The Routledge Handbook of Gender and EU Politics

Edited by Gabriele Abels, Andrea Krizsán, Heather MacRae and Anna van der Vleuten

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Contents

Figures

Tables

Abbreviations and acronyms

ACP	Africa, Caribbean and Pacific
ACRE	Alliance of European Conservatives and Reformists
AEMN	Alliance of European National Movements
AFCO	Committee on Constitutional Affairs, European Parliament
AfD	Alternative für Deutschland
AGRIFISH	Agriculture and Fisheries Council
AIDCO	EuropeAid Co-operation Office
ALDE	Alliance of Liberals and Democrats for Europe
AP	action programme
APF	Alliance for Peace and Freedom
APPF	Authority for European Political Parties and European Political Foundations
AVFT	Association des victimes de harcèlement moral, psychologique, sexuel, dans le cadre du travail
BME	black and minority ethnic
CAHRV	Coordination Action on Human Rights Violations
CARD	Coordinated Annual Review on Defence
CDU	Christian Democratic Union of Germany
CEAS	Common European Asylum System
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women, United Nations
CEDEFOP	European Center for the Development of Vocational Training
CEE	central and eastern Europe
CETA	Comprehensive Economic and Trade Agreement
CFR	Charter of Fundamental Rights
CFSP	Common Foreign and Security Policy
CJEU	Court of Justice of the European Union
CoE	Council of Europe
CoFoE	Conference on the Future of Europe
COMPET	Competitiveness Council
COREPER	Comité des représentants permanents
CPCC	Civilian Planning and Conduct Capability
CPE	critical political economy

CRC	Combahee River Collective
CROME	Critical Research on Men in Europe
CSDP	Common Security and Defence Policy
CSMM	Critical Studies on Men and Masculinities
CSO	civil society organization
CSPEC	Confederation of Socialist Parties in the European Community
CSR	country-specific recommendation
DEVAW	Declaration on the Elimination of Violence against Women
DF	Dansk Folkeparti, Danish Peoples' Party
DG	Directorate-General
DG CLIMA	Directorate-General for Climate Action
DG DEFIS	Directorate-General for Defence Industry and Space
DG DEVCO	Directorate-General International Cooperation and Development
DG ECFIN	Directorate-General for Economic and Financial Affairs
DG EMPL	Directorate-General Employment, Social Affairs and Equal Opportunities
DG Justice	Directorate-General Justice, Fundamental Rights and Citizenship
DG RELEX	Directorate-General for External Relations
DG RTD	Directorate-General for Research and Innovation
DUP	Democratic Unionist Party
EAEC	European Atomic Energy Community
EASO	European Asylum Support Office
EC	European Communities
ECB	European Central Bank
ECD	European Consensus on Development
ECHR	European Convention on Human Rights and Fundamental Freedoms (Council of Europe)
ECJ	European Court of Justice
ECOFIN	Economic and Financial Affairs Council
ECPM	European Christian Political Movement
ECR	European Conservatives and Reformists
ECSC	European Coal and Steel Community
ECtHR	European Court of Human Rights
ECU	European Currency Unit
EDC	European Defence Community
EDF	European Development Fund
EDP	European Democratic Party
EDP	excessive deficit procedure
EEAS	European External Action Service
EEC	European Economic Community
EES	European Employment Strategy
EFA	European Free Alliance
EFDD	Europe of Freedom and Direct Democracy
EFTA	European Free Trade Association

EGC	European Green Coordination
EGP	European Green Party
EIDHR	European Instrument for Democracy and Human Rights
EIGE	European Institute for Gender Equality
EL	Party of the European Left
ELDR	European Liberal Democrat and Reform Party
ELSA	Ethical, Legal and Social Aspects
EMPL	Committee on Employment and Social Affairs, European Parliament
EMS	European Monetary System
EMU	Economic and Monetary Union
ENF	Europe of Nations and Freedom
ENoMW	European Network of Migrant Women
ENP	European Neighbourhood Policy
ENVI	Environment Council
EP	European Parliament
EPA	Economic Partnership Agreement
EPG	European party groups
EPLO	European Peacebuilding Liaison Office
EPO	European Protection Order
EPP	European People's Party
EPRS	European Parliamentary Research Service
EPSCO	Employment, Social Policy, Health and Consumer Affairs Council
EPSR	European Pillar of Social Rights
ERA	European Research Area
ERG	European Research Group
ERM	Exchange Rate Mechanism
ESC	Economic and Social Committee
ESDP	European Security and Defence Policy
ESF	European Social Fund
ESS	European Security Strategy
ESS	European Social Survey
ETF	European Training Foundation
ETS	Emissions Trading System
ETUC	European Trade Union Confederation
EU	European Union
EUCO	European Council
EUMC	European Monitoring Centre on Racism and Xenophobia
EU OSHA	European Agency for Safety and Health at Work
EUPP	Euro Plus Pact
Euratom	European Atomic Energy Community
EUROFOUND	European Foundation for the Improvement of Living and Working Conditions

