applicability and direct effect established by the ECJ, and in spite of some tensions between the ECJ and the highest courts of some member States (see Stone Sweet 2004; Kumm 2005; Maher 1996), 'the relationship between the Court of Justice and the national courts, including supreme courts, has worked reasonable well' (Edwards 2010: 173).

Whether we are seeing a move to what Keleman (2010) termed 'Eurolegalims', that is governance which is dominated by detailed legal rules which are backed up and enforced through litigation; or whether law is one part of a wide array of mechanisms which drive integration, what is clear is that law can and does play an important part in driving integration forward. We have seen this above in relation to gender equality law but examples could be drawn from almost any policy area the EU is involved in.

3. Examples of gendered analysis of legal integration

There is little work which combines legal analysis with political science methodology in order to examine legal integration and then also does so from a gender perspective. There are a number of studies which do include a legal dimension and which say something about legal integration even where they are not specifically focusing on an examination of EU integration. They are worth briefly outlining here to give a sense of the work which can be done in this area. What is striking as that these studies all recognise that a purely legal

analysis gender equality or areas impacting on gender equality is not likely to be able to fully explain what is driving the development of law and policy and the impact of that law. All of the work outlined below is very clear that law is about far more than the text of treaties, regulations and directives or the decision of the court; legal integration is also about how that law is understood, accepted or rejected, utilised and tested by Member States, EU institutions, individuals and civil society actors. The same bit of law can therefore be both the object and the agent of integration at the same time.

Alter's work on the ECJ is an excellent example of scholarship which bridges the disciplinary divide between law and political science and several examples have already been cited. Together with Vargas she provides a useful explanation of how organisations can use law and litigation in particular to bring about legal change which will have an impact in the home state as well as across the EU. The article focuses on the UK's Equal Opportunities Commission and its litigation strategy though the 1980s which was highly successful in using EU law in order to being about changes in national provisions (Alter and Vargas 2000).

The importance of organisations and civil society in particular in mobilising law is picked up in the work of Rachel Cichowski. She uses the examples of gender equality law as well as environmental protection to show how 'an international treaty governing economic cooperation became a quasi-constitutional polity granting individual rights and public inclusion' (Cichowski 2007:1). Her work is underpinned by detailed empirical work which gives it a rich evidence base and allows her to fully explore how and why integration has moved forward in a particular way in a particular policy area. Her work highlights that the interaction between civil society and the legal arena has been key particularly in the area of gender equality.

Catherine Hoskyns' work in which she sets out a feminist perspective on the EU's equality policies (Hoskyns 1996) is worth considering for no other reason than that it is one of the early explorations of this area of law. She notes that women have 'raised their voices and used legal channels and policy instruments … to generate social change in ways undreamed of by the pragmatists who drafted the Treaty of Rome.' (Hoskyns 1996: 209-210) While the majority of her work centres on the political institutions and their work, she also provides a detailed consideration of the ECJ and in particular her analysis of the Defrenne case is insightful and useful. Hoskyns, in her analysis of the case law draws a distinction between the cases related to the employment sphere where she suggests that the ECJ has been innovative and the decisions far reaching and the area of social security where she finds the court to be rather more conservative. If her analysis holds true then we would expect to see

equality law in the employment sphere to be rather more advanced than a gendered understanding of social security provisions. Hoskyns work therefore highlights the importance of law as a part of moving gender equality forward but also brings to our attention the importance of gendering cases which are not directly about non-discrimination or equality in order to highlight the hidden biases and assumptions.

Jo Shaw's work has emphasised the dual legal and political role of the ECJ and this is a useful starting point for considering how legal integration works. As a legal institution, the ECJ's decisions and the way in which they interpret EU law are perhaps the most important aspects in need of investigation whereas as a political institution the court's interaction with all the other institutions and Member States' courts is at least as important then the published judgment. Only by considering both together can we really understand how legal integration works and what the role of law and the role of the court is. The other important issue raised by Shaw in this context is the fact that many of the Courts decisions can be seen as opportunist rather than as necessarily feminist or gender aware. She notes that the court has 'cloaked itself in something akin to a feminist cloak almost always only where some gain can be obtained in terms of reinforcing its own legitimacy within the system' (Shaw 2000c: 142). Arguably therefore the court is not gender aware as much as aware of its own position within the EU institutional framework.

