



HELSINGIN YLIOPISTO
HELSINGFORS UNIVERSITET
UNIVERSITY OF HELSINKI

Nordic Network for European Legal Studies, NNELS Seminar

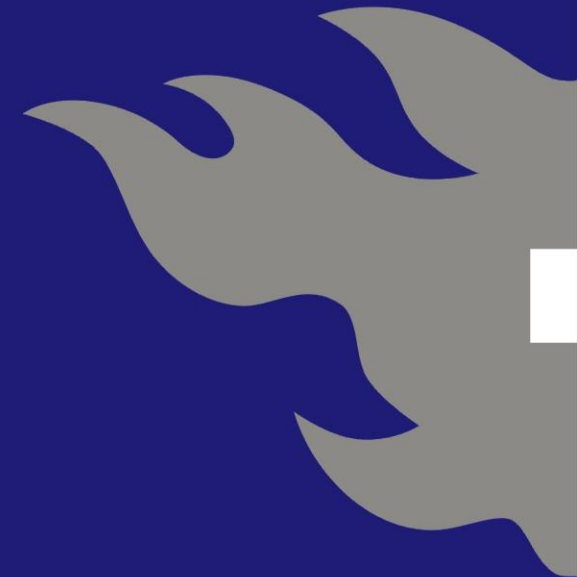
Topic: The Rule of Law in EU and the Ajos case

Juha Raitio

Professor of European Law

University of Helsinki

10 October 2018





AJOS-CASE: The problem as a starting point

- Nielsen & Tvarno, Europarättslig Tidskrift 2017, s. 303 ff.:
- **”In its judgment in the AJOS-case, the CJEU upheld its findings in Mangold and Küçükdeveci. The Danish Supreme Court defied th CJEU and did the opposite of what the CJEU had held it was obliged to do”**
- The case was about discrimination on grounds of age, which has been a controversial issue even in the case law of the CJEU:
 - C-144/04 **Mangold** (2005) ECR I-9981, C-411/05 Palacios de la Villa (2007) ECR I-8531, C-88/08 Hütter (2009) ECR I-5325, C-229/08 Wolf (2010) ECR I-1, C-341/08 Petersen (2010) ECR I-47, C-555/07 Küçükdeveci (2010) ECR I-365, C-45/09 Rosenblad (2010) ECR I-9391, C-141/11 Hörnfeldt, 5.7.2012, C-501/12 – C-506/12, C-540/12 ja C-541/12 Specht, 19.6.2014, C-20/13 Unland, 9.9.2015, C-530/13 Schmitzer, 11.11.2014, C-529/13 Felber, 21.1.2015, etc.

AJOS-Case?



- ERT, Nielsen & Tvarno 2017:
- The dispute concerned two private persons, an employer(AJOS) and an employee (Rasmussen, or the legal heirs of the employee). The employer refused to pay the employee a severance allowance.
- Rasmussen had been employed by Ajos since 1.6.1984 until 25.5.2009, when he was 60. He remained on the employment market after his dismissal in 2009. Rasmussen was (in principle) entitled to a severance allowance equal to 3 months salary based on Danish Act on Salaried Employers.
- In the national case law (1973, 1988, 1991, 2008, 2014) the Danish Supreme court had established that the employee was not entitled to severance payment, if the employee upon his resignation was entitled to a retirement pension from the employer, regardless of whether the employee had chosen to make use of the right to pension.

AJOS-Case?

- ERT, Nielsen & Tvarno 2017:

- Rasmussen was entitled to an old-age pension payable by the employer, so based on the established national case law the employer Ajos barred his entitlement to the severance allowance.

- However, Rasmussen's trade union brought an action on behalf of him claiming that Ajos should pay a severance allowance equal to 3 months' salary (literal interpretation of the Danish Salaried Employees Act, Section 2 A).

- The First instance ruled that Ajos should pay the allowance

- It referred to Mangold –case law and to the principle of non-discrimination on grounds of age as well as to the C-499/08 Ingeniorforeningen i Danmark, i.e. Ole Andersen –case, in which the CJEU had ruled that the Danish interpretation of Section 2 A infringed the Equal Treatment in Employment and Occupation Directive 2000/78/EC).

