

A Typology of Comparators and Comparisons in EU Equality Law

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Locating the centrality of comparison in EU equality law

Locating the centrality of comparators in EU equality law

General principle of equal treatment implies that **comparable situations** must not be treated differently and different situations must not be treated in the same way, unless such treatment is objectively justified

- *C-313/04 Franz Egenberger, para. 33*

Direct discrimination occurs when one person is treated **less favourably than another** is, has been, or would be treated **in a comparable situation**

- *Art. 2(2)(a) Framework Employment Directive and Race Equality Directive*

Indirect discrimination occurs when an apparently neutral provision, criterion or practice would put persons having a particular [characteristic] at a particular disadvantage **compared with other persons**

- *Art. 2(2)(b) Framework Employment Directive and Race Equality Directive*

Locating the centrality of comparators in EU equality law

Hypothetical comparators possible in the context of equal pay as some women work in gender-segregated sectors

- *Recital 28 Pay Transparency Directive*

ECJ uses comparison as a tool to assess whether differential treatment amounts to a *prima facie* case of discrimination

- Claimant is compared to a comparator
- A comparator is a person in a similar situation as the claimant, but who does not share the protected trait assumed to be the reason for discrimination

Comparators in single-axis equality cases

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Single-axis cases: cases based on a single discrimination ground

Two types of comparators used by the ECJ:

- Intercategorical comparators
- Intracategorical comparators

Comparisons in single-axis equality cases

Intercategorical comparator: a similarly situated comparator who does not share the protected trait that the claimant assumes led to their discrimination

- Eg: *Case 43-75 Defrenne*: female air hostess compared to male cabin steward (women ⇔ men)
- Eg: *Case C-389/20 CJ v TGSS*: number of female domestic workers covered by a special social security scheme compared to number of male domestic workers (women ⇔ men)
- Eg: *Case C-668/15 Jyske Finans*: people born outside of the territory of an EU Member State or EFTA compared to Danes (mostly racialised minorities ⇔ white people)

Comparators in single-axis equality cases

Intracategorical comparator: a similarly situated comparator who shares one of more protected traits in common with the claimant

- Eg: *Case C-193/17 Cresco*: ECJ compared employees of recognised churches to other employees, religious and non-religious (religious people ↔ religious people)
- Eg: *Case C-16/19 VL*: ECJ compared employees with disabilities who had submitted disability certificates prior to a certain date and employees with disabilities who had submitted their certificates after a certain date (people with disabilities ↔ people with disabilities)

Comparing inter- and intracategorical comparison

	Intercategorical comparison	Intracategorical comparison
Definition	Claimant and comparator do not share the relevant protected trait in common	Claimant and comparator share at least one or more of the relevant protected traits in common
Emphasis	Emphasises the different trait between the claimant and comparator as an unjustifiable reason for differential treatment	Emphasises the similar trait between the claimant and comparator as an unjustifiable reason for differential treatment
Aim	Illuminates inequality between groups	Illuminates inequality within groups
Representational hierarchy or diversity?	Representational hierarchy: conceptualises discrimination within a group homogeneously by prioritising experiences of singularly-marginalised people	Representational diversity: accommodates heterogeneous experiences of discrimination within a group
Minoritised sub-groups?	Conceals the discrimination of minoritised sub-groups	Visualises the discrimination of minoritised sub-groups

Comparator-free approaches in EU equality law

Comparator-free approaches in EU equality law

Centrality of comparison and comparators in EU equality law causes problems

- ECJ **cannot identify appropriate comparator?** No discrimination
 - Eg: *Case C-356/12 Glatzel*: ECJ held that claimant who had an eye condition allowing him to drive certain vehicles was not comparable to a comparator with an eye condition allowing them to drive other vehicles
- ECJ chooses **wrong comparator?** No discrimination
 - Eg: *Case C-249/96 Grant v South-West Trains*: ECJ compared lesbian woman to homosexual man in gender discrimination claim
 - Wrong comparator because both claimant and comparator are equally disempowered

Comparator-free approaches in EU equality law

Pregnancy discrimination

- *Case C-177/88 Dekker* para. 12: no comparator because only women can be refused employment on grounds of pregnancy
- But *Case C-179/88 Hertz*, para. 17: the ECJ resorts to comparators in cases about illnesses originating in pregnancy or childbirth that occur after maternity leave because “male and female workers are equally exposed to illness”

