Abstracts & Speakers' Short Biographies

The Prohibition of Discrimination in the EU and Turkish Laws

Dr. Valentina Rita Scotti, Postdoctoral Research Fellow, Koç University Law School

Abstract

The presentation will provide an introduction on the principle of equality/anti-discrimination in the EU and in Turkey setting the framework for the in-depth analysis about its application in the field of insurance law. Therefore, methodologically, it will be a comparison based on the descriptive method, with a minor place left for academic considerations and doctrinal elaboration.

The presentation will essentially be divided in three parts. An introduction will deal with the origins of the principle of equality and with its entrenchment in post-WWII Constitutions which made of it a pillar principle of constitutionalism. In order to stress the current understanding of the principle, the distinction between differences and inequalities in law will be explained as well as the distinction between legal and de facto discriminations. The rationale and aim of affirmative actions will also be introduced in this part. Finally, the principle will be discussed in connection with the 'balancing' principles of rationality and proportionality.

Thereafter, following a brief overview about the UN understanding of the principle of equality, the presentation will detail how it has been entrenched in EU Treaties, also providing to the audience a brief recap about the evolution of the EU as a *sui generis* international organization. A greater attention will be devoted to the content of the Treaty currently in force, the Treaty of Lisbon, before analysing the three generations of EU legislation with regard to the application of the principle of anti-discrimination. Mindful that the content and relevance of the case law of the Court of Justice of the European Union (CJEU) on gender discrimination in insurance will be covered by Dr. Lima Rego, CJEU case law will only be mentioned in this part of the presentation for the purpose of reminding to the audience the role that this body had in the interpretation of EU law.

The last part of the presentation will eventually focus on the Turkish public law, providing a brief introduction on the evolution of the principle of equality in the 1924 and 1961 Constitutions and then an analysis of the provision entrenched in 1982 Constitution, its evolution through constitutional amendments and its judicial interpretation. To this end, also some references will be provided to the relevant provisions in civil and criminal codes.

Short Biography

Dr. Valentina Rita Scotti works as Post-doctoral Researcher in Comparative Public Law at Koç University Law School since 2016. She holds a Ph.D. in Comparative Public Law from the University of Siena, Italy and is a licensed Associate Professor in Comparative Law since 2018. She has been acting as Adjunct Professor in Comparative Constitutional Law at LUISS University in Rome since 2012 and has lectured in several universities, in Jean Monnet Programs and in training courses for public officers organised by Italian institutions. She extensively participated in international conferences and has taken part in numerous organising committees for international symposiums. Her main research fields are constitutionalism and human rights in the Mediterranean area (including gender rights), and cross-fertilization in constitutional transitions.

The Use of Statistics in Insurance: Where to Draw the Line and Why it Matters - A Focus on Gender Discrimination

Dr. Margarida Lima Rego, Associate Professor, NOVA University, Lisbon, School of Law; President, AIDA Portugal

Abstract

Insurers characteristically rely on the findings of actuarial science to assess and put a price-tag on each risk that they cover. By definition, insurance is discriminating: its modus operandi is to classify risk-bearers into more or less homogeneous groups and price their insurance according to such classifications, so that each group member will pay the premium that best matches its individual risk. Such is the principle of actuarial fairness. However, not all individual traits may be used unrestrictedly as actuarial factors. Especially sensitive are those classifications, such as a person's sex, which have been identified as being most likely to lead to discrimination, because historically they have been major sources of discrimination. By using past data to predict the future, statistical analysis can be used as an instrument to perpetuate past injustices, in a way that is incompatible with the promotion of equality. Whenever that is the case, its use must be banned. These are the two apparently very different egalitarian accounts of distributive justice which appear to collide when we discuss the topic of discrimination in insurance.

In my intervention I shall tackle this apparent collision; I shall look into the legislative and judicial processes leading up to the ECJ's decision that the unisex rule contained in Article 5(1) of the EU Gender Directive must be applied without any possible exception in relation to the calculation of

individuals' premiums and benefits in new contracts to make clear how the absolutist version of the unisex rule came to be. I shall question whether it would be possible to distinguish between acceptable and unacceptable uses of sex as an actuarial factor by applying a moderate version of the unisex rule only to reject this possibility, also taking into account a recent ruling of the ECJ. I shall also contrast what happened to sex as an actuarial factor in Europe to the prospects of other common actuarial factors, such as age and disability, also taking into consideration the European Commission's existing proposal for a directive prohibiting discrimination on the basis of such factors, and conclude that such other factors do not appear to be at risk of following a similarly restrictive path.

