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The European Court of Justice and LGBT rights. An analysis from the theories of judicial behaviour.

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A Vilanova de Meià, 12 de juny de 2021.

Abstract.

Building upon the current discussion among scholars regarding the role the European Court of Justice (ECJ), as a fundamental actor in building a far more integrated Union, plays vis à vis the EU member states, this article focuses on the protection the ECJ provides on account of Community legislation to the LGBT community in Europe. We focus on the degree to which the Court faces threats from member governments when ruling on salient issues, such as LGBT rights. Hence, this article posits that even if the European Court of Justice acknowledges the saliency of LGBT issues for national governments, it is still willing to further expand the scope of Community legislation when ruling on cases of alleged gender identity and sexual orientation discrimination.

Keywords: European Court of Justice; LGBT rights; EU legislation; Member states.

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Introduction.

The European Union has been committed, ever since its foundation under the label of the Coal and Steel Community in 1952, in building a far-reaching Union well beyond its initial economic rationale. Indeed, numerous primary and secondary Community legislation have broadened the Union's competences by allowing it to legislate in policy areas that had traditionally been of its member states' responsibility.

Following from this discussion, the European Court of Justice (ECJ) jurisprudence has often been regarded as crucial in triggering the integration process in which EU member states have been involved in the last decades. Hence, the case-law from the Court on the direct effect and supremacy of EU legislation over national law is to be understood as positioning the European Court of Justice in a central role within the EU legal system (Hix and Høyland, 2012).

Even if such developments have usually been targeted at protecting Union citizens' rights and living standards, EU member states have often regarded the ECJ's meddling into salient policy areas in which national bodies used to be the sole legislator as a potential threat with regards to their interests.

Deciding on LGBT rights, which often involve ruling on areas that used to fall under national responsibility, such as marital status, social benefits, pensions, and migrant assessment procedures, among many others, might therefore be costly for the European Court of Justice, which depends on member states to see its jurisprudence applied. Hence, as it will be discussed in what follows, the ECJ has to make a choice whether to abide by its interests, even if that comes at the expense of a potential conflict with national governments, or refrain from ruling counter to member states' interests. Our research question follows from this discussion.

To what extent has the European Court of Justice effectively protected the LGBT community in the European Union through its jurisprudence?

This research thus analyses the case-law from the European Court of Justice between 1996, when the first ruling on gender identity was issued, and 2020. Please note that our analysis focuses on gender identity and sexual orientation discrimination in the European Union, and how the ECJ has ruled in such cases. To date, the Court has not issued any ruling involving intersexuals or queer people, for which we have excluded these groups from our analysis.

The first part of this research provides a theoretical framework regarding the evolution of anti-discriminatory EU legislation on gender identity and sexual orientation discrimination, as well

as a brief overview accounting for the role the ECJ has played on these particular subjects. We also provide a review of the theories of judicial behaviour with a particular focus on the European Court of Justice. This will allow us to better acknowledge how do its judges respond to salient issues for member states.

Following the above-mentioned theoretical discussion, the second part of this research puts forward two hypothesis that may contribute to respond to our research question. Hence, we provide a systematic analysis of ECJ case-law on sexual identity and sexual orientation discrimination.

Theoretical Framework.

A brief overview of EU anti-discrimination legislation on LGBT issues.

Precisely because the European Union's predecessor, the European Economic Community, was founded as a result of the willingness to promote the common market within its members, the economic and free movement rationale fostering the Community integration process stressed the importance of securing economic and free movement rights for those living within its member states. Hence, economic and commercial integration were the main features to be addressed by Community law during the first decades following the signature of the Treaty of Rome. As Uladzislau Belavusau and Kristin Henrard (2019, pp. 614-620) contend, the Community was initially eager to only promote equal opportunity rights on nationality and gender issues, as a means to further strengthen the common market by not jeopardizing its citizens' economic and free movement rights. As Mark Bell (2011) put it, equal treatment was initially considered as having an instrumental role in the pursuit of the Community's economic and commercial goals.

Prior to the 1990s landmark legal developments in EU primary legislation, which paved the way for a greater protection against discrimination on the grounds of sexual orientation, 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 was adopted on the basis of former article 119 EEC Treaty, establishing the principle of equal treatment for male and female workers for equal work. Hence, through litigation at the European Court of Justice, cases of alleged gender identity discrimination against those

following gender reassignment surgery were then framed by the Court within the already existing Community gender equality provisions.¹

According to Uladzislau Belavusau (2020), it was in the 1990s, once it became clear that the Court could not address discrimination suffered by gay and lesbian individuals by means of existing legislation on sex issues², that pressure was directed towards the Community to broaden its powers. In fact, the European Parliament urged, as early as 1984, the Commission to take every necessary means to tackle discrimination based on sexual orientation³. It was thus the lack of a legal basis to approve new legislation extending the protection provided by Community law to sexual orientation discrimination which hindered the European Parliament's claims to further extend the scope of EU legislation to cover sexual orientation discrimination (Cellini, 2015).

Even if the Maastricht Treaty provided for a clause advocating for the protection of human rights within the EU⁴, no references were made whatsoever to specific grounds of discrimination such as sexual orientation. Hence, the certainty that primary legislation was needed to empower the Council to take appropriate legislative action on this regard led to the approval of the Treaty of Amsterdam, which entered into force in 1999 and introduced, for the very first time in the Community's history, a provision clause directly advocating for equal treatment by prohibiting discrimination based on sexual orientation among many other discriminatory grounds (Shreeves, 2020). Indeed, Article 13 TEC, now article 19 TFEU, provided the legal basis for the Council to approve secondary anti-discrimination legislation on whatever grounds it mentions, once the consent of the European Parliament has been obtained. For the Council to pass such legislation, though, unanimity among member states must be secured.

The Treaty of Amsterdam finally permitted the EU to introduce secondary legislation to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age, or sexual orientation. Indeed, the approval of Directive 2000/78/EC (Framework Equality Directive, FED), following the entry into force of the Treaty of Amsterdam, is considered as a landmark development in EU anti-discriminatory legislation. This Directive also enabled private

¹ See C-13/94, P v. S & Cornwall County Council, 1996.

² See Case 249/46, Grant v. South West Trains, 1998.

³ European Parliament Resolution on sexual orientation discrimination at the workplace (1984) Official Journal of the European Communities 84/C104/46.

⁴ Art. F TEU Maastricht version.

litigation in the ECJ through the preliminary reference procedure, which has allowed national courts to act as enforcers of the Court's decisions, which has placed them at the heart of the EU legal system (van der Vleuten, 2014).

The FED, though, only addresses discrimination cases on current art. 19 TFEU discriminatory grounds, such as sexual orientation, etc., in the areas of employment and occupation. Despite its restricted scope, this directive has effectively protected the LGBT community within the EU, as member states are obliged to transpose its content into national law. Therefore, it has allowed the ECJ to issue judgements addressing sexual orientation discrimination, which it could not do prior to the approval of the FED (Belavusau, 2020, p. 5). Indeed, Directive 2000/78/EC has homogenised member states' legislation when it comes to address sexual orientation issues related to employment and occupation. This has served as a way to approve new anti-discrimination legislation at national levels (Cellini, 2015).

The Lisbon Treaty further strengthened the role of equality⁵ and human rights in the EU by according the EU Charter of Fundamental Rights primary legal status within the Union legal *acquis*⁶. Indeed, art. 21 (1) of the Charter includes a prohibition on sex and sexual orientation discrimination, among many other discriminatory grounds (Muir, 2013, pp. 76-77).

However, whereas several grounds mentioned in art. 19 TFEU, such as sexual orientation, are solely protected at the employment area by means of Directive 2000/78/EC, other grounds, such as gender equality and racial or ethnic origin are addressed through a wide spectrum of EU legislation covering various policy areas (Prpic, 2017). Hence, a so-called hierarchy of discriminatory grounds within the EU law is said to exist, even if art. 19 TFEU does not make any distinction among these grounds (Howard, 2006). Indeed, discrimination against transsexual individuals in the EU is currently regarded as falling within the scope of gender equality provisions, which allows individuals following gender reassignment surgery to rely on a much comprehensive EU legal protection.

