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Transforming the European Legal Order: The European Court of Justice at 60+

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Abstract

The European Court of Justice has played a pivotal role in the transformation of international law obligations between Member States into an integrated legal order with direct applicability and effect in those Member States. This article explores whether or not the ECJ continues to be relevant to EU governance and integration and whether it continues to transform the legal orders of the Member States. It briefly outlines the early case law which transformed the legal order, and the preliminary reference procedure as an important element of that transformation, and then considers the extent to which the ECJ continues to act in ways which are transformational even though the legal order itself has remained relatively static. The EU citizenship jurisprudence serves as a useful example of how integration is driven forward by the Court. This article argues that the Court's decisions do continue to have significant impact on areas of law and policy and EU governance generally. It illustrates this argument using gender equality law and Human Rights as pertinent examples and concludes that the ECJ remains relevant in governance terms as it continues to drive forward EU integration in many areas and influence the development of law and policy across the Member States.

Keywords

European Court of Justice; Governance; EU Legal Order

The European Court of Justice (ECJ)¹ has played a pivotal role in the transformation of international law obligations between Member States into an integrated legal order with direct applicability and effect in those Member States. While a significant amount of literature has been devoted to the Court's jurisprudence and key decisions have been analysed in detail in the legal literature, the ECJ has received relatively little attention from a political or governance perspective.² The article thus begins with a brief assessment of the early case law which transformed the treaties into an integrated legal order applicable directly in Member States and argues that without these decisions EU governance would look very different today. The focus on case law is important as it is through the case law of the ECJ that we are able to interpret the Court's intentions. Unlike other EU institutions, the Court cannot set out its policy priorities or the direction it wishes to go in. It must remain silent about any designs or priorities it may have and speak through its legal decisions. Those decisions are then open to interpretation by commentators who must try and deduce the extent to which the ECJ does indeed have a grand plan and what that plan is.

The role and status of the ECJ is, however, affected by more than its decision making and judgments and this article considers why Member States have not only accepted the legal order as created by the ECJ but also its case law more generally and why, rather than curbing the Court's power, Member States have instead allowed it to expand into more and more areas. Finally, the article

¹ Now of course it is more accurate to refer to the Court of Justice of the European Union as an umbrella term covering the ECJ, the General Court and specialist tribunals. For ease of reference, the term ECJ is used throughout this article and although this is mostly accurate, it is acknowledged that the exact meaning of that term has changed over time.

² There are of course notable exceptions such as Karen Alter, *The European Court's Political Power*. (Oxford: Oxford University Press, 2009) and more recently Mark Dawson, Bruno DeWitte and Elise Muir, *Judicial Activism at the European Court of Justice* (Cheltenham: Edward Elgar, 2013).

considers whether the transformative nature of the Court's decisions is limited to those early cases or whether it has continued to change the legal and political landscape. Although the legal order itself has remained fairly static following the early transformation, the Court remains active and has continued to make decisions which transform certain policy areas and embrace certain modes of governance. In doing so, the Court assumes a position of authority and power in the institutional framework which supports and encourages increasing judicialisation of the EU.

TRANSFORMING THE LEGAL ORDER

The role of the ECJ in shaping the EU as we know it today should not be underestimated. The EU is very much based upon legal documents, legal principles, the rule of law and the workings of the ECJ. It is a Union for lawyers characterised by an increase in legal actions brought to the EU by EU citizens represented by EU law specialist lawyers, and this increasing role of lawyers and Courts in the regulation of EU matters is seen by some to be a move towards American style adversarial legalism, with the emergent version in the EU being termed as Eurolegalism.³ Eurolegalism, so Kelemen argues, is the result of fragmented governmental and economic power and is in fact a far more important mode of governance in the EU than so-called modes of new governance which are dealt with in detail by both Michelle Cini and Ingeborg Tömmel⁴ in their contributions to this special issue. Whether or not Kelemen's view is justified is open for debate, but his argument does raise the question of how a set of treaties setting out international law obligations between signatory states became a situation where the legal order has been so transformed that judicialisation of EU regulation and governance is commonplace.

Early analyses place the Court firmly at the centre of the EU's legal universe, seeing it as a key player shaping law and legal development. Other commentators sideline the Court as an institution merely doing the bidding of the most powerful Member States and thus as an institution which is inherently governed by politics rather than the rule of law. The exchange between Garrett⁵ and Mattli & Slaughter⁶ sets out the arguments for those respective positions clearly but, as Karen Alter⁷ notes, there now seems to be a consensus that the truth lies somewhere between those two positions; with the Court having significant autonomy without being immune to political processes and Member State or EU institutional interests.

