

## Legal Reasoning of the Court of Justice in the Context of the Principle of Equality Between Judicial Activism and Self-restraint

By Oreste Pollicino\*

*“Those with a taste for fairy tales seem to have thought that in some Aladdin’s cave there is hidden the Community law in its splendour and that on a judge’s appointment there descends on him knowledge of the magic words Open Sesame. Bad decisions are given when the judge has muddled the password and the wrong door opens. But we do not believe in fairy tales any more.”<sup>1</sup>*

### A. Introduction

The law-making function of judges in general, and more specifically of the judges of the Court of Justice, was and continues not only to provoke debates and confrontations between different doctrinal opinions, but also to act as a battleground for opposing ideologies regarding the functions, powers and limits of the judiciary in our society. The issues involved are by nature trans-sectorial, (with aspects of a legal, social, economical and political nature), and thus cannot be restricted to a single field of inquiry. The difficulty of this subject would have made a general approach presumptuous. I thus preferred to restrict my study to an analysis of some of the decisions made by the Court of Justice regarding the principle of sex equality. This is a field of inquiry which is particularly suitable for identifying the decisional techniques of the Court, as well as for understanding the concepts of judicial activism and self-restraint and their respective limits. Such an analysis requires that we place our conclusions in the context of a general framework, and establish parameters to help us recognize a creative decision and evaluate its outcome.

The first part will deal with the following issues: underlining what I consider the real meaning and extent of a judge’s power, with particular emphasis on the spe-

---

\* Master in European law, Bologna University; LLM in European law ,College of Europe, Bruges; PhD in Constitutional law, Milan University; Lecturer in Public law, Bocconi University, Milan.

<sup>1</sup> Lord Reid, *The Judge as Law Maker*, 12 JOURN .SOC. PUB TEACH LAW 22 (1972).

cific role of the European Court of Justice, and identifying and evaluating law-making judicial operations.

In the second part, in the light of the framework and the criteria outlined in the first part, I will focus my analysis on three paradigmatic cases in the context of the principle of equality in order to apply in practice the theoretical conclusions reached in the first chapter.

The third and concluding part will tackle the problem of the present and future constitutional features of the European Judicature, examining if and to what extent the Court of Justice acts as a Constitutional Adjudicator.

#### B. Examining the Law-making Function of the Courts in General and of the European Court of Justice in Particular

Ever since the creation of the European Community, the Court of Justice has not simply been a group of judges with expertise in European law, but has represented one of the real driving forces of European integration. In other words, if today there exists something called E.C. law, with its own particular features, characteristics, and issues, all this is due to the Court's work. As, in a well known piece, Stein wrote of it, "tucked away in the fairyland Duchy of Luxemburg 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."<sup>2</sup> The masterpiece of the European Court has been the "constitutionalisation" of the Treaties, which, by nature, are sources of international law.

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 Court has had to pay the price of no longer being subject to 'benign neglect' but becoming, on the contrary, the target of harsh accusations and the

---

<sup>2</sup> E. Stein, *Lawyers, Judges and the Making of a Transnational Constitution*, A. J. INTN'L L. 1 (1981).

<sup>2</sup> H. RASMUSSEN, ON LAW AND POLICY IN THE EUROPEAN COURT OF JUSTICE (Martinus Nijolf ed., Copenhagen 1986); H. Rasmussen, *Between Self restraint and Activism: A Judicial Policy for the European Court*, 13 EUR. L. REV. 28 (1988); P. Neill, *The European Court of Justice: a Case Study in Judicial Activism*, 218, Intergovernmental Conference, Minutes of Evidence, House of Lords 1996.

beneficiary of valiant defences for the way in which it has interpreted its judicial function.<sup>3</sup>

I do not intend to deal directly with the legitimacy of the Court's role. Rather, I would like to examine the relations, first in a general context and then in a Community framework, between the scope of judicial functions and the necessity of judicial creativity. By adopting this approach it will be possible to better understand the peculiarity of the European judiciary and its importance in the process of European integration.

After having examined the various options highlighting the nature and essential features of judicial activism, so widely studied and discussed by legal scholars, I shall apply the "*a contrario*" method. In following this approach I will try to underline what law making is not, in order to eliminate possible misunderstandings and misleading definitions, and thus allow the authentic nature of law making to emerge.

In particular, I will contest the validity of three assertions that are frequently brought up in the debate on this issue. These assertions, which, if taken seriously, prevent us from realising the essence of judicial law-making power, are:

- 1) Such power is not implicit in the judicial function, but is a degeneration of it.
- 2) Judicial law-making power is tantamount to legislation
- 3) Judicial law-making power is an exclusive pro-integration decisions prerogative and does not concern situations where the Court of Justice adopts an approach of self-restraint.

I shall review each of these definitions in turn.

### **I. Judicial Law-making: Degeneration or Expression of Judicial Functions**

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

---

<sup>3</sup> J.H.H. Weiler, *The Court of Justice on Trial*, 24 COMMON MARKET L. REV. 555 (1981); M. Cappelletti, *Is the European Court of Justice Running Wild?*, 12 EUR. L. REV. 3 (1987); M. Cappelletti, *The Law-Making Power of the Judges and its Limits*, M. U. L. REV. 15 (1981); D. Keeleng, *In Praise of Judicial Activism, but What Does It Mean? And Has the European Court of Justice ever Practiced It?*, in SCRITTI IN ONORE DI G.F. MANCINI, 505 (Curti Gialdino ed., Milano 1998); T. Tridimas, *The European Court of Justice and Judicial Activism*, 21 EUR. L. REV. 199 (1996); G.F. Mancini, *Attivismo e Autocontrollo nella Giurisprudenza della Corte di Giustizia*, RDE 229 (1990); Lord Slynn of Hadley, *What is a European Community Judge?*, 52 C.L.J. 234 (1993).

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 spokesman of the law. This concept confirms the idea that by purely deductive logic the judge could ascertain the law without personal responsibility or creative means.

By contrast, it must be underlined that judicial function involves *per se* not only the interpretation of law but also its creation. If one accepts this fundamental observation, there is no clear distinction between legal analysis or interpretation on the one hand and judicial law-making on the other. In fact both of them, far from belonging to different spheres, the former legal and the latter political, fall within the boundaries of legitimate judicial function.

The conclusion that law-making is *per se* part of judicial functions allows us to reconsider the current debate and try, instead of explaining law-making decisions as a shift from law and towards politics, to find an explanation inside the *legal system*<sup>4</sup> itself.

It might be interesting, firstly, to briefly examine the reasons for the birth and expansion of the creative role of judicial interpretation in general, and, secondly, the specificity of European judicial activism.

#### 1. *Reasons behind the creative role of judicial interpretation.*

Awareness of the potential creativity within the judicial function has been heightened by two main factors: a different approach to the method of interpretation and the radical transformation of the role of law and government in modern "welfare" societies.

The new interpretative approach was called the "revolt against formalism,"<sup>5</sup> and it is characterised by two innovative elements, which both display elements of judicial creativity: the method of systematic interpretation and the relevance of the

---

<sup>4</sup> This concept has been elaborated by Authors influenced by F. Geny. According to this view, deciding a case cannot merely consist of subsuming certain facts under a pre-existing rule of law; the decision itself will add to the interpretation of the rule to be applied, and may thus help to define its meaning.

<sup>5</sup> This expression tended to accentuate the element of pure and mechanical logic in judicial decision making, while neglecting, or concealing, the voluntaristic, discretionary, element of choice.

