Stals

Panóptica
ISSN 1980-7775

Sant'Anna Legal Studies

STALS / Panoptica Book Review

Davide Strazzari

Discriminazione razziale e diritto. Un'indagine comparata per un modello "europeo" dell'antidiscriminazione.

Cedam, 2008

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Panóptica - Revista Eletrônica Acadêmica de Direito
http://www.panoptica.org

Davide Strazzari, Discriminazione razziale e diritto. Un'indagine comparata per un modello "europeo" dell'antidiscriminazione, Cedam, 2008, pag. X-492, € 44,00

Reviewed by

Giuseppe Martinico[1]

Structure of the work

The work I am going to review provides an original and valuable contribution to one of the classic subjects of constitutional law: that of racial discrimination.

The book is composed of a general introduction, five central chapters and the conclusions; one of the most important premises of Strazzari's reasoning consists of the existence of a European "model" in the field of anti-discrimination policies.

By European the author means something different from the "EC model" and, after having resumed the general argumentation followed by Strazzari, I would like to focus on this point.

A brief overview

In the *Introduction* Strazzari starts from directive n. 2000/43/CE- on the principle of equal treatment irrespective of one's racial or ethnic origin- and n. 2000/78 CE- establishing a general framework for equal treatment in employment and occupation- which represent an important reference mark for the struggle against discrimination in EC law.

These directives are the final achievement of a long run begun with some non-binding documents (such as the European Council resolution at the Dublin Summit on the struggle against racism and xenophobia in 1990) followed by the introduction of art. 13 after the Amsterdam Treaty.

Strazzari briefly recalls the steps of the anti-discrimination struggle: the prohibition of racial discrimination from being conceived as a limit to the lawmakers' action to becoming a binding clause for the privates as well.

The latest trend of this route shows the inadequacy of an anti-discrimination policy exclusively founded on the intent to discriminate (based on the importance of the clear will to pose a discriminatory behaviour) and the necessity to move towards a different approach looking also at the discriminatory effects of whichever measures or acts (although the underlying will is not discriminatory in principle).

This approach implies two main consequences:

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1) a relief of the burden of proof since the discriminated person does not have to demonstrate the intentional element of the behaviour.

2) a redistributory logic in the anti-discriminatory legislation which accompanies that of the compensatory function and implies a strong connection between solidarity and equality.

After having introduced his main premises, Strazzari recalls the peculiarity of the struggle against racial discrimination in a context characterized by diversification such as the European one.
In the first chapter the author sums up, in his own words, the "*concepts and definitions*" of discrimination, attempting to clarify the problematic relationship between the notion of indirect discrimination and that of redistributive justice.
According to Strazzari, the importance given to the actual effect of discrimination - rather than to the abstract will of the subject who is discriminating - and the key role attributed to it by the judges make of the notion of indirect discrimination a conceptual tool to remove those economic and social situations of asymmetry, thus making it an instrument of social justice.
Why is it necessary to acknowledge a fundamental role to the judge in this context? Because he/she plays a crucial function in the comparative moment between the different situations involved in the case, which is a fundamental step in adjudication in the field of discrimination.
The so-called affirmative actions, which are a characteristic tool of redistributive justice, in fact, can be provided by the laws or by the judges.
On the basis of sensible factors (race, sex, handicap) the subjects "favoured" by the affirmative actions can be identified both by the legislator and by the judge and, in this sense, upon the two actors rests the complicated task to distinguish between reasonable differentiation and mere discrimination.
This is why Strazzari concludes that the judgment of reasonableness is the synthesis of the formal and substantial equality principles.
Having said this, how is it possible to evaluate an affirmative action from a legitimacy point of view? The answer can be found in the proportionality assessing the suitability of the measure to the objectives pursued.
In the second chapter the author deals with the American model of struggle against discrimination, stressing the jurisprudential and legislative evolution occurred over the years against the background of the equal protection clause: the parabola of the disparate impact theory and the reaction of the legislator with the 1991 Civil Rights Act.

After providing a general overview of the situation in the US, the conclusions reached by the author point out the progressive shift of the US model towards a compensatory paradigm, according to which the procedural meaning of equality seems to be privileged in respect to the substantial one (pag. 211).