Principles which are key to the functioning of the EU legal order as we now know it cannot be found in the Treaties, certainly not the early ones as Shaw notes: '[The Treaty provisions] give no hint, however, that the obligations undertaken by the Member States under the Treaties they have signed are relevant at any level other than that of international law'.⁸ Fennelly makes the same point,

3 Daniel R. Kelemen, *Eurolegalism The Transformation of Law and Regulation in the European Union*, (London: Harvard University Press, 2011).

4 Michelle Cini, 'Good Governance and Institutional Change: Administrative Ethics Reform in the European Commission', *Journal of Contemporary European Research*, 12(1) (2016): 440-454; Ingeborg Tömmel, 'EU Governance of Governance: Political Steering in a Non-Hierarchical Multilevel System', *Journal of Contemporary European Research*, 12(1) (2016): 406-423.

5 Geoffrey Garrett, 'The Politics of Legal Integration in the European Union,' *International Organization*, 49(1) (1995): 171-81.

6 Walter Mattli and Anne-Marie Slaughter 'Law and Politics in the European Union: A Reply to Garrett,' *International Organization*, 49(1) (1995): 183-90.

7 Alter, *The European Court's Political Power*.

8 Jo Shaw, *Law of the European Union*. Third Edition, (Basingstoke: Palgrave, 2000).

recognising the role of the ECJ at the same time: 'The treaties did not provide for direct effect, still less for supremacy. They established the Court of Justice, which filled the gap'.⁹

In hindsight, it is easy to say that the development of EU law was inevitable but this is too simplistic. While Shaw notes that the Court 'has consistently given a maximalist interpretation of the authority and effect of EU law ... to ensure that 'the law is observed'',¹⁰ Alter points out that 'the ECJ's agency matters – the ECJ can choose to play a minimalist role, interpreting law narrowly and even illogically when there is little social support for the law it is asked to apply'.¹¹ Furthermore, 'there is no set of unidirectional hypotheses that predicts when, why and how the ECJ will be activist or influential'.¹² Nonetheless it is clear that the ECJ has been 'legally audacious [and] politically successful in altering so completely the terrain in which [it] operate[s]'.¹³

The case of *Van Gend en Loos*¹⁴ is a 'famous stepping stone of legal doctrine, but [also] a breakthrough in the political relationship between member states and the club'¹⁵ as it 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. In 1964, the Court built further on its decision in *Van Gend* and the ideas of direct applicability (that is the legal mechanism that the EU Treaties and Regulations apply in all Member States without the need to be transposed into national law) and direct effect (that is the legal mechanism that individuals can rely directly on EU law in their national Courts to enforce EU law rights granted to them) established in it by clarifying the principle of supremacy in *Costa v ENEL*¹⁶ and then *Internationale Handelsgesellschaft*: 'The law born from the Treaty [cannot] have the Courts opposing to it rules of national law of any nature whatsoever...'.¹⁷ The cases 'represented, not just in their time but permanently, a giant leap on the road to European integration'.¹⁸ In *Francovich and Bonifaci v Italy* the ECJ went further:

It must be held that the full effectiveness of Community rules would be impaired and the protection of the rights which they grant would be weakened if individuals were unable to obtain compensation when their rights are infringed by a breach of Community law for which a Member State can be held responsible.¹⁹

By the 1990s therefore, the Member States had been 'judicially tamed'²⁰ and the ECJ had 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'.²¹

⁹ Nial Fennelly 'The European Court of Justice and the Doctrine of Supremacy: *Van Gend en Loos*; *Costa v ENEL*; *Simmethal*' in, Miguel P Maduro, and Loic Azoulay (eds), *The Past and Future of EU Law*, (Oxford: Hart Publishing, 2010), at 39-46.

¹⁰ Shaw, *Law of the European Union*.

¹¹ Alter, *The European Court's Political Power*.

¹² *ibid*, at 4.

¹³ Karen Alter, *The European Court's Political Power*, (Oxford: Oxford University Press, 2009), at 5.

¹⁴ Case 26/62 *Van Gend en Loos* [1963] ECR 1.

¹⁵ Luuk Van Middelaar, *The Passage to Europe*. Translated by Liz Waters. (London: Yale University Press, 2013), at 49.

¹⁶ Case 6/64 *Costa v ENEL* [1964] ECR 585.

¹⁷ Case C-11/70, *Internationale Handelsgesellschaft* [1970] ECR 1125.

¹⁸ Fennelly, 'The European Court of Justice and the Doctrine of Supremacy'.

¹⁹ Case 6&9/90 *Francovich and Bonifaci v Italy* [1990] ECR I-5357 at 5415.