In France, where the reaction against formalism started, the spokesman of the new generation of lawyers was Geny. He embodied the reaction of legal theory against the excessive legalism of the post-codification era.

choice element for the judges. According to the former, when applying a given legal rule, one cannot disregard the position of that rule in the overall context of the applicable rules and the impact these rules will have on human conduct in society. "The interpretation of the rule should, therefore, not only be guided by textual and historical arguments: elements of the system and of purpose will have to come at play. These elements can be found by consulting tradition, case law and literature, and by rethinking the cohesion of the different chapters of the legal system."<sup>6</sup> The second element characterizing the new interpretative approach is the discovery of the importance of choice in the judicial process. Choice means discretion, evaluation and balancing; it means giving consideration to the choice's practical and moral results; and it means employment of not only the arguments of abstract logic, but those of economics and politics, ethics, sociology and psychology.<sup>7</sup>

With regard to the radical transformation of the role of law and government in modern "welfare" societies, it is not the right place to discuss the reasons for and effects of this transformation. What is relevant for us is that the significant growth of State intervention in fields previously left to private self-regulation has led to a corresponding increase in judicial activity. In particular, the *Welfare State*, by nature, cannot simply exercise a traditional repressive function, but must, on the contrary, ensure active protection for citizens. Such a policy involves planning for future development, 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 encourages judges' creativity and freedom of choice.

## 2. *The specific need for judicial creativity in the European Legal System.*

In addition to the reasons which determine the judges' general inclination towards law-making, there are, in the European context, particular explanations which emphasize the law-making attitude of the Court of Justice. The two main reasons are the European institutional framework and the Treaties' language and nature.

With regard to the former, it must be underlined that, because of the need for unanimity, the legislative process has often been characterised by total or partial iner-

---

<sup>6</sup> T. Koopmans, *The Theory of Interpretation and The Court of Justice*, in *LIBER AMICORUM IN HONOUR OF LORD SLYNN OF HADLEY* (D. O'Keefe & A. Bavasso eds., 2000), Vol. I, *JUD. REV. IN EUR. UNION L.*, *KLUWER L. INT'L* 48 (2000).

<sup>7</sup> See M. Cappelletti, *supra*, note 2, at 22. The importance of choice in judicial process is accentuated by the willingness of political branches of governments to pass responsibility for difficult decision to the judiciary.

tia. The Court of Justice has the role of filling the void left by the legislative branch. As Kutscher has explained, the inactivity of the legislature compels 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. The ECJ refers to the aims of the Community and to general principles of EC law, and Community judges sometimes find themselves compelled to interpret from the standpoint of the existential necessities of the Communities and ensure the maintenance of their capacity to function.<sup>8</sup> 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.<sup>9</sup>

In relation to the second reason, the nature of the Treaties encourages creative law making. 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. In the second place, 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 considerations."<sup>10</sup>

Another consideration, often underestimated, that explains the necessity for creative European jurisprudence, is the attempt by the Court, in the context of Article 234 EC, not to send away the litigant or the national judge without an answer, in order to avoid a denial of justice. Thus the Court of Justice may, at times, have the task of providing "a creative answer to questions where there is no obvious answer."<sup>11</sup>

---

<sup>8</sup> H. KUTSCHER, *METHODS OF INTERPRETATION AS SEEN BY A JUDGE OF THE COURT OF JUSTICE* 2, sect 6(a).2 (Luxemburg 1976).

<sup>9</sup> T. KOOPMANS, *The Roots of Judicial Activism*, in *PROTECTING HUMAN RIGHTS: THE EUROPEAN DIMENSION, STUDIES IN HONOUR OF GERARD J. WIARDA* 327 (Mather & H. Petzold eds., 1988).

<sup>10</sup> D.T. KEELING, *supra* note 3, at 510, where the Author uses the example of the construction of Article 28CE.

<sup>11</sup> *Id.* at 512.

Thirdly, the multilingual nature of E.C. law must be taken into consideration, which implies that the expressions contained in the Treaties are beset by the difficulties involved in expressing their meaning in various linguistic versions.

The favourite method of interpretation utilised by the Court is the teleological method, 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 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."<sup>12</sup>

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 adapt the original meaning of the Treaty dispositions 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, on the one hand, the Member States and the European institutions have left their final intention open and obscure; on the other, these objectives obviously cannot be the result of the political opinions of ECJ members, which, of course, may differ. The most objective guidelines are to be found in the European legal system itself and above all in the preamble of the EC Treaty (hereinafter the 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, 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.

---

<sup>12</sup> Case 283/ 81, *Cilfit v. Italian Ministry of Health*, 1982 E.C.R. 3415, 3430.

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.<sup>13</sup> These unwritten principles<sup>14</sup> extrapolated by the Court of Justice from the laws of the Member 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."<sup>15</sup>

According to all the considerations mentioned above, it is clear that this method of decision-making, which often leads to creative operations by the Court, is not a degeneration but a natural implication of the European legal system, and consequently remains inside the lawful scope of judiciary functions without spilling over into the political arena. As was rightly stressed, European judicial activism, intended as law creation, is greatly different from the same term used in the U.S. In particular, the judges of the Court of Justice decide according to legal criteria even if they sometimes have to define for themselves which rules they apply. Their task is not to form the political reality or to change the conditions of life following their own ideas, even if their judgement often has far-reaching political consequences.<sup>16</sup>

If this method of decision-making, as affirmed before, is a physiological expression of European jurisprudence and not a political degeneration of it, it is possible to consider the law making process from another point of view. Instead of explaining the activist cases as a move from law to politics, we could find an explanation inside the legal system itself, in which there is no fixed line dividing law from politics, but where the *telos* determining the teleological interpretation of the Court includes political, social, and economic elements as part of that process of integration which remains the main task of the Community action.

## II. Judicial Law-making and Legislation

It has often been affirmed that, by exercising a creative role, judges in fact exercise a legislative power.<sup>17</sup> But are the courts by their very nature compelled to act as legis-

---

<sup>13</sup> See, U. Everling, *On The Judge-Made Law of the European Community's Courts*, *supra* note 6, at 38.

<sup>14</sup> In this context, T. 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*". See T. TRIDIMAS, *THE GENERAL PRINCIPLES OF EC LAW* 4 (Oxford 1999).

<sup>15</sup> TRIDIMAS, *supra* note 14, at 4.

<sup>16</sup> See, EVERLING, *supra* note 13, at 28.

<sup>17</sup> See, Sir K. Diplock, *The Courts as Legislators*, in *THE LAWYER AND JUSTICE* 263 (B.W. Harvey ed., London 1978).

lators? It should be pointed out that just because the judges are, as we have seen, by their very nature compelled to make law, this does not mean that they act as legislators.

The essential differences between the judicial and legislative process are in terms of procedure.<sup>18</sup> In particular, they are represented by the basic rules of natural justice laid down in the three ancient aphorisms: 1) *Nemo Iudex in causa propria*; 2) *Audiat et altera pars*; 3) *Ubi non est actio ibi non est iurisdictio*. The first rule requires the judge to be impartial and therefore not to decide in cases in which he has any personal interest, nor should he be subjected to pressure by the interested parties. The second rule requires that all the parties be given a fair opportunity to be heard by an impartial judge. The third rule expresses the passivity of the Courts, according to which the judicial process is not set in motion by the court on its own initiative, but requires a claimant or plaintiff to be initiated.<sup>19</sup>

These are the main differences dividing the judicial process from the legislative one, which, at the same time, represent, on the one hand, the basic limits of the judicial process, and on the other its formidable and unique strength.

### III. Judicial Creativity and Self-restraint

The third commonly-held view, which I consider as inconsistent with a comprehensive analysis of the judicial law-making process, is the idea that judicial creativity should only be present in activist or pro-integration decisions and not in those cases where the Court decides to remain within the boundaries of its case law. By contrast, in some of those situations, where the facts are such as to merit a departure from consolidated precedent, the Court manipulates the factual or legal premises of the case in order to avoid such a departure and remain consistent with precedent.<sup>20</sup>

---

<sup>18</sup> See, M. Cappelletti, *supra* note 3, at 43.

