AGAINST THE IDEA OF “AMERICANIZATION” OF EUROPEAN JUDICATURE IN THE CONTEXT OF THE NEW ERA OF JUDICIAL GLOBALIZATION.

Oreste Pollicino
Researcher in Comparative Public Law, Bocconi University, Milan.

1. AN OVERVIEW OVER THE CENTURIES OF JUDICIAL POWER’S PROGRESSIVE STRENGTHENING.

The classical topic of transforming the notion of the frame of state (i.e. the vertical relationship between governors and citizens) seems able to affect the different (but related) issue of the institutional balance, in a horizontal perspective, within the constitutional powers of the State (i.e. legislative, executive and judiciary branches).

In particular, it is possible to see in the change from the nineteenth century liberal State to the present post-modern globalized governance passing through the affirmation of the post war welfare societies, a corresponding gradual strengthening of the role of judicial power.

It is well known that the “minimal” State of the nineteenth century was characterised, with regard to the horizontal division of powers, by the absolute predominance of the Parliament over the executive and the judiciary branches, which were considered as ancillary powers of the popular sovereignty’s representative body. This Parliament hegemony found its expression, in relation to the sources of law hierarchy, in the absolute predominance of the

1 See Zagrebesky, Il diritto mite, 33 and Bognetti, La divisione dei Poteri, Milano, 2001, 29 ff.
“legal rule” which, according to a pure “rule of law” logic, was prevailing also over the constitutional (flexible) documents.

With specific regard to judicial power, it considered, in the very lucky Montesquieu metaphor\(^2\), not more than the “bouche de la loi”. It is well known that this expression tended to accentuate the element of pure and mechanical logic in judicial decision making, while neglecting, or concealing, the voluntary and discretionary element of choice. It is for this main reason that in the historical period under scrutiny, judicial power could be defined, only apparently paradoxically, as a “not power”, because of the circumstance that it was not expected to express its own will but only to apply clear and precise rules defined by the legislative power.

In the twentieth century, with the affirmation of the social state, it is widely recognized that the executive power has taken the place of the Parliament in the leading role of modern welfare societies.

The welfare state, in fact, by nature, cannot simply exercise traditional repressive functions or restrict itself to guarantee negative liberties but it must, on the contrary, ensure an active and promotional protection to the citizens. Such a policy involves by definition planning for future developments and affirming broadly formulated social aims and principles, leaving the courts with the task of concretising, in real life cases, the meaning, extension and limits of these aims and principles.

It is evident that this kind of legislation has encouraged the creativity of judges and the freedom of choice\(^3\) and the significant growth of state intervention in

\(^2\) Montesquieu, De l'esprit des lois, 1758.

\(^3\) It was not a coincidence that, at the beginning of XX century, in parallel with the above named change in the institutional balance between the State’s constitutional powers, was born a cultural and juridical movement called “revolt against the formalism” which, against the excessive legalism of the post-codification era, argued that deciding a case could not consist of subsuming certain facts under subsuming rule of law. According to this view, the decision itself will add to the interpretation to the rule to be applied and may thus help to define its meaning. See Geny, Méthode d’interprétation et sources en droit privé positif, Paris, 1899.
fields previously left to private self-regulation has led to a corresponding increase in judicial activity\(^4\).

More precisely, in the social State, through a process of “judicialization” of politics, the distance between institutions and citizens has become narrower and the occasions of exchange of views between the same actors more frequent. The role of the Court, in this context, can be characterized as a privileged meeting place\(^5\).

Concluding this very brief overview, it seems evident that in the actual era of legal and economical globalization, the classical constitutional governance is changing those characteristics which marked its development process in previous centuries.

In particular it seems to be in a definitive decline that historical constellation characterised for the contextual presence, within the same national borders, of the State, sovereignty and economy triangle\(^6\).

The post-modern constitutionalism is rather marked by a process of sovereignty’s fragmentation followed by a parallel process of its re-articulation within a multilevel and polycentric order.

In this scenario, it is decisive to find out the right and quickest interconnection routes in order to connect the different constitutional centres which frame, at national, supranational and international level, the new polycentric global order.


\(^5\) See, for a similar point of view, Ferrarese, Il diritto al presente, Bologna, 2002, 208.

It is a common opinion that judicial decisions’ multilevel network is the best interconnection route\textsuperscript{7}. The “road to juristocracy” consequently represents one of the main trends of the post-modern constitutionalism in the judicial globalisation era\textsuperscript{8}.

In other (more convincing) words, ‘judicial power has moved from being the “weak ring” of the chain to become the strong one\textsuperscript{9}.

Judge-made law seems to be in a better position than legislative or administrative acts, in terms of flexibility and its pragmatic approach, to face the challenge of legal systems as they become increasingly more interdependent and are in a constant and unforeseen transformation.

To put it blandly: the global governance seems to prefer the language of the “law in action” than the ink of the “law in the books”\textsuperscript{10}.

\section{Against the Idea of “Americanization” of European Judicial Law.}

If it is not possible to disagree with the evolving tendencies emerging in the academic debate very briefly summarised above, it is not possible however, at the same time, to deny that there is still something missing in the current debate.


\textsuperscript{10} The dichotomy between “law in action” and “law in the book” was originally underlined by R. Pound, \textit{Law in Books and Law in Action}, in Amer. Law Rev, 1910, 12.
The missing piece seems to be an analysis effort in order to isolate, in the era of judicial globalisation\textsuperscript{11}, the European judiciary DNA.

To put it simply, when the discussion about the global expansion of judicial power comes across the European Court of Justice’s case law, it is taken as example in order to show how the common law wind of USA Supreme Court is now blowing also on Luxemburg\textsuperscript{12}. In other words, through the emerging role of the Judicature in the “old continent”, it would be progressively developing a gradual “americanization” of European constitutional law\textsuperscript{13}.