²⁰ Van Middelaar, *The Passage to Europe*, at 80.

²¹ Alec Stone Sweet 'Constitutional Dialogues in the European Community', in Marie Slaughter, Alec Stone Sweet and Joseph H. H. Weiler (eds), *The European Courts and National Courts: Doctrine and Jurisprudence*, (Oxford: Hart Publishing, 1999), at 305-330.

In doing so, the ECJ reserved for itself the power to define key concepts which impact on governance at EU and Member State levels. Governance competence is shifted away from Member States whose laws must now comply with the interpretation of EU law by the ECJ. Although Tömmel in this issue points out that procedural avenues are often shaped using Directives and Regulations, the ECJ also has a role to play in second order governance²² and these cases set the foundations for that. They also, of course, set the foundations for increasing judicialisation of EU policymaking and are instrumental in shaping modes of governance. Tömmel notes that the EU builds a system of 'governance of governance'; the ECJ, through its early case law, ensured that the system is one which remains open to judicial scrutiny.

It is difficult to know whether the transformation of the legal order and its impact on governance was intentional or accidental. Mayer argues that the decision in *Van Gend en Loos* is not likely to have seemed that dramatic to the judges at the time and was simply an attempt at creating a conceptual and methodological way of working which was 'detached from classical public international law constraints'.²³ Mayer points to the fact that the decision in *Van Gend en Loos* and its consequences are perhaps not that far removed from the views on European integration of the six Member States at the time and draws attention to a 1963 case note by Ophüls²⁴ who states that the Court simply reiterated the 'predominant view'. However, it is equally likely that the legal revolution brought about by this series of cases was accidental. As Rasmussen points out, *Van Gend* was 'a narrow decision that depended on two new judges whose nomination less than a year before had been far from straightforward'.²⁵

Whether or not *Van Gend en Loos* was intended to transform the legal order, the case certainly changed the legal landscape. Arguably, the cases that came next were less about transformation and more about an evolution which consolidated the position established by *Van Gend en Loos*. The principles they established were presented on a case by case basis making the changes appear incremental and less radical.²⁶ For example the decisions on state liability came, for some, as another transformation and radical shift in how EU law should operate and how Member States should be held to account for breaches of their obligations. However, there is considerable evidence that this decision should not have come as such a surprise. The Court had already held that Member States must make good any unlawful consequences of a breach of Community law,²⁷ and a little later, in 1973, the Court declared admissible an action for infringement of Member States' obligations even though the Member State had remedied the situation.²⁸ Admissibility was based on the possible interest to an individual in relation to a Member State's responsibility while they were in breach. From there to state liability is a very small evolutionary, rather than transformative, step.

²² J. Kooiman, *Governing as Governance*, (London: Sage, 2003) and Tömmel, 'EU Governance of Governance'.

²³ Franz C. Mayer, 'Van Gend en Loos: The Foundation of a Community of Law', in Miguel P Maduro and Loic Azoulay (eds), *The Past and Future of EU Law*, (Oxford: Hart Publishing, 2010), at 21.

²⁴ Carl F. Ophüls, 'Anmerkung zum Urteil des EuGH vom 5.2.1963 - Rechtssache 26/62' *Neue Juristische Wochenschrift*, 16, (1963): 1751.

²⁵ Morten Rasmussen, 'From Costa v ENEL to the Treaties of Rome: A Brief History of a Legal Revolution', in Miguel P Maduro and Loic Azoulay (eds), *The Past and Future of EU Law*, (Oxford: Hart Publishing, 2010), at 83.

²⁶ M. Shapiro 'The European Court of Justice', in Paul Craig and Grainne De Burca (eds), *The Evolution of EU Law*, (Oxford: Oxford University Press, 1999).

²⁷ Case C6/60 *Humblet v Belgium* [1961] ECR 1128.

²⁸ Case 39/72 *Commission v Italy* [1973] ECR 101.

TRANSFORMING NATIONAL LEGAL ORDERS: THE ACCEPTANCE OF EU LAW

The relationship between EU law and national law and Member State politics is not based solely on the ECJ's activities but also depends on how Member States have reacted to and engaged with the EU legal framework over time. This part of the article briefly considers the preliminary reference procedure as a vital part of this relationship. In this context, it has been noted that 'one of the most important aspects of the Court's contribution has been its characterization of the relationship between the EU and national law'.²⁹ In what Mancini called an 'exercise of remarkable judicial creativity',³⁰ the Court distanced itself from established international law principles and developed an 'organic connection between the Court of Justice and the national Courts'³¹ in the form of the preliminary reference procedure. As well as being important for the development of ECJ jurisprudence and its political and legal credibility because it provides a link between the EU and national Courts and encourages the interpretation of key legal concepts, the preliminary reference procedure and the way it has been used also helps explain the development of EU law in the Member States and their acceptance of it.

