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Does the European Court of Justice induce societal change? The record so far—with a green future in mind

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Abstract

Over the seven decades of its existence, the European Court of Justice (ECJ) has performed well as a conflict-solving institution. From the existing literature, it becomes less clear however to what extent it served as an effective agent for societal change. Obtaining clarity on this issue seems imperative in the current day and age, considering the gargantuan challenges of accelerating climate change and environmental degradation: if the ECJ generally manages to 'deliver', at least some further progress could realistically be expected on this front also. The present article conducts an examination reviewing the experiences in the green domain from a comparative perspective, seeking to discern possible patterns and draw common inferences. Thus, it aims to expose how and when judges prove successful in recalibrating the conduct or opinions of real people in actual practice. Those insights may well inform future progress in different fields—the ecological as much as anywhere.

1 | INTRODUCTION: A COURT AND ITS IMPACT

The European Union and its Court of Justice have been studied almost ad nauseam. Legal scholars and political scientists have written much on the impact of the Court on the Union and how its case-law has transformed the legal system.[1] Equal attention has gone out to the interaction between judges, national governments and other interlocutors, as well as to the standards of behaviour for this 'least dangerous branch'.[2] It has performed well in its main

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[1]Seminal treatises are J.H.H. Weiler, 'The Transformation of Europe', (1991) 100 *Yale Law Journal*, 243–283; A. Stone Sweet, *The Judicial Construction of Europe* (Oxford University Press, 2004); A.-M. Burley and W. Mattli, 'Europe before the Court: A Political Theory of Legal Integration', (1993) 47 *International Organization*, 41–76.

[2]See, e.g., Dorte Sindbjerg Martinsen, *An Ever More Powerful Court? The Political Constraints of Legal Integration in the European Union* (Oxford University Press, 2015); the contributions in P. Syrpis (ed.), *The Judiciary, the Legislature, and the EU Internal Market* (Cambridge University Press, 2012) or in M. Adams, H. de Waele, J. Meeusen and G. Straetmans (eds.), *Judging Europe's Judges: The Legitimacy of the Case Law of the European Court of Justice* (Hart Publishing, 2013); as well as H. Rasmussen, *On Law and Policy in the European Court of Justice* (Martinus Nijhoff Publishers, 1986).

function as a conflict-solving institution, particularly in infringement cases, urging Member States to redress violations of EU law alleged by the European Commission.

The record is less clear, however, on whether the Union's judiciary has been an effective agent for societal change. We know that the Court's pronouncements have had an impact on the law—and naturally so. Its output has also influenced or modified political decisions and strategies at the national level, in spite of domestic counterparts anticipating and containing the expected implications, managing to avert undesirably grand changes to sensitive pieces of legislation.[3] Still, we are largely in the dark as to the extent to which the Court has genuinely been able to 'deliver' in this respect. In other words, how far did it actually succeed in going beyond? Might it be said that, due to its case-law, something has really changed at the societal level—tilting perceptions, triggering different patterns of behaviour, eliciting a willingness to live up to an adjusted norm in reality? Or, to put it in more clichéd terms—was merely the Member States' law in the books altered, or did the law in action undergo modifications too? Obtaining clarity on this issue seems imperative, considering the gargantuan challenges of accelerating climate change and environmental degradation facing the European Union: for if the ECJ indeed manages to effectively deliver in its role as a change agent, at least some further progress could also realistically be expected on this front.

For the unsuspecting reader, a quick glance abroad reveals what judicial actors are generally capable of. One should, for example, be reminded of the US Supreme Court's audacious decision in *Brown v. Board of Education*, seeking to bring an end to racial segregation in the sphere of education.[4] Even there, about 70 years later, one dares to say that the judges' course was not wholly internalised by the American people: discriminatory policies at schools and universities endured, if not *de jure*, then *de facto*. From the very beginning, however, one wonders whether the European Court of Justice (ECJ) would ever be able to pull off something similar.[5] Commentators refer to the weaving of an 'EU law fabric' over the course of time and, in sync with the fashionable twentieth-century theories of Pierre Bourdieu, talk of the emergence of a 'transnational legal field'.[6] Uncertainty reigns, though, on which part of this bonanza can be considered a product of judicial activity, and how substantial the judiciary's share in it all is.

To some, the central question posited here could appear trite and nonsensical. By way of response, it is easy to, for example, point to the steady rise of strategic litigation, or to signal how in the early days, policy entrepreneurs like Éliane Vogel-Polsky daringly pushed the envelope of the Community's equal treatment rules.[7] If the ECJ would not be able to induce societal change, or so the rebuke would allege, such efforts would have been doomed. For sure, actors like Vogel-Polsky brought about changes to the law, and often also to the legal discourse. Yet what did they achieve apart from that? Which, if any, were henceforth the new 'facts on the ground'? What is currently *really* known here—and what sorts of proof may one have recourse to?

'Societal change' is of course a polysemic notion, and numerous different interpretations are thinkable. The present exploration aims to trace whether and how the Court might effectuate more generic developments within countries—not limited to statutes, jurisprudence and political and judicial actors, but stirring up a broader momentum, transforming ideas, habits or preferences of different groups and communities, either in a single Member State or in Europe more widely. In line with the theme of this special issue, the article predominantly seeks to ascertain whether the ECJ has been capable of making a difference in the domain of environmental protection. For verification purposes, it juxtaposes the green experiences with two other areas of Court activity, in order to discern possible patterns and draw common inferences.

[3]M. Blauberger, 'With Luxembourg in Mind… The Remaking of National Policies in the Face of ECJ Jurisprudence', (2012) 19 *Journal of European Public Policy*, 109–125; L. Conant, *Justice Contained: Law and Politics in the European Union* (Cornell University Press, 2002).

[4]*Oliver Brown et al. v. Board of Education of Topeka*, 387 U.S. 483.

[5]In the current article, the focus is placed on the ECJ as the oldest and most decisive limb of the institution, in full ordinarily referred to as 'Court of Justice of the European Union'.

[6]A. Vauchez, 'Introduction: Euro-lawyering, Transnational Social Fields and European Polity-Building', in A. Vauchez and B. de Witte, *Lawyering Europe* (Hart Publishing, 2013), 1; P. Bourdieu, 'The Force of Law: Towards a Sociology of the Legal Field', 38 (1987) *Hastings Law Journal*, 814–853.

[7]R.D. Kelemen, 'Eurolegalism and the European Legal Field', in A. Vauchez and B. de Witte, *Lawyering Europe* (Hart Publishing, 2013), 256; A. Irigoien Domínguez, 'Éliane Vogel-Polsky, Advocate for a Social Europe', *College of Europe Department of Legal Studies Working Paper* 01/2022.

