

JUDICIAL ACTIVISM IN THE EUROPEAN COURT OF JUSTICE — THE CASE OF LGBT RIGHTS

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INTRODUCTION

The European Court of Justice (“the Court” or “the ECJ”) is a unique court in many respects. It is the central dispute settlement body of the European Union (“EU” or “the Union”)—an international organization that displays a mix of supranational and intergovernmental characteristics.¹ It is considerably weaker than domestic courts in national states—for example where it concerns ensuring compliance with its judgments. However, it is in

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1. The ECJ is sometimes confused with the European Court of Human Rights (ECtHR), which is based in Strasbourg (France) and connected to the Council of Europe, an intergovernmental organization that encompasses forty-seven Member States, ranging from Iceland to Russia. The ECtHR mainly deals with claims of violations of the European Convention of Human Rights (ECHR), lodged by individuals against a Member State of the Council of Europe.

comparison much more powerful than other international tribunals, for example the International Court of Justice. Small wonder then that the ECJ has attracted a great deal of scholarly attention, which is all the more warranted in light of the fact that it has—over the years—managed to carve out its own domain and place itself in a leading position *vis-à-vis* the courts and governments of the EU Member States.²

In the political arena, the ECJ has occasionally caught flak—for instance in 1979, when the prominent French MP Michel Debré accused the ECJ of “*mégalomanie malade*” (“pathological megalomania”).³ A more measured, but equally vehement account was given by Margaret Thatcher, who proclaimed in June 1993 that “some things at the Court are very much to our distaste.”⁴ In the 1980s, some scholars started to criticize the activism and seemingly political role of the Court, wondering whether it was “running wild.”⁵ Former ECJ Judge Federico Mancini admitted that “judges are usually incompetent as lawmakers,”⁶ but argued in favor of the Court’s activism nonetheless by pointing at the quasi-permanent stagnation of the European integration process in the 1960s and 1970s. Moreover, he expected it to take a step back after 1986, when a *rélanche européenne* (“European re-launch”) was staged with the signing of a new treaty, the so-called Single European Act.⁷ However, this constituted not so much the end, but rather a re-launch of the debate—this time also involving political scientists.

Interestingly, there seems to exist a disciplinary division of labor. The legal debate has so far focused predominately on the relationship between European law and national law, and the way in which the ECJ has (re)shaped the latter to the benefit of European law—“constitutionalizing” the treaties along the way. Indeed—especially in the field of human rights—the ECJ seems to behave more like a supreme court in a federal state than as a dispute settlement tribunal of an international organization. In contrast, the political science debate has mostly revolved around the question of whether the legal system and the ECJ’s conduct were consistent with the interests of the most powerful EU Member States,⁸ or whether the Court “upgraded the

2. A famous investigation of its early path-breaking case law is Eric Stein, *Lawyers, Judges and the Making of a Transnational Constitution*, 75 AM. J. INT’L L. 1 (1981).

3. Assemblée Nationale, Sixième Législature, Séance du 1er Juin 1979, 4610 (Fr.).

4. 546 PARL. DEB., H.L. (5th ser.) (1993) 560 (U.K.).

5. Probably the most famous early critic is HJALTE RASMUSSEN, ON LAW AND POLICY IN THE EUROPEAN COURT OF JUSTICE: A COMPARATIVE STUDY IN JUDICIAL POLICYMAKING (1986).

6. G. Federico Mancini, *The Making of a Constitution for Europe*, 26 COMMON MKT. L. REV. 595, 612 (1989).

7. *Id.* at 613.

8. See, e.g., PAUL TAYLOR, THE LIMITS OF EUROPEAN INTEGRATION (1983); Geoffrey Garrett, *International Cooperation and Institutional Choice: The European Community’s Internal Market*, 46 INT’L ORG. 533 (1992); Geoffrey Garrett & Barry Weingast, *Ideas*,

common interest”—even against the wishes of the national governments.⁹ By consequence, legal scholars tend to give center stage to the relationship between the ECJ and national (ordinary, supreme, and constitutional) courts, but they “ignore or assume” the political impact of the ECJ¹⁰—whereas political scientists concentrate largely on the relationship between the ECJ and the governments of the Member States.

This Article forms an interdisciplinary effort in which we try to combine both perspectives and examine how the ECJ—with the support of lower domestic courts—has carved out its domain at the expense of both governments and national constitutional and supreme courts. Contrary to the orthodox opinion—adhered to in legal doctrine as well as in political science—we offer conclusive evidence that the ECJ is neither an innocuous interpreter of treaty rules nor an agent of particular national interests, but that it instead follows a distinct policy agenda defending first of all the interests of citizens, not of Member States. We shall underpin this central argument with an analysis of the series of ECJ rulings on lesbian, gay, bisexual, and transgender (“LGBT”) rights. The (regulation of the) legal position of the LGBT minority group remains a subject of controversy in many a national context. So far, the competence of the EU on the issue has been extremely limited, and the currently twenty-seven Member States anxiously guard their sovereignty in this field. Nevertheless, as we will demonstrate, the ECJ deftly managed to slide into place as an autonomous norm-setter, expanding the entitlements of LGBT individuals, and even awarding them more rights and benefits than their national governments were willing to grant them.

Our plan of discussion is as follows. We will first engage in a general *tour d’horizon* of the position of the Court within the European legal system, briefly touch upon its functioning and composition, and highlight its overall performance up until now (Part I). Next, we delve deeper into the academic debates on the role of the ECJ, portraying the main lines of discussion in legal scholarship, as well as among political scientists (Part II). Subsequently, we will trace the Court’s case law on LGBT rights, analyzing to what extent it has functioned as an autonomous emancipator and transformed the subject matter at stake (Part III). We finish up and draw the lines together in the concluding section, wherein we will rehearse our main argument one more time and underscore its significance (Part IV).

Interests, and Institutions. Constructing the European Community's Internal Market, in IDEAS AND FOREIGN POLICY 173 (Judith Goldstein & Robert O. Keohane eds., 1993).

9. Anne-Marie Burley & Walter Mattli, *Europe Before the Court: A Political Theory of Legal Integration*, 47 INT’L ORG. 41 (1993), available at <http://www.seep.ccu.hu/alpsa/articles/burley.pdf>.

10. *Id.* at 42.

I. THE ROLE OF THE COURT IN THE EUROPEAN INTEGRATION PROCESS

A. Jurisdiction, Composition, and Case-Load

Despite the terseness and humility of the provisions in the original EU treaties that spelled out the jurisdiction, composition and organization of the ECJ, its role in the European integration process has been nothing less than seminal.¹¹ Surprisingly, the current clause on its jurisdiction—Article 19 (1) of the Treaty on European Union (“TEU”)—remains an almost exact copy of its earliest version, Article 164 of the Treaty establishing the European Economic Community (“TEEC”), drawn up in 1957.¹² According to this proviso, the Court of Justice “shall ensure that in the interpretation and application of the [European] Treaties the law is observed.”¹³ Under Articles 258–260 of the Treaty on the Functioning of the EU (“TFEU”), the Court rules in so-called “infringement proceedings” where the European Commission believes that an EU Member State has failed to fulfill its obligations under the Treaties. On the basis of TFEU’s Article 263, the Court decides in “actions for annulment,” whereby a Member State, EU institution, or natural or legal person contends that an adopted legal act violates any other European rule, general principle, or procedural requirement. Under TFEU’s Article 269, the ECJ is granted the competence to decide so-called “preliminary references”—questions on the interpretation or validity of EU legal acts submitted by any court or tribunal in a Member State—which has proven to be of extreme importance in the shaping of the relationship between the EU and the national legal and political orders. The Court also decides on a number of other actions which are of less constitutional significance, *inter alia* the action for failure to act (Article 265 of the TFEU) and the action for damages (Article 268 *juncto* 340 of the TFEU).

In accordance with TFEU’s Article 19 (2), the twenty-seven judges are appointed for a six-year term and eligible for infinite reappointment. This

11. The ECJ as an institution is divided into three branches: the Court of Justice (in a narrow sense), the General Court, and the Civil Service Tribunal. The latter two have been created at quite a late stage. The General Court was created in 1987, and was originally designated the “Court of First Instance.” The Civil Service Tribunal was created in 2006. Our analysis pertains to the Court of Justice as it has exclusively dealt with all the LGBT cases so far. The two younger branches still enjoy only a limited jurisdiction, and are subordinated in almost every respect.

12. Which, in turn, was a copy of Article 31 of the 1951 Treaty of Paris that established the European Coal and Steel Community.

13. At present, the plural “Treaties” refers to the “Treaty on European Union” and the “Treaty on the Functioning of the European Union.” The latter is the successor to the “Treaty establishing the European Economic Community,” which was renamed in 1992 to “Treaty establishing the European Community” or “EC Treaty.” All current and earlier versions of the treaty—texts are available at <http://eur-lex.europa.eu/en/treaties/index.htm> (last visited May 31, 2010).

entails the risk that they are insufficiently independent, compared to their counterparts in the highest national courts; for example, a proper contrast would be the life–tenure of the justices of the US Supreme Court. Moreover, until recently there existed only a very summary selection process whereby a Member State merely had to propose its candidate to the other Member States; thereafter, the nominated person was always appointed to the Court without much (public) discussion.¹⁴

As the members of the ECJ all come from different Member States, the various legal traditions are thought to be represented in equal fashion.¹⁵ This reflects the political concern to ensure the legitimacy of Court decisions throughout the Union, but it carries yet another danger that the judges remain too intimately affected by their particular national background. All the same, these possible risks and objections have so far never led to any substantial alterations in the composition or nomination process.

