

# The AJOS case

## consistent interpretation and general principles

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# The AJOS case

- The Danish Supreme Court's Ajos judgment can be read in an unofficial translation into English made by the Supreme Court at

<http://www.supremecourt.dk/supremecourt/nyheder/pressemeddelelser/Documents/Judgment%2015-2014.pdf>

The authentic Danish text can be seen at

<https://cdn2.hubspot.net/hubfs/1737441/archive/UfR/Links/U%202017.824%20H.pdf>

# Mange artikler om Ajos-sagen

- Jonas Christoffersen: Kort Nyt – Ajos-sagen, EU Ret og Menneskeret nr. 2, 2016
- Ruth Nielsen og Christina D. Tvarnø: Det afviste manuskript i Ajos-debatten, på internettet på <http://openarchive.cbs.dk/handle/10398/9471>,
- Ruth Nielsen and Christina D. Tvarnø: Danish Supreme Court infringes the EU Treaties by its ruling in the Ajos case, ERT (Europarättsligt Tidskrift) 2017 No 2,
- Ole Spiermann: En højesteretsdom om EU-tiltrædelsesloven, U2017 B 297,
- Ruth Nielsen og Christina D. Tvarnø: PRÆJUDIKAT ELLER IKKE PRÆJUDIKAT - Chartrets retsvirkning i dansk ret efter EU-domstolens og Højesterets afgørelser i Ajos-sagen, TfR 2017 nr. 2-3,
- Ruth Nielsen og Christina D. Tvarnø: Det afviste manuskript II i Ajos-debatten, på internettet på <http://openarchive.cbs.dk/handle/10398/9611>,
- Mikael Rask Madsen, Henrik Palmer Olsen and Urska Sadl: Competing Supremacies and Clashing Institutional Rationalities: The Danish Supreme Court's Decision in the Ajos Case and the National Limits of Judicial Cooperation, European Law Journal No 1 2017,
- Jens Kristiansen: Grænser for EU-rettens umiddelbare anvendelighed i dansk ret – Om Højesterets dom i Ajos-sagen, U 2017 B 75,

# Mange artikler om Ajos-sagen

- Michael Møller Nielsen og Julie Flindt Rasmussen: Efter Ajos - har vi alle grundlæggende rettigheder?, HR Magasinet 2017, <http://www.hrjura.in/>,
- Ulla Neergaard and Karsten Engsig Sørensen: Activist Infighting among Courts and Breakdown of Mutual Trust? The Danish Supreme Court, the CJEU, and the Ajos Case, Yearbook of European Law, (2017) p. 1,
- Jens Kristiansen: EU-chartret og grundlovens § 20, U.2017 B 413,
- Rass Holdgaard, Daniella Elkan and Gustav Krohn Schaldemose: From cooperation to collision: the ECJ's AJOS ruling and the Danish Supreme court's refusal to comply, Common Market Law Review 2018 p. 17
- Rass Holdgaard, Daniella Elkan og Gustav Krohn Schaldemose :Both sides now: En kommentar til Ajos-sagen, EU Ret og Menneskeret nr. 4 2017

# The two errors in the AJOS judgment

- Failure to comply with the duty to interpret national law in conformity with EU law
- Failure to apply the general EU law principle of prohibition against discrimination on grounds of age

# Consistent interpretation

- In the Pfeiffer case (C-397/01), the CJEU held in ground 115 the duty to interpret in conformity with EU law:
- requires the national court to consider national law as a whole in order to assess to what extent it may be applied so as not to produce a result contrary to that sought by the directive

# The Discrimination Act (Forskelsbehandlingsloven)

- It follows from the Pfeiffer case that the Supreme Court should look at Danish law as a whole including the Discrimination Act and not only at section 2a (3) of the Salaried Employees Act
- The Supreme Court rejected using the Discrimination Act because of some remarks in the preparatory works to the Discrimination Act

# Remarks in the preparatory works

- In the Björnekulla-case (C-371/02) the CJEU held that remarks in preparatory works of legislation contrary to EU law did not reduce the duty of national judges to interpret national law in conformity with EU law.
- Björnekulle was about interpreting a national law that implemented a directive

