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Oreste Pollicino

Discriminazione sulla base del sesso e trattamento preferenziale nel diritto comunitario.

Un profilo giurisprudenziale alla ricerca del nucleo duro del new legal order.

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By *Giuseppe Martinico*¹

Overview of the research

The reviewed volume is the outcome of a long research project conducted by the author – currently Associate Professor in Law at the Bocconi University of Milan – during several research experiences; it won the “Marco Biagi” prize, an important award which permitted Pollicino to publish the volume for the Italian publisher Giuffrè of Milan.

The contents of this volume have been partially anticipated in some papers appeared in Italian and international journals during these years².

The aim of the work consists of the study of both the preferential treatment’s evolution and the logics of the European Court of Justice (ECJ)’s *modus decidendi* in this field.

According to the author, in fact, this field of inquiry is particularly suitable for identifying the Court’s decisional techniques, as well as understanding the concepts of judicial activism and self-restraint and their respective limits.

Such an analysis allows the author to place his conclusions in a general framework context, and to establish parameters which help us appreciate a creative decision and evaluate its outcome; as a matter of fact, the final chapter of the volume, rather than limiting its considerations to the field of sex equality principle, is focused on the current constitutional moment in the EU.

Structure of the work

The book consists of a general introduction followed by six central chapters and the author’s final remarks .

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² O. Pollicino, ‘Legal Reasoning of the Court of Justice in the Context of the Principle of Equality Between Judicial Activism and Self-restraint’, *German Law Journal*, 3/2004, 283-317

In the first chapter, after having underlined what is regarded by the author as the real meaning and extent of the judge's power, with particular emphasis on the specific role of the ECJ, and after having identified and evaluated the Court's lawmaking judicial operations, he focuses on the legal and jurisprudential evolution of the principle of equal treatment before the *Kalanke*³ judgment.

The second chapter is devoted to the comparison between the "twin cases" *Kalanke and Marschall* which represent - according to the scholarship- the reference mark for the new season of the preferential measures' evolution in EC law.

The third part of the volume focuses on the preferential treatment's second phase: it is divided into two sections: the first one is centred on the legal (positive law) framework while the second one concentrates on the jurisprudential evolution (*Badeck*⁴ versus *Abrahamsson*⁵ and *Schnorbus*⁶) in matter of sex equality law.

In the fourth chapter Pollicino resumes the trends analytically studied in the previous chapters stressing the need for balancing in those cases the values involved before the ECJ.

The fifth chapter dwells on the comparison between *Grant* and *P.v.S.* underlining the opposite solution reached by the ECJ in these very similar cases.

The final remarks (once more divided into two sections) focus on the human dignity principle as an emerging value which should characterize the EC anti-discriminatory law and the European Social law's new season. The principle of human dignity has been recently re-discovered by the ECJ in the very famous judgment *Omega*⁷ as an impenetrable barrier for the reasons of economic law. This statement should be read as the finishing line of a long run, which started after *Solange I*⁸. This judgment intended to demonstrate (not by coincidence before a German judge) the ripeness of the EU legal system and, in general, the outcome of the constitutional dialogue with the national judicial interlocutors.

The second section of the final remarks hypothesises the constitutional tolerance principle's possible transfiguration in the light of the counter-limits' communitarization as provided by art. I-5 of the Constitutional Treaty and art. 4 EUT after the Lisbon Treaty, which will be discussed in the next section of this book review.

³*Kalanke*, C-450/93, ECR, 1995, I-3051.

⁴*Badeck and others*, C-158/97, ECR, 2000, I-1875.

⁵*Abrahamsson and Anderson*, C-407/98, ECR, 2000, I-5539.

⁶*Schnorbus*, C-79/99, ECR, 2000, I-10997.

⁷*Omega*, C- 36/02, ECR 2004, I-9609.

⁸*BverfG*, 37 [1974] 321 ff.

The judicial dialogue as a perspective of analysis

An important feature of this volume is its case-study nature . In fact Pollicino makes of sex based discrimination in the EU law a tool for studying the “new legal order” (that is the EC law)’s driving forces which, in his opinion, are the ECJ’s self-restraint and judicial activism.

According to Pollicino the judicial dialogue represents a privileged perspective for studying the relations between interacting legal orders, especially looking at the European Constitutional legal order’s multilevel and pluralistic constitutional structure.

As Pollicino acknowledges, ever since the European Community’s creation the Court of Justice has not simply been a group of judges with expertise in European law, but it has represented one of the real driving forces of European integration.

The author focuses on the presumed inconsistencies which characterize the ECJ’s case-law in the field of sex equality and attempts to read them through the political motives’ looking glass.

Another fundamental feature of this volume is the way the chosen cases are analysed: as he states at the beginning of the work, after describing the set of facts which characterize the annotated couples of cases, he moves to draw a preliminary distinction between the legal reasoning (the “how” level) and the motive’s analysis carried on by the judges (the “why” level)⁹.

Thus implicitly admitting that the ECJ does not follow mere formalistic argumentations in its reasoning and that, on the contrary, it gives its rulings and decisions’ political consequences full thought .