The EU has no system of docket control, leave for appeals, or other types of case–filtering mechanisms. By consequence, the ECJ is unable to control the type of cases that come before it, and it has to cope with an impressive workload.¹⁶ Among the less significant issues to adjudicate are the classification of goods for customs purposes and the establishing of simple and overt violations of rules contained in the European treaties and legislation. Conversely, of spectacular importance are its decisions involving the demarcation of Union versus Member State competencies, the choice of the proper legal basis for legislation, and the definition of key terms and concepts coined in (established or novel) rules of EU law.

B. Landmark Rulings and Overall Performance

1. *Supremacy, Direct Effect and State Liability*

Although fifty years *ex post facto*, any analysis of the Court’s influence on the European integration process ought to start in the early 1960s. The

14. Consolidated Version of the Treaty on the Functioning of the European Union art. 255, Mar. 30 2010, 2010 O.J. (C 83) 47 [hereinafter TFEU]. Since December 1, 2009, TFEU Article 255 stipulates that henceforth, a special panel shall be convened to evaluate the suitability of proposed candidates. However, its deliberations take place behind closed doors and are unlikely to be substantial. Moreover, the panel is only rendered competent to issue a non–binding opinion.

15. TFEU Article 19 contains no requirements as regards their nationality, which has prompted some to come up with rather adventurous suggestions. See Tom Kennedy, *Thirteen Russians! The Composition of the European Court of Justice*, in LEGAL REASONING AND JUDICIAL INTERPRETATION OF EUROPEAN LAW: ESSAYS IN HONOUR OF LORD MACKENZIE-STUART 69 (A.I.L. Campbell & M. Voyatzi eds., 1996).

16. Since 2007, it has received and decides about 500 cases each year. The statistics are extensively detailed on the ECJ’s website: see http://curia.europa.eu/jcms/upload/docs/application/pdf/2009-03/ra08_en_cj_stat.pdf (last visited May 31, 2010).

twin judgments in *Van Gend & Loos*¹⁷ and *Costa v. ENEL*¹⁸ are after all commonly regarded as the pristine heralds of a Court treading higher ground, and in these rulings the ECJ left behind traditional conceptions of what international judges do and are capable of. At first sight, these judgments do not seem to fully deserve the revolutionary epithet that has so often been ascribed to them. After all, in *Van Gend & Loos*, the Court did not launch an entirely new doctrine—as direct effect is not a phenomenon exclusive to European law. Under different guises, and especially manifest in the form of “self-executing provisions,” it is also well-known to international law.¹⁹ At the same time, the move of the Court does retain a bold flavor: in its ruling, it created the possibility of invoking the rules stemming from a supranational origin before the national courts in *all* of the EU Member States. Thereby, it coolly pierced through the vested monism/dualism dichotomy, sidelined national courts, and decommissioned the relevant applicable rules in the various Member State constitutions.

Likewise, *Costa v. ENEL*—in which the Court proclaimed that all European legal rules take precedence over national ones—may initially seem not to provide for that great a novelty. After all, a cardinal principle of international law is its supremacy over national law.²⁰ Yet a sharp divide remains between the international and the national plane: although the former assumes itself hierarchically superior, most states in their national legal systems do not actually accord supremacy to international rules of law.²¹ Since 1964—owing to *Costa v. ENEL*—EU law is markedly different in that national legal systems—in case of conflict—are obliged to always award absolute priority to the applicable supranational rules. As such, the judgments on supremacy and direct effect carry an indelible activist mark: these doctrines were not enshrined in the Treaties, but constitute pure products of judge-made law, created for the benefit of the *effet utile* of

17. Case 26/62, *Algemene Transport en Expeditie Onderneming Van Gend & Loos v. Nederlandse Administratie der Belastingen*, 1963 E.C.R. 1.

18. Case 6/64, *Flaminio Costa v. ENEL*, 1964 E.C.R. 585.

19. This is still insufficiently recognised in EU legal scholarship, despite having been pointed out by more than one author from the early 1980s onwards. See Derrick Wyatt, *New Legal Order, or Old?*, 7 EUR. L. REV. 147 (1982); Bruno de Witte, *Retour à Costa. La primauté du Droit Communautaire à la Lumière du Droit International*, 19 REV. TRIM. DROIT EUROPÉEN 425 (1984) (Fr.).

20. See the Permanent Court of International Justice’s *Advisory Opinion in the case of the Greco-Bulgarian Communities*, 17 PUBLICATIONS OF THE PCIJ 32 (1930) (noting that “it is a generally accepted principle of international law that in the relations between Powers who are contracting Parties to a treaty, the provisions of municipal law cannot prevail over those of the treaty”). See also the International Court of Justice’s *Advisory Opinion with regard to the Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947*, 34 ICJ REPORTS (1988), ¶ 57 (noting that “[i]t [is] sufficient to recall the fundamental principle of international law that international law prevails over domestic law”).

21. See, e.g., ANTONIO CASSESE, INTERNATIONAL LAW 236 (2d ed. 2005).

European law. Thus, the subsequent case law that expanded the scope and gist of both these notions further carried an activist stamp as well.²²

The same can be said for the principle of Member State liability for violations of EU law. Although closely connected to the doctrines of supremacy and direct effect, it was launched only decades after all legislative attempts to establish such a principle in the treaties had failed.²³ Subsequently, in *Francovich*,²⁴ the ECJ was happy to proclaim member state liability a principle that was actually already “inherent” in the European legal order—reining in the various particular (and often divergent) national rules that regulated the matter up until then.

2. *Extending its Judicial Review Competence*

With the passing of time, the Court has become the architect of ever more numerous institutional innovations, several of which related to its own competence to engage in judicial review. Again, little or no foothold was to be found in the Treaties for any of the decisions reached.

To start with, the preliminary reference procedure was deployed in such a way as to maximize the ECJ’s role and function: in *Foto-Frost*²⁵ national courts were declared incompetent to decide on the validity of EU rules themselves and obliged to bring any such questions on legality before the European Court. Through *Haegeman*,²⁶ *SPI*,²⁷ and *Bussen*²⁸ it suddenly became possible to submit references on sets of rules that lay flatly outside the purview of Article 234 of the EC Treaty.²⁹

22. See Case 9/70, *Franz Grad v. Finanzamt Traunstein*, 1970 E.C.R. 825 (demonstrating the direct effect of decisions); Case 43/71, *Politi v. It.*, 1971 E.C.R. 1039 (demonstrating the direct effect of regulations); Case 41/74, *Yvonne van Duyn v. Home Office*, 1974 E.C.R. 1337 (demonstrating the direct effect of directives); Case 106/77, *Amministrazione delle Finanze dello Stato v. Simmenthal SpA*, 1978 E.C.R. 629 (demonstrating that every national court is obliged to set aside contrary national law); Case 11/70, *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, 1970 E.C.R. 1125 (demonstrating that even national constitutional rules have to be set aside by virtue of the supremacy of European law).

23. In the past, on at least three different occasions, calls were made to introduce the relevant rules into primary law. See Court of Justice, *Suggestions of the Court of Justice on European Union*, BULL. EUR. COMMUNITIES, SUPP. 9/75, 17–19; see the Report of the European Commission of 21 October 1990 for the 1991 IGC, BULL. EUR. COMMUNITIES, SUPP. 2/91, 165–69; Resolution on the Responsibility of the Member States for the Application of and Compliance with Community Law, 1983 O.J. (C 68) 32.

24. Cases C–6 & C–9/90, *Francovich v. It.*, 1991 E.C.R. I–5357.

25. Case 314/85, *Frost v. Hauptzollamt Lübeck–Ost*, 1987 E.C.R. 4199.

26. Case 181/73, *Haegeman v. Belg.*, 1974 E.C.R. 449.

27. Joined Cases C–267 & 269/81, *Amministrazione delle Finanze dello Stato v. Petrolifera Società Italiana SpA (SPI)*, 1983 E.C.R. 801.

28. Case 221/88, *European Coal & Steel Comty. v. Acciaierie e Ferriere Busseni SpA*, 1990 E.C.R. I–519.

29. See TFEU, art. 267.

*Les Verts*³⁰ and *Chernobyl*³¹ represent two other paradigmatic cases. TFEU's Article 173 contained an exhaustive list spelling out which litigants were entitled to request the Court to review the legality of an adopted EU legal act. The Court single-handedly decided to pry open this provision and broaden the catalog under the cloak of preserving the rule of law in the Community, owing up to the supposedly overriding requirements of the principle of institutional balance. In 2007, in *Segi*³² and *Advocaten voor de Wereld*,³³ the ECJ extended its competence to review legal acts adopted in the politically charged domain of "PJCC" (the rules of EU law relating to the Member States' police and judicial cooperation in criminal matters). Two years earlier, in *Pupino*,³⁴ it had already exported the doctrine of "indirect effect" (the duty for national courts to interpret national law in conformity with EU law) to the PJCC. In the recent *ECOWAS* case,³⁵ the ECJ broke yet newer ground and extended its review competence to the "CFSP"—the set of rules that seek to underpin a common foreign and security policy of the Member States. In its ruling, it declared itself competent to review the legality of CFSP instruments, despite its formal exclusion from that domain on the basis of (the former) TFEU Article 46.

