The European Court of Human Rights: Judging nondiscrimination

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1. Introduction

The European Court of Human Rights (ECtHR) shows increasing sensitivity to issues of nondiscrimination and—as Carmelo Danisi rightly notes in his article1—the scope of the prohibition of discrimination contained in article 14 of the European Convention of Human Rights (ECHR) has definitely been extended. Not only is the number of cases decided on the grounds (or also on the grounds) of the principle of nondiscrimination growing, but—more significantly—the class of cases based on the aforementioned provision reveals that whenever a highly controversial, delicate, or questionable issue is brought before the Court, the principle of nondiscrimination is always reserved a major role in the judicial reasoning. Undoubtedly, the ECtHR is adopting a more proactive role in the fight against any kind of discrimination, and this new attitude is in part influenced by the EU institutions and other international bodies. The survey of the European jurisprudence provided by Danisi presents a self-confident Court applying severe standards even at the cost of narrowing the margin of appreciation that the ECHR accords to member states. The only notable exception is the case of same-sex marriages.

On the basis of the account offered by Danisi’s article, I would like to inquire into the reasons for the expanding role of nondiscrimination in the ECtHR’s case law. I will argue that this expansion is intertwined with the liberal ideal of protecting everybody’s right to the freedom of choice on a neutral basis. Considered in this light, the case law of the ECtHR appears to be more problematic than in the picture portrayed by Danisi. Sometimes the Court’s attitude seems inconsistent and leads to unpredictable results. However, it is more important to notice

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that nondiscrimination judgments intrinsically lack the neutrality that is often ascribed to them.

2. Nondiscrimination and the aspiration to neutrality of liberal societies

Many good reasons account for the prominence of nondiscrimination in contemporary European jurisprudence. One of these, and not a minor one, is related to the perception that *prima facie* nondiscrimination is a commonly shared, non-negotiable principle because it provides a *neutral* ground on which to settle the most hotly debated controversies of our postmodern society: gender issues, reproductive rights, bioethical problems, the notion and role of the family, law and religion, the protection of ethnic minorities in multicultural contexts, and so on. No matter what one’s personal opinion regarding these disputes may be, the solution should not result in the discrimination of any group. In a way, when a debate touches on the point of nondiscrimination, the tone changes from a judgmental to a neutral one. Whereas controversies about rights and their limitations require difficult balance among competing values and are deeply divisive, nondiscrimination is perceived as a common, undisputed goal. A good example showing the “neutralizing effect” of nondiscrimination is *S.H. v. Austria,* a recent case regarding medically assisted procreation that involve the use of ova and sperm from donors. The reasons for these restrictions—as explained by the Austrian institutions and shared by other European states—were based on public values and interests competing with the individual desire to have a child, such as the protection of the biological identity of the children, the prevention of eugenic reproduction, the exploitation of women, and the commercialization of maternity. The European Court does not enter into a discussion about the legitimacy and the justification of the limitations imposed on individual rights by the national legislation. Instead, it takes a different approach: if the right to privacy encompasses “the right of a couple to conceive a child and to make use of medically assisted procreation for that end,” it must be guaranteed without discrimination, the Court says. Therefore, following the Court’s reasoning, all restrictions on medically assisted procreation should be banned because every regulation may have the effect of denying some couples the possibility of having a baby, ultimately amounting to discrimination. The issue that was brought before the Court was a veritable conundrum and did not have any easy solution. However, no matter how disputable any alternative option would be, in this case, it was clear that the arguments based on nondiscrimination worked as a discussion stopper, thanks to its aura of neutrality.

As a matter of fact, according to liberal ideals, law is to be neutral in order for all personal choices to be allowed and respected. The liberal ideal wants each person to decide for oneself what one values and how one is going to live one’s life in the light of these values: one must be entitled to a set of “deliberative
freedoms,” allowing one to live following one’s personal preferences. Nondiscrimination is a prominent tool for securing these deliberative freedoms: when nondiscrimination is respected, everybody can freely accede to one of the options at stake, regardless of color, sex, race, or preferences. Liberal ideals affirm that people should not have to factor certain traits of their identity into their deliberations. Nondiscrimination is essential to the liberal project because it urges the removal of all hindrances to free choice. Although in the past liberty and equality were considered competing values, in the current postmodern liberal society freedom of choice and nondiscrimination reinforce one another: they are the twin cornerstones of contemporary legal order. Their intimate kinship is mirrored by the frequent use, in the cases brought before the ECtHR, of article 14 of the ECHR on nondiscrimination in conjunction with article 8 on the right to privacy—the very origin of the right to free choice.

The interaction between nondiscrimination and freedom of choice has the ambition of squaring the circle by protecting diversity without creating inequality: differences in reality should not matter in the legal realm because nondiscrimination aims at correcting reality. Seen through the lens of nondiscrimination, all differences become indifferent before the law. In this perspective, nondiscrimination has a neutralizing effect; it serves the aspiration of liberal society to neutrality.