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.³²

It is beyond the scope of this article to describe and explain the preliminary reference procedure in detail, suffice it to say that in hearing preliminary references from national Courts, the ECJ interprets the law and answers the exact questions referred. The national Courts must then apply the law, following the ECJ's guidance, to the factual situation before them.

As well as making the enforcement of EU law rather more practical than leaving it to EU institutions, allowing the national legal systems to take on the role of adjudicating EU law rights has a profound impact on EU integration and governance. 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, have been referred to the ECJ and which have therefore allowed the ECJ to interpret areas as it sees fit.³³ However, for the EU legal system to develop in the way that it did, it had to be accepted by the Courts of the Member States. The preliminary reference procedure gives Member States' Courts a stake in the proceedings. Or put differently, it co-opts them into the EU legal system, making them part of it. That is not to say though that national Courts accepted the ECJ's jurisdiction without any conflict at all. Given Member States' concerns about the loss of sovereignty to the EU, it is not surprising that Courts across Member States were also a little wary of the ECJ and its role, or rather the impact the ECJ would have on their role. As the highest Courts in Member States, and often the only Courts with jurisdiction over questions of constitutional law, many of the Constitutional or Supreme Courts across the EU were reluctant to refer questions to the ECJ, sometimes even explicitly reserving the right to decide such questions for themselves and ignoring the principle of supremacy of EU law. There was, and to some extent still is, therefore a power struggle between the highest Member State Courts and the ECJ as to who can define

²⁹ Shaw, *Law of the European Union*, at 27.

³⁰ Mancini 1998 quoted in Shaw, *Law of the European Union*, at 29.

³¹ Shaw, *Law of the European Union*, at 29.

³² Alec Stone Sweet, 'The Judicial Coup d'Etat and the Problem of Authority: CILFIT and Foto-Frost', in Miguel P Maduro and Loic Azoulay (eds), *The Past and Future of EU Law*, (Oxford: Hart Publishing, 2010), at 201.

³³ Court of Justice of the European Union, Annual Report, Luxembourg 2015, http://curia.europa.eu/jcms/jcms/Jo2_7000/ [accessed 26 October 2015].

important constitutional principles and decide key cases, and who, in the case of potentially unpopular decisions, is willing to do so.³⁴ Overall though, 'in practice, the relationship between the Court of Justice and the national Courts, including supreme Courts, has worked reasonably well'.³⁵

However, there is also another power struggle to consider; one which is inherent in every legal system which has an appellate structure and which in this case goes some way towards explaining how the EU legal order became incorporated into national legal systems. This is the power struggle between lower Courts and higher Courts in the Member States. Being able to refer questions of EU law to the ECJ gives lower Courts considerable power and the ECJ has always protected lower Courts' right to refer. By giving the lower Courts a stake in the EU legal order, the ECJ has avoided constant power struggles with supreme or constitutional Courts and has opened an avenue for a steady stream of cases which in turn normalises the process and leads to acceptance of EU law in Member States. It, of course, also leads to increased judicialisation of EU integration and policymaking because it is the ECJ, through the national Courts, which is expanding the scope of EU law and policy. The statistics show that in most Member States, significantly more references come from courts other than the highest level or constitutional Courts.³⁶ The focus of defining law, legal principles and their scope thus shifts away from law makers and to the Courts, firmly embedding the ECJ's role within governance structures.

THE WORK GOES ON: TRANSFORMATIVE EVOLUTION?

So far this article has considered the initial transformation and subsequent evolution of the EU legal order. It then considered one of the key processes and its use by the ECJ in ensuring Member State acceptance of the European legal order and EU law more generally. The final question to consider is whether the ECJ has continued to transform the legal order it created. In this final part of the article, I argue that although there have been several decisions which have had significant impacts in their respective substantive areas such as *Baumbast*³⁷ or recently *Zambrano*³⁸ (closely followed by *McCarthy*³⁹ and *Dereci*⁴⁰) in relation to citizenship, *Coleman*⁴¹ in relation to discrimination law, and *Hoefner v Macroton GmbH*⁴² in relation to competition law for example, there have not been any decisions which have made significant changes to the legal order itself. Since *Van Gend en Loos*, the legal order has remained fairly static with the ECJ claiming authority to define important concepts and questions and extending the reach of direct effect into more and more areas. However, some of its decisions do have a significant impact on questions of governance.