These developments in EU anti-discriminatory legislation “have converted EU law into a significant battlefield for LGBT rights in Europe”, and have thus triggered a move away from the original conception of the EU as a market-oriented organization lacking a broad human rights agenda (Belavusau, 2020, p. 8). Belavusau and Henrard (2019) contend that the Treaty

⁵ Art. 2 & 3 TEU.

Art. 10 TFEU

⁶ Art. 6 (1) TEU.

of Amsterdam's approval gave the Community not only an economic ethos, but also a social one. By addressing discrimination cases, EU law has distanced itself from its initial common market approach (Bell, 2011). As Ellis and Watson put it, "with the expansion of the Union's concerns to cover other grounds of discrimination, it would appear well-nigh inevitable that what has been true in the past for sex equality will also hold good for other fields of equality law" (Ellis and Watson, 2012, p. 8).

Nevertheless, even if equal treatment provisions have remarkably extended within the EU legal system, borrowing from Anna van der Vleuten (2014, pp. 130-131), the initial willingness to strengthen a liberal-based economic integration process has thrown a spanner in the works by still impeding anti-discrimination legislation, alien to the labour market, from ever taking place.

The European Court of Justice and LGBT rights.

As Cellini (2015, pp. 17-18) argues, gender identity and sexual orientation issues are of particular sensibility for EU member states. As he contends, there is a tension between the domain of the *demos*, which very often opposes to judicial activism on sexual identity and orientation issues, and the domain of the ECJ committed at upholding a rights-based Union beyond its initial economic rationale.

The alleged activist role of the ECJ when judging on LGBT issues stems from the fact that it is common to consider primary and secondary EU legislation as often vague and imprecise regarding its anti-discrimination provisions. Hence, it is for the ECJ, by means of its jurisprudence, to clarify them (Belavusau and Henrard, 2019, p. 624). Not only has the ECJ provided clarification for ill-defined provisions in EU anti-discriminatory law, but it has also contributed to a greater homogenization of national laws addressing sexual orientation and gender identity discrimination. Indeed, as Cellini mentions, the European Court of Justice jurisprudence has greatly contributed to bridging the legal differences existing among EU member states and national legal provisions (Cellini, 2015, p.7).

Indeed, the ECJ has exercised by means of its decisions its own jurisprudence on gender identity and sexual orientation discrimination, which has very often been regarded as a way of fostering the development of a much more integrated and far-reaching Union. Indeed, Anna van der Vleuten's (2014) work provides some quotations intended to support this argument, such as Guy Harpaz's, who contended that "the adoption of common human rights standards based, inter alia, on the jurisprudence of the Strasbourg Court, may provide the cement for the further construction of the European integration project". Van der Vleuten's work also quotes a former

ECJ judge, Pierre Pescatore, who once wrote that this Court has also been inspired by “une certaine idée de l’Europe”, as well as former Advocate General Mancini, who contended that “if we want Community law to be more than a mere mechanical system of economics (...) , if we wish it to be a legal system corresponding to the concept of social justice and European integration, not only of the economy but of the people, we cannot fail to live up to what is expected from us” (van der Vleuten, 2014).

Member states have very often been reluctant to acknowledge the interference of supranational actors such as the European Court of Justice when ruling on salient issues that have traditionally been of national competence, such as social protection or education (van der Vleuten, 2014, p. 120; Bell, 2011, p. 620). As a result, several provisions have been introduced in EU primary and secondary legislation dealing with equal rights that have enabled national actors to retain exclusive competence on some specific issues. The ECJ’s willingness to tackle discrimination based on sexual orientation has thus been restricted by such exceptions (de Waele and van der Vleuten, 2013).

Precisely because gender identity and sexual orientation discrimination are contested issues affecting core national values, the European Court of Justice often sits as a Full Court or a Grand Chamber when ruling on these discrimination grounds (van der Vleuten, 2014, p. 127). By doing so, the Court intends to make sure that its judgements reflect the legal traditions of EU member states (de Waele and van der Vleuten, 2013, p. 655).

National governments reluctant to approve new secondary legislation on sexual orientation can count on art. 19 TFEU unanimity requirement within the Council of the European Union when called upon to agree on new legislation on any of the grounds mentioned in article 19 TFEU. Indeed, art. 19 TFEU requisite has so far impeded the approval of the Proposal for a Council Directive, whose aim is to strengthen the prohibition of discrimination based on sexual orientation beyond the employment and occupation policy area⁷, for more than 10 years. As a result, it is still blocked at the Council of the EU as unanimity has not yet been reached (Shreeves, 2020).

Judicial Behaviour and the European Court of Justice.

There is little doubt about the role of the ECJ in building a more integrated Union. As Simon Hix and Bjørn Høyland (2012) contend, the Court has played a fundamental role in the

⁷ Proposal for a Council Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, COM (2008) 426.

constitutionalization process the European Union has endured. Indeed, the ECJ has evolved as an important supranational actor through two landmark rulings⁸ which asserted the direct effect and primacy of EU legislation over national law. Hence, the Court has had the chance to constitutionalize its human rights agenda as well as equal treatment rights in Europe (Bell, 2011; Muir, 2013).

As Carrubba et al. contend (2008, p. 449) such achievements give the ECJ the opportunity to rule counter to member states' preferences. As a consequence, the constitutionalization process the EU legal system is involved in preoccupies member states on account of the uncertain, legally binding and enforceable character of Union legislation enforced by the Court (Blauberger and Schmidt, 2017).

Drawing from Mark Bell's (2011, p. 626) work, this situation has presumably permitted the ECJ to be "less vulnerable to change or repeal" by other actors involved in the EU governance system. Indeed, Dawson (2013) contends that there is no such a political response mechanism in the EU through which those actors whose interests are affected by an ECJ decision can easily propose new legislation. Hence it seems that the ECJ has become mightier as it has constitutionalized the EU legal system.

However, contrary to Dawson's (2013) account, both member states and the European Court of Justice are constantly engaged in a dialogue through which, by submitting written observations to cases pending before the ECJ or by codifying its case-law, national governments warn the Court by signaling their preferred judicial outcome (Blauberger and Schmidt, 2017).

As described by Carrubba et al. (2008), precisely because the ECJ largely relies on national executive and legislative bodies to implement its rulings, it is constrained by these actors when called upon to decide on a specific issue. National governments can shape the outcome a Court decision by showcasing threats of noncompliance with ECJ case-law, override, or even engage in treaty reforms to minimize the Court's role should its rulings not match with the national government's preferred outcome (Carrubba et al., 2008).

As judicial behaviour theories contend, the role of higher courts is dependent on the amount of information they have on how other actors will respond to its activism. As Jeffrey A. Segal contends (2011, p. 20), "judges must temper their decisions by what they can do, or else risk

⁸ See C-26/62, *Van Gend en Loos v. Nederlandse Administratie der Belastingen*, 1963.

See C-6/64, *Flaminio Costa v. ENEL*, 1964.

being overturned". Spiller and Gelly's work (2007) highlight the importance of the aforementioned threats in shaping the rulings of any given court.

As costs of ruling counter to executive and legislative interests increase, courts, which might be aware of the power of the executive and legislative branches of government to execute threats of override and noncompliance, are forced to act strategically and thus refrain from ruling counter to member states' preferences. Indeed, as recalled by the strategic approach, judges behave both rationally trying to increase their utility by advancing their interests, while still feeling constrained not to deviate from the preferred policy outcomes of legislative and executive bodies (Spiller and Gelly, 2007). In sum, the ECJ tends to issue rulings following not only its material self-interest, that is, securing its powers within the EU legal system, but also follow an ideological self-interest committed at upholding citizen's rights when it has the certainty that no national government will easily override its decisions (De Waele and van der Vleuten, 2013).