Obviously, convincing evidence for the posited thesis would have to have an empirical, or at minimum a legal-empirical foundation. The precise methods employed deserve a further elaboration that will be offered next (Section 2). Then, we attempt to validate the theory by first investigating a classic domain of ECJ intervention, the internal market (Section 3). Hereafter, the environment is placed in the spotlight, in order to gauge which results have been generated in that sphere (Section 4). So as to carry out a more complete falsification of the core argument, we lastly take a peek into the field of LGBT rights (Section 5). The concluding section appraises the findings and brings the various lines together (Section 6).

2 | SOCIETAL CHANGE: THE HOW AND WHAT

To establish whether or not the ECJ has been successful in effectuating more general developments within countries, generating a broader momentum, transforming ideas, habits or preferences of different groups and communities, obviously specific cases need to be advanced and inspected. A perpetual difficulty arises then with regard to representativeness—regularly culminating in the disproval of *idées reçues* for being overly tied to the fields scrutinised. In the available literature on EU compliance, this has, for instance, helped to expose leading approaches as spurious 'sometimes-true theories'.[8] In comparison, the gambit seems easier in view of the binary goal of the present article, whereby a combination of plausible insights is believed to suffice for verifying or falsifying the key thesis: either the ECJ succeeds in effecting societal change, or it cannot (yet) be fully asserted whether it ever does so. Nonetheless, the 'excavation sites' must be cautiously selected.

The choice was made to concentrate first on a traditional field wherein the judges allegedly managed to bend the rules in their favour in the past decades, correspondent with a supposed agenda of realising a transnational polity—presumably an ideal setting for engaging in a preliminary survey.[9] We then zoom in on the domain of the environment, to which multiple studies in this special issue are devoted—the principal contribution of the present article being to demonstrate what can realistically be expected from the Court, now and in the future. Of late, especially climate change has witnessed a flurry of litigation, spurred by global trends. In the EU as much as elsewhere, judicial outputs have been fuelling grass-roots activism, in turn raising the chance of creating virtuous cycles—but whether that is so requires corroboration. To arrive at a rounder picture, a final study is deliberately carried out of the less likely terrain of LGBT rights, wherein the legal instruments to be interpreted and applied are relatively young, as is the ECJ's case-law. Those ingredients allow for the extra inquiry to function as a falsification exercise, enabling us to reflect holistically on the relevant circumstances and prerequisites before wrapping up.

The foregoing indicates already that the article adopts a law-in-context approach, fine-tuned in other quarters.[10] It is complemented by elements from the causal process tracing (CPT) method, in order to identify with greater accuracy which phenomena are properly attributable to the dealings of the Court. CPT is ordinarily used to describe policy events, elucidating the path(s) by which they come about.[11] The sequence of the influencing factors needs to be traced, also comprising arguments against a causal connection between the suspected cause and effect, as well as potential other causes for the observed outcome. Concretely, researchers are called upon to conceptualise the causal mechanism based on a pre-existing theorisation and elaborate on the data underpinning the theorised causal chain, which can be qualitative or quantitative in nature.[12] CPT distinguishes between four possible relationships. The first is the *straw-in-the-wind* nexus, whereby the event studied did precede the flagged outcomes but provides neither a necessary nor a sufficient criterion for accepting or rejecting causality, just slightly weakening rival hypotheses ('B

[8]G. Falkner, M. Hartlapp and O. Treib, 'Worlds of Compliance: Why Leading Approaches to European Union Implementation Are Only "Sometimes True Theories"', (2007) 46 *European Journal of Political Research*, 395–416.

[9]Cf. A. Vauchez, *Brokering Europe: Euro-lawyers and the Making of a Transnational Polity* (Cambridge University Press, 2015).

[10]See, e.g., F. Nicola and B. Davies (eds.), *EU Law Stories: Contextual and Critical Histories of European Jurisprudence* (Cambridge University Press, 2017).

[11]D. Collier, 'Understanding Process Tracing', (2011) 44 *PS: Political Science and Politics*, 823–830, at 823.

[12]D. Beach and R.B. Pedersen, *Process-Tracing Methods: Foundations and Guidelines* (University of Michigan Press, 2013), 14.

could be caused by A'). A *hoop* does not by itself affirm a hypothesis of causality but indicates a necessary criterion and strongly weakens alternative explanations ('Without A, probably no B'). The *smoking gun* lends strong support to a theorised causation and almost eliminates the rival hypotheses ('B was at least, and perhaps solely, caused by A'). The most convincing linkage is dubbed *doubly decisive*, entailing confirmation of the causality hypothesis and an elimination of all others ('B was caused by A, and certainly not by C, D and E').[13] Attaching the correct label revolves around the execution of a within-case analysis, both to depict the dynamics that led to a particular situation and to shed light on the generalisable mechanism linking causes and consequences within a population of kindred cases.[14] Therewith, CPT should surpass the mere identification of correlations and assist in determining which results are genuinely attributable to the studied judicial activity and which of these could have emerged regardless of that factor. Its specific application will be explained in the case studies below, with an additional 'counterfactual check' being performed to examine the indispensability of the Court's contribution, subsequently informing three summarising tables.

On a related note, the verb one chooses to employ (also in the title of this article) is of paramount importance. Whenever the ECJ potentially contributed to a development, the intention is to establish how meaningful its role was—and notably, to extrapolate from that what may further be expected from the Court in the green sphere of action. Whereas to 'inspire' or 'influence' societal changes refers to a fairly weak relation, to 'force' or 'produce' would be too strong. Close to the mark are 'spark', 'foment' or 'stimulate'. A conscious choice has been made for 'induce', by way of middle ground leaving enough room for nuance—but defying the purely coincidental.

In proceeding in this manner, the research boils down to a semi-sociological undertaking, tapping into a distinct scholarly tradition and relying on qualitative data from the selected contexts to arrive at authoritative conclusions. It dovetails neatly with publications measuring court impact, which have themselves become a staple of scientific discourse.[15] There exists, moreover, meticulous and compelling inquiries into how lawyers and other professionals contribute to the shaping of EU law, pointing out how the legal reasoning of European jurists is instilled by societal and political elements.[16] The aforementioned methodologies might be placed on their heads, however: while there is enough work being done on the political repercussions of the legal interpretations, this is much less true as regards mapping their societal implications. Though one could argue that such studies are best conducted by social scientists, arguably a lawyerly analysis should prove capable of highlighting aspects that tend to escape academics trained differently—proffering building blocks for subsequent explorations, still deferring to other disciplinary angles as desirable.

3 | A CLASSIC DOMAIN: THE INTERNAL MARKET

The internal or single market—originally called the common market—is often considered the EU's pride and joy, a construct generally hailed as its biggest success. The 1951 European Coal and Steel Community functioned as a trailblazer, pooling the resources in two crucial areas, eradicating barriers to trade and commerce between the six participating countries. The 1957 European Economic Community followed on that trodden path, expanding the strategy to countless other sectors, enjoining countries to open up further and abandon every protectionist reflex. The primary law regime was infused by a plethora of legislation adopted in the late 1980s and early 1990s, part of the 'Europe 1992' programme initiated by the Delors Commission.