- BUT: In Ole-Anderson case there was a public employer.



AJOS-Case?

- Ajos appealed to the Supreme Court claiming that Ole Andersen case does not fit to the facts at hand, since now it is a question of two private parties, i.e. a horizontal relationship. The ruling was claimed to be against the principle of legal certainty and the protection of legitimate expectations.
- So the Supreme Court referred the case to the CJEU in order to determine the content and scope of the direct effect of the prohibition of age discrimination in horizontal cases.
- The CJEU had to weigh and balance between the general principle prohibiting discrimination on grounds of age and the various elements of legal certainty (*Vertrauensschutz*).



AJOS-Case? CJEU: Age Discrimination

1. "The general principle prohibiting discrimination on grounds of age, as given concrete expression by Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, **must be interpreted as precluding, including in disputes between private persons, national legislation, such as that at issue in the proceedings before the referring court, which deprives an employee of entitlement to a severance allowance where the employee is entitled to claim an old-age pension** from the employer under a pension scheme which the employee joined before reaching the age of 50, regardless of whether the employee chooses to remain on the employment market or take his retirement."

AJOS-Case? CJEU: Legal Certainty



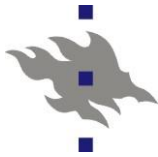
- 2. "EU law is to be interpreted as meaning that a national court adjudicating in a dispute between private persons falling within the scope of Directive 2000/78 is required, when applying provisions of national law, **to interpret those provisions in such a way that they may be applied in a manner that is consistent with the directive or, if such an interpretation is not possible, to disapply, where necessary, any provision of national law that is contrary to the general principle prohibiting discrimination on grounds of age.** Neither the principles of legal certainty and the protection of legitimate expectations nor the fact that it is possible for the private person who considers that he has been wronged by the application of a provision of national law that is at odds with EU law to bring proceedings to establish the liability of the Member State concerned for breach of EU law can alter that obligation"



The Danish Supreme Court, 2016

- The Supreme Court reversed the ruling of the first instance court and emphasised the established national legal practise.
- The bill which proposed the Maastricht amendment to the Accession Act 1993: Article 6(3) TEU on general principles **was not part of the conferral of power from Denmark to the EU.**
- Additionally, Denmark had not conferred power over the EU to make the Charter of Fundamental Rights directly applicable in Denmark.
- Therefore the national Supreme Court claimed to have competence to decide this horizontal dispute.

/ But the Charter is nowadays binding in Member States and it contains Article 21, which codifies the principle of non-discrimination on many grounds, including age. So how to comment this?



Starting point: Rule of law, legal certainty and the principle of non-discrimination on grounds of age as "general principles"

- See e.g. Raitio J, The Principle of Legal Certainty in EC Law, Kluwer Academic Publishers, 2003, p. 366:
- Legal certainty and rule of law
- Questions of fact: / Questions of law
- General considerations direction (Dworkin: principle argues in one direction, but does not necessitate a particular decision)
- Principle of non-discrimination on grounds of age
- Questions of fact: / Questions of law
- Observation yes/no direct answer
- Non-discrimination on grounds of age – rule-like principle, specific, direct answer
- Legal Certainty, Rule of law – wide scope of application, "rhetorical balloons"?
 - *Ex analogy metanorms lex specialis / lex superior ? WHY?*



Rule of law and legal certainty are fundamental general principles – Article 2 TEU, values of the EU

■ Levels of Justification (e.g. Peczenik):

- 1. Rules
- 2. Concepts
- 3. Principles and policies (legal certainty?, non-discrimination?)
- 4. Values, political morality (rule of law?)

- The nature of legal certainty as an underlying principle can be illustrated by referring to the Defrenne-case. The principle of **equal pay** was relevant in that case and it can be defined relatively accurately by reference to a net of cases and to the secondary legislation. The same applies to the principle of non-discrimination on grounds of age. In turn, the underlying principles such as legal certainty and rule of law cannot be formulated in a specific way. **Therefore the rule of law or legal certainty tend to be weak arguments in the case law.**



Why are the principles of legal certainty and rule of law important as legal arguments?