In the third chapter the EC law model is analyzed from the perspective of the European Treaties and directives.

The pages devoted to indirect discrimination are particularly interesting since in them Strazzari attempts to sum up all the legislative evolution which has led to the codification and development of such a concept.

By indirect discrimination we mean a concealed discrimination pursued *de facto* through a measure which formally does not seem to do that.

In order to evaluate whether a measure represents a sort of indirect discrimination a two-step procedure is performed by the judge: the first step consists in a kind of relational-comparative control in order to demonstrate that such a measure causes a major prejudice to the protected group; in the second step a sort of teleological control is performed in order to verify whether justification to such a measure could be found in the pursuance of a legitimate goal.

At the end of this chapter Strazzari tries to resume the main features of the so called European model: it is a *corpus* of rules and principles which seems to be sufficiently robust to deal with the issue of discrimination conceived as a social phenomenon which touches groups and categories of people.

In the fourth and fifth chapter the author deals with two "national experiences" (defined in his work as the internal side of the European model), the British and the French, which provide different national responses to the issue of the coexistence between diversities.

The author chooses these two experiences because of their past as colonial forces and their current feature of "polyethnic" legal orders (according to the distinction by Will Kymlicka[2]).

As we know these two cases are very different in terms of response to the issue of diversity: the French one insists on the refusal to acknowledge collective rights to the minorities and racial groups and implements a policy of assimilation of the foreign cultures to the national one; the British one, instead, is focused on the acknowledgement to minority groups of the right to express their own culture.

Starting from this dichotomy Strazzari resumes the latest developments of both national experiences and their progressive transformation.

[2] Kymlicka distinguishes between two kinds of multicultural societies: "Multinational states" and "polyethnic states", the former characterized by the fact that the minorities are incorporated by assimilation, conquest, or voluntary agreement while the latter are formed by the immigration of diverse ethnic groups. W. Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights*, Clarendon Press, Oxford, 1995.

Specifically the author studies the impact of the directive n. 2000/43/EC and 2000/78 EC in both legal orders, in other words how these orders have responded to the need of implementing the EC law measures.
The British case seems to be very reactive to the EC stimulation and for certain aspects many of the innovations required at the supranational level may have found their model in the British experience; more complicated seems to be the French adaptation.

Final remarks: the importance of the distinction between European and EC law

As I wrote at the beginning of this review, the book represents a valuable contribution to the literature on law and discrimination: a classical subject of (national) constitutional law is rediscovered and dealt with at supranational level.
Particularly interesting is the distinction proposed by the author between Community and European law.
By the former he means the law made by the EC Institutions while by the latter he conceives the outcome of the interpenetration of EC and national law.
This vision is shared by those conceptions which conceive the European constitution as a synthesis (Pernice) between national and supranational constitutionalism.
From this perspective, in order to capture the peculiarity of the European model, one has to look at the national "reaction" to the top-down provisions coming from the supranational level.
As Strazzari says, the field of discrimination represents the ideal ambit to test such a distinction between the European and the EC level: when looking at the national (British and French) experiences we can realize the existence of different routes to reach the goals set by the same (EC) legal measure (the directive).
This profile reveals another characteristic of the European model: the prospective asymmetries existing in the implementation of the EC legal framework.
Another characteristic of the European model is the appearance of a preventive side in the struggle against discrimination thanks to the spreading of Social Dialogue.
It conceives the achievement of the non-discrimination principle as a target which not only should be pursued through specific measures of intervention but which should nourish the whole public power's activity (this is precisely the logic of mainstreaming), in other words, we can appreciate the shift from a negative dimension in discrimination policies (prohibition to discriminate) to a positive dimension (promotion for real equality).

Approaching the last pages of the book, the reader could wonder whether an actual (positive) European model in this field does exist: if so it would be very diversified and characterized by a preventive paradigm (to be conceived as complementary to the classic tools of the anti-discriminatory policies), resting on non-binding legal acts. Is that too little to be regarded as a model?

Strazzari himself seems to realize the paradox admitting that the EC model, in order to become European, needs time to develop itself trough a work of coordination and cooperation between national and supranational bodies in order to transfer that experience, expertise and knowledge which neither the legal integration nor the interpretive function of the ECJ can guarantee.

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