EWL	European Women's Lobby
EYCS	Education, Youth, Culture and Sport Council
FAC	Foreign Affairs Council
FEMM	Committee on Women's Rights and Gender Equality, European Parliament
FGM	female genital mutilation
FI	feminist institutionalism
FP	Framework Programme
FPE	feminist political economy/feminist political economist
FRA	European Union Agency for Fundamental Rights
GAC	General Affairs Council
GAD	Gender and Development
GAP	Gender Action Plan
GDP	gross domestic product
GER	gender equality regime
GFP	gender focal person
GIA	gender impact assessment
GM	gender mainstreaming
GSC	General Secretariat of the Council
GSP	Generalised System of Preferences
GUE	European United Left
HR/VP	High Representative for Foreign Affairs and Security Policy/ Vice President
IcSP	Instrument contributing to Stability and Peace
ID	Identity & Democracy Group
ILGA	International Lesbian, Gay, Bisexual, Trans and Intersex Association
ILO	International Labour Organisation
IMF	International Monetary Fund
IPU-PACE	Inter-Parliamentary Union and Parliamentary Assembly of the Council of Europe
ITC	International Trade Centre
JHA	Justice and Home Affairs Council
JRC	Joint Research Centre
LGBT	lesbian, gay, bisexual, transgender
LGBTI	lesbian, gay, bisexual, transgender, intersex
LGBTIQA+	lesbian, gay, bisexual, trans/transgender, intersex, queer/ questioning, and asexual
LI	liberal intergovernmentalism
LIBE	Committee on Civil Liberties, Justice and Home Affairs, European Parliament
MENF	Movement for a Europe of Nations and Freedom
MEP	Member of the European Parliament
MP	Member of Parliament

MPCC	Military Planning and Conduct Capability
MTO	Medium-Term Objective
NATO	North Atlantic Treaty Organization
NFMM	Nordic Association for Research on Men and Masculinities
NGL	Nordic Green Left
NGO	non-governmental organization
NI	new institutionalism
OLP	ordinary legislative procedure
OMC	open method of coordination
OJ	Official Journal of the European Union
OSCE	Organisation for Security and Co-operation in Europe
PES	Party of European Socialists
PESCO	permanent structured cooperation
PHARE	Poland and Hungary Assistance for Economic Reconstruction
PiS	Polish Law and Justice Party
PPEU	European Pirate Party
PPP	public–private partnerships
PTA	preferential trade agreement
PVV	Partij voor de Vrijheid, Dutch Freedom Party
QMV	qualified majority vote
R&D	research and development
RE	Renew Europe
RN	Rassemblement National
RRI	responsible research and innovation
RRP	radical right-wing parties
RRP	radical-right politics
RTD	research and technological development
RWP	right-wing populism
S&D	Progressive Alliance of Socialists and Democrats
SDG	Sustainable Development Goals
SEA	Single European Act
SEDE	Committee on Security and Defence, European Parliament
SGP	Stability and Growth Pact
SIA	sustainability impact assessment
SOTEU	State of the Union address
STOP	Sexual Trafficking of Persons
TCN	third-country national
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TRAN	Committee on Transport and Tourism, European Parliament
TSCG	Treaty on Stability, Coordination and Governance
TSD	trade and sustainable development
TTE	Transport, Telecommunication and Energy Council
TTIP	Transatlantic Trade and Investment Partnership

