

EU anti-discrimination law and economic inequalities

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Introductory remarks

Initial puzzle:

Is 'social class' absent from EU anti-discrimination law?

No protected ground of social class/socio-economic status exists

EU anti-discrimination law's starting point is economical: the equal pay provision

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Rephrasing of the research question:

How does EU anti-discrimination law concern economic inequalities?



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Structure of presentation

- 1) What economic inequalities?
- 2) EU anti-discrimination law and its underlying notions of equality
- 3) Economic inequality in ECJ's case law
- 4) Concluding remarks and the limits of addressing economic inequalities through anti-discrimination law

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The study's working hypothesis

- I start from the theories of underlying notions of equality (equality of what and equality for whom) in research on economic inequalities and EU anti-discrimination law
- EU anti-discrimination law is formal in outset, but also substantive in some parts of case law
- I find there is a nexus between economic inequalities and the substantive equality approach

This informs my **hypothesis**:

EU anti-discrimination law addresses economic inequalities when ECJ, as the interpreter of EU anti-discrimination law, engages in a substantive approach in its case law.

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What inequalities are economic inequalities ?

- Highly studied – lacking unified theory
- Existing scholarship primarily concerned with income
- Income broadly understood as/in
 - social groups
 - household/family
 - Accumulation of capital
 - Social security

—> in sum: Economic inequality is about structural inequalities; lacking opportunities and outcomes

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EU anti-discrimination law and different notions of equality

There are (at least) 2 present notions of equality in EU anti-discrimination law

1) Formal equality:

- Likes should be treated alike
- Merit
- Neutrality principle; no personal characteristics relevant (gender-blind, color-blind)
- Identifiable treatment
- Requires a comparator

- Aims at a **legal equality**
- EU anti-discrimination law's starting point: ECJ has defined discrimination as "application of different rules to comparable situations..." see e.g. C-13/63 Italy v. Commission and subsequent cases

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EU anti-discrimination law and different notions of equality

2) Substantive equality

- Personal/group characteristics matter
- Context matters
- Group protection instead of comparison
- Concerned with opportunities /outcomes rather than treatment/rules

- Substantive equality aims at equality of opportunities

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Examples from case law 1

Cases that illustrate the nexus between economic inequalities and the substantive equality:

C-177/88 Dekker (gender) Refusing a pregnant women, who was the best qualified for the job, employment, on the basis of financial consequences for the employers. ECJ established that pregnancy equates gender.

C-54/07 Feryn (Race) Public statement about recruitment policy of immigrants. ECJ found that it was not necessary to be a victim per se for a practice to discriminate contrary to the Race Directive.

C-303/06 Coleman (Disability) mother of disabled child denied flexible working arrangement which others were given. ECJ found that discrimination by association in the workplace is unlawful.

- ECJ finds that declarations/statements or prejudices or associations suffices to be victim of discrimination, the Court does not insist on *identifiable treatment*
- Similarly not insisting on finding a *personal comparator*, but finding proxies for e.g. gender in pregnancy and focusing on group protection.

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Examples from case law 2

C-154/18 Horgan and Keegan vs. Minister for Education and Skills and others Salary reduction for school teachers – criteria: employees hired after cut-off date in 2011 had their salaries cut by 10%. The ECJ searched for a comparator and did not find one (no relation to age) – no search for disparate impact on younger age groups.

C-49/18 Carlos Escribano concerned salary reductions for judges in Spain according to categories of employment seniority and pay grade so that those earning the most got cut the least. Directive 2000/78. ECJ: searching for a comparator. Finding that length of service is not comparable to age.

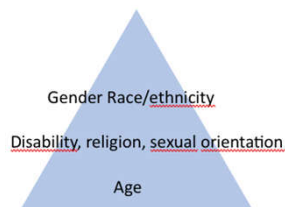
See also C-539/15 Daniel Bowman v Pensionsversicherungsanstalt

- Indirect discrimination - Age discrimination
- The ECJ insisted that the criterion for the remuneration scheme reductions had to be formally tied to age – as such the whole argument about an indirect discriminatory effect is futile.
- The ECJ has otherwise, according to theory, used indirect discrimination to address structural discrimination, but here it is showing the opposite.

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Concluding remarks 1

- ECJ addresses economic inequalities when it, despite a formal baseline, applies a substantive approach.
- The substantial issue (pay, pension or access to employment) can have more or less direct impact on levels of economic inequality (this is for the economists to assess)
- Does to ECJs approach to economic inequalities also correspond to the varied protection offered the different grounds, i.e. corresponding to a hierarchy of protected grounds?



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Concluding remarks 2

Limits to how effective EU anti-discrimination law can be in responding to economic inequalities:

- Only 'in the context of...' not 'on the basis of social class'
- The main inequality is a social one between protected grounds
- But, by adopting a substantive approach the ECJ can get further and address more structural economic inequalities between the protected grounds, which the formal approach cannot.

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