[13]Collier, n. 11 above, 826–827.

[14]D. Beach, 'Process-Tracing Methods in Social Science', *Oxford Research Encyclopedias, Politics*, <https://oxfordre.com/politics/view/10.1093/acrefore/9780190228637.001.0001/acrefore-9780190228637-e-176>.

[15]See, e.g., M.L.M. Hertogh and S. Halliday (eds.), *Judicial Review and Bureaucratic Impact: International and Interdisciplinary Perspectives* (Cambridge University Press, 2004).

[16]Nicola and Davies, n. 10 above, 9.

Said legislation, as well as the successive treaties concluded between the Member States, tell only half the story. In the legal literature, the ECJ is ubiquitously credited with the realisation of the internal market, thanks to a series of revolutionary dicta.[17] In the 1974 judgment in *Dassonville*, the prohibition on quantitative restrictions and measures having equivalent effect was proclaimed to capture 'all trading rules (…) capable of hindering, directly or indirectly, actually or potentially, intra-community trade'.[18] Five years later, in *Cassis de Dijon*, the Court added to this a principle of mutual recognition, enabling goods to be shipped and sold on identical conditions across the EU, save for mandatory requirements justifying incidental exceptions.[19] It stuck to its guns in the *Sunday trading* cases, before allowing a minor retreat vis-à-vis selling arrangements in the 1993 *Keck* ruling, whilst limiting the reach of that term in, for example, *Mickelsson & Roos*.[20] Pronouncements of the same streak were rendered in the fields of persons, services and capital, so that each of these production factors could be widely dispersed.[21] A commensurate formula in EU competition law prohibited actual or potential effects on intra-state trade, reinforcing its bite against companies conspiring in cartels or abusing their dominant positions.[22]

These generous interpretations of rudimentary treaty norms have definitely paid off. From a mundane vantage point, when simply comparing the supermarket offerings of today with those in the 1950s, or the types of shops settled the high streets and what they have on display, it is easy to see that economic patterns have changed massively over the course of the last six decades. The purchase of Greek olives or Italian cheese, the hiring of a Polish plumber, the opening of a Latvian bank account, mass import of French liquor—such ventures have become thinkable, or just a lot more practical, looking back at the status quo in the pre-EU era. Naturally, this resulted primarily from the treaties enacted at the macro level, implemented by rules at the meso level, trickling down to behavioural changes among traders and entrepreneurs at the micro level. Every national measure adopted by public authorities or activities by private parties impeding cross-border sale or movement is outlawed—requiring a specific, well-reasoned, convincing justification in order to stand a remote chance of being upheld.[23] Without, however, judges deciding pertinent disputes, giving interpretations and drawing the necessary boundary lines, the words on paper would not automatically induce altered behaviour. The Court's judgments breathed real life into arcane clauses, inviting participants in the national legal system (from policy-makers to end consumers) to adjust their views or switch tracks radically. *Dassonville*, for example, meant that an incisive effects-based test had to be applied, not hemmed in by the stilted treaty language.[24] Of course, top-down instructions must never be expected to lead to instant modification and compliance. Time is needed to let the new routines, especially when spectacular, sink in. Well-known are the tales of the foot-dragging, incidentally even the full-blown resistance against the ECJ's rulings.[25] Simultaneously, the Court came ever closer to achieving its goals through acceptance at the grassroots level, inter alia becoming clear from the statistical truth that national judges were incrementally mobilised to refer matters of European law to it and settle conflicts in its favour.[26] Another typical and impactful development originated in the *Bosman* case, revolving

[17]M. Cappelletti, M. Seccombe and J.H.H. Weiler (eds.), *Integration through Law* (De Gruyter, 1986); C. Barnard, *The Substantive Law of the EU* (Oxford University Press, 2004); L.W. Gormley, 'Free Movement of Goods and EU Legislation in the Court of Justice', in P. Syrpis (ed.), *The Judiciary, the Legislature, and the EU Internal Market* (Cambridge University Press, 2012), 49–61.

[18]Case 8/74, *Procureur du Roi v. Benoît and Gustave Dassonville*, ECLI:EU:C:1974:82.

[19]Case 120/78, *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein*, ECLI:EU:C:1979:42.

[20]Case C-145/88, *Torfaen Borough Council v. B & Q plc*, ECLI:EU:C:1989:593; Case C-169/91, *Council of the City of Stoke-on-Trent and Norwich City Council v. B & Q plc*, ECLI:EU:C:1992:519; Joined Cases C-267/91 and C-268/91, *Criminal proceedings against Bernard Keck and Daniel Mithouard*, ECLI:EU:C:1993:905; Case C-142/05, *Åklagaren v. Percy Mickelsson and Joakim Roos*, ECLI:EU:C:2009:336.

[21]See, e.g., Case C-76/90, *Manfred Säger v. Dennemeyer & Co. Ltd*., ECLI:EU:C:1991:331.

[22]Case C-250/92, *Gøttrup-Klim et al. Grovvareforeninger v. Dansk Landbrugs Grovvareselskab AmbA*, ECLI:EU:C:1994:413; Joined Cases C-295/04 to C-298/04, *Manfredi and Others v. Lloyd Adriatico Assicurazioni SpA and Others*, ECLI:EU:C:2006:461.

[23]S. Weatherill, 'The Several Internal Markets', *Yearbook of European Law* 2017, 125, 128.

[24]Ibid., 132.

[25]See, e.g., B. Davies, *Resisting the European Court of Justice: West Germany's Confrontation with European Law, 1949–1979* (Cambridge University Press, 2012); K.J. Alter, *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe* (Oxford University Press, 2003); H. de Waele, 'Wherefore by Their Fruits Ye Shall Know Them: Re-appraising Success and Failure in the Life of the European Court of Justice', *Cambridge Yearbook of European Legal Studies* 2021, 54–72, 57–60.