<sup>19</sup> It must be emphasized, in this context, a main difference, between the European Courts, particularly the European Court of Justice, where the jurisdiction is mandatory and the US Supreme Court, where most cases come to it by the procedure known as *certiorari* and over 95 per cent of these cases are dismissed without any review because they are considered as raising no issue of general importance nor representing major injustice. Thus, "the Washington Justices have the inestimable privilege of being able to decide what to decide." See G. F. Mancini, *The US Supreme Court and the European Court of Justice*, in *LEGAL ASPECTS OF INTEGRATION IN THE EUROPEAN UNION 3* (Emiliou & D. O'Keefe eds., London 1997). It must also be underlined, as brilliantly noted by D. O'Keefe, that the European Court of Justice is sometimes able to reach the same result by using the notion of inadmissibility under article 234. See D. O'Keefe, *Is the Spirit of Article 177 Under Attack? Preliminary Reference and Admissibility*, 23 *EUR. L. REV.* 509 (1998).

<sup>20</sup> A clear exemplification of this attitude is given by the obstinacy of the Court to apply the mandatory requirements doctrine only to indistinctly applicable measures, often manipulating the configuration of

The Court may also decide to reinterpret a previous active judgement in a creative and restrictive manner, allowing it to adopt, in the case under examination, a self-restraint approach. This is a topic I will examine in my case analysis. I refer, in particular, to the scope of application of *P v. S*<sup>21</sup> judgement that the Court delivered in *Grant*.<sup>22</sup>

Following this *a contrario* reasoning, we may conclude that judicial law-making in general, and European judicial creativity in particular is a necessary implication of the judiciary function, very different from legislative power and present not only in activist judgments but also in the Court's approach to self-restraint.

### C. A Case Law Analysis

#### I. In search of test criteria for the evaluation of activism

After having analysed the main characteristics of the judicial law-making in the first part, we now need to focus on how the judicial creativity of the Court of Justice has contributed to the evolution of EC sexequality law. Before embarking on a selective case analysis in this field, it would be convenient to establish methodological guidelines in order to identify and evaluate creative judgments.

I propose to consider first of all the political institutional context as the relevant background for the Court's activity. I will go on to examine the new elements found in certain cases which placed them beyond the bounds of previous case law. Thirdly, I will examine the Court's ruling and the legal reasoning supporting the decision taken, in particular underlining how through the use of teleological interpretation and the general principles of EC law, the Court is able to manipulate, with a high degree of judicial creativity, the articles of the EC Treaty (hereinafter the Treaty), the EC legislation and its own previous jurisprudence. Finally, I will try to understand why, when faced with a number of possible solutions, the Court chose the one it did.

---

the facts of the case, transforming a clearly discriminating measure into an indistinctly applicable measure in order to be able to justify it on the grounds of the mandatory requirement. See J. Bengoetxea, et al., *Integration and Integrity in Legal Reasoning of the European Court of Justice*, in THE EUROPEAN COURT OF JUSTICE 73 (G. De Burca & J.H.H. Wailer eds., Oxford 2001).

<sup>21</sup> Case 13/94, *P v. S and Cornwall County Council*, 1996 E.C.R. I-2143.

<sup>22</sup> C-249/96, *Grant v. South West Trains Ltd*, 1998 E.C.R. I-621.

It must be clarified that this is not intended as an exhaustive commentary of the cases, which will be analysed only for their relevance to my investigation of the judicial law-making approach of the Court.

The first part of my analysis will focus on *Defrenne 2*,<sup>23</sup> where activism and self-restraint are combined in an absolutely original approach. In the second part, I will attempt to compare *P v. S*<sup>24</sup> and *Grant*,<sup>25</sup> rulings which deal with the issue of sex discrimination.

## II. *Defrenne and the Manipulation of Article 141*

### 1. *The European political context.*

It is important to define the period in which the judgement was issued. In the mid-1970s, the driving force of European integration was the Court of Justice. It had already shown its capacity to *constitutionalise* the Treaty by applying for the first time the direct effect doctrine in *Van Gend en Loos*<sup>26</sup> and by introducing the concept of supremacy in *Costa and Enel*.<sup>27</sup> While the Court was busy with this difficult task, at the legislative level the Member States were unable to find an alternative solution to the constant rule of unanimity, causing a period of legislative inertia. All the expectations for the evolution of EC law were focused on the creativity of the Court of Justice.

### 2. *Factual background and novelty of the legal situation.*

Ms Defrenne, who worked as an air hostess for the Societè Anonyme Belge de Navigation Arienne (hereinafter, Sabena) was a victim of clear sex discrimination. In fact, she was paid less than the male member of the air crew performing identical duties. There is an explicit provision of the Treaty, Article 141 (ex 119) (hereinafter Article 141) that prohibits this kind of discrimination, stating that "each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied."

---

<sup>23</sup> Case 43/75, *Defrenne v Sabena*, 1976 E.C.R. 455.

<sup>24</sup> *Supra*, note 20.

<sup>25</sup> *Supra*, note 21.

<sup>26</sup> Case 26/62, *Van Gend en Loos v. Nederlandse Administratie der Belastingen*, 1963 E.C.R. 1.

<sup>27</sup> Case 6/64, *Costa v Enel*, 1964 E.C.R. 585.

There are two aspects in the case, related to this provision, which deserve separate analysis, because they both represent a departure from the precedent case law of the Court and perfectly illustrate its techniques and its judicial methods of interpretation. The first is Ms Defrenne's request for horizontal direct effect to be given to Article 141. The second, according to the observations of Ireland and the UK governments, is that, by attributing direct effect to Article 141 retroactively, an intolerable burden would be imposed on their national economies, leading to the insolvency of many employers, who would be unable to meet claims for arrears of pay.

I will consider these aspects in turn, applying the test outlined above to each one. First, I will identify the new legal situation that the Court had to examine in this case. Second, I will investigate how the Court ruled, examine the legal reasoning behind the decision, and look at the teleological interpretation used to justify it. Third, I will try to understand why the Court decided as it did, taking into consideration the relevance and consequences of the judgment for the political legal context and for the evolution of EC law.

### III. Direct Horizontal Effect of Article 141

The first important issue for the Court was to decide whether this provision of Article 141 could be considered as having direct effect in the legal order of Member States and, consequently, independently of any national provision, entitle workers to institute proceedings before a national court in order to ensure its observance, and if so, from which date. What is important to underline is that the Court was asked to give the provision a horizontal effect in order to allow Ms Defrenne to bring Sabena before the national Court.

#### 1. *Novelty of the legal situation.*

The novelty of the legal situation under examination in relation to the precedent case law is significant in various aspects:<sup>28</sup> first of all, concerning the effect it was asked to grant to a Treaty provision, Article 141 contains an obligation to achieve objectives of social policy. This kind of policy, by nature, involves a certain degree of freedom of action on the part of the national authorities.

In the second place, concerning the request to recognize a horizontal effect to Article 141, the Court was asked to acknowledge an obligation which was addressed unequivocally and exclusively to the Member States. This is the great difference with the other provisions for which the Court acknowledged a horizontal effect,

---

<sup>28</sup> Some of them were underlined in the observations of the U.K. and Irish Governments.

such as Articles 39 (ex 48) and 49 (ex 59), which do not refer exclusively, at least not explicitly, to the Member States.<sup>29</sup>

Another distinction with the previous decisions in the matter of direct applicability was that the Court held some provisions of the Treaty to be directly applicable because of their aim to ensure the attainment of fundamental freedoms. In other words, their purpose is to benefit the Community as a whole, rather than pursuing, like Article 141, a social aim limited to a specified class of persons. Consequently, their realisation is closely linked to the basic tasks and activities of the Community as set out in Articles 2 and 3 of the EC Treaty. In no instance do they involve direct intervention in a contractual relationship between individual persons.

Finally, unlike the other Treaty articles to which the Court granted direct effect, the language of Article 141 is formulated in terms of a "principle", in order to define the right to equal pay for the same work. The Irish and UK governments, obviously, underlined this aspect, affirming that, "in the absence of national implementing legislation, an obligation of the kind contained in Article 141, in relation to its formulation as statement of principle, is incomplete and cannot properly be completed by interpretative judicial decisions."<sup>30</sup> This was basically an euphemistic way of saying: 'be careful: you are judges, not legislators.'