Of course, it may be hard find fault with these judgments, since private persons and institutions could otherwise continue to be confronted with the (adverse consequences of) binding acts of public law without any effective legal remedy. Nonetheless, as the Court *proprio motu* brought these changes to the European edifice—corroborating these with novel rules and principles of its own devising—the aforementioned judgments again neatly fit an activist bill. Significantly, at the latest round of intergovernmental negotiations on treaty reform, the Member States continued to withhold general jurisdiction in the CFSP from the ECJ.³⁶ Exemplary was the statement made by the then-chancellor of Austria, Wolfgang Schüssel, who remarked that "the ECJ . . . has in the last couple of years systematically expanded European competencies, even in areas, where there is decidedly no [European] community law . . . Suddenly, judgments emerge on the role of women in the German federal army . . . that [are] clearly national law."³⁷ Evidently, with regard to the sensitive area of defense and security policies, the Member States perceived the Court to be much too intrusive.

30. Case 294/83, Parti Ecologiste 'Les Verts' v. Parliament, 1986 E.C.R. 1365.

31. Case C-70/88, Parliament v. Council (Chernobyl), 1990 E.C.R. I-204.

32. Case C-355/04 P, Segi and Others v. Council, 2007 E.C.R. I-1657.

33. Case C-303/05, *Advocaten voor de Wereld v. Leden van de Ministerraad*, 2007 E.C.R. I-3633.

34. Case C-105/03, *Maria Pupino*, 2005 E.C.R. I-5285.

35. Case C-91/05, *Comm'n v. Council (ECOWAS)*, 2008 E.C.R. I-3651.

36. See TFEU, art. 275 (1).

37. See Mark Beunderman, *Fresh EU Presidency Attacks European Court of Justice*, EU OBSERVER (Jan. 3, 2006), <http://euobserver.com/9/20621>.

3. *Entrenching the Internal Market*

The *raison d'être* of the original EEC was to establish an internal market in which the free movement of goods, persons, services, and capital was ensured, as well as a regime of free and undistorted competition. This still forms a key objective of the EU at the present time.³⁸ In spite of all the progress made by means of official legislation—especially since the ambitious *rélanche européenne* referred to earlier—the internal market would never have been what it is right now without the relevant case law from the ECJ.

In the free movement of goods for example, in rulings such as *Dassonville*³⁹ and *Rewe-Zentral*,⁴⁰ the Court engaged in an extremely broad reading of the provision that contained a prohibition on quantitative restrictions and measures having an equivalent effect. The same goes for the stern construction of identical provisions concerning the freedom to provide services and the freedom of establishment, in *Reyners*,⁴¹ *Säger*,⁴² *Gebhard*,⁴³ and *Centros*.⁴⁴ Of fundamental importance was also its liberal approach to the concept of “worker,” granting rights of free movement and social security benefits to Member State nationals wherever they reside in the Union—even in situations where one might seriously have questioned the genuine and effective character of the employment.⁴⁵ The Court has been willing to blaze a trail with remarkable fury for the relatively new rules on EU citizenship as well, creating residence rights as well as social welfare entitlements on startlingly feeble grounds.⁴⁶ In the latter line of cases, the

38. See TFEU, art. 26 (1)–(2).

39. Case 8/74, *Procureur du Roi v. Dassonville*, 1974 E.C.R. 837.

40. Case 120/78, *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein*, 1979 E.C.R. 649.

41. Case 2/74, *Reyners v Belg.*, 1974 E.C.R. 631.

42. Case C-76/90, *Säger v. Dennemayer & Co.*, 1991 E.C.R. I-4221.

43. Case C-55/94, *Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*, 1995 E.C.R. I-4165.

44. Case C-212/97, *Centros Ltd v. Erhvervs- og Selskabsstyrelsen*, 1999 ECR I-1459. One may also point here to the groundbreaking case-law on patient mobility, sparked by the Court's broad conception of what constitutes a service; see Case C-120/95, *Decker v. Caisse de Maladie des Employés Privés*, 1998 E.C.R. I-1831; Case C-158/96, *Kohll v. Union des Caisses de Maladie*, 1998 E.C.R. I-1931; Case C-372/04, *Watts v. Bedford Primary Care Trust*, 2006 E.C.R. I-4325. For an in-depth analysis, see Johan W. van de Gronden, *Cross-Border Health Care in the EU and the Organization of the National Health Care Systems of the Member States. The Dynamics Resulting from the European Court of Justice's Decisions on Free Movement and Competition Law*, 26 WISC. INT'L L.J. 705 (2009).

45. Case 53/81, *Levin v. Staatssecretaris van Justitie*, 1982 E.C.R. 1035; Case 139/95, *Kempf v. Staatssecretaris van Justitie*, 1986 E.C.R. 1741; Case 196/87, *Steymann v. Staatssecretaris van Justitie*, 1988 E.C.R. 6159; Case C-456/02, *Trojani v. CPAS*, 2004 E.C.R. I-7573.

46. Case C-85/96, *Martínez Sala v. Freistaat Bayern*, 1998 E.C.R. I-2691; Case C-184/99, *Grzelczyk v. Centre Public d'aide Sociale d'Ottignies-Louvain-la-Neuve*, Case C-

ECJ even said of Union citizenship that it was “destined to be the fundamental status of nationals of the Member States”—words that fit particularly well in visionary speeches of federalist politicians, but seem slightly out of place amidst legal vernacular. Yet when it comes to furthering their “*certainne idée de l’Europe*,”⁴⁷ the judges of the ECJ do not necessarily feel constrained by a lack of black-letter law.

In EU competition law, the Court did not shun an activist stance either, although the exact dosage has varied through the years. At any rate, the judgment in *Continental Can*⁴⁸ provides singularly important evidence; in this case, the absence of any specific rules regarding merger control in the Treaties or anywhere else once again presented no bar to the creation of adventurous judge-made law on the subject.

4. *Proclaiming Absolute Autonomy*

Van Gend & Loos has already been touched upon, yet apart from the introduction of direct effect it is of course also legendary for proclaiming the existence of a “new legal order of international law.”⁴⁹ One year later, in *Costa v. ENEL*, the Community was even pronounced to be a new legal order—period, and the law stemming from the Treaty (“an independent source of law”) as being of a “special and original nature.”⁵⁰

For a long time, speculation has been rife on the exact scope and purport of these phrases. Various authors have questioned the newness, the specificity, and the uniqueness of the European legal order. A number of them negated the possibility of a truly autonomous system that is immune to the general rules and distinct from its siblings in international law.⁵¹ Scholars have pointed to the fact that the international legal order is actually host to many sub-systems: the EU forms one of many, and contrary to the Court’s assertions there is nothing revolutionary in creating an organization

184/99, 2001 E.C.R. 1–6193; Case C–413/99, *Baumbast v. Sec’y of State for the Home Dep’t.*, 2002 E.C.R. 1–7091.

47. Words employed in a famous article by Pierre Pescatore, *The Doctrine of “Direct Effect”*: *An Infant Disease of Community Law*, 8 EUR. L. REV. 155, 157 (1983). See also G. Federico Mancini & David T. Keeling, *Democracy and the European Court of Justice*, 57 MOD. L. REV. 175, 186 (1994) (“The preference for Europe is determined by the genetic code transmitted to the Court by the founding fathers, who entrusted it the task of ensuring that the law is observed in the application of a Treaty whose primary objective is an ‘ever closer union among the peoples of Europe.’”).

48. Case 6/72, *Europemballage Corporation a v. Comm’n of the European Comtys.*, 1973 E.C.R. 215.

49. See *Algemene Transport en Expeditie Onderneming Van Gend & Loos*, 1963 E.C.R. at 23.

50. See *Flaminio Costa*, 1964 E.C.R. at 593.

51. See, e.g., Theodor Schilling, *The Autonomy of the Community Legal Order: An Analysis of Possible Foundations*, 37 HARV. INT’L L.J. 389 (1996); Trevor C. Hartley, *International Law and the Law of the European Union – A Reassessment*, 72 BRIT. Y.B. INT’L L. 1 (2001).

for unlimited duration with its own institutions, competencies, and legal personality.⁵² The Court has nevertheless repeatedly stressed the full autonomy and independence of the European legal order and denounced multiple rules and conventions that threatened to clash with, cloud, or pollute the Union's *sui generis* system.⁵³ Still, as long as the basis of the EU structure continues to be located in a traditional treaty arrangement, the entity remains firmly rooted in international law, whether it likes it or not. It thus would seem unable to ever truly break free and live the dream of a self-contained, absolutely autonomous legal order.

As theoretically sound as the latter considerations may have been, they discounted or underestimated the willingness of the Court to explode the linkages with international law at long last. In the recent *Kadi* judgment,⁵⁴ the true ambit of the pronouncements in *Van Gend* and *Costa v. ENEL* has finally been clarified. In this ruling, the ECJ dealt the final blow to the idea of an only quasi-separate, limited, unoriginal "new legal order." In effect, it considered the general principles of EU law hierarchically superior to international rules and denounced the overriding authority of the UN Charter and Security Council resolutions. In so doing, it put the independent character of the Union's legal system beyond doubt.⁵⁵

II. THE ACADEMIC DEBATES ON THE ROLE OF THE COURT

A. The Debate in Legal Doctrine

The first legal studies on the role of the Court in the integration process date from the early 1970s and are characterized by a mild and wholly benevolent approach.⁵⁶ Only in 1986 did the first critical treatise see the light of day, when the Danish scholar Hjalte Rasmussen took issue with the zealous pro-integration stance of the Court, and—employing some strong

52. Alexander Orakhelashvili, *The Idea of European International Law*, 17 EUR. J. INT'L L. 315, 345 (2006); see also de Witte, *supra* note 19, at 446.