The best example of such an approach is represented by the comparison between cases like *Grant*¹⁰ and *P.v.S*¹¹, two very similar cases dealt with by the ECJ, the different outcomes of which are explained by Pollicino through an insight of the underlying political reasons: the need for mixing the rationale of integration (by his definition the principle of *evolving dynamism*) with the rationale of respect for constitutional diversity (by his definition the principle of *constitutional tolerance*).

By *evolving dynamism*¹² Pollicino means that process of slow but steady transformation of the European *humus* which featured at the beginning, in 1957, an evident market-oriented goal and has

⁹ According to Weiler’s distinction. On this see: J.H.H. Weiler, “The Constitution of the Common Market Place: The Free Movement of Goods” in P.Craig-G.De Burca (eds.) *The Evolution of EC Law*, Oxford University Press, 1999; Id. “Epilogue: Towards a Common Law of International Trade”, in J.H.H. Weiler (ed.), *The EU, the WTO and the NAFTA*, Collected Courses of the Academy of European Law, Oxford University Press, 2000. See also M. Poiares Maduro, *We The Court. The European Court of Justice and the European Economic Constitution*, Hart Publishing, Oxford, 1998.

¹⁰ *Grant c. South west trains Ltd*, C-249/96, ECR, 1998, I-621.

¹¹ *P v. S*, C-13/94, ECR, 1996, I-2143.

¹² See, for a deeper analysis of the European legal order’s dynamic character, J.P. Jacqué, *Droit institutionnel de l’Union européenne*, Bruxelles, 2001, 12 ff.

incorporated, during the years, both a social and a political dimension, driven by the Court of Justice's courageous activism which, in an often embarrassing inertia of the European community's legislative power, has taken on the "job of constitutionalising" the EC Treaty.

With regard to the principle of constitutional tolerance, Pollicino refers to the very famous conceptualization by Joseph Weiler according to which the secret of the European Constitution consists of that act of voluntary subordination shown by the peoples of the Member States before the EC law¹³.

This voluntary obedience does not permit the ECJ to accelerate on the reasons of integration overlooking the States' feedback to its decisions.

As stressed by Pollicino it is possible to read *Grant* and *P v S* coherently by looking at the different impact of the ECJ's decisions on the factual background. In those cases it was self-evident that the acknowledgement of rights to homosexual couples would have had much worse financial repercussions on the Member States than the possible acknowledgement of transsexuals' rights. Consequently, such a decision would have been less understood by the States.

The attention paid by the ECJ to the current phase of European integration and to the impact of its decision on the member states clearly displays its role of systemic actor; for example, in *Grant*:

"In the present state of the law within the Community, stable relationships between two persons of the same sex are not regarded as equivalent to marriages or stable relationships outside marriage between persons of opposite sex, and an employer is not therefore required by Community law to treat the situation of a person who has a stable relationship with a partner of the same sex as equivalent to that of a person who is married to or has a stable relationship outside marriage with a partner of the opposite sex. It is for the legislature alone to adopt, if appropriate, measures which may affect that position".

These are only two examples of the attention given by the ECJ to the constitutional structures of the Member States and to the national and supranational legislative discretion.

As previously discussed, the conclusions of the volume focus on the constitutional tolerance principle's possible destiny after the Constitutional Treaty.

Pollicino, in fact, devoted his final pages to the consequences of an expressed primacy clause as written in art. I-6 of the Constitutional Treaty.

As we know, the EC law primacy principle, devised by the genius of the ECJ in 1964 (judgement *Costa/Enel*¹⁴), is not based on written grounds, despite the diffuse acceptance.

¹³ J.H.H Weiler, "Federalism and Constitutionalism: Europe's Sonderweg", *Harvard Jean Monnet Paper*, 10/2000, in <http://jeanmonnetprogram.org/papers/00/001001.html> .

¹⁴ *Costa Enel*, 5/64, ECR, 1964, 1141.

Many commentaries insisted on the perfect continuity between the precedent situation and the possible perspectives after the Constitutional Treaty.

Pollicino, on the contrary, attempts to investigate the possible consequences of the combination between art. I-6 -which could mean the end of the voluntary obedience and constitutional tolerance- and art. I-5 which would represent the communitarization of the so called “*counter-limits*”¹⁵.

After the Dutch and French referenda the Constitutional Treaty changed its nature giving rise to the new Reform Treaty: among the changes it should be noted the disappearance of the primacy clause (better, its “exile” to a declaration enclosed in the Reform Treaty).

Art. I-5 (transferred into the new art. 4 EUT) instead would remain together with the reasons for respecting national diversities which were already present in art. 6 EUT (current version).

It is very difficult to foresee the evolution of the European Constitutional law, there being too many variables- first of all the uncertainty on the Reform Treaty’s entry in force after the Irish refusal in the last June referendum- although the suggested dialectic between evolving dynamism and constitutional tolerance seems very precious and useful to contrast the possible evolution that the semi-permanent revision of Treaties cause and to provide the jurist with solid analytical grounds.

¹⁵The counter-limits are those national principles the Constitutional Courts of member states considered as ultimate barriers against the penetration of EC law according to *Solange I* doctrine. This formula has been introduced in the Italian scholarly debate by Paolo Barile: P. Barile, ‘Ancora su diritto comunitario e diritto interno’ in *Studi per il XX anniversario dell’Assemblea costituente*, VI, Firenze, 1969, 49.