Against this view it is worth emphasizing that the analysis of the European experience related to our topic constitutes a interesting field of research not only because it represents a meaningful expression of judicial globalization trend, but also (and perhaps mainly) because, within this scenario, it seems able to constitute a specific model of expansion of the judicial power.

In particular, the specificity of European judicature finds its roots in substantial and structural reasons, the first connected with the system of legal values proper of the European dimension, the second related to the specific DNA characterising the European legal order.

With regard to the substantial reasons, if it is true that the Luxembourg Court has created a constitutional doctrine by a common law method\textsuperscript{14}, it must be clearly underlined that the above named doctrine remains purely European. This means that through this methodology and by referring explicitly and implicitly to the common constitutional traditions of the member States, the ECJ

\textsuperscript{11} Baudenbacher, Judicial globalization: new development or old wine in new bottles?, Texas international law journal, 2003, 502 ff.
\textsuperscript{12} See Ferrarese, Il diritto al presente, Bologna, 80
\textsuperscript{13} See Zoller, l’Americanisation du droit constitutionnel, prejuges et ignorances, Archives de philosophie du droit, 2001, 41 ff.
identified an exclusive system of legal values which constitutes an effective European constitutional heritage.
In other words and for those who like rhetoric: an independent judicial island in the ocean of the judicial globalisation.

In relation to the structural reasons, two are the elements which seem to make unique the architecture of the European legal order: the principle of evolving dynamism and the principle of constitutional tolerance.

2.1. THE PRINCIPLE OF EVOLVING DYNAMISM AND THE TELEOLOGICAL HERMENEUTICAL APPROACH.

The first element\(^{15}\) is characterised by the process of slow but constant transformation of the European *humus*, which characterised, at the beginning, in 1957, by an evident market oriented goal, has incorporated, during the years, a social and a political dimension.

This transformation process has been driven by the courageous activism of the Court of Justice, which, in an often embarrassing inertia of the European community legislative power, has taken on the “job of constitutionalising” the EC Treaty.

As, in a well known piece, Stein wrote: ‘tucked away in the fairyland Duchy of Luxembourg and blessed, until recently, with the benign neglect by the powers that be and the mass media, the Court of Justice of the European Communities has fashioned a constitutional framework for a federal-type structure in Europe’\(^{16}\).

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\(^{15}\) See, for a deeper analysis of the dynamic character of European legal order, J.P. Jacqué, *Droit institutionnel de l’Union européenne*, Bruxelles, 2001, 12 ff.

It would have been inconceivable to bring about such a radical transformation without applying a degree of judicial creativity.

Of course, every conquest has its price, and the ECJ has had to pay the price of no longer being subject to ‘benign neglect’ but becoming, on the contrary, the target of harsh accusations\(^\text{17}\) and the beneficiary of valiant defences\(^\text{18}\) for the way in which it has interpreted its judicial function.

More precisely the European judges had the role, especially in the early years, to fill up the void left by the legislative branch. As Kutscher\(^\text{19}\) has explained, the inactivity of the legislature compelled the Courts to decide questions and solve problems which should be dealt with by the legislature, i.e. the Council and the Commission, and to a lesser degree also the European Parliament.

In particular, the well known European democratic deficit - where the role of representative bodies in the legislative process is hard to define and where, more generally, the link between voters' wishes and political decisions has become extremely tenuous - confers a legitimate character upon judicial creativity which courts lack in developed democratic system\(^\text{20}\).

To put it differently, it can be underlined that the creative and activist role of the European Court of Justice is directly proportionate to the legislative inertia of the member States Executives powers joining the Council of the European Union.


\(^{19}\) Kutscher, Methods of interpretation as seen by a judge of the Court of Justice, Luxemburg, 1976, 2.

By contrast, when the member States have taken seriously their role of constitutional legislators of the European Union, the European judges have often taken a pace back\(^{(21)}\).

It is enough to enumerate some of the “glorious period” grandes arrêts\(^{(22)}\), to realise they coincide with the time when it was more evident the member State legislative inertia in revising the founding Treaty, i.e. until 1987 (when European Union Treaty was drafted) and especially until 1993, the year of the “Maastricht revolution”.

The above named intergovernmental steps have represented the clear expression of the member States’ will to recapture their legitimate role as European law-makers. A role which was interpreted by the Court of Justice with surprising “casualness” for more than twenty years.

More specifically in Maastricht the member States, by constitutionalising the principles of proportionality and subsidiarity, made clear their refusal to accept other judicial intrusions in the areas expression of (remaining) national sovereignty.

On the other hand, the German and Italian Constitutional Courts had already opened the dance of the constitutional objections to the primacy doctrine\(^{(23)}\).

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\(^{(21)}\) The reference is obviously to the pace back which Federico Mancini asked to the Court at end of eighties. F. Mancini, *The Making of a Constitution for Europe*, in *C. Mkt L. Rev.*, 1989, 613.


It is in the light of the named institutional changes, that the Court, in the nineties, has chosen the self-restraint route.


The principle of evolving dynamism at the heart of the European legal order - and the consequent special role interpreted by the Court of Justice as the engine of the European integration process - has been also fostered by the wording of the Treaty of Rome.

The EC Treaty, in fact, is not to be seen as a list of conquests already made but, rather, as a programme to be realised progressively over time. In other words, it must be underlined that the congenital vocation of the Treaty, moreover typical of constitutional charters, of being both an act and a work in progress.

It is then obvious that the nature of the Treaties encourages creative law making.

There are two reasons for this:

Firstly, because they are the products of a compromise between States which may share ultimate goals but still represent different economic, social, political and legislative backgrounds and may hold strongly divergent views on specific policy areas.