53. See, e.g., Opinion 1/76, Draft Agreement Establishing a European Laying-Up Fund for Inland Waterway Vessels, 1977 E.C.R. 741; Opinion 1/91, Draft Agreement Relating to the Creation of the European Economic Area, 1991 E.C.R. I-6084; Opinion 1/00, Proposed Agreement Between the European Community and Non-Member States on the Establishment of a European Common Aviation Area, 2002 E.C.R. I-3493.

54. Joined Cases C-402/05 P & C-415/05 P, Yassin Abdullah Kadi v. Council, 2008 E.C.R. I-6351.

55. J.H.H. Weiler, *Editorial*, 19 EUR. J. INT'L L. 895 (2008), has compared *Kadi* to the ruling of the U.S. Supreme Court in *Medellin v. Texas*, 552 U.S. 491 (2008); in effect, the ECJ proclaimed the EU to be equally "domestic" as the U.S. legal system, deciding for itself if and how it wants to incorporate rules of international law.

56. See, e.g., ANDREW WILSON GREEN, *POLITICAL INTEGRATION BY JURISPRUDENCE: THE WORK OF THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES IN EUROPEAN POLITICAL INTEGRATION* (1969); PIERRE PESCATORE, *LE DROIT DE L'INTÉGRATION* (1972); H.G. Schermers, *The European Court of Justice: Promoter of European Integration*, 22 AM. J. COMP. L. 444 (1974); ROBERT LECOURT, *L'EUROPE DES JUGES* (1976).

language—accused it of regularly engaging in “revolting judicial behavior.”⁵⁷ Rebuttals were provided by Joseph Weiler and Mauro Cappelletti, amongst others.⁵⁸ In the course of the 1990s, two new rounds of discussion took place.⁵⁹ For the past few years however, no new installments in the series have been published, and the discussion appears to have been terminated without having been properly concluded. Since all attempts at providing a critical assessment of the ECJ’s demeanor have themselves been the subject of hefty criticism—and the apologists of the Court expressed the last word on the subject—one might be tempted to conclude that the debate culminated in a victory for the latter.

Some arguments and counter-arguments have re-emerged time and again. When critics bring forward their evidence of a Court that keeps overstepping the line, a trusted demurral is that the proof tends to be selective and that judicial activism occurs in a small minority of cases only.⁶⁰ As a broader defense, the apologists of the ECJ advance that it has to make the most of framework treaties that regulate few topics in exhaustive detail. Thus, the fact that something is not mentioned or not fully covered by treaty provisions should in itself never be considered decisive: this is meant to leave room for detailed new rules that the ECJ may rightfully bring into being.⁶¹ Moreover, since the other EU institutions repeatedly fail to deliver the goods, the Court is well-positioned to step into their shoes. The European legal system is actually intended to function in this manner, with a

57. RASMUSSEN, *supra* note 5, at 12.

58. Mauro Cappelletti, *Is the European Court of Justice “Running Wild”?* 12 EUR. L. REV. 3 (1987); J.H.H. Weiler, *The Court of Justice on Trial*, 24 COMMON MKT. L. REV. 555 (1987).

59. PATRICK NEILL, *THE EUROPEAN COURT OF JUSTICE: A CASE STUDY IN JUDICIAL ACTIVISM* (1995) (Neill was a challenger in the first round of discussions); *see also* Lord Howe of Aberravon, *Euro-Justice: Yes or No?*, 21 EUR. L. REV. 192 (1996); Takis Tridimas, *The Court of Justice and Judicial Activism*, EUR. L. REV. 199 (1996); and Trevor C. Hartley, *The European Court, Judicial Objectivity and the Constitution of the European Union*, 112 L. Q. REV. 95 (1996) (Hartley was a challenger in the second round of discussions; for a response to Hartley, see Anthony Arnall, *The European Court and Judicial Objectivity: A Reply to Professor Hartley*, 112 L. Q. REV. 411 (1996)). *See also* ANTHONY ARNULL, *THE EUROPEAN UNION AND ITS COURT OF JUSTICE* (1999) and TREVOR C. HARTLEY, *CONSTITUTIONAL PROBLEMS OF THE EUROPEAN UNION* (1999) [hereinafter HARTLEY, *CONSTITUTIONAL PROBLEMS*].

60. *See, e.g.*, Tridimas, *supra* note 59, at 200; Howe, *supra* note 59, at 189; Albertina Albors Llorens, *The European Court of Justice, More Than a Teleological Court*, 2 CAMBRIDGE Y.B. EUR. LEGAL STUD. 373, 398 (1999).

61. *See, e.g.*, Tridimas, *supra* note 59, at 205; Michel Waelbroeck, *Le Rôle de la Cour de Justice dans la Mise en Oeuvre du Traité CEE*, CAHIERS DE DROIT EUROPÉEN 350 (1982); Charlotte Gaitanides, *Artikel 220*, in *KOMMENTAR ZUM VERTRAG ÜBER DIE EUROPÄISCHE UNION UND ZUR GRÜNDUNG DER EUROPÄISCHEN GEMEINSCHAFT* 324 (H. von der Groeben & J. Schwarze eds., 2003); JEAN-VICTOR LOUIS, GEORGES VANDERSANDEN, DENIS WAELBROECK & MICHEL WAELBROECK, *COMMENTAIRE MÉGRET, LA COUR DE JUSTICE. LES ACTES DES INSTITUTIONS* 16 (1993).

prominent pioneering role for the Court that has to ensure that the integration process keeps its pace.⁶²

At present then, a broad consensus seems to exist in legal doctrine that the ECJ has been faithfully interpreting the rules, legitimately filled some gaps, and has never engaged in excessive activism. Rather, it has acted in an overall manner that has genuinely corresponded with the tasks entrusted to it under the treaties, and it continues to do so. By consequence, one cannot seriously find fault with any of the rulings highlighted in the previous section; the Court was expected to constitutionalize the Treaties, entrench the internal market, and stress the autonomy of the European legal order. Moreover, concepts such as supremacy, direct effect, and state liability fit in well with both the general system and specific treaty articles. However, as we shall argue in the present paper, the case law on LGBT rights shows how the ECJ has been a less than faithful performer, and that it in fact has engaged in excessive activism, structurally to the detriment of Member State interests. We consider the fact that the Court even felt entitled to do so in this politically sensitive domain—where the EU enjoys no substantive powers of regulation—to be most telling. To our mind, it forms but one illustration of its general posture, about which critical lawyers rightly expressed their discomfort in the earlier rounds of debate. Moreover, as we will be pointing out further on, none of the justifications advanced by the Court's supporters can ultimately be considered wholly convincing.

B. The Debate in Political Science

In contrast with the early interest from legal scholars, political scientists only really “discovered” the ECJ in the mid-1990s. The re-launch of the integration process in 1986 was followed by a revival of non-state centric integration theories, which attributed a key role to supranational actors such as the European Commission and the ECJ in the integration process. In a thought-provoking article, the neo-functionalists Anne-Marie Burley and Walter Mattli argued that the ECJ had spurred the integration process in a way beyond Member State control, owing to its clever collaboration with lower national courts.⁶³ This marked the start of a debate with the inter-

62. This “most-favored rationale” has been fiercely criticised in Hjalte Rasmussen, *Towards a Normative Theory of Interpretation of Community Law*, 1992 U. CHI. LEGAL F. 135, 155–59, and HARTLEY, CONSTITUTIONAL PROBLEMS, *supra* note 59, at 45–58. Compare Michel Mangenot, *Le Conseil d’Etat et l’institutionnalisation du système juridique communautaire* 3 (Apr. 1, 2004), available at http://halshs.archives-ouvertes.fr/docs/00/28/86/26/PDF/Mangenot_Systeme_juridique_communautaire_2004.pdf (commenting that the founding fathers of the EU actually designed the Court to keep the Commission in check).

63. See Burley & Mattli, *supra* note 9, at 63–65; see also Walter Mattli & Anne-Marie Slaughter, *Law and Politics in the European Union: A Reply to Garrett*, 49 INT’L ORG. 183 (1995).

governmentalist (or rational institutionalist) school, spearheaded by Geoffrey Garrett. Garrett had argued the previous year that the Member States of the EU had consciously delegated authority to the ECJ to enable it to monitor compliance with EU rules and thus make costly agreements stick. He claimed (in accordance with the predominant view among legal scholars) that the Court has been a faithful agent of the (most powerful) Member States in its decisions as well.⁶⁴ In a quantitative study of 2,978 preliminary rulings, Alec Stone Sweet and James Caporaso refuted Garrett's claim and concluded that Member State preferences did not significantly influence the Court's actions.⁶⁵ Mark Pollack offered a synthesis of the two approaches, using principal-agent analysis; he assessed the explanatory value of four factors, deduced from inter-governmentalism and neo-functionalism, constraining the ability of the Member States to control the Court.⁶⁶

In 1998, a new round of discussion ensued. Both sides agreed that the debate between the two schools had "reached the limits of its usefulness,"⁶⁷ as the "master-servant" distinction was too simplistic. However, rational institutionalists continued to focus their attention on the strategic interactions between the ECJ and Member State governments, aiming to specify under which conditions the Court will make "adverse" decisions or "tailor its decisions to the anticipated reactions of Member State governments."⁶⁸ Neo-functionalists Slaughter and Mattli, in turn, moved the discussion forward by disaggregating the state into separate governmental institutions—which interact with one another, with individuals, and groups in domestic and transnational societies, as well as with supranational institutions, "in order to explain variation in the degree and timing of legal integration both across countries and within them."⁶⁹ Karen Alter has extensively contributed to this line of research, investigating among other things the variation in the role of lower national

64. See Garrett, *supra* note 8, at 558; see also Geoffrey Garrett, *The Politics of Legal Integration in the European Union*, 49 INT'L ORG. 171, 180 (1995).