Problem: An American judge decided the guilt or innocence of traffic violators by the flip of a coin when he could not decide the case on the basis of the testimony.

- What about legal certainty? The probability of acquittal is 1:2, 50 %.
So does legal certainty refer to predictability only?
- Is this against the rule of law?

- See Bix, Brian: Language and Legal Determinacy, Oxford, 1995, p. 106.

Legal certainty and rule of law?



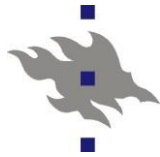
- In *Groussof's* words **legal certainty** reflects the ultimate necessity of clarity, stability and intelligibility of law (See Groussof, Xavier: *General Principles of Community Law*, Groningen: Europa Law Publishing, 2006, p. 189). Many Nordic scholars find that legal certainty refers to the predictability and acceptability of legal decision-making (e.g. *Aarnio, Peczenik*, etc.).
- **Rule of law** is in turn linked to the prohibition to abuse of power. Thus it is a bit more abstract than legal certainty, which can be related e.g. to *Vertrauensschutz* or *principle of non-retroactivity*.
- The Rule of Law can not be defined without controversies, but in any case it is linked in the same context than democracy and human rights in the EU. The substance of human rights has become the part of the very foundations of EU legal order.



The Thick conception of Rule of Law

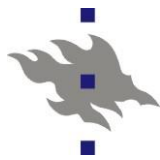
- *Von Bogdandy, Armin – Antpöhler, Carlino – Ioannidis, Michael: Protecting EU values, Reverse Solange and the Rule of Law Framework, in Jacob, András – Kochenov, Dimitri (eds): The Enforcement of EU law and Values, Oxford University Press, Oxford, 2017, pp. 218-233, at p. 226:*
 - *"This general orientation towards a **"thick"** concept of Rule of Law is in principle reaffirmed in the decision to submit Poland to the Framework, which notes that the Rule of Law is a constitutional principle with **both formal and substantive components**. Nevertheless, when it comes to the actual reprimands against Polish reforms, priority is accorded to the formal dimension".*

Conclusion



- Trying to balance between the rule of law and the principle of non-discrimination on grounds of age is difficult, since these principles have a different *dimension of weight* as principles (Dworkin) and they belong to the different levels of law (Tuori, Critical legal positivism).

- Is the following explanation of "Rechtstaat" relevant even in the context of the Ajos-case?
- Carl Schmitt: Legalität und Legitimität: **Berlin, 1932**, p. 19:
 - " *Das wort "Rechtsstaat" kann soviel verschiedenes bedeuten...* ja "es ist begreiflich, dass propagandisten und advokaten aller art das wort gern für sich in anspruch nehmen, um den gegner als feind des rechtsstaats zu diffamieren. Ihrem rechtsstaat und ihrem rechtsbegriff gilt der spruch "recht aber soll vorzüglich heissen, was ich und meine gevalten preisen".
 - *Ex analogy metanorms **lex specialis** / lex superior ?*



Comparison: Arguments of the CJEU and the Danish Supreme Court

- Supreme court: Predictability and stability of the national legal system (Raitio: formal and factual legal certainty). This is national matter and should be ruled by the national courts.
- CJEU: Legal certainty must be analysed in the framework of EU law, not national law. Supremacy ! This is a matter of material law principles such as non-discrimination. The Mangold-case law should prevail. Additionally, the preliminary rulings procedure and the bindingness of a preliminary ruling should not be compromised like that!
 - So legal certainty and rule of law can be relied on by both courts and parties. (rhetorical balloon or not? Schmitt's idea revisited...)