\(\text{(24) 4-10-1991, The Society for the protection of unborn children Ireland c. Stephan Grogan, C-159/90, ECR, I-4695.}\)
\(\text{(25) 17-10-1993, Meng, C-2/91 ECR I-5751.}\)
\(\text{(26) 24-11-1993, Keck e Mithouard, C-267/91 e C-268/91, ECR I-6097.}\)
\(\text{(27) 17-10-1995, Kalanke, C-450/93 in ECR, I-3051.}\)
\(\text{(28) Opinion 28-3-1996, in ECR, I-1759.}\)
\(\text{(29) 13-10-1998, C-249/96, Grant c. South west trains Ltd, ECR, I-2143.}\)
Secondly, the Treaties are by nature programmatic, outlining policy in general terms without giving precise definitions. In this context Keeleng has observed that the ECJ, entrusted with the challenging task of constitutional adjudication, is forced to exercise a highly creative role in weighing up such cryptic and vague rules, concepts, and values. “For many provisions of the EC Treaty, a narrow or a broad view of their scope is equally compatible with their wording. The choice between the two can only be governed by policy consideration” 30.

In order to apply the principle of evolving dynamism, the favourite method of interpretation of the ECJ has always been the teleological one, which seeks to interpret a rule by taking into account the purpose, aim and objective it pursues. This kind of purposive approach was clearly declared by the Court of Justice in the CILFIT case, where it affirmed that “every provision of Community law must be placed in its context and interpreted in the light of the provisions of E.C. law as a whole, regard being had to the objectives thereof and to its state of evolution at the date on which the provision in question is to be applied” 31.

The teleological method of interpretation is perfectly consistent with the dynamic and evolving nature of the European Community, which over the years has changed its objectives and its plans from a purely economic approach to a broader system of values which affects social and environmental issues, and the protection of human rights. Consequently, the Court has to reinterpret and to adapt the original meaning of the Treaty provisions in accordance with the new values and aims that are becoming part of the European dimension.

In the light of these considerations, the question which should be asked, when examining an ECJ decision, is not whether law has been applied or created, but rather what the Community's telos is. This is a difficult question to answer because the member States and the European institutions have left their final intention open and obscure. The most objective guidelines are to be found in

the European legal system itself and above all in the preamble of the EC Treaty and in the general principles of EC law.

Concerning the first source, the most important aim is indicated by the introductory sentence of the preamble of the EC Treaty, namely the decision of the Member States “to lay down the foundations of an ever closer union among the peoples of Europe”. If a method of systematic interpretation is used to interpret this expression together with the more concrete aims of the first articles of the Treaty, then it is possible to have a clear view of the Court's approach to the judicial law-making process.

With regard to the second source cited above, in order to determine the telos, the Court has emphasised the role of the general principles of EC law in the light of its mission to ensure that the law, and not only the rules of the Treaty, is observed. These unwritten principles extrapolated by the Court of Justice from the laws of the Members States show the creative function of the Court and more generally, its contribution to the development of the Community from a supranational organisation to a constitutional order of States. In this context, Takis Tridimas uses an evocative metaphor when speaking of general principles as “children of national law, but as brought by the Court they became enfants terribles”\textsuperscript{32}.

According to all the considerations mentioned above, it is clear that methodology of decision-making characterising the judicial approach of the Court of Justice, even if it often leads to creative operations by the European judges, is not a degeneration but a natural implication of the European legal system\textsuperscript{33}.


\textsuperscript{33} In doctrinal debate we often come across the conviction that a clear distinction exists between legal interpretation and judicial activism. According to this distinction, the former is considered a legitimate expression of judicial function and the latter its degeneration, involving a judge’s arbitrary intrusion into the political arena by giving priority to values other than legal ones, such as, in the case of the ECJ, supporting the process of European integration. It must be emphasised that the aforementioned conviction is misplaced, being based on an old and reductive concept of judicial function, whereby the judge was seen as an inanimate, robot-like
2.2. THE PRINCIPLE OF CONSTITUCIONAL TOLERANCE AND THE DOUBLE LEVEL JUDICIAL STRATEGY OF THE COURT.

The second element which concurs to shape the European legal order’s uniqueness is the principle of constitutional tolerance, according to which, in Joseph Weiler’s usual brilliant terms, “constitutional actors in the Member States accept the European Constitutional discipline not because as a matter of legal doctrine.... They accept it as an autonomous voluntary act endlessly renewed by each instance of subordination ....The Quebecois are told in the name of the people of Canada, you are obliged to obey. The French or the Italians or the Germans are told: in the name of peoples of Europe, you are invited to obey....When acceptance and subordination is voluntary, it constitutes an act of true liberty and emancipation from collective self-arrogance and constitutional fetishism: a high expression of Constitutional Tolerance”34.

By applying the principle of tolerance to the European judicature mechanisms, it is evident that the European Court of Justice, unlike the American Supreme Court and the European Constitutional Courts, has almost no powers that do not ultimately derive from its own prestige or the intellectual and moral force of its opinions35 and, in particular, it cannot count on a constitutional discipline which forces the member States to obey to its decisions. The obedience of the member States is then purely voluntary and the Court is paying an incredible amount of attention to fostering this “miraculous” attitude of constitutional tolerance.

The European judges, finding themselves between the need to be coherent to the principle of evolving dynamism and the necessity to respect the principle of constitutional tolerance, were forced to invent a complex judicial strategy in order to pursue the teleological spirit of the EC Treaty without abusing the constitutional tolerance shown by the member States.

Alternatively put, the ECJ had to find a compromise between two judicial routes going towards two opposite directions.

On the one hand, in the light of the principle of evolving dynamism, it has had to follow the judicial route addressed to pursue an activist and often creative teleological hermeneutical approach, in order to adapt the original economic vocation of the EC Treaty to the non-economic priorities emerging in the European dimension over the years.

On the other hand, in the light of the principle of constitutional tolerance, the European judges could not have allowed themselves to forget the judicial self-restraint route which has always prevented them from being too intrusive towards the member States’ constitutional legal orders, in order to not overstep the threshold of tolerability beyond which the principle of constitutional tolerance can change in his opposite (dark) side: the expression of the national constitutional arrogance.