65. See Alec Stone Sweet & James A. Caporaso, *La Cour de Justice et l'Intégration Européenne*, 48 REVUE FRANÇAISE DE SCIENCE POLITIQUE 195, 221 (1998) (Fr.).

66. See Mark A. Pollack, *Delegation, Agency, and Agenda Setting in the European Community* 51 INT'L ORG. 99 (1997).

67. See Walter Mattli & Anne-Marie Slaughter, *Revisiting the European Court of Justice*, 52 INT'L ORG. 177, 178 (1998); Geoffrey Garrett, R. Daniel Kelemen, & Heiner Schulz, *The European Court of Justice, National Governments, and Legal Integration in the European Union*, 52 INT'L ORG. 149, 175 (1998).

68. See Garrett, Kelemen, & Schulz, *supra* note 67, at 150; for an application of principal-agent analysis to the relations between the Court and member state governments (specifically on the principle of state liability), see Jonas Tallberg, *Supranational Influence in EU Enforcement: The ECJ and the Principle of State Liability*, 7 J. EUR. PUB. POL'Y 104, 118 (2000); see KAREN J. ALTER, *THE EUROPEAN COURT'S POLITICAL POWER: SELECTED ESSAYS 37-39* (2009) (assessing critically the usefulness of principal-agent analysis).

69. See Mattli & Slaughter, *supra* note 67, at 204.

courts as motors of European legal integration, and variations in the use of European litigation strategies.⁷⁰

Despite the wealth of research covering so many aspects of the ECJ's performance, we still note an important gap which might hinder a proper understanding of the Court's rulings in, for instance, LGBT cases. A significant portion of the political science research on the political role of the Court—both from rational institutionalist and other perspectives—starts from a strictly materialist definition of the Court's interests. It assumes that the Court has an “institutional interest in extending the scope of Community law and its authority to interpret it”⁷¹ and to “promote its own prestige and power.”⁷² These assumptions ignore the non-material component of self-interest, and thus do not allow for an interpretation of the ECJ's behavior in the specific light thereof. The non-material or ideological dimension of self-interest stems from the basic identity of the ECJ as a guardian of citizens' rights. As remarked, the Court adheres to “*une certaine idée de l'Europe*.” It thus interpreted, for example, the four freedoms (the core of the internal market) in such a way that they did not only imply strong prohibitions for Member States, but also constituted a source of rights for individuals. Moreover, as illustrated, it extended its own jurisdiction to ensure that individuals were able to assert their rights in a court of law. Departing from the intentions of the founders of the European Union and from rationalist expectations, the ECJ has not behaved first and foremost as an agent of Member State interests—keeping the European Commission and disobedient governments in check—but has served its own interests in terms of guardian of the rights of the “peoples of Europe,”⁷³ the European citizens, even against the interests of their respective governments and national constitutional courts. In the debate among political scientists, this ideological dimension of the Court's behavior has continued to be underestimated. This too marks the importance of our discussion of case law on LGBT rights in the next section.

III. THE CASE OF LGBT RIGHTS

A. LGBT Rights in European and National Context

Only forty years after the founding of the European Communities was the duty to protect fundamental rights inserted in the Treaties. Since 1997, TEU's Article 6 states that the Union shall respect the fundamental rights

70. See Karen J. Alter, *The European Court's Political Power*, 19 W. EUROPEAN POL. 458 (1996); Karen J. Alter & Jeannette Vargas, *Explaining Variation in the Use of European Litigation Strategies: European Community Law and British Gender Equality Policy*, 33 COMP. POL. STUD. 316 (2000).

71. Garrett, Kelemen & Schulz, *supra* note 67, at 155.

72. Mattli & Slaughter, *supra* note 67, at 180.

73. See Mancini & Keeling, *supra* note 47, at 186.

“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.” An explicit reference to sexual orientation was included as well. Based on TFEU’s Article 19, appropriate action may 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 obtaining the consent of the European Parliament. In 2000, the Council adopted the Employment Equality Directive,⁷⁴ which requests Member States to combat direct and indirect discrimination in employment on all TFEU Article 19 grounds. In 2008, the Commission submitted a proposal for a Directive on implementing equal treatment outside the labor market—again for all Article 19 grounds including sexual orientation—but the Council still has not reached agreement on it at the present day and time.⁷⁵ The concept of transgender rights remains completely absent from the EU treaties and EU legislation.

At the national level, the legal position of LGBT individuals differs strongly between the various EU Member States. In five countries, same-sex couples have the right to marry, namely in Belgium, the Netherlands, Portugal, Spain and Sweden. In six more Member States, same-sex couples can have their relationship registered.⁷⁶ Regarding the position of LGBT employees, the bulky report of the European Group of Experts on Combating Sexual Orientation Discrimination⁷⁷ indicated that the implementation of Directive 2000/78/EC showed serious deficiencies. A follow up study pointed out that more specifically the wide scope of

74. Council Directive 2000/78/EC, of 27 November 2000 Establishing a General Framework for Equal Treatment in Employment and Occupation, 2000 O.J. (L303) 16.

75. *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 (July 2, 2008). Following the entry into force of the Lisbon Treaty on December 1, 2009, the Commission has proposed to change the legislative procedure for pending proposals, in this case to replace the consultation procedure by a special legislative procedure where the consent of the European Parliament is required: see *Consequences of the Entry Into Force of the Treaty of Lisbon for Ongoing Interinstitutional Decision-Making Procedures*, COM (2009) 665 final (Dec. 2, 2009).

76. See ROBERT WINTEMUTE, *SEXUAL ORIENTATION AND GENDER IDENTITY DISCRIMINATION: THE CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS AND THE EUROPEAN COURT OF JUSTICE* 1 (2009), available at [www.ilga-europe.org/content/download/9913/58423/file/Council%20of%20Europe%20\(Comm%20for%20HR\)%202009-04-15.doc](http://www.ilga-europe.org/content/download/9913/58423/file/Council%20of%20Europe%20(Comm%20for%20HR)%202009-04-15.doc).

77. See EUROPEAN GRP. OF EXPERTS ON COMBATING SEXUAL ORIENTATION DISCRIMINATION, *COMBATING SEXUAL ORIENTATION DISCRIMINATION IN EMPLOYMENT: LEGISLATION IN FIFTEEN EU MEMBER STATES* 600 (2004) [hereinafter EUROPEAN GRP. OF EXPERTS], available at <http://www.law.leiden.edu/organisation/meijers/research-projects/samesexlaw.html#european-group-of-experts-on-combating-sexual-orientation-discrimination> (last visited May 31, 2010).

exceptions that apply to employers with a particular religious ethos clashes with the general principle of non-discrimination.⁷⁸

Public opinion and the attitude of politicians with regard to lesbians, gays, and transsexuals vary along the Member States as well. Particularly in Eastern and Southeastern Europe (including Italy), homophobia, discrimination, and violence on grounds of sexual orientation constitute serious problems.⁷⁹ Across the board, the attitude towards transsexuals is even more negative than that towards gays and lesbians.

These sharply divergent situations in the Member States restrain the possibilities for the ECJ to review national legislation in the light of TEU's Article 6; after all, it only provides for protection of fundamental freedoms as they "result from the constitutional traditions *common* to the Member States." In addition, the competence of the Union on this issue has been strictly delineated. 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. LGBT rights are perceived to affect "the cornerstone of society," in other words national conceptions of marriage and family.⁸⁰ The ECJ was always much aware that LGBT cases were special: these rulings have always been delivered by a high number of judges (the full court or a "Grand Chamber"), so as to ensure that these reflect the legal traditions of a majority of the Member States.

We will now proceed to the pivotal issue of whether the rulings on gender identity and sexual orientation have truly created new rights and duties, whether the ECJ has acted as more than a mere mouthpiece of Member State wishes or Treaty rules, and whether it thus appears to have engaged in excessive activism.

B. Transgender Rights

To be up front regarding transgender rights, one may answer Part III (A)'s concluding questions in the affirmative. In all three cases that have been decided so far the Court has boldly forged ahead and enhanced the rights of transsexual citizens.

78. *Developing Anti-Discrimination Law in Europe: The 25 EU Member States Compared*, at 43 (July 2007), available at http://www.migpolgroup.com/public/docs/6.DevelopingAntiDiscinEurope_Comparativeanalysis_III_EN_07.07.pdf.

79. See Leigh Philips, *EU Shows East-West Divide on Homophobia*, EU OBSERVER, (Mar. 31, 2009), <http://euobserver.com/9/27881>.

80. How sensitive this topic is becomes clear from the fact that Poland obtained an opt-out from the EU Charter of Fundamental Rights, which was attached as a protocol to the Treaty of Lisbon, for (legally unfounded) fears that ratification of the Charter could force Poland to open up civil marriage to same-sex couples.

The issue in the 1996 case of *P. v. S.*⁸¹ was the dismissal of a British transsexual. In its judgment, the ECJ took an unflinching stance and ruled that discrimination of a person who has undergone a sex change operation equaled discrimination on the ground of belonging to a particular sex, thus stretching the scope of Directive 76/207 on equal treatment for men and women.⁸² The ECJ rejected the view of the British government that dismissal of a transsexual is not a case of sex discrimination, and that the Directive concerned was never meant to cover transsexuals. The Court argued that the intentions behind the Directive were irrelevant, and that the general principle that sex may not play a role in the way in which someone is treated had to take precedence in any case. It thus expanded the notion of sex discrimination in Directive 76/207 so as to include discrimination on the basis of a sex change, and it ruled that tolerating such discrimination would amount to a failure in its duties to respect the dignity and freedom of that person.⁸³ Unsurprisingly, this bold ruling caused quite a stir in the United Kingdom, as the successive Conservative governments were outspoken opponents of new anti-discrimination legislation. Lobby groups for LGBT rights had been working hard to end the political deadlock, but hitherto in vain.