As Carrubba et al. (2008) put it, the European Court of Justice behaves as a strategic actor. As the Court becomes increasingly aware of how override, noncompliance and even treaty revision will weaken its powers as well as legitimacy, it will thus feel constrained when deciding.

The relation between the ECJ and national governments can therefore be seen as an interaction from which results a noncooperative strategic game as Garrett et al. (1998) argue. Hence, when deciding whether to issue a ruling adversely affecting member states' interests or refraining from doing so, the European Court of Justice is indeed at a crossroads. Even if it is in the ECJ's interests to change the *statu quo* by issuing bold rulings, member governments, as the potential costs of such a decision increase, will most likely form a coalition to overrule, engage in noncompliance or even in treaty reforms. Should the Court ascertain these possibilities, it will definitely refrain from ruling counter to their interests (Garrett et al., 1998).

Several scholars have contested the constraining character of the above-described threats. In a multi-level governance system such as the EU's, in which many actors act as potential veto players, even if the European Court of Justice issues a judgement on a salient issue counter to member states' ideal point, it just needs to have the certainty that some member governments, national courts or even EU institutions, committed at strengthening the Court's activist role deemed harmful for member states' interests, will support its decisions and not join override and treaty reform (Hix and Høyland, 2012). Spiller and Gelly (2007) highlight that in

fragmented political systems retaliation against judicial decisions becomes more difficult and thus courts may feel unconstrained when ruling.

However, Carrubba et al. (2008), analysis demonstrates the responsiveness of the European Court of Justice to threats of override and noncompliance. Hence, their work accounts for the insurmountable character of such threats in the EU, as member states can form sufficiently strong coalitions to overrule a Court's decision. Additionally, governments can unilaterally decide to resist compliance with ECJ judgments deemed harmful for their interests. As already stated, government preferences significantly shape ECJ rulings as the Court acknowledges the feasibility of national actors' threats.

Methodology.

As recalled from the arguments that have been presented so far, the European Court of Justice is perfectly aware that LGBT issues are highly salient for member states, as they often involve marital status or even social benefits. Indeed, as we have also discussed, national governments, when drafting EU legislation aimed at addressing gender identity and sexual orientation discrimination, place so many hurdles whose objective is to strengthen national competence vis-à-vis the EU, and thus impede the Court from issuing rulings on such salient issues (de Waele and van der Vleuten, 2013). Hypothesis 1 follows from this discussion.

***Hypothesis 1:** The European Court of Justice acknowledges the saliency of LGBT issues for member states when called upon to rule on them.*

Our analysis acknowledges the conclusions from Carrubba et al. (2008) empirical analysis regarding the degree to which the ECJ favourably rules to the member states' preferred output. Indeed, as the authors conclude, threats of override and noncompliance shape the European Court of Justice's judgements. However, in cases brought before the Court under the preliminary reference procedure, as it is for the national referring court to ultimately decide on a specific issue, and thus enforce whatever the output might be, threats of noncompliance directed against the ECJ will not represent a major threat. Indeed, 17 out of 18 judgements on LGBT issues have been brought before the Court through the preliminary reference procedure.⁹ As a result, the Court, when hearing cases under art. 267 TFEU's procedure, definitely feels constrained by threats of override and treaty reform, which require support of large coalitions

⁹ Please, see Annex 1.

of member states if they are to produce any effect. Additionally, written observations submitted to the Court by member states serve to showcase the feasibility of such threats (Carrubba et al., 2008). All things considered, should the Court be responsive to these warnings, it will refrain itself from issuing groundbreaking rulings and thus protect the LGBT community by further Europeanizing these issues. Taking into consideration what has been assessed, Hypothesis 2 is written as follows.

***Hypothesis 2:** The European Court of Justice, even if it acknowledges that LGBT issues are salient for member states, rules for LGBT's rights.*

In order to better capture the legal protection the ECJ accords the LGBT community in Europe, it remains clear that judgments by the Court on LGBT issues must be regarded as the dependent variable in our analysis. The perceived salience that LGBT judgements might have for member states, and the willingness of the ECJ to push for a more integrated Union by advancing its citizens' rights account for the independent variables of our study.

To test the falsifiability of the aforementioned hypothesis we have studied all the judgments issued by the ECJ on LGBT issues. Specifically, 18 cases have been ruled by the Court on alleged cases of sexual orientation and gender identity discrimination from 1996 to 2020.

In order to better capture the arguments presented by the ECJ when deciding on LGBT cases, we have created a database in which the relevant information about those 18 rulings is systematically presented.¹⁰ Please, not that, as it has already been described, the Court has addressed alleged claims of gender identity discrimination through EU legislation aimed at securing equal treatment for men and women. Hence, ECJ judgements on alleged gender identity discrimination are presented separately from sexual orientation ones.

Bearing in mind the dependent and independent variables drafted for the purposes of our research, a quantitative study involving the 18 LGBT-related judgements is presented. This section aims at assessing the degree to which the ECJ regards LGBT issues as salient for member states' interests. Hence, the proportion of cases heard by each bench hearing type serves as an indicator for Hypothesis 1, as well as the number of observations submitted by member state governments, the procedure through which LGBT cases are brought before the Court and having national governments as litigants. The degree to which the ECJ protects LGBT cases is framed under Hypothesis 2.

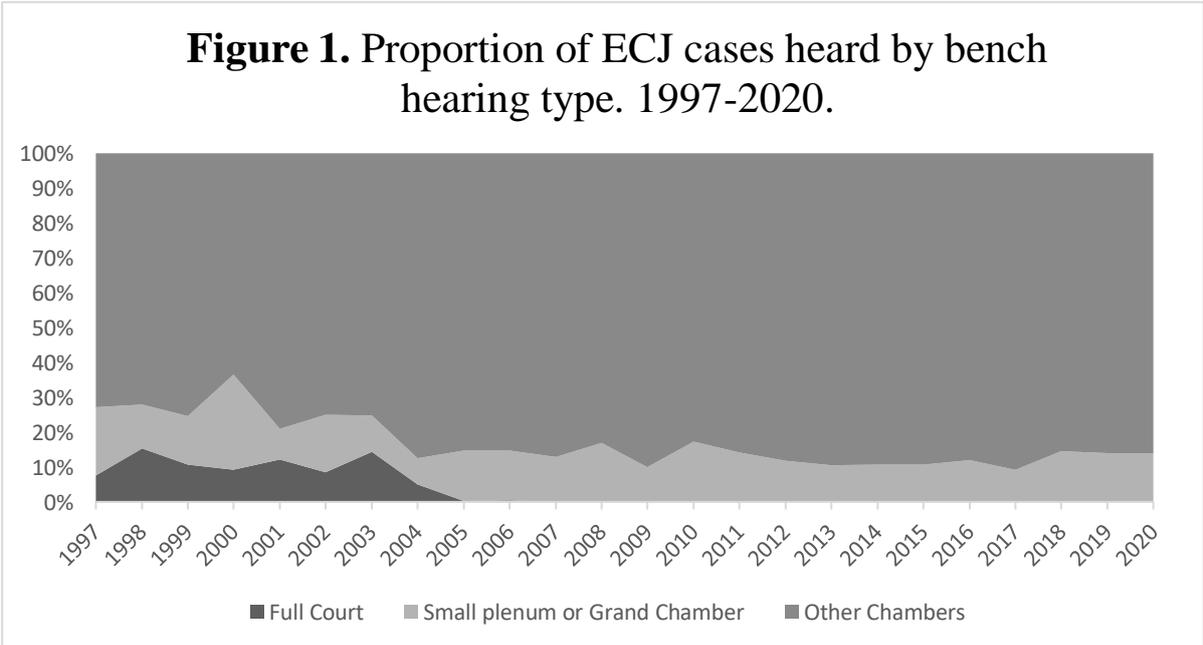
¹⁰ Tables 1 and 2 are presented in Annex 1.

