

Dignity, Democracy, Diversity

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Title of Workshop	PROMOTING DIVERSITY THROUGH REGULATION
Abstract	<p>This workshop investigates the regulatory tools available to the state to promote diversity. The main focus of this workshop is on regulation through legislation. How does the state decide upon which tool to use? What are the philosophical and political justifications for it? Can we see these as a spectrum of tools ranging from the least coercive to the most coercive? Are any of these tools more effective than others?</p> <p>There has been a slow development over the years in the way that law has been used. Historically, legislation was an instrument used not to promote diversity, but to ban it. Laws were introduced to prohibit certain classes of person from carrying out certain activities. With the rise of notions of civil rights and equality, these prohibitions were gradually removed, to be replaced by laws which prohibited discrimination. The next stage is arguably laws which go further than prohibiting discrimination, but which actively promote diversity.</p> <p>We examine a number of different geographical areas: Northern Ireland, Korea, Sweden, and the EU generally. We look through the prisms of: gender, religious belief, political opinion and multiculturalism. Is it valid to assess equality within one of these dimensions, or is it really only equality if we look at all its dimensions?</p> <p>We evaluate the quality of legislative initiatives. Does affirmative action work? How does it square with constitutional commitments to equality? In particular, we look at gender quotas in decision making bodies – is equal treatment sufficient, or do we need to have equality of outcomes? Is there a difference between equality as a legal principle, and equality before the law? When it comes to positive discrimination, is one type of equality being sacrificed for another? Do we need to recognise the value of different kinds of work?</p>
Organiser(s)	<p>Professor Felix Uhlmann (University of Zurich) Dr Ronan Cormacain (consultant legislative counsel) Professor Mauro Zamboni (University of Stockholm)</p>
Keywords	Diversity, Regulation, Legislation, Legislative policy

1) ABSTRACT – REGULATING MULTICULTURALISM, THE TWO FACES OF EQUALITY IN A GLOBALIZED LEGAL LANDSCAPE

Maria Nääv, PhD candidate, Faculty of Law, Stockholm University, Sweden

In Swedish law, equality as a legal principle (functioning as the foundation of Anti-discrimination law) and equality before the law is often referred to as the very same thing. However, when legislating on these issues, a tension between the legal concepts becomes clear. It seems that they at the same time are closely related with one and another and at the same opposed to each other. It seems that the complex relationship between equality as a legal principle regulating discrimination and equality before the law becomes apparent when it comes to legislation that deals with protected groups (i.e. the discrimination grounds). Legislation on positive action measures aimed to enhance equality in favor for underrepresented groups can serve as an illustrative example of this tension. The legal concept of equality thus both legitimizes and delegitimizes such measures at the same time. Positive action measures are at the same time sometimes regarded as prohibited under equality and sometimes as a fully legitimate legal instrument that derives from equality as a legal principle.

Furthermore, when studying the preparatory works for the Swedish anti-discrimination law over the last four decades, it seems that the relation between the two concepts cannot be explained as a merely dialectic (or conflicting) relation. The concepts are engaged in a more complex and temporal relation, in which they are sometimes described as the very same thing, sometimes partly the same thing, and sometimes contradictory to each other.

This paper suggests a genealogical approach as a way of studying this phenomenon. Using Duncan Kennedys article *Three Globalizations of law and legal thought* as a framework (both methodological and in substance) the paper analyses the tension between the concepts. By situating the discourse around the concepts historically one can understand which trait of legal thought they represent and how they interact in a globalized legal landscape. In the paper, I argue that the current ambiguity in Swedish legislation on positive action measures (of underrepresented or subordinated groups) can be understood if one understands them as representing two historical traits of legal thought. The understanding of equality that prohibits positive action measures (with emphasis on equality before the law) represents a legal formalist conception of equality (deriving from Kennedys first globalization). The second understanding, in which positive action measures are legitimate under (and even included in) legal equality represents a social engineerable way of legal thinking (that derives from Kennedys second globalization). In Swedish Anti-discrimination law, both these historical ways of thinking about equality are discursively accepted, but the problem remains – the are analytically incompatible concepts. This specific tension and the parallel ways of thinking about equality and anti- discrimination legislation represents in many ways the complexity and pluralism of legal thought that characterizes the general legal discourse on multiculturalism and legal equality in the legislative field.

2) GETTING EVEN: A REQUIREMENT OF GENDER EQUALITY

Miriam Rocha, JusGov – Research Centre for Justice and Governance, University of Minho, Portugal

Until the mid-twentieth century women were generally discriminated, both by law and society, in different aspects of life, including access to power and decision-making processes. Such discrimination occurred under a gendered model of social organisation that ascribed men the productive labour and women the reproductive one. Nowadays, in Western societies, discriminatory legal barriers have been abolished, and it is generally accepted that women have achieved gender equality before the Law. However, the sexual division of labour continues to have strong social expression.

There are several measures – for example, quota systems and affirmative actions – that aim at promoting diversity in decision-making processes. In this paper, we argue that, despite those measures, it will not be

possible to achieve authentic gender equality until men and women share the responsibilities that still fall today mainly on women (unpaid care work). We intend to discuss and analyse some of the legal solutions that tend to promote the sharing of responsibility among men and women, e.g. the extension of paternity leave.