2. *The Court's decision and its legal reasoning: interpretative methods as tools in the evolution of European social law.*

The Court decided, despite the peculiarity of Article 141 and the serious objections raised by the Irish and UK governments, to recognize a direct effect to the provision, not only vertically but also horizontally. The question that must be asked is how was the Court able to transform a provision, clearly addressed only to Member States, into an effective "weapon" in the hands of female workers who could demand their rights to receive the same pay as men doing the same work.

It is only by analysing the method of interpretation and the teleological approach of the Court that is possible to understand how it was able to rewrite the Treaty. The most obvious way to begin the judgment would have been to respond to the arguments of the UK and Irish governments. However the Court knew that it could not achieve its aim in this way, because the differences between Article 141 and the other articles to which the Court had granted direct effect were too evident. It

---

<sup>29</sup> The judgment which gave direct horizontal effects to these provisions was the Case 36/74, *Walrave v. Kock*, 1974 E.C.R. 1405.

<sup>30</sup> *Defrenne*, *supra* note 23, at 460.

needed to place this provision in a particular light in order to emphasize the importance of its effectiveness.<sup>31</sup> It thus began, as it had in *Van Gend en Loos*,<sup>32</sup> by observing that the answer to the question of whether Article 141 had direct effect “depended on the nature of the principle of equal pay, the aim of this provision and its place in the scheme of the Treaty.”<sup>33</sup>

This kind of approach, often found in *hard cases*,<sup>34</sup> makes it clear that the Court is engaging in a teleological interpretation, furthering the aims of the Treaty by recourse to dynamic criteria and purposive considerations. The Court acknowledged that one of the aims of the Article 141 was to ensure a level competitive playing field, but went on to emphasize another aim: “secondly, this provision forms part of the social objectives of the Community, which is not merely an economic union, but is at the same time intended, by common action, to ensure social progress and seek constant improvement of living and working conditions, as is emphasized by the preamble to the Treaty.”<sup>35</sup>

Two considerations can be drawn from this statement: first of all, for the first time, the Court underlined that the main subject of the Community is not only *homo economicus*, but that it also pursues social tasks. For this reason, it does not want merely to build an economically common area, but it also wants to achieve social conditions in which the rights of workers are effectively protected.

The second consideration is related to the importance of the preamble of the Treaty as a preferential source where the Court finds the *telos* for its teleological interpretation. Some scholars have criticized this approach, affirming that “the Court seeks inspiration in guidelines which are essentially political in nature, and hence not considered applicable; this is the root of judicial activism which may represent an usurpation of power.”<sup>36</sup>

However, valid counter arguments exist against these assertions. First of all, the preamble and principles of the Treaty, far from being “merely political declarations

---

<sup>31</sup> See A. ARNULL, *THE EUROPEAN UNION AND ITS COURT OF JUSTICE*, OXFORD EC LAW LIBRARY 460 (1999).

<sup>32</sup> *Supra*, note 25, at 13, where the Court took in consideration the “spirit, the general scheme, and the wording” of the provision.

<sup>33</sup> Defrenne, *supra* note 23, para 7.

<sup>34</sup> See, J. BENGOTXEA, *THE LEGAL REASONING OF THE EUROPEAN COURT OF JUSTICE* 233 (Oxford 1993).

<sup>35</sup> Defrenne, *supra* note 23, para 1.0

<sup>36</sup> H RASMUSSEN, *supra* note 3, at 62.

devoid of a legally binding meaning,"<sup>37</sup> are part of the law that the Court has the mission to enforce and the reference made by the Court to them, far from being an "abuse," is part of the teleological interpretation which, as was underlined above, represents the key element in the evolution of EC law.<sup>38</sup> Secondly, the reference to the preamble made by the Court in *Defrenne* acquires more importance because, in this way, it was able to redress the absence of the principle of equal pay amongst the fundamental objectives of the EC Treaty.

By referring to the preamble it is emphasized, according to the words of the A.G. Trabucchi, that "the attainment of the principle of equal pay is of exceptional importance as a step towards economic and social progress and in achieving the constant improvement of living and working conditions."<sup>39</sup>

The second stage in the Court's reasoning, after having emphasised the relevance of the principle of equal pay, is to affirm that this principle forms part of the foundations of the Community. It is doubtful whether the drafters of the Treaty had this in mind, but nevertheless it clearly shows how the Court takes the emergence of new values into consideration in its dynamic method of interpretation.

Before the Court could admit the direct effect of Article 141, a final issue needed to be looked at. In fact, no interpretation, whether teleological, systematic or purposive can ignore the wording of a disposition. Article 141 expressly imposes an obligation on Member States without conferring rights on individuals. Here, the Court has been consistent with its affirmation in *Van Gend and Loos*, according to which "subjects of the new Legal Order are not only the Member States but also their nationals."<sup>40</sup> If this is true, Mrs Defrenne, as a subject of the Community legal order, and a victim of overt sex discrimination forbidden by the same new Legal Order, was entitled, independently of the legislation of Member States, to institute proceedings before a national Court in order to ensure the observance of the right of equal pay, which the Community system has recognised directly to the individuals.

Such judicial creativity operation did not go unnoticed, and some scholars attacked this interpretative approach. Rasmussen, for example, has seen it as an expression of uncontrolled judicial activism. He has categorized the decision as *situation three*

---

<sup>37</sup> H. RASMUSSEN, *supra* note 3, 32.

<sup>38</sup> M. Cappelletti, *supra* note 2, at 6.

<sup>39</sup> *Defrenne*, *supra* note 23, at 489.

<sup>40</sup> *Supra*, note 26, at 12.

(the worst) in a hypothetical test of acceptability of judicial creativity, "where judicial constructions are made squarely disrespectful of the textual indications found in the constitutional document."<sup>41</sup>

Other criticisms concentrated on the difference between the affirmation in *Van Gend en Loos* regarding the possibility of conferring direct effect on a disposition of the Treaty<sup>42</sup> and its application in *Defrenne*, where Article 141 does not display all the features necessary for its direct application.<sup>43</sup>

I believe that these criticisms, even if they may sometimes be justified, do ignore the specificity of the Community system, in which a literal interpretation of the Treaty's dispositions is unthinkable. The Court of Justice took on the difficult job of "manipulating" the dispositions of the Treaty to allow a reading that took into consideration the new values and needs emerging after the formulation of the Treaty's rules. These values and needs could not have been foreseen by the founding fathers. Such manipulation certainly requires a certain amount of creativity, but this does not mean that such creative operations must be considered abusive. This is the only means which EC law has of becoming constitutionalised, of freeing itself from the label of being merely a tool of economic integration and of acquiring a social dimension which can put man in general, and not only *homo economicus*, at the centre of its system.

It must also be considered that, in this case, the Court chose a superior principle amongst Treaty provisions and rules, in the light of which the case had to be resolved. This principle must be looked for in the dispositions of the preamble, according to which, one of the aims of the European Community is to improve economic and social progress and achieve the constant improvement of living and working conditions. This means that the ECJ established a hierarchy of constitutional rules and values: therefore not all the Treaty provisions are the same. Some are mainly technical, while others – such as the preamble and the fundamental principles – are of vital importance.

If there appears a contradiction between these two levels of constitutional normativity, the most important provision, has to be followed, as occurred in *Defrenne*. In

---

<sup>41</sup> H. RASMUSSEN, *supra* on law. note 3, at 29.

<sup>42</sup> *Van Gend en Loos*, *supra* note 25 at para. 13, where the Court indicated that a Treaty provision can be directly effective only if it is not "qualified by any reservation on the part of States which would make its implementation conditional upon a positive legislative measure enacted under national law".

<sup>43</sup> T. HARTLEY, *CONSTITUTIONAL PROBLEMS OF THE EUROPEAN UNION* 42, note 70 (Oxford 1999).

this Context it has been observed that the ECJ's activism lies in reality in the establishment of a super-constitutionality among the Treaty provisions.<sup>44</sup>

What has been said is consistent with what was stated in the first part, which regarding judicial creativity as an intrinsic characteristic of a judge's function and not as a degeneration of it.