[26]Following on from Case 26/62, *Van Gend & Loos v. Nederlandse administratie der belastingen*, ECLI:EU:C:1963:1; see, e.g., M. Broberg and N. Fenger, *Broberg and Fenger on Preliminary References to the European Court of Justice* (Oxford University Press, 2021), 29–42.

around a professional football player unable to transfer from a club in one country to an outfit abroad. The response of the ECJ, underscoring the right of free movement within the internal market, caused a tremendous upset, intervening mightily in the existing commercial sportive customs.[27] The face of the game, the design of competitions, the management of clubs and branch organisations such as UEFA were transformed forever. Fascinatingly, non-EU nationals would stand to profit from the adjacent *Simutenkov* ruling, in tune with a long string of decisions supporting the invocation of international agreements concluded with third countries.[28] The Court had meanwhile facilitated the arrival of, and residence in, the Union of myriad workers and service providers—once again impacting directly at the societal level, by affecting the composition of the domestic populations. In a wholly different corner, the limits of law and politics were stretched as never before by creative attempts to connect the right to abortion to the receipt of cross-boundary services, testifying to a new utilitarian mindset catching on with individual Europeans.[29]

We have now identified several types of societal change, begging the question whether, and if so how, the 'fingerprints' of the Court are visible in the internal market domain. The facts on the ground are suggestive of a *smoking gun* nexus between the observed outcomes and the preceding rulings: whereas rival factors (such as the mentioned deluge of legislation since the late 1980s) will have played an ancillary role, the ECJ bears at least some responsibility for the currently prevailing context, on a scale exceeding both the *hoop* and *straw-in-the-wind* theorems. The induced change was not solely brought into being through the case-law (which would have been *doubly decisive*), but at least partially so. To buttress that conclusion, we should reflect on the converse situation had the Court not existed: the Member States would possibly have executed their treaty commitments, but the ambit of the latter would have stayed limited, preserving the 'silo character' of the national economies and trade policies. This already renders the counterfactual scenario unlikely. In close conjunction, consider the withdrawal of the United Kingdom from the European Union, which undoubtedly occurred for a combination of reasons. Nevertheless, the influx of foreign workers, boosted by the Court's jurisprudence, figured prominently among the complaints of pro-Brexit voters.[30] Beyond the relevant primary and secondary law, the latter resulted too from the societal changes effected by the ECJ—the liberalising judgments that made the country increasingly attractive for foreign migrants, with the much-criticised supremacy principle to boot ('let's take back control of our borders and laws').[31]

Admittedly, the magnitude of the societal change has remained limited still, owing to the fact that not all EU laws are obeyed and transposed perfectly in this sphere. Annually, a great number of infringement actions are launched by the Commission, seeking improvements and rectifications.[32] The establishment of so-called SOLVIT centres further indicates unfinished business.[33] According to one authoritative commentator, the internal market comes across as shockingly fragmented on a daily basis, particularly due to local bureaucratic intransigence and wilful or unintentional misconstruing of the European rules.[34] This sentiment is echoed in industrial circles, lamenting differentiated implementation styles, unilateral regulatory pushbacks and supranational under-enforcement.[35] Surely the

[27]Case C-419/93, *Union royale belge des sociétés de football association ASBL and Others v. Jean-Marc Bosman*, ECLI:EU:C:463.

[28]Case C-265/03, *Simutenkov v. Ministerio de Educación y Cultura and Real Federación Española de Fútbol*, ECLI:EU:C:2005:213; Case C-18/90, *Office national de l'emploi v. Kziber*, ECLI:EU:C:1991:36; Case C-192/89, *Sevince v. Staatssecretaris van Justitie*, ECLI:EU:C:1990:332; Case C-438/00, *Deutscher Handballbund eV v. Kolpak*, ECLI:EU:C:2003:255.

[29]Case C-159/90, *The Society for the Protection of Unborn Children Ireland Ltd v. Stephen Grogan and Others*, ECLI:EU:C:1991:378.

[30]M. Goodwin and C. Milazzo, 'Taking Back Control? Investigating the Role of Immigration in the 2016 Vote for Brexit', (2017) 19 *British Journal of Politics and International Relations*, 450–464; D. Undzenas, K. Dunn and V. Spaiser, 'Re-examining the EU Referendum Vote: Right-Wing Authoritarianism and Social Dominance Orientation as Indirect Trait-Level Motivation', (2021) 31 *Journal of Elections, Public Opinion and Parties*, 1–22.

[31]See, e.g., Case 292/89, *The Queen v. Immigration Appeal Tribunal, ex parte Antonissen*, ECLI:EU:C:1991:80; Case C-413/99, *Baumbast and R v. Secretary of State for the Home Department*, ECLI:EU:C:2002:493; Case 6/64, *Costa v. E.N.E.L.*, ECLI:EU:C:1964:66. Compare the 1970s remarks of Pierre Pescatore, cited in Vauchez, n. 9 above, at 176: '[T]his new combination of direct impact with priority of EC law—which was accepted, though not without difficulties, on the continent—will require a fundamental revision of some deep-rooted habits of political and legal thinking in Great Britain … I am under the impression that this has not yet been fully realized in the United Kingdom'.

[32]European Commission, Single Market Scoreboard, <https://single-market-scoreboard.ec.europa.eu/>.

[33]<https://ec.europa.eu/solvit/index_nl.htm>.

[34]S. Weatherill, 'The Principle of Mutual Recognition: It Doesn't Work Because It Doesn't Exist', (2018) 43 *European Law Review*, 224–233, 232.

[35]J. Allenbach-Ammann, 'European Businesses Lament Fragmentation of the EU Single Market', *EurActiv.com*, 28 June 2022, <https://www.euractiv.com/section/economy-jobs/news/european-businesses-lament-fragmentation-of-the-eu-single-market/>.

blame can and should not be placed with the Court—even if ostensibly, the societal change it induced did not effect a *wholesale* mentality shift among the responsible public authorities.

Internal market		
Regulatory foundation: basic		
Time frame: long (1950s–2020s)		
Societal changes (sample) * Mobilising of domestic judges to involve the ECJ * Increased influx of foreign nationals * Greater choice for consumers, adapted sales/purchasing and import/export strategies of producers	**Believed causal factors (sample)** * *Dassonville* (reduction of interstate barriers) * *Cassis de Dijon* (duty of mutual recognition) * *Van Gend & Loos* (invocability at national courts)	**Counterfactual hypothesis** Probable Possible Unlikely X
Causal relationship: Smoking gun		

4 | THE MAIN TESTING GROUND: ENVIRONMENTAL PROTECTION

The previous assessment offers reassurance that the ECJ is able to pull off societal change in at least certain respects. Yet, could the inferences equally hold for the topical but starkly contrasting domain of the environment?[36] It deserves noting that, while on the radar of the EU legislator since the 1970s, it is but a relatively recent field of Union competence. Environmental protection as such did not feature anywhere in the original EEC Treaty, so that the institutions resorted to the instrument of soft law instead, putting out a European Environmental Action Plan in 1973, the first of what would become a series.[37]

Due to the lack of a dedicated legal basis, again in contrast to the internal market, refuge had to be sought in the generic competence clause of what was then Article 235 of the EEC Treaty in order to enact substantive rules.[38] To satisfy the widely expressed desire for action, a gamut of measures was adopted on this footing—among which was the celebrated Birds Directive (79/509)—in tandem with Article 2 of EEC Treaty that listed 'the improvement of living and working conditions' as one of the objectives of the integration process. This slightly suspect tactic, gaining in popularity in the 1980s, survived incisive scrutiny by the ECJ.[39]

The Single European Act (1987) marked the beginning of a new era, and at the moment when the serious nature of the issues concerned was finally getting through to the public at large, environmental action became a cardinal focal point in EU policy-making. A separate title was inserted into the EEC Treaty, as well as a so-called 'linking clause', demanding that the relevant concerns would duly be taken into account during the drafting of new laws and instruments.[40] At the summits in Maastricht (1991) and Amsterdam (1997), the policy was amplified further, and sustainable development was added as one of the Union's leading objectives.

