

Current Reflections on EU Antidiscrimination Law

ERA Seminar

Trier, 13 -14 September 2010

**The ECJ Judgments on the Anti-Discrimination Directives:
Already a Doctrine?**

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*....(it) results, as it were,
in an Archimedean position...*

Advocate General Geelhoed
Conclusions in the Chacón Navas case

Abstract

1. Anyone looking back over the doctrinal debate in the aftermath of the enactment of Directives 2000/43/EC and 2000/78/EC and the expectations for social change that they had raised would think that the European Court of Justice's application of the new anti-discrimination law is disappointing both from a quantitative point of view (up until the present there have been fewer than a score of references for preliminary rulings and just eleven decisions) and from a qualitative point of view (the Court's positions appear to vary, and there are evident signs of disagreement among judges and Advocates General on questions of substance, such as the existence or otherwise within the Community legal order of a general principle of non-discrimination, the depth of judicial scrutiny, the relationships between national and European sources and the horizontal effects of the directives)¹.

¹ Cf. E. Szyszczak, *Antidiscrimination Law in the European Community*, *Fordham Int. L.J.*, 2009, 652.

The basic premise underlying my paper is that the Court's inconsistency can be explained by the fact that the discourse on equality and discrimination is taking place at a time when the relationships between levels of government and jurisdiction in the EU multilevel system are being redefined. In a situation like this, the judicial dialogue on equality and fundamental principles becomes a tool of continuous negotiation on the distribution of legislative and jurisdictional competences between national and supranational institutions. This process is taking place after the demise of the European constitution, whose entry into force would *a priori* have solved at least some of the ongoing disputes. Equally, the insertion in the Treaty of Lisbon and the additional protocols of clauses that have created uncertainty as regards the meaning of the principle of supremacy and the relationship between fundamental rights and general principles in the EU legal order, may explain why *disagreement* appears at this point in time to be the dominant tone of the Community debate on equality.

2. The caution displayed by the ECJ in *Bartsch* and *Kucukdeveci* after the criticisms raised by the *Mangold* decision have not, however, prevented it from using the equality principle (also in its negative form as a principle of non-discrimination) as a *metaprinciple*, which is capable of rearranging the boundary lines between competences, turning them into flexible demarcation lines, and of giving rise to a European jurisdictional circuit, which is capable of by-passing national jurisdictions². This happens because the principle of equality is a “non-matter”, a principle that cuts across the sphere of competences of the European Union and of its Member States.

As a result, the principle of equality ends up playing the same role in European integration that it has always played in all multilevel political systems, namely that of realigning the boundaries of competences (and thus of power) between the centre and the periphery, making these boundaries dynamic, and of extending the jurisdiction of the courts to apply them (thereby also reinforcing judicial power relative to political power).

² The same can also be said of other discrimination cases decided in other legislative settings (such as *Cordero Alonso*, *Del Cerro Alonso* and *K.B.*), in which the “exchange of messages” between European and national judges seems to take place sidestepping confrontation with the custodians of the national constitutions.

3. This tendency, which has already appeared in the past, in the history of European integration (with the *Cowan* case representing an early example), seems destined to become more accentuated with the entry into force of the Treaty of Lisbon and with the attribution of a binding force to the Charter of Fundamental Rights of the European Union. The cases concerned with discrimination show that when the principle of equality operates in connection with fundamental rights and with their nature as self-asserting sources, this provides legitimacy to the ECJ's claim to have the right to decide on the distribution of competences. One question that must be asked, however, is whether, once the Charter of Fundamental Rights has entered into force, by invoking the principle of equality and fundamental rights, the ECJ could assert the doctrine of *incorporation* by stealth, without the limits which it had itself laid down in the past.

4. The second line of thought pursued in this paper is that, despite the evident limits of the Court's discrimination doctrine, cases like *Mangold*, *Maruko*, *Coleman* and *Feryn* show, nonetheless, how the Court is applying the principle of non-discrimination in an innovative and powerful manner, linking it firmly to the protection of fundamental individual rights. In this case too, there are still several grey areas, such as the failure to clarify the role played by human dignity as a *ratio* for the special protection accorded by the Community legal order against discrimination based on subjective grounds.

On this subject, there are those who have claimed that there is a risk of "judicial colonialism", which, through the use of the weapon of fundamental rights under the banner of a battle fought for civilisation, might sacrifice the national cultural and social models already in existence³. Such risks ought not to be over-stated. Integration between legal orders is, by its very nature, a process of continuous re-definition of the boundaries between the legal orders involved in that integration. The management of the normative pluralism may instead require the creation of procedural channels that would act as tools of dialogue between

³ Cf. M. Cartabia, *L'ora dei diritti fondamentali nell'Unione Europea*, in M. Cartabia (ed.), *I diritti in azione. Universalità e pluralismo dei diritti fondamentali nelle Corti europee*, Il Mulino, Bologna, 2007, p.

national supreme courts and the European Court of Justice⁴.

5. These developments entail the risk of a political overexposure of judicial power. This too explains the difficulties the Court faces in developing a consistent doctrine on discrimination. However, the possibility that the Courts will absorb the powers duly allocated to the legislative and executive bodies is, to some extent, inherent in the counter-majoritarian role played by the courts in applying the anti-discrimination clauses. The express recognition of this role would appear to be the most important step in enhancing European anti-discrimination law.

Despite the variegated genesis of anti-discrimination protections, it is possible to pinpoint in both national and international law a number of constant characteristics which link their development ineluctably to the problem of democratic pluralism (and thus the problem of the legitimacy of power and political representation)⁵. Ever since the famous *footnote four* in the judgment handed down by the US Supreme Court in the *Carolene Products* case in 1938, the principle of non-discrimination has been used for the purpose of resolving one of the structural problems of democratic societies, namely the exclusion from the political process or from the results of that process of minority groups bearing characteristics signalling difference – be it with respect to the racial, ethnic or religious majority or even with respect to the dominant gender. The job of correcting this malfunction in the system of political representation has been entrusted to the courts and to their test of strict scrutiny.

Some of the basic categories that have allowed the principle of non-discrimination to open up channels of access to the political process to the excluded groups and, in particular, to the categories of majority and minority, are now struggling to adapt to a supranational entity that has not yet drawn the boundary lines within which a minority is subject to the will of the majority. Moreover, these categories are also finding it hard to adapt to factors of discrimination linked to identity-linked characteristics or characteristics cutting across the groups (gender, age and so on). The principle of non-discrimination,

⁴ Cf. G. Itzcovich. *Fundamental Rights, Legal Disorder and Legitimacy: the Federfarma Case*, Jean Monnet Working Paper, 12/08.

⁵ Cf. M. Barbera, *Not the same? The judicial role in the new Community anti-discrimination law context*, in *ILJ*, 2002, pp. 82 ff.

however, continues to be one of the instruments modelling the very idea of community and defining its boundaries. Cases like *P.*, *Maruko* and *Feryn* are telling the legislators and citizens of the Union's member countries who must be recognised as an effective member of the community and treated as such.