UDHR	Universal Declaration of Human Rights
UKIP	UK Independence Party
UN	United Nations
UNFCCC	United Nations Framework Convention on Climate Change
UNSC	United Nations Security Council
UNSCR	United Nations Security Council Resolution
V4	Visegrád countries
VAW	violence against women
WasH	Women against sexual harassment
WAVE	Women Against Violence Europe
WEU	Western European Union
WEUCO	Women's European Council
WID	Women in Development policy
WIDE	Women in Development Europe
WPS	Women, Peace and Security
WTO	World Trade Organization

14

The Court of Justice of the EU and judicial politics

Jessica Guth and Sanna Elfving

This chapter deals with the Court of Justice of the European Union (CJEU) as both a political and legal institution. The CJEU has often been described as political because of its prominent role in developing EU law as well as promoting further integration within the EU through its judgments. These judgments constitute a major source of EU law and apply in all member states. In terms of equality law, the judgments concerning equal pay, pensions, retirement ages and the protection afforded to workers due to pregnancy and maternity have been very influential, and many of these cases have also developed the EU legal order and strengthened its influence in member states (see Guth 2016). This first section briefly outlines the court's composition, power and position. Section two focuses on existing work on gendering the CJEU, outlining key themes and key gaps. Research on the CJEU can be divided into two main categories: first, gendering the court itself and how it works and, second, the case law i.e. the outcomes of that work. These approaches highlight how applying a gender lens can help us better understand the power dynamics and relationships at play in the institutional structure. The final section of this chapter focuses on the way forward and, particularly, the relationship between the CJEU and the European Court of Human Rights (ECtHR) as an area for future research. In spite of the CJEU's and the ECtHR's very distinct jurisdictions, their decisions in areas of law where fundamental human rights play a role are mutually reinforcing, and therefore the relationship between these courts could be important for the future of substantive gender equality.

The CJEU is made up of two individual courts. In the post-Brexit Court of Justice (ECJ) there are 27 judges plus 11 Advocates General, and on the General Court there are two judges from each member state (54). Out of the current total 92 judicial-level appointments, only 22 are women (seven in the ECJ[1] and 15 on the General Court) and, historically, very few women have been appointed, leaving the CJEU dominated by men. The CJEU's main role is to enforce EU law in a consistent and uniform way and thus accountable act as an arbitrator between individuals, organisations, and the political institutions holding the EU's executive and legislative power, namely the European Parliament, the Commission and the Council (see Ahrens and Rolandsen Agustín (European Parliament), Hartlapp et al. and Abels in this volume). Its decisions arguably drive the legal integration of Europe, necessitating 'cooperation among Member States in economic, political, and social domains' (Peritz 2018, 427). The CJEU deals principally with three types of legal procedures, each promoting legal integration to varying degrees. The so-called

infringement proceedings are used by the Commission to bring a non-compliant member state in line in case of a breach of EU law. Further, private and public institutions, at both the national and EU level, may seek annulment of acts of the EU institutions due to lack of competence or breach of procedural rules directly before the CJEU. Lastly, and perhaps most importantly, citizens and businesses may challenge any national rules that are inconsistent with EU law. They do this in their national courts, which, in the course of their proceedings, may seek preliminary rulings on specific legal questions from the CJEU.

Scholarship on judicial politics lies at the intersection of law, social and political science. It theorises and empirically studies the relationships and balance of power between judiciary, the legislature and the executive (Dunoff and Pollack 2017, 233). Literature on the judicialisation of politics tends to focus on the changes to the status of law, the values influencing judicial decision-making, and revision of the balance of power between different government agencies (Hersant and Vigour 2017, 292). The judicial politics methodology often combines 'a qualitative research grounded at least partly in observation and interview ... with the study of documents, videos, or quantitative data (systematic case analyses)' (Hersant and Vigour 2017, 294). The traditionally understood form of judicial politics generates statistical analysis of case law which is subsequently used to measure judicial behaviour (Chalmers and Chaves 2012). This can be done by theorising judges as rational actors who seek to maximise their influence on policy making by realising their policy preferences (Rachlinski et al. 2017). Much of the existing literature focuses on the US federal courts, whereas less has been written about the CJEU judges and the institution (Dunoff and Pollack 2017, 233). According to scholars, the dynamics of EU judicial politics are inseparable from the analysis of the litigated legal norms, identity of the litigants, and the judgment of the CJEU itself, and hence only a few EU legal norms are susceptible to the traditionally understood form of judicial politics (Chalmers and Chaves 2012, 25). We focus on cases brought to the CJEU using the preliminary reference procedure. However, obtaining the empirical evidence to substantiate the extent of political influences in the context of the CJEU, where deliberations are secret and no dissenting opinions are published, is challenging (Dyevre 2010, 303). Additionally, most existing studies take the US federal courts as their starting point, with far fewer studies placing the EU at the centre. In those that do, early work tended to conceptualise the CJEU as an institution doing the bidding of the most powerful member states (see Guth 2016 for a summary of the literature). However, this perspective oversimplifies matters and underestimates the power of judicial independence. Reflecting the growing influence of economic thinking on political and social science, political scientists have increasingly stressed the role of institutional factors as the main determinants of judicial decision-making (Dyevre 2010; Epstein and Knight 2000). Even legal scholars are not oblivious to the fact that the political climate has some bearing on the judges (Adams and Bomhoff 2012; De Londras and Dzehtsiarou 2015; Dzehtsiarou 2018, 90; O'Brien 2017a).

