

BOOK REVIEW

Mirka Kuisma, *Confronting Legal Realities with the Legal Rule, On Why and How the European Court of Justice Changes Its Mind*, University of Turku 2021, 343 pages

Alezini Loxa*

The work under review is a doctoral dissertation, successfully defended at the University of Turku on 7 May 2021. The doctoral thesis under the title ‘Confronting Legal Realities with the Legal Rule, On Why and How the European Court of Justice Changes Its Mind’ examines the phenomenon of doctrinal change in the case law of the Court of Justice of the EU (hereinafter the Court).

On its face, the title of Mirka Kuisma’s work can provoke different feelings to lawyers, and will perhaps leave many of them wondering how a legal study can answer the question of how and -most importantly- why the Court proceeds in change of doctrine. A quick look through the book is enough for one to realize that Mirka Kuisma is doing a lot more than answering her research question. She is proceeding in a truly comprehensive and novel study of doctrinal change in the case law of the CJEU,¹ and she is providing the readership with a concise overview not only of the phenomenon of doctrinal change, but also of how the Court should structure its future work on the matter.

Kuisma begins the thesis with an introductory Part (Part I) that sets out the theoretical and methodological considerations of her work. Essentially her work is ‘loosely’ grounded in Scandinavian Legal Realism,² MacCormick’s second-order justification,³ and on social constructivism.⁴ The work examines two key questions: how and why the Court changes its mind. The first question relates to the factors that affect doctrinal change. The second question focuses on how the Court signals such change in a ruling. In order to answer these questions, the material is examined through doctrinal analysis and qualitative textual analysis. In this first part, Kuisma further acknowledges the limitations of her study, ie, the lack of

* PhD Researcher, Lund University.

¹ The issue of doctrinal change was the subject of examination in Vassilis Christianos, *Reversals of ECJ case law* (Ant. N. Sakkoulas 1998). The theoretical output was of great significance, but the scope was limited in the examination of *Keck* and *Mithouard* and the publication exists in Greek only. The author is not expected to be aware of this, but I note it in order to point out that this matter has been of timeless interest in different EU law academic communities, but very few have attempted to tackle it conclusively.

² As she states in her summary Mirka Kuisma, *Confronting Legal Realities with the Legal Rule, On Why and How the European Court of Justice Changes Its Mind* (PhD dissertation, University of Turku 2021). She mentions on this, among others, Alf Ross, *On Law and Justice* (University of California Press 1959) and Ruth Nielsen, ‘Legal Realism and EU Law’ in Henning Koch and others (eds), *Europe: The New Legal Realism* (Djof 2010).

³ Neil MacCormick and Ota Weinberger, *An Institutional Theory of Law: New Approaches to Legal Positivism* (D Reidel Publishing 2010).

⁴ Peter Berger and Thomas Luckmann, *The Social Construction of Reality. A Treatise in the Sociology of Knowledge* (Doubleday 1967).

falsifiability of her claims; the impossibility of ever knowing the full reasons behind change when all the Court produces is a final ruling. Nevertheless, she does proceed in the endeavour and she limits her lenses by focusing ‘on the account of the law that the Court gives’ as a reason for change.⁵

In Part II, Kuisma explores the issue of judicial discretion and sets her study against the broader framework of the Court’s role in the Union legal system. After explaining her choice of treating Court as one collective institutional actor, due to the unitary image cultivated by the Court itself and reflected in the practice of the Court, she goes on to focus on the concept of judicial policy. Judicial policy is a concept, which Kuisma introduces in order to capture the element of choice inherent in judicial interpretation. As she notes, judicial policy is used in order to ‘connote judicial constructions about what legal interests the law is seen to promote as well as the best ways of achieving them’.⁶ The concept builds on the theoretical premises of her study regarding judicial worldview and MacCormick’s second-order justification.⁷ More specifically, while MacCormick’s second-order justification exists in the context of a particular case, Kuisma’s judicial policy is used to refer to the same considerations, but ‘as an overarching theme visible in the body of case law on a given issue’.⁸ In this Part, Kuisma states her hypothesis that doctrinal change takes place when the Court’s perception of what is the best judicial policy changes.⁹ She argues that judicial discretion, as linked to judicial policy, is a way for the Court to be in touch with social reality and maintain its legitimacy as a constitutional actor. For this, Kuisma suggests that the legitimacy of the Court’s judicial governance should be evaluated by how open the Court is when developing judicial policy.

In Part III, Kuisma discusses doctrinal change on a general level and analyses the elements of the doctrine of change of the Court. Before zooming in the case studies, Kuisma analyses the phenomenon through the examination of different lines of case law in order to extract its more concrete characteristics. In this Part, she also engages with accounts of Members of the Court in order to guide her analysis.¹⁰ Kuisma shows that there is a general – albeit undertheorized - agreement on the ability of the Court to change its mind. However, there appears to be no concrete threshold for when change should happen. Moreover, Kuisma classifies three categories of grounds deemed legitimate for change: technical grounds, system-maintenance grounds, and policy-driven grounds.¹¹ She further notes that there is a support by Members of the Court for openness, with regard to the communication of change. However, she also notes that there might be other reasons that point to implicit action. Finally, she observes that the way in which the Court proceeds in doctrinal change

⁵ Kuisma (n 2) 21.

⁶ *ibid* 35.

⁷ On judicial worldview, she bases the study on Aarnio Aulis, *The Rational as Reasonable. A Treatise on Legal Justification* (D Reidel Publishing 1987), who elaborated on legal worldview, and Richard Posner, *How Judges Think* (Harvard University Press 2008) on judge’s worldviews as priors.