The citizenship jurisprudence, for example, provides an example of the ECJ's expansive interpretations of EU law and its willingness or even desire to push the development forward

³⁴ Imelda Maher, 'National Courts as European Community Courts', *Legal Studies*, 14(2) (1994): 226-243; Alec Stone Sweet, *The Judicial Construction of Europe*, (Oxford: Oxford University Press, 2004); M. Kumm, 'The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Treaty', *European Law Journal*, 11 (3) (2005): 262-307.

³⁵ David Edwards, 'CILFIT and Foto-Frost in their Historical and Procedural Context', in Miguel P Maduro and Loic Azoulai (eds), *The Past and Future of EU Law*, (Oxford: Hart Publishing, 2010), at 173.

³⁶ Court of Justice of the European Union, *Annual Report*, Luxembourg 2015, http://curia.europa.eu/jcms/jcms/Jo2_7000/ [accessed 26 October 2015] at 117-119.

³⁷ Case C-413/99. *Baumbast and R v. Secretary of State for the Home Department* [2002] ECR I-7136.

³⁸ C-34/09 - *Ruiz Zambrano v Office national de l'emploi* [2011] ECR I-01177.

³⁹ Case C-434/09 *McCarthy v Secretary of State for the Home Department* [2011].

⁴⁰ Case C-256/11 *Dereci and others v Bundesministerium für Inneres* [2011] ECR I.

⁴¹ C-303/06 *Coleman v Attridge Law and Steve Law* [2008] ECR I-05603.

⁴² Case C-41/90 *Hoefner v Macroton GmbH* [1991] ECR I-1979.

incrementally in spite of considerable Member State resistance.⁴³ A further example can be found in relation to the fiscal compact. Since March 2012, the ECJ, through the Treaty on Stability, Coordination and Governance, has the power to enforce Member States' commitment to the 'fiscal compact' section of the Treaty. While the legal order itself is not affected by this as such, the step is potentially transformative. As Chalmers notes,

Policing the constitutional retrenchment of public finances is an unusual role for a Court. However, in the ECJ's case it is not a one-off role, and the new task is symptomatic of the Court moving increasingly to centre stage in fiscal and welfare policy-making within the European Union.⁴⁴

The development of competition law in the EU provides another useful example as to how the ECJ drives the evolution of the legal order and the transformation of policy areas forward. Elsewhere in this special issue, Sandra Eckert provides a comparative analysis of regulatory governance in the energy and competition sectors which provides valuable insights.⁴⁵ Suffice it to say here that the ECJ's acceptance of soft law instruments allows and facilitates the coming together of various modes of governance mixing the traditional community method with new modes of governance, and placing soft law instruments on a firm constitutional footing using general legal principles such as legal certainty.⁴⁶ The ECJ has therefore acknowledged and accepted the multi-level, often non-hierarchical modes of governance discussed in detail in Ingeborg Tömmel's contribution.

It is beyond the scope of this article to explore all of these areas and indeed the contributions to this special issue explore some of the most relevant questions in greater detail, but exploring some of these areas provides an insight into how and why the ECJ's jurisprudence continues to be important for questions of governance in the EU.

One such area where the ECJ has transformed the legal landscape across the Member States is that of gender equality. Prechal commented: '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'.⁴⁷ This area therefore serves as a useful example to illustrate the ECJ's transformational role and explore the extent to which this transformation is part of a grand plan to drive EU integration and favour particular modes of governance. The case of *Defrenne II*⁴⁸ provided the first example of directly effective Treaty rights being enforceable against a private institution (or person) rather than a Member State and as a result citizens benefit from a highly effective mechanism to enforce EU Law rights through national Courts. The impact on governance is clear: cases result in national legislation which is under scrutiny being changed and laws in other Member States also being reviewed. In *MacCarthys Ltd v Smith*⁴⁹ the English Equal Pay Act 1970 was shown to be incompatible with EU law and had to be changed

⁴³ Jessica Guth and Edward Mowlam, 'The Evolution of European Union Citizenship - Where Does Zambrano Take Us? *The Law Teacher*, 46(1) (2012): 75 -82. See also Maas in this special issue, Willem Maas, 'European Governance of Citizenship and Nationality' (2016), *Journal of Contemporary European Research*, 12 (1): 532-551.

⁴⁴ Damian Chalmers 'The European Court of Justice has taken on huge new powers as 'enforcer' of the Treaty on Stability, Coordination and Governance. Yet its record as a judicial institution has been little scrutinised' *EUROPP* entry posted on March 7, 2012, <http://blogs.lse.ac.uk/europpblog/2012/03/07/european-court-of-justice-enforcer/> [accessed 26 July 2013].