In 2004, the case of *K.B.*⁸⁴ came before the Court. Ms. K.B. claimed that her transsexual female-to-male partner would not be able to lay claim to a survivor's payment because they were not married. They wanted to marry but were legally not entitled to do so, since her husband was registered as a woman and it was impossible to change a person's sex in the British registry of birth—even when a person had undergone gender reassignment surgery. Ms. K.B. challenged the legislation that made it impossible for transsexuals to marry based on their newly acquired sex. The ECJ happily took up the gauntlet and decided to stretch the scope of then-Article 141 of the EC Treaty on equal pay for women and men so that it would also cover discrimination of transsexuals. Pursuant to this ruling—but also due to intense domestic pressure—the British government reversed its course at last, and the British Gender Recognition Act was adopted the same year.

Finally, the case of *Richards*⁸⁵ concerned a British pension fund's refusal to grant a male-to-female transsexual an entitlement to an old age pension before her 65th birthday because the funds considered her to be a man. The British court that referred the issue to the ECJ asked whether this was a case of unlawful discrimination based on Directive 79/7—an instrument seeking

81. Case 13/94, *P. v. S.* & Cornwall Cnty. Council, 1996 E.C.R. I-2143.

82. Council Directive 76/207/EEC, of 9 February 1976 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.

83. See *P. v. S.* & Cornwall Cnty. Council, 1996 E.C.R. I-2143, ¶ 22.

84. Case 117/01, *K.B. v. Nat'l Health Servs. Pensions Agency*, 2004 E.C.R. I-541.

85. Case C-423/04, *Richards v. Sec'y of State for Work & Pensions*, 2006 E.C.R. I-3585.

to combat sex discrimination in social security systems.⁸⁶ The British government argued that the consequences for transsexuals of the differentiation in the British pensions act were irrelevant, yet the Court stated in clear terms that the contrary was true. In the view of the ECJ, this was a case of impermissible discrimination of a male-to-female transsexual who would have been entitled to a pension if she had had the possibility to register as a woman in the national civil registry. Therewith, the improvement of the position of transsexuals in the EU legal order was definitely secured. Coincidentally, all three of the landmark rulings concerned the United Kingdom, but the effects of the Court's rulings resounded throughout the Union. Henceforth, the equal treatment rights and social welfare entitlements of transsexuals had to be recognized in each and every EU Member State.

C. Lesbian and Gay Rights

The story is slightly more complicated with regard to lesbian and gay rights due to the presence of one case which, at first glance, appears to deviate from the general activist trend. We will point out *infra* how and why the overall picture remains consistent nevertheless.

In 1996, the case of *Grant* came before the ECJ.⁸⁷ Lisa Grant argued that her male predecessor had received a yearly travel allowance for his female partner (with whom he co-habited without being married), whereas she had been refused a travel allowance for her female partner. She considered this refusal unfair discrimination on the basis of her sexual orientation; if her partner had been a man, she would have received the allowance.⁸⁸ The Court's advisor, Advocate-General Elmer, agreed with Ms. Grant and referred to the principle in *P. v. S.* that sex may not play a role in the way someone is treated. To the amazement of many,⁸⁹ the ECJ disagreed with its Advocate-General and stated that it saw no possibility to deepen the concept of sex discrimination so as to include discrimination based on sexual orientation. Instead of comparing the unmarried co-habiting Grant with her unmarried cohabiting predecessor, the ECJ compared her situation to that of an imaginary male-male couple, and applied an "equal misery

86. Council Directive 79/7/EEC, of 19 December 1978 on the Progressive Implementation of the Principle of Equal Treatment for Men and Women in Matters of Social Security, 1979 O.J. (L6) 24.

87. Case C-249/96, *Grant v. South-West Trains Ltd.*, 1998 E.C.R. I-621.

88. The argument had been made before in U.S. legal writing. See Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men is Sex Discrimination*, 69 N.Y.U. L. REV. 197 (1994).

89. See, e.g., Paul L. Spackman, *Grant v. South-West Trains: Equality for Same-Sex Partners in the European Community*, 12 AM. U. J. INT'L L. & POL'Y 1063 (1997).

argument;”⁹⁰ both couples would have been treated equally badly, and for that reason, this was not to be considered a case of sex discrimination.

As we shall see, this “deviant case” does not represent a real break with the overall trend; however, it does beg for further explanation. Why did the ECJ choose to default on this excellent occasion to stretch the scope of sex discrimination further and include lesbian and gay rights? A first explanation would point at the potential financial repercussions of such a ruling. It is a fact that the group of persons benefited by *P. v. S.* was much smaller: transsexuals constitute a small minority (in the UK estimated at 2,000 to 5,000 persons), whereas the EU has a gay and lesbian population of some 35 million that could have benefited from a favorable ruling in *Grant*. The British government had sounded the alarm bell that “acute difficulties in relation to employment, pensions and social security” would arise due to the number of court cases that would then start pouring in,⁹¹ and the French government had emphasized the serious repercussions for the French social security systems. In only a few earlier cases had the ECJ taken the potential financial consequences of a ruling into account, but even there it stuck with its decision on principle and only restricted the retroactivity.⁹² In the light of that tradition, and considering its reputation as a staunch defender of citizens’ rights, it would have damaged the Court’s credibility if it would have put economic concerns before fundamental rights here. Consequently, if the cost aspects had been the true reason, the ECJ would have limited its ruling in time, but not in principle.

A second explanation may be that the ECJ favored to leave ethical, moral, and religious issues to be regulated by the Member States, which it had preferred to do before. This argument is far from convincing though, as the Court has equally cut across traditional views—often grounded in religious convictions—on multiple occasions.⁹³

Based on the material and ideological interests of the ECJ, we would like to advance a third explanation for the Court’s reticence. In order to preserve its authority, the ECJ usually avoids stepping on governments’ and constitutional courts’ toes simultaneously. In fundamental human rights cases, it needs some foothold in the constitutions of the Member States, as

90. Christine Denys, *Homosexuality: A Non-issue in Community Law?*, 24 EUR. L. REV. 419, 423 (1999).

91. Mark Bell, *Shifting Conceptions of Sexual Discrimination at the Court of Justice: From P v. S to Grant v. SWT*, 5 EUR. L. J. 63, 76 (1999).

92. See Case 43/75, *Defrenne v. Sabena*, 1976 E.C.R. 455; Case 262/88, *Barber v. Guardian Royal Exch. Assurance Grp.*, 1990 E.C.R. I-1889. In *Defrenne*, the ECJ limited the retro-active effect of the ruling with the argument that negligence of the Commission had misled Member States and companies. In *Barber*, the retro-active effect was restricted to the date that the facts in *Defrenne* had arisen.

93. *E.g.*, concerning the sex of the breadwinner and the repartition of paid and unpaid work in the family see Bell, *supra* note 91, at 77; see also ANNA VAN DER VLEUTEN, *THE PRICE OF GENDER EQUALITY: MEMBER STATES AND GOVERNANCE IN THE EUROPEAN UNION* 130 (2007).

well as some backing from the ECHR, to avoid upsetting them both. In *Grant*, both were lacking. The ECJ observed that there was no consensus among Member States as regards the question of whether stable relations between persons of the same sex were to be considered as equivalent to stable relationships between persons of a different sex. It also observed that the European Convention on Human Rights did not protect these relationships.⁹⁴ The “juge–rapporteur,” who has the task of drawing up the report on the basis of which the Court makes its deliberations, was the Frenchman Jean–Paul Puissechet. He was very much aware of the lack of consensus, exemplified by the then–heated debate in France about gay marriage, and would later qualify the Court’s decision as not “retrograde” but “a scrupulous picture of the state of law at that moment.”⁹⁵ The ECJ could not find a consensus as regards the legal position of same–sex couples based on the constitutional provisions of the Member States in the same way in which, in the 1970s, it inferred a consensus on the basis of the various constitutional provisions on the equal rights of women and men. In *Grant*, the Court concluded that in such circumstances, “it is for the legislature alone to adopt, if appropriate, measures which may affect that position.”⁹⁶ It referred to the newly incorporated provision (with the Treaty of Amsterdam) that enabled for the future adoption of EU legislation that would tackle the discrimination of gays and lesbians.⁹⁷ This seemed a rather skewered reading of that provision however; the reasoning employed seemed to provide the ECJ with exactly the intergovernmental consensus that was said to be lacking. Yet, the provision presented no more than an enabling clause, which would result in enforceable rights only if all Member States would agree (since unanimity was required for the approval of any Directive based on this Treaty article). Therefore, it confirmed the lack of consensus, rather than codifying a new consensual norm regarding sexual orientation.⁹⁸

In all, even though the ECJ passed on the chance to deliver a new, ground–breaking ruling, it did give a clear message with regard to the urgent need of anti–discrimination legislation. This message was captured by Stonewall, the British lobby group for LGBT rights, which considered

94. See *Grant*, 1998 E.C.R. I-621, ¶ 34.

95. Jean–Paul Costa & Jean–Paul Puissechet, *Entretien Croisé des Juges Français*, 96 POUVOIRS: REVUE FRANÇAISE D’ETUDES CONSTITUTIONNELLES ET POLITIQUES 161, 165 (2001) (“Il ne s’agissait pas là d’une prise de position rétrograde mais d’une photographie, se voulant scrupuleuse, de l’état du droit à un moment donné”).

