The role of the national Judge in the application of EU Anti-Discrimination Law

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Scheme

• The role of the national Judge in EU Anti-Discrimination Law
• The role of the national Judge in ECHR and ESC
National Judges and EU Law

• Judges are an essential gear in system of EU Law
  • Respect the primacy of EU Law (Costa - C-6/64)

  • Consistent interpretation of national law with EU Law (Marleasing (C-106/89) and Pfeifer (C-39/01))

EU Anti-Discrimination Law

• Primary sources
  • Art 267º TFEU (former 141º TUE and 119TEC)
  • Art 21º and 51º CFREU;

• Secondary sources:
  • Directive 2006/54 (Recast) - sex
  • Directive 2000/43 - Race
• Art 157° TFEU
  • Highly creative interpretation by the CJEU developing concepts such as the burden of proof (Danfoss (C-109/88), justifications for indirect discrimination (Bilka (C-170/84)):
  • Very importante: the concept of «remuneration» which goes well beyond the traditional national concepts reaching to occupational pensions (Garland (C-12/81)).

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• Arts 21° + 23+ + 52°, n.° 3 and n.° 4 od CFREU;
  • These provisions intend to do an integrated interpretation with:
    • The case law of the ECHR;
    • The common constitutional traditions of the member states;

• V.i: it is a floor of rights; member states can provide for higher levels of protection;

• General clause of discrimination
The case law empire

• National and CJEU Judges have had a pivotal role in the development of EU Law because:

  • Directives are the codification of pre-existing CJEU case law:
    • Jenkins (C-96/80) and Bilka (C-170/84) - concept of direct discrimination;
    • Danfoss (C-109/88) - concept of burden of proof;

  • CJEU case law was strongly influenced by decisions of American and British courts;

Tendencies

• One can perceive two distinct tendencies in CJEU case law

  • **Strict interpretation** - leaving no margin of manoeuvre to national courts;

  • **Open interpretation** - devolves the question to national courts while providing a guideline for decisions;
Strict interpretation

• Concept of »disability« (D. 2000/78)
  • Chacón Navas (C-13/05);
  • HK Denmark (C-335/11 and 337/11)

Very precise definition in line with the UN Convention of the Rights of Persons with Disabilities;

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• Discrimination by association
  • Coleman (C-303/06)
  • It is not provided for in the directives; it is strictly a judicial construction;

• Concept of »bona fide occupational requirements«
  • Wolf (C-229/08), Prigge (C-447/09), Vital Pérez (C-416/13), Sorondo (C-258/15) and Asma Bougnaoui (C-188/15)
  • Very strict interpretation widely criticised; national courts with no margin of manoeuvre;
Open interpretation

- The CJEU gives national courts a margin of discretion while providing for guidelines for the final decision.

- Age discrimination:
  - Age concern (C-388/07), Domnica Petersen (C-31/08) and Georgiev (C-250/09).
  - The CJEU admits that social and labour market management policies may justify discriminatory treatments; it devolved the control of the proportionality of the measures to the national courts.

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- Religious discrimination
  - Samira Achbita (C-188/15) and Asma Bougnaoui (C-157/15).
  - It devolved to the national courts the control of the proportionality of the less restrictive means of ensuring an image of neutrality vis-a-vis customers.
  - It left open the question of neutrality within the company.
National courts and the ECHR and the ESC

• ESC - case law of the ECSR
• Vexata quaestio of the direct effect of the ESC
  • France - the ESC and the case law of the ECST do not enjoy direct effect within french law (Cass: 17/07/2019 - n.º 19-70.010 and 19-70.011);
  • Some national spanish case law provided the ESC with direct effect based upon spanish constitutional law.

Case law ECSR

• Recl 55/2009 - »on call services« are a violation of the limits of daily working time (art 2º, n.º 1 ESC)
  • Court of Barcelona (Iberclima) - spanish constitutional law could step aside EU law and apply the ECSR case law because EU Law simply provides for a floor of rights;
• Recl 65/2011 - probationary period of 12 months is a violation of art 4º, n.º 4 ESC;
  • Court of Barcelona (Benicio) - it applied the case law of the ECSR directly to put aside national law;
Conclusion:

- National Judges have a particular responsibility to ensure the primacy of EU Law, setting aside conflicting national rules and interpreting national law consistently to ensure the effectiveness of EU Law.

- Case Law is extremely important in discrimination cases because the Directives are a codification of pre-existing case law and, given the use of open concepts, the judicial construction of the CJEU is of pivotal importance in their application.

- The CJEU has varied in the interpretation of the Directives between
  - Strict interpretation of key concepts
  - Open interpretation of problematic issues, providing guidelines for the solution and delegating the final decision to the national courts