3. *A motive analysis: why did the Court decide as it did?*

In order to understand the reasons for the Court's decision to grant direct horizontal effect to Article 141, we must investigate how seriously the obligation provided by this provision was taken by the Member States.

By the end of the first stage of the transitional period (31 December 1961), Article 141 was far from having been universally implemented. In December 1961, the Member States therefore adopted a resolution on the harmonization of rates of pay for men and women which purported to extend the deadline for giving effect to the equal pay principle until 31 December 1964. Even by then, the principle had not been implemented. The Commission, despite announcing in 1973 that it would initiate proceedings under Article 226 (ex 169) of the Treaty against those Member States still in breach of Article 141, didn't take any action. In 1975 the equal pay Directive was adopted in order to speed up full implementation of the equal pay principle, and this appeared to allow Member States a further year's grace.

It was clearly a situation of total inertia in which, on the one hand the Member States tried every possible way to avoid complying with the article's implementing obligation, and on the other the Commission seemed afraid of pursuing defaulting Member States.

In this context, by granting direct horizontal effect to Article 141, the Court intended to send a clear message to the Member States. It made it clear that the dynamic process of the evolution of E.C. law could not be blocked by the inertia of Member States or European Commission,<sup>45</sup> and that the rights provided by the Treaty, which the Member States did not want to confer on their nationals by im-

---

<sup>44</sup> See, V. Constantinesco, *The ECJ as A Law Maker: Praeter aut Contra Legem?*, in *LIBER AMICORUM*, *supra* note 5, at 79.

<sup>45</sup> The Court reached its goal. In fact after the judgment the Commission started to do its job properly and brought a number of actions against the failing Member States. See G.F. Mancini & D. Keeleng, *From ERT to CIFLT: The Constitutional Challenge Facing the European Court*, in *YEAR BOOK OF EUROPEAN LAW* 10 (1991).

plementing legislative measures, would be judicially attributed by the Court itself directly.

Another point that the Court wanted to make clear was the existence of a “European social dimension,” which until then was almost completely excluded from the Community’s priorities. The fact that, after *Defrenne*, a female worker could initiate proceedings before national courts in order to ensure the observance of the principle of equal pay for equal work, was an early step in the *constitutionalisation* of the principle of sexual equality.

#### IV. The Limitation of the Retrospective Effect of the Judgment

##### 1. *Novelty of the legal situation.*

The novelty of the situation presented to the Court was not the request by some Member States to consider the economic effects of its decision, but in the form which their arguments were presented. The Court had to deal with a problem that resulted from the astuteness of Irish and UK government’s lawyers, who made exemplary use of the Brandeis brief technique.<sup>46</sup> The Irish and the UK governments added that, if the Court had decided to grant direct retroactive effect to Article 141, this would have had disastrous economic consequences for many employers in both countries. The repercussions of company closings might, indeed, affect entire national economies. These submissions impressed the Court. It asked the two governments to answer a number of questions in writing pertaining to the alleged fatal economic and social consequences which a directly applicable Article 141 with retroactive effect would have had. In turn, the two governments, with great descriptive detail, presented the facts of the case to the Court in a Brandeis-type brief.

##### 2. *The Court’s decision and its legal reasoning.*

The Court took the submissions of the UK and Irish Governments seriously. It failed to be convinced by the considerations of AG Trabucchi, who underlined that “arguments of this kind, however pressing on grounds of expediency, have no

---

<sup>46</sup> So called because it was introduced for the first time by Brandeis in the case of *Muller v Oregon*, 208 U.S. 412, when before becoming a Judge of the Supreme Court, he worked as a lawyer before the same Court. Brandeis managed to prove that the physical differences and differences to attitude regarding work between men and women were such as to permit a State to prohibit a working day of over 10 hours for women alone. Basically, by presenting for the defence of his argument a voluminous documentation of a medical, sociological and psychological nature, Brandeis convinced the Court that the measure in question was not discriminatory since there were significant differences between the two sexes which legitimated it, and it was thus not in conflict with the Federal Constitution.

relevance in law.”<sup>47</sup> He added, furthermore, that “in view of the fact that Article 141 is recognized as having direct effect solely in respect of pay, properly so called, representing consideration for “equal work”, the financial consequences should not reach too high a level, having regard to the effects of limitation in the various Member States”.<sup>48</sup>

The Court, by contrast, reasoned as follows: “although the practical consequences of any judicial decision must be carefully taken into account, it would be impossible to go as far as to diminish the objectivity of the law and compromise its future application on the ground of the possible repercussions which might result, as regards the past, from such a judicial decision.”<sup>49</sup> Secondly, the Court focused its attention on the behaviour of the Member States and of the Commission, which until that moment had failed to take into consideration the measures necessary to ensure the functioning of Article 141. Such behaviour would have caused, in the opinion of the Court, misconception of the effects of this provision.<sup>50</sup> The awareness by the Authorities and the individual citizens that this article did not have direct effect was surely taken into consideration by the Court to limit its retroactive effect. Thirdly, the Court underlined that the retroactive application of the rule could have had an extremely negative influence on the principle of legal certainty, since the general level at which pay would have been fixed could not be known.<sup>51</sup>

In the light of these considerations, the Court concluded that “the direct effect of Article 141 cannot be relied on in order to support claims concerning pay periods prior to the date of this judgment, except as regards those workers who have already brought legal proceedings or made an equivalent claim.”<sup>52</sup>

Thus, a so-called prospective judgment<sup>53</sup> appeared for the first time in the Court’s case law. This phenomenon is certainly not alien to the jurisprudence of the Su-

---

<sup>47</sup> Defrenne, *supra* note 23, at 492, AG conclusions: He referred to the Case 28-67, Molkerei-Zentrale Westfalen Lippe, 1968 E.C.R. 206, where the Court, in spite of the possible economical consequences, decided to not alter its interpretation of Article 90 (ex 95), declaring that the argument was not by itself of such a nature as to call in question the correctness of that interpretation.

<sup>48</sup> Defrenne, *supra* note 23, at 492, AG Conclusions.

<sup>49</sup> *Id.* at para 71.

<sup>50</sup> *Id.* at 72-73.

<sup>51</sup> *Id.* at para 74.

<sup>52</sup> *Id.* at para 75.

<sup>53</sup> In other words, a ruling which has an effect *ex nunc* and not *ex tunc*.

preme Court of the United States. The Supreme Court, faced with the question of whether a constitutional ruling should have retroactive or only prospective effect, emphasised that it would consider three determining factors: the purpose to be achieved by the new rule, the extent to which law enforcement authorities relied on the old rule and the effect of the new rule on the Administration of Justice.<sup>54</sup>

Careful analysis shows that the same factors were considered by the Court of Justice: reliance on the status quo by the Commission, State authorities, and private individuals was certainly present in *Defrenne*. Furthermore, as Wyatt has underlined, "a retroactive ruling in *Defrenne* would have had a detrimental effect on the administration of justice, for as the Court pointed out, it would have been impossible to ascertain the wage patterns which would have emerged had the requirements of the Treaty been observed. This conclusion, of course, is consistent with the purpose of the rule. The social aim of Article 141 would hardly have been furthered by national courts giving judgments against employers which would have driven some into bankruptcy and others into dismissing its hapless beneficiaries."<sup>55</sup>

Obviously such a significant innovation<sup>56</sup> was bound to attract criticism. One type of criticism regarded the technique used by the Court to limit its decision in time.<sup>57</sup> It was objected that a fairer alternative than that chosen by the Court would have been the *prospective simpliciter overruling*, in which the new rule expressed by the Court would be valid only for the future and not considered relevant for the pending case, which would be decided on the basis of the old rule. To support this thesis, reference was made to a similar approach adopted by the Supreme Court of the United States in the *Sunburst* decision.<sup>58</sup> The principal counter argument against this criticism is that potential litigants are given no incentive to start a suit since, if they win, their case is governed by the old doctrine, the new doctrine applying only to future disputes.<sup>59</sup>

---

<sup>54</sup> See D. Wyatt, *Prospective Effect of a Holding of Direct Applicability*, EUR. L. REV. 399 (1976).