3) GENDER QUOTAS IN DECISION-MAKING BODIES - REGULATORY PROMOTION OF EQUALITY OF RESULTS IN THE EU

Ana Horvat Vuković, Assistant Professor, Department of Constitutional Law, Faculty of Law, University of Zagreb, Croatia

In the EU, equality of results paradigm is utilized in the area of gender equality. Other than tiebreak preferences in standardized jobs, a number of member states have been using quotas in corporate and political bodies. Those seem to be best testing grounds for such policies, due to a non-controversial array of arguments supporting their use and a more lax application of formal equality tailored to highly competitive activities hinging on the use of merit. Regarding quotas in decision-making bodies, the argument from democracy posits a lack of legitimacy for decisions reached by an unbalanced representation of genders. This attenuates the normative strength of adopted policies and regulations, rendering their acceptance and enforcement difficult. A supporting argument is one from diversity, positing a greater quality of decisions reached and better business performance, i.e. a greater responsiveness to the need of the voting/consumer base. Of course, a gender-specific difference in perspectives is due to membership of a suppressed political minority, and not by some innate difference borne out of genetics/endocrine systems. Both the democracy and diversity arguments are not grounded in distributive justice. However, their utilitarian logic appeals to a market democracy and makes them the forerunners in terms of accepted quota justifications.

Arguments that are, in turn, based on a particular view of distributive justice, echoing the anti-subordination theory, stress the quotas' impact on group disadvantaging and rebalancing of power. A critical mass of women (transcending pure tokenism) in decision-making bodies enhances female social capital and status, symbolically spilling over into a newfound self-respect for the whole community, as well as lifting women up through ancillary instruments such as female professional networking, mentoring and sponsorship (nurturing ambition and initiating into dominant company codes). Role-model theory allows for a show of permeability of obstacles. The bluntness of the quota system severs the informal social phenomenon of networking. The „gatekeeper“ phenomenon is based on the homophily principle that has traditionally hindered women from „rising through the ranks“, as the vertical segregation makes it likely that the persons involved with selection procedures for higher positions will be male and tend to select candidates similar to themselves. In this way, quotas also protect from unconscious bias, and (according to social contact hypothesis) foster inter-subjectivity between the genders. This influences social solidarity and disrupts the constant reproduction of set centers of power. Indirectly, quotas also promote transparency in recruitment/promotion procedures and clarification of criteria employed.

4) LEGISLATIVE EVALUATION OF GENDER-BASED LAWS IN KOREA

Kyungho Choi, Research Fellow, Korea Legislation Research Institute, Seoul, Korea

Article 11(1) of the Korean Constitution states that all citizens shall be equal before the law, and there shall be no discrimination in political, economic, social or cultural life on account of sex, religion or social status. The concept of equality includes gender equality. The Constitutional Court of Korea has stated that the meaning of equality is not absolute equality that denies any discriminatory treatment, but relative or substantial equality. This research introduces legislations for promoting gender equality in Korea and their

legislative evaluations. Gender-based legislations include Framework Act on Women's Development and Act on Support for Female-Owned Business. The research also includes how these legislations could give positive impacts on Korean society. I also add the Constitutional Court's responses and their understanding of affirmative action-based legislation. The Constitutional Court has been responsible for judging the constitutionality of laws, including gender based laws.

5) PROMOTING (RELIGIOUS AND POLITICAL) DIVERSITY THROUGH LEGISLATION IN NORTHERN IRELAND

Dr Ronan Cormacain, Consultant Legislative Counsel, London, United Kingdom

Northern Ireland is a jurisdiction which has gone through a prolonged period of violent political conflict and inter-community strife. One of the mechanisms for resolving the conflict was to try to remove discrimination and to promote diversity. The primary focus of these efforts was on differences arising out of political view point and religious affiliation. Crudely put, this was the difference between Catholics / Nationalists / Republicans on one side, and Protestants / Unionists / Loyalists on the other side. Legislation was introduced in several areas, to prevent discrimination and also to promote diversity. This presentation examines several of these legislative initiatives.

In the field of employment, there have been several Fair Employment Acts. These promoted "equality of opportunity" and made it unlawful to discriminate on the grounds of political opinion or religious belief. This also extended to the provision of goods and services.

In the political sphere, the Good Friday Agreement and the Northern Ireland Act 1998 legislated for a particular form of government – the mandatory coalition. Given the previous difficulties which arose when one side of the community always formed the government, the new procedure required the government to be made up of parties from both sides of the community.

In policing, again given the historical imbalance in membership of the police service, legislation was introduced to promote diversity. The Police (Northern Ireland) Act 2000 obliged 50:50 recruitment, i.e. at least half of all new recruits had to be from the Catholic community.

Language diversity has been a political stumbling block. There has been a historic ban on the use of the Irish language in the courts. There has been increasing attempts to promote both Ulster Scots and the Irish language. But one of the main causes for the most recent collapse of government has been the argument over the need for an Irish Language Act.

At the root of all these legislative initiatives is the same problem – a society divided between two groups who have difficulty treating each other fairly. Law is seen as a way to resolve this root problem, by remedying discrimination and by promoting diversity. This paper examines how this was done, why law was used, and whether or not it has been successful.