On the other hand, a qualitative study is assessed in order to assess the extent to which the European Court of Justice has protected LGBT rights in Europe. All throughout the analysis presented in what follows, each judgement is classified into various categories depending on the issue at stake on each of them. Such categorisation has been proposed as different Community legislation is applied depending on the issue at stake. Hence, we have grouped LGBT rulings as follows: blood donations, free movement rights of Union citizens across EU member states, asylum assessment procedures, gender identity, and employment as well as occupation. Please note that, as it has already been argued, due to the different Union legislation applied in cases of alleged gender identity discrimination, we have included a special category in which we classify these cases, even if they relate to pensions, working benefits, etc.

Overview of ECJ’s case-law on LGBT issues.

Quantitative analysis of ECJ jurisprudence on LGBT issues.

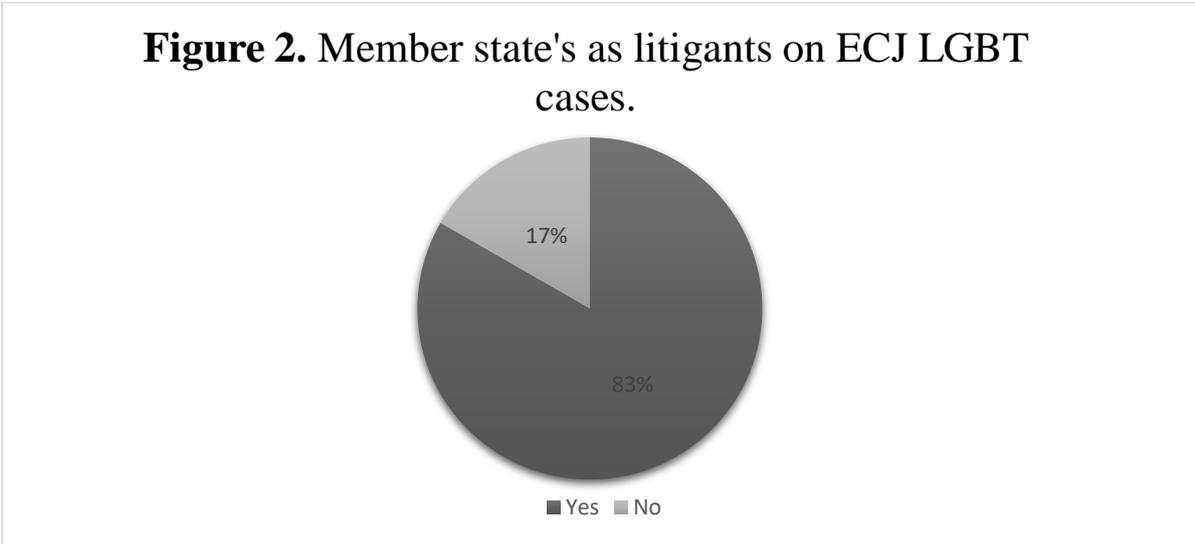
The European Court of Justice publishes, on an annual basis, several statistical reports accounting for its annual judicial activity. These allow us to capture how ECJ judges sit when called upon to rule on the cases brought before them. As it has been assessed, the Court sits as a Full Court, a Grand Chamber or in smaller ones depending on the perceived saliency of a specific issue (de Waele and van der Vleuten, 2013; van der Vleuten, 2014). As seen in Figure 1, between 1997 and 2020 the cases heard by smaller chambers has gradually increased. Note that no data is available for 1996.



Source: Personal collection. Data compiled from ECJ’s judicial activity annual reports.

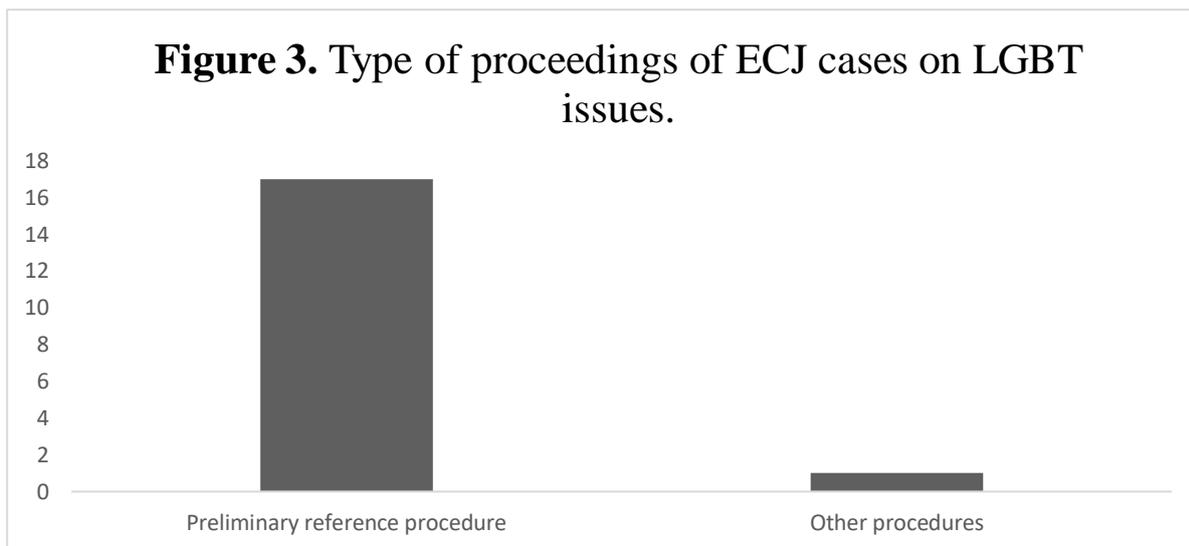
Whereas 2,84% and 13,20% as an average of the totality of ECJ cases issued by each bench hearing type between 1997 and 2020 were respectively heard by a Full Court and a Small Plenum, later called Grand Chamber, 83,94% of its rulings or opinions have been issued by smaller chambers. In contrast, 22,22% of LGBT-related issues have been assessed by a Full Court, whereas 38,88% have been issued by the Grand Chamber. The same percentage accounts for cases heard by smaller chambers.

Cases judged by the European Court of Justice with claims of alleged gender identity and sexual orientation discrimination have very often involved the presence of national governments acting as litigants. Indeed, Figure 2 highlights the involvement of national governments, or alternatively, national agencies, public bodies, etc., as litigants in the cases ECJ judges have addressed.



Source: Personal collection. Data compiled from ECJ’s judgements on LGBT issues. See Annex 1.

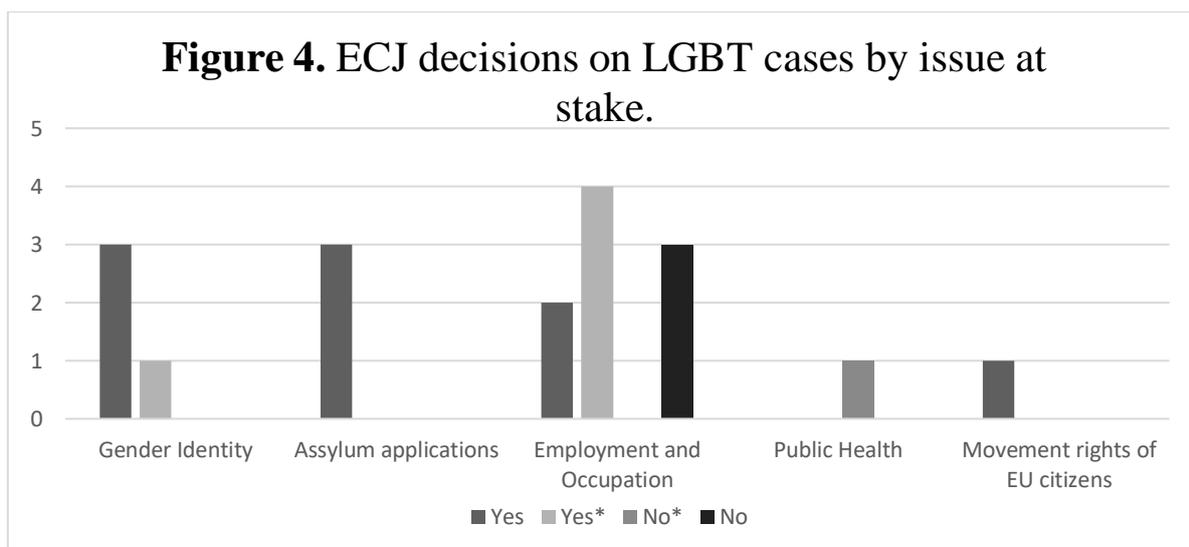
As it can be observed from the above-presented graph, member states have acted as litigants before the Court in 83% of LGBT cases. In all such cases, except in *Joined Cases C-122/99 P and C-125/99 P. D. & Kingdom of Sweden v. Council of the European Union*, in which national governments have performed as the plaintiff, member states have acted as the defendant party. The remaining 17% involve other nongovernmental actors as litigants, such as private organizations, or individuals.