The CJEU is not specifically gender aware even though the case law demonstrates some small victories in the course of its development (Guth and Elfving 2018, 2). Petra Ahrens (2018, 46) concludes that even though the CJEU has been instrumental at times in advancing gender equality, it has been excluded from gender equality policy-making under the Europe 2020 Strategy (COM (2010)2020). Additionally, one could argue that the CJEU has occasionally been viewed as working against the equality agenda (Guth and Elfving 2018). However, since law is not gender neutral, there is very little the CJEU can do to address gender or intersectional inequalities, if national or European legislation is drafted in discriminatory terms, or the legal questions arriving at the court have had gender filtered out of them. Even the most liberal judiciary can only act within the limits of its powers and the confines of the legislation granting those powers.

Gendering the CJEU

There is currently very little work that examines the CJEU as a political and legal institution from a gendered perspective (Guth 2016). Most key publications in this area centre on a consideration of equality law. For instance, Karen Alter and Jeannette Vargas (2000) considered the highly successful litigation strategies of the UK Equal Opportunities Commission, which utilised EU law to drive legal changes in the 1980s. Jo Shaw (2001) has been more critical of the idea that the CJEU is gender aware by pointing out that many of its decisions, which are fundamental in terms of equality law, were self-serving, and 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 2001, 142). Chalmers and Chaves (2012, 37) have arrived at a similar conclusion, that the court's interest in its judgments is principally self-serving, namely 'to secure authority for itself and its work'. Some of the earliest work in this area reminds us that law does not exist in isolation, and that judicial decisions are often the product of political struggles and activism (Cichowski 2007; Hoskyns 1996). Indeed, the role of civil society, legal mobilisation, and strategies that help drive policy areas forward are equally important (Cichowski 2007; Hoskyns 1996; McIntosh Sundstrom et al. 2019). This aspect of how the CJEU functions is often ignored in both political science and legal scholarship. Catherine Hoskyns' 1996 work is fascinating also because it shows how the CJEU approaches diverse types of cases differently. According to her, the CJEU is more gender aware and bold in relation to employment cases, but much more conservative in relation to social security, for example. She therefore reminds us that gendering the CJEU as an institution is not enough; we also need to take into account the context and subject matter of the decisions. Gendering the court means gendering the institution itself, the way it works, and the outcome of that work, namely the judicial decisions.

Gendering the CJEU as an institution and the way it works has not been done frequently. Sophie Turenne (2015, 2017) has explored some of the issues in her work looking at judicial systems from a comparative perspective and, in particular, the extent to which judiciaries can, and should, reflect the societies they serve. Angela Zhang (2016) has considered appointment to the CJEU and judicial independence of the EU judges in some detail and, although her work lacks gendered analysis, it is useful in posing some gendered questions. It highlights that the appointment process has many political hallmarks with all the gendered assumptions and biases that might come with that. Her findings support earlier gendered analysis by Kenney (2002), who likened appointments to the CJEU to diplomatic appointments, which, depending on the context, may reward or punish the nominees. These arguments have been expanded in the authors' own work, which suggests that the CJEU's current composition means that the court overall, and the chambers in particular, remain male dominated to the detriment of diversity of experience (Guth and Elfving 2018, 43–44; Kenney 2013; Malleson 2003).