Short Biography

(PhD in Private Law (Universidade Nova de Lisboa, 2009) • MPhil in Contract Law (Oxford University, 2001) • MJur in European and Comparative Law (Oxford University, 2000) • Law Degree (Universidade de Lisboa, 1999))

Prof. Lima Rego is Associate Professor and Vice-Dean at NOVA School of Law, NOVA University, Lisbon, and is Of Counsel to Morais Leitão, Galvão Teles, Soares da Silva & Associados. As an academic she has taught different courses and published in a wide range of topics within private law. She is the scientific coordinator of NOVA Law's Master in Law and Financial Markets and the adjunct scientific coordinator of its Doctoral Programme in Law, being its representative at the NOVA Doctoral School. She has drafted legislation in the field of insurance law in her capacity as advisor to the Portuguese Government, upon the request of the Consumer Directorate-General.

She is the President of AIDA Portugal, the local chapter of the International Association of Insurance Law (AIDA). She also currently acts as the Chairperson of the Commercial Law and Practice Commission of the Portuguese chapter of the International Chamber of Commerce (ICC). She is a member of the Portuguese Bar.

Apples and Apples or Apples and Oranges? Treating Commercial Parties Differently under the Insurance Act, 2015

Livashnee Naidoo, Doctoral Candidate, Commonwealth Scholar (University of Southampton); Lecturer in Commercial, Shipping and Insurance Law (University of Cape Town)

Abstract

In 2006 the English and Scottish Law Commissions ('the Law Commissions') launched an ambitious project to reform insurance contract law. This culminated in the Insurance Act of 2015 ('the Act') and the Consumer Insurance (Disclosure and Representation) Act, 2012 which amends the Common law and the Marine Insurance Act of 1906 ('the 1906 Act') in England. The Act received Royal Assent on 12 February 2015 and entered into force in mid-2016. It represents the largest overhaul of insurance law since the 1906 Act and has recast several long-standing principles,

including warranties. English Law, for the first time, recognises a doctrinal distinction between consumer and commercial insurance. That distinction is however not the focus of my talk; rather my focus is on the distinction within *commercial* insurance under the Act.

Commercial insurance covers a variety of risks, contracts and parties. These range from small and medium sized enterprises who could be regarded as quasi-consumers, to sophisticated insurance markets like marine insurance. Indeed, in recognising that contracting parties in commercial insurance are a non-homogenous group, the Law Commissions created a default regime that targets the mainstream commercial markets. In doing so, markets such as marine insurance that fall outside the mainstream markets would have the option to contract out of the Act where they find the reforms to be unsuitable.

My talk considers the aspect of differential treatment under the Act from two perspectives: risk control terms (s11), and contracting out (ss17-18). These provisions are viewed as the most controversial in the Act due to the uncertainty which arises from their application and interpretation. I claim that the risk control provision in s11 is regulatory as even though the contract has provided for a contractual defence, the law has now intervened to prevent reliance on that defence where the requirements of s11 have been met. That position subsists in relation to *all* commercial insurance parties. Section 11 therefore adopts a protectionist approach by assuming that even sophisticated marine insurance parties require this protection and, in doing so, dilutes party autonomy in these markets.

The contracting out provisions were seen as a saving grace but the Act has increased the threshold for contracting out. In order to successfully contract out to more onerous terms, the transparency provisions in the Act have to be satisfied, and this requires a consideration of the characteristics of the insured persons and the circumstances of the transaction. Unlike s11, the contracting out provisions allows for a differentiation based on the type of commercial insurance and contracting parties that are involved. Yet like s11, the interpretation of the contracting out provisions remain uncertain.