⁴⁵ Sandra Eckert, 'The Governance of Markets, Sustainability, and Supply. Toward a European Energy Policy', *Journal of Contemporary European Research*, 12 (1) (2016): 502-517.

⁴⁶ Oana Ștefan, 'Soft Law in Court: Competition Law, State Aid, and the Court of Justice of the European Union', (Kluwer, 2013).

⁴⁷ S. Prechal, 'Achievements and Trends in EU Gender Equality Law' (2005), [online] available at www.euroinfo.ee/malta/pdf/c4.pdf [accessed on 30 November 2015] at 35.

⁴⁸ Case C-43/75 *Defrenne v Sabena* (No.2) [1976] ECR 455.

⁴⁹ Case 129/79 *MacCarthys Ltd v Smith* [1980] ECR 1275.

and a series of cases following on from that clarified the important aspects of gender equality law (*Bilka Kaufhaus GmbH*,⁵⁰ *Kalanke*⁵¹ and *Marschall*⁵²). The ripple effect of those decisions was felt across the EU and had a significant impact on gender equality law at the national level⁵³ resulting in increasing integration, the potential for further litigation and thus increasing judicialisation.

Undoubtedly, the case law of the ECJ has transformed gender equality law but was this deliberate? Jo Shaw 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'.⁵⁴ The move to transform equality law in *Defrenne II*⁵⁵ and cases that followed may thus have rather more to do with the ECJ's awareness of its own position within the EU institutional framework than with a predominant concern with gender equality.⁵⁶ The ECJ has clearly shown an awareness of its position and the possibility that its powers may be limited by Treaty and that there is thus a need to safeguard its position and not be seen to make decisions with significant and potentially costly consequences for Member States. Once such balancing act can be seen in the cases relating to pensions and equal pay.⁵⁷ Once the ECJ had concluded that Article 119 had direct effect and that occupational pensions were included in the definitions of pay, the Council attempted to limit the severe financial consequences for many employers by issuing Directive 86/378⁵⁸ on pensions which gave Member States time to implement the effects of equal pay legislation on pensions. In *Barber v Guardian Royal Exchange*,⁵⁹ the ECJ essentially overruled that Directive by stating that differences in pensionable age based on sex were discriminatory and had to be eliminated; the ECJ did however limit the retrospective effect of that decision. Nonetheless, the Member States' governments reacted strongly to a decision with potentially crippling financial implications for employers, they added a protocol to the Maastricht Treaty⁶⁰ and that protocol limits the application of the principle of equal treatment to any work after the Barber decision. The ECJ did get the opportunity to respond⁶¹ and could, arguably, have decided to fight back. However, the possibility of jeopardising its future position and the future acceptance of ECJ jurisprudence meant that, instead, the ECJ accepted the protocol. 'In effect the Court's ruling said: 'this is what we meant all along. The member governments did not overrule us; they simply helped us clarify a point''.⁶² The balancing act did not stop there though. It seems likely that the EU Member State governments

⁵⁰ Case 170/84 *Bilka Kaufhaus GmbH v. von Hartz* [1986] ECR 160.

⁵¹ Case C-450/93 *Kalanke v Freie Hansestadt Bremen* [1995] IRLR 660.

⁵² Case C-409/95 *Marschall v Land Nordrhein Westfalen* [1997] ECR I-06363.

⁵³ K. Alter and J. Vargas, 'Explaining Variation in the Use of European Litigation Strategies. European Community Law and British Gender Equality Policy', *Comparative Political Studies*, 33(4) (2000): 452-482; L. Anderson, 'European Union Gender Regulations in the East. The Czech and Polish Accession Process', *East European Politics and Societies*, 20(1) (2006): 101-125; D. Schiek and V. Chege (2009): *European Union Non-discrimination Law. Comparative Perspectives on Multidimensional Equality Law*, (London, New York: Routledge-Cavendish).

⁵⁴ J. Shaw, 'Gender and the Court of Justice', in De Burca, G and Weiler, J.H.H. (eds) *The Court of Justice*, (Oxford: Oxford University Press, 2000), at 142.

⁵⁵ Case C-43/75 *Defrenne v Sabena* (No.2) [1976] ECR 455.

⁵⁶ Jessica Guth, 'Law as the Object and Agent of Integration: Gendering the Court of Justice of the European Union, its decisions and their impact', in Gabriele Abels and Heather MacRae (eds), *Gendering European Integration Theory: Engaging New Dialogues*, (Leverkusen: Barbara Budrich Verlag, 2015).