The existing body of work on the CJEU highlights several key gaps in the literature. Some of these gaps apply generally to the study of the court (although they may exacerbate gendered considerations) and some are gender specific. One of the gaps arises from a lack of access to the CJEU and its judges, which makes understanding of individual motivations of the judges difficult. In the CJEU context the lack of dissenting opinions exacerbates its impenetrability. As a result, there is an absence of a systematic analysis of how the judges' backgrounds impact on their decision-making at this level. Other gaps include the application of a gendered lens to policy areas where gender is less obvious consideration, and the failure to consider multiple forms of discrimination. We deal with these in turn.

In order to fully understand the CJEU and how it operates, we need to understand its personnel. This includes not only the judges and Advocates-General but also others working in the court. Access is, of course, always difficult, but while a detailed analysis of case law in specific areas can tell us something, it cannot provide an understanding of individual judges' decision-making, influence, or the dynamics of judging at the CJEU (Guth and Elfving 2018). We do not have dissenting opinions, information about how decisions were reached, or the extent of any disagreement. We can certainly gain some information about Advocates-General and their opinions; yet, by and large, we need detailed empirical work with the judges and the staff at the CJEU to understand how the personalities, background, training and dynamics shape the institution and its decisions. We know from work on national judiciaries, particularly in the US, that it matters who our judges are (Boyd 2016; Boyd et al. 2010; Collins et al 2010; Glynn and Sen 2015; Rackley 2013; Sotomayor 2002). This work needs to now be applied and tested in the European context. While research in the US has shown that most judges think that, on average, they are more skilful at avoiding the influence of race and gender bias than their colleague (Negowetti 2015; Rachlinski et al. 2017), a gendered analysis shows that judges are not as good at this as they think. According to Sotomayor (2002, 92), 'personal experiences affect what facts judges choose to see'. It is this personal experience that researchers now need to begin to capture in a systematic way.

To fully understand how the CJEU should take gender into account, we need a systematic review of the existing work in order to ask questions that can form the basis of a research agenda that takes us further towards a judicial politics and that is not only gender aware but gender active. We need a more comprehensive understanding of the importance of non-governmental organisations, lobbying and interest groups, as well as advocates, in the process of furthering cases in supranational courts. We need a more holistic understanding of how gender plays out in national systems, particularly in cases that raise EU law related questions. We need a better understanding of legal mobilisation, access to justice, and about how processes and procedures work to exclude or include gender as an issue for the court to consider. We need to understand the interplay between the European Convention on Human Rights and the fundamental rights provided in the framework of the EU as well as the relationships between courts at all levels, including between the CJEU and the ECtHR.

Additionally, EU member states have ratified the Istanbul Convention on Violence against Women from May 11, 2011 (CETS No. 210), which requires Parties to the Convention to ensure the practical realisation of the principle of equality between women and men by abolishing discriminatory laws and practices; adopting legislative measures preventing and condemning all forms of discrimination against women, and enshrining the principle of equality of men and women in national constitutions or other appropriate legislation (Article 4(2)). As is evident from this provision, the Convention is not limited to preventing domestic violence since it 'places detailed legally binding obligations on states parties as regards the measures that they must adopt in relation to violence against women' (McQuigg 2017, 6).

By studying the outcomes of the judicial work, i.e. the case law, we can gain insights into how particular issues are dealt with. Almost all of this work from a gender perspective has focused on gender equality law, and even the authors' own work has not gone much beyond areas of law with obvious gender implications (Guth 2016; Guth and Elfving 2018). In addition, little scholarship is systematically and explicitly focused on the CJEU, but rather considers case law as part of a wider framework, or as an aside. This work is incredibly valuable in understanding gender implications in various policy areas and highlight different approaches in different areas (Hoskyns 1996).[2] However, there is no systematic gender analysis across all policy areas, which could tell us something about how the court deals with gender per se. The lack of this systematic research is

not that surprising as it would be a huge undertaking to examine the CJEU's decisions in areas as diverse as trade, EU citizenship, and competition law, or decisions dealing with acts of annulment, for example. However, to fully understand the impact of gender we need to understand how the CJEU operates specifically in areas in which gender is not an obvious factor. A starting point might be to review existing work in various policy areas to draw parallels and identify differences that can then be further researched. Such research might then begin to highlight the extent to which gender is integrated into judicial decision-making and politics and whether the CJEU is genuinely gender aware.