I would like to put to the test whether or not the principle of nondiscrimination maintains its promise of neutrality in the practice of the ECtHR by looking at the examples examined by Danisi and other scholars. In the overview of the cases I will focus solely on the issue of neutrality; I am not interested here in discussing the merits of the decisions. Whether or not I agree with the results of the decisions taken into consideration is not relevant to the purpose of the present discussion.

3. Emphasizing or downplaying the discrimination argument

According to Danisi’s narrative, the ECtHR is increasingly developing the principle of nondiscrimination, with the relevant exception of same-sex marriages. At first sight, all recent evolution in European jurisprudence fits into Danisi’s analysis, but on closer examination the ECtHR’s case law appears to be more “unprincipled.” It is true that in numerous recent cases discrimination is given prominent attention; however, it seems occasionally to be overshadowed by other prevalent concerns, depending on the factual situation and on a case by case basis.

Sophia Reibetanz Moreau, *What is discrimination?*, 38 Phil. & Pub. Aff. 2, 143–179 (2010) constructs discrimination as a wrong akin to a tort, where the interest protected is precisely the personal capacity of deliberative freedoms.

Luigi Ferrajoli, *L’uguaglianza e le sue garanzie, in Le ragioni dell’Uguaglianza* 25, 32 (Marta Cartabia & Tiziana Vettor eds., 2009).

Michael J. Sandel, *Democracy Discontent, in Justice: A Reader* 331 (Michael J. Sandel ed., 2007) points out that the liberal self-image requires two basic features: an independent, autonomous, and unencumbered self, as well as equal respect. Freedom is identified with autonomy of choices, and equality with nondiscrimination.
For example, in Opuz v. Turkey, a case concerning domestic violence in Turkey, the discrimination issue is intentionally brought into the spotlight by the Court. The decision condemns Turkey for violating articles 2 and 3 of the ECHR because the national authorities failed to take adequate measures to prevent an aggressor from carrying out his threats against the physical integrity and the life of the victims. The Court could have stopped there, as it happens in many cases where the violation of a plurality of rights and of articles of the Convention is alleged by the plaintiffs. In the Opuz case, however, the Court went on to examine the issue of nondiscrimination and reiterated the condemnation of Turkey also on the basis of article 14. The result of the decision in this specific case was not affected by the Court’s further statement, because the violation of the right to life and personal integrity is of paramount gravity; but the insistence on the nondiscrimination issue gave the Court the opportunity to draw attention to the status of women in Turkey and to the many forms of discrimination to which they are subjected. To put it bluntly: the Court wanted to make a case against the discrimination of women in that society.

Let us now consider the following case dealing with discrimination on the grounds of sexual orientation. Santos Couto v. Portugal is a decision concerning a man convicted for homosexual relations with adolescents. Since the Portuguese criminal code has two different provisions for heterosexual and homosexual relations with adolescents, the second being more severe than the first, the applicant argued that his conviction was discriminatory and based on his sexual orientation. Notwithstanding a relevant precedent, in which a request similar to that filed by the applicant was granted, the ECtHR issued a finding of nonviolation. Focusing on the concrete circumstances of the case, the Court showed that the man would have been convicted even on the narrower grounds of the provision envisaged for heterosexuals. Consequently, in this case, his sexual orientation was not considered a relevant feature to be taken into account.

By contrast, in Kozak v. Poland, as Danisi says, the European Court attached great importance to the argument of sexual orientation. Despite the unclear nature and duration of the relationship between the two partners, in the Court’s opinion “the relevant element was not the question of the applicant’s residence in the flat or the emotional, economic or other quality of his relationship with [his partner] but the homosexual nature of that relationship.” Had the Court used the same “test of resistance” that was used in the previous case—i.e., had the Court inquired whether or not in that particular case the right of succession to the tenancy would have been denied even if the applicant had been in a heterosexual relationship—the result

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8 S.L. v. Austria, App. No. 45330/99, Eur. Ct. H.R. (First Section, 9 Jan. 2003). The Court held that the more severe punishment of adult homosexual acts with consenting adolescents than of heterosexual ones was incompatible with the ECHR.
might have been different. At the same time, in the Santos Couto case, should the Court have stressed that the Portuguese criminal code had stricter rules applying to homosexual relations with minors, the decision might have been the opposite.

4. The problem of the relevant comparator

Not only is the nondiscrimination clause susceptible to being applied inconsistently by judges, but, in most cases, the very structure of the discrimination test as such is responsible for the unpredictable outcomes of the controversies. Nondiscrimination is one of the most valuable principles of our legal civilization, one which has significantly contributed to advancing the legal treatment of vulnerable groups and to the redressing of wrongs which occurred in the past; and yet it is not, and cannot be, a neutral principle. As a matter of fact, judging nondiscrimination implies drawing a comparison between different persons and situations. Comparing people is not a mechanical activity but requires the highlighting of a specific relevant feature which has to be taken into consideration for the comparison. The trouble with determining nondiscrimination is that no two people are alike in every respect and, at the same time, all people are alike in some respect. Consequently, statements of nondiscrimination entail comparisons of two persons by reference to some criteria that determine the relevant aspect in which those persons are alike or different. The choice of the “relevant feature of comparison” governs the outcome of the judgment.