<sup>55</sup> *Id.* at 402

<sup>56</sup> See, M. Waelbroeck, *Can the Court of Justice Limit the Retrospective Operation of its Judgements?*, YEAR BOOK EUR. L. 115 (1981).

<sup>57</sup> See, W. Van Gerven, *Contribution de l'Arret Defrenne au Developpment du Droit Communautaire*, 13 C. D. E. 131 (1977); T. Hartley, *The European Court, Judicial Objectivity and The Constitution of European Union*, 112 L. Q. R. 97, n.10 (1995).

<sup>58</sup> *Great Northern Railway v. Sunburst Oil and Refining Co.* 287 US 358 (1932).

<sup>59</sup> A. Arnall, *The European Court and Judicial Objectivity: A Reply to Professor Hartley*, L. Q. L. R. 414 (1996).

It should also be underlined that, while it is true that the Supreme Court has often applied the *prospective judgment simpliciter*, it has often, above all in constitutional fields, used the same technique of limitation in time of its decision used by the Court of Justice in *Defrenne*. A case in point is the decision in *Linkletter v. Walker*.<sup>60</sup> In this case, the Supreme Court, in explaining the effects of a previous innovative decision,<sup>61</sup> underlined that the new rule would apply only "to cases still pending on direct review at the time it was rendered and not to the convictions pronounced by the Courts of the State which have already acquired the effect of *res judicata* before the new rule was formulated."<sup>62</sup> It was rightly maintained that this type of technique of temporal limitation of the effects of the decision, which was also applied in *Defrenne*, is a form of limited retroactivity rather than a real prospective overruling.

One of the fiercest opponents of the approach taken by the Court was surely Hamson, who has argued that "the Court had arrogated to itself a dispensing power not known to any modern Court of any Member State", in particular the power to declare that a rule of law was valid for the future but had no effect for the past. That power, he has observed "is inherently the mark of the legislative function and there is an obstinate belief upon the Continent of Europe that the Court does not have a legislative function."<sup>63</sup> Hartley was hardly more lenient towards the Court, stating that "the *Defrenne* doctrine is justifiable only on the assumption that it is constitutive-legislative, rather than declaratory: if the Court is merely stating what the law always was, there would be no reason for its ruling to be limited in this way."<sup>64</sup> According to these considerations, *Defrenne* doctrine could not be reconciled with legal principle.<sup>65</sup>

These criticisms, in my opinion, underestimate the role of the European Court of Justice in the process of Community integration. Such views are, in fact, based on a perception of the judicial function of interpretation as essentially limited to the "ascertainment" of legal norms, whereas it might be more useful to recognize that a

---

<sup>60</sup> *Linkletter v. Walker*, 381 U.S. 618 (1964).

<sup>61</sup> *Mapp v. Ohio*, 367 US 643 (1961).

<sup>62</sup> *Linkletter supra* note 60. See R. JOILLET, LE DROIT INSTITUTIONNEL DE COMMUNITÉS EUROPEENNES. 225 (Le Contieux, Liege, 1981); G. GUNTHER, CASES AND MATERIALS IN CONSTITUTIONAL LAW, 546 (New York 1975).

<sup>63</sup> C. HAMSON, "Methods of interpretation- a Critical Assessment of the Results" in Reports of a Judicial and Academic Conference (Luxemburg, 1976) p II-15.

<sup>64</sup> HARTLEY, *supra* note 43, at 41.

<sup>65</sup> Hartley, *supra* note 57, at 97.

certain degree of creativity characterizes any process of interpretation. In other words, the objection that by limiting the retroactive effect of the ruling the Court recognized that it was engaging in judicial legislation, become futile once it is recognized that the Court of Justice, like any court charged with interpreting provisions whose meaning is uncertain, has a law-making function, as was shown in the first part of the paper.

In this context, it may be useful to relate what was said by the albeit conservative Lord Diplock, according to whom, "the rule that a new precedent applies to acts done before it was laid down is not an essential feature of the judicial process. It is a consequence of a legal fiction that the Courts merely expound the law as it has always been. The time has come, I suggest, when we should discard this fiction."<sup>66</sup>

Moreover, I believe that the role of the constitutional adjudicator of the Court of Justice has also been undervaluated. In fact, by nature, the European Judges find themselves having to weigh up potentially conflicting values and principles. In *Defrenne*, the Court found itself having to achieve a balance between, on the one hand, the principle of legal certainty, and, on the other, the principle of equal treatment before the law. The former requires that, those who in good faith have relied on a certain rule of law, are not damaged by an unexpected change of this rule. According to the latter, all the parties with an interest in an interpretation with a declarative effect must have the possibility of relying on this, to make their rights respected for facts judged previous to the decision, but which are nevertheless undeniably governed by the dispositions interpreted innovatively by the Court.

The use of the prospective judgment simply allowed the Court to balance, in this case, the principle of legal certainty against the principle of equality before the law. The balance, and, consequently, the compromise that the Court considered fairest could be summarised in the following terms: the "courageous" parties that are not satisfied by the interpretation of a Treaty disposition, were rewarded for their "efforts", thanks to the innovative interpretation of Article 141 by the Court. Thanks to their enterprising spirit, the disposition of the Treaty subject to the judgment was in fact "brought up to date". The other interested parties, whose subject of judgement is already *res judicata*, and who have not taken the risk of asking the Court for an innovative interpretation of the Treaty, cannot have the same advantage from the "unexpected success" of another more enterprising party. Finally, all those with a

---

<sup>66</sup> Sir K. Diplock, *The Courts as Legislators*, in *THE LAWYER AND JUSTICE* 281 (B. W. Harvey ed., 1978).

vested interest in the decision may appeal to the new interpretation of the constitutional text for the future.<sup>67</sup>

3. *A motive analysis: why did the Court rule as it did?*

Once the elements that the Court had to take into consideration to balance the interests at stake have been clarified, we can try to investigate the reasons that led the Court to limit the effects of its decision.

First of all, there was a need to consider, in the light of the principle of legal certainty, the serious effects which the judgments might have on past relations established in good faith.<sup>68</sup> Secondly, it should be remembered that the Court must perform its law-making function responsibly and with due regard for the consequences of its action on those likely to be affected by its rulings, with particular reference to the negative economic repercussions that its decision would have caused for some Member States.<sup>69</sup>

Although such explanations are undoubtedly reasonable, they are not the only ones which may explain the Court's approach. With regard, in particular, to the economic repercussions on the national economies of Member States, the A.G. Trabucchi had rightly underlined that these would not be particularly significant, since the acknowledgement of the direct effect of Article 141 would only have been effective for payment for the same type of work. He had also correctly added that the rules of national prescription would surely have limited workers' rights to initiate proceedings. It should be finally underlined that, with regard to the observations of the Ireland and UK governments, the potential exposure of employers in those States, where Article 141 would in any event have been directly applied only from 1973 onwards, was much more limited than that of the employers in the original six Member States, but no objection on these grounds seems to have been advanced by the governments of States in the latter group.

However if, according to the previous considerations, the justification of economic repercussions is not an entirely satisfactory explanation for the approach of the Court, may there perhaps be a deeper reason – not declared by the Court – that was decisive in limiting the temporal effects of the new rule? I believe that the basis for

---

<sup>67</sup> See, K. LENAERTS, *LE JUGE ET LA CONSTITUTION AUX ETATS-UNIS D'AMERIQUE ET DANS L'ORDRE JURIDIQUE EUROPEEN* 703 (Bruxelles 1988).

<sup>68</sup> See, TRIDIMAS, *supra* note 3, at 201.