What we can see from the current research is that a gendered analysis of the CJEU reveals that law is not gender neutral, and that the processes through which cases arrive at the court means that gendered considerations are potentially blocked at the various stages: the facts provided to the court, the legal question asked and the arguments made will already have been filtered based on the experience and background of the advocates and the national judiciary. This therefore highlights the importance of legal mobilisation, gender aware advocacy, gender awareness in the national courts, and the CJEU's willingness to hear the gendered voices in danger of being drowned out by formalistic procedures and dominant legal discourse. These aspects have so far not been subjected to thorough and rigorous analysis by researchers.

While gender has been under-researched, questions of multiple forms of discrimination have garnered even less attention. Although the CJEU has dealt with racial discrimination and xenophobia in a small number of cases (European Commission 2018, 24), it is yet to look at discrimination caused by multiple factors, e.g. gender and race or gender and religion. This is unsurprising given that neither EU law nor most national legislation explicitly prohibits multiple discrimination.

Further, 'adding inequalities' together does not provide any advantage in litigation and might, in fact, make it more difficult to prove discrimination in the first place. The lack of intersectional approach has been argued to divert attention from the dynamics of advantage privileging dominant groups because it may foster a sense of hierarchy among marginalised groups (McCall 2005). However, treating multiple inequalities as separate issues tends to privilege the interests of advantaged subgroups, specifically white women and ethnic minority men (Holmsten et al. 2010; Krook and Nugent 2016). The impact of multiple forms of discrimination needs exploration in relation to the people who make up the CJEU, and we need to consider that judges' views are influenced by political and ideological considerations as well as their background and position in society (Kairys 1998). Griffith (1997, 7) makes this point in relation to the English judiciary, noting specifically that many judges of the highest courts belong to a narrow social background. Therefore, female judges in the English courts are perhaps likely to have more in common with their male peers than with, for instance, women belonging to ethnic or sexual minorities. If, however, female and minority judges' experiences and viewpoints are different from those of their white male colleagues, they may present 'political, legal, moral, and popular interests' of underrepresented individuals and groups (Sen 2017, 375, 379). This needs to be explored in relation to the judicial decisions made in the same way that we suggest above in relation to gender only.

Where do we go from here: future directions

In this section we suggest three key directions for gendered research: first, detailed empirical work with CJEU staff at all levels; second, more systematic work considering the impact of gender across the range of the CJEU's work, including consideration of intersectional issues; and, finally, research that fully considers the relationship between the CJEU and the ECtHR,

particularly in relation to gender and intersectionality. Our first two suggestions have already been explored in the previous sections. Suffice it to say that empirical work with staff could focus on life history interviews, which capture their background, education, training and perceptions of their work, as well as on specific questions about how the CJEU works, and the influence of characteristics and politics. This could be supplemented with work analysing decisions, taking into account the composition of chambers, the Advocate-General assigned to the case, and, where available, other staff working on the case. Analysis of areas of work can be done by careful reading of the case law and interrogating each case, applying a gender lens. This allows the researcher to ask different questions about what and who was included or excluded; where was the focus; what was deemed important and why; could other questions have been asked, and what would that mean for the outcome of a case (for further suggestions on this type of methodology, see Guth and Elfving 2018).