Source: Personal collection. Data compiled from ECJ’s judgements on LGBT issues. See Annex 1.

Figure 3 refers to the type of proceeding through which LGBT-related cases have been brought to the ECJ. As noted, 17 out of 18 cases have reached the Court through the preliminary reference procedure.

Figure 4 aims to shed light on the protection provided by the ECJ to the LGBT community by categorising those cases on the basis of the Community legislation applied. As it will become clear in the next section, the Court not always fully protects the LGBT community in the European Union through its judgements, for which such question cannot always be answered by a plain *yes* or *no* category. As a consequence, we have additionally included the variables *yes** and *not**.



Source: Personal collection. Data compiled from ECJ’s judgements on LGBT issues. See Annex 1.

As understood from Figure 4, the Court has fully protected the LGBT community on asylum applications judgements as well as in gender identity ones. However, the area of employment

and occupation must be regarded as a much more contested area for the ECJ when deciding on LGBT rights.

A detailed analysis on the ECJ's case-law on LGBT issues.

Blood donations.

As assessed in C-528/11¹¹, Union law must be interpreted in a uniform way, regardless of the different translations of Directive 2004/33/EC. As ruled by the Court, a permanent deferral from blood donations is to be applied when there is a high risk of contagion. The risk assessment of a blood donation by a man who has had sexual relations with other men must be made by the referring court. However, a permanent deferral from blood donations by men who have had sexual relations with other men should be considered as discrimination on the grounds of sexual orientation as established by art. 21 of the EU Charter of Fundamental Rights. Nevertheless, according to art. 52 of the Charter, disregard for the rights and freedoms the Charter recognizes can only be justified when such limitations respect, among others, the essence of such rights and freedoms and pursue objectives of general interest, which, according to the Court, the permanent deferral in dispute does. As regards the principle of proportionality, it is for the referring court to determine if there are less coercive means to test blood donations from men that have had sexual relations with other men without appealing to permanent deferral methods. Hence, is for the referring court to examine by scientific means if blood donations by men who have had sexual relations with other men puts blood recipients in a high risk to contract severe infectious diseases. The referring court will also have to determine if discrimination on the grounds of sexual orientation can be justified according to the principle of proportionality.

Free movement rights of Union citizens all across EU member states

As C-673/16¹² judgement recalls, according to art. 7 from Directive 2004/38/EC family life is strengthened when a Union citizen lives with a third country national in a host EU Member State and both are married according to that country's law. The Court ruled that Art. 21 TFEU must be interpreted as precluding a denial of a residence permit for more than three months to a third country national married with a Union citizen, even if national law does not allow homosexuals to marry. The ECJ ruled that Directive 2004/38/EC considers a spouse, which is

¹¹ C-528/13. Geoffrey Léger v. Ministre des Affaires sociales et de la Santé et des Droits des femmes ; Établissement français du sang.

¹² C-673/16. Relu Adrian Coman and Others v. Inspectoratul General pentru Imigrări and Others.

regarded as having a gender-neutral meaning, as part of a Union citizen's family. Consequently, art. 21 TFEU is to be applied in the main proceedings since a Union citizen can invoke this Treaty provision when aiming to conduct a family life with its family in all EU member states. The Court stated that member states must respect Union law, particularly those provisions set forth in the TFEU, even when deciding on a topic of their competence. In a situation such as the one at stake in the main proceedings, art. 21 TFEU is to be understood as conferring a right of residence for more than three months to a third country national in the EU member state the Union citizen to whom it is married is a national.

Asylum assessment procedures.

Joined Cases C-199/12 to C-201/12¹³ judgement contends that homosexuals should be regarded as a social group according to Directive 2004/83/EC. Hence, they might be entitled to claim a well-founded fear of being persecuted in their countries of origin because of their sexual orientation. A term of imprisonment effectively applied to third-country nationals on account of their homosexuality must be considered as a discriminatory and disproportionate punishment, and thus constitutes an act of persecution. It is not conceivable to ask asylum seekers claiming to have a homosexual orientation, which is considered to be a fundamental characteristic of this social group's identity, to conceal it in order to escape persecution in their countries of origin.

As ruled in Joined Cases C-148/13 to C-50/13¹⁴, both Directive 2004/83/EC and Directive 2005/85/EC are to be interpreted as opposing that, while assessing the circumstances of an asylum application based on a fear of persecution for being homosexual, stereotyped questions about homosexuals may arise. Even if national authorities are entitled to assess asylum applications, the provisions laid down in the EU Charter of Fundamental Rights, such as the right to private and family life and the right to human dignity, must be respected. An asylum applicant who has not revealed his homosexual identity at the beginning of an assessment process does not necessarily lack credibility, as the Court stated that such issues are intimate ones and thus it might be difficult to publicly share them.

¹³ Joined Cases C-199/12 to C-201/12. X, Y & Z v. Minister voor Immigratie en Asiel.

¹⁴ Joined Cases C-148/13 to C-50/13. A, B & C v. Staatssecretaris van Veiligheid en Justitie.

In C-473/16¹⁵, the Court established that, when assessing an alleged homosexual identity, expert's reports must respect the provisions set forth in Directive 2011/95/UE and specially those laid down within the EU Charter of Fundamental Rights. However, a final decision cannot solely be based on such reports because asylum applicants regard these as crucial for their application and his free consent is not properly given. This situation constitutes a breach of art. 7 of the EU Charter of Fundamental Rights, that is, the right to respect for his private life. The Court argued that such tests produce disproportionate effects when compared to the purposes why they are used.

Gender identity.

In C-13/94¹⁶ the Court decided that Directive 76/207 aims at countering discrimination on the grounds of sex, as the right of not being discriminated against on this ground is a fundamental right according to the Court jurisprudence. Hence, the scope of Directive 76/207 must be interpreted broadly to include gender reassignment surgery in the area of work. Indeed, people acquiring a new sex might suffer from unequal treatment based on the sex they used to have. Tolerating a situation such as the one at stake in the main proceedings violates the principle of respect for human dignity and human freedom every person is entitled to.

On C-117/01¹⁷ the ECJ judged that, according to the Court jurisprudence, a survivor's pension such as the one in dispute in the main proceedings must be regarded as "pay" and thus falls within the scope of both art. 141 EC and Directive 75/112/EEC. Member states are entitled to grant benefits to married couples, though this must not be in breach of antidiscrimination provisions laid down by Community law. Nevertheless, a situation such as the one in the main proceedings relates to unequal treatment as K.B. and her spouse will never be able to lawfully marry according to UK legislation. National provisions impeding a transsexual from marrying a person with the sex he or she used to have before undergoing gender reassignment, as birth certificates cannot be changed, are in breach of article 12, that is, the right to marry as enshrined at the European Convention on Human Rights. It was for the national court to determine whether in a case such as the one in the main proceedings a person in a situation similar to K.B.'s can invoke art. 141 EC so her spouse can receive a widower's pension should K.B. die.

¹⁵ C-473/16. F v. Bevándorlási és Állampolgársági Hivatal.

¹⁶ C-13/94. P v. S. & Cornwall County Council.

¹⁷ C-117/01. K.B. v. National Health Service Pensions Agency; Secretary of State for Health.