⁸ Kuisma (n 2) 38.

⁹ *ibid*.

¹⁰ She refers to either AG Opinions or extra-judicial writings of the Members of the Court serving at the period when doctrinal change happened and/or who were involved in the cases where doctrinal change happened.

¹¹ Kuisma (n 2) 87-102. These categories go back to the Opinion of Advocate General Lagrange, Case 28/62 *Da Costa en Schaake NV and others v Administratie der Belastingen* ECLI:EU:C:1963:2.

has repercussions for the application of EU law at national level, which can be expected to affect the Court's grounds for change as well as the methods of communication.

In Part IV, Kuisma abandons the abstract examination and dives deeper in four specific case studies.¹² These are 1) *Keck* and *Mithouard* as a 'paradigmatic' example of a change of doctrine;¹³ 2) the *Mangold* saga, where the court openly refused a change of doctrine;¹⁴ 3) the *Dano* quintet, which, according to Kuisma, represents a misread doctrinal change;¹⁵ and 4) the *ERTA* doctrine where she focuses on the failed attempts by different interlocutors to force doctrinal change. This pointillistic, as she states, examination does not have the aim of providing general conclusions, but rather of illustrating what she developed on the previous parts through concrete examples. To do this, Kuisma employs the components of the doctrine of change that she identified in her examination under Part III and she examines how they appear in each case study. In this examination, she looks both at the factors that affected the Court's approach towards doctrinal change, but also on the communicative practices of the Court as to how the change (or rejection of change) was announced in the rulings.

Finally, in Part V, Kuisma proceeds in answering her research questions and she critically evaluates her work. On the why and how the Court changes its mind, Kuisma responds that the Court does so 'if forced thereto by reasons of doctrinal inconsistency or social demand, rarely and opaquely'. Further, she suggests that there is a disconnect between the role and communication of doctrinal change in the Court's praxis. That is in the sense that the ability of the Court to change its mind seems connected to its discursiveness with surrounding social developments. Nevertheless, the Court's communicative practices seem to prevent transparent discussion between the Court and the different stakeholders.¹⁶ That is in the sense that the Court may at times attempt to hide or understate the doctrinal development that is taking place. According to Kuisma, such communicative practices can harm the Court's credibility. For this reason, she concludes with the suggestion that the Court should ensure more openness in doctrinal changes. For Kuisma, this would ensure that the stakeholders are able to hear and to gain the experience of being heard.

Overall, Mirka Kuisma examines a substantial amount of very diverse material, in order to tackle a very tough question, and she proceeds in a truly novel scientific contribution. She is to be commended not only for the novelty and consistency of her work, but also for her ability to navigate through an immense amount of case-law from different areas of EU law with due respect to the specificities of each area and full awareness of the strengths and limitations of her endeavour. This is apparent in Part II, where she reviews different instances of doctrinal change and masterfully induces the general characteristics of the doctrine of

¹² The reasons for the choice not to proceed in an exhaustive examination are substantiated in Kuisma (n 2) 23-28.

¹³ *ibid* 27.

¹⁴ Here she focuses on Case C-144/04 *Mangold* ECLI:EU:C:2005:709; Case C-555/07 *Kücükdeveci* ECLI:EU:C:2010:21; Case C-441/14 *Dansk Industri* ECLI:EU:C:2016:278.

¹⁵ Here she includes Case C-333/13 *Dano* ECLI:EU:C:2014:2358; Case C-67/14 *Alimanovic* ECLI:EU:C:2015:597; Case C-299/14 *García-Nieto and others* ECLI:EU:C:2016:114; Case C-233/14 *Commission v Netherlands* ECLI:EU:C:2016:396; Case C-308/14 *Commission v United Kingdom* ECLI:EU:C:2016:436.

¹⁶ By stakeholders Kuisma seems to broadly mean other EU institutions, Member States, national courts and the parties to the proceedings.

change. It is even more so, in Part IV, where she examines in the same detail and with the same diligence all four case studies from different EU fields, and she even goes as far as to suggest readings that are not widely shared by the established scholarship in each field. For example, in the *Dano* case-study, Kuisma challenges the mainstream account of doctrinal change as noted in academic scholarship and suggests that a change in the abstract interpretation of the law took place at an earlier stage in the Court's case-law.

This work further attests a rare pedagogic ability, which Kuisma clearly possesses. In between the sections and the chapters, she is constantly moving between very abstract theoretical ideas and their concrete deep applications in diverse areas of EU law. While doing this, she does not lose the attention of the readership or the coherence of her argumentation for a second. Everything is masterfully tied together for her broader examination and is well communicated to her audience.

Her work, as any, is not without critique. For example, some sections, while informative, did not add much to the main point. Similarly, in her reflection in Part V, there is an overlap between addressing the why and the how questions as regards the communicative discrepancy. This, however, does not take away from the importance of her work or the meticulous way in which she executed it.

Mirka Kuisma's dissertation definitely deserves publication with a major publisher to reach a wider audience, as it is a great contribution to the literature engaging with the CJEU as a constitutional actor. Different authors who have examined specific instances of doctrinal change wryly mention that the Luxembourg Judges must be reading the morning papers. One can never be certain about that or about what are the exact reasons why the Court changes its mind. What is certain is that if the Luxembourg Judges were to read Kuisma's work, they would be impressed by the meticulous nature of her work and they would find – very much needed – suggestions on how to better-perform doctrinal change in the future.