In light of the above, I claim that the Act represents a new type of regulation for sophisticated marine insurance law and practice that reflects contextualism and protectionist tendencies. Both these provisions present difficulties for judges in how to interpret and apply these provisions across a range of commercial insurance disputes. I submit that judges should adopt a minimalist approach to interpretation in relation to sophisticated marine insurance contracts by giving effect to the parties' agreement and maximising party autonomy. My approach adopts a legal doctrinal perspective coupled with applied contract theory. It contributes to scholarship and practice in understanding the new Act and how judges should approach it when the first cases are brought before the English courts.

Short Biography

Livashnee (Liv) Naidoo is a doctoral candidate at the University of Southampton, fully funded as a Commonwealth Scholar (thesis submission May 2019). She is also a Lecturer in Commercial, Shipping and Insurance Law at the University of Cape Town (currently on research leave). She

holds a LLM in Shipping Law (with distinction) from the University of Cape Town and a Bachelor of Laws (LLB) (*cum laude*) from the University of KwaZulu-Natal. She is an admitted Attorney and Notary of the High Court of South Africa and has practised in Shipping law, International Trade, and Insurance law. She is also a member of the Institute of Chartered Shipbrokers and the Maritime Law Association of South Africa. Liv writes at the intersection of applied contract theory, commercial contract law, and (sophisticated) commercial markets – with a focus on marine insurance and shipping contracts.

You Inherit, You Lose? Negative Differential Treatment Based on Genetic Characteristics

Dr. Ayşegül Buğra, Director, Dr. Nüsret-Semahat Arsel International Business Law Implementation and Research Center; Assistant Professor of Transport and Insurance Law, Koç University Law School

Abstract

Genetic characteristics play a vital role in assessing the risk that underwriters prepare to undertake. They are particularly relevant in the context of insurance policies offering cover for life, health, critical illness, income protection and disability. The genetic disposition of an applicant may express itself through genetic diseases which may already be manifest at the time the insurance cover is sought. If so, insurers may require the applicant to take diagnostic tests so as to confirm a diagnosis based on existing symptoms – this established practice has not generally been challenged nor prohibited by legal norms. In other cases, however, the applicant may be carrying the risk of developing a genetic disease without there being any symptoms at the time the insurance contract is concluded – this can in turn be detected through predictive genetic tests.

On the one hand, the underwriters' access to genetic information – even if no current symptoms are in place - is arguably necessary for a more informed risk assessment and has accordingly resulted in a number of practices developed within insurance markets, such as requesting applicants to undergo predictive genetic tests or requesting applicants to disclose predictive test results. On the other hand, the foregoing practices also raise intricate concerns as to the prospective insured's right of access to insurance, particularly where the processing of data results in the negative differential treatment of the insured and the charge of an unaffordable premium. Another alarming query could be whether these requests would collide with the applicant's right to privacy or its right not to know.

Amid these concerns, a number of instruments have been adopted over the years to specifically regulate and delimit the procedures that are meant to be followed by underwriters in collecting and processing this type of genetic data as well as their practice of requesting applicants to take predictive genetic tests. With a view to take a snapshot of the possible policy approaches to be adopted in this regard, this presentation will seek to analyse the relevant Council of Europe Conventions and Recommendations, as well as soft law materials such as the Principles of European Insurance Contract Law (PEICL). Reference will also be occasionally made to the relevant rules applicable under Turkish law.

Short Biography

Dr. Buğra is a graduate of Galatasaray University and holds LL.M and Ph.D degrees from the University of Southampton (UK) where she also worked as Tutor and Research Fellow (Informa Research Fellow in Maritime & Commercial Law – 2012; Institute of Maritime Law RF – 2015). She is the receiver of the British Insurance Law Association (BILA) Book Prize (2018), European Commission Erasmus+ Jean Monnet Module Grant (2018), International Insurance Law Association (AIDA) Europe Conference Best Paper Prize (2018), Turkish Science Academy Young Scientist Award (2016), and *Modern Law Review* grant (2012). She is the author of the book *Insurance Law Implications of Delay in Maritime Transport* (Informa Law from Routledge, 2017) and has recently contributed to the book *A Legal and Regulatory View on InsurTech* (Springer, 2019) with her chapter 'Room for Compulsory Product Liability Insurance in the European Union for Smart Robots? Reflections on the Compelling Challenges'. She is a Presidential Council Member of AIDA.