Our third suggestion is worth considering in a little more detail. Although all individual EU member states, as signatories to the European Convention, are subject to the jurisdiction of the ECtHR, the EU itself is not formally bound by the Convention (Spaventa 2015, 35–36). This would only be the case if the EU itself ratified and then acceded to the Convention, primarily to allow individuals to appeal the decisions of the CJEU to the ECtHR. Such appeals would have been possible only in very specific circumstances and after the individuals have exhausted all other judicial avenues (Craig 2013; Dzehtsiarou et al. 2014). However, in its *Opinion 2/13* (ECLI:EU:C:2014:2454), the CJEU stated that external scrutiny of EU law by an outside body would run counter to the primacy, unity and effectiveness of EU law as guaranteed by the EU Treaty. It is therefore unlikely that decisions of EU institutions will be subjected to ECtHR jurisdiction in the foreseeable future. The situation is the same for the Istanbul Convention. Although the Commission's Gender Equality Strategy 2020–2025 (COM(2020) 152 final) makes the EU's accession to the Convention a priority, from the legal point of view this will not be able to occur before the CJEU has resolved the EU institutions' disagreement over which treaty articles can be used as a legal basis for the accession (*Opinion 1/19*) – the outcome of which is likely to either speed up or block the accession. The disagreement relates to a number of factors, including the lack of explicit EU competence to legislate in fields that have traditionally been exclusive member state competence (e.g. criminal law and family law) as well as views that member states cannot be forced to provide in their national law the legal recognition for same-sex couples or the necessity for transgender women to benefit from the protection provided in the 1951 Convention on the Status of Refugees (Prechal 2019). There are views, however, that regardless of whether the EU becomes a party to this Convention, the Istanbul Convention contains overlapping requirements with EU law and the EU could legislate within existing competence in order to achieve the aims of the Convention. Additionally, the Istanbul Convention is likely to have an impact on the decisions of the CJEU through the substantial body of the ECtHR case law on domestic violence that the CJEU is likely to consult (McQuigg 2017, 4; Nousiainen 2017).

The lack of scrutiny over the EU institutions by the ECtHR does not mean that its work is irrelevant. Although legal academics disagree over the level of co-operation between the CJEU and the ECtHR, both courts make frequent referrals to one another's jurisdiction (for criticism of the CJEU's lack of referrals to the ECtHR and the ECtHR case law, see de Búrca 2013). An obvious example of such area is equality case law (see Radacic 2008; Suk 2017). Additionally, the ECtHR's decisions have been argued to constitute the benchmark for the CJEU when interpreting provisions of EU law relating to family life and family reunification (Lambert 2014, 211). Indeed, the CJEU has indicated its readiness to follow the ECtHR's jurisprudence on Article 8 ECHR (right to private life) in such cases (e.g. *Parliament v Council* (C-540/03); *Ruiz Zambrano* (C-34/09)). This is in spite of the fact that the two courts' approaches often differ

considerably because they operate in different legislative frameworks (Lambert 2014, 214). There is also evidence of the two courts' efforts to find a workable framework to address the protection of fundamental rights in Europe in the area of European arrest warrants (von Danwitz 2019).

Further evidence that the CJEU's decisions often follow guidance from the judgments of the ECtHR can be found in the area of asylum law. Gendered readings of decisions concerning applications for asylum highlight how men and women experience the asylum process differently, and how ignoring gender can leave women vulnerable to exploitation and abuse. However, both courts have shown themselves to be, at best, gender blind in this area. The interplay between the two courts is most visible in the CJEU's decision in *NS* (C-411/10; C-439/10) and the ECtHR's decision in *MSS v Belgium and Greece* (Application No. 30696/09). Both courts concluded that there were substantial grounds for believing that there were systemic flaws in the national asylum procedures and reception conditions. This resulted in the amendment of Article 3(2) of Regulation (EU) No. 604/2013 (Dublin Regulation) to include a prohibition to return of an asylum-seeker to the member state that s/he had first entered as this could result in 'a risk of inhuman or degrading treatment' within the meaning of Article 4 of the Charter of Fundamental Rights of the EU (2010/C 83/02) (prohibition of torture and inhuman or degrading treatment or punishment). There are several other ECtHR decisions concerning reception conditions in a number of EU member states (for further discussion of the relevant case law, see Garlick 2015a, 2015b). In 2017, the CJEU extended the scope of Article 4 to encompass possible deterioration of psychological wellbeing of a Syrian asylum applicant who had recently given birth (C-578/16 PPU). The court recognised that the impact of a transfer from one member state to another within the framework of the Dublin Regulation could have potential negative psychological consequences for the new mother who suffered from post-natal depression with violent and suicidal predispositions. Although there was a strong presumption that the medical treatment offered to asylum-seekers in all member states would be adequate, due to her serious mental or physical illness her transfer could not proceed, if there was any possibility of a permanent deterioration of her health as this would constitute 'a real and proven risk of inhuman or degrading treatment' (C-578/16 PPU, §§ 70/96). The court did not, however, definitely rule out the possibility of her transfer at a later stage, making an explicit reference to the ECtHR decisions where poor mental health was not a barrier to expulsion of non-EU citizens. In *Dragan v Germany* (Application No. 33743/03, § 927) the ECtHR found that authorities were not prevented from proceeding with the deportation of a stateless woman to her native Romania despite explicit suicide threats, provided that specific steps were taken to prevent such threats from being actualised. While Case 578/16 might look like a good gender-aware decision, the judgment focuses on mental health generally and does not draw out the particulars of, for example, post-natal depression. The CJEU had the potential to go further and be explicit about women's rights but chose not to, leaving women in similar situations vulnerable to transfer and deportation when their health is poor.