In the interim, the theme began to emerge with great frequency in the case-law of the Court. A significant part of this litigation consisted of attempts at annulling EU measures believed to be environmentally harmful. It needs to be immediately foregrounded that many of these trials have foundered, from a procedure initiated by Greenpeace in

[36]Understood here in a broad sense, ranging from endangered species and protection of habitats, to the modern templates (part of the 'European Green Deal') covering emissions standards and the fight against climate change.

[37]For a more complete account, see, e.g., H. Somsen, 'The European Union and the OECD', in J. Werksman (ed.), *Greening International Institutions* (Earthscan, 1996), 181–204.

[38]Currently Art 352 TFEU.

[39]See, e.g., Case 91/79, *Commission v. Italy*, ECLI:EU:C:1980:85, and Case 240/83, *Procureur de la République v. Association de défense des brûleurs d'huile usagées*, ECLI:EU:C:1985:59.

[40]Art 6 TFEU; cf. N. Dhont, *Integration of Environmental Protection in Other EC Policies: Legal Theory and Practice* (Europa Law Publishing, 2003).

1996 against a subsidy for Spanish power stations, to 'the people's climate case' from 2019, which purported to nullify a batch of instruments claimed to set too low emission standards.[41] Favourable results were obtained on various other occasions, inter alia the air quality rulings that granted invaluable enforcement rights to individuals and pressure groups, holding domestic authorities to account and requiring them to improve their compliance record.[42]

Although the upshot of the jurisprudence is not exactly grand, looking at the steadily rising numbers in the dockets of the ECJ and the national courts, the latter pronouncements visibly did inspire NGOs to submit follow-up claims. The *Finnish wolf hunting* (2019) and *Austrian hamster* (2020) rulings are additional examples, alerting citizens to the plight of endangered species and underlining the possibilities for legally addressing the subject matter.[43] One judgment strongly suggestive of societal change dates from half a decade ago, with its ramifications bound to reverberate far into the future. In November 2018, on a reference from the Dutch Council of State pertaining to the Habitats Directive, the ECJ spoke out damningly about a national programme regulating permits for nitrogen disposition.[44] Consequently, the Netherlands government saw itself forced to abruptly halt the construction of housing across the country, prescribe a reduced maximum speed for traffic on every highway and design plans for a drastic overhaul of the farming sector, which caused tremendous unrest and incited mass protests in 2019 and 2022.[45] At the moment, the necessary policy reforms are gradually being set in motion, destined to transform the face of agriculture and reconfigure spatial planning choices and the zoning of nature and infrastructure, besides influencing the mobility choices of parts of the population.[46] This momentum is currently spreading to neighbouring Belgium, where courts have taken their cue from the Dutch precedent, compelling regional governments to respond.[47]

Seemingly then, environmental degradation has become a rallying cause at long last. Coinciding with the aforementioned case, the Białowieża Forest saga caused a similarly fierce uproar in Poland. In the spring of 2016, a massive logging operation commenced in said area on the instructions of the Polish environmental minister, citing infestation of the bark beetle as an excuse for tripling the earlier felling targets.[48] This triggered hefty responses by politicians and the media, as well as assertive demonstrations by civil society organisations that involved campaigners camping on-site and chaining themselves to trees.[49] During the infringement proceedings, culminating in 2018 in a clear-cut condemnation of Poland, interim measures were imposed by the ECJ upon the request of the Commission.[50] The Polish authorities refused to abide by this 2017 order, infuriating their critics, and after a supreme delay

[41]Case 321/95 P, *Stichting Greenpeace Council and Others v. Commission*, ECLI:EU:C:1998:153; Case T-330/18, *Carvalho and Others v. Parliament and Council*, ECLI:EU:C:2019:324. See also, e.g., Joined Cases C-404/12 P and C-405/12 P, *Council and Commission v. Stichting Natuur en Milieu and Pesticide Action Network Europe*, ECLI:EU:C:2015:5.

[42]Case C-237/07, *Janecek v. Freistaat Bayern*, ECLI:EU:C:2008:447; Case C-404/13, *The Queen, on the application of ClientEarth v. The Secretary of State for the Environment, Food and Rural Affairs*, ECLI:EU:C:2014:2382; Case C-379/15, *Association France Nature Environnement v. Premier ministre and Ministre de l'Écologie, du Développement durable et de l'Énergie*, ECLI:EU:2016:603; Case C-752/18, *Deutsche Umwelthilfe eV v. Freistaat Bayern*, ECLI:EU:C:2019:1114.

[43]Case C-477/19, *IE v. Magistrat der Stadt Wien*, ECLI:EU:C:2021:881; Case C-674/17, *Luonnonsuojeluyhdistys Tapiola Pohjois-Savo—Kainuu ry v. Risto Mustonen and Others*, ECLI:EU:C:2019:851. See also Case C-383/09, *Commission v. France*, ECLI:EU:C:2011:369.

[44]Joined Cases C-293/17 and C-294/17, *Coöperatie Mobilisation for the Environment UA and Vereniging Leefmilieu v. College van gedeputeerde staten van Limburg and College van gedeputeerde staten van Gelderland*, ECLI:EU:C:2018:882.

[45]See, e.g., 'Dutch Farmers Stage Tractor Protest, Cause Huge Jams', *Deutsche Welle*, 10 January 2019, <https://www.dw.com/en/netherlands-farmers-stage-tractor-protest-cause-huge-jams/a-50665750>; 'Farmers Protest Violence Condemned, but Four Provinces Cave In to Demands', *Dutch News*, 19 October 2019, <https://www.dutchnews.nl/news/2019/10/farmers-protest-violence-condemned-but-four-provinces-cave-in-to-demands>; 'Why Dutch Farmers Are Protesting over Emissions Cuts', *BBC News*, 29 July 2022, <https://www.bbc.com/news/world-europe-62335287>; 'Protecting Nature, Destroying Lives—the Chemist vs. the Dutch Farmers', *Politico*, 9 March 2023, <https://www.politico.eu/article/johan-vollenbroek-netherlands-nitrogen-pollution-climate-change-farming>.

[46]See, e.g., Government of the Netherlands, 'The Nitrogen Strategy and the Transformation of the Rural Areas', <https://www.government.nl/topics/nature-and-biodiversity/the-nitrogen-strategy-and-the-transformation-of-the-rural-areas>.