The work discussed above is all focused on gender equality law within the EU. To fully appreciate what gendered approaches to work on EU legal integration can add it is worth also considering work which is not explicitly focused on gender equality law. There are several examples which look at closely related issues such as mothering in the EU (Guerrina 2005) or families and family law in the EU (McGlynn 2009). The work of Ackers, over a series of projects based on detailed empirical work has considered the situation of migrant women (Ackers 2009), migrant retirees (Ackers and Dwyer 2002) and migrant children (Ackers and Stalford 2004) as well as highly skilled migrants specifically including women (Ackers and Gill 2008) in the EU. While her work is not specifically examining integration, her work does fully explore the lived experience of her chosen research participants and charts their experience of the EU legal framework. She adds an important dimension to work which provides an analysis of legal doctrine and work which considers integration in a theoretical context, by showing how this integration is experienced through the creation and enforcement of legal rights in specific political contexts.

All the work introduced above suggests that a gendered reading of EU law can add to our understanding of (legal) integration by highlighting dynamics and issues which otherwise

remain hidden. The next section sets out a gendered critique in more detail in order to show more clearly what such an approach can bring.

4. Applying a gendered critique to legal integration

Legal Integration, considered from a gender perspective raises a number of issues and concerns which are worth considering carefully. The first, and perhaps most obvious point we need to consider is who is driving the legal integration; who are the people making decisions which drive integration forward? The ECJ is made up of 28 judges, 5 of whom are women, and nine Advocate Generals, 3 of whom are women. 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'. (Anasagasti et al 1999: 7)

Rackley (2013: 165) argued further 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'; 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). Judges with different backgrounds are likely to have different views and while different views may sometimes be in conflict and give rise to tensions, Rackley 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' (Rackley 2013: 177).

This is, in an EU context, actually not controversial. After all the Treaties, in Article 19TEU, insist that each Member State appoints one judge and it is unquestioningly accepted that this is important. 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). 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. Why then is it acceptable to expect the Union's women to accept decisions made by male dominated Courts?

A concrete example from a key area in legal integration; that of EU Citizenship may help to show why a gendered interpretation of law highlights the hidden biases and assumptions. European Union Citizenship, so the ECJ declared, was to be the fundamental status of national of the EU Members States (*Grzelczyk* 2001). Some have argued that it was never intended to provide concrete rights but instead was designed to bring the people closer to the Union and make it meaningful in other than just economic terms (see Currie 2009). EU Citizenship decisions have had a significant impact on integration shaping the way citizens can move within the Union and the rights they can rely on. On first glance Citizenship case law appears gender neutral at worst and some may be cautiously optimistic that gender issues are being taken into consideration. For example in the case *Martinez Sala* (1985), the ECJ agreed that there did not always have to be a link between an EU migrant carrying out some sort of economic activity in the form of employment or self-employment and their right to receive social advantages. In addition carers seem to have received some recognition in EU citizenship case law which can be seen as a positive step towards gender equality (for examples the cases of *Chen* (2005), *Ibrahim and Teixera* (2010)).

However looking at two cases decided in quick succession in 2011 highlights how gendering Court decisions highlights issues not otherwise visible. 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 issues 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 Mr Zambrano and his family to leave the territory of the EU and thus deprive the children of their EU rights. In *McCarthy* the refusal did apparently 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 and other questions which are important if we are to gender the citizenship case law. Mr

Zambrano had been working and supporting himself and was able to so again if allowed to legally work in Belgium. Mrs McCarthy had never worked and was dependent on state assistance. 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* (2005), *Ibrahim and Teixera* (2010)) – where there is a carer of an EU national child, residence and associated rights are granted. The ECJ seems rather more sceptical of partners and spouses in general:

> '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: online).

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. 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 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. But none of these questions were asked or considered by the Court.

Importantly of course, some may argue that the Court never got the opportunity to consider those issues because it is simply asked to consider the question(s) put to it by the referring court. This is worthy of further examination on two points. First the possibility of applying a gendered reading of the question referred and thus using a gendered analysis of what facts and legal issues are relevant to deciding the case is something which is open to the Court. Secondly, this point does highlight that the Court is dependent on national courts. In this regard, 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 as lower courts across Member States tend to have more women judges than Appeal or Constitutional Courts (with some notable exceptions such as Bulgaria (CEPEJ 2012). If it is accepted that women judges are more likely to acknowledge that questions arising are gendered (see Rackley 2006, Hale and Hunter 2008) 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 of 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 1999: 14).