As ruled in C-423/04¹⁸, gender reassignment discrimination fell within the scope of Directive 79/7/EEC. Indeed, the principle of equal treatment must be regarded as a human right that the Court has to specially protect regardless of the fact that it is for the national legislature to establish the conditions to legally recognise a change of gender. By refusing to recognise Ms. Grant's new sex after having undergone gender reassignment surgery, and thus not granting her a pension other women without undergoing gender reassignment are entitled to, is to be interpreted as unequal treatment leading to discrimination as laid down in Directive 79/7/EEC. In a dispute such as the one Ms. Richards is involved in, British national law impedes her from enjoying the provisions laid down by Community law. In such a case, national law was considered as contrary to Community law even if the entitlement to legally recognise gender reassignment falls within the Member State's competence. The financial costs that his ruling could trigger for member states did not justify limiting in time its effects, which can only be done in specific circumstances.

In C-451/16¹⁹, the Court judged that states must always comply with Union law, especially with those provisions dealing with discrimination, such as Directive 79/7/EEC, which should also be applied to discrimination arising from gender reassignment. According to Directive 2006/54/EC, direct discrimination shall exist when a person has been, is, or might be treated on the basis of his or her sex in a less favourable way than others being in a comparable situation. In a situation such as the one in the main proceedings, the national legislation in dispute obliges those who have undergone a sex reassignment surgery to annul the marriage they might have entered to before changing their gender. Indeed, M.B. had to do so if her new sex is about to be recognised and thus receive a retirement pension at the age of 60. However, people that have not changed their sex need not comply with this requisite. As the Court stated that both situations are to be considered as comparable, the national provision at stake treated less favourably those who had changed their sex after having married, for which it must be regarded as direct discrimination on the grounds of Directive 79/7/EEC. Not recognising homosexual marriage does not justify committing direct discrimination on the grounds of sex according to Directive 79/7/EEC provisions.

¹⁸ C-423/04. Sarah Margaret Richards v. Secretary of State for Work and Pensions.

¹⁹ C-451/16. MB v. Secretary of State for Work and Pensions.

Employment and Occupation.

C-249/96's decision²⁰ established that the conditions laid down in SWT's regulations affect all workers having a homosexual relationship regardless of their sex. Hence, there is no breach of the principle of equal treatment on the basis of art. 119 from the EC Treaty and Directive 75/117 EEC. Provided that Community law and most national law of the Community member states did not treat a marriage or a stable heterosexual relationship as equivalent to a homosexual one, an employer cannot be obliged to do such a thing. It was for the legislature alone to take legal action addressing this situation. Neither art. 119 from the EC Treaty nor Directive 76/207 EEC were to be applied in situations involving a different treatment on the basis of sexual orientation. Even human rights treaties cannot broaden the scope of existing Community law.

In Joined Cases C-122/99 and C-125/99²¹ the Court decided that it could not interpret the Staff Regulations in a way that different situations distinct from a marriage are regarded as comparable to a marriage. Indeed, there was a great variety of national legislation regarding how a marriage and a homosexual union are registered. It was the Community legislature's willingness to grant a household allowance only to married partners even if member states have assimilated a registered partnership with marriage. It is for the Community legislature to change this situation by amending the Staff Regulations. A situation such as the one in the main proceedings related to a household allowance on the basis of the Staff Regulations, and thus does not rule on D's civil status. The Staff Regulations provision at stake did not give rise to discrimination on the grounds of sex as it is not relevant if the official is a man or a woman when granting a household allowance, nor to discrimination on the grounds of sexual orientation, since it was applied regardless of the sex of the partner. It only examines the legal nature of the ties between the Community official and its partner. No infringement on the principle of equal treatment could be claimed either as same-sex partners and spouses are not in a comparable situation. Indeed, there was a great variety among member states regarding the legal recognition of same-sex partnerships. A considerable amount of member states did not place a registered union in a comparable situation as regards a marriage.

In C-267/06²² it was decided that a survivor's pension as the one granted by an occupational pensions scheme like the Vddb is to be considered as "pay", for which it fell within the scope

²⁰ C-249/96. *Grant v. South-West Trains Ltd.*

²¹ Joined Cases C-122/99 P and C-125/99 P. *D. & Kingdom of Sweden v. Council of the European Union.*

²² C-267/06. *Tadao Maruko v. Vddb.*

of Directive 2000/78/EC without Recitals 13 and 22 being applied in the main proceedings. The Court argued that member states must always comply with Community law, especially with non-discrimination provisions. According to the referring court there was a gradual harmonisation in Germany between same-sex life partnerships and marriages, for which they were both placed in a comparable situation regarding a survivor's pension benefit. The ECJ decided that should the referring court find that married couples and life partners were in a comparable position regarding the entitlement of a survivor's pension, VdB Regulations must be considered to incite direct discrimination on the grounds of sexual orientation according to non-discrimination principles. The VdB will not suffer financial difficulties should not this judgement be limited in time.

As judged by the Court in C-147/08²³, a retirement pension granted to employees had to be considered as "pay" according to art. 157 TFEU and thus fell within the scope of Directive 2000/78/EC. Discrimination on the grounds of sexual orientation was said to exist, as stated by Directive 2000/78/EC, when married couples and registered partners are in a comparable situation regarding the entitlement of a retirement pension. However, it was for the referring court to determine it. Member states are only obliged to transpose Union law into their national laws once the time-limit for transposing had expired. Hence, no direct discrimination on the grounds of sexual orientation can be claimed before its expiry, and after that time-limit cannot individuals invoke Union law even if it is not directly transposed into national law. Consequently, the principle of equal treatment as laid down in Directive 2000/78/EC could only be claimed once the time limit for transposing this Directive had expired.

In C-81/12²⁴, the Court established that discrimination based on the grounds of Directive 2000/78/EC shall be taken to occur although who made those statements did not had any legal capacity to represent the club in recruitment issues. Sport is subjected to EU law as long as it is considered an economic activity involving professional and semi-professional football players. The rules on sanctions laid down in Directive 2000/78/EC must be interpreted as requiring that those sanctions applied by national authorities should be effective, dissuasive and proportionate. The Court insisted that national law must be interpreted in the light of the Directives it is transposing.

²³ C-147/08. Jürgen Römer v. Freie und Hanestadt Hamburg.

²⁴ C-81/12. Asociația Accept v. Consiliul Național pentru Combaterea Discriminării.

Following the Court conclusions in C-267/12²⁵, the concept of "pay", as laid down in Directive 2000/78/EC had to be broadly interpreted. Hence, it was considered that a national collective agreement such as the one at stake in the main proceedings falls within the scope of Directive 2000/78/EC as it included concepts such as salary bonuses and days of special leave. Direct discrimination on the grounds of sexual orientation, as set out in Directive 2000/78/EC, was likely to occur when marriage is only reserved to persons of opposite sex, as well as in those circumstances in which married couples and those that have entered a civil solidarity pact are found to be in a comparable situation regarding the entitlement of benefits such as salary bonuses and days of special leave.

In C-443/15²⁶ the Court ruled that a survivor's pension must be regarded as "pay" according to art. 157 TFEU regardless of how it is funded. The conditions to grant a pension such as the one at stake in the main proceedings could not be considered as discriminatory as they were applied regardless of the sexual orientation of its claimants. Not being able to meet such conditions was then the result of the state of the law in Ireland. Union law cannot restrict those matters falling within the competence of EU member states, such as marital status, as long as they respect Union law. Even if receiving a survivor's pension relied on whether a marriage or a civil partnership has been celebrated before the 60th birthday of the member of the scheme, no discrimination on the grounds of age was said to exist either as laid down in art. 6 of Directive 2000/78/EC. According to the Court, new grounds of discrimination such as a combined discrimination on the grounds of sexual orientation and sex that goes beyond the ones set forth in art. 1 of Directive 2000/78/EC could not be claimed when none of them is acknowledged separately.