3. THE FIRST-LEVEL STRATEGY: THE ART OF JUDICIAL PERSUASION.

The “compromise” judicial journey has been concretised by ECJ in a double level argumentative strategy: a first level approach addressed to the national judges, a second one addressed to the legislative and executive bodies of the Member states.
In relation to the first level of the above named strategy addressed to the national judges, the Court of Justice has emphasised the importance of persuasion in judicial discourse.

In particular the European judges have developed, by applying a didactic methodology to their legal reasoning, “a judicial style which explains as declares the law”\(^{36}\). This is particularly true with specific reference to the procedure of art. 234 EC. It was not easy for the ECJ to induce the national judges to feel confident towards such new and sophisticated “judicial conversation tool" but, during years of “courteous pedagogy“\(^ {37}\) it has managed to persuade them.

It has been due to the trust so obtained that the European judges have been able to build with a national judges an exceptionally cooperative, and sometimes accomplice, judicial dialogue.

According to many scholars, this process has contributed to transforming the Court of justice into something very similar to a constitutional court\(^ {38}\) and the national courts in a European law decentralised judges\(^ {39}\).

In other words, community law would have brought on a transmutation of the functions of national courts acting as community judges\(^ {40}\).

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\(^{39}\) Pescatore, *Il rinvio pregiudiziale di cui all’art. 177 del trattato CEE e la cooperazione tra la corte ed i giudici nazionale*, in *Foro italiano*, 1986, IV, 26 ff.

To this regard, it should not be forgotten that the national courts have followed the instructions from Luxembourg even when these instructions have been against their constitutional mandate.

It is enough to remind here of the *Simmenthal* case[^41] “the culmination of the principle of direct effect and supremacy, in which the ECJ held the Italian courts simply had to defy Italian constitutional rules to the Corte costituzionale”[^42].

As a brief conclusion, the judicial style of European judges has been sufficiently convincing if it persuaded the national judges to accept European Court of Justice requests even when the acceptance has meant a radical departure from their respective national constitutions.

3.1. THE SECOND-LEVEL STRATEGY: THE CONSTITUTIONAL ACTORS OF MEMBER STATES AS INTERLOCUTORS. A CASE STUDY IN THE FIELD OF DISCRIMINATION AGAINST SEXUAL MINORITIES.

In relation to the member States’ possible reactions, the Court of Justice has increased sensitivity towards the limits of its judicial activism. In particular the Court has always been attentive to the potential impact of its decisions on the national legal, political and social orders of the Member states.

One of the defining parameters in this effect-oriented analysis seems to be the so called majoritarian activist approach[^43], according to which among the different possible solutions of a case, the European judges are going to choose the final ruling which is likely to meet with the highest degree of consensus in the majority of the member States.

[^43]: Maduro identifies the same judicial approach in the different field of European economic constitution. See Maduro, *We, the Court. The European Court of justice and Economic Constitution*, Oxford, 1998, 72 -78.
By analysing in this perspective the “(European) law in action”, it is very common to face the following question: why should a couple of cases that are very similar in their factual and/or legal background be decided in an opposite, thus almost schizophrenic, way by the Court of Justice?

The key to the apparent enigma is found by reflecting upon the impact that a decision can have on the national legal systems by the application of the majoritarian activism approach, as it is proved by the following case law analysis of two decisions in the field of protection of sexual minorities.

It is a convenient preliminary matter to establish a methodological three-step test to apply to the case law which will be examined.

a) First the factual background and the novelty of the legal situation shall be considered

b) Secondly, in the context of the legal analysis, an examination of the Court’s ruling and the legal reasoning supporting the decision shall ensue, highlighting, in particular, how the Court is able to manipulate, with a high degree of judicial creativity, the articles of the Treaties, the secondary legislation provisions, and its own case law through the use of teleological interpretation and by referring to the general principles of law.

c) Finally, following a motive analysis approach, it is sought to determine why, when faced with a number of possible solutions, the Court chose the one it did. In this last investigation step it should emerge the compromise and flexibility skills of the European judicature involved in finding the right balance between the principle of evolving dynamism and the principle of constitutional tolerance.

At the time of the founding Treaty, the existence of sexual minorities was hardly conceivable. The equal treatment directive\(^{44}\), in introducing the principle of equality, refers to the principle of equal treatment for men and women, but was not intended to take into consideration discrimination on ground of sex related to transsexual or homosexual issues\(^{45}\).

4.1.1. FACTUAL BACKGROUND AND NOVELTY OF THE LEGAL SITUATION.

A) P v. S.

The Court had to decide whether the principle of equal treatment between men and women, contained in the directive 76/207, also applied to transsexuals or, in other words, if discrimination against transsexuals fell within the scope of sex discrimination.

The applicant in the main proceedings was dismissed from his employment following his decision to undergo gender reassignment. The question referred to the Court was whether the equal treatment directive precludes dismissal of a transsexual for reasons related to gender reassignment.

B) GRANT.

The Court had to decide whether discrimination on the grounds of sexual orientation fell within the scope of sex discrimination. In this case, the applicant,

\(^{44}\) Council Directive 76/207 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions 1976 O.J. (L39/40).

a female lesbian employee, argued that she was the victim of sex discrimination because she was refused certain travel concessions by her employer, which had been available to her predecessor for his cohabitant of the opposite sex on the grounds that her cohabitant was of the same sex.

4.1.2. THE COURT’S DECISION AND ITS LEGAL REASONING: THE IMPORTANCE OF THE APPROPRIATE COMPARATOR.

A) P v. S AND THE MANIPULATIONS OF COMMUNITY LEGISLATION.