[47]W. Timmermans and V. Van Tuyne, 'Nitrogen Crisis in Flanders? A Recent Judgment May Have Serious Consequences', *Lexology.com*, 8 March 2021, <https://www.lexology.com/library/detail.aspx?g=c901f9fb-3382-48bb-b925-cb82a3d54fa4>; M. Chini, '"Huge Impact": Flanders Urged to Adapt Nitrogen Decree', *The Brussels Times*, 28 September 2023, <https://www.brusselstimes.com/711573/huge-impact-flanders-urged-to-adapt-nitrogen-decree>.

[48]A. Koper and M. Goettig, 'Polish Minister Approves Tripling of Logging in Ancient Forest', *reuters.com*, 25 March 2016, <https://www.reuters.com/article/us-poland-environment-forest/polish-minister-approves-tripling-of-logging-in-ancient-forest-idUKKCN0WR15H>.

[49]See, e.g., 'Police Break Up Bialowieza Forest Sit-in in Warsaw', *Deutsche Welle*, 11 October 2017, <https://www.dw.com/en/polish-police-break-up-protest-against-bialowieza-forest-logging/a-41322966>; 'Activists Occupy Ranger Headquarters in Primeval Forest Dispute', *France24.com*, 9 November 2017, <https://www.france24.com/en/20171109-activists-occupy-ranger-headquarters-primeval-forest-dispute>.

[50]Case C-441/17 R, *Commission v. Poland*, ECLI:EU:C:2017:877; Case C-441/17, *Commission v. Poland*, ECLI:EU:C:2018:255.

halted their demolition of this Natura2000 territory. While the incumbent government was returned to office in the 2019 elections, the affair opened the eyes of nature conservationists as to the governing party's lax ecological policies. It came to bolster their resolve and that of countless colleagues elsewhere, giving an impetus to the Europeanisation of environmental activism.[51]

Truth be told, in the last two examples, selected from a longer thread of Court interventions against trespassing Member States, the decisions of the EU's judiciary may not have altered the ideas, habits or preferences of societal groups and communities directly. Moreover, green NGOs were around long before the Court made its first important moves, and the failed 'people's climate case' they supported merely followed on from the existing legal mobilisation. Oddly, in the Netherlands the Dutch Council of State was perceived as the villain-in-chief, whereas it merely limited itself to confirming the ECJ's dictum. As described, the concomitant shockwaves nevertheless produced sizeable modifications, or are soon expected to do so. No less severe sentiments were stirred up in manifold societies by the logging operation in Poland, fuelling a polarisation that persists up to the present day. Simultaneously, with regard to the enforcement of air quality rules, or the preservation of animals and their natural habitats, the prevailing opinions appear to be tilting quite radically away from the permissive culture of yore.[52]

Applying CPT in the given context, the Court's judgments were plainly essential factors and not just events that preceded the upheavals that occurred in more than one country. The linkage between the two is a virtually linear one. The counterfactual hypothesis is unlikely, for if the ECJ had not been there, the crisis in the Netherlands would not have materialised, nor had that domino tipped over the stones in Belgium. Considering that since 2016, Poland has ignored Commission demands regularly, its government is likely to have continued tearing down Białowieża. Thus, on the basis of the reviewed case-law sample, just as in the internal market domain, there exists sufficient causality to assume congruence with the *smoking gun* model: the changes that can be observed were to a large extent Court-induced, even when all rival hypotheses (with other contributing factors, e.g., the interpreted substantive norms, playing a greater role) cannot be eliminated altogether.

Environmental protection		
Regulatory foundation: more extensive		
Time frame: medium (1970s–2020s)		
Societal changes (sample)	**Believed causal factors (sample)**	**Counterfactual hypothesis**
* Sectoral upheavals, particularly in the agricultural field	* *Janecek & co.* (individually enforceable air quality rules)	Probable
* Societal unrest and backlash in some countries	* *Dutch nitrogen* judgment (limiting emissions)	Possible
* Increased NGO mobilisation	* *Białowieża* infringement case (outlawing logging programme)	Unlikely X
Causal relationship: Smoking gun		

5 | A FALSIFICATION EXERCISE: LGBT RIGHTS

Admittedly, the assertions made with regard to the role of the Court in the flagship domain of environmental protection are not entirely incontestable, prompting a desire for a third case study, enabling a more complete

[51]See, e.g., ClientEarth, 'Saving Bialowieza', <https://www.clientearth.org/latest/latest-updates/stories/saving-bialowieza/>; European Greens, 'Help Save the Białowieża Forest in Poland', <https://europeangreens.eu/news/save-bia%C5%82owie%C5%BCa-forest-poland>, or WWF, 'Saving Bialowieza, Europe's Primeval Forest', <https://www.wwf.eu/what_we_do/forests/saving_biaowiea_forest/>.

[52]Atlas of European Values, <https://www.atlasofeuropeanvalues.eu/maptool.html>, especially the entries 'Support for Environmental Protection' and 'Worries about Climate Change'.

falsification of the core argument. The (regulation of the) legal position of LGBT persons is believed to represent a suitable reference point, knowing that, for the longest time, the competence of the EU remained limited, just as in environmental matters, and Member States zealously guard their prerogatives in this field.[53] On the other hand, the judicial reasoning here flowed from established ECJ precedents in the sphere of fundamental rights and non-discrimination, similar to the internal market pronouncements. In the slipstream of these developments, the Court deftly slid into place as an autonomous norm setter, expanding the entitlements of the individuals concerned, awarding them more rights and benefits than either their national governments or the authors of the treaties were willing to grant them.

While the prime foundation of equal treatment featured in the (predecessor to the) TFEU from the very beginning, fundamental rights were enshrined in the treaties roughly only 40 years later. Since 1997, Article 6 TEU states that the Union shall recognise the fundamental rights 'as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms (…) and as they result from the constitutional traditions common to the Member States'. The sexual orientation criterion was explicitly incorporated as well. Based on Article 19 TFEU, appropriate action can be undertaken 'to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation'. This provision empowers the European Commission to submit draft directives; the Council of Ministers decides upon these by unanimity, after gaining the consent of the Parliament. In 2000, the Council adopted the Employment Equality Directive, which requests Member States to combat direct and indirect discrimination in employment on all Article 19 TFEU grounds.[54] In 2008, the Commission submitted a proposal for a directive on implementing equal treatment outside the labour market for all Article 19 grounds including sexual orientation, but the Council has not reached agreement on it yet.[55] Transgender rights are wholly absent from both the treaties and the legislation. The ECJ nonetheless dared to press the accelerator on repeated occasions. For instance, in all three cases on transgender persons decided so far—*P. v. S*. (1996), *K.B*. (2004) and *Richards* (2006), the Court stood up for their rights and ensured their equality, on the labour market as well as in the pensions sphere.[56] As regards lesbian and gay rights, despite adverse pronouncements in *Grant* (1996), *D*. (2001), *Römer* (2011) and *Parris* (2016), its judgments in *Maruko* (2008), *Hay* (2013), *Coman* (2018) and *V.M.A*. (2022) secured respectively that surviving same-sex partners may lay claim to the same pension benefits as heterosexuals; ditto when it concerns salary and employment conditions; that family reunification rights under EU free movement law also apply to same-sex spouses; and that Member States are obligated to issue parentage documents to children born out of same-sex partnerships lawfully entered into elsewhere in the Union.[57] These bold strides evince the classic activist posture adopted by the Court, defying domestic anxieties and prejudices.[58]