96. See *Grant*, 1998 E.C.R. I-621, ¶ 36.

97. EC Treaty, art. 13 (as in effect 2005; now TFEU, art. 19 (1)).

98. See Kenneth A. Armstrong, *Tales of the Community: Sexual Orientation Discrimination and EC Law*, 20 J. SOC. WELFARE & FAM. L. 455, 461 (1998).

Grant a success because it highlighted how unjust the existing legislation was and led to more mobilization and media coverage than ever before.⁹⁹

In 2001, in the case of *D.*,¹⁰⁰ Mr. Puissechet once again acted as the “juge-rapporteur.” In this case, the Court confirmed its ruling in *Grant*, and did not consider the registered partnership of a Swedish EU-official with his male partner equivalent to a marriage. The case nevertheless represents a step forward, as the Court confirmed its exclusive power to rule on the status of certain relationships. The Swedish, Danish, and Dutch governments argued in vain that their national rules and not the ECJ defined the concept of marriage and exclusively regulate what did and did not constitute a relationship. The ECJ followed its advisor, this time Advocate-General Mischo, who argued that the ECJ could rely on its own previous definitions of relationships. According to Mischo, it would only have to revise its interpretation if a “broad social development” would have changed the situation across the EU—not in a single country—so as to ensure a uniform interpretation throughout the Union.¹⁰¹

Some years later, that momentum had apparently arrived, and the status of same-sex relationships was finally recognized by the Court. In 2007, the aforementioned Directive 2000/78 was put to the test for the first time in the case of *Maruko*.¹⁰² Mr. Tadao Maruko claimed a widower’s pension, but this was refused by the pension fund of German theatres as he and his partner had not been married. The German legislator did not allow for gay and lesbian couples to marry (comparable to the British legislator that did not allow for transsexuals to marry). Nevertheless, Mr. Maruko and his partner had entered into a registered partnership in 2000, immediately after German law had made it possible for them to do so. The ECJ explored the question of whether *Lebenspartnerschaft* and marriage could be considered equivalent—as argued by both the claimant and the European Commission—because similar duties apply to both registered partners and husbands and wives under German law. This same issue had arisen before the German Federal Constitutional Court, when in 2001 several of the German federated states had questioned the compatibility of the law on registered partnerships with the German Constitution (which explicitly protects the concept of marriage). The German government had hoped to avoid such controversy by reserving marriage exclusively for different-sex couples and the registered partnership exclusively for same-sex unions. The Federal Constitutional Court confirmed the position of the federal

99. See Lisa Vanhala, *Anti-Discrimination Policy Actors and Their Use of Litigation Strategies: The Influence of Identity Politics*, 16 J. EUR. PUB. POL’Y 738, 751 (2009).

100. Joined Cases C-122/99 P & C-125/99 P, *D. & Kingdom of Swed. v. Council*, 2001 E.C.R. I-4319.

101. Joined Cases 122/99 P & C-125/99 P, *D & Swed. v. Council*, 2001 E.C.R. I-4319, ¶¶ 42-44.

102. Case C-267/06, *Tadao Maruko v. Versorgungsanstalt der deutschen Bühnen*, 1998 E.C.R. I-1757.

government, and ruled that the law did not violate the constitutional protection of marriage and family, as long as same-sex partnerships were not called marriage. In 2004, pursuant to a perceived greater social acceptance of same-sex unions among the German population, the law on registered partnerships was revised and the rights conferred were expanded.¹⁰³ In that same year, *Maruko* came before the European Court of Justice.

In essence, the central question in *Maruko* was whether one may regard it a case of unfair discrimination if same-sex couples do not possess rights they could only acquire if they would marry, when they were legally permitted not to do. The Court ruled that if a surviving partner in a comparable situation as a surviving spouse was treated differently, then this had indeed to be qualified as a case of direct discrimination; but that it was up to the referring national court to decide whether the surviving partner was truly in a comparable situation with a surviving spouse.¹⁰⁴ In November 2007, the German Federal Administrative Court decided that marriage and registered partnership were not similar, and that the German legislator had wanted them to be different. One month after the ruling of the ECJ, in a similar case as *Maruko*, it became clear that the Federal Constitutional Court held this opinion as well.¹⁰⁵ It confined the question of “whether there was similarity” to “whether there was equality”—which it answered in the negative. It stated that the entitlement to benefits, bonuses, and maintenance allowances in a marriage is based upon the reality that one spouse has less earning capacity because this spouse has to take care of the children, while a similar situation does not exist for same-sex couples.¹⁰⁶ However, the administrative court in Munich that had originally referred *Maruko* to the ECJ did not follow the ruling of the Federal Constitutional Court but that of the ECJ, and stated that—given the evolution of German legislation—surviving spouses and registered partners found themselves in a comparable situation with regard to survivor’s pensions. Consequently, on October 30th, 2008, it decided that Mr. Maruko was entitled to a surviving spouse allowance.¹⁰⁷

103. See Kelly Kollman, *European Institutions, Transnational Networks and National Same-Sex Unions Policy: When Soft Law Hits Harder*, 15 CONTEMP. POL. 37, 47 (2009).

104. In previous lawsuits, German courts had taken different views as regards comparability; mostly the duties had been considered comparable, but not the claims to payments. See EUROPEAN GRP. OF EXPERTS, *supra* note 77, at 211.

105. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], May 6, 2008, 1830/06, available at http://www.bverfg.de/entscheidungen/rk20080506_2bvr183006.html.

106. This reasoning is unconvincing because payments, bonuses, and maintenance allowances are granted to married couples regardless of whether they have children, while same-sex couples with children are not entitled to receive them.

107. Bayerisches Verwaltungsgericht [VG] [Bavarian Administrative Trial Court], Oct. 30, 2008, M12K 08.1484, available at http://www.slpn.de/fileadmin/user_upload/Downloads/BMF-Schreiben_Urteile/VG_Muenchen20081030.pdf.

In *Maruko*, the ECJ delivered a far-reaching judgment. It clearly wanted to avoid being accused of developing European rules on marriage (something the British government had warned against in its observations). When Directive 2000/78 was negotiated, several Member States had pled successfully for the insertion of a recital stating that the Directive “is without prejudice to national laws on marital status and the benefits dependent thereon.”¹⁰⁸ The insertion of this recital provoked strong reactions from interest groups as well as from the European Commission, who feared that all sorts of rules that benefit married couples would remain permanently out of reach for same-sex couples. In *Maruko*, the Member States found out that the recital protected marriage legislation far less than they had thought.¹⁰⁹ In fact, the ECJ ruled that the Member States are competent regarding marital issues, but that they have to exercise this competence within the boundaries of EU law—especially within the boundaries of the non-discrimination provisions—including those relating to sexual orientation. Admittedly, the ECJ did restrict the scope of its ruling by labeling *Maruko* as a case of direct discrimination, whereas it in fact constituted a case of indirect discrimination (the unequal treatment was based on the in-itself neutral distinction between marriage and partnership). However, the ECJ magisterially put unequal treatment of a registered partnership on par with unequal treatment based on sexual orientation. It was able to do so because in Germany only same-sex couples are allowed to enter into a registered partnership. By consequence, *Maruko* exerts a maximum effect only in those countries that know a legal regime for such partnerships that is largely similar to marriage.¹¹⁰ So, while strengthening citizens’ rights, the ECJ did display some respect for the constitutional differences between the Member States regarding same-sex relations. All the same, it is expected that in Germany—as well as in all other Member States that know registered partnerships for same-sex couples—more cases will be coming up and be referred to the ECJ. Thus, although the saga is not fully complete yet, lesbian and gay rights in the EU have been vastly enhanced.

108. Council Directive 2000/78/EC, 2000 O.J. (L303) 16, § 22.

109. See Christa Tobler & Kees Waaldijk, *Case C-267/06, Tadao Maruko v. Versorgungsanstalt der deutschen Bühnen, Judgement of the Grand Chamber of the Court of Justice of 1 April, 2008, Not Yet Reported*, 46 COMMON MKT. L. REV. 723, 734 (2009).

110. Which entails that, for example in Poland—where same-sex relationships currently have no legal status at all—*Maruko* does not confer any new rights upon LGBT individuals. See Katharina Boele-Woelki, *The Legal Recognition of Same-Sex Relationships Within the European Union*, 82 TUL. L. REV. 1949 (2008) (providing an overview of national rules and practices of EU Member States as regards the recognition of same-sex relationships). An insightful comparison between free movement of same-sex couples in the EU and in the U.S. is drawn by Adam Weiss, *Federalism and the Gay Family: Free Movement of Same-Sex Couples in the United States and the European Union*, 41 COLUM. J.L. & SOC. PROBS. 81 (2007).

IV. CONCLUSION

From four decades of case law countless examples can be drawn that underscore the consciously political role of the European Court of Justice. Even so, in EU legal doctrine this fact has still not been commonly acknowledged, and searching critical comments remain rare. A pro-integration sentiment appears to hold sway in the literature just as much as among the judges at the Court itself. The orthodox view remains that the ECJ has always interpreted the rules with prudence and in good faith, and that supposedly novel doctrines chime rather nicely with the general system. Thus, the majority of scholars insist that the overall behavior of the Court cannot be called into question and deny that it ever truly engaged in activism. The debate in political science stands in marked contrast, yet even there a substantial number of authors maintain that the Court—if not dancing to the piping of the Member States—can at least be considered a loyal agent that will never structurally move against their interests. Also, they content themselves with charting the process and developing theories and explanations without posing normative questions or stressing the problematic side of this political jurisprudence. Unfortunately, due to the reality of the ever-greater barriers between different academic disciplines, it appears unlikely that the slowly emerging consensus in political science regarding the pivotal role of the Court will be spilling over to legal doctrine anytime soon. All the same, to those who continue to doubt the validity of the evidence, we would suggest taking a closer look at the various installments in the saga of LGBT rights, which—in our view—clearly demonstrate how the ECJ has managed to slide into place as an autonomous norm-setter that awarded more rights and benefits to lesbian, gay, and transgender persons than their national governments have been willing to grant them.