It is probable the force of the opinion of AG Tesauro had a great influence on the innovative approach of the Court. Referring to the words of the directive, on the one hand, he admitted that the directive did not literally and specifically address the problem of adverse treatment of transsexuals and was not literally and specifically intended to do so, but on the other hand, he underlined that transsexuals must fall within its scope, as they are not a third sex and have a right to sexual identity. He finally added, "I am well aware that I am asking the Court to make a courageous decision. I am asking it to do so, in the profound conviction that what is at stake is a universal fundamental value, indelibly etched in modern legal traditions and in the constitutions of the more advanced countries: the irrelevance of a person's sex with regard to the rules regulating society."46

The Court, in line with these forceful observations, made a "courageous" decision by showing a high degree of judicial creativity. The Court's innovative approach can be distinguished into three different parts.

Concerning, first of all, the analysis of the legislative measure under discussion, the Court was aware that the directive did not literally and specifically address the problem of the adverse treatment of transsexuals and was not literally and specifically intended to do so. Consequently, the ECJ did not refer to the

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46 P v. S, at 2157.
original intention of the legislator but focused instead on the spirit and scheme of the directive,\textsuperscript{47} concentrating on three different concepts, namely the principle of equal treatment for men and women, the principle of non-discrimination on grounds of sex, and the principle of equality. The emphasis on the latter was the key element in the decision.

The Court, regarding the principle of equality as being fundamental in EC law, was in fact able to transcend the provisions of Community legislation and manipulate the directive's meaning in order to extend its scope to apply to discrimination arising from the gender reassignment of the person concerned.

The second innovative judicial approach in the case is related to the human rights issue. In fact, usually, when the Court has been called on to take into particular consideration the issue of human rights in interpreting the facts of a case, it has always taken a cautious approach, by first ascertaining the applicability of EC Law to the facts.

By contrast in \textit{P v. S}, “the reasoning of the Court quite literally overturns its earlier prospective on this point”\textsuperscript{48}. In fact, the Court reversed this standard test to determine if a human rights matter fell within its jurisdiction. Thus the Court began its reasoning by affirming that “the right not to be discriminated against on grounds of sex is one of the fundamental human rights whose observance the Court has the duty to ensure”\textsuperscript{49}.

The European judges continued by affirming that the non-discrimination principle is to be extended to transsexuals.

Finally, by the clear manipulation of a secondary legislative measure, the ECJ concluded that the scope of a directive must be read in the light of this principle.

\textsuperscript{47} It is a typical formula which indicates the Court's will to adopt a teleological interpretative approach.


\textsuperscript{49} P.v.S., at par 19.
It was an innovative reasoning compared to the traditional approach, which would have consisted in looking first at the scope of the directive and then examining how the principle of equality applied within its scope.

The third aspect of judicial creativity in this case concerns the consideration, in the Court's reasoning, of a different kind of comparator in contrast to the traditional approach. In this context, the UK government added, applying the Aristotelian concept of equality\footnote{For a critique of this concept, see More, Equal Treatment of the Sexes in European Community law: What Does "Equal" Mean?, in Feminist Legal Studies, 1993, 51. He underlined how it is a tautological notion: «It tells us to treat like people alike; but when we ask "who like people", we are told they are people who should be treated alike».} that, in this case, no discrimination was involved because a female-to-male transsexual would have been treated in exactly the same way as the applicant.

The ECJ, however, had little sympathy for this argument, adopting instead as the appropriate comparator the pre-transsexual persona\footnote{Tridimas, General Principles, at 70.}. In fact, the European judges underlined that “where a person is dismissed on the grounds that he or she intends to undergo, or has undergone, gender reassignment, he or she is treated unfavourably by comparison with persons of the sex to which he or she was deemed to belong before undergoing gender reassignment”\footnote{P. v.S, at par. 21.}.

This means the comparison was made between the condition before and after gender reassignment surgery. Following this reasoning, the Court departed from the traditional comparison between a male and female heterosexual. Such reasoning undermined the hegemony of heterosexual paradigm, which until then implicitly underpinned the sexual equality principle\footnote{Denys, Homosexuality: a non-issue in Community Law?, Eur. L. Rev., 1999, 422.}.

However, the Court did not stop here; instead it moved from an approach, based on an Aristotelian notion of equality according to which like should be treated alike to a broader, more substantive, concept of equality, affirming that “to tolerate such discrimination would be tantamount, as regards such a person,
to a failure to respect the dignity and freedom to which he or she is entitled, which the Court has a duty to safeguard\(^{54}\).

It is clear how the Court, by "breaking with the past", viewed the principle of equality as a general principle of EC law which transcends the provisions of Community legislation.

**B) GRANT: A “CREATIVE” SELF-RESTRAINT?**

The Court adopted a self-restraint approach, affirming that sexual orientation did not represent grounds for sex discrimination. By adopting this approach, the Court, nevertheless, showed a high degree of judicial creativity\(^{55}\).

This will be seen this by underlining two aspects of the case which are, in our opinion, a good example of judicial law-making: the choice of a relevant comparator and the manipulative reading of the outcome in *P v. S*.

Concerning the first element, Mrs Grant had advanced two closely related arguments: first of all, that the refusal constituted discrimination directly based on sex and secondly, that discrimination based on sex included discrimination against sexual orientation.

The only way for the Court to accept these arguments would have been to apply a comparison between homosexuals and heterosexuals – *in casu* between a female homosexual (Mrs Grant) and a male heterosexual (her predecessor). Basically, this would have meant applying the traditional non-discrimination formula that consists in changing the sex of the person concerned while keeping all other circumstances constant.

\(^{54}\) *P. v.S*, at par. 22.

\(^{55}\) See below conclusive remarks.
By contrast, the Court decided that the condition, the effect of which is that the worker must live in a stable relationship with a person of the opposite sex in order to benefit from the travel concessions is, like the other alternative conditions prescribed in the undertaking's regulations, applied regardless of the sex of the worker concerned,

Consequently, it rejected, in this case, the existence of sex discrimination, affirming “that travel concessions are refused to a male worker if he is living with a person of the same sex, just as they are to a female worker if she is living with a person of the same sex”\(^56\).