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 (2010) explores the disjuncture between the gender equality rhetoric and myth at EU level and its translation or implementation into national contents. 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 and because national judges are of course part of the national context and rhetoric (and less likely to be women). Nonetheless the fact that all courts can refer a question is a positive which can be used by EU citizens to argue for a more nuanced and gender aware reading of EU legal integration where the opportunity arises. The problem is though that such an opportunity has to arise. The preliminary reference procedure

requires that there is a genuine legal dispute between two (or more) parties and that the interpretation of EU Law is necessary to resolve that dispute. This means that hypothetical questions cannot be referred and interest groups cannot engineer a disagreement in order to get a ruling on a particular issue. The issue has to come up in a dispute and the issue has to require the interpretation of EU Law. This means that some EU law has to exist in the first place. In some cases of course this is not controversial and in areas such as equal pay or non-discrimination the legal provisions and associated case law are well known and the positive impact on the women of the EU are clear. In other areas, this becomes more difficult – EU citizenship is one such area and in particular the free movement of persons is full of examples where decisions have been made which have gendered implications which could have more fully informed the judgments but did not. Shaw's work (2000a, 2000c, 2005) for example suggests that ECJ decisions and EU policy generally privilege certain EU citizens over others and construct gender roles in certain ways. The EU model itself appears to be built on full labour market participation by all including women as workers and mothers and men as the main earners in a heterosexual family set up (see also Lombardo and Verloo 2009; Maier and Lombardo 2008; Guth 2011; O'Brien 2009, 2013).

The Citizens' Rights Directive (Directive 2004/38) provides further examples of how a gendered reading can make a difference to our understanding of what rights can and should be granted to EU migrants. Residence in another Member State is lawful as long as the person moving is economically active or can show that they are not a burden on the host state and those who are lawfully resident are entitled to equal treatment with host nationals when it comes to social assistance. While this suggests the possibility of an approach broader than worker/economically active status, it still highlights the economic roots of free movement and questions whether we can really speak of citizenship in its truest sense. As Chalmers and colleagues note:

> 'Yet the practical effect of these conditions is that 'expensive' members of society do not enjoy free movement rights. […] Union Citizenship is a citizenship for all Europeans who are not poor or sick' (Chalmers et al. 2014: 478).

The case of *Baumbast* (2002) serves as an illustration that economic self-sufficiency is at the forefront of the Courts mind. The ECJ held that limitations on residence rights 'are applied in compliance with general principles of EU law and, in particular, the principle of

proportionality'(*Baumbast* at para 94). Although Mr Baumbast might not have had the required medical insurance in the UK, he did have medical insurance in Germany, where the family travelled to receive any treatment. Mr Baumbast and his family were not reliant on the host state for any financial benefits or help and in fact Mr Baumbast had previously engaged in economic activity, thus contributing to the economy in the UK. Taking all those matters into consideration the ECJ felt that denying the family their right to residence was not proportionate:

> 'the Court's use of proportionality has injected a greater degree of flexibility into the black-letter provisions and allowed it to extend residence (and equal treatment) rights to some individuals who fall outside of the formal legislative regime'(Currie 2008: 168).

The economic rationale is clear – the family would not be a burden on the host state. Some financial solidarity between Member States can and should be expected in the EU – just as long as citizens do not expect too much. We are therefore left with a situation where social assistance under Directive 2004/38 is available to EU citizens who are lawfully resident in another Member States, either as workers or because they have sufficient resources and sickness insurance; those who are not economically active or self-sufficient are not entitled to help. This makes no sense at is seems to be offering help to those least likely to need it and denying it to those most likely to require assistance. Applying a gender lens highlights a number of issues. Women are less likely to fall into the privileged category of economically active than men are, leaving them as either dependent for their EU free movement rights on husbands (or possibly partners or sons) who do fall within that category or unable to claim their fundamental status as EU citizens at all. This is partly due to a narrow interpretation of economic activity as linked to employment or self-employment ignoring other areas such as volunteering and, in particular, care.