Comparator-free approaches in EU equality law

Harassment: a form of discrimination [...] when unwanted conduct related to any of the grounds [...] takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment

- *Art 2(3) Framework Employment Directive; Art 2(3) Race Equality Directive; Arts 2(1)(a) & (b) Recast Equality Directive; Arts 2(c), (d) & 4(3) Dir 2004/113*

Comparator-free approaches in EU equality law

Ascertaining harassment requires **an autonomous assessment** whether the treatment the claimant was subjected to causes **dignitary harm**

- Instead of comparing, harassment requires consideration of **the context** the claimant is in
- Akin to MacKinnon's **dominance approach**: discrimination stems from the systemic disadvantage of marginalised social groups based on their domination by powerful groups (eg employer ↔ employee)

Case C-303/06 Coleman: claimant was harassed as the mother of a child with a disability, therefore discrimination by association

- But several comparisons between the treatment of the claimant and other workers present in judgment

Comparator-free approaches in EU equality law

Comparator-free approaches remain in an embryonic stage. Why?

- Comparison gives equality law an illusion of objectivity by focussing on immediate evidentiary facts
- **Contextualisation** of discrimination in the broader systems of marginalisation (eg racism, sexism, disablism) that transform mere differential treatment to discrimination appears subjective
 - Discrimination is contingent on **unequal power and resource distribution** across society, creating **systems of marginalisation** (eg racism, sexism, disablism, homophobia); which equality law aims to dismantle
 - Courts fear being critiqued for **"institutionalising their own social views into legal mandates"** if they venture into contextualisation: Goldberg

Comparator-free approaches in EU equality law

But choosing a comparator is a subjective exercise

- ECJ often has the choice between several comparators
- Wrong comparator leads to judgments which **level down protection** against discrimination when a comparator who is equally disenfranchised is chosen
 - Eg *Case C-249/96 Grant v South-West Trains*; *Case C-363/12 Z*

Relying on comparison entrenches majoritarian norms into law, **forcing marginalised groups to assimilate**

- Eg *Case C-157/15 Achbita*; *Joined Cases C-804/18 and C-341/19 WABE & Müller*; *Case C-148/22 OP v Commune d'Ans*

Comparators in intersectional discrimination cases

Comparators in intersectional discrimination cases

Intersectional discrimination occurs when two or more grounds interact **synergistically**, resulting in the discrimination of those who are multiply burdened by intertwining systems of subordination

- Kimberlé Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' [1989] *Uni Chi Legal F* 139

Comparison in intersectional discrimination cases

Intersectionality is characterised by a **simultaneous dynamic of sameness and difference**

- *DeGraffenreid v General Motors Assembly Div ETC 413 F Supp 142 (ED Mo 1976)*:
 - black women are similar to white women by way of their gender
 - black women are similar to black men by way of their race
 - black women are different from both black men and white women in the intersectional discrimination encountered at the intersection of racism and sexism
- *Case C-443/15 Parris*



Comparison in intersectional discrimination cases

Can intersectionality's simultaneous dynamic of sameness and difference be captured by **combining inter- and intracategorical comparators**?

- *Case C-344/20 LF v SCRL*: several comparators brought forward by the claimant, spanning both inter- and intracategorical comparators incl.
 - Muslim woman who wears a headscarf ⇔ non-religious worker
 - Muslim woman who wears a headscarf ⇔ Muslim man who wears a beard
 - Muslim woman who wears a headscarf ⇔ women who wear headscarves for aesthetic, cultural, or health reasons

ECJ did not provide clarity on the multiple comparators

Is it worth venturing into the possibility of multiple comparators, there where courts already struggle with choosing the suitable comparator in single-axis cases?

Comparators in intersectional discrimination cases

Comparator-free approach to intersectional discrimination cases preferable

- *Case C-363/12 Z v Government Department*:
 - Gender: ECJ compared commissioning mother to a commissioning father; equally disempowered people in this context, so levelling down
 - Disability: definition based on the outdated medical model of disability

Comparator-free alternative: contextualisation

- women with disabilities have historically been excluded from the panoply of parental rights in a manner that is particular to those at the intersection of the interlocking systems of sexism and disablism
- Z's treatment is a contemporary continuation of this harmful pattern of discrimination

Thank you

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