INDIRECT DISCRIMINATION

A Case Study into the Development of the Legal Concept of Indirect Discrimination under EC Law

CHRISTA TOBLER
The concept of discrimination must be interpreted on the basis of factual criteria. A purely theoretical idea is not sufficient. (The Commission in *Sotgiu*, 1974)

Nothing is more fascinating and at the same time more deceptive than equality, and justice is often based on inequality; all this is well known. (Advocate General Lagrange in *Italian Refrigerators*, 1963)
FOREWORD

This book is an updated and restructured version of a habilitation thesis submitted in the summer of 2003 to the Law Faculty of the University of Basel, Switzerland. In German speaking Switzerland, the habilitation is a prerequisite for eligibility for what are termed ordinary professorships. Under the traditional habilitation system, a candidate must first submit a written thesis on a topic of personal expertise. Once such a thesis has been approved, a candidate must present and defend an oral address in a separate subject area. The habilitation thesis and oral presentation together determine the range of subjects which the candidate will be entitled to teach once the habilitation procedure has been successfully completed (the so-called venia legendi). In my case, the written habilitation thesis concerned the development of the legal concept of indirect discrimination under both EC law and Swiss sex equality law. The oral presentation addressed the liberalization of the Swiss electricity market.

In Switzerland, habilitation theses are published only after successful completion of the habilitation procedure. I am grateful to the Law Faculty of Basel University and in particular to Prof. Anne Peters for their support and help throughout this rigorous procedure. I am also very grateful to Prof. Ingeborg Schwenzer whose efforts enabled me to come to Basel from The Netherlands where I was living and working at a time when I had no formal links with any Swiss university. Without her assistance, in all likelihood I would not have undertaken my habilitation in Basel nor served in my present capacity at the University’s Europe Institute.

As originally submitted, my habilitation thesis was written in English. Also written in English, this book presents to the greater public-at-large those aspects of my thesis which specifically concern EC law. However, in the near future I intend to publish the chapter that deals specifically with Swiss law in a German language version. Since English is not my mother tongue, I enlisted the assistance of a native speaker to perform the various tasks involved in the language editing of this present publication. I have enjoyed the support of Sylvester (Danny) Ryan who dedicates himself to helping non-native English speakers express themselves in law. Indeed, his grounding in both language and EC law contributed significantly to my efforts to express myself clearly in this book. For that I am truly grateful to him.

When I undertook the study of law in Switzerland in the early 1980s, EC law was not a well established part of the university legal curriculum. In fact, I only began my formal study of EC law during the academic year 1993/1994 as a participant of The Leiden LL.M. Programme in EC Law. That same academic year I also gained a thorough grounding in equality and discrimination law through courses offered by...
Foreword

the (then in existence) Department on Women and the Law (afdeling vrouw en recht) of the Law Faculty of Leiden University. The coursework that I was privileged to take in Leiden laid the groundwork for the analyses which I have undertaken in this book. Thus, I would like to express my heartfelt thanks to all my Leiden teachers, but particularly to Prof. Rikki Holtmaat (Professor of International Non-Discrimination Law at the Leiden Law Faculty), Dr. Bob Lane (of Edinburgh University and my teacher in the important Basic Course of the Leiden LL.M. Programme) and Prof. Piet Jan Slot (Director of the Europa Institute of the Leiden Law Faculty). After the completion of my LL.M. studies at Leiden, Prof. Slot enabled me to return to the Europa Institute and to work for The Leiden LL.M. Programme in EC Law. I have benefitted enormously from my continued close association with Leiden, particularly with regard to my knowledge of EC law. In the framework of my position with Leiden University, the work done for this present study was part of the E.M. Meijers Institute’s research programme ‘Securing the rule of law in a world of multilevel jurisdiction: coherence, institutional principles and fundamental rights’ and, more specifically, of the sub-programme ‘The protection of fundamental rights in an integrating Europe’.