A more nuanced and gender aware reading of the EU law provisions could lead to different results, a different way of thinking about who, as an EU citizen, is deserving of rights. The work of Charlotte O'Brien, though not explicitly labelled feminist or gendered, gives us an insight into what this might look like. In 2009 she argued

> 'in favour of an integrated interpretation approach: that the reach of free movement rights should be defined according to a duty of both formal and

> substantive equal treatment. The scope of migrant work should be subject to the same principles as the content of Community law. In this way some asymmetry could be redressed; not by attempting to Europeanise the social, but by socializing the (already European) economic'. (O'Brien 2009: 1107)

This may not sound particularly gendered but has big implications for allowing the provision of care and voluntary work as well as a whole host of characteristics all EU citizens possess to be taken into account when considering rights. In 2011 and 2012 O'Brien presents similar arguments in relation to volunteers (O'Brien 2011a) and free movement and the development of EU discrimination provisions arguing that

> 'An alternative approach to economic rationality is here advocated, in which the choice is not between economic utilitarianism and individualistic human rights, but a choice between definitions of "utility", a choice that should take account of the long-term interests of society.' (O'Brien 2011b: 27)

And finally in 2013, O'Brien reminds us why holistic approaches to evaluating law and policy areas as well as concepts and ideas and to approaching EU integration in different areas as a whole rather than considering each individual step in isolation are important:

> 'EU citizenship is the subject of incremental and painstaking construction. In allowing ourselves to get caught up with dissecting each separate instalment that comes with each new case, we risk accepting without scrutiny what should be a controversial ideological framework – that of an economic/market citizenship. Within this framework, rights do not attach to personhood; rather rights are triggered, interpreted, delineated and weighed according to a miscellany of conditions. As a result, claimants can face "social welfare cliff edges" – tipping them over the edge of the cliff, from full protection to none – on the basis of apparently arbitrary tricks of circumstance'. (O'Brien 2013: 1643)

A gendered analysis of EU legal integration allows us to not fall into that trap and to challenge the ideological framework of economic/market citizenship within which much of (legal) integration is framed. A gendered reading also allows us to take a more holistic approach, particularly if both legal and political science approaches are acknowledged: We

can acknowledge the importance of the individual legal decisions and the overall legal framework as well as *all* the actors involved in those decisions and the impact the decisions and the framework will have at EU and national level, in terms of further developing policy and advancing integration.

5. Conclusions

EU Legal Integration as a theoretical idea informed fully by both law and political science is in its infancy. Work has been done by political scientists and some work has been done by lawyers but interdisciplinary work is needed and gender scholars with an interest in the EU are well placed to drive this work forwards. This chapter has highlighted that we should not fall into the trap of seeing the legal as something objective, rational and neutral because it is, just like anything else, gendered. They way treaties are negotiated, the way secondary legislation is arrived at, and the way decisions are referred to and then made by the Court all have gendered implications. The make-up of the court has consequences, the preliminary reference procedure has consequences and yet there is almost no research exploring these issues in any systematic way. Legal integration needs examining closely from all sorts of perspectives but a gendered analysis can be a valuable first step to more fully understanding how legal integration impacts on a wide variety of EU citizens and it therefore is an important step towards fully understanding EU integration as a whole. In particular a gendered analysis of EU law and its role in integration allows us to move away from the market focused analysis so often seen and take account of all actors, their priorities and preferences and the impact they can have on the development and implementation of EU law and policy.

Combining legal and political analysis and adding a gender lens to those approaches highlights that while law plays an important role in EU integration and while the ECJ undoubtedly created the legal framework which ensure citizens have a significant stake in the integration process as well as opportunities to shape it, using law to drive integration forward is as much a political process as it is a legal one. The focus on law alone is what makes legal integration theories problematic because just focusing on the legal texts and court decision only tells us part of the story about integration. The outcome of case law might result in Member States having to change their national laws in order to comply but they tell us little about why the cases were brought in the first place or exactly what the impact will be. Because gendered approaches tend to have a wider focus, gendered reading of legal integration theories allows us to see law as more than just the legal text and decisions but as the entire process which begins with law making and ends with an understanding of how

people engage with the legal provisions and how they impact on EU citizens. A gendered reading helps us to understand how

> 'The EU's shift towards more participatory, reflexive or fragmented forms of legal rule does not simply displace "integration through law", but recursively re-evaluates and conditions its very meaning. This sense of EU law's sustained ability to steer European societies and to reinvent itself in response to new political and societal challenges […] may be a central factor in explaining the intrigue that "integration through law" continues to invoke' (Augenstein 2012: 8)

Discussion Questions

1. What is legal integration?
2. What is the role of law in EU integration?
3. What was the role of law in advancing gender equality law?
4. What can a gender lens tell us about the role of law in EU integrations?

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