To an American audience, the whole issue might appear to be rather hackneyed. After all, the discussion on judicial activism in the U.S. Supreme Court is almost as old as that venerable institution itself. But, one should keep in mind here the notion that “all judges play a political role to a certain extent” is a much more commonly acknowledged idea in the U.S. than it is in Europe.¹¹¹ Moreover, judicial activism is probably much less remarkable in unitary states and federations, but the EU is still an international organization, albeit one that—as remarked in our introduction—displays a curious mix of supranational and intergovernmental elements. The main difficulty one should have with

111. Equivalents of, for example, RICHARD NEELY, *HOW COURTS GOVERN AMERICA* (1981) or ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* (1997) have never been published on the other side of the Atlantic.

judicial activism lies in the famous “countermajoritarian problem,”¹¹² which poses a comparatively greater problem in the European Union than in the United States for example. The legitimacy of the ECJ is much weaker than that of a supreme court or constitutional court in a federal or unitary state to begin with—as there exists no homogeneous body politic, no “European people” in the same way that there is an “American people” on whose shared values the Court may rely when it churns out ground-breaking case law. In comparison, *Lawrence v. Texas*¹¹³ was without doubt a landmark ruling in the U.S. on both the federal level and for the individual states. But, for the twenty-seven Member States of the EU—which retain a much higher degree of sovereignty *vis-à-vis* their Union—the impact of cases such as *P. v. S.* and *Maruko* was considerably greater. True, the ECJ and the U.S. Supreme Court face the same difficulty in having to find the correct balance in shaping and molding constitutional rules in a centrifugal or centripetal way. Yet the European experiment appears the more remarkable, since it involves a dispute settlement body of an international organization forging ahead and managing to secure the competence for calling the shots all by itself.¹¹⁴ The European Court of Justice has assumed the role of a federal constitutional court, although the EU lacks a constitution and is neither a federation nor likely to become one on short notice. Even if a certain measure of judicial activism has proven to be inevitable in any modern legal system where legislators simply cannot regulate all matters exhaustively, there still seems to be cause for concern where a court engages in bouts of *excessive* activism, which is precisely where the shoe pinches with regard to the ECJ.¹¹⁵

It might be tempting to think that the EU’s top judges must ultimately have enjoyed the support of a majority of Member States, for otherwise it would have experienced a political backlash and court-curbing initiatives would have been deployed long ago already. The great failing in this line of reasoning lies in the fact that it takes little account of the complexity of the Treaties’ amendment regime. In accordance with TEU’s Article 48, the Treaties can only be amended when all the Member States agree to this, and

112. The classic term coined by ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 18 (1962).

113. 539 U.S. 558 (2003).

114. The textual assertion is made with all due respect for the audacious move of the U.S. Supreme Court in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) (establishing judicial review). For an interesting comparison between this case and the decision of the ECJ in *Van Gend & Loos*, see Daniel Halberstam, *Constitutionalism and Pluralism in Marbury and Van Gend*, in *THE PAST AND THE FUTURE OF EU LAW: REVISITING THE CLASSICS ON THE 50TH ANNIVERSARY OF THE ROME TREATY* 26 (Miguel Poiaras Maduro & Loïc Azoulai eds., 2008).

115. An attempt to convey this message to a Dutch-language readership, emphasizing the important distinction between (acceptable) activism and (unacceptable) excessive activism was made in HENRI DE WAELE, *RECHTERLIJK ACTIVISME EN HET EUROPEES HOF VAN JUSTITIE* (2009).

any amendments can only take effect when all Member States have ratified them in accordance with their national constitutional provisions. Thus, if a judgment of the ECJ interprets a Treaty rule in an awkward or misguided way, unanimity is required among the Member States in order to reverse it: one lone dissenting voice is enough to uphold the unwanted judgment and the eventual undesired consequences thereof.¹¹⁶ So, normally unanimity is required to change the Treaties, but if the Court through its verdict *materially* amends them, unanimity is required to reverse this. Moreover, due to the fact that every Member State needs to ratify an amendment reversing a Court judgment successfully, and considering that the EU has been absorbing numerous new members in the past decade (a process likely to continue in the coming years), it appears increasingly unlikely that the Treaties will be amended again in the foreseeable future.¹¹⁷ This guarantees the failure of any attempts at Court-curbing initiatives since the necessary consensus among the Member States will be nearly impossible to attain.

Finally, one could riposte that since our evidence amounts to only a small number of cases, there surely can be no question of such a higher and more objectionable form of activism. After all, the Court annually decides hundreds of cases, where we have demonstrated that it has gone beyond the limits of its judicial task in only a handful of rulings at most. A similar

116. Secondary EU law can be adopted by a qualified majority of the Council of Ministers. However, due to the hierarchy of norms, such rules are of little use when the desire is to counter unwelcome ECJ interpretations of primary law (the Treaties). Moreover, the Commission would have to propose such measures, Parliament would have to approve as well, and the attainment of even a qualified majority can still prove rather difficult. The hardships recently experienced in the attempted adoption of a new Working Time Directive, necessitated by the Court's judgment in Case C-151/02, *Landeshauptstadt Kiel v. Norbert Jaeger*, 2003 E.C.R. I-8389, illustrate the general point (no agreement on a new Directive could so far be reached). See also Karen J. Alter, *Who Are the "Masters of the Treaty"?: European Governments and the European Court of Justice*, 52 INT'L ORG., 121, 136 (1998) ("EC law based on regulations or directives can be rewritten by a simple statute that, depending on the nature of the statute, requires unanimity or qualified majority consent. A few of the Court's interpretations have been rewritten in light of their decisions, though surprisingly few. This is because ECJ decisions usually affect member states differently, so there is not a coalition of support to change the disputed legislation.").

117. See Martin Shapiro, *The European Court of Justice*, in THE EVOLUTION OF EU LAW 321, 332 (Paul Craig & Gráinne de Búrca eds., 1999) ("Those who have the power to destroy or cripple institutions will only do so if the marginal gains exceed the marginal costs of doing so. At any given moment the potential costs in disturbance to the Community institutions as a whole entailed by moving against the Court were likely to appear to each Member State to far outweigh the particular costs being imposed on it by the Court at the moment. Only if the Court had conducted itself in such a way as to suggest that it would act consistently case-by-case to pile up greater and greater costs against one member or set of members would the cost benefit calculus of some members have turned against it . . . The ECJ's case-by-case method of decision-making both made it difficult for any Member State to anticipate whether its long-term losses from the Court would be greater than its long-term gains and allowed the Court constantly to tinker with its cost-benefit yields to each member so as to avoid any of them concluding that it is clearly worth initiating decisive action against the Court.").

argument has cropped up in every single debate among legal scholars.¹¹⁸ By way of rebuttal, we are inclined to quote Ovid's maxim that "the drop hollows out the stone by frequent dropping."¹¹⁹ Also, one may draw a crude analogy with a physician who—in alternation—heals and kills patients; the killing does not become any more acceptable or soothing because there are many more instances of healing. Thus, judgments in which the ECJ has been excessively activist, in which clear and unequivocal rules have been extremely bent or stretched, remain *eo ipso* reprehensible, even if they make up only a small minority of all decided cases overall. Moreover, as said, the fact that the Court dared to engage in activism in this politically sensitive domain—where the Member States deliberately refrained from transferring their sovereign legislative competencies—is in itself most telling, and to our mind forms an excellent illustration of its general posture.

To be sure, our aim has been to increase the awareness of the political role of the European Court of Justice, and we sought to furnish irrefutable proof in the form of the case law on LGBT rights. We would not venture to suggest that the Court never exercises restraint. Yet, it should be admitted that whenever it does so it often makes up for that by taking two steps forward in a later case.¹²⁰ Perhaps the deference displayed in *Grant* may be best understood against this background. Therefore—to our mind—the case law on LGBT rights fits the general bill perfectly: the rulings discussed showcase the Court's propensity to assume the role of a steadfast promoter of European integration to all those who—up until now—were completely unaware of it. Furthermore, they offer conclusive evidence to those who failed to grasp the nettle so far, refused to do so, or needed just a little bit more convincing.

118. See, e.g., Tridimas, *supra* note 59, at 200; Albors Llorens, *supra* note 60, at 398.

119. OVID, *EPISTULAE EX PONTO*, IV, 10, 1.5 ("Gutta cavat lapidem [non vi sed saepe cadendo.]") (alteration in original) (Henri de Waele & Anna van der Vleuten trans., 2011).

120. Also, a novel doctrine or extreme interpretations is often introduced in a subtle and gradual way: in early cases, it is pronounced, but it may not (yet) be applied, and subjected to various conditions. Then, in a later case, it will nonetheless be relied upon as an established precedent, and the earlier qualifications are eventually diluted or erased. This strategy has been observed and criticised in Garrett, Keleman & Schulz, *supra* note 67, at 158; STEPHEN WEATHERILL & PAUL BEAUMONT, *EU LAW* 196 (1999); TREVOR C. HARTLEY, *THE FOUNDATIONS OF EUROPEAN COMMUNITY LAW* 81–82 (5th ed. 2003).