<sup>69</sup> See, KEELING, *supra* note 3, at 534.

this approach may have been the necessity for the Court's decision in *Defrenne* to be acceptable. The Court was perfectly aware of the creativity of the interpretation that led it to recognize direct effect to Article 141, and recognised the need to compensate for this judicial activism with a self-restraint approach which could make the innovative rule established by the Court more acceptable. Following such reasoning, the Court had to balance the typical teleological method of interpretation,<sup>70</sup> according to which "the general spirit of the treaty must be enforced no matter how inconvenient the consequences", with the exigency to limit the effects of its ruling in time to avoid excessively upsetting the Member States.<sup>71</sup>

V. *P v. S* vs. *Grant*: "the right of freedom and dignity" vs "the equal misery"?

At the time of the founding Treaty, the existence of sexual minorities was hardly conceivable. The Equal Treatment Directive,<sup>72</sup> 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.<sup>73</sup>

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*

---

<sup>70</sup> A method that tends to emphasize the manifest significance of legal rights created by EC law.

<sup>71</sup> See, M. Cappelletti & D. Golay, *Judicial Branch in the Federal and Transnational Union*, in *INTEGRATION THROUGH LAW* 333, note 281 (M. Cappelletti, et al, eds., Vol I, Berlin 1986).

<sup>72</sup> 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).

<sup>73</sup> A. Cambell & H. Lardy, *Discrimination Against Transsexuals in Employment*, 21 *EUR. L. REV.* 413 (1996).

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, 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.<sup>74</sup>

2. *The Court's decision and its legal reasoning: the importance of the appropriate comparator.*

a. *P v. S and the manipulation of Community Legislation*

I believe that 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."<sup>75</sup>

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 Court did not refer to the original intention of the legislator but focused on the spirit and scheme of the Directive,<sup>76</sup> 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 princi-

---

<sup>74</sup> For a deep analysis of these cases see Tridimas, *supra* note 14, at 69.

<sup>75</sup> P v. S, *supra* note 20, at 2157.

<sup>76</sup> It is a typical formula, as seen in Defrenne, which indicates the Court's will to adopt a teleological interpretative approach.

ple 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 approach 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. However in *P v. S*, as brilliantly pointed out by Flynn, "the reasoning of the Court quite literally overturns its earlier prospective on this point".<sup>77</sup> 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."<sup>78</sup> The Court continued by affirming that the non-discrimination principle is to be extended to transsexuals. Finally, by the clear manipulation of a secondary legislative measure, it concluded that the scope of a directive must be read in the light of this principle. As Flynn has observed, this was a innovative reasoning compared to the traditional approach, which would have consisted in looking first at the scope of the directive and then finding how the principle of equality applied within its scope.<sup>79</sup>

The third aspect of judicial creativity in this case concerns the consideration, in the Court's reasoning, of a different kind comparison's complement compared to the traditional approach. In this context, the UK government added, applying the Aristotelian concept of equality,<sup>80</sup> 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 Court, however, had little sympathy for this argument, adopting instead as the appropriate comparator the pre-transsexual persona.<sup>81</sup> In fact, the Court underlined that "where a person is dismissed on the grounds that he

---

<sup>77</sup> L. Flynn, *Case Note on P.v.S. and Cornwall Council*, 34 COMMON MARKET L. REV. 384 (1997).

<sup>78</sup> *P v.S*, *supra* note 21, at para 19.

<sup>79</sup> See, L. FLYNN, *supra* note 77, at 384.

<sup>80</sup> For a critique of this concept, see G. More, *Equal Treatment of the Sexes in European Community law: What Does "Equal" Mean?*, 1 F. L. S. 51 (1993). 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".

<sup>81</sup> See, TRIDIMAS, *supra* note 14, at 70.

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.”<sup>82</sup> 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.<sup>83</sup>

However, the Court did not stop here, and 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.”<sup>84</sup> It’s clear how the Court, by “breaking with the past”, viewed the principle of equality as a general principle E.C. law which “transcends the provisions of Community legislation.”<sup>85</sup>

*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.<sup>86</sup> I will show this by underlining two aspects of the case which are, in my opinion, a good example of judicial law-making: the choice of a relevant comparator and the reading of the outcome in *P v. S*.

Concerning the first element, 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

---

<sup>82</sup> *P v.S*, *supra* note 21, at para 21.

<sup>83</sup> C. Denys, *Homosexuality: a non-issue in Community Law?*, 24 EUR. L. REV. 422 (1999).

<sup>84</sup> *P v.S*, *supra* note 21, at para 22.

<sup>85</sup> TRIDIMAS, *supra* note 14, at 70.

<sup>86</sup> This should be a concrete explication of what I affirmed in the first part of the paper, when I contested the common opinion according to which judicial creativity should be present only in activist or pro-integration decisions and not in the cases where the Court decides to adopt an approach of self-restraint. See, *supra* section 1.3.

to apply a comparison between homosexuals and heterosexuals – *in casu* between a female homosexual (Grant) and a male heterosexual (her predecessor). This basically 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.

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”.<sup>87</sup> 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 homosexuals,<sup>88</sup> 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”.<sup>89</sup> Wintermute brilliantly 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.”<sup>90</sup> 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 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.

---

<sup>87</sup> Grant, *supra* note 22, at para 27.

<sup>88</sup> Grant is compared with a male homosexual.

<sup>89</sup> Dennys, *supra* note 83, at 423.

<sup>90</sup> R. Wintermute, *Recognising New Kinds of Direct Discrimination: Transsexualism, Sexual Orientation and Dress Codes*, 60 M. L. R. 345 (1997). See also, N. Bamforth, *Sexual Orientation Discrimination after Grant v South-West Trains*, M. L. R. 63 (2000).

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 scholars<sup>91</sup> 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”.<sup>92</sup>

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.”<sup>93</sup> Why should these considerations not be valid for homosexuals? Are they perhaps less entitled than transsexuals to the right of dignity and freedom?

Another reason to believe that in *Grant* the Court would have followed the substantial notion of equality highlighted in *P v. S*<sup>94</sup> was that, as 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”.<sup>95</sup>

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.

---

<sup>91</sup> See Flynn, *supra* note 77, at 381; C. Barnard, *P.v S: Kite Flying or New Constitutional Approach?*, in *THE PRINCIPLE OF EQUAL TREATMENT IN E.C. LAW 78* (A. Dashwood & S. O’leary eds., London 1997).

<sup>92</sup> *Grant*, *supra* note 21, at 633.

<sup>93</sup> *P v S*, *supra* note 22, at para 21.

<sup>94</sup> Where the Court took “a tentative step to underline that the Union is not only about securing market freedoms but also achieving social justice”, Barnard, *supra* note 91, at 70.

<sup>95</sup> T. HARTLEY, *THE FOUNDATIONS OF EUROPEAN COMMUNITY LAW 78* (1998).

Despite the temptation to explain immediately the reason for this different approach, it is more consistent with the general test<sup>96</sup> established above to investigate the legal reasoning that allowed the Court to depart from the statements made in *P v S*.

First of all, it interpreted narrowly the notion of sex, referred to in para. 21 of *P v S*,<sup>97</sup> as biological and a purely physical concept. Following this interpretation, it is possible to assume that in *Grant* the Court deduced 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. 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.<sup>98</sup>

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 of 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. The Court moreover 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.<sup>99</sup>

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

---

<sup>96</sup> *Supra* section 2.1.

<sup>97</sup> Where the Court affirms that the transsexual's discrimination is based on the sex of the person concerned.

<sup>98</sup> *See, Denys, supra* note 83, at 424.

<sup>99</sup> *Grant, supra* note 21, at para 33.

was a lost opportunity to apply a broader notion of sex equality, which includes the more dynamic sociological dimension of gender.”<sup>100</sup>

In relation to the reference to the law of the European Convention of Human Rights, there have been two fundamental criticisms. 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.<sup>101</sup> 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.<sup>102</sup>

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, using our usual test, why the Court adopted this approach of self-restraint.