Judging in C-258/17²⁷, the ECJ argued that if it was for the referring court to determine whether or not a pension such as the one at stake in the main proceedings was regarded as "pay" as laid down in art. 157 TFEU. The fact that such pension was given to an employee due to its work, the period of service and the salary received while working, were decisive factors to consider. Art. 2 of Directive 2000/78/EC could only be applied once its transposition period expired. The disciplinary sanction by means of which E.B. was punished with an early retirement thus gave rise to direct discrimination on the grounds of sexual orientation as laid down in Directive

²⁵ C-267/12. *Frédéric Hay v. Crédit agricole mutuel*.

²⁶ C-443/15. *Dr. David L. Parris v. Trinity College Dublin; Higher Education Authority; Department of Public Expenditure and Reform; Department of Education and Skills*.

²⁷ C-258/17. *E.B. v. Versicherungsanstalt öffentlich Bediensteter BVA*.

2000/78/EC, as it only punished same-sex indecency committed by homosexual men. Only after the time-limit for transposing Directive 2000/78/EC had expired, the reduced pension E.B. was receiving could be considered as producing a discriminatory effect, for which it was for the national court to analyse such reduction.

In C-507/18²⁸ it was established that Directive 2000/78/EC's provisions regarding the conditions for access to employment must be interpreted broadly as it aims to establish a general framework to forbid discrimination at work, which is a fundamental right. Consequently, even if there was no selection procedure at the moment in such public statements were made, they fall within the scope of Directive 2000/78/EC. Otherwise, the protection this Directive offers would be illusory. Indeed, the public statements made by NH are to be considered as falling within the scope of Directive 2000/78/EC if the public statements at stake and the conditions for access to employment are united by a link which is not hypothetical. It is for the national court to establish the existence of such a linkage as it is aware of the details involved in the main proceedings. Such an interpretation of Directive 2000/78/EC does not undermine the principle of freedom of expression, which is not an absolute right according to the EU Charter of Fundamental Rights and can thus be restricted on the grounds of art. 52 of the Charter. Directive 2000/78/EC does not preclude national legislation granting an association as such as the one in the main proceedings to bring legal proceedings to enforce the anti-discrimination provisions laid down in Directive 2000/78/EC. However, it is for the national courts to determine under which circumstances can an association such as the one in the main proceedings take legal proceedings to claim discrimination on the basis of Directive 2000/78/EC.

Conclusion.

As it has been argued, the European Court of Justice has positioned itself, through its jurisprudence, as a fundamental actor in the EU legal system. As a result, some areas that had traditionally been of national competence have been addressed by the ECJ as the Union has become competent to legislate on them. Hence, the European Court of Justice, committed at upholding European citizens' rights as a way to further contribute to the European integration process, has been empowered to rule on issues that member states regard as salient as they traditionally fell under national competence, such LGBT issues.

²⁸ C-507/18. NH v. Associazione Avvocatura per i diritti LGBTI - Rete Lanford.

Drawing from judicial behaviour theories, we have highlighted that the ECJ, even if it has strengthened its role as a supranational actor within the Community legal system, is still dependent on national bodies to implement its rulings. Hence, these can engage in overruling, noncompliance, and even in treaty reforms so as to undermine the Court's role in the European Union should its judgements not match their preferences. As a result, the ECJ tends to behave strategically, by refraining to rule counter to member states' ideal point, while still contributing to strengthen a much more integrated Union.

Through the above-presented quantitative analysis of LGBT judgements issued by the European Court of Justice, it remains clear that the Court, when ruling on these cases, is perfectly aware of the saliency of LGBT issues for member states, as Hypothesis 1 contended. Indeed, member states acted as litigants in 17 out of 18 LGBT related cases, and more specifically, 16 national governments acted as the defendant party. As it has also been assessed, the Court has judged LGBT-related cases as a Full Court or a Grand Chamber in a higher proportion than it has done so in all ECJ decisions between 1997 and 2020.

As regards Hypothesis 2, the Court has issued several landmark rulings through its case-law on LGBT issues. Indeed, it has broadly interpreted the already quite limited scope of Directive 2000/78/EC so as to make sure that discrimination resulting from social benefits, pensions and working conditions is precluded, as in *Maruko* or *Accept*. The case-law from the Court on gender identity discrimination allows us to assert the Court's willingness to effectively protect a powerless community with Union legislation. More specifically, in *P* the ECJ established the grounds for including discrimination following gender reassignment surgery within the sex equality provisions. The fact that the Court has largely relied on primary EU legislation, consisting of EU Treaties, as well as the European Charter of Fundamental Rights, showcases the ECJ's willingness to accord its decisions involving sexual orientation and gender identity discrimination a higher degree of protection and even a constitutionalised legitimacy within the EU legal system.

However, even if the Court has issued bold rulings on LGBT issues, as 17 out of 18 cases involving alleged claims of gender identity and sexual orientation discrimination have been decided through the preliminary reference procedure, the ECJ can only provide national courts with the necessary tools to correctly rule on the referred case in the light of Community legislation, as in *Léger*, *Maruko* or *Römer*. Hence, even if the ECJ provides such clarification, national courts have to assess the extent to which discrimination can be found in a given case as laid down by Community legislation. Even if the European Court of Justice has issued some

bold rulings aimed at securing LGBT's rights in Europe, its ability to do so, as it became clear in *Grant*, depends not only in the existence of Community legislation providing the grounds to do so, but also on a minimum agreement among EU member states. Having national governments who have already introduced national legislation precluding discrimination on gender identity and sexual orientation reassures the Court as treaty reforms require unanimity in the Council of the EU, as well as in changing most EU secondary legislation. Judgements relating to the employment and occupation policy area are the ones in which it is more difficult to assess the European Court of Justice's willingness to push for a wider Europeanisation. Indeed, consistent with our acknowledgment of the ECJ acting strategically, the Court might not be willing to rule counter to national governments' interests in this contested policy area, as its judgements would carry significant economic costs for member states and thus would have an incentive in engaging in noncompliance, override, and treaty reform.

Further research on how national courts have ruled once having obtained a response from the ECJ would definitely be useful to comprehend the role the European Court of Justice might have had in securing LGBT rights in the European Union. The response from affected national governments to the Court's jurisprudence might be of interest as it might have served as a warning for the ECJ should it rule again on LGBT issues.

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- C-249/96. Grant v. South-West Trains Ltd.
- Joined Cases C-122/99 P and C-125/99 P. D. & Kingdom of Sweden v. Council of the European Union.
- C-117/01. K.B. v. National Health Service Pensions Agency; Secretary of State for Health.
- C-423/04. Sarah Margaret Richards v. Secretary of State for Work and Pensions.
- C-267/06. Tadao Maruko v. VdB.
- C-147/08. Jürgen Römer v. Freie und Hanestadt Hamburg.
- C-81/12. Asociația Accept v. Consiliul Național pentru Combaterea Discriminării.
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- C-528/13. Geoffrey Léger v. Ministre des Affaires sociales et de la Santé et des Droits des femmes ; Établissement français du sang.

- C-443/15. Dr. David L. Parris v. Trinity College Dublin; Higher Education Authority; Department of Public Expenditure and Reform; Department of Education and Skills.
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- C-451/16. MB v. Secretary of State for Work and Pensions.
- C-258/17. E.B. v. Versicherungsanstalt öffentlich Bediensteter BVA.
- C-507/18. NH v. Associazione Avvocatura per i diritti LGBTI - Rete Lanford.

Annexes.

Annex 1.

Table 1. ECJ judgements on gender identity issues.