Let us now turn to the issue of the possible societal change (if any) induced by the Court on this front, also to validate our findings on its achievements in the environmental domain. In an EU counting 27 Member States, public opinion and the attitude of politicians as regards lesbians, gays and transsexuals continues to vary—and no less profoundly when compared with people's opinions on ecological topics.[59] In eastern and southeastern Europe (including Greece and Italy), homophobia, discrimination and violence on grounds of sexual orientation cause serious

[53]The letters 'Q', 'I' and 'A' as well as the customary '+' have been omitted, for want of case-law pertaining to these subgroups.

[54]Dir 2000/78/EC establishing a general framework for equal treatment in employment and occupation, [2000] O.J. L303/16.

[55]Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, COM (2008) 426 final.

[56]Case C-13/94, *P. v. S. and Cornwall County Council*, ECLI:EU:1996:170; Case C-117/01, *K.B. v. National Health Service Pensions Agency and Secretary of State for Health*, ECLI:EU:C:2004:7; Case C-423/04, *Sarah Margaret Richards v. Secretary of State for Work and Pensions*, ECLI:EU:C:2006:256.

[57]Case C-249/96, *Lisa Grant v. South-West Trains Ltd*, ECLI:EU:C:1998:63; Joined Cases C-122/99 P and C-125/99 P, *D. and Kingdom of Sweden v. Council*, ECLI:EUC:2001:304; Case C-147/08, *Jürgen Römer v. Freie und Hansestadt Hamburg*, *ECLI*:EU:C:2011:286; Case C-443/15, *David L. Parris v. Trinity College Dublin and Others*, ECLI:EU:C:2016:897; Case C-267/06, *Tadao Maruko v. Versorgungsanstalt der deutschen Bühnen*, ECLI:EU:2008:179; Case C-267/12, *Frédéric Hay v. Crédit agricole mutuel de Charente-Maritime et des Deux-Sèvres*, ECLI:EU:C:2013:823; Case C-673/16, *Coman and Others v. Inspectoratul General pentru Imigrări and Ministerul Afacerilor Interne*, ECLI:EU:C:2018:385; Case C-490/20, *V.M.A. v. Stolichna obshtina, rayon Pancharevo*, ECLI:EU:C:.2021:1008.

[58]H. de Waele and Anna van der Vleuten, 'Judicial Activism in the European Court of Justice: The Case of LGBT Rights', (2011) 19 *Michigan State Journal of International Law*, 639–666.

[59]See Atlas of European Values, <https://www.atlasofeuropeanvalues.eu/maptool.html>, and especially contrast the entries 'Justifiable: Homosexuality' and 'Gays and Lesbians Should Live as They Wish' with 'Support for Environmental Protection' and 'Worries about Climate Change'.

problems.[60] The legal position of LGBT persons also differs markedly. In 13 countries, same-sex couples have the right to marry, namely in Austria, Belgium, Denmark, Finland, France, Germany, Ireland, Luxembourg, Malta, the Netherlands, Portugal, Spain and Sweden. In eight more Member States, they can have their relationship registered. Other countries elect not to recognise homosexual partnerships, with Hungary, Poland and Slovakia defining marriage in their constitutions as a union between a man and a woman. On top of this, Hungary introduced generally discriminatory laws against LGBT groups, inter alia engaged in sexual education activities, and several Polish regions and municipalities have proclaimed 'LGBT-free zones'.[61] Additionally, as regards the position of LGBT employees, reports from the European Group of Experts on Combating Sexual Orientation Discrimination indicate that the implementation of Directive 2000/78 is marred by deficiencies.[62] A follow-up study posited that the wide scope of exceptions that apply to employers with a distinct religious ethos contravenes the general principle of non-discrimination, but hitherto failed to provoke a judicial response.[63] Across the board, the attitude towards transsexuals appears strikingly more negative than that towards gays and lesbians. All this paints a bleak picture indeed, with courts that chose to forge ahead not being able to induce societal change themselves. It has, however, not stopped NGOs from stepping up their game as regards public interest litigation, often emerging victoriously from the courtroom—albeit that it does not immediately translate to how other members of society perceive and receive the message.[64]

Prima facie, the divergent situations in the Member States restrain the possibilities for the ECJ to review national legislation. After all, Article 6 TEU merely provides for protection of fundamental freedoms as they flow 'from the constitutional traditions *common* to the Member States' (italics added). Besides, questions of gender identity and sexual orientation easily tread on topics of marriage and family law in which domain the EU enjoys no primary competence. Populist, right-wing governments like to present LGBT rights as affecting parents' right to education, and the family as 'the cornerstone of society'. We observe notwithstanding how the Court managed to impact on the interpretation of the law, application of domestic policies, legal standing and litigation strategies of private actors. From a CPT perspective, clearly the judiciary did contribute to the shaping of the contemporary landscape, albeit that the evidence does not stack up as impressively in comparison with our first and second exhibits. Arguably, another factor explaining the less rich pickings here resides in the shorter time scale of the LGBT rights evolution. Disparate as the outcomes are, we should bear in mind that they eventually might coalesce, to firm up a broader climate of greater respect and tolerance—in the medium or long term, ushering in genuinely changed societies, depending on the country concerned. The incremental mobilisation of women, enhancing their position and breaking down barriers at the national level since the 1970s, aided by the ECJ, constitutes a promising adjacent tale.[65]

All in all, considering the divergences we have been confronted with, the more cautious *hoop* connection looks the most appropriate. Without doubt, the ECJ's output was essential for the described events to take place, shying away from pure conjecture, yet offering neither a stronger probability nor a 100% exactitude. The inference may be underpinned by the counterfactual scenario: it is in itself possible and not entirely unimaginable that the Member States sued would have spontaneously begun to award the litigants in, for example, *P. v. S.*, *Coman* or *Richards* rights on the basis of the primary and secondary law alone. Still, such an advancement would not have been probable if the ECJ had not been there. This suffices to reveal the general direction of the causal process, weakening alternative

[60]L. Philips, 'EU Shows East–West Divide on Homophobia', *EUObserver.com*, 31 March 2009, <https://euobserver.com/eu-political/27881>.

