

# 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 267° TFEU (former 141° TUE and 119TEC)
  - Art 21° and 51° CFREU;
- Secondary sources:
  - Directive 2006/54 (Recast) - sex
  - Directive 2000/78 - Framework Direct.
  - Directive 2000/43 - Race

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- **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)).

## ...cont

- **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;

## ...cont

- 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;

## ...cont

- **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 questio 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