Finally, my education, my habilitation and the publication of this book would not have been possible without the love, care and continued support of family and friends, particularly of my parents, Ruth and Theophil Tobler-Pulfer, and of my partner, Jacques Beglinger. They have been and continue to be a blessing to me. It is to them that I dedicate this book – though in the case of my mother, I must do so ‘in loving memory’.

Basel and Leiden, March 2005

Christa Tobler
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# ABBREVIATIONS

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<tr>
<td>AG</td>
<td>Advocate General</td>
</tr>
<tr>
<td>AJP</td>
<td>Aktuelle Juristische Praxis</td>
</tr>
<tr>
<td>Art</td>
<td>Article</td>
</tr>
<tr>
<td>BRK</td>
<td>Zeitschrift für Bank- und Kapitalmarktrecht</td>
</tr>
<tr>
<td>CDE</td>
<td>Cahiers de droit européen</td>
</tr>
<tr>
<td>CEDAW</td>
<td>Convention on the Elimination of All Forms of Discrimination against Women</td>
</tr>
<tr>
<td>CML Rev</td>
<td>Common Market Law Review</td>
</tr>
<tr>
<td>DM</td>
<td>Deutsche Mark (German Mark; former German currency)</td>
</tr>
<tr>
<td>EC</td>
<td>European Community</td>
</tr>
<tr>
<td>ECHR</td>
<td>European Convention on Human Rights</td>
</tr>
<tr>
<td>ECJ</td>
<td>European Court of Justice (Court of Justice of the European Communities)</td>
</tr>
<tr>
<td>ECSC</td>
<td>European Coal and Steel Community</td>
</tr>
<tr>
<td>EEC</td>
<td>European Economic Community</td>
</tr>
<tr>
<td>e.g.</td>
<td>exempli gratia (for example)</td>
</tr>
<tr>
<td>EL Rev</td>
<td>European Law Review</td>
</tr>
<tr>
<td>EU</td>
<td>European Union</td>
</tr>
<tr>
<td>EuGH</td>
<td>Europäischer Gerichtshof (Court of Justice of the European Communities)</td>
</tr>
<tr>
<td>EuGRZ</td>
<td>Europäische Grundrechte-Zeitschrift</td>
</tr>
<tr>
<td>EWS</td>
<td>Zeitschrift für europäisches Wirtschafts- und Steuerrecht</td>
</tr>
<tr>
<td>GATT</td>
<td>General Agreement on Trade and Tariffs</td>
</tr>
<tr>
<td>I.C.R.</td>
<td>Industrial Court Reports (UK)</td>
</tr>
<tr>
<td>i.e.</td>
<td>id est (that is)</td>
</tr>
<tr>
<td>ISO</td>
<td>International Organization for Standardization</td>
</tr>
<tr>
<td>ILJ</td>
<td>Industrial Law Journal</td>
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<td>LLM.</td>
<td>Master of Laws</td>
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Intersentia
Abbreviations

MJ Maastricht Journal of European and Comparative Law
NJB Nederlands Juristenblad
NJW Neue Juristische Wochenschrift
NTER Nederlands tijdschrift voor Europees recht
n.y.r. not yet reported
OJ Official Journal of the European Union
PCIJ Permanent Court of International Justice
RdA Recht der Arbeit
R & R Tijdschrift voor Rechtstheorie en Rechtsphilosophie
RTDE Revue trimestrielle de droit européen
Rt. Hon. Right Honorable (Government Minister in the UK)
S.C.R. Supreme Court Reports (Canada)
SDA Sex Discrimination Act (UK)
SEW Sociaal-economische wetgeving
SR Systematische Sammlung (systematic collection of Swiss Federal law)
StR Steuer Revue
TvC Tijdschrift voor Consumentenrecht
UK United Kingdom of Great Britain and Northern Ireland
USA United States of America
WTO World Trade Organisation
ZeuP Zeitschrift für Europäisches Privatrecht
ZvglRwiss Zeitschrift für vergleichende Rechtswissenschaft