[61]R. Picheta and I. Kottasová, 'In Poland's "LGBT-Free Zones", Existing Is an Act of Defiance', *CNN.com*, 1 November 2020, <https://edition.cnn.com/interactive/2020/10/world/lgbt-free-poland-intl-scli-cnnphotos>.

[62]C. Waaldijk, 'Conclusions', in European Group of Exports, Final Report, *Combating Sexual Orientation Discrimination in Employment: Legislation in Fifteen EU Member States* (2004), <https://scholarlypublications.universiteitleiden.nl/access/item%3A2885670/view>.

[63]M. Bell, I. Chopin and Fiona Palmer, *Developing Anti-discrimination Law in Europe: The 25 EU Member States Compared III* (2007), <https://www.migpolgroup.com/_old/portfolio/developing-anti-discrimination-law-in-europe-the-25-eu-member-states-compared-iii/>.

[64]See, e.g., Case C-81/12, *Asociația ACCEPT v. Consiliul Național pentru Combaterea Discriminării*, ECLI:EU:C:2013:275; Joined Cases C-148/13 to C-150/13, *A., B. and C. v. Netherlands*, ECLI:EU:C:2014:2406.

[65]Cf. Vauchez, n. 6 above, 11; S. Douglas-Scott, 'Subjects and Objects of EU Human Rights Law', in S. Bardutzky and E. Fahey (eds.), *Framing the Subjects and Objects of Contemporary EU Law* (Edward Elgar, 2017), 115–117.

explanations for the entrenchment of LGBT rights without eliminating them altogether (which would have been *doubly decisive*). The dynamics here are thought to transcend the tenuous *straw-in-the-wind* assumption, as the case-law undeniably embodied a necessary minimum for the outcomes to arise. Simultaneously, the results of this falsifying case study bear out the overall validity of the approach pursued.

LGBT rights		
Regulatory foundation: basic		
Time frame: short (1990s–2020s)		
Societal changes (sample) * Liberalisation of policies towards registered partnerships and equal treatment for transgender persons * Backlash in certain countries * Increased NGO mobilisation	**Believed causal factors (sample)** * *P. v. S.* (equal treatment on the labour market) * *Maruko* (equal treatment in the pensions sector) * *Coman* (family reunification rights)	**Counterfactual hypothesis** Probable Possible X Unlikely
Causal relationship: Hoop		

6 | CONCLUSIONS: THE POTENTIAL AND THE PREREQUISITES

Felix Frankfurter once remarked that the judiciary possesses an 'awesome power'.[66] In deploying it, they occasionally risk forging ahead, urging society to adapt prematurely. Vice versa, shifting ideas, habits or preferences of societal groups and communities regularly encourage courts to modify their approach. The foregoing analysis provides illustrations of both tendencies, but the ECJ's proactive attitude does seem to loom a bit larger.

For sure, the internal market, environmental concerns and LGBT rights are distinct fields, displaying societal changes that were induced in different ways. In spite of the (deliberately) contrasting time frames and levels of regulation, the highlighted jurisprudence verily did change hearts, minds and actual behaviour to lesser or greater degrees, even when the gist of the rulings is not necessarily being complied with in full. The proof that the Court succeeded in stirring up a broader momentum, transforming ideas, habits or preferences of different groups and communities ranges from the commercial actors who decide to modify their strategies to optimally market their products and the NGOs that venture to sue in order to enhance the legal position of minority groups, to individuals who felt obliged to vote to leave the EU or stage violent protests against reforms that threaten their business models. Since the ambit of the rules in the selected areas hardly changed in the periods examined, the events described are even more credibly ascribable to the Court. In the environmental sphere, it proved to be just as visible as in the internal market—and the effects of its activities there stood out significantly when juxtaposed with the LGBT rights arena.

The proactive attitude of the ECJ, coupled with its own waxing importance after the launch of the doctrines of direct effect and supremacy, has tempted a growing number of lawyers and academics to focus on the EU. Some refer to this trend as 'Eurolegalism', an almost self-serving cycle of rules, courts, procedures, firms and professional training needs.[67] This phenomenon offers extra testimony of societal change, for the increasing opportunities that have arisen for litigating European law, as well as studying and publishing on it, has transformed legal practice and academia, including the ideas, habits and preferences of the persons working therein.[68] Due to the potency of the

[66]F. Frankfurter, dissenting opinion in *Trop v. Dulles*, 356 U.S. 86.

[67]R.D. Kelemen, *Eurolegalism: The Transformation of Law and Regulation in the European Union* (Harvard University Press, 2011).

[68]C. Lahusen, 'Law and Lawyers in the Brussels World of Commercial Consultants', in A. Vauchez and B. de Witte, *Lawyering Europe* (Hart Publishing, 2013), 177–194; A. Arnull, 'The Americanization of EU Law Scholarship', in A. Arnull, P. Eeckhout and T. Tridimas (eds.), *Continuity and Change in EU Law: Essays in Honour of Sir Francis Jacobs* (Oxford University Press, 2008), 415–431.

'Brussels effect', the power of the Court stretches ever farther—its creative interpretations on, for example, consumer rights or privacy plausibly generating societal change on other continents too.[69] The concomitant export of at least some parts of the EU environmental *acquis* spells hopeful for green activists across the globe.

Which circumstances may be deemed crucial for the ECJ's ability to deliver, so that it has gradually become feasible to predict future trajectories of change, inter alia in the ecological domain? The exhibits presented above demonstrate that the institution does not operate in a vacuum and requires a minimal regulatory substrate. In the internal market area, the sparse character of the applicable norms formed no impediment, but there it did take time before the law in reality became congruous with the law in the books. The investigation in the environmental field suggests that in the medium term, an extension of the quantity of rules, when written in ever finer detail, assists the judiciary in getting audiences to accept the message and act accordingly. Our final inquiry on the LGBT rulings cautions that an overly crude normative framework is bound to raise the controversial nature of the Court's pronouncements, meaning in turn that a diligent implementation need not be expected in the short term and is then prone to vary between countries—stymieing potential societal change in the process. This underlines the need for a thick legislative template in order to achieve true progress—which happens to be precisely what the Green New Deal package envisages.[70] The moral, as can be derived from the story of the ECJ so far, is that a court bent on recalibrating the views of members of society will rarely appear to accomplish anything without a basic legal foundation, when confronted with non-receptive (let alone hostile) interlocutors, when scholars proceed to appraise its performance at too early a stage, or when they do so in isolated domains. These precepts, if taken to heart, should enable the EU's judiciary to plot a course that leaves a lasting imprint on the conduct or opinions of real people in actual practice—in the ecological field as good as anywhere.

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[69] A. Bradford, *The Brussels Effect: How the European Union Rules the World* (Oxford University Press, 2020).

[70] For details, see, e.g., the set of Regulations and Directives outlined on <https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/european-green-deal_en>.