### 3. A motive analysis: Why did the Court decide for a different approach?

There are several factors that can help us evaluate the decision in *Grant*. First of all, transsexuals form 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”. The number of homosexuals in Europe, meanwhile, is 35 million.<sup>103</sup> 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.<sup>104</sup>

---

<sup>100</sup> See, *Dennys*, *supra* note 83, at 424; See also, K. Berthou & A. Masselot, *La CJCE et Les Couples Homosexuels*, 12 DROIT SOCIAL 1037 (1998).

<sup>101</sup> See, M. Bell, *Shifting Conceptions of Sexual Discrimination at The Court of Justice: from P.v S to Grant SWT*, 5 EUR. L. J. 73 (1999).

<sup>102</sup> 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.

<sup>103</sup> *P v. S.*, *supra* note 21, point 42 AG Elmer.

<sup>104</sup> As Flynn has pointed out, “protection of homosexuals in relation to decisions to appoint, promote, or dismiss employees would affect more employers than the protection of transsexuals. Besides, there was

Secondly, there is an important difference in the “challenge” which transsexuals offer to social norms compared with lesbian and gay men. As it has been 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.”<sup>105</sup>

Furthermore, the Court clearly underlined that “in the present state of E.C. law, stable relationships between two persons of the same sex are not regarded as equivalent to marriages or stable relationships outside marriage between persons of opposite sex.”<sup>106</sup> While it is true, as AG Elmer underlined, that the limitation of the scope of article 141 must be kept free from the moral conceptions of Member States,<sup>107</sup> 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-cultural context of the Member States.

In light of these factors, we should ask ourselves the following questions: how would the Member States have reacted if in *Grant* the Court had decided that sexual orientation fell within the bounds of sex discrimination? Would the 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”.<sup>108</sup>

There is another element in the Court’s decision that helpful to understand why the judicial outcome was due deference to the Member States. At the end of its judg-

---

the prospect that employment-related benefits such as health insurance, pension coverage and other advantages would have to be extended to the partners of lesbians and gay men.” FLYNN, *supra* note 77, at 381.

<sup>105</sup> *Id.*

<sup>106</sup> *Grant*, *supra* note 22, at para 35

<sup>107</sup> *Id.* at point 17 AG Elmer.

<sup>108</sup> *Id.* at para 36.

ment in *Grant*,<sup>109</sup> the ECJ. made an express reference to Article 13,<sup>110</sup> 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.

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 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."<sup>111</sup> 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 sexual orientation as a form of discrimination had been recognised.

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.<sup>112</sup> The question remains the same: was that acceptable?

Conclusions

#### D. The Court as Constitutional Adjudicator Between Powers and Limitations of Powers

The constitutional functions of the Court of Justice have often been underlined.<sup>113</sup> This is not the place to deal with this problem comprehensively. What must be em-

---

<sup>109</sup> *Id.* at para 48.

<sup>110</sup> On the value and the challenges of the new Article 13 in the context of the principle of equality, see L. Flynn, *The Implications of Article 13 After Amsterdam: Will Some forms of Discrimination be more equal than others?*, *Common Market L. Rev.* 1138 (1999).

<sup>111</sup> G.F. Mancini, *The Making of a Constitution for a Europe*, 26 *COMMON MARKET L. REV.* 613 (1989).

<sup>112</sup> See J. McInnes, *Case Note on Case C-249, Lisa Jacqueline Grant v. South West Trains Ltd*, 36 *COMMON MARKET L. REV.* 1054 (1999).

<sup>113</sup> See, J. Rinze, *The Role of the European Court of Justice as a Federal Constitutional Court*, 5 *E. P. L.* 426 (1993); W. Van Gerven, *Towards a Coherent Constitutional System within The European Union*, *E. P. L.* 81 (1996); F.G. Jacobs, *Is the Court of Justice of the European Communities a Constitutional Court*, in *CONSTITUTIONAL ADJUDICATION IN EUROPEAN COMMUNITY AND NATIONAL LAW, ESSAYS FOR THE HON. MR JUSTICE T.F. O'HIGGINS* 25 (D. O'Keefe & D. Curtin eds., Ireland 1992); A. Donner, *The Constitutional Powers of the European Court of Justice of the European Communities*, 127 *COMMON MARKET L. REV.* 14 (1974).

phasised, in the light of what has been discussed above, is the constitutional role that the Court of Justice plays in the interpretation of the articles of the Treaty and of the EC legislation. In fact, the structural openings presented by the EC founding charter represent the ideal tool for its constitutional interpretation by the Court. The 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 the congenital vocation of the Treaty, moreover typical of constitutional charters, of being both an *act and a work in progress*. Exploiting these characteristics, the Court, with a high degree of judicial creativity, has taken on the job of “constitutionalising” the Treaty, creating, as has been brilliantly remarked, “a constitutional doctrine by a common law method.”<sup>114</sup>

In this work, the Court has made use of the precious tools of the general principles of EC Law. As it has been seen, in fact, through the use of these principles, the ECJ has managed to manipulate the extension and meaning of both the dispositions of the Treaty and the secondary legislation. In particular, it has been examined the role of the principle of equality and legal certainty in the operations of judicial creativity related to the interpretation of Article 141 (*Defrenne*) and of the Equal Treatment Directive<sup>115</sup> (*P v. S and Grant*).

If the above-mentioned role makes the Court of Justice resemble a Constitutional Court, there is something else, as appeared from the case analysis carried out in this paper, which distinguishes the ECJ from Constitutional Courts elsewhere in the world, and which at the same time represents its most important challenge: the weakness of the Court’s remedial powers, especially under Article 234. It means that the enforcement of its judgments requires the essential cooperation of national Courts, and their broader remedial powers. As Cappelletti perceptively wrote, “unlike the American Supreme Court and *the European Constitutional Courts*, the Court of Justice has almost no powers that are not ultimately derived from its own prestige, intellectual and moral force of its opinions.”<sup>116</sup> The same concept, in a broad context and from the point of view of Member States, has been defined as the *principle of Tolerance* characterizing European Constitutionalism process.<sup>117</sup>

---

<sup>114</sup> See, R. POSNER, *LAW AND LEGAL THEORY IN UK AND USA* 14 (Oxford 1996); T. Tridimas, *Judicial Review and The Community Judicature: Towards a new European Constitutionalism?*, 3 T. L. J. 119 (2001).

<sup>115</sup> *Supra* note 72.

<sup>116</sup> Cappelletti & Golay, *supra* note 71, at 327, emphasis added.

<sup>117</sup> J.H.H. Wailer, *Federalism and Constitutionalism: Europe’s Sonderweg*, 13 Harvard Jean Monnet Paper (10-2000). He explains the meaning of the principle of the Principle of Tolerance in the usual brilliant way: “constitutional actors in the Member States accept the European Constitutional discipline not because as a matter of legal doctrine.... They accept it as a it as a an autonomous voluntary act.... The Quebecois are

In order “to foster” this tolerance or voluntary obedience, the Court has adopted two approaches, one addressed to the national judges, the other to the Member State constitutional bodies.

First, the Court has emphasised the importance of persuasion in judicial discourse and has developed a judicial style which explains as well as declares the law.<sup>118</sup> It was by using this kind of didactic method that the Luxembourg judges won the confidence of their colleagues in the national courts,<sup>119</sup> in their constant “war” for the supremacy of Community law.

In relation to the Member’s States possible reactions, the Court has increased sensitivity to the limits of its judicial activism. Through a constant analysis of its decisions in the socio-political context in which they are applied, the Court has always been highly attentive to ensure that it does not overstep the threshold of tolerability beyond which the Member States could react by reaffirming exclusive rights of sovereignty, or simply by not accepting to carry out any decisions they feel go beyond the authority assigned to the Court of Justice to ensure that “the law is observed in the interpretation and application of the Treaty”.

---

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”

<sup>118</sup> See, *Cappelletti & Golay*, *supra* note 71, at 333.

<sup>119</sup> See, *Mancini*, *supra* note 111, at 604.