Comments from the Finnish (theoretical) perspective – The Danish Supreme Court

- MacCormick: pluralism as a key word to understand the relationship between national legal systems and EU law, not hierarchy (supremacy in a narrow sense). There is feed-back both ways
- Problem: The radical pluralism thesis (see e.g. Jääskinen 2008, The legal systems of the EU and Member States are radically separate). Has the Danish Supreme Court applied the Kelsenian influenced radical pluralism thesis?
- Separate legal systems? Is it really so when the human rights and general principles are concerned?
 - Charter is binding. The European convention of human rights is binding in all Member States. (Copenhagen criteria for the accession procedure, "stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities").
 - The general principles such as non-discrimination possess general application all over the EU.



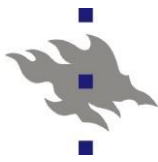
Human Rights in the Case Law of the European Court of Justice

- Article 2 TEU is partly based on Article 6(1) TEU:
- "The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties."
- See C-402/05 P and C-415/05 P, Kadi, paras. 303 and 304: "Those provisions cannot, however, be understood to authorise any derogation from the principles of liberty, democracy and respect for human rights and fundamental freedoms enshrined in Article 6(1) EU as a foundation of the Union. Article 307 EC may in no circumstances permit any challenge to the principles that form part of the very foundations of the Community legal order, one of which is the protection of fundamental rights, including the review by the Community judicature of the lawfulness of Community measures as regards their consistency with those fundamental rights.



But is the prohibition of non-discrimination on grounds of age a principle at all?

- Based on the EU case law it is clearly a principle (Mangold-case law). See also Article 21 of the Charter and Article 19 (1) TFEU.
- But then again, should all the reasons to discriminate be treated equally by the CJEU? And is the principle the prohibition of non-discrimination? (Not the grounds of it)
- For example, the Römer-case (C-147/08 Römer (2011) ECR I-3591) dealt with the principle of non-discrimination on grounds of sexual orientation, but it seems that the discrimination on grounds of age weighs more than that.
- Why? We all get old, but only a minority of us are gay...
- If so, is this more like a policy than a principle?



Two remarks

- Now EU law is to be applied by the national courts in the context of disputes between private persons (consistent interpretation of general principles) EU law takes precedence even in the context of horizontal cases, (Mangold- case law)
- In the AJOS-case the difficulty in interpretation related to material law, i.e. to weighing and balancing of principles, which had a material content (rule of law has a material content too, "Thick"). In such a context EU law should prevail more clearly than in the contexts where there is a collision of national procedural norms and EU law at hand.
 - See e.g. Kühne & Heitz –line of cases and *res judicata*, which is also referred to in the context of legal certainty.



Procedural aspects and legal certainty

Line of cases:

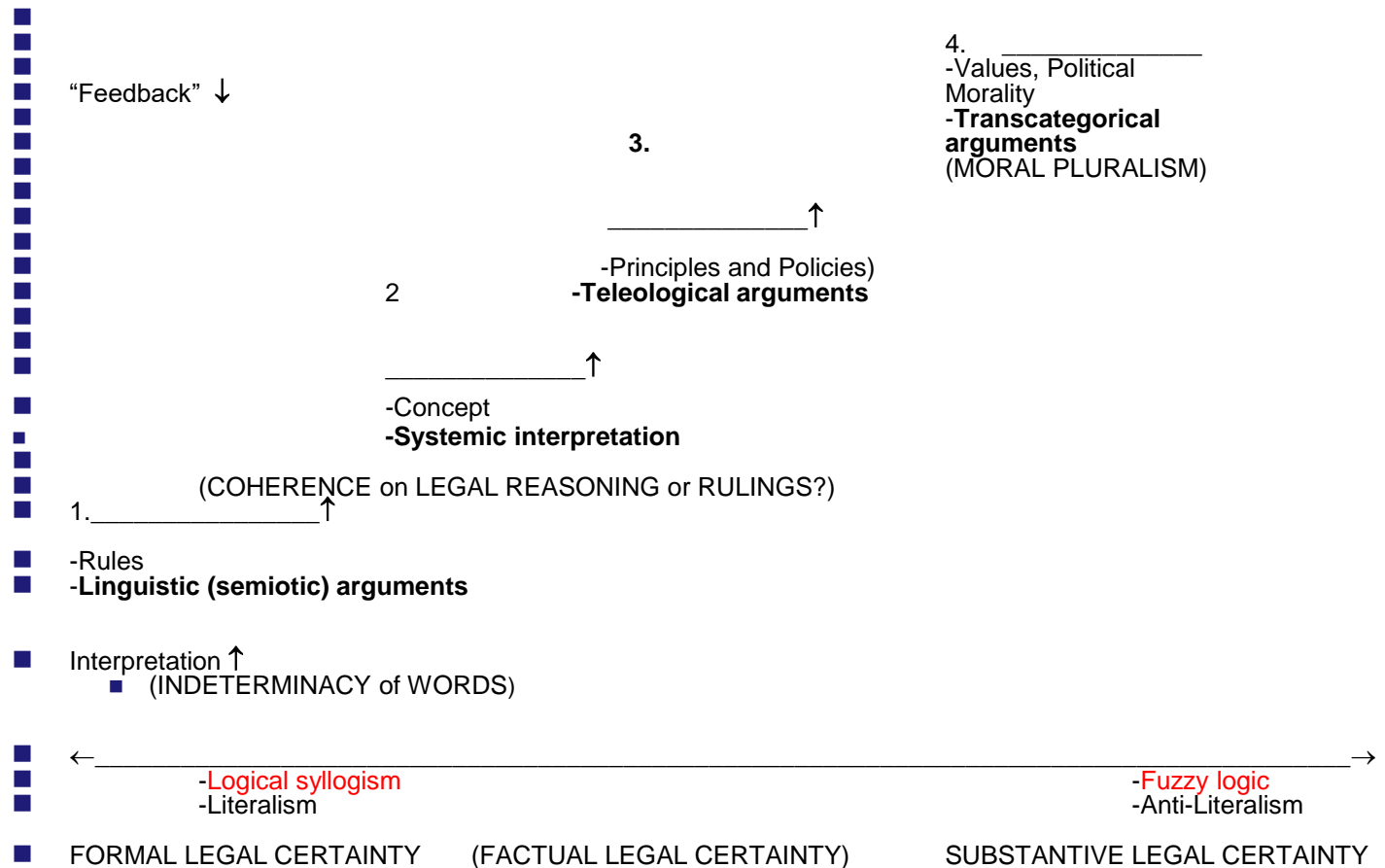
-C-453/00 **Kühne & Heitz** (2004) ECR I-837

- C-234/04 Kapferer (2006) ECR I-2585
- C-2/06 Kempter (2008) ECR I-411
- C-241/11 Byankov, ECLI:EU:C:2012:608
- C-213/13 Impresa Pizzarotti, ECLI:EU:C:2014:2067
- C-69/14 Tarsia, ECLI:EU:C:2015:662

- See Kapferer, p. 21: "Therefore, Community law does not require a national court to disapply domestic rules of procedure conferring finality on a decision, even if to do so would enable it to remedy an infringement of Community law by the decision at issue (see, to that effect, Case C-126/97 *Eco Swiss* [1999] ECR I-3055, paragraphs 46 and 47).
- QUESTION? HOW DO THE PRINCIPLES "BIND"? THEY ARE NOT LIKE RULES, BUT SUITABLE FOR WEIGHING AND BALANCING.



Levels of Justification (e.g. Peczenik, Klami)





Systemic argumentation and coherence

- COHERENCE ON LEGAL REASONING OR RULINGS?

- Judge Edward 1996 against the accusation of judicial activism in ECJ:
 -
 - *"The judge's role cannot be confined to that of providing a technocratic literal interpretation of texts produced by others.(.). As a system based on case law the judge must proceed from one case to another seeking, as points come up for decision, to make the legal system consistent, coherent, workable, and effective"*.

- CONCLUSION: THE RULING OF THE CJEU IN THE AJOS CASE WAS COHERENT IN THE FRAMEWORK OF EU LAW (systemic interpretation).

- THANK YOU!