Case	Sitting date	Type of proceeding	Judges sitting	Community Law involved	Member states as litigants? *	Observations submitted by member states	Issue	Protected by the Court's ruling?
C-13/94. P v. S. & Cornwall County Council.	30 April 1996.	Preliminary Ruling.	Full Court.	Directive 75/207/EEC.	Yes.	1	Dismissal of P. after having told her boss his intention to undergo gender reassignment surgery.	Yes.
C-117/01. K.B. v. National Health Service Pensions Agency; Secretary of State for Health.	7 January 2004.	Preliminary Ruling.	Full Court.	Art. 141 EC Treaty. Directive 75/117/EEC.	Yes.	1	Denial to grant a widower's pension to K.B.'s married partner should K.B. decease. K.B.'s spouse was born as a woman and underwent surgical gender reassignment to become a man. According to British legislation birth certificates cannot be changed and marriage can only be considered as such when its members are a male and a female. In fact, they both married through an adapted ceremony.	Yes. *
C-423/04. Sarah Margaret Richards v. Secretary of State for Work and Pensions.	27 April 2006.	Preliminary Ruling.	First Chamber.	Directive 79/7/EEC.	Yes.	1	Refusal to grant Ms. Richards, who was born as a man and underwent a gender reassignment operation to become a woman, a retirement pension when she turned 60. At this age according to British national law women born before 1950 were entitled to be awarded by a retirement pension.	Yes.

C-451/16. MB v. Secretary of State for Work and Pensions.	26 June 2018.	Preliminary Ruling.	Grand Chamber.	Directive 79/7/EEC.	Yes.	1	Rejection to grant a retirement pension when M.B. turned 60, the age at which women born before 1950, as established under British national law, are entitled to be awarded a retirement pension. M.B. was born as a male and had undergone a sex reassignment operation. Nevertheless, she was not considered as being a woman as she lacked a full gender recognition certificate. For M.B. to receive such certificate acknowledging her new gender her marriage had to be annulled, which she and her wife did not want to.	Yes.
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*Note that we have included public bodies, agencies, departments, ministries, etc. as a litigant in a given case as an equivalent for a member state's involvement as such.

Table 2: ECJ judgements on sexual orientation issues.

Case	Sitting date	Type of proceeding	Judges sitting	Community Law involved	Member states as litigants? *	Observations submitted by member states	Issue	Protected by the Court's ruling?
C-249/96. Grant v. South-West Trains Ltd.	17 February 1998.	Preliminary Ruling.	Full Court.	Art. 119 EC Treaty. Directive 75/117 EEC. Directive 76/207 EEC.	No.	2	Refusal to grant reduced travel concessions for a female partner of a woman working for South-West Trains Ltd (SWT). As argued by SWT, those travel concessions could be granted to heterosexual couples and not to homosexual ones.	No.
Joined Cases C-122/99 P and C-125/99 P. D. & Kingdom of Sweden v. Council of the European Union.	31 May 2001.	Appeal.	Full Court.	Art. 119 EC Treaty.	Yes.	3	Rejection to grant a household allowance to an official of the European Communities, D., working at the Council. D., a Swedish national, had entered a same-sex registered partnership according to Swedish laws. The Staff Regulations provided a household allowance to married officials. When requested by D. the Council failed to construe a registered partnership with a marriage.	No.
C-267/06. Tadao Maruko v. Vddb.	1 April 2008.	Preliminary Ruling.	Grand Chamber.	Directive 2000/78/EC.	Yes.	2	Denial to grant a survivor's pension by a compulsory occupation pensions scheme (Vddb) to a survivor same-sex registered life partner. According to Vddb's Regulations only widows and widowers are entitled to such benefits. Being considered a widow or a widower is dependent upon having a marriage status	Yes. *
C-147/08. Jürgen Römer v. Freie und Hanestadt Hamburg.	10 May 2011.	Preliminary Ruling	Grand Chamber.	Art. 157 TFEU. Directive 2000/78/EC.	Yes.	0	Refusal to grant a higher retirement pension provided to married couples to an employee in a homosexual registered partnership. Only married pensioners are entitled to such benefits.	Yes. *

C-81/12. Asociația Accept v. Consiliul Național pentru Combaterea Discriminării	25 April 2013.	Preliminary Ruling.	Third Chamber.	Directive 2000/78/EC.	Yes.	1	Discriminatory public assertions refusing to hire a football player presented as being homosexual.	Yes.
Joined Cases C- 199/12 to C-201/12. X, Y & Z v. Minister voor Immigratie en Asiel.	7 November 2013.	Preliminary Ruling.	Fourth Chamber.	Directive 2004/83/EC.	Yes.	5	Rejection of 3 asylum applications submitted by residence seekers claiming to have a homosexual orientation. They could not prove that should they return to their countries of origin they'll have a well-founded fear of being persecuted for belonging to a social group.	Yes.
C-267/12. Frédéric Hay v. Crédit agricole mutuel.	12 December 2013.	Preliminary Ruling.	Fifth Chamber.	Directive 2000/78/EC.	No.	2	Refusal to give special benefits granted to married employees based on Crédit Agricole's national collective agreement even if Mr. Hay had concluded a civil solidarity pact.	Yes.
Joined Cases C- 148/13 to C-50/13. A, B & C v. Staatssecretaris van Veiligheid en Justitie .	2 December 2014.	Preliminary Ruling.	Grand Chamber.	EU Charter of Fundamental Rights. Directive 2004/83/EC. Directive 2005/85/EC.	Yes.	6	Rejection of 3 asylum applications lodged by third country nationals fearing persecution in their countries of origin for having a homosexual orientation.	Yes.

C-528/13. Geoffrey Léger v. Ministre des Affaires sociales et de la Santé et des Droits des femmes; Établissement français du sang.	29 April 2015.	Preliminary Ruling.	Fourth Chamber.	EU Charter of Fundamental Rights. Directive 2002/98/EC. Directive 2004/33/EC.	Yes.	1	Permanent deferral, based on a national decree, from blood donations by a male donor that has had sexual relations with other men. It was considered that blood donations by men who have had homosexual relations puts its recipients in a high risk because of severe infectious diseases.	No *
C-443/15. Dr. David L. Parris v. Trinity College Dublin; Higher Education Authority; Department of Public Expenditure and Reform; Department of Education and Skills.	24 November 2016.	Preliminary Ruling.	First Chamber.	Directive 2000/78/EC.	Yes.	1	Refusal to grant a survivor's pension to Mr Parris' same-sex civil partner should Mr. Parris die. Mr. Parris is a member of a pension scheme. To receive such a pension Mr. Parris ought to be married or have entered a same-sex civil partnership before the age of 60, which he could only do at the age of 64, when same-sex civil partnerships were legally allowed in Ireland.	No.
C-473/16. F v. Bevándorlási és Állampolgársági Hivatal.	28 January 2018.	Preliminary Ruling.	Third Chamber.	EU Charter of Fundamental Rights. Directive 2011/95/EU.	Yes.	3	Rejection, based on a psychological examination, of an asylum application submitted by F., who claimed a fear of being persecuted in his country of origin on account of his homosexuality. F.'s statements were found to lack credibility based on a psychological expert's report.	Yes.
C-673/16. Relu Adrian Coman and Others v. Inspectoratul General pentru Imigrări and Others.	5 June 2018.	Preliminary Ruling.	Grand Chamber.	Directive 2004/38/EC.	Yes.	5	Denial by Romanian authorities of the right of temporary residence for more than three months to an American citizen, Mr. Hamilton, who married a Romanian citizen, Mr. Coman, in another EU member state. Romanian national law states that marriage is a union between a man and a woman.	Yes.

C-258/17. E.B. v. Versicherungsanstalt öffentlich Bediensteter BVA.	15 January 2019.	Preliminary Ruling.	Grand Chamber.	Directive 2000/78/EC.	Yes.	2	Compulsory early retirement and a reduced pension for a federal police officer accused of having committed a same-sex indecency on two minors on the basis of a 1945 Austrian Criminal Law.	Yes. *
C-507/18. NH v. Associazione Avvocatura per i diritti LGBTI - Rete Lanford.	23 April 2020.	Preliminary Ruling.	Grand Chamber.	EU Charter of Fundamental Rights. Directive 2000/78/EC.	No.	2	Public statements made by NH. in a radio interview in which he declared that he would not want to recruit homosexuals for his law firm nor work with them. As a consequence, the association Avvocatura per i diritti LGBTI - Rete Lanford brought a representative action against NH to national courts.	Yes. *

*Note that we have included public bodies, agencies, departments, ministries, etc. as a litigant in a given case as an equivalent for a member state's involvement as such.