Although increased collaboration between the two courts is positive, intersectional reading of case law provides further evidence that we need a better understanding of how the courts deal with interaction between gender, race and other categories of difference. The need to consider intersectional issues in order to offer better strategies to try and achieve substantive equality is evident in both the ECtHR decision in *Şahin v Turkey* (Application No. 44774/98) and the CJEU's decisions in *Bougnaoui* (C-188/15) and *Achbita* (C-157/15). These decisions fail to recognise that a seemingly neutral criterion or practice, which requires all employees to hide visible symbols of their faith (e.g. headscarves), is likely to have a more significant impact on specific minorities (e.g. Muslim women). More gender-aware jurisprudence from either court could have a significant impact on the other as their relationship evolves. Therefore, research, which

clearly demonstrates how recognising gender and its intersection with other characteristics shape the way in which the court deals with and decides such cases, could help both courts strive for better decision making.

In order to fully understand how the influences between these courts play out and what they mean for gender, we need to include not only gendered, but intersectional aspects, in a systematic analysis of the case law. This also means that the same detailed empirical work we suggest for the CJEU should be done for the ECtHR. Unlike the CJEU, the ECtHR has the ability to issue dissenting opinions. Therefore, it could be easier to investigate the impact of gender and multiple inequalities within the ECtHR. However, although dissenting opinions are allowed on the ECtHR, they are rare (Dyevre 2010). Therefore, empirical testing of whether more female or minority judges will have a significant impact on the decision-making processes or the outcome of cases in either court may be challenging (Volcansek 2000, 7). According to Voeten (2007), it is possible to gain a more accurate representation of the ideological positions of individual judges only if dissenting opinions are common. He analysed the votes of 97 judges on 709 cases between 1960 and 2006, concluding that there was both a liberal and a conservative wing in the ECtHR. He further found statistically significant support for the view that judges from member states, which are more favourably disposed toward European integration or have joined the EU more recently, were likely to rule in favour of the individual applicant than the state. A similar detailed analysis focusing on the impact of gender would provide valuable insights. The structural issues at play in relation to the ECtHR would offer further rich sites for analysis. For example, the data on the gender breakdown of cases, including those concerning gender equality, brought before the ECtHR demonstrates that women remain underrepresented among the litigants (Council of Europe 2015), and further research is needed to fully understand the barriers faced by women in particular.

A gendered analysis of areas of overlap between the CJEU and ECtHR must therefore fully understand both courts, their make-up, ways of working, and the different legal and political contexts in which they operate as well as how the jurisprudence of one might influence the other.

Conclusion

This chapter introduced some of the key ideas and concepts around judicial politics from both political science and legal perspectives as they can be applied to the CJEU. It has shown that while there is some progress in terms of understanding the impact gender has, there is a lot of work yet to be done to achieve gender parity within the court. In addition, we need to systematically map and understand how gender shapes the CJEU, its work, its relationship with other courts and, of course, gender equality across the European Union.

Notes

1 Eleanor Sharpston, the UK's Advocate General, whose term will expire at the end of October 2021 was replaced by a new male Advocate General from Greece, sworn in more than a year before the end of her term.

2 See e.g. work on the following policy areas: citizenship (O'Brien 2017a, 2017b, 2017c); migration and mobility (Allwood 2015); climate change (Allwood 2014); external relations (Guerrina and David 2013); Brexit (Guerrina et al. 2018; Guerrina and Masselot 2018); caring responsibilities (di Torella and Masselot 2010, 2016; Guerrina 2005); security policy (Guerrina and Wright 2016; Haastrup 2018), and economic policy (Cavaghan 2017; Kantola and Lombardo 2017) to name just a few. See also part 3 in this volume.

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