# Views on Björnekulla

- The articles by Christina Tvarnø and Ruth Nielsens follow Björnekulla
- Karsten Engsig Sørensen argues that it is doubtful how much weight should be put on Björnekulla, but that it should be followed when interpreting national legislation that implements directives, see Sørensen, Karsten Engsig: Pligten til EU-konform fortolkning i Olsen, Birgitte Egelund og Karsten Engsig Sørensen (red.): EU-Retten i Danmark, Kbh. 2018 s. 315

# The Supreme Court and Björnekulla

- The Supreme Court does not mention Björnekulla. It violates the rule laid down in it by rejecting to use the Discrimination Act because of remarks in its preparatory works. The Discrimination Act implements directive 2000/78/EC.
- Why? Lack of knowledge or disagreement?

# Contra legem

- There is no duty to interpret in conformity with EU law if that would be contra legem. It is not quite clear what that means, two interpretations
- Interpretation against the clear wording of an Act
- Interpretation against a clear rule in national law

# Contra legem – the AG

- The advocate general in Ajos stated in ground 68:
- 68. The Latin expression '*contra legem*' literally means 'against the law'. A *contra legem* interpretation must, to my mind, be understood as being an interpretation that contradicts the very wording of the national provision at issue. In other words, a national court is confronted by the obstacle of *contra legem* interpretation when the clear, unequivocal wording of a provision of national law appears to be irreconcilable with the wording of a directive.

# Contra legem - CJEU

- The CJEU did not repeat the view of the Advocate General but stated in ground 33 and 34:
- 33 It should be noted in that connection that the requirement to interpret national law in conformity with EU law entails the obligation for national courts to change its established case-law, where necessary, if it is based on an interpretation of national law that is incompatible with the objectives of a directive....
- 34 Accordingly, the national court cannot validly claim in the main proceedings that it is impossible for it to interpret the national provision at issue in a manner that is consistent with EU law by mere reason of the fact that it has consistently interpreted that provision in a manner that is incompatible with EU law.

# Contra legem - the Supreme Court

- The Supreme Court held that contra legem is interpretation against a clear rule
- It regarded the rule as based on a combination of case law and the fact that the legislator had accepted it by not changing it by legislation

# Conclusion on consistent interpretation

- The Supreme Court should have applied the Discrimination Act following Pfeiffer and Björnekulla.
- The CJEU did not take the opportunity to give a clear ruling on what contra legem means.

# General EU law principles

- The CJEU stated clearly in ground 35 that if the national court regarded itself as unable to solve the problem by means of consistent interpretation
- it is nonetheless under an obligation to provide, within the limits of its jurisdiction, the legal protection which individuals derive from EU law and to ensure the full effectiveness of that law, disapplying if need be any provision of national legislation contrary to that principle (judgment in *Küçükdeveci*, C-555/07, EU:C:2010:21, paragraph 51).

# General EU law principles

- The Supreme Court took the view that
- under the Law on accession, principles developed or established on the basis of Article 6(3) TEU have not been made directly applicable in Denmark. The same holds true for the provisions of the Charter, including Article 21 thereof on non-discrimination which, under the Law on accession, has not been made directly applicable in Denmark.

# Collision between CJEU and the Supreme Court

- Monism and dualism
- The CJEU takes a monist approach as it has done ever since Costa/Enel (6/64)
- The Supreme Court takes a dualist approach based on an interpretation of the Accession Act based on remarks in the preparatory works to this Act

# A Philosophy of Law Perspective

- The Supreme Court's approach fits well with Scandinavian legal relism as it was formulated by Ross in the mid 20th century see Alf Ross: *Ret og Retfærdighed*, Kbh. 1953
- The CJEU's approach fits well with European realistic legal positivism as formulated by Tvarnø and Nielsen, see Christina D. Tvarnø and Ruth Nielsen: *Retskilder og Retsteorier*, Kbh. 2017.