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

Introduction
The Court of Justice of the European Union (CJEU) has been subject to relatively little scrutiny from a gender perspective. Lawyers have tended to focus their examination of the court and its work on specific decisions or opinions or on the workings of the preliminary reference procedure and the relationship between it and national courts and legal systems. Political scientists have paid comparatively little attention to the CJEU as an institution of political relevance initially focusing on it as an agent of the most powerful states (See Garret 1992, Garrett and Weingast 1993, Burley and Mattli 1993) and later acknowledging though ible activism (See for example Weiler 1994, Mattli and Slaughter 1995, 1998, Alter 2009 wing body of work considering the EU generally as well as EU institutions, actors, policies and processes more specifically from a gendered perspective (For recent examples of books see Abels and Mushaben 2012, Beveridge and Velutti 2008, Kantola 2010, Lobardo and Forest 2012, Van der Vleuten 2007, Caracciolo di Torella and Masselot 2010) and there is also a growing body of work which examines the CJEU and its work, there is very little which brings those two areas together. *Political scientists and feminists alike often fail to recognize courts as political institutions and judgeships as decision-making positions that require a gender balance'* and as a result, when considered from a gendered or feminist perspective, we know almost nothing about the CJEU. This paper seeks to address that gap in our understanding by highlighting some of the issues relating to gender and setting out a research agenda for the future.

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

[illegible] are qestions around how the institution carries out its work and thus in the case of a court, how

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

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

> iary 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- (2013; 177).

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

However at EU level this collective enterprise is difficult to unpick and it is almost impossible to study the impact of diversity including gender because judgments are given by the Court as a whole without dissenting judgments or separate judgments. We simply do not know who thought what and why. This is in contrast to the UK Supreme Court for example, where

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

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

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

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

How the CJEU works   gender implications

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

Bringing a case to the CJEU

As mentioned above the CJEU if made up of three separate courts with separate jurisdictions. The three courts have slightly different jurisdictions and do not form an appeal structure as we might know it from national legal systems. The Civil Service tribunal has jurisdiction

(Telemarsicbruzzo 1993). Under Article 276 TFEU any court may refer a question on the interpretation of EU law and court is fairly widely defined to include tribunals and bodies with judicial decision making powers (see Dorsch 1997). An obligation to refer arises where a case researches the highest national court for that particular action[1] or where a question of the validity of EU law arises.

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

> ity litigation procedures in all EU member
> states, it seems that certain national systems
> and better equipped to provide effective and easy access to justice
> (Tesoka p14).

The extent to which gender questions are seen as relevant and in addition the extent to which EU law is seen as a way to help address gender questions will also vary from Member State to Member State. MacRae in two papers published in 2008 and 2010 explores the disjuncture between the gender equality rhetoric and myth at EU level and its translation or implementation into national contenticial dece3 0 1 408.11 c9400 0 1 461de nise1Ao2 decll

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

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

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

This has not changed in the 15 years since then and is perhaps even more so the case in areas where the gender implications are less obvious and gendered consequences are unintended. While the gender implications of the preliminary reference procedure are not at all clear, what is clear is that the issues are complex and would benefit from a systematic and detailed examination. In depth work which looks at the use of preliminary references in Member

help us better understand the potentially different impact of the processes on men and women as well as the impact gender may have on the processes (and therefore help make the case for a more diverse judiciary at all levels).

Judicial Decision Making in the CJEU

Once a case has come before the ECJ (and indeed the other two courts which make up the CJEU) and has been heard, deliberations are secret and, as noted above, judges swear an oath to uphold that secrecy. As well as making research into the impact of gender on judging the CJEU level difficult, the process itself has gender implications. If there are ei5,caln JEU level Cleve9

negotiations that went on to arrive at the final decision and we therefore do not know very much about the power relationships wit *although some studies have identified gender differences in judicial decision making, others have failed to uncover systematic differences between male and female judges* obvious given the discussion in part 2 of this paper which argued that it is the diversity in experience that might make for an overall better judiciary rather than the fact that men and women will always and inherently make different decisions. However Collins et al raise an

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

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

> developed not out of

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

> *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
> 2011).

While the acknowledgement of the importance of carers rights is important and enhances

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

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

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

establish a foundation to equality jurisprudence which will govern the interpretation of the

approach has been welcomed by some and criticized by others (See for example Mendes 2000) and it was ultimately not taken up by the ECJ. However it is an approach which would facilitate the consideration of gender alongside other factors and which might be more sensitive to gender implications and one which could be employed in a variety of policy areas.

Even using just two recent cases, we can see that cases which do not explicitly raise gender issues have gendered consequences and also that applying a gender lens to the cases might lead to a different understanding of the issues and this different outc

Garrett and Weingast (1993),
reign Policy: 173- 206

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