⁵⁷ See Case 80/70, *Defrenne v. Belgium* [1971] ECR 445, Case 43/75, *Defrenne v. SABENA* [1976] ECR 455, Case 170/84, *Bilka Kaufhaus GmbH v. von Hartz* [1986] ECR 1607 and Case 262/88, *Barber v. Guardian Royal Exchange* [1990] ECR I-1889. See also Geoffrey Garrett, Daniel R. Kelemen and Heiner Schulz, 'The European Court of Justice, National Governments, and Legal Integration in the European Union' *International Organization*, 52(1) (1998): 149-76.

⁵⁸ Directive 86/378 OJ 1986 L225/40.

⁵⁹ Case 262/88, *Barber v. Guardian Royal Exchange* [1990] ECR I-1889.

⁶⁰ Treaty on European Union, Protocol No. 2 on Article 119.

⁶¹ Case 109/91, *Ten Oever v. Stichting Bedrijfspensioenfonds voor het Glazenwassers – en Schoonmaakebedrijf* [1993] ECR I-4879.

⁶² Geoffrey Garrett et al. 'The European Court of Justice', at 167.

intended to limit the application of Article 119 generally but the ECJ held in two cases⁶³ that the retrospective application of the principle of equal treatment was not limited in relation to the right to join an occupational pension scheme and claims to do so could therefore be backdated. The ECJ did, however, give Member States a way of limiting claims by holding that claimants would have to pay their historical contribution in order to join the scheme retroactively so while the decisions are theoretically far reaching and supportive of gender equality, they are quite limited in practice, making them more acceptable to the Member States.

This series of cases shows the power play between EU institutions and between the ECJ and Member States which sees the ECJ pushing the limits of what Member States will accept but not pushing beyond those limits and risking a significant push back which may limit its power in the future. Nonetheless, it is worth noting that the ECJ has been instrumental in shifting the focus of EU policy by changing the weight afforded to different issues and by insisting on expansive interpretation of concepts such as pay, even if allowing the application of those principles to be time limited. The earlier economic focus of decisions gave way to social policy concerns with the ECJ declaring in *Deutsche Telekom AG* that:

the economic aim pursued by Article 141 of the treaty [on equal pay], 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.⁶⁴

The ECJ is a strategic player in the institutional set up of the EU and has a significant impact on shaping law and policy, the cases above are one illustration of that.

Finally, the ECJ's approach to human rights issues is worth mentioning as this is widely predicted to be the next area for significant legal development in the EU context. With the EU's accession to the European Convention on Human Rights and its own Charter annexed to the Treaties, the ECJ is set increasingly to decide on matters of Human Rights and is likely to decide them in a different way to their previous approach. As Stone Sweet points out, 'lawyers and judges will be more comfortable working with a codified text than with unwritten general principles',⁶⁵ which governed this area until recently. The result might well be increased rights-based litigation, thus increasing judicialisation. This area also serves as an example of how the ECJ continues to try and safeguard its position in the institutional framework and to try and ensure that decisions remain open to judicial scrutiny. The opinion on the EU's accession to the European Convention, delivered by a full Court at the end of 2014, gives us some insight.⁶⁶ The ECJ notes that the European Court of Human Rights (ECtHR) jurisprudence would be binding on all EU institutions including the ECJ and that the ECJ's rulings on human rights issues could not bind the ECtHR. However, the ECJ pointed out that this 'cannot be so as regards the interpretation which the Court itself provides of EU law and, in particular, of the Charter of Fundamental Rights of the European Union'.⁶⁷ The ECJ went on to consider the lack of arrangements for dealing with the overlap in jurisdiction between the Courts and points to the possibility of undermining the effectiveness of the preliminary reference procedure and the effectiveness of EU law overall. On the question of whether the ECtHR can rule on questions in which the ECJ has had prior involvement, the ECJ commented: '[t]o permit the ECtHR to rule on such

⁶³ Case 57/93, *Vroege v. NCIV Instituut voor Volkshuisvesting BV and Stichting Pensioenfonds NCIV* [1994] ECR I-4541 and Case 128/93, *Fisscher v. Voorhuis Hengelo BV and Stichting Bedrijfspensioenfonds voor de Detailhandel* [1994] ECR I-4583.

⁶⁴ Case C-50/96 *Deutsche Telekom AG v. Schröder*, [2000] E.C.R. I-743, at paragraph 57.

⁶⁵ Alec Stone Sweet, 'The European Court of Justice', in Paul Craig and Grainne De Burca (eds), *The Evolution of EU Law*, Second Edition, (Oxford: Oxford University Press, 2011), at 152.

⁶⁶ OPINION 2/13 OF THE COURT (Full Court) 18 December 2014 EU:C:2014: 2454.

⁶⁷ Court of Justice of the European Union, *Annual Report*, Luxembourg 2015, http://curia.europa.eu/jcms/jcms/Jo2_7000/ [accessed 26 October 2015] at 12.

a question would be tantamount to conferring on it jurisdiction to interpret the case law of the Court of Justice'.⁶⁸ The ECJ also seems less than impressed that the ECtHR, as the law now stands, would have jurisdiction to review certain acts/omissions which the ECJ currently does not have jurisdiction to review (mainly acts and omissions relating to Common Foreign and Security Policy matters) noting that:

[t]he Court has already had occasion to find that jurisdiction to carry out a judicial review of acts, actions or omissions on the part of the EU, including in the light of fundamental rights, cannot be conferred exclusively on an international court which is outside the institutional and judicial framework of the EU.⁶⁹

The ECJ is asserting its position vis-à-vis the ECtHR and highlighting that it sees the interpretation of the ECHR as part of its remit. The power play between the Courts and between the EU institutions and the Courts will provide a rich area for research in the future and will go some way to highlight the extent to which the ECJ continues to be transformational.

The preceding examples have given an insight into how the ECJ seems to be transforming EU law and policy areas even where the legal order remains static. Shifts in focus on substantive areas are partly due to questions being posed by Member States' Courts but are also influenced by the ECJ's approach to the questions posed and the decisions they make as decisions are likely to lead to further legal development and possibly litigation.⁷⁰

The ECJ's reach is wide in scope. There are no policy areas with which the Court has not in some way engaged. As Jacobs notes, the EU 'is based on the rule of law to a far greater extent than any previous or contemporary international or transnational organisation'.⁷¹ That emphasis on the rule of law and the importance of law in the expansion of the EU's remit, has led to policy areas evolving over time on a case by case basis as legal arguments have built on previous ones and the ECJ has based its decisions on precedent. However, there are some decisions which have transformed policy areas or at least had the potential to do so even in circumstances where there is no transformation of governance structures or the legal order, individual decisions do very much matter for individual policy areas and ultimately also for how governance operates.

CONCLUSION

'The EU provides one of the most important examples of extensive judicialisation ever documented across a wide range of policy areas'.⁷² There are clearly elements of what Kelemen has termed Eurolegalism. The importance of the ECJ and of litigation in shaping the EU legal system should not be underestimated. The ECJ transformed the treaties into something far more relevant to Member States and their citizens than they would otherwise have been and thus opened the (flood) gates for litigation on EU law issues. This article has illustrated how the early decisions of the ECJ transformed the legal order completely by declaring EU law supreme, directly applicable and often directly effective and then making Member States liable for breaches of their obligations. Once that legal

⁶⁸ Court of Justice of the European Union, *Annual Report*, Luxembourg 2015, http://curia.europa.eu/jcms/jcms/Jo2_7000/ [accessed 26 October 2015] at 12.

⁶⁹ Opinion 2/13; paragraph 256.

⁷⁰ There is a significant body of work around legal mobilisation which considers the impact on EU case law and policymaking on litigation strategies in an EU context. See for example Rachel Cichowski, *The European Court and Civil Society: Litigation, Mobilization and Governance*, (Cambridge: Cambridge University Press 2007) and Lisa Vanhalla, *Making Disability Rights a Reality? Disability Rights Activists and Legal Mobilization*, (New York: Cambridge University Press, 2011).

⁷¹ Francis G. Jacobs, *The Sovereignty of Law: The European Way*, (Cambridge: Cambridge University Press, 2007), at 35.

⁷² Stone Sweet, 'The European Court of Justice', at 145.

order had been established, it was accepted by Member States partly because of the way the preliminary reference procedure has been used by the ECJ to protect lower national Courts' rights to refer questions, thus giving them and citizens a stake in the functioning of the EU legal order. It is therefore likely that the ECJ played a key role in instigating what Tömmel⁷³ has considered the second phase of governance. Without the ECJ's actions it would have been impossible for integration to move forward in the way that it did, perhaps resulting instead in it doing so away from the political gaze and in a rather more hidden fashion. Arguably, the Court then also paved the way for the third phase as integration had progressed to such a point where deliberate liberalisation of the market was possible. Finally, the article considered whether the ECJ continues to be transformational and concluded that while it might continue to transform policy areas, the legal order itself has remained static. That is not to say that the ECJ is no longer relevant in governance terms, it continues to drive forward EU integration in many areas and influence the development of law and policy across the Member States.

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⁷³ Tömmel, 'EU Governance of Governance'.