Let us return to the case of Orsus v. Croatia, examined by Danisi, regarding Roma students who complained about being assigned to separate classes. Were they assigned to special classes because they lacked a sufficient command of Croatian, as the First Section decided in its judgment of July 17, 2008? Or were they victims of racial discrimination, as the Grand Chamber eventually decided? The choice of the comparator determined the results of the two decisions. Who are the “like” students to be compared with in this case? If the linguistic skills were the relevant feature to be taken into account, then the result would be a finding of nonviolation; if, instead, the question of race were to prevail in the analysis, then the Court would reach the opposite result.

5. Unveiling non-neutrality

The hazy character of nondiscrimination judgments is particularly salient in cases concerning the status of the family, same-sex couples, and other types of relationship, which have frequently been brought to the attention of courts in recent years. Most of them involve

13 See Danisi, supra note 1, which criticizes the ECtHR for its inconsistency and for not pushing the principle of nondiscrimination far enough in cases concerning same sex couples.
homosexual couples claiming the same rights and privileges as those accorded to married couples. According to Schalk and Kopf v. Austria, European states are not obliged to extend marriage license to same-sex couples, since article 12 of the ECHR provides men and women with the right to marry and to found a family. Nevertheless, the Court says that the notion of “family life” under article 8 applies to same-sex and other de facto unions. Consequently, different forms of protection are considered consistent with the European Convention. In many European countries, but not in all of them, registered partnerships have gradually extended to same-sex couples a certain number of benefits and privileges that used to be limited to married couples. Differences between marriage and union partnership can be acceptable, says the Court, especially as far as parental rights are concerned. Moreover, at the opposite ends of the spectrum, some countries recognize same-sex marriage while others envisage neither marriage nor legal partnership for same-sex couples.

Is this diversity in the domain of family life a matter of nondiscrimination, or does it have to do with the difference in values that each society attaches to marriage and family ties?

The ambivalence of these controversies is made clear by an awkward request brought before the Court in the case of Burden v. United Kingdom. Two aged sisters, having lived together their whole life, claimed the same inheritance tax exemptions as married and civil partnership couples. They asserted to be in an analogous position to married couples or civil union partners, and affirmed that the different, unfavorable treatment applied to their situation was discriminatory. The ECtHR, of course, rejected their request.

What is interesting for the purpose of our discussion is the Court’s reasoning. The Fourth Section justified tax exemption and its scope by evoking the peculiar value that societies attach to marriage and which, in many cases, they extend to civil partnerships; national legislation can legitimately limit fiscal benefits to the relationships most valued in that society. The Grand Chamber, on the other hand, focused on the analogy and differences between two siblings cohabiting for many years and married or union registered couples. The outcome was the same, but, in my view, the legal arguments in the reasoning of the Grand Chamber were weaker and ultimately concealed the real question under debate, namely the interests pursued by the legislature by means of the fiscal policy.

It is not difficult to foresee that the Court will be called on again very soon to take sides with respect to different attitudes adopted by national legislatures towards family life, and the question to ask is whether nondiscrimination is the only appropriate grounds on which to settle these disputes. The trouble is that in these cases nondiscrimination is no more neutral than rights-oriented arguments, and it might end up concealing the value choices made.

6. Continuing the debate

The principle of nondiscrimination proves to be a flexible and fluid benchmark whose shape derives, as we have seen in this quick overview, from the rights at stake and the class of the rights holders involved, the factual circumstances of the case, and the social and political background. In many cases discrimination assessments involve value choices to no lesser extent than any other decision concerning the scope, content, and limitations of rights. If this is true, some consequences should be taken into account by the Court. These include:

(a) The burden of proof: a widespread bias about nondiscrimination was pointed out years ago by Isaiah Berlin: “the assumption is that uniformity, regularity, similarity, symmetry ... need not be specially accounted for, whereas differences, unsystematic behavior, change in conduct, need explanation and as a rule, justification.”\(^{17}\) In legal terms, this bias translates into a general presumption in favor of equal treatment: whenever a difference in treatment is to be applied, the burden of proof shifts onto the advocates of the difference—in the cases before the ECtHR, usually onto the defendant government. This presumption, and the consequent shift in the burden of proof, must be questioned if we agree that the weight of the nondiscrimination argument needs to be modulated according to the rights and the rights holders involved in each particular case.

(b) The margin of appreciation: as Danisi points out, the expansion of nondiscrimination issues has the effect of constraining the margin of appreciation of Member States to the point of rendering it meaningless. However, nondiscrimination does not necessarily imply uniformity of national legislation, as other experiences demonstrate. It can be plainly said in relation to the system of the European Convention that “the default value is autonomy of political and moral identity [of its members] which requires justification only if purposely abused.”\(^{18}\) This is true in all cases, and the margin of appreciation is not necessarily to be ruled out when nondiscrimination comes into play.

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