It is clear that, in the application of non-discrimination formula, the Court changed not only the sex of the person concerned, but also the sex of her partner. It is clear that this reasoning is based on a comparison between homosexual suggesting an adherence to the heterosexual paradigm. Grant is compared with a male homosexual, concluding that in both cases they would suffer an «equal misery»\(^57\).

Robert Wintemute has questioned this kind of reasoning. He underlined that “this comparison avoids a finding of direct sex discrimination by changing not only the sex of the women, but also of her partner. Yet for a valid sex discrimination analysis, the comparison must change only the sex of the complaining individual, and must hold all other circumstances constant”\(^58\).

The author has concluded that, because an individual's sexual orientation can only be defined by reference to their sex, distinction based on sexual orientation necessarily also involves distinction based on the sexes of the individuals concerned. The basis for categorising a woman as lesbian is that she is attracted to women, in the same way that the basis for categorizing a man as

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\(^56\) Grant, at par 27.
\(^57\) Denys, supra note 54, at 423.
heterosexual is that he is attracted to women. So, where a woman is penalized for being attracted to women but a man is not, the only difference between the two is their sex.

Concerning the second aspect of judicial creativity, it must be underlined that, after the innovative approach in *P v. S*, there was great interest in the possible outcome of *Grant*, and many scholars⁵⁹ expected that the Court would conclude that sexual orientation could also be prohibited as sex discrimination.

The AG Elmer also saw this as an appropriate decision, affirming that “there is nothing in either the EU Treaty or the EC Treaty to indicate that the rights and duties which result from the EC Treaty, including the right not to be discriminated against on the basis of gender, should not apply to homosexuals, to the handicapped, to persons of a particular ethnic origin or to persons holding particular religious views. Equality before the law is a fundamental principle in every community governed by the rule of law and accordingly in the Community as well. The rights and the duties which result from Community law apply to all without discrimination and therefore also to… (those) citizens of the Community…who are homosexuals”.⁶⁰

Besides, the Court in *P v. S* declared that “to tolerate transsexual's discrimination would be, as regards such a person, a failure to respect the dignity and freedom to which he or she is entitled, and which the Court has a duty to safeguard“⁶¹.

Why should these considerations not be valid for homosexuals? Are they perhaps less entitled than transsexuals to the right of dignity and freedom?


⁶⁰Grant at 633.

⁶¹P. v S. supra note 22, at par 21.
Another reason to believe that in *Grant* the Court would have followed the substantial notion of equality highlighted in *P v. S* was that, as Trevor Hartley in a broader context has observed, “a common tactic by the Court is to introduce a new doctrine gradually: in the first case that comes before it, it will establish the doctrine as a general principle, and if there are not too many protests, it will be reaffirmed in later cases: the qualifications can then be whittled away and the whole of the doctrine revealed”\(^62\).

The Court did, however, exactly the opposite. It applied, without further explanations, the *P v. S* reasoning to transsexuals but not to lesbians and gay men, when the two groups appeared, using the *P v. S* reasoning, to be similarity situated.

Despite the temptation to explain immediately the reason for this different approach, it is more consistent with the general test established above to investigate the legal reasoning that allowed the Court of Justice to depart from the statements made in *P v S*.

First of all ECJ interpreted narrowly the notion of sex, referred to in para. 21 of *P v. S*,\(^63\) as biological and a purely physical concept. Following this interpretation, it is possible to assume that in *Grant* the Court deducted that the statements in *P v S* were confined to cover only transsexuality as a biological phenomenon. This means that the Court considered a person's search for a more integrated identity by undergoing medical treatment to adapt his physical characteristics to his psychological nature as a medical problem. Consequently, being a medical issue, transsexuality falls within the narrow notion of sex as a biological matter.

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\(^63\) Where the Court affirms that the transsexual's discrimination is based on the sex of the person concerned.
By contrast, in *Grant*, the Court considered the issue of homosexuality as outside the biological limits of its notion of sex, implying the perception of this concept more as an exercise of free will rather than a medical notion\(^{64}\).

The second judicial creative source that the Court used to depart from *P v S* was the "opportunistic" reference to the law of the European Convention on Human Rights. Unlike the case of *P v. S*, where the Court was quite prepared to disregard the negative jurisprudence of the Court of Human Rights on transsexuals, the ECJ in *Grant* placed great weight on the fact that the E.C.H.R. held that homosexual couples do not constitute a family for the purposes of Article 8 regarding the right to respect for family life.

Moreover, the Court added that the very case law of the E.C.H.R considered that giving more favourable treatment to married and unmarried opposite sex couples than to same sex couples was compatible with the principle of non-discrimination expressed in Article 14 of the Convention\(^{65}\).

As was foreseeable, this restrictive interpretation of *P. v S.*, was the target of several adverse criticisms regarding the Court's approach of "creative" self-restraint.

Concerning the narrow conception of the notion of sex, it has been affirmed that the unfavourable outcome in *Grant* suggests "an unwillingness of the Court to bridge the gap between sex (transsexuality) and gender (homosexuality), stressing that this was a lost opportunity to apply a broader notion of sex equality, which includes the more dynamic sociological dimension of gender"\(^{66}\).

In relation to the reference to the law of the European Convention of Human Rights, there have been two fundamental criticisms.

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\(^{64}\) See, Dennys, *supra* note 54, at 424.

\(^{65}\) *Grant*, at para 33.

\(^{66}\) See, Dennys, *supra* note 54, at 424; See also, Berthou & Masselot, *La CJCE et Les Couples Homosexuels*, in *Droit Social*, 1998, 1037.
First of all, it has been noted as the Court of Justice has always maintained that it is free to require a higher level of human rights protection than that of the Council of Europe.\textsuperscript{67}

Secondly, it has been underlined as the most recent case cited by the Court in Grant dated back to 1990, whereas most legal developments on combating discrimination against sexual orientation have happened more recently. In this context, it is interesting to observe how Grant is inconsistent with the subsequent case law of the E.C.H.R. Recently it accepted, in Smith v United Kingdom, that a dismissal of lesbian and gay military personnel on the grounds of their sexual orientation violated, inter alia, the right to the respect for private life protected by Article 8 of the European Convention of Human Rights.\textsuperscript{68}

The above are surely valid criticisms of the Court's reasoning. But, in order to make a comprehensive assessment of the decision we must investigate why the Court adopted this approach of self-restraint.

4.2. P. v. S. Versus GRANT. A COMBINED MOTIVE ANALYSIS: WHY AN ANTITHETICAL APPROACH FOR TWO SIMILAR CASES?

It would not be possible even to attempt answering this question if it would not be recalled what is has been written above about the peculiar position of European Court of Justice in the European legal order and, in particular, about the court’s exigency to weight out its decision’s effects in relation to their degree of “acceptability” for the political bodies of the member States.

\textsuperscript{67} See Bell, Shifting Conceptions of Sexual Discrimination at The Court of Justice: from P.v S to Grant SWT, Eur. L. J., 1999, 73.

\textsuperscript{68} Applications no. 33985/96 and 33986/96, 29 EHRR 493 (2000). See also, Da Silva Mouta v. Portugal (application no. 33290/96), which reinforced the Court's decision in Smith, affirming that sexual orientation discrimination can violate Article 14 of the Convention, which prohibits discrimination in the enjoyment of other Convention Rights.
Keeping in mind these peculiarities of the European legal system, it is possible to identify some factors which can help us to understand the reasons for the apparently schizophrenic approach of the Court.

First of all, there is an important difference in the “challenge” which transsexuals offer to social norms compared with lesbian and gay men. As it was brilliantly underlined: “transsexuals effectively ask to be treated as the woman (or man) that they consider themselves to be, and whose external physical features they effectively possess after surgery and hormonal treatment. They move from belonging to one sex to the other but do not call into dispute the social roles and the expectations imposed on men or women as such. By contrast, for many people lesbians and gay men offer a more fundamental challenge to the social meaning assigned to what it is to be a ‘woman’ or a ‘man’ precisely because they do not wish in any way to be less of a woman or man by reason of their sexual orientation”\(^{69}\).

Secondly, transsexuals formed in Europe, at the moment of the court’s ruling, a small group, whose number AG Tesauro tried to quantify: “one male every 30,000 and one female every 100,000 have the intention of changing sex by surgery”. In the same period of reference, the number of homosexuals in Europe, could have calculated in around 35 millions\(^{70}\).

It is self-evident that the acknowledgement of rights to homosexual couples would have had much worse financial repercussions for the member States than those caused by the issue regarding the rights of transsexuals and, consequently, it would have been less understood by the same States.

Furthermore, the Court clearly underlined, in the light of the majoritarian activism approach described above as the main parameter in the *hard cases*, that “in the present state of E.C. law, stable relationships between two persons

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\(^{69}\) Flynn, note 49 at 381.
\(^{70}\) P. v. S., par. 42 AG Elmer.
of the same sex are not regarded as equivalent to marriages or stable relationships outside marriage between persons of opposite sex.\textsuperscript{71}

While it is true, as AG Elmer underlined, that the prohibition of discriminations on the ground of sex must be kept free from the moral conceptions present in the Member States, it is however also true that the duty of the Court is also that of considering the degree of consensus that a decision may obtain in relation to the socio-political context of the Member States in order not to abuse their constitutional tolerance.

In light of these factors, we should ask ourselves the following questions: how would the member States have reacted if in \textit{Grant} the Court had decided that sexual orientation fell within the bounds of sex discrimination? Would this decision have been accepted or acceptable? Would it have remained within the boundaries of judicial function, albeit one with a high degree of creativity, or would the Court have assumed the role of the legislator?

The Court gave a reply which was as concise as it was peremptory to these questions: “in those circumstances, it is for the legislature alone to adopt, if appropriate, measures which may affect that position.”\textsuperscript{72}

There is another element in the Court's decision that is helpful to understand why the judicial outcome was due to deference of the Member States. At the end of its judgment in \textit{Grant},\textsuperscript{73} the ECJ made an express reference to Article 13\textsuperscript{74}, introduced by the Amsterdam Treaty, which allows the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, to take appropriate action to eliminate various forms of discrimination, including discrimination based on sexual orientation.

\textsuperscript{71} Grant, par. 35.
\textsuperscript{72} Grant, par. 37.
\textsuperscript{73} Grant, par. 48.
\textsuperscript{74} On the value and the challenges of the new Article 13 in the context of the principle of equality, see Flynn, \textit{The Implications of Article 13 After Amsterdam: Will Some forms of Discrimination be more equal than others?}, in \textit{Common Market L. Rev.}, 1999, 1138.
It should be noted that, at the time the Court made its decision in *Grant*, the Amsterdam Treaty had not yet come into force. Thus, article 13 did not at this stage have any legal force. In order to understand the real value of the *Grant* decision, we must ask why the Court saw the need to mention the fact of its adoption.

It can be explained by underlining, in the light of the characteristics of the principle of evolving dynamism as described above that just as legislative inertia and European democratic failings are good reasons for judicial activism, by contrast, “when democracy advances and politics assert its claims, judges are bound to take a pace back”\(^{75}\).

This was exactly what the Court did in *Grant*: a pace back as a sign of due deference to the choice of the Member States to take appropriate action by legislative measures, once the need to combat the discrimination on the sexual oriented had been recognised by the legislative (even if not representative) power of the European Union.

In this context, if the Court in *Grant* had interpreted the existing law in such a way to include sexual orientation discrimination, it would have been acting in defiance of the member States joining the Council of European union. The question remains the same: was that acceptable?

At the end of the motive analysis, it is possible to argue that if, on the one hand, the influence of principle of constitutional tolerance on the judicial approach of the Court can be appreciated in a “vertical dimension” connecting European Community with the members State legal orders, and on the other hand, the principle of evolving dynamism express its meaning in a “horizontal dimension”, through a process of direct proportionality between activism of the Court of Justice and inertia of the European constitutional legislator.

5. A DOUBLE GROUND CONCLUSIVE REMARKS.

From the analysis carried on thus far it is possible to draw up a double ground of conclusive remarks.

The first level is “legal reasoning oriented”, aimed to clarify the relationship between judicial activism’s notion and the judicial technique used by the Court of Justice.

The second level could instead be defined as “content oriented”, and it is finalised to propose an alternative instrument finalised to uniform the European social policy in the member States.

1. In relation to the legal reasoning argument, the creative self restraint approach in Grant can contribute to unmask the commonly-held view according to which judicial creativity should only be present in activist or pro-integration decisions of the Court of Justice and not in those cases where the European judges decide to remain within the boundaries of its case law by adopting a self-restraint approach.

The named commonly held view, which is inconsistent with a comprehensive analysis of the judicial law-making process, is the consequence of an overlap of two different and autonomous legal concepts.

It should be in fact differentiated, on one hand, the decision’s final ruling and, on the other hand, the legal reasoning through which the same final result is achieved by the court.

The decision’s final ruling can be either “progressist”, by taking another step further along the European integration process, either conservative, by remaining wisely within the boundaries of previous case law. In both cases the
evaluation of the activism or self restraint approach in the final judgment must be distinguished by the evaluation of the legal reasoning on which the court’s final judgment is founded.

Only by keeping in mind this distinction it is possible to realize that a legal reasoning characterising a decision which is clearly marked by a self-restraint final result (as in Grant) can be more creative than a reasoning which is able to bring, as in P v S, to an activist final judgment.

The above finding is only apparently paradoxical. To a deeper analysis there are indeed elements which allow to identify a larger space of creativity and originality in the judicial techniques leading to a self restraint conservative final ruling than in the legal reasoning which is functional to an activist progressist final judgment.

More precisely, recalling what has been written above about the hermeneutical methodology of the Court of Justice, it appears evident that in the activist decisions the European judges can count on the “law-making classical cocktail”, whose ingredients are, as it has been already underlined, the opening’s wording of the EC Treaty and the teleological interpretative approach.

By contrast, in the self restraint final judgments, the Court must invent, case by case, without a “prearranged recipe”, the legal reasoning adequate not to go beyond the maximum degree of acceptability present in the majority of the member States, without, at the same time, disappointing all the supporters of an application of the principle of evolving dynamism independently from the judgment implications related to the protection of the fundamental principle of constitutional tolerance.

2. The second (and last) conclusive remark is concerning the possibility of an alternative normative source of uniforming the European social dimension
through the reference to the above named majoritarian activist approach’s mechanism.

To this regard, the starting point is the awareness of the architectural asymmetry between the achievement of European common market and the development of a European social dimension, or, to put it differently, between the negative and positive integration76.

It is well known that, at least in the first generation of European economic Constitution77, the Court of Justice has pursued the negative integration’s goal through an activist, scornful and very criticized action of “judicial deregulation”, by capturing in article 28 EC Treaty’s vices, “all trading rules enacted by member States which are capable of hindering, directly or indirectly, actually or potentially, intra-community trade”78.

It is obvious that a similar judicial approach in relation to the achievement of a European positive integration is simply unthinkable. Not only because in the social matters the member States keep in defending bravely the last national sovereignty’s fragments, but especially because in order to build a social regulative framework the judicial pars destruens must concur, by nature, with a normative pars costruens which can be only legislative based. It is evident that, with regard to this second part, the European community needs the active support and the effective cooperation of the member States’ legislative bodies, because of the simple fact it (still) has in re ipsa neither the competence nor the budget to adopt, at a centralised level, an efficient social policy of redistribution.

78 It is the celebrated Dassonville formula. See Case C-9/74 Procureur du Roi v Dassonville, 1974, ECR 837, par. 5.
The second conceptual step consists realising the structural limits and the overall failure of the European normative attempt to harmonise the social policy in the member States’ legal systems.\(^79\)

In relation to its limits, it is manifest that the European vocation to harmonise the social national policies could not go, within the narrow boundaries of its competences, beyond the imposition, on member States’ legislative institutions, of European directives transposition duties in their respective national legal systems. The only weapon in the European hands in order pursue a social harmonisation is than a legal tool of hexogen and external pressure on member State legislation.

With regard to its failure, it is well known that the harmonisation attempt of national legislations in the field of social policy which was largely completed in the nineties did not bring about the desired results and, for this reason, since 2000\(^80\), it has substantially put aside in favour of an alternative and overvalued social policy regulative instrument: the wrongly celebrated OMC.\(^81\)

After having become aware of, on the one hand, the structural limits and comprehensive failure of the social policy harmonisation trial and, on the other hand, the unimproved effects of its substitute OMC, it is then possible, in the light of the results of the case law analysis carried out, to enucleate an alternative source in order to foster a European social dimension.

Reference is due to the majoritarian activist approach adopted by the court which implies that only a social model’s spread application in the European Union can save the national legislators from the intrusive intervention of the European Court of Justice. In other words, it is very probable that if the English regulation in Grant would have been shared by the majority of member States’


\(^80\) European Council in Lisbon, march, 2000.

national legislations, the European Court of Justice, in the light of the majoritarian activism approach, would not have declared it void.

This means that in order to avoid a dangerous regulative insulation which can easily become the target of the majoritarian activism approach, the national social legislators are in a way forced to individualise common European social standards by looking beyond their national regulative model of social policy.

Such mutual observation and influence’s mechanism seems able to bring to a process of progressive convergence of the national social policies.

The added value of this process would be its endogen nature\(^{82}\) and its consequent better possibilities to reach the hoped results with respect to the above described hexogen and not satisfying attempts of achieving a European social policy.

**Informação Bibliográfica:**


**Bibliographical Information:**


\(^{82}\) The social input would not